

FLORIDA'S DIRECT FILE STATUTE: A PROSECUTOR'S PLAYGROUND

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I. INTRODUCTION

Miguel Rodriguez was fifteen years old when he and three friends made a decision that would brand Miguel a convict for the rest of his life.¹ Miguel and his three friends broke into what they believed was an abandoned home and vandalized the property.² He was a good kid who had never been in trouble before, nevertheless, prosecutors charged him as an adult under the direct file statute.³ Eventually, Miguel accepted a plea bargain and was sentenced to four years' probation, ordered to pay restitution, and given house arrest for six months.⁴ One evening, Miguel

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1. See Alissa Figueroa, *How did these four kids get drastically different punishments for one crime?*, FUSION: THE NAKED TRUTH (Oct. 14, 2015, 4:42 PM), <https://fusion.tv/story/210411/florida-juveniles-charged-same-crime-different-punishments/> (explaining that Miguel was one of four teenagers who burglarized an uninhabited home); see also Jim Rosica, *Stop prosecuting kids as adults, advocates say*, FLA. POLITICS (Dec. 5, 2017, 10:51 AM), <http://floridapolitics.com/archives/251063-prosecuting-kids-adults> (explaining that because Miguel was directly charged as an adult in criminal court, he was stripped of his chance to go to college).

2. See Figueroa, *supra* note 1 (explaining that Miguel and three others vandalized the house by overturning furniture, throwing paint on the walls, breaking jars of food, and also stealing game consoles, DVDs and a computer); see also Deborah Brodsky & Cyrus O'Brien, *No Place for A Child: Direct File of Juveniles Comes at a High Cost; Time to Fix Statutes*, THE JAMES MADISON INST. (Feb. 2016), <https://www.jamesmadison.org/Library/docLib/2016-Juvenile-Justice-Policy-Brief-21.pdf> ("Two of the boys, including the leader, were charged as juveniles and served probation without stepping foot in jail. Miguel and the third boy are serving four-year sentences in adult prison.").

3. See FLA. STAT. § 985.557 (2018) (outlining Florida's discretionary and mandatory direct file provisions); see also Figueroa, *supra* note 1 (explaining that Miguel was a good student and enjoyed writing, and cared for his younger brother when his older brother was deployed to Iraq); Brodsky & O'Brien, *supra* note 2 (explaining that direct file statutes grant prosecutors unfettered discretion to charge children directly in adult criminal court).

4. See Figueroa, *supra* note 1 (explaining the outcome of Miguel's case); see generally *Probation*, BLACK'S LAW DICTIONARY (5th ed. 1979) (defining probation as "allowing a person convicted of some minor offense (particularly juvenile offenders) to go at large, under a suspension of sentence, during good behavior, and generally under the supervision or

missed his curfew by a few minutes, which resulted in a violation of his probation and put him in prison for four years because the prosecutor direct filed and tried him as an adult.⁵

Since the establishment of this republic's first juvenile court, legal systems in the United States have recognized that children are distinctive from adults and ought to be treated differently.⁶ The juvenile justice system was founded on the premise that juvenile offenders were simply delinquent and required individualized treatment where the goal was rehabilitation.⁷ Through its decision in *Kent v. United States*, the Supreme Court established a process to waive⁸ juvenile court jurisdiction over a young offender and transfer jurisdiction to the adult criminal court.⁹

guardianship of a 'probation officer'"); see generally *Restitution*, LAW.COM: LEGAL DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=1831> (last visited Nov. 21, 2018) (defining restitution as "[r]eturning to the proper owner property or the monetary value of loss" and "may be a condition of granting a defendant probation or giving him/her a shorter sentence than normal"); see generally *House Arrest*, DICTIONARY.COM, <http://www.dictionary.com/browse/house-arrest> (last visited Nov. 21, 2018) (defining house arrest as the "confinement of an arrested person to his or her residence or to a public place, as a hospital, instead of in a jail").

5. See Figueroa, *supra* note 1 (explaining that the terms of Miguel's probation only allowed him to leave his home for work and grocery shopping and because he missed his curfew once, he was sentenced to four years in prison); see also Rosica, *supra* note 1 (providing that Miguel was twenty years old when he began his prison sentence).

6. See Alba Morales, *Branded For Life: Florida's Prosecution of Children as Adults Under its "Direct File" Statute*, HUMAN RIGHTS WATCH: REPORTS 14 (Apr. 2014), https://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf [hereinafter *Branded For Life*] (explaining that unlike the adult criminal justice system which focuses on retribution, the juvenile justice system focuses on rehabilitation); see also *Roper v. Simmons*, 543 U.S. 551, 570–71, 588 (2005) (finding that children are less culpable than adults and more likely to be rehabilitated).

7. See *Branded For Life*, *supra* note 6 (explaining that juvenile courts across the United States were generally designed to focus on early intervention and rehabilitation and to emphasize an individualized approach to youth crime); see also Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1452, 1469 (2006) (inferring that juvenile court judges based their decisions on the unique circumstances of each offender rather than simply the severity of the offense).

8. See PRESTON ELROD & R. SCOTT RYDER, *JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE* 216 (Sean Connelly & Megan R. Turner eds., 4th ed. 2011) (explaining that the term "waiver" refers to the juvenile court giving up its original jurisdiction over the youth, and transferring the offender to the criminal system, where he will be tried and punished as an adult).

9. See *Kent v. United States*, 383 U.S. 541, 560–66 (1966) (establishing a process for juveniles to be transferred to adult criminal court); see also Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS AND VICTIMS: NAT'L REP. SERIES BULL., 1–5 (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (stating that every state has a procedure in place which allows or requires the transfer of juveniles into adult criminal court).

However, beginning in the 1980s, the rehabilitative ideal that had guided the juvenile justice system began to take a turn toward more punitive measures.¹⁰ This ideological shift came in part as a response to an increase in crimes committed by juveniles.¹¹

Trying juveniles as adults is greatly debated in our country.¹² There are those who believe in “adult time for adult crime,” while others believe children do not have the capacity to be as culpable as adults.¹³ There are also those who believe trying juveniles as adults will deter them from committing future crimes.¹⁴ Among the juvenile waiver procedures

10. See Griffin et al., *supra* note 9, at 9 (highlighting that in the 1980s, virtually every state expanded juvenile transfer laws, making it easier to waive juveniles into adult criminal court); see also Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 281, 282–83, 292 (1991) (explaining that society began to view juvenile courts as too therapeutic).

11. See *Branded For Life*, *supra* note 6, at 14–15 (expressing that during the 1980s, it was believed that the increase in adolescent crime was going to get worse over the next ten years); see also Griffin et al., *supra* note 9, at 8 (“In the 1970s alone, five states enacted new prosecutorial discretion laws, and seven more states adopted some form of automatic transfer. By the mid-1980s, nearly all states had judicial waiver laws, 20 states had automatic transfer laws, and 7 states had prosecutorial discretion laws.”).

12. See Jessica Reaves, *Should the Law Treat Kids and Adults Differently?*, TIME (May 17, 2001), <http://content.time.com/time/nation/article/0,8599,110232,00.html> (showing that the topic of transferring youths to adult criminal court has garnered much attention and sparked much debate); see also Bishop & Frazier, *supra* note 10, at 282–83 (explaining that transferring juveniles to criminal courts is controversial).

13. See Elizabeth S. Scott, “*Children Are Different*”: Constitutional Values and Justice Policy, 11 OHIO ST. J. CRIM. L. 71, n.104 (2013). Richard E. Redding, *Adult Punishment for Juvenile Offenders: Does It Reduce Crime?* 4 VILL. UNIV. CHARLES WIDGER SCH. L. WORKING PAPER SERIES, Paper No. 47, 2006, <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1047&context=wps> [hereinafter Redding, *Adult Punishment*]. During the 1980’s, state legislatures responded to the public’s fear and frustration over the perceived increase in juvenile crimes, and the seemingly inadequate response of the juvenile court system by diverging away from the rehabilitation. See Redding, *Adult Punishment*, *supra*. The Supreme Court opinions on the Eighth Amendment put forward two messages: that juveniles are less culpable than adults and are more likely to be rehabilitated. See Scott, *supra*. The Supreme Court drew these conclusions based on behavioral and neurobiological data, which distinguished attributes of adolescent criminal activity from adult criminal activity. *Id.* Some of these traits include: “adolescents’ propensity for taking risks without considering future consequences; their vulnerability to external influences, particularly of peers; and their unformed characters.” *Id.*

14. See Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. 2–3 (June 2010), <https://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf> (“The nationwide policy shift toward transferring juvenile offenders to the criminal court is based largely on the assumption that more punitive, adult criminal sanctions will act as a deterrent to juvenile crime.”) [hereinafter Redding, *Juvenile Transfer*]; see also Steiner & Wright, *supra* note 7, at 1455 (explaining that the goal of trying juveniles as adults “would be to deter future juvenile crime, whether specifically through harsher sanctioning of the transferred juvenile or more generally through the threat of increased punishment to other potential youth offenders”).

implemented across the United States, prosecutorial direct file has been among the most controversial.¹⁵ Under direct file statutes, a prosecutor's decision to transfer a juvenile to adult court is usually made without any oversight from either the juvenile court or the adult court.¹⁶ Some states, including Florida, also have mandatory provisions requiring a prosecutor to charge certain offenses directly in adult court.¹⁷ Most states with direct file statutes do not provide prosecutors statutory guidance as to what factors they should consider when deciding whether to transfer a juvenile to adult court.¹⁸

Juvenile transfers into criminal court have far-reaching implications for children and "significant symbolic meaning for the justice system."¹⁹ For the child, transfer to the adult criminal system means the possibility of harsher sentencing, and for the system, transfer to adult criminal court symbolizes that the juvenile justice system will no longer protect the child.²⁰

15. See Bishop & Frazier, *supra* note 10, at 284–85, 289–93 (highlighting prosecutorial waiver as the most controversial transfer mechanism which has been the object of sharp criticism); see also *Branded For Life*, *supra* note 6, at 17–19, 63 (pointing out that Florida's prosecutorial direct file law has waived more youths out of the juvenile system and into the adult criminal system than any other state).

16. See Griffin et al., *supra* note 9, at 2, 5, 10 (explaining that under the direct file method concurrent jurisdiction is given to the juvenile and criminal court, and the prosecutor decides where to file the charges); see also Bishop & Frazier, *supra* note 10, at 284–85 ("Ordinarily, the prosecutor's decision to file charges in criminal court is nonappealable [sic]" and the direct file statutes usually provide either no guidelines or vague ones.).

17. See Griffin et al., *supra* note 9, at 2 ("Statutory exclusion laws grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile-age offenders. If a case falls within a statutory exclusion category, it must be filed originally in criminal court."); see also Steiner & Wright, *supra* note 7, at 1454 (stating that statutory exclusion is a juvenile transfer method that has excluded certain offenses from juvenile court jurisdiction); Bishop & Frazier, *supra* note 10, at 284 (explaining that the types of offenses included in legislative waiver statutes are capital offenses and major felonies).

18. See Griffin et al., *supra* note 9, at 5 (highlighting that "prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking [sic]"); see also *Branded For Life*, *supra* note 6, at 3 (criticizing direct file statutes because they "[do] not give judges any role to play in the decision to pursue direct file . . . cannot stop a prosecutor from charging a child in adult court, and . . . has no power to refuse to hear a case and send it to juvenile court, regardless of how unsuitable the case is . . .").

19. See Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, JUV. JUST. BULL. 2 (Dec. 2012), <https://www.ojjdp.gov/pubs/232932.pdf> (explaining that transferring adolescent offenders to adult criminal court is a serious decision); see also Scott, *supra* note 13, at 99 ("[T]he decision about whether a particular youth will be tried as an adult should be made in a way that is compatible with constitutional values.").

20. See Mulvey & Schubert, *supra* note 19, at 2; see also Bishop & Frazier, *supra* note 10, at 283 ("The status of 'juvenile' carries with it a shield from publicity, protection against extended pre-trial detention and post-conviction incarceration with adults, and a guarantee that

This Comment will examine the advantages and disadvantages of direct file statutes, focusing primarily on Florida.²¹ Part II of this Comment analyzes the three different types of waiver—judicial, legislative, and prosecutorial—and discusses Florida’s juvenile transfer laws, specifically Florida’s direct file statute.²² Part III discusses the issues stemming from Florida’s direct file statute, particularly that the statute is arbitrary, does not deter crime, increases recidivism, and goes against the Supreme Court finding that juveniles are different from adults.²³ Lastly, Part IV proposes to eliminate discretionary prosecutorial direct file, and how the Florida Legislature can limit prosecutors’ discretionary power in the meantime.²⁴

II. BACKGROUND

A. OVERVIEW OF JUVENILE TRANSFER LAWS

State legislatures created the transfer mechanism for juvenile cases that would be more appropriately addressed by the adult criminal justice system.²⁵ In the United States, every jurisdiction has a procedure for transferring or waiving juveniles into adult criminal court.²⁶ There are generally three types of waivers: judicial waiver, legislative waiver, and prosecutorial waiver.²⁷

confinement will not extend beyond the age of majority.”).

21. See *infra* Part II–III.

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

25. See Eric L. Jensen, *The Waiver of Juveniles To Criminal Court: Policy Goals, Empirical Realities, and Suggestions For Change*, 31 IDAHO L. REV. 173, 188 (1994) (explaining that transfer of juveniles to adult court has been an option since the juvenile court’s inception, specifically for very violent and egregious crimes); see also Griffin et al., *supra* note 9, at 2 (providing that juvenile transfer laws create an exception that allow the criminal prosecution of juveniles “even though they fall on the juvenile side of the jurisdictional age line”).

26. See Griffin et al., *supra* note 9, at 2 (stating that every state has some mechanism that allows or requires the transfer of juveniles to criminal court, and many set a threshold for waiver eligibility depending on age, offense, or past record of delinquency); see also ELROD & RYDER, *supra* note 8, at 216 (explaining that every state has made it possible for juveniles to be tried as adults).

27. See Redding, *Juvenile Transfer*, *supra* note 14, at 2 (explaining there are different methods to transfer a juvenile into criminal court); see also Griffin et al., *supra* note 9, at 2 (noting that every state uses at least one method of juvenile transfer).

1. Judicial Waiver

Judicial waiver allows the juvenile court judge to be the primary decision maker in the transfer process.²⁸ Judicial waiver is most often initiated by a prosecutor requesting that a juvenile be tried as an adult in the adult criminal justice system.²⁹ The juvenile court then holds a fitness hearing to determine whether the juvenile is amenable to the juvenile court's treatment and services.³⁰ The basic structure of the hearing must conform with the criteria set out in *Kent v. United States*: (1) the juvenile must be afforded effective assistance of counsel; (2) the judge must allow the juvenile to be effectively represented by counsel; (3) the juvenile's counsel must be provided access to the juvenile's social record; and (4) the judge must provide a statement of reasons for his decision if he waives the juvenile court's jurisdiction.³¹ Although juvenile judges have broad discretion in waiving jurisdiction, there are certain factors that must be taken into account when evaluating the juvenile, which vary from state to state.³²

28. See ELROD & RYDER, *supra* note 8, at 218 (explaining that judicial waiver is a process by which a juvenile court judge can waive a juvenile into adult court, and most states allow the transfer of juveniles to criminal court through judicial waiver); see also *Branded For Life*, *supra* note 6, at 14 (recognizing that judicial waiver is the traditional method by which juveniles are transferred to criminal court, and most states use it, either as the sole means of transfer or in conjunction with other methods).

29. See FLA. STAT. § 985.556(2) (2018) (providing that in Florida, the state attorney may request a juvenile be tried as an adult in criminal court if the juvenile was fourteen or older at the time the offense was allegedly committed); see also Griffin et al., *supra* note 9, at 2 ("Discretionary waiver statutes prescribe broad standards to be applied, factors to be considered, and procedures to be followed in waiver decisionmaking [sic] and require that prosecutors bear the burden of proving that waiver is appropriate.").

30. See FLA. STAT. § 985.556(4)(c) (2018) (setting out the factors to be considered by a Florida juvenile court judge, including the seriousness of the alleged offense, the sophistication and maturity of the juvenile, and the previous history and delinquency record of the child); see also Gordon A. Martin, Jr., *The Delinquent and The Juvenile Court: Is There Still a Place For Rehabilitation?*, 25 CONN. L. REV. 57, 70, 76–77 (1992) (explaining that most judicial transfer statutes include a list of criteria that a juvenile court judge must or should consider in making a transfer determination).

31. See *Kent v. United States*, 383 U.S. 541, 554, 557 (1966) (enumerating the safeguards the presiding juvenile court judge must provide the juvenile during a judicial waiver hearing); see also Martin, *supra* note 30, at 70 (providing that the two main factors considered by states in their transfer decisions are the dangerousness of the juvenile offender and the amenability of the juvenile to rehabilitative treatment).

32. See *Kent*, 383 U.S. at 566–67; see also Melissa A. Scott, *The "Critically Important" Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?*, 50 LOY. L. REV. 711, 729–31 (2004); Jeree Thomas, *Raising the Bar: State Trends In Keeping Youth Out of Adult Courts (2015–2017)*, CAMPAIGN FOR YOUTH JUST. 35 (Bonnie Newman Davis ed., 4th ed. 2017), http://cfyj.org/images/A-StateTrends_Report-Web.pdf. The factors listed in *Kent* include: (1) "[t]he seriousness of the alleged offense . . . and whether the protection of the community requires

2. Legislative Waiver

Legislative waivers, or statutory exclusions, automatically exclude certain categories of juvenile offenders from juvenile court jurisdiction.³³ Through legislative waiver, states modified their transfer statutes to include objective requirements as an automatic basis for transfer, mainly age and offense committed.³⁴ As of 2011, twenty-nine states have enacted legislative waiver statutes.³⁵ Legislative waiver presumes that the juvenile court cannot sufficiently penalize some juvenile offenders, and thus assesses the appropriate punishment for them.³⁶

waiver”; (2) “[w]hether the alleged offense was . . . aggressive, violent, premeditated or willful”; (3) “[w]hether the alleged offense was against a person or against property”; (4) the strength of the prosecution’s case against the adolescent; (5) whether the juvenile has adult co-defendants; (6) “[t]he sophistication and maturity of the juvenile”; (7) the juvenile’s previous contacts with the juvenile and adult criminal justice systems; and (8) “[t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile” through juvenile court services, facilities, and treatment. *See Kent*, 383 U.S. at 566–67. These factors vary by states, for example, in California juvenile court judges consider the juvenile’s “physical and emotional health, the effect of the minor’s family on criminal sophistication, [and] any significant trauma” the juvenile has been subjected to. *See Thomas, supra*, at 39–40. In Missouri, a juvenile court judge also considers racial disparities when determining the appropriateness of juvenile waiver. *Id.* Taking into account these factors during waiver hearings allow a juvenile offender to receive an individualized determination as to which jurisdiction he should be subjected to, which comports with the best interests of the juvenile and the safety of society. *See Scott, supra*, at 730.

33. *See Bishop & Frazier, supra* note 10, at 282–84 (explaining these statutes were enacted in an attempt to cure the problem with discretion in judicial waiver by taking the juvenile judge’s decision out of the picture); *see also Griffin et al., supra* note 9, at 2, 4, 10 (explaining that when an offense has been excluded by law from juvenile court jurisdiction, the case against a minor accused of that offense originates in criminal court).

34. *See Thomas, supra* note 32, at 35 (indicating that in Massachusetts if a juvenile is fourteen years of age or older and has been charged with first or second degree murder, he shall be proceeded against in adult criminal court); *see also* GA. CODE § 15-11-560(b) (2018) (providing that in Georgia there are several offenses that statutorily exclude youth from juvenile court if they are between the ages of thirteen and seventeen, including: first and second degree murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and armed robbery or aggravated assault if committed with a firearm).

35. *See Griffin et al., supra* note 9, at 3, 6 (listing the following states have enacted legislative waiver statutes: Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington, and Wisconsin); *see also ELROD & RYDER, supra* note 8, at 218 (outlining the standard criteria included in every states’ legislative waiver statutes may include: the seriousness of the offense and prior record of delinquency).

36. *See Barry C. Feld, The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 708 (1991) [hereinafter Feld, *Transformation of the Juvenile Court*] (explaining that legislative waiver statutes eliminate judicial sentencing discretion by basing the decision to charge the juvenile as an adult exclusively on the offense allegedly committed); *see also* Katherine L. Evans, *Trying Juveniles as Adults: Is the Short Term Gain of Retribution Outweighed by the Long Term Effects on Society?*, 62 MISS. L.J. 95, 105 (1992) (providing that the trend toward legislative

3. Prosecutorial Waiver

Prosecutorial waiver, or direct file, places the decision to try a juvenile as an adult entirely with the prosecutor.³⁷ Under direct file statutes, the juvenile offender is subject to the concurrent jurisdiction of the criminal court and the juvenile court.³⁸ In this instance, a prosecutor may file charges against the juvenile either initially in juvenile court, or directly in the adult criminal court.³⁹ Today, thirteen jurisdictions have direct file statutes.⁴⁰ Under direct file statutes, neither the juvenile nor the criminal court has any oversight over the prosecutor's transfer decisions.⁴¹ Additionally, most states' direct file statutes do not provide prosecutors

waiver statutes make sentencing of these juveniles more consistent and comparable to adults than individualized judicial waiver).

37. See *Branded For Life*, *supra* note 6, at 18 (providing that ten jurisdictions let prosecutor's decide whether to charge a juvenile fourteen years of age or older with in adult criminal court for certain offenses); see also Griffin et al., *supra* note 9, at 5 (outlining that prosecutorial waiver does not afford a juvenile a hearing nor the opportunity to know on what basis the prosecutor made his decision to try the juvenile in adult criminal court).

38. See Bishop & Frazier, *supra* note 10, at 284–85 (“It is the prosecutor’s charging decision that determines in which forum the case will be heard.”); see also *Concurrent Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining concurrent jurisdiction as “[j]urisdiction that might be exercised simultaneously by more than one court over the same subject matter within the same territory, a litigant having the right to choose the court in which to file the action”).

39. See COLO. REV. STAT. § 19-2-517(1)(a), (2) (2018) (providing that the district attorney may file charges in the court of his choice if the juvenile (1) “[i]s alleged to have committed a class 1 or 2 felony;” (2) is alleged to have committed certain sexual assault offenses; or (3) has previously had a case transferred or directly filed in adult criminal court—with a couple of exceptions); see also MONT. CODE § 41-5-203(2) (2017) (outlining that juvenile courts and adult criminal courts have concurrent jurisdiction over “all alcoholic beverage, tobacco products, and gambling violations alleged to have been committed by a [juvenile]”).

40. See Thomas, *supra* note 32, at 35 (explaining that twelve states and the District of Columbia have direct file statutes); see also Renata Sago, *Charging Youths As Adults Can Be a ‘Cruel Wake-Up Call.’ Is There Another Way?*, NAT’L PUB. RADIO 5 (Aug. 15, 2017, 10:30 AM), <https://www.npr.org/2017/08/15/542609000/sentenced-to-adulthood-direct-file-laws-bypass-jvenile-justice-system> (providing that Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Louisiana, Michigan, Montana, Nebraska, Oklahoma, Virginia, and Wyoming have direct file statutes).

41. See Scott, *supra* note 13, at 94, 100 (“[A]utomatic transfer and direct file statutes eliminated any judicial determination that adult adjudication is appropriate for particular youths. These laws dramatically shift discretionary authority to make jurisdictional decisions from judges to prosecutors who are far less likely to consider youthful immaturity or other mitigating circumstances.”); see also Griffin et al., *supra* note 9, at 5 (inferring that prosecutorial waiver laws in retrospect function almost exactly like statutory exclusion laws because prosecutorial waiver requires no oversight by the juvenile or adult criminal court, and little or no individual assessment).

with any guidance as to what factors they should consider when deciding to charge a minor directly in adult criminal court.⁴²

B. FLORIDA'S JUVENILE TRANSFER LAWS

Florida's current statutory delinquency scheme includes judicial waiver, as well as mandatory and discretionary waiver by the state attorney.⁴³ Indictment may also serve as a method to transfer a juvenile to adult criminal court.⁴⁴ The judicial waiver provisions of Florida Statute § 985.556 provide for voluntary and involuntary waiver, and further subdivides involuntary waiver into discretionary and mandatory.⁴⁵ The judicial waiver statute ultimately vests the decision to transfer with the

42. See Stacey Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2447 (1996) (noting that prosecutorial waiver schemes are unlike any other situation in the criminal system in which a state attorney enjoys unfettered discretion in choosing the forum in which to charge a juvenile); see also Steiner & Wright, *supra* note 7, at 1455 (explaining that because state attorneys are acting in the interest of the state, absent any oversight, they may be capable of putting those interests above the best interests of the juvenile); *Branded For Life*, *supra* note 6, at 18 (explaining that most states with direct file statutes provide prosecutors little, if any, guidance as to what factors should be considered when determining whether to charge a juvenile as an adult); Jodi K. Olson, *Waiver of Juveniles to Criminal Court: Judicial Discretion and Racial Disparity*, 2 JUST. POL'Y J. 10, 10–11 (2005) (explaining that a study which examined juvenile transfer data in Florida and interviewed several prosecutors, “found a lack of statutory guidelines governing the transfer process of cases, that waiver was easily accomplished, and that the prosecutors generally displayed a lack of support for traditional juvenile justice principles”).

43. See FLA. STAT. § 985.556 (2018); see also FLA. STAT. § 985.557 (2018). Waiver may be voluntary on the part of the juvenile, or involuntary in which the decision is left to the juvenile judge after the state attorney has filed a motion requesting the court to transfer the child for prosecution as an adult. See § 985.556. All waivers require the prosecutor to file a motion and the court to conduct a hearing on that motion to determine whether that particular case should be transferred to adult criminal court. *Id.* Certain offenses require prosecutors to file charges against juvenile offenders in criminal court, while others allow prosecutors to choose. See § 985.557.

44. See FLA. STAT. § 985.56 (2018) (providing that a juvenile charged with allegedly committing an offense that is punishable by life imprisonment or death will be subject to the jurisdiction of the criminal court upon indictment by a grand jury); see also *Indictment*, THE LAW DICTIONARY, <https://thelawdictionary.org> (last visited Nov. 21, 2018) (defining indictment as “[a] written accusation of one or more persons of a crime or misdemeanor, presented to, and preferred upon oath or affirmation, by a grand jury legally convoked”).

45. See FLA. STAT. § 985.556(1) (2018) (providing that a juvenile, joined by a parent, guardian, or guardian ad litem, may demand in writing to be transferred to criminal court to be tried as an adult); see also FLA. STAT. § 985.556(2) (2018) (outlining that a prosecutor may, upon motion, request the juvenile court to transfer a juvenile to criminal court if the juvenile was fourteen years of age or older at the time the alleged offense was committed); FLA. STAT. § 985.556(3) (2018) (outlining two circumstances in which a prosecutor must motion the juvenile court to waive jurisdiction: (1) if the juvenile was fourteen years of age or older and has been previously convicted of a felony; and (2) if the juvenile was fourteen years of age or older, has previously been adjudicated delinquent, and has allegedly committed his fourth felony).

juvenile judge, even for mandatory judicial waiver.⁴⁶

The direct file portion of the statute is also subdivided into discretionary and mandatory direct file.⁴⁷ In Florida, prosecutorial direct file is the most commonly used mechanism to transfer juveniles to criminal court.⁴⁸ Once a juvenile is direct filed into adult criminal court, he or she is no longer under the jurisdiction and protection of the juvenile justice system.⁴⁹ Ordinarily, the prosecutor's decision to file charges in adult court is not appealable.⁵⁰

1. Discretionary Direct File

The Florida Legislature initially enacted prosecutorial waiver legislation in 1978, granting prosecutors limited discretion.⁵¹ Since then,

46. See FLA. STAT. § 985.556(4)(c) (2018) (explaining that the juvenile court must conduct a waiver hearing on all transfer requests, whether voluntary, discretionary, or mandatory, and providing a list of factors the juvenile court shall consider in deciding whether to transfer the juvenile to adult criminal court, including, but not limited to: the seriousness of the offense, whether it was committed in an aggressive manner, "the sophistication and maturity of the child," and the prior record and history of the juvenile); see also FLA. STAT. § 985.556(4)(e) (2018) ("Any decision to transfer a child for criminal prosecution must be in writing and include consideration of, and findings of fact with respect to, all criteria in paragraph (c).").

47. See FLA. STAT. § 985.557(1) (2018) (outlining the statutory provisions for discretionary direct file); see also FLA. STAT. § 985.557(2) (2018) (outlining the statutory provisions for mandatory direct file).

48. See *Direct File of Children to Adult Court Is Decreasing; Better Data Needed to Assess Sanctions*, THE FLA. LEGISLATURE OPPAGA 3 (Report No. 17-06, Mar. 2017), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1706rpt.pdf> (stating that as of 2015-2016, less than 1% of juveniles were transferred to criminal court through judicial waiver; less than 1% of juveniles were transferred to criminal court through indictment by a grand jury; and 99% of juveniles were transferred through direct file); see also Sago, *supra* note 40, at 4 (providing that in Florida during the 1990s and into the 2000s, direct file became the most common mechanism for transferring juveniles to criminal court).

49. See FLA. STAT. § 985.557(3)(a) (2018) (outlining that once a juvenile has been transferred to the adult criminal system and has been found to have committed an offense, the juvenile will from that point on be handled by the adult criminal system for any future violations of state law); see also *Branded For Life*, *supra* note 6, at 23 (explaining that once a juvenile is convicted and sentenced as an adult in Florida, any subsequent charges brought against the juvenile must be filed in adult criminal court).

50. See Bishop & Frazier, *supra* note 10, at 285; see also Scott, *supra* note 32, at 736. "This discretionary power is carried out without a hearing, without any statement of reasons, without counsel, and without any showing that the youth is either dangerous or nonamenable to treatment in the juvenile justice system." See Bishop & Frazier, *supra* note 10, at 287-88. Some states have reverse waiver statutes which function similarly to an appeal. See Scott, *supra* note 32, at 739. "Reverse waiver statutes allow the criminal court that has attained jurisdiction over the juvenile to remand the juvenile back to the jurisdiction of the juvenile court." *Id.*

51. See Henry George White et al., *A Socio-Legal History of Florida's Juvenile Transfer Reforms*, 10 U. FLA. J.L. PUB. POL'Y. 249, 268 (1999) ("Direct-file provisions were part of a comprehensive reform of Florida's juvenile justice system considered in 1978."); see also Bishop

the list of qualifying offenses has expanded, and the discretion of the prosecutor has broadened.⁵² The current version of Florida's discretionary direct file statute allows prosecutors to charge juveniles aged sixteen or seventeen directly in criminal court for virtually any offense, and juveniles aged fourteen or fifteen for specific offenses.⁵³ With respect to juveniles aged sixteen or seventeen, prosecutors wield unfettered discretion in determining whether to charge the juvenile directly in adult criminal court.⁵⁴

2. Mandatory Direct File

Florida's mandatory direct file statute was initially introduced along with discretionary direct file in 1978.⁵⁵ Mandatory direct file applies when a juvenile's case meets certain criteria set out in the statute.⁵⁶ The

& Frazier, *supra* note 10, at 287.

[In the 1970s,] prosecutors ha[d] rather limited powers over the transfer of youths under the ages of sixteen and seventeen. They may transfer any sixteen- or seventeen-year-old charged with any felony. Any sixteen- or seventeen-year-old charged with a misdemeanor or even a local ordinance violation may also be charged as an adult if he has had two prior adjudications of delinquency, one of which involved a felony.

Id.

52. See *Direct File Legislative History*, THE FLA. BAR (Apr. 5, 2013), https://www.floridabar.org/dasset/cmdocs/cm450.nsf/c5aca7f8c251a58d85257236004a107f/b10ab6fbee1418d3b85257b870071ad2d/%24FILE/Transfer%20information%20for%20FL%20Bar%20Meeting%2006_24_13.pdf (outlining the changes to Florida's direct file statute in 1997, 1999, 2000, 2001, 2006, 2007, and 2011); see also *Branded For Life*, *supra* note 6, at 22 (explaining that the Florida legislature expanded the state attorney's discretion with respect to direct filing multiple times throughout the 1990s).

53. See FLA. STAT. § 985.557(1)(a) (2018); see also FLA. STAT. § 985.557(1)(b) (2018). The discretionary provisions of the direct file statute allow a state attorney to charge a juvenile directly in adult criminal court "when in the state attorney's judgment and discretion the public interest requires that adult sanctions be considered or imposed." See § 985.557(1)(a); § 985.557(1)(b). If a juvenile is fourteen or fifteen years old at the time he allegedly committed the offense, a state attorney may only direct file him if the offense falls within the list of offenses provided. See § 985.557(1)(a). These offenses include: major felonies, "[u]nlawful throwing, placing, or discharging of a destructive device or bomb," aggravated battery, and many more. *Id.*

54. See FLA. STAT. § 985.557(1)(b) (explaining that as long as the juvenile was sixteen or seventeen years old at the time the offense was allegedly committed, the state attorney may file the charges directly in adult criminal court at his discretion).

55. See White et al., *supra* note 51, at 270 (providing that in Florida "[t]he 1978 legislation that first granted direct-file discretion to prosecutors also included a change in waiver provisions that had the effect of creating a de facto mandate for direct filing in certain cases").

56. See *Direct File of Children to Adult Court Is Decreasing; Better Data Needed to Assess Sanctions*, *supra* note 48, at 4 (explaining that if a juvenile's case meets certain criteria, a prosecutor will not have any discretion in deciding whether to charge the juvenile in adult criminal court, he must do so); see also *Branded For Life*, *supra* note 6, at 18 (noting that whether a juvenile is eligible to be direct filed to adult criminal court depends on the charges, the

mandatory direct file provision effectively bypasses waiver hearings as to enumerated offenses and vests original jurisdiction in the adult criminal court.⁵⁷

III. DISCUSSION

A. FLORIDA: THE LEADER IN THE TRANSFER OF JUVENILES TO ADULT COURT

Florida transfers more juveniles out of the juvenile court and into the adult criminal justice system than any other state.⁵⁸ Between 2003 and 2008, Florida transferred juveniles to criminal court at approximately twice the rate of Oregon and Arizona.⁵⁹ During that same time period, Florida transferred juveniles at about eight times the rate of California.⁶⁰ Florida has ultimately transferred over 12,000 juveniles to adult criminal court over a period of just four years.⁶¹

juvenile's age, and the juvenile's previous record and history).

57. See FLA. STAT. § 985.557(2) (2018); see also *Branded For Life*, *supra* note 6, at 3. Florida's mandatory direct file statute delineates four circumstances in which the state attorney has no choice but to try the juvenile as an adult in criminal court. See *Branded For Life*, *supra* note 6, at 22–23. The statute mandates the transfer of sixteen or seventeen-year-old habitual offenders charged with a “violent crime against a person” or a juvenile charged with a “forcible felony.” See § 985.557(2)(a)–(b). The mandatory direct file statutory provision applies to juveniles, regardless of their age, if they have allegedly committed an offense involving the stealing of a motor vehicle. See § 985.557(2)(c). If the offense allegedly committed by a sixteen or seventeen-year-old involves a weapon, the juvenile must be direct filed to adult criminal court. See § 985.557(2)(d).

58. See Sago, *supra* note 40 (stating that Florida has always “embraced an aggressive direct file system run by state attorneys”); see also *Branded For Life*, *supra* note 6, at 19 (providing that Florida has one of the harshest transfer policies in the country).

59. See *Branded For Life*, *supra* note 6, at 19 (showing that Oregon has the second-highest transfer rate, and Arizona has the third-highest transfer rate); see also Griffin et al., *supra* note 9, at 18 (stating that Florida is a “clear outlier” in terms of juvenile transfers to adult criminal court).

60. See Eli Hager, *The Worst State for Kids Up Against the Law*, THE MARSHALL PROJECT (Mar. 24, 2015, 2:21 PM), <https://www.themarshallproject.org/2015/03/24/the-worst-state-for-kids-up-against-the-law> (explaining that between 2003 and 2008, California and Florida had similar transfer laws); see also Griffin et al., *supra* note 9, at 18 (providing that “Florida’s rate was about five times the average transfer rate” of other states that reported total transfers during this period).

61. See Kevin Huguelet, *Florida’s Direct File Law: How State Attorneys Hold Too Much Power*, U. MIAMI. L. REV.: ONLINE EDITION (Nov. 20, 2014), <https://lawreview.law.miami.edu/floridas-direct-file-law-state-attorneys-hold-power/> (noting that some of the juveniles transferred were as young as twelve years old); see also Sago, *supra* note 40 (stating that between 2006 and 2011, more than 15,600 juveniles passed through the adult criminal justice system for both violent and nonviolent offenses).

One explanation for these extraordinary numbers is Florida's direct file statute.⁶² With respect to trying juveniles in adult criminal court, Florida relies on its discretionary direct file statute almost exclusively.⁶³ Direct file has nearly replaced judicial waiver in Florida, which accounts for only about two percent of total transfers.⁶⁴

If a juvenile violates the law, the prosecutor files either a petition, in which case the juvenile is adjudged civilly delinquent, or an information, in which the juvenile can be held criminally liable.⁶⁵ The discretionary direct file portion of Florida Statute § 985.557(1) is absent of safeguards that would preclude a prosecutor's unpredictability in exercising his or her discretion.⁶⁶ Prosecutors are not required to provide any reasoning for their decision to file a juvenile's case directly in criminal court, nor does the statute contain any provisions allowing judicial review of prosecutors' potential abuse of the discretion they are given.⁶⁷ Moreover, Florida Statute § 985.557(3) requires prosecutors to direct file any juvenile that was previously charged and sentenced as an adult.⁶⁸ This "once an adult, always an adult" provision essentially allows prosecutors to determine that a juvenile is no longer capable of rehabilitation.⁶⁹

62. See Griffin et al., *supra* note 9, at 18 (providing that Florida's high transfer rates are a result of the state's broad prosecutorial discretion law).

63. See *Branded For Life*, *supra* note 6, at 24 (explaining that of the more than 12,000 transferred juveniles between 2009 and 2013, ninety-eight percent entered the adult criminal justice system via direct file); see also Sago, *supra* note 40 (providing that during the 1990s and 2000s, direct file became the preferred mechanism for handling juveniles in Florida).

64. See Griffin et al., *supra* note 9, at 18 (showing that from 2003 to 2008 judicial waiver accounted for about four percent of total transfers in Florida); see also Huguelet, *supra* note 61 (stating that direct file accounts for about ninety-eight percent of juvenile transfers to criminal court).

65. See *Filing of Formal Charges*, MIAMI DADE PUB. DEFENDER, http://www.pdmiami.com/filing_of_formal_charges_juv.htm (last visited Nov. 21, 2018) (explaining the process of filing charges against juveniles).

66. See FLA. STAT. § 985.557(1) (2018) (indicating a lack of guidelines for prosecutors when making transfer decisions); see also *Juveniles Charged as Adults*, MIAMI DADE PUBLIC DEFENDER, http://www.pdmiami.com/juveniles_charged_as_adults.htm (last visited Nov. 21, 2018) (providing that a prosecutor's discretionary decision to direct file a case cannot be reviewed by any neutral judicial officer and the decision cannot be appealed).

67. See *Branded For Life*, *supra* note 6, at 42, 90–91 (explaining that Florida's direct file statute violates international standards of discretion "by failing to require prosecutors to consider a child's special status prior to making the direct file determination."); see also FLA. STAT. § 985.557 (showing there is no provision allowing juveniles to object to their transfer).

68. See FLA. STAT. § 985.557(3) (outlining the effect of direct file); see also *Branded For Life*, *supra* note 6, at 23 (explaining that once a juvenile is sentenced as an adult, he or she will automatically be charged in criminal court for any subsequent offense).

69. See *Branded For Life*, *supra* note 6, at 23 n. 66 (providing that of the thirty-four states with "once an adult, always an adult" provisions, Florida, the District of Columbia, and Oklahoma are the only states that do not "place limitations on when a [juvenile] with a prior adult

B. TRANSFER LAWS DO NOT SERVE AS A DETERRENT TO JUVENILE CRIME

A juvenile transferred to the adult criminal system is deprived of the rehabilitative services and programs offered by the juvenile court system.⁷⁰ Prosecutorial and legislative waiver shifted the juvenile justice system's focus from rehabilitation to punishment.⁷¹ Discretionary direct file decisions are, in effect, sentencing decisions because the prosecutor must decide whether to subject the juvenile to the punitive outcomes of the adult criminal court or to the rehabilitative outcomes of the juvenile court.⁷² Proponents of direct file claim that being tried in criminal court may serve as a wake-up call for juveniles.⁷³ Some also argue that direct file promotes efficiency and satisfies the desires of the "get tough" movement.⁷⁴

The nationwide trend towards making it easier to transfer juveniles to adult criminal court is based largely on the assumption that more punitive,

conviction can be sent to adult court").

70. See Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 500 (1987) (explaining that the sentencing policies in adult court are inconsistent with those in juvenile court) [hereinafter Feld, *Legislative Changes*]; see also Bishop & Frazier, *supra* note 10, at 281 (stating that "rehabilitative treatment and protective supervision traditionally have been the preferred responses to juvenile misbehavior").

71. Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 PENN ST. L. REV. 233, 243 n.64 (2005) ("A prosecutor's discretions and the conflict that is inherent to this form of legislative waiver . . . contravenes the foundational principles of the juvenile court"); see also Sabo *supra* note 42, at 2446-47 (explaining that prosecutorial waiver ignores the best interests of the juvenile).

72. See Redding, *Adult Punishment*, *supra* note 13, at 16 (providing that juveniles in the adult system have "greatly reduced opportunities for meaningful rehabilitation in the criminal justice system"); see also Vincent Schiraldi & Jason Ziedenberg, *Features, The Florida Experiment: Transferring Power From Judges to Prosecutors*, 15 CRIM. JUST. 46, 49 (2000) (providing that a 1998 survey "found that a majority of Americans oppose changing federal law to allow for prosecutorial waiver of youth to adult court").

73. See Redding, *Adult Punishment*, *supra* note 13, at 4, 8 (explaining the perception that trying juveniles as adults will lead to adult sentences, and that these sentences would deter juvenile crime); see also Steiner & Wright, *supra* note 7, at 1457 (explaining that recidivism rates in juveniles retained in the juvenile justice system were actually lower than those who were transferred to the adult criminal justice system).

74. See Huguelet, *supra* note 61 (inferring that direct file is quicker because it bypasses a waiver hearing and all the individual considerations made by a juvenile judge); see also Eric K. Klein, *Denis The Menace or Billy The Kid: An Analysis of the Role of Transfer To Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 395 (1998) (explaining that proponents of direct file "argue that in a society more concerned with retribution and selective incapacitation than with rehabilitation, it is necessary to streamline the method of transfer in order to facilitate these goals").

adult criminal sanctions will serve as a deterrent to juvenile crime.⁷⁵ Advocates of more lenient waiver laws expected recidivism rates of juveniles transferred to the adult court to be lower than those retained in the juvenile system.⁷⁶ There are two types of deterrence prosecutorial waiver attempts to achieve: specific deterrence and general deterrence.⁷⁷ Specific deterrence aims towards decreasing the chance a juvenile offender will re-offend, and general deterrence aims towards preventing juveniles from committing their first offense.⁷⁸

Several studies on the deterrent effect of transfer laws have been conducted.⁷⁹ As of 2010, six studies have indicated that juveniles tried as adults in criminal courts have higher recidivism rates when compared to similar youth who were tried in the juvenile court.⁸⁰ Moreover, juveniles

75. See Klein, *supra* note 74, at 374 (providing that the trend towards trying juveniles is attributable to the assumption that they will receive longer and harsher sentences, which, in turn, will act as a deterrent and will lower the juvenile crime rate); see also Steiner & Wright, *supra* note 7, at 1454 (explaining that transferring juveniles to adult criminal court would accomplish the goal of “detering future juvenile crime”).

76. See Steiner & Wright, *supra* note 7, at 1457 (explaining that recidivism rates of juveniles retained in the juvenile justice system were actually lower than those who were transferred to the adult criminal justice system); see also Redding, *Juvenile Transfer*, *supra* note 14, at 6 (explaining that the existing research provides evidence that trying juvenile offenders in adult criminal court does not reduce recidivism, rather it “substantially increases” it).

77. See Redding, *Juvenile Transfer*, *supra* note 14, at 2 (explaining specific deterrence refers to “whether trying and sentencing juvenile offenders as adults decreases the likelihood that they will reoffend,” and general deterrence refers to “whether transfer laws deter any would-be juvenile offenders”); see also Thomas A. Loughran et al., *Studying Deterrence Among High-Risk Adolescents*, JUV. JUST. BULL. 4 (Aug. 2015), <https://www.ojdp.gov/pubs/248617.pdf> (explaining general deterrence benefits society as a whole and specific deterrence benefits individuals).

78. See Loughran, *supra* note 77 (explaining that in the view of general deterrence, “clearly announced laws backed up with aggressive enforcement, prosecution, and punishment send a message to the community that crime will not be tolerated” and specific deterrence “emphasizes the importance of one’s own prior offending and sanction experiences in framing the costs and benefits of criminal involvement”).

79. See Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 SAGE J. CRIME & DELINQ. 171, 171 (1996) (comparing the recidivism rates of 2,738 juvenile offenders transferred to criminal court in Florida in 1987 with a matched sample of juvenile offenders who were retained in the juvenile justice system); see also Steiner & Wright, *supra* note 7, at 1454–55 (examining the effects of prosecutorial direct file laws in fourteen states as of 2003, comparing juvenile arrest rates the five years before and the five years after states enacted their prosecutorial transfer laws).

80. See Redding, *Juvenile Transfer*, *supra* note 14, at 4; see also Griffin et al., *supra* note 9, at 26. One study observed that ninety-one percent of juveniles tried in criminal court for robbery were rearrested, and seventy-three percent of juveniles tried in juvenile court for robbery were rearrested. See Redding, *supra* note 14, at 4. These findings indicate that regardless of whether juveniles are imprisoned in juvenile or adult facilities, adult criminal court processing alone results in a higher recidivism rate. *Id.* Each of the six studies employed different methodologies and measures, and gathered data “on a variety of jurisdictions, populations, and types of transfer

transferred and prosecuted as adults in criminal courts generally recidivate sooner and more often.⁸¹

Several studies found higher recidivism rates among juveniles tried as adults when compared to similar youth offenders retained in the juvenile court.⁸² A Florida study compared the recidivism rate of 2,738 juveniles transferred to adult criminal court with a matched sample retained in the juvenile court, and found that 30% of transferred juveniles re-offended and only 19% of those retained in juvenile court re-offended.⁸³ Additionally, the study found that juveniles tried as adults re-offended within 135 days and those retained in the juvenile court re-offended within 227 days.⁸⁴

Several possible reasons for the increased recidivism of juveniles tried as adults have been identified: (1) “[t]he stigmatization and other negative effects of labeling juveniles as convicted felons;” (2) “the sense of resentment and injustice juveniles feel about being tried as adults;” (3) “the decreased focus on rehabilitation and family support in the adult system;” and (4) “the learning of criminal mores and behavior from adult criminals.”⁸⁵ Moreover, juveniles with a felony conviction have a harder time reentering society.⁸⁶

laws.” See Griffin et al., *supra* note 9, at 26.

81. See Huguelet, *supra* note 61; see also Josh Rovner, *How Tough on Crime Became Tough on Kids: Prosecuting Teenage Drug Charges in Adult Courts*, THE SENT’G PROJECT (Dec. 7, 2016), <http://www.sentencingproject.org/publications/tough-crime-became-tough-kids-prosecuting-teenage-drug-charges-adult-courts/> (explaining studies have found that “harsher penalties increase reoffending rates, partially because the adult system is a ‘school for crime’”); see also Redding, *Adult Punishment*, *supra* note 13, at 4, 12 (discussing the effect transfer has on juvenile recidivism rates).

82. See Redding, *Adult Punishment*, *supra* note 13, at 12 (“Seven large-scale studies indicate that youth tried in adult criminal court for violent crimes have greater recidivism rates after release than those tried in juvenile court, though it is unclear whether transfer affects recidivism for property offenders.”); see also Jarod K. Hofacket, *Comment: Justice or Vengeance: How Young is Too Young For A Child To Be Tried and Punished as an Adult?*, 34 TEX. TECH. L. REV. 159, 165–66 (2002) (explaining that juveniles who have served in adult prisons are more likely to reoffend than their counterparts in juvenile facilities who committed comparable crimes).

83. See Redding, *Adult Punishment*, *supra* note 13, at 13 (discussing the Florida study on juvenile recidivism rates); see also Bishop et. al., *supra* note 79, at 171, 182 (providing statistics on juvenile recidivism in a Florida study).

84. See Bishop, *supra* note 79, at 182 (providing data on the time it takes juveniles to re-offend); see also Redding, *Adult Punishment*, *supra* note 13, at 13 (providing that judicially transferred juveniles “were rearrested more quickly upon their return to the community than youth who were retained in [the] juvenile justice system during the same period”).

85. See Redding, *Adult Punishment*, *supra* note 13, at 15; see generally *Mores*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/mores> (last visited Nov. 21, 2018) (defining mores as the “fixed morally binding customs of a particular group”).

86. See Redding, *Adult Punishment*, *supra* note 13, at 15 (explaining that felony convictions result in “the loss of a number of civil rights and privileges . . . , further reducing the opportunities for employment and community reintegration”); see also Christopher Hartney,

C. TREND TOWARDS LIMITING THE TRANSFER OF JUVENILES TO ADULT COURT

Growing trends are finding ways to limit prosecutorial direct file, and the overall number of juveniles transferred to adult criminal court.⁸⁷ In California, for example, voters passed legislation that now bars prosecutors from deciding whether to try a juvenile as an adult, effectively eliminating direct file.⁸⁸ Other states have raised the age in which juveniles may be treated as adults, in an effort to lower the number of juveniles transferred to criminal court.⁸⁹ Several states are taking measures to limit prosecutors' discretionary transfer power by reducing the number of offenses that allow for discretionary direct file, and by raising the age in which juveniles can be directly filed in criminal court.⁹⁰

1. California

In 2016, California passed Proposition 57, which eliminated the ability of state attorneys to direct file juveniles to adult criminal court.⁹¹

Youth Under Age 18 in the Adult Criminal Justice System, NAT'L COUNCIL ON CRIME AND DELINQ. 1 (June 2006), https://ncfy.acf.hhs.gov/sites/default/files/docs/15516-Youth_Under_Age_18.pdf (explaining that juveniles in the adult criminal justice system face harsher sentences, little or no rehabilitation programming, a criminal record, and a greater chance of death and victimization in adult jails and prisons).

87. See Thomas, *supra* note 32, at 29 (stating that several states have taken steps to limit juvenile transfer methods); see also John Kelly, *19 States Have Narrowed Juvenile Involvement in Adult System Since 2015*, THE CHRON. OF SOC. CHANGE (Oct. 10, 2017), <https://chronicleofsocialchange.org/juvenile-justice-2/19-states-narrowed-juvenile-involvement-adult-system-since-2015/28413> (stating that "[s]ince 2015, more than one-third of states have taken" steps to limit the number of juveniles transferred to adult criminal court).

88. See Jeremy Loudanback, *California Supreme Court: Law Barring Direct File of Juveniles Is Retroactive*, THE CHRON. OF SOC. CHANGE (Feb. 1, 2018), <https://chronicleofsocialchange.org/news-2/california-supreme-court-says-law-barring-direct-file-juveniles-is-retroactive> (explaining that prosecutors in California can no longer directly file juveniles into criminal court without approval from a judge); see also Sago, *supra* note 40 (explaining that California prosecutors no longer have unfettered discretion in transferring juveniles to criminal court).

89. See Thomas, *supra* note 32, at 12, 14, 16 (providing that Louisiana, New York, North Carolina, and South Carolina have all participated in the "raise the age" campaign); see also Kelly, *supra* note 87 (explaining that Georgia, Michigan, Missouri, Texas, and Wisconsin have current bills to raise the age of juvenile jurisdiction to eighteen).

90. See Thomas, *supra* note 32, at 35.

91. See J. Richard Couzens & Tricia A. Bigelow, *Proposition 57: "The Public Safety and Rehabilitation Act of 2016,"* CAL. CTS. 4 (May 2017), <http://www.courts.ca.gov/documents/prop57-Parole-and-Credits-Memo.pdf> (outlining the changes Proposition 57 had on California's prosecutorial direct file law); see also Loudanback, *supra* note 88 (explaining that prior to Proposition 57, California gave prosecutors broad discretion to direct file juveniles fourteen years of age or older).

Pursuant to the new law, prosecutors now bear the burden of proving why a juvenile should be transferred, and every juvenile is afforded a fitness hearing before a juvenile judge.⁹² Moreover, in February of 2018, the California Supreme Court ruled that Proposition 57 may be applied retroactively to pending cases.⁹³ Many of the roughly four thousand juveniles that have been directly filed to adult court since 2010, now have the chance of returning to the juvenile system.⁹⁴

2. Vermont

For many years Vermont had one of the harshest direct file statutes in the country.⁹⁵ Prosecutors enjoyed unfettered discretion with respect to direct filing sixteen and seventeen-year-old juvenile offenders.⁹⁶ In 2016,

92. See Couzens & Bigelow, *supra* note 91 (explaining that Proposition 57 also eliminated the presumptions that certain juveniles were unfit for juvenile court); see also Sago, *supra* note 40 (explaining that during a hearing the juvenile judge will consider all the circumstances surrounding the juvenile's case).

93. See Loudenback, *supra* note 88 (explaining that juveniles "with an open court case in the adult system—where a final judgment had not yet been handed down as of Nov. 8, 2016—can benefit from the rights offered by Prop[osition] 57."); see also *The People v. The Superior Court of Riverside Cty.*, 4 Cal. 5th 299, 303 (Cal. 2018) (stating that Proposition 57 applies retroactively because "being treated as a juvenile in juvenile court—where rehabilitation is the goal—rather than being tried and sentenced as an adult can result in dramatically different and more lenient treatment." . . . and thus "reduces the possible punishment for a class of persons, namely juveniles").

94. See Loudenback, *supra* note 88 (explaining that in recent years the number directly filed juveniles had begun to decrease); see also Thomas, *supra* note 32, at 37 (providing that of the approximately ten thousand juveniles that were prosecuted in adult court, about seventy percent were direct filed by state attorneys).

95. See Sarah Barr, *Several States Look to Keep Teenagers Out of Criminal Court*, JUV. JUST. INFO. EXCHANGE (June 23, 2016), <https://jjie.org/2016/06/23/several-states-look-to-keep-teenagers-out-of-criminal-court/> (explaining that prosecutors in Vermont were allowed to charge sixteen and seventeen-year-olds directly in adult court for virtually any offense, no matter how minor); see also Bob Sheil, *2016 Legislative Wrap-Up: Juvenile Justice (H.95)*, VOICES FOR VT.'S CHILD., <https://www.voicesforvtrkids.org/2016-update> (last visited Nov. 21, 2018) (explaining that Vermont's broad direct file law resulted in lifelong criminal records for juveniles, which made it difficult for them to later "procure employment, gain access to public housing and federal student loans").

96. See Barr, *supra* note 95 (explaining that under Vermont's previous direct file law, prosecutors were able to direct file juveniles for any misdemeanor or felony); see also Erica Garfin, *A Study of Vermont State's Attorneys' Practices And Perspectives Regarding 16 And 17 Year Old Youth*, 5 (June 27, 2014), <https://legislature.vermont.gov/assets/Documents/2016/WorkGroups/House%20Judiciary/Reports%20and%20Resources/W~Children%20and%20Family%20Council~State%E2%80%99s%20Attorneys%20Practices%20and%20Perspectives%20Regarding%2016%20and%2017%20Year%20Old%20Youth~2-10-2015.pdf> (explaining that prosecutors have the choice to not file charges, file charges in the juvenile court, or file criminal charges in the adult court against alleged juvenile offenders).

the Vermont legislature passed and signed HB 95, which brought a number of significant juvenile justice reforms.⁹⁷

The first major change in the law was the abolishment of discretionary direct file.⁹⁸ All misdemeanor and felony offenses involving juveniles under the age of eighteen must now originate in the juvenile court, with the exception of twelve enumerated offenses.⁹⁹ The second major reform dictated that juveniles under the age of twelve can now only have their cases heard in juvenile court.¹⁰⁰ The purpose of these changes is to minimize the lifelong effects of being tried as an adult.¹⁰¹

3. Indiana

Indiana recently passed SB 160, creating a “reverse transfer” mechanism in which juveniles already in the adult criminal system can return to the juvenile system.¹⁰² SB 160 provides that “[w]hen a young person is charged with a direct-file offense as well as other offenses, but the direct-file charges are dismissed or acquitted . . . the adult court [may] make the decision to transfer that child back to the juvenile court for

97. See Thomas, *supra* note 32, at 37 (providing that Vermont was the first state to eliminate discretionary prosecutorial waiver); see also Barr, *supra* note 95 (noting the most significant changes to Vermont’s juvenile laws and referring to them as a “sweeping package of changes”).

98. See Barr, *supra* note 95 (explaining that as a result of HB 95, if prosecutors want to charge a juvenile in criminal court they must first go before a judge); see also Thomas, *supra* note 32, at 37 (providing that HB 95 did not “roll back the legislatures power to statutorily exclude” juveniles from juvenile court).

99. See Barr, *supra* note 95 (referring to the twelve enumerated offenses as the “Big 12,” which prosecutors are required to file charges in criminal court); see also VT. STAT. tit. 33, § 5204 (2018) (listing that the twelve offenses include murder, manslaughter, aggravated assault, arson, kidnapping, etc.).

100. See Sheil, *supra* note 95 (explaining that ten and eleven-year-old juvenile offenders can only have their cases heard in juvenile court, and twelve and thirteen-year-old juvenile offenders must have their cases originally filed in juvenile court; however, there are exceptions in which they can be transferred to criminal court); see also Thomas, *supra* note 32, at 33 (providing that Vermont’s previous law allowed a juveniles case to be filed in criminal court at the age of ten).

101. See Barr, *supra* note 95 (explaining that the purpose of the changes to Vermont’s juvenile laws is to make sure “there are not lasting collateral consequences that follow [juveniles] along for the rest of [their] life”); see also Sheil, *supra* note 95 (inferring that a reason for the changes to Vermont’s laws stemmed from the knowledge “that a youth is much less likely to engage in future criminal activity if her or his case is processed through the juvenile rather than the adult criminal justice system”).

102. See Zoe Schein, *Indiana Bill Creates Path Out for Youth*, NAT’L JUV. JUST. NETWORK (Apr. 25, 2016), <http://www.njjn.org/article/indiana-bill-creates-path-out-for-youth-directly-filed-to-adult-system> (explaining that the “reverse transfer” mechanism is not automatic, a juvenile judge must decide whether to send the juvenile to the juvenile court); see also Thomas, *supra* note 32, at 36 (stating that Indiana statutorily excludes youth from the juvenile justice system with respect to nine enumerated offenses, including: murder, attempted murder, kidnapping, rape, carrying of a handgun without a license, etc.).

adjudication and disposition.”¹⁰³ Giving juveniles a way back to the juvenile justice system will restore the possibility of rehabilitation, and discourage prosecutors from overcharging juveniles.¹⁰⁴

IV. SOLUTION

Florida should amend its direct file statute by stripping prosecutors of their unfettered discretionary power to directly charge juveniles in adult criminal court for virtually any offense.¹⁰⁵ The decision to charge juveniles in either adult or juvenile court should be taken out of the hands of prosecutors because there is an inherent conflict between a prosecutor's role as a representative of society's best interests and of a juvenile's best interests.¹⁰⁶ The Florida legislature has provided two alternative transfer methods: judicial waiver and grand jury indictment.¹⁰⁷ These two alternative transfer methods put the decision to charge and try a juvenile as an adult in the hands of neutral third parties.¹⁰⁸

Until the Florida Legislature repeals discretionary prosecutorial direct file, it should implement new provisions that will limit prosecutors' discretionary power and will give juveniles a better opportunity to remain a juvenile in the eyes of the court.¹⁰⁹ The Florida Legislature can adopt a

103. See Schein, *supra* note 102; see also Sago, *supra* note 40 (providing that Indiana has removed certain offenses from the direct file statute allowing them to be heard in juvenile court; specifically: “criminal gang activity, intimidation, and substance abuse-related acts”).

104. See Sago, *supra* note 40; see also Schein, *supra* note 102. Indiana's “reverse transfer” mechanism gives the court the chance to review the facts before setting the case aside. See Schein, *supra* note 102. It also gives juvenile offenders the opportunity to benefit from juvenile services, namely education and life skill development, which are not age-appropriate in the adult system. *Id.* Sending juveniles back to the juvenile system exposes them appropriate rehabilitative care. See Sago, *supra* note 40.

105. See generally *supra* Part III (stating the negative effects of discretionary direct file and why other states have eliminated or limited their direct file statutes); see also S.B. 192, Reg. Sess. (Fla. 2017) (providing proposed amendments to Florida's direct file statute).

106. See Sabo, *supra* note 42, at 2446 (explaining that prosecutors seeking to do justice are adversaries to juveniles and cannot effectively represent the best interests of society and the best interests of the juvenile at the same time); see also Sago, *supra* note 40 (providing the opinion of a Florida state attorney that discretionary direct file “allows for more nuances in how prosecutors across Florida's 20 circuits interpret the gravity of crimes and the potential threat a youth offender has on the overall safety of a community, criteria that arguably reflect personal values and interpretations of the law”).

107. See FLA. STAT. § 985.556 (2018); see also FLA. STAT. § 985.56 (2018).

108. See *supra* notes 43–50 and accompanying text (explaining that judicial waiver and indictment allow judges or juries to determine whether a juvenile should be transferred and neither of the two have any conflicting interest in the forum or outcome of the case).

109. See *supra* Part III, Section C (discussing how California, Indiana, and Vermont limited the discretionary power of state attorneys); see also S.B. 192, Reg. Sess. (Fla. 2017) (showing efforts to change how and why juveniles can be transferred to criminal court by state attorneys).

reverse waiver provision, in which a hearing is held in front of the adult criminal court judge to determine whether the juvenile should be sent back to the juvenile court, making a prosecutors transfer decision appealable.¹¹⁰ Moreover, the reverse waiver provision should give juveniles an immediate right to appeal transfer decisions as opposed to requiring them to wait until after their adult court conviction.¹¹¹ At the very least, discretionary prosecutorial direct file should be available only for juvenile offenders that have previous delinquent history or criminal convictions.¹¹²

V. CONCLUSION

Florida should follow the juvenile transfer approach of California and Vermont and eliminate discretionary prosecutorial direct file.¹¹³ As demonstrated by the increased recidivism rates of juveniles transferred to criminal court, discretionary direct file does not effectively deter juveniles from committing crimes.¹¹⁴ Discretionary prosecutorial direct file is arbitrary and goes against the accepted notion that children are fundamentally different than adults and should be treated as such.¹¹⁵

110. See Scott, *supra* note 32, at 739–40 (explaining the function of reverse waiver provisions); see also Thomas, *supra* note 32, at 29 (stating that twenty-five states have reverse waiver provisions).

111. See Thomas, *supra* note 32, at 34 (explaining that in Texas “juveniles can immediately appeal [transfer decisions] with no need to wait for their trial and conviction in adult court”); see also Lisa A. Cintron, *Comment: Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. L. REV. 1254, 1276 (1996) (explaining that appeals of transfer decisions “after conviction denies the juvenile any mechanism to request immediate rectification of improper transfer orders [and] incorrect applications of transfer statutes,” which essentially “amounts to no right of appeal when, due to delays in criminal and appellate court processes, the information from the original transfer . . . becomes outdated and the juvenile reaches majority age.”).

112. See Thomas, *supra* note 32, at 36 (stating that in 2015 Illinois passed legislation that requires a prosecutor’s transfer decision to be based on previous delinquent history or possible gang affiliation); see also Griffin et al., *supra* note 9, at 7 (stating that “once [an] adult/always [an] adult” laws in Maryland, Michigan, Minnesota, and Texas apply only to subsequent felonies committed by previously transferred juveniles).

113. See *supra* Part III, Section C (explaining how California and Vermont effectively eliminated discretionary prosecutorial direct file).

114. See *supra* Part III, Section B (explaining why transferred juveniles have a higher rate of recidivism); see also *Branded For Life* *supra* note 6, at 2 (stating that transferring juveniles increases recidivism).

115. See *supra* Part II–III.