

CERTIFICATION & DISCRETIONARY WAIVER BIBLIOGRAPHY

CASES

SUPREME COURT CASES

Kent v. United States, 383 U.S. 541 (1966).

The Court held that a juvenile court waiver of jurisdiction must be accompanied by a statement of the reasons, therefore. An informal hearing, access to counsel, and access to the child's social record are required prior to entry of a waiver order.

Breed v. Jones, 421, U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975)
Double jeopardy requirements in transfer proceedings.

Roper v. Simmons, 543 U.S. 551 (2005).

Noting (1) the lack of maturity of juveniles, (2) the increased vulnerability of juveniles to negative influences and outside pressures, and (3) the still-developing character of juveniles, the Court held that the Eighth Amendment forbids the imposition of the death penalty on juvenile offenders under the age of 18.

Graham v. Florida, 560 U.S. 48 (2010).

The United States Supreme Court held that U.S. Const. amend. VIII prohibited JLWOP sentences for non-homicide juvenile offenders. Citing *Thompson* (487 U.S. 815, 826 (1988)), the Court held that, while transfer laws may indicate that 15-year-olds are old enough to be tried in criminal court for serious offenses, transfer laws do not tell us anything about States' views regarding the appropriate punishment for these juvenile offenders. "[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences."

Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012)

The Court abolished mandatory sentences of life without parole for juveniles convicted of all crimes, including homicides. *Miller v. Alabama* holds that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on cruel and unusual punishments. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, mandatory life without parole poses too great a risk of disproportionate punishment. *Miller* requires that sentencing courts consider a child's diminished culpability and heightened capacity for change before condemning him or her to die in prison. Although *Miller* does not foreclose a sentencer's ability to impose life without parole on a juvenile, a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "irreparable corruption."

Montgomery v. Louisiana, 577 U.S. 190, 136 S. Ct. 718, 723 (2016)

Miller's holding that mandatory life imprisonment without parole for juvenile homicide offenders violated the Eighth Amendment announced a new substantive rule that was retroactive in cases on collateral review. Giving *Miller* retroactive effect did not require

states to relitigate sentences in every case. Instead, states could remedy Miller violations by permitting juvenile homicide offenders to be considered for parole.

Jones v. Mississippi, 141 S. Ct. 1307 (2021)

The Court held that a state's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient. The Court's precedents did not require an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility. *Miller v. Alabama* did not require the sentencer to make a separate finding of permanent incorrigibility before imposing a life-without-parole sentence. And *Montgomery v. Louisiana* did not purport to add to Miller's requirements. Because the Constitution does not require an on-the-record explanation of mitigating circumstances by the sentencer in death penalty cases, it would be incongruous to require an on-the-record explanation of the mitigating circumstance of youth by the sentencer in life-without-parole cases.

TREATISE

ROBERT O. DAWSON, TEXAS JUVENILE LAW § 10 (9TH ED. 2018).

TEXAS CASES

Ex Parte Rodriguez, 466 S.W.3d 846 (Tex. Crim. App. 2015)

District Court lacked jurisdiction because serving juvenile with summons two hours before transfer hearing violated requirement summons be served at least two days prior to hearing.

Hildago v. State, 983 S.W. 2d 746 (Tex. Crim. App. 1999)

The Sixth Amendment's right to assistance of counsel applies to juveniles. Certifications were intended to be used only in exceptional cases. "The philosophy was that, whenever possible children "should be protected and rehabilitated rather than subjected to the harshness of the criminal system" because "children, all children are worth redeeming."

Moon v. State, 410 S.W.3d 366 (Tex. Crim. App. 2014) overruled by *Ex parte Thomas*, 623 S.W.3d 370 (Tex. Crim. App. 2021)

The court held that the juvenile court abused its discretion in waiving its jurisdiction over Moon and certifying him for trial as an adult. The juvenile court's finding that there was little, if any, prospect of adequate protection of the public and likelihood of reasonable rehabilitation of defendant was so against the great weight and preponderance of the evidence as to be manifestly unjust.

Ex parte Thomas, 623 S.W.3d 370 (Tex. Crim. App. 2021)

Moon v. State is expressly overruled. Courts are not required to make detailed findings. Detailed findings are certainly preferable and helpful to keep the appellate court from having to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing. But, it's the hearing itself that prevents the transfer process from being arbitrary; the case-specific fact-findings

are not necessary to protect a fundamental constitutional right. Kent does not hold otherwise. To the extent that language in *Moon v. State*, 2014 Tex. Crim. App. LEXIS 1918, suggests that such findings are a fundamental constitutional right, that language is disavowed.

OTHER STATE & FEDERAL CASES

Gingerich v. State, 979 N.E.2d 694 (Ind. Ct. App. 2012) (transfer denied Mar. 7, 2013, 984 N.E.2d 221).

The Indiana Court of Appeals held that the juvenile court abused its discretion when it denied the defendant's request for a continuance of the waiver hearing to adult court, thereby denying the defendant's right to due process. The relevant statute read that only "after full investigation and hearing" could the juvenile court waive jurisdiction. The defendant had only a week between a finding of probable cause and the waiver hearing. The defendant showed that a continuance would have aided his defense.

In re Luis R., 992 N.E.2d 591 (Ill. App. Ct. 2013).

The Second District Illinois Court of Appeals held that the State is prohibited from instituting juvenile delinquency proceedings against a defendant who is over the age of 21 when the petition is filed. Without a valid juvenile petition, Illinois law likewise prohibits discretionary transfer to criminal court.

Manduley v. Superior Court, 27 Cal. 4th 537 (Cal. 2002).

The state supreme court concluded that Cal. Welf. & Inst. Code § 707(d) did not deprive petitioners of their constitutional rights by permitting the prosecutor to file charges against the juvenile petitioners in criminal court.

State In re V.A., 50 A.3d 610 (N.J. 2012).

This appeal focuses on New Jersey's transfer statute, which permits the transfer of 16- and 17-year-olds to adult criminal court upon prosecutorial motion. Defendants asked the state supreme court to reverse the judgment of the lower court, which adopted a "patent and gross abuse of discretion" standard for judicial review of prosecutorial waiver motions. The Supreme Court of New Jersey relied on its previous decision in *State v. Lagares*, 127 N.J. 20 (1992), to determine that in light of the potential for enhanced punishment, a prosecutor's waiver decision should be reviewed under an abuse of discretion standard rather than the standard of patent and gross abuse of discretion. Under this lower standard of abuse of discretion, the Court has more room to review considerations and justifications provided in the transfer motion. Here, the New Jersey Supreme Court held that the prosecutors' motion for waiver must demonstrate individualized assessments for each juvenile charged and account for all factors considered and deemed applicable in order to be granted. Furthermore, the Court held that prosecutors must provide an individualized deterrence assessment for each juvenile charged. This newly adopted standard of review provides an additional level of protection against arbitrariness in prosecutorial decisions affecting punishment for a juvenile while still maintaining deference to prosecutorial discretion. It also provides

courts the opportunity to ensure due process rights are adequately granted to juveniles by requiring individualized consideration for both waiver and deterrence justifications in motions to transfer.

United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972).

The court held there was no violation of due process or equal protection. The court reasoned that prosecutorial discretion in prosecuting a juvenile as an adult is not unconstitutional unless it is based on suspect factors (*i.e.*, race or religion).

ARTICLES

Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263 (2013).

This article proposes a so-called “Youth Discount,” or a proportional reduction of adult sentence lengths, as “a straight-forward way for legislatures to recognize juveniles’ categorically diminished responsibility and to incorporate youthfulness as a mitigating factor in sentencing.”

Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581 (2012).

This article provides an overview of three strikes laws and the Court’s Eighth Amendment jurisprudence on punishments imposed under habitual offender sentencing statutes. Utilizing the analytical framework of *Graham*, Caldwell shows how the use of juvenile strikes to enhance juvenile sentences in California constitutes cruel and unusual punishment.

Charles Puzzanchera & Sean Addie, *Delinquency Cases Waived to Criminal Court, 2010*, OJJDP JUV. OFFENDERS AND VICTIMS: NAT’L REP. SERIES BULL., Feb. 2014.

In 2010, 6,000 delinquency cases were waived—down 55 percent (13,300 cases) from 1994. According to the bulletin, this decline can be attributed to the decline in juvenile violent crime together with the widespread expansion of nonjudicial transfer laws. In 2010, 1.5 percent of person offense cases were waived, 0.9 percent of drug offense cases were waived, 0.7 percent of property offense cases were waived, and 0.2 percent of public order offense cases were waived. Half of waived cases in 2010 involved person offenses.

Edward P. Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, OJJDP JUV. JUST. BULL., Dec. 2012.

Bulletin presents findings from Pathways to Desistance study of serious adolescent offenders in Maricopa County, Arizona, who were transferred from juvenile to adult court.

Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1 (2010).

Article seeks to identify the central reasons behind the legislative shift in juvenile

transfer during the 1990s. According to the article, attempts to expand prosecutorial power in juvenile courts fueled legislative changes. However, the response of policy makers was ill fitted to this goal. For example, Zimring states that the so-called blended jurisdiction (or blended sentencing) that developed, in which juvenile courts maintained jurisdiction over serious and violent juvenile offenders, was “nothing short of surrender.” Had the real danger been loss of jurisdiction, this legislative response would have been appropriate. However, blended sentencing did nothing to directly respond to the primary goal of expanding prosecutorial power.

Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH. L. REV. 29 (2013).

This article argues that juvenile transfer procedures could benefit from the “more developed and principled jurisprudence” on the death penalty. Hoeffel argues that the Court’s rationale for narrowing the eligibility criteria for the death penalty for adults and eliminating juveniles from its reach can and should be applied to juvenile transfer; “death is different,” and “children are different too.” In addition, the article notes that 34 states have “once adult/always adult” laws (any subsequent charges against a transferred youth will be filed in adult criminal court).

Jason Tashea & Al Passarella, *Juvenile Justice Study: Transferred Juveniles from Adult System and Their Outcomes*, 10:5 BALTIMORE CITY JUV. CT. REV. (2013).

This report by Advocates for Children and Youth provides background information on reverse youth transfer in Baltimore, Maryland, and the findings of its recent study. Baltimore presently has an “adult time for adult crime” system that automatically charges youth as adults for certain enumerated crimes. Known as “exclusionary offenses,” youth are automatically excluded from juvenile proceedings and processed through the adult criminal justice system for 33 specific crimes. However, reverse transfer is allowed if the youth can show that juvenile court jurisdiction is in the best interest of both the youth and society in general. Advocates for Children & Youth studied a sample of 100 reverse transfer cases between 2009 and 2011. According to the study, juveniles can spend the equivalent of almost an entire school year in the adult system before receiving a waiver back to the juvenile system. In addition, only 29 percent of juveniles granted reverse transfers were sentenced to out-of-home placement or detention centers. To combat the failures of Baltimore’s automatic transfer system, Advocates for Children and Youth recommend ending automatic transfer of youth and increasing access to community-based and trauma-informed programs.

Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143 (2014).

This article argues that mandating a minority rule against adult prosecution for offenders under seventeen years of age is the next logical step in juvenile justice reform. Taylor-Thompson recognizes that removing children from adult prosecution will be no easy feat: “[it] will likely take more than a trio of Supreme

Court cases and hopeful dicta.” She is optimistic that economic pressures will lead state legislatures to reevaluate their punitive juvenile policies and practices.

Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013).

This article begins by recognizing how “society has always tolerated some disruptive, and even delinquent, adolescent behavior without formal state intervention and without significant cost or threat to public safety.” Nonetheless, this tolerance does not seem to apply to black and Hispanic youth. The author draws on contemporary research to show how race impacts perceptions of adolescent culpability. Henning recommends developing a fair and equitable framework for identifying those youth who should be diverted from juvenile court intervention.

Kristin Johnson et al., *Disregarding Graduated Treatment: Why Transfer Aggravates Recidivism*, 57:5 CRIME & DELINQ. 756 (2011).

This article explores the relationship between juvenile transfer and recidivism. Traditional studies have found that the transfer of juveniles into the adult correctional system leads to higher rates of recidivism. The authors hypothesize that the relationship between juvenile transfer and recidivism is more complicated than traditional studies recognize, and that the types of sanctions imposed or not imposed on offenders should be considered as well. The authors’ research concludes that the correctional history, specifically leapfrog and/or failure to use graduated interventions, predict recidivism better than earlier research methodologies that focus only on transfer.

Maisha N. Cooper et al., *Factors Affecting Juvenile Waiver to Adult Court in a Large Midwestern Jurisdiction*, 2012 J. INST. JUST. INT’L STUD. 43 (2012).

This article presents the results of a research study that sought to identify the variables that predict transfer decisions. According to the study, the offense and the age of the juvenile are key to transfer decisions. In addition, the study showed that disproportionate arrest rates between white and black youth in the 1990s have since moderated within the Midwestern jurisdiction.

Megan C. Kurlychek & Brian D. Johnson, *Juvenility and Punishment: Sentencing Juveniles in Adult Criminal Court*, 48:3 CRIMINOLOGY 725 (2010).

Study reveals that juveniles processed in adult court, on average, receive an additional sentencing penalty related to their juvenile status. According to the study, sentences for juveniles in adult court are between 62 and 75 percent more severe than those meted out to similar young adult offenders, particularly for drug offenses.

Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010).

This article argues that the rationale of *Graham* can be used to establish a right to rehabilitation for juveniles. Arya notes that attempts to challenge transfer

statutes have been largely unsuccessful since *Kent*. She supports a move toward a zero-retribution approach to juvenile justice.

Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, OJJDP JUV. OFFENDERS AND VICTIMS: NAT'L REP. SERIES BULL., Sept. 2011.

Only 13 states publicly report the total number of their transfers. In 2007, 14,000 juveniles from these 13 states were transferred to adult criminal court. Forty-five states have discretionary waiver statutes; 15 states have presumptive waiver laws; and 15 states have mandatory waiver laws, which require that juvenile courts waive jurisdiction over specified categories based on age/offense and prior record criteria. In addition, only 15 states rely on traditional hearings to decide whether to transfer a specific juvenile, whereas 35 states permit direct filing in criminal court. Of these states, some permit "reverse waiver" hearings that are up to the judge's discretion. Thirty-four states have adopted some form of "once adult/always adult" laws. Overall, the use of judicial waiver has sharply declined since the mid-90s, as juvenile violence has decreased and new transfer mechanisms have displaced waiver.

Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OJJDP JUV. JUST. BULL., June 2010.

Bulletin cites specific deterrence as a major reason for transferring a particular juvenile to adult criminal court. However, the evidence suggests that transfer laws have little or no specific deterrent effect. According to the article, six major studies have shown that juveniles convicted in criminal court have higher recidivism rates than their counterparts in juvenile court. In terms of general deterrence, the results are less clear.

Richard E. Redding & Kursten Brooke Hensl, *Knowledgeable Judges Make a Difference: Judicial Beliefs Affect Juvenile Court Transfer Decisions*, 62:3 JUV. & FAM. CT. J. 15 (2011).

Article discussed the findings of a vignette survey of 232 juvenile court judges from around the country. Study showed that more experienced judges saw greater rehabilitative potential in the juvenile in the survey's hypothetical than their less seasoned counterparts. The experienced judges were less likely to transfer the hypothetical juvenile to the criminal court.

Thomas Grisso, *Clinicians' Transfer Evaluations: How Well Can They Assist Judicial Discretion*, 71 LA. L. REV. 157 (2010).

This article alerts courts and attorneys to the problems of relying on clinicians for conducting transfer evaluations. Clinicians often receive limited guidance regarding these evaluations from their professions and the law. Grisso argues that assessment methods and decisions about transfer can be better accomplished in juvenile court than in reverse-transfer hearings in criminal court.

REPORTS

BENJAMIN ADAMS & SEAN ADDIE, U.S. DEPT. OF JUSTICE, OJJDP FACT SHEET: DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2009 (2012).

This fact sheet discusses the three basic types of transfer laws, explains the different types of circumstances under which each type of transfer occurs, provides statistics on the types of cases in criminal court, and outlines the process the transferred cases follow. The fact sheet concludes with charts on gender, racial, and ethnic differences of youth in adult courts.

CARMEN DAUGHERTY, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2011-2013 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM (2013).

This report tracks the progress of four trends that emerged in 2005: (1) “eleven states have passed laws limiting states’ authority to house youth in adult jails and prisons,” (2) “four states have expanded their juvenile court jurisdiction so that older youth who previously would be automatically tried as adults are not prosecuted in adult criminal court,” (3) “twelve states have changed their transfer laws making it more likely that youth will stay in the juvenile justice system,” and (4) “eight states have changed their mandatory minimum sentencing laws to take into account the development differences between youth and adults, allow for post-sentence review for youth facing juvenile life without parole or other sentencing reform for youth sentenced as adults.”

JASON ZIEDENBERG, U.S. DEPT. OF JUSTICE NATIONAL INSTITUTE OF CORRECTIONS, YOU’RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS (2011).

This report documents the key findings identified during a convention of juvenile justice and adult corrections experts in the summer of 2010. Some of the most important findings include: (1) transferred youth have higher recidivism rates than non-transferred youth, (2) transfer might run counter to correctional and rehabilitative goals, as pretrial, post-conviction, and community supervision corrections systems face challenges keeping youth safe and supervised, and (3) a number of states have recently developed new ways to manage transferred youth, which improve public safety, contain costs, and successfully rehabilitate youth and aid in their transition to adulthood.

JEFFREY A. BUTTS, JOHN JAY COLLEGE OF CRIMINAL JUSTICE, TRANSFER OF JUVENILES TO CRIMINAL COURT IS NOT CORRELATED WITH FALLING YOUTH VIOLENCE (2012).

Butts refutes the common misconception that increased transfer rates were responsible for the drop in violent youth crime during the 1990s. Butts’s analysis shows that these two variables actually bear no relationship to one another.

NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM (2010).

This report identifies four trends, as of 2010, that have emerged in 15 states: (1) “four states have passed laws limiting the ability to house youth in adult jails and prisons,” (2) “three states have expanded their juvenile court jurisdiction so that older youth who previously would be automatically tried as adults are not prosecuted in adult criminal court,” (3) “ten states have changed their transfer laws making it more likely that youth will stay in the juvenile justice system,” and (4) “four states have all changed their mandatory minimum sentencing laws to take into account the developmental differences between youth and adults.”

OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP FAMILY LISTENING SESSIONS (2013).

OJJDP together with the Campaign for Youth Justice held four focus groups composed of families and youth who have had firsthand experiences with the juvenile justice system. This report summarizes participants’ experiences and their recommendations for juvenile justice reform.

UCLA SCHOOL OF LAW, THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM: A REVIEW OF THE LITERATURE (2010).

This literature review revealed the disproportionate impact of youth transfer on minority youth and the high rates of pretrial detention, conviction, and incarceration. Juvenile sentencing in adult courts is often more severe than in juvenile courts, and placement in adult facilities puts transferred youth at a heightened risk of assault and abuse. In addition, transfer policies have produced no proven deterrent effect, and several jurisdictions have experienced higher recidivism rates as a result.

OTHER

Brief for Juvenile Law Center & National Juvenile Defender Center as Amici Curiae Supporting Petitioner, *G.A.W. v. Illinois*, 133 S.Ct. 100 (2012) (No. 11-8143).

Amici challenge Section 5-101(3) of the Illinois Juvenile Court Act, which prohibits jury trials in delinquency proceedings. Amici argue that “all juveniles who face severe, adult-like consequences in the juvenile court system” have a jury trial right under the Sixth and Fourteenth Amendments.

Brief for Juvenile Law Center et al. as Amici Curiae Supporting Defendant, *State v. Barela*, 149 N.M. 22 (2010) (No. 31,909).

The Juvenile Law Center et al. argue that the Sixth Amendment preserves the right to a jury trial in juvenile court sentencing hearings that result in serious adult sentences. Judicial fact-finding alone is insufficient w