



YOUTH TRANSFER:

*The Importance of Individualized
Factor Review*

AUTHORED BY JEREE THOMAS

CAMPAIGN FOR

YOUTH JUSTICE

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The Campaign for Youth Justice (CFYJ) is a national initiative focused on the removal of youth under 18 from the adult criminal justice system. The Campaign works with youth, families, legislators and system stakeholders to create more developmentally appropriate ways to hold youth accountable for their actions, while eliminating the harms associated with exposure to adult courts, jails, and prisons.

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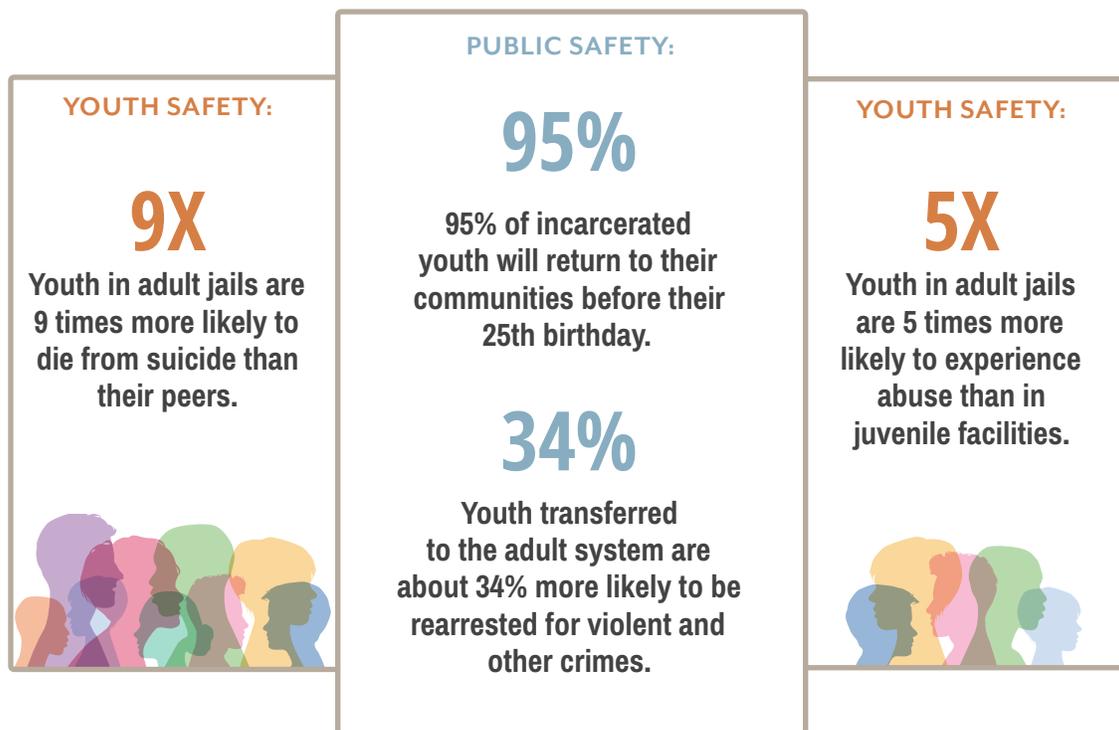
1 | YOUTH IN ADULT COURTS, JAILS AND PRISONS

A. Youth Safety

In 2012, the Attorney General's National Task Force on Children Exposed to Violence recommended to prosecutors "[w]henver possible, prosecute young offenders in the juvenile justice system instead of transferring their cases to adult courts."¹ The research supporting this recommendation is clear that youth have unique needs that require a specialized justice system equipped to handle those needs.² When judges or prosecutors transfer youth to the adult criminal justice system, the lifelong collateral consequences of that placement affect both the youth, and their communities. Youth prosecuted as adults are more likely to die from suicide than any other cause while incarcerated in adult jails and prisons.³ While the juvenile suicide rate in 2014 for the general population aged 10-17 is on average 4.04 youth per 100,000,⁴ and generally remains level in juvenile facilities,⁵ the suicide rate for youth under 18 in adult jails is 36 youth per 100,000, nine times the rate of their peers.⁶

The Prison Rape Elimination Act of 2003 (PREA), specifically acknowledges the security challenges of incarcerating youth in adult facilities, citing that juveniles are five times more likely to be victimized in an adult facility than in a juvenile facility.⁷ (See Figure A)

Figure A: Safety Statistics for Youth in Adult Jails and Prisons



B. Public Safety

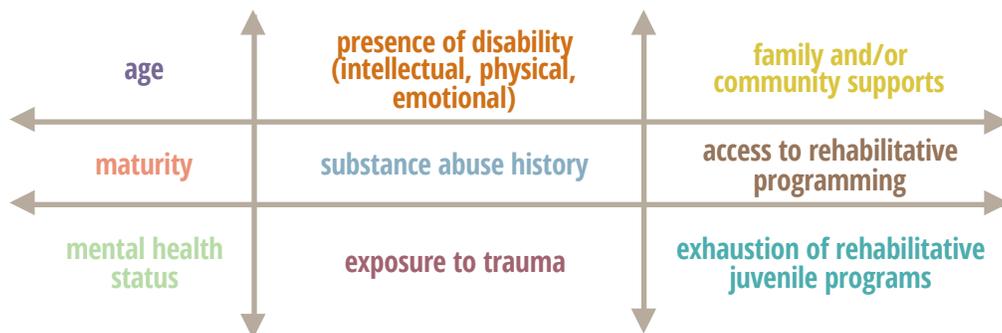
Sentencing youth to serve their time in adult facilities is not only a risk to youth, but also to their communities. Ninety-five percent of incarcerated youth will return to their communities before their 25th birthday; therefore, the experience and rehabilitative services they receive in their youth and young adulthood are critical to public safety.⁸ Unfortunately, few youth in adult jails and prisons have access to any developmentally appropriate rehabilitative services. Beyond services, adult facilities' staffing ratios, visitation policies, and physical infrastructure are designed for security and punishment, not for the rehabilitation of children. As a result, youth transferred from the juvenile system to the adult system are about 34% more likely to be re-arrested for violent or other crimes than their peers.⁹ Given these undesirable outcomes for youth and their communities, the former Attorney General's recommendation to keep youth in the juvenile justice system whenever possible is an important one for prosecutors and judges to consider. *(See Figure A)*

C. Transfer Considerations: Individual Factors

If a judge or prosecutor is considering transfer of a juvenile to the adult system, that decision should be rare and weighted heavily by the individual needs of that young person, not just the factors that surround the nature of the arresting offense. In states across the country, judges and prosecutors are considering a variety of factors in their transfer decisions. Most statutory transfer factors are limited to judicial transfer and reverse waiver by judges. However, prosecutors should consider judicial transfer factors in developing arguments, policies, and procedures for or against transfer.

Some critical individual transfer factors include age, maturity, mental health status, presence of an intellectual/emotional/physical disability, substance abuse history, exposure to trauma, family and/or community supports available, access to rehabilitative programming, and exhaustion of rehabilitative juvenile programs. Prosecutors should consider these factors in addition to traditional factors that focus on the nature of the offense, the extent of the harm caused by the offense, and the youth's history in the juvenile justice system. *(See Figure B)*

Figure B: Critical Individual Transfer Factors



D. Transfer Considerations: Systemic Factors

There are also systemic factors that both judges and prosecutors should consider specifically to mitigate racial and ethnic disparities and disproportionality that exists in transfer. In 2014, Black youth were 14% of the youth population nationally,¹⁰ 35.9% of the juvenile delinquency cases,¹¹ and 52.5% of youth transferred to the adult system by juvenile court judges. This is the highest percentage in nearly 30 years of data collection.¹² (See Figure C)

This disproportionality exists on a state-level as well. Even though **Missouri** is one of the only states that requires the consideration of racial disparities when their juvenile court judges consider transfer, racial disparities and disproportionality persist. In 2016, Black youth were approximately 15% of the youth population,¹³ but 71.7% of the youth transferred by juvenile court judges.¹⁴ (See Figure D)

Figure C: Youth Transfer Racial Disparity Nationally (2014)

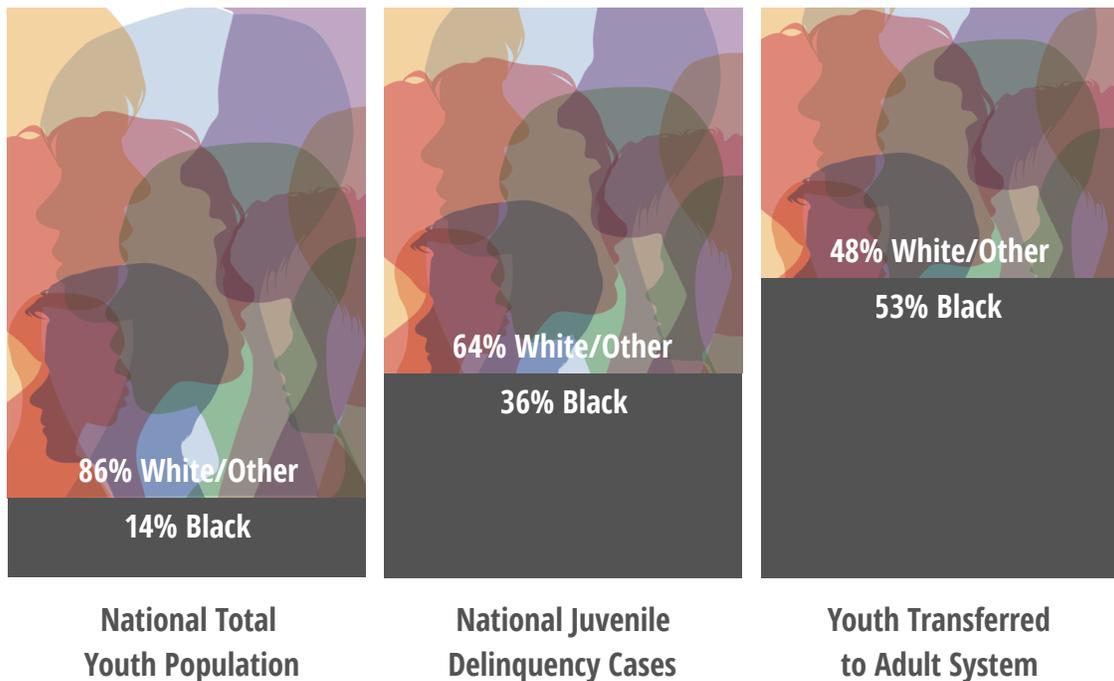
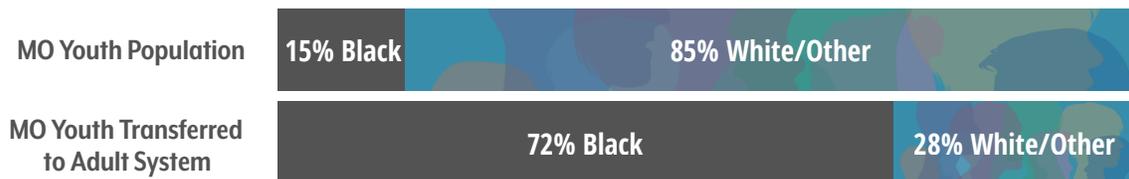


Figure D: Youth Transfer Racial Disparity in Missouri (2016)



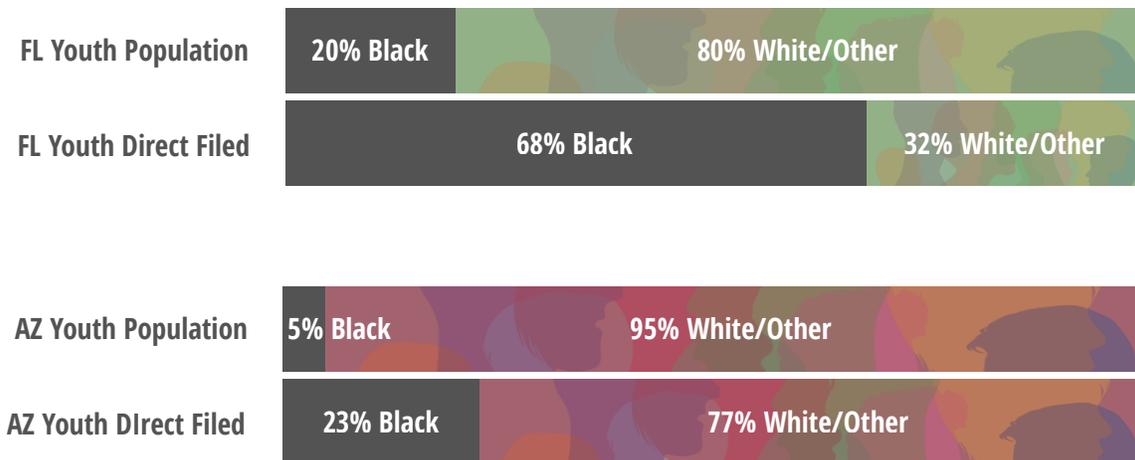
Racial and ethnic disparities and disproportionality persist in prosecutorial direct file as well. In 2016, before **California** ended direct file, the Center on Juvenile and Criminal Justice (CJCJ), along with the W. Haywood Burns Institute, and the National Center for Youth Law released a report highlighting that while the number of prosecutorial direct files were decreasing, the rate of direct file for Black youth was 11.3 times the rate of their White peers.¹⁵

Similarly, in 2017, the **Florida** Legislature Office of Program Policy Analysis & Government Accountability (OPPAGA) released a report on direct file. Black youth were 67.7% of the youth with prior adjudications who were direct filed by the discretion of a prosecutor, but they made up only 20% of the youth population in Florida in 2016.¹⁶

This trend continues in **Arizona**, where Black youth were 5% of the youth population, but 23% of the youth direct filed in 2016.¹⁷ Comparatively, in 2006, Black youth were 4% of the youth population and 16% of the youth direct filed in Arizona. (See Figure E)

In 2016, before California ended direct file... the rate of direct file for Black youth was 11.3X the rate of their White peers.

Figure E: Direct File Racial Disparity in Florida & Arizona (2016)



It is critical that judges and prosecutors consider these individual and systematic factors when determining whether to prosecute a youth as an adult. This brief includes transfer criteria considered by judges and prosecutors in three states and the U.S. Federal system. These statutes provide different models of individualized transfer considerations. An analysis follows each highlighted statute and the brief concludes with specific recommendations regarding transfer criteria.

2 | PROSECUTORIAL FACTORS

A. Juvenile Transfer Factors considered by U.S. Attorneys¹⁸

The Criminal Resource Manual provided to U.S. Attorneys across the country recommends that AUSA's prepare a memorandum in support of a motion to transfer a juvenile to adult status. In the recommendations, the guidance is that the memorandum should address the factors that the court is required to consider in assessing whether a transfer would be in the interest of justice. These factors set forth in 18 U.S.C. § 5032, include:

[T]he age and social background of the juvenile. the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

ANALYSIS: This excerpt from the Criminal Resource Manual for U.S. Attorneys outlines what federal prosecutors should include in their memorandums in support of a motion to transfer. Note that age, developmental and psychological maturity, and the availability of treatment programming for the youth are key factors in this guidance. With the exception of the nature of the alleged offense, all of the factors take an individualized look at the youth and their amenability to treatment in the juvenile system.

B. Nebraska Direct File Statute¹⁹

In 2015, Nebraska passed comprehensive juvenile justice reforms that included reforms to direct filing youth into the adult system. The statute reads:

(1) The county attorney or city attorney, in making the determination whether to file a criminal charge, file a juvenile court petition, offer juvenile pretrial diversion or mediation, or transfer a case to or from juvenile court, and the juvenile court, county court, or district court in making the determination whether to transfer a case, shall consider: (a) The type of treatment such juvenile would most likely be amenable to; (b) whether there is evidence that the alleged offense included violence; (c) the motivation for the commission of the offense; (d) the age of the juvenile and the ages and circumstances of any others involved in the offense; (e) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court; (f) the best interests of the juvenile; (g) consideration of public safety; (h) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct; (i) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (j) whether the victim agrees to participate in mediation; (k) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; (l) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (m) whether a juvenile court order has been issued for the juvenile pursuant to section 43-2,106.03; (n) whether the juvenile is a criminal street gang member; and (o) such other matters as the parties deem relevant to aid in the decision.

ANALYSIS: Nebraska’s statute highlights the consideration of alternatives to traditional justice system involvement for youth. Prosecutors and judges are required to consider alternatives to detention including juvenile pretrial diversion programs and mediation. The statute also emphasizes age, culpability, and the best interest of the youth, balanced with the best interest of the community’s safety.

C. Juvenile Transfer Factors Considered by New Jersey Prosecutors

In 2015, the New Jersey Legislature passed S2003/A4299, which created a list of factors that prosecutors must consider for the purposes of transferring a youth to the adult system. The following year in In re NH, the New Jersey Supreme Court interpreted the new law:

The new waiver law codifies the factors that prosecutors must consider and requires them to submit a written statement of reasons that is reviewed for abuse of discretion. The statement of reasons should apply the factors to the individual juvenile and not simply mirror the statutory language in a cursory fashion. At the waiver hearing, the court must review whether the State considered all eleven factors set forth in the statute, N.J.S.A. 2A:4A-26.1(b), and determine whether the prosecutor abused his discretion in considering [those] factors in deciding whether to seek a waiver, N.J.S.A. 2A:4A-26.1(c)(3). The court may deny a waiver motion if it is clearly convinced that the prosecutor abused his discretion. N.J.S.A. 2A:4A-26.1(c)(3). (pp. 7-13)

The bill language is as follows:

(3) The court may deny a motion by the prosecutor to waive jurisdiction of a juvenile delinquency case if it is clearly convinced that the prosecutor abused his discretion in considering the following factors in deciding whether to seek a waiver:

- (a) The nature and circumstances of the offense charged;*
- (b) Whether the offense was against a person or property, allocating more weight for crimes against the person;*
- (c) Degree of the juvenile’s culpability;*
- (d) Age and maturity of the juvenile;*
- (e) Any classification that the juvenile is eligible for special education to the extent this information is provided to the prosecution by the juvenile or by the court;*
- (f) Degree of criminal sophistication exhibited by the juvenile;*
- (g) Nature and extent of any prior history of delinquency of the juvenile and dispositions imposed for those adjudications;*
- (h) If the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, and the response of the juvenile to the programs provided at the facility to the extent this information is provided to the prosecution by the Juvenile Justice Commission;*
- (i) Current or prior involvement of the juvenile with child welfare agencies;*
- (j) Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the prosecution by the juvenile or by the court; and*

(k) If there is an identifiable victim, the input of the victim or victim's family.

The Attorney General may develop for dissemination to the county prosecutors those guidelines or directives deemed necessary or appropriate to ensure the uniform application of this section throughout the State.

ANALYSIS: This statute and the New Jersey Supreme Court case interpreting the law, require prosecutors to conduct an individualized review of a youth, specifically mitigating factors such as their special education needs, mental health, substance abuse needs, age, maturity and culpability. It is also of note that prosecutors have to consider their prior involvement in the child welfare system. This specific factor is unique, but acts as an indicator for adverse childhood trauma in a child's family life that could affect their behavior.

D. Transfer Factors Considered by California Juvenile Court Judges²⁰

In 2015, California revised the fitness criteria judges must consider before transferring youth to the adult system. The fitness requirements include:

(2) Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E). If the court orders a transfer of jurisdiction, the court shall recite the basis for its decision in an order entered upon the minutes. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the transfer hearing, and no plea that may have been entered already shall constitute evidence at the hearing.

(A) (i) The degree of criminal sophistication exhibited by the minor.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions, and the effect of the minor's family and community environment and childhood trauma on the minor's criminal sophistication.

(B) (i) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's potential to grow and mature.

(C) (i) The minor's previous delinquent history.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the seriousness of the minor's previous delinquent history and the effect of the minor's family and community environment and childhood trauma on the minor's previous delinquent behavior.

(D) (i) Success of previous attempts by the juvenile court to rehabilitate the minor.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any

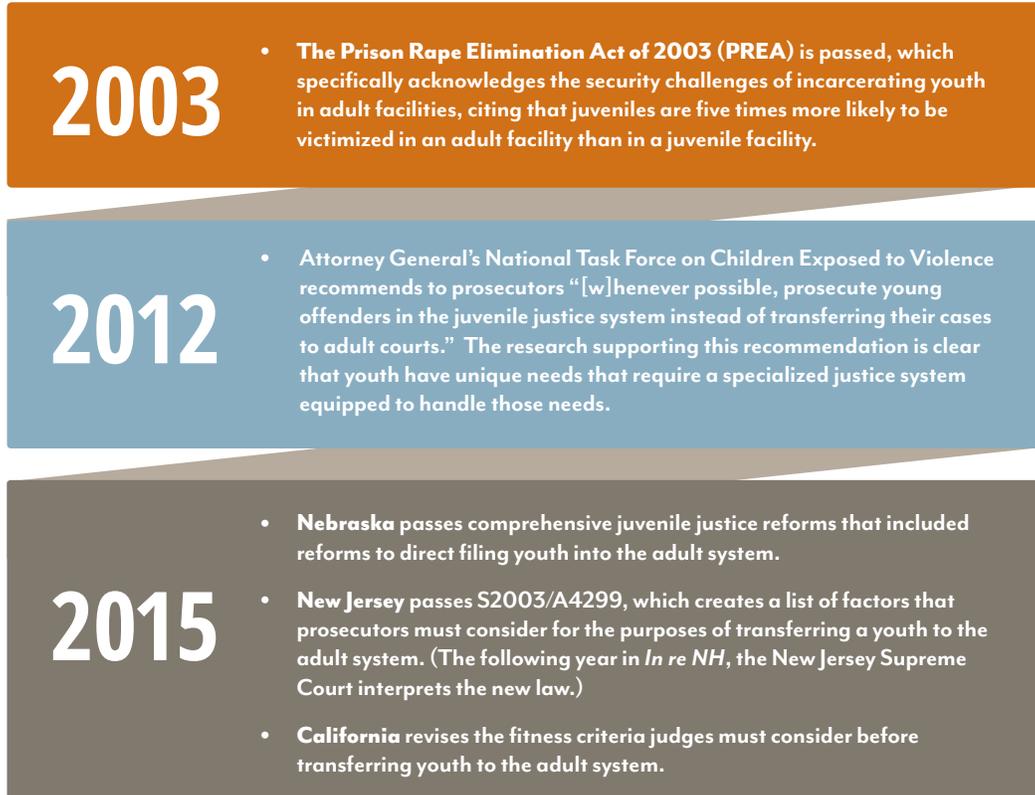
relevant factor, including, but not limited to, the adequacy of the services previously provided to address the minor's needs.

(E) (i) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

(ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including but not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development.

ANALYSIS: California's judicial waiver statute includes a robust list of factors that a judge must consider and then recite their basis for their decision. Judges have discretion in regards to the weight of each factor. Previously, California had a presumptive judicial waiver process that required a judge to presume that a youth is unfit for the juvenile system and that they should transfer the youth unless their defense attorney could prove otherwise. California no longer has presumptive waiver due to the passage of *Proposition 57*.²¹ It is critical that judges do not allow their discretion to weigh each factor as they see fit result in the offense itself constantly overriding the individual needs of the youth. The transfer criterion outlined in California's statute are robust, but they are only effective if juvenile court judges apply equal weight to them as they apply to the offense and the juvenile's history.

Figure F: Timeline of Youth Transfer-Related Policies Referenced in this Brief



3 | POLICY RECOMMENDATIONS

A. For Prosecutors:

In order to limit the collateral consequences of prosecuting youth as adults, prosecutors should adopt the judicial and direct file factors considered in the statutes and guidance highlighted in this brief.

Specifically, prosecutors should:

1. **Consider individual factors** in transfer decisions: *the age, maturity, and sophistication of the youth; the effectiveness of services and dispositional alternatives available in the criminal justice versus the juvenile justice system; any mental, intellectual or physical disabilities of the youth; their familial and community support network; and their history of trauma.*
2. **Consider systemic factors** like racial and ethnic disparities in transfer decisions as well.
3. **Document these factors in every case.** When possible, **recruit research assistance** in providing an independent evaluation and data analysis related to outcomes for youth transferred under the criteria.
4. In states with and without prosecutorial direct file, prosecutors have substantial power to **affect positively a young person's future and the public safety of their community** by considering the individual needs of that young person. *While there is not evidence that direct file statutes deter juvenile violent crime, there is evidence that treatment in a developmentally appropriate and evidence-based juvenile justice system is more effective than the adult system, while simultaneously saving states money.* Prosecutors make charging decisions based on the individual facts of each case and defendant, this practice is most critical when deciding whether to transfer a youth to the adult system. Having documented specific and individualized factors will strengthen this practice and further public safety.

B. For Juvenile Court Judges:

Similarly, juvenile court judges should:

1. If your statute permits, **prioritize and weigh equally individual factors** related to what each youth needs in order to grow into a productive and contributing member of their community.
2. If available, **appoint mitigation specialists or forensic social workers** to review and report on the needs of the youth and evidence-based community treatment programs available to the youth before making the transfer decision.
3. Based on the individual needs of the youth, **consider a continuum of less restrictive options** that will allow the youth to mature in a supportive social environment within their community.
4. Finally, **hold not only youth, but programs and placements accountable** for providing the treatment and support services that they are required to provide. In many states, judges are statutorily required to consider whether a youth has successfully completed programs or placements within the juvenile justice system. *This consideration is often limited to scrutiny of the actions of the youth and not the quality of programming or fidelity to an evidence-based model by adults providing the services.* Judges should consider and hold accountable service providers when deciding why a youth might be successful or unsuccessful in a juvenile justice program.

Prosecutors and judges have incredible power and discretion to shape the course of a young person's life and promote the safety of their community. It is critical that they utilize this power and discretion in conjunction with evidence-based practices and individualized consideration of rehabilitation.

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Author: Jeree Thomas, *Policy Director at the Campaign for Youth Justice*

Research & Writing Assistants: Hayley Carlisle and Kenya Roy

Campaign for Youth Justice Staff: Marcy Mistrett, Brian Evans, Aprill Turner, Rachel Kenderdine, Rachel Marshall, Alyssa Swearingen, Harmeet Kamboj
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1220 L Street, NW, Suite 605
Washington, DC 20005
campaignforyouthjustice.org