

Journey Into Juvenile Justice

by Charles N. Curlett Jr. and Lauren McLarney



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During the 1980s and '90s, the nation was in the throes of “child predator” paranoia. The “adult time for adult crime” movement produced historic expansion of juvenile transfer laws, and the number of juveniles tried as adults increased at aggressive, exponential rates.¹

In the decades since, sentiments have changed. The law has evolved in response to developments within the scientific community demonstrating that children are not just small adults and should be treated differently in matters of criminal justice. Between 2005 and 2011, the Supreme Court advanced its juvenile justice jurisprudence in a series of holdings that abolished the death penalty for juvenile offenders, prohibited sentencing juveniles to life without parole, and established age as a factor in the *Miranda* custody analysis.² The court of public opinion seems to agree. In July 2016, when the Wisconsin Court of Appeals upheld the decision to try two girls—both 12 years old and mentally ill at the time of the “Slender Man” crime—as adults, *Rolling Stone* ran a scathing piece that labeled the decision “absurd.”³ In August 2016, a federal judge ordered the release of Brendan Dassey—a young man with intellectual deficits who had been incarcerated in an adult prison since he was 16 and whose trial was later recounted in Netflix’s “Making a Murderer”—and nearly everyone cheered.⁴

Against this backdrop, Baltimore has seen a spike in juvenile crime amid its increasing crime rates. In January 2016, a group of teens surrounded a cyclist and, in the course of the ensuing robbery, the cyclist was killed. The youngest defendant, who became my client, was 15 years old at the time. Maryland law dictates that 15-year-olds charged with murder automatically begin in the jurisdiction of the adult court.⁵ But Maryland law also offers a vehicle for transfer to the juvenile court, where I felt my client belonged. While my case has played out exclusively in state court, practicing in the area of juvenile justice requires an understanding of the federal implications involving juvenile crime.

Federal Transfers

The federal court system lacks a juvenile division, so the general rule is that “the government cannot try a

juvenile for federal crimes until he is transferred to adult status pursuant to the Juvenile Act.”⁶ However, juveniles charged with federal offenses are still held accountable through one of two options: adjudication in the state juvenile court or transfer to the federal system for adult prosecution. In this scenario, “transfer” means a waiver of a child’s juvenile status.

The Juvenile Justice and Delinquency Act (Juvenile Act) requires mandatory transfer of any juvenile who is at least 16 years old, has committed a felony offense that has an element of physical force or certain drug offenses, and who has previously been found guilty of an enumerated act.⁷ This means a child who was adjudicated for burglary at 14 and is now facing drug trafficking charges at 16 will be tried as an adult. If convicted, he could serve at least 10 years in federal prison.⁸

The Juvenile Act authorizes discretionary transfer for juveniles who are at least 15 years old and charged with certain offenses, so long as the attorney general certifies that the state juvenile court will not take the child and “there is a substantial federal interest ... to warrant the exercise of federal jurisdiction.” In those cases, the district court must consider several prescribed factors to determine if transfer is “in the interest of justice.” Otherwise, the juvenile “is surrendered to the appropriate legal authorities of such state.” This interrelationship between systems has implications for lawyers in the federal bar.⁹

State Transfers

Each year, an estimated 250,000 juveniles are prosecuted and sentenced as adults.¹⁰ Every state has at least one mechanism for making that happen. Most allow the juvenile court to “waive” jurisdiction. The waiver is usually at the discretion of the prosecutor, but sometimes the waiver is presumptive or even mandatory. More than half of states bypass that process for entire classes of juveniles, granting criminal courts automatic jurisdiction over those who have committed certain offenses or have a history of crime. Most of those states allow juveniles to seek a “reverse waiver” back down to the juvenile court. Maryland is one such state.¹¹

In Maryland, cases involving juveniles who are 14 years old and older automatically begin in the juris-

diction of the adult court when the youth is charged with an offense that would be subject to life imprisonment if it was committed by an adult. The same rule applies to juveniles who are 16 and older who are charged with nearly any other violent crime, drug trafficking offense, or traffic violation. Only some are eligible for reverse waiver.¹² In those scenarios, reverse waiver and “transfer” are interchangeable, making the term distinct from its federal counterpart.

While the state bears the burden of proof in a criminal prosecution, a reverse waiver hearing is a different kind of criminal proceeding. The child bears the burden of convincing the court that he “is a fit subject for juvenile rehabilitative measures” such “that a transfer of its jurisdiction is in the interest of the child or society.”¹³ By statute, the court must consider five factors to make that determination: “(1) the age of the child; (2) the mental and physical condition of the child; (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children; (4) the nature of the alleged crime; and (5) the public safety.”¹⁴

Maryland courts have added other rules to the test, and they form a puzzling circle. First, the judge cannot assume the child is guilty because it would force the juvenile to preview his defense during a proceeding that purportedly focuses on the actor, not the act.¹⁵ Related, the court cannot be “unduly influenced by the ‘nature of the offense’” such that it fails “to consider sufficiently the [juvenile’s] ‘amenability to treatment.’”¹⁶ However, the court is not precluded from considering the individual “actions taken by the alleged perpetrators,” like who was the ring leader versus who was the lookout. But still, such consideration is not required. The court suggests that a juvenile’s individual role in the crime only matters if the child was the lookout. Coming full circle, the court also held that a judge best avoids an improper presumption of guilt by “objectively” recounting the facts of the crime “without attributing any of the acts specifically to [the juvenile].”¹⁷

In the case of my client, those rules shaped my advocacy. Weighing the factors, he was young and had the mental condition of a child in crisis. An ideal subject for treatment, he had a strong support system, a clean record, and he was eligible for many programs in the juvenile system. Nearly every factor weighed in favor of transfer.

Nevertheless, the nature of the alleged crime was as serious as can be, and the question was whether transfer was in the interest of the child *or society*. The court has broad discretion in how it balances those competing interests. I reminded the court it would be a reversible error to deny my client his place in the juvenile system by giving undue weight to the very thing that landed him outside of the system in the first place. The court’s decision would hinge on how the judge viewed those competing priorities.

An Unfocused Patchwork of Systems

It is hard to discern a set of national priorities from the landscape of transfer laws. The federal statute is internally inconsistent: the court’s inquiry is supposedly “permeated” by a goal of rehabilitation but the “crucial factor” regarding a juvenile’s potential for rehabilitation must then “be balanced against the threat to society posed by juvenile crime.”¹⁸ The law has been heavily criticized: a U.S. District Court recently called the statute “dysfunctional”¹⁹ and the Supreme Court has questioned its validity.²⁰ The statute seems out of place amid a cast of progressive reforms. While the Supreme Court has created more and more special safeguards for juveniles, little has been done in the area of juvenile transfer. The Court has admittedly

“never attempted to prescribe criteria for . . . a decision to transfer a juvenile for trial in adult court.”²¹ While juveniles enjoy many constitutional protections, a right to treatment in a juvenile court does not appear to be one of them.²²

Moreover, there is little uniformity. Many transfers are determined by discretion: the federal statute allows the court to balance the factors “in any manner it feels appropriate”²³; 15 state systems give the prosecutor *complete* discretion to charge a juvenile directly in adult criminal court without even holding a hearing; and in Maryland, the court “may, in its discretion, decline to strictly apply the rules of evidence during a reverse waiver hearing.” And when rules are prescribed, they vary across the schemes. For example, the federal statute requires the court to “consider the extent to which the juvenile played a leadership role” in the crime,²⁴ while Maryland courts are encouraged to focus on mitigating actions.²⁵ Across the state systems, transfer laws vary considerably. This comes as no surprise, given that access to a juvenile court is a privilege offered by states,²⁶ and those states have “considerable latitude” to decide who gets that privilege and who does not.^{27,28}

Positive ‘Transfer-mation’

Fortunately, the “altered conception of juveniles as supervillains proved to be short-lived.” Starting around 2005, legislatures began adopting reforms to reverse the damage caused by that misguided movement.²⁹ To date, the Center for Youth Justice reports “legislative wins” in 29 states.³⁰ Nevertheless, “the punitive reforms that the moral panic had facilitated remain[s] on the books,” and the transfer process slugs on.³¹

As for my client, the judge granted our motion for transfer to the juvenile court. Among the victories achieved in my career, I count this as one of the most rewarding. If only all proceedings could be this transformative. ☺

Endnotes

¹Patrick Griffin, *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws, With Recommendations for Reform*, NAT’L CTR. FOR JUVENILE JUSTICE (Nov. 2008), www.ncjj.org/PDF/MFC/MFC_Transfer_2008.pdf.

²*Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

³Bridgette Dunlap, ‘Slender Man’ Trial: Why Trying These Girls as Adults Is Absurd, ROLLING STONE (Jul. 29, 2016), www.rollingstone.com/culture/features/slender-man-trial-trying-these-girls-as-adults-is-absurd-w431464.

⁴*Dassey v. Dittmann*, No. 14-CV-1310, 2016 WL 4257386 at *35 (E.D. Wis. Aug. 12, 2016), *prob. juris. noted*, 16-3397 (7th Cir. Sept. 9, 2016).

⁵See Md. Code Ann., Cts. & Jud. Proc. § 3-8A-03(d)(1) (2016).

⁶*United States v. Woods*, 827 F.3d 712, 715 (7th Cir. 2016).

⁷Juvenile Justice and Delinquency Act, 18 U.S.C. § 5032 (2016).

⁸See *U.S. v. David A.*, 436 F.3d 1201 (10th Cir. 2006).

⁹Juvenile Act, at § 5032.

¹⁰Campaign for Youth Justice, *State Trends: Legislative Victories from 2011-2013* (2013).

¹¹Patrick Griffin, Sean Addie, Benjamin Adams, & Kathy Firestone, *Trying Juveniles As Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEPARTMENT OF JUSTICE (2011), www.ncjrs.

gov/pdffiles1/ojdp/232434.pdf; Katherine I. Puzone, *An Eighth Amendment Analysis of Statutes Allowing or Mandating Transfer of Juvenile Offenders to Adult Criminal Court In Light of the Supreme Court's Recent Jurisprudence Recognizing Developmental Neurosciences*, 3 VA. J. CRIM. L. 52, 53 (2015).

¹²See CJ § 3-8a-03(d).

¹³*Gaines v. State*, 201 Md. App. 1, 10 (2009) *cert. denied*, 424 Md. 55 (2011); *Wilkins v. State*, No. 1945, 2015 WL 7432111 at *3 (Md. Ct. Spec. App. Nov. 19, 2015) (citation omitted).

¹⁴Md. Code Ann., Crim. Proc. § 4-202 (2016).

¹⁵*Whaley v. State*, 186 Md. App. 429, 962, 974 A.2d 951 (2001) (citing *In re Samuel M.* 293 Md. 83, 96, 441 A.2d 1072 (1982)).

¹⁶*In re Johnson*, 17 Md. App. 705, 713-714, 304 A.2d 859 (1973).

¹⁷*Gaines*, *supra* n.13, at 14-15.

¹⁸*United States v. O.*, No. 15 Cr. 608-10 (KPF), 2016 WL 4197597 at *5 (S.D.N.Y. Aug. 8, 2016) (quoting *United States v. Juvenile Male*, 844 F. Supp. 2d 312, 316 (E.D.N.Y. 2011)).

¹⁹*U.S. v. A.S.R.*, 81 F.Supp.3d 709, 714 (E.D. Wis. 2015).

²⁰*Graham*, *supra* n.2, at 62.

²¹*Breed v. Jones*, 421 U.S. 519, 537 (1975).

²²*Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978).

²³*U.S. v. O.*, *supra* n.18, at *5 (citation and internal quotation marks omitted).

²⁴18 U.S.C. § 5032.

²⁵*Gaines*, *supra* n.13, at 14-17.

²⁶*Woodard*, *supra* n.22, at 785.

²⁷*Kent v. U.S.*, 383 U.S. 541, 552-53 (1966).

²⁸*Griffin*, *supra* n.11, at 2-3; *Puzone*, *supra* n.11, at 65.

²⁹*State Trends*, *supra* n.10.

³⁰State Snapshot, CAMPAIGN FOR YOUTH JUSTICE, www.campaignforyouthjustice.org/state-work/state-snapshot (last visited Oct. 10, 2016).

³¹Kevin Lapp, *As Though They Were Not Children: DNA Collection from Juveniles*, 89 TUL. L. REV. 435, 471 (2014).



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