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Consequences of Transfer of Children into Adult Criminal Court

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Before the
Committee on the Judiciary
District of Columbia Council

On

Bill 15-0537 - The Omnibus Juvenile Justice System, Victims Rights and Parental Participation Act of 2003;

Bill 15-0460 - The Juvenile Justice and Parental Accountability Amendment Act of 2003; and

Bill 15-0573 - The Juvenile Justice Task Force Establishment Act of 2003

14 JANUARY 2004

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Madame Chair and members of the Committee: Today you confront one of the most significant legislative issues that may ever come before you. The fate of children hangs on what you are considering. You have the option of approving requests for legislation that would make it easier by far to prosecute children in adult criminal court in the District of Columbia. I am asking you to consider the consequences of transfer, and then to retain a system that requires a judicial hearing and approval before any child is prosecuted in adult criminal court. My position is based on my experience as a litigating attorney, observations in this area, and my knowledge of the research. My plea to you comes equally from my heart and my mind.

I am a criminal defense attorney and, for 17 years, the founder and executive director of The Sentencing Project, a Washington-based organization that has long been critical of our nation's unprecedented reliance on incarceration and harsh sentencing policies. The Sentencing Project is well known for research and reports analyzing the impact of incarceration and punitive sentencing policies, for describing the racial and class disparity that occurs in the administration of these policies, and for promoting fairer, more effective, constructive and humane ways of reducing crime within and outside the criminal justice system. The Sentencing Project has also studied and recommended changes in court procedures and policies that help assure that the outcomes of cases -- that sentencing-- serve the interests of the defendant, the victim, and the community whenever, and to the fullest extent, possible.

Most of The Sentencing Project's work focuses on adults in criminal court. But in 1998, in response to the dramatic increase in the number of children prosecuted in adult court, we undertook an initiative that focused on the unique problems of this defendant population. We formed an Advisory Committee of experienced practitioners. We prepared specific recommendations for defender programs that represent juveniles charged in adult court, which was published and disseminated by the Department of Justice. And, we continued to observe and comment on the practice of prosecuting children in adult court. We have published several reports and articles that address the consequences of prosecuting children in adult criminal court.

Along with many of the other individuals and groups from whom you will hear on these issues, The Sentencing Project is concerned about the hazards that adult corrections poses for children. We are concerned about the racial disparity between children who are prosecuted as adults and those who are allowed the benefits of the juvenile court system. We are disturbed that the national tendency to increase punishment of adult offenders as a way of controlling crime –the same tendency that has resulted in a seven-fold increase in the numbers of adult prisoners in the last 30 years—now reaches down to the children this nation historically chose to protect and rehabilitate in a juvenile court system designed for that purpose. But most of all, we are concerned that the prosecution and trial, if it comes to that, of juveniles in adult criminal court is fundamentally unfair to the child and counterproductive to the goal of reducing youth crime.

I would like to share my personal experience and observations which underlie our concerns about fairness and crime reduction.

In 1999, a defense attorney who specialized in the defense of children charged with serious crimes invited me to return to criminal court and join her in the defense of a girl named Latasha Armstead. Latasha was 13 at the time she was involved with an older male in

a brutal homicide in Milwaukee, Wisconsin. At that time, I had not tried a case in nearly 20 years, but I agreed to do so after two meetings with the girl.

Other cases followed. They were wrenchingly sad cases. One was the case of a boy and his friend who simultaneously shot each other while playing a game together with the friend's father's guns. The boy I worked for took a bullet through his spinal cord just below his neck. During the first six hours of the paralysis which will be with him the rest of his life, he lay helplessly in blood on a bed next to his dying friend. Finally, the dying boy’s father came home and in horror called 911.

Another was the case of a boy called "J. P." in Missouri, who shot his favorite uncle in the back of the head with a 22-caliber rifle while the two of them were alone in the uncle’s four-room frame house. "J.P." told so many different stories to the police that they charged him with murder.

With the same lead co-counsel, I represented at sentencing Nathaniel Brazill, who shot his favorite teacher in the front of his head and in front of a classroom of middle school students in West Palm Beach, Florida.

There was also the case of a 15-year-old girl who allegedly hired a hit man to kill her boyfriend. After the hit man shot the boyfriend's brother from a car the girl was driving, she was charged with attempted murder. I played a small part in the defense of one of the juveniles charged in the notorious beating death of Charley Young, a Milwaukee, Wisconsin man who was chased by a group of young people onto a neighborhood porch and beaten to death.

The attorney who invited me to work on these cases is Robin Shellow of Milwaukee, Wisconsin. Shellow is an experienced and insightful lawyer-advocate for children charged with serious crimes. She took on most of these cases pro bono. Some of my colleagues in

the juvenile justice community generously recognized our work in four of these cases by presenting us with the 2001 Juvenile Defender Leadership Award.

Still, it must be said that many other attorneys right here in the District have had more experience than I with exactly these kind of tragic, violent cases. If I have anything to add to the committee's deliberations about increasing the number of children in adult criminal court, it may only be the good fortune in being given time to reflect upon what happened to children who have been put to trial there. I know, first hand, the consequences if this Council takes steps to permit more children of the District of Columbia to be tried as adults in the criminal branch of Superior Court. I would like to describe two of those consequences today.

First, you will be putting more children into an adult criminal court that is no place for a child. What works for adults in criminal court does not work for children. The child who finds himself or herself in adult court is put at a disadvantage in comparison to adults who may have done something that is far worse. As legislators, you will be asked for permission to prosecute more children as adults precisely because children in adult court can be punished more severely, and for longer, than their peers who remain in juvenile court. You may be able to accept that. What you won't be asked for is permission to treat children more harshly, and to greater legal disadvantage, than adults who have longer criminal histories and far more serious offenses behind them. But that is what will happen if they are transferred to adult criminal court.

Second, because in adult criminal court the wrong questions are asked, any decision to allow prosecuting more children as adults, particularly those who have committed serious violent offenses, increases community risk. In the interest of future public safety, the District of Columbia should retain juvenile cases in juvenile court jurisdiction.

Here are the details behind these two observations:

The adult criminal court is no place for a child

I was the examining attorney when, at age 15, Latasha Armstead testified in her defense at trial. Question by question I took her though the events of the day of the murder of her grandmother's care nurse. I heard her speak clearly, with some force, and without much confusion. She sounded animated, she was on the stand for more than two hours, she did not collapse, she provided detail and sequence. She admitted to certain acts and denied others.

I was elated. It had taken many hours to prepare and I went home at the end of the day feeling it had been well worth it.

The next day's newspaper was a cold splash in the face. The reporter described Latasha speaking in a "flat monotone," and that she "showed no emotion as she recounted [the victim's] slaying." If the jury felt that way, or even close to it, Latasha was headed for conviction of murder in the first degree.

What the reporter or the jury couldn’t know was that on her day in court, Latasha spoke longer, in more detail, and with greater emphasis than she had at any time about the homicide. Sometimes, in the juvenile lock-up, she would refuse to speak at all. Or, she would change the subject or put her head on the table. She would be completely flat in affect for hours on end, until the young lay pastor from a local church walked into the room. Then she became animated, open, laughing. Not so with us. She would close down, seemingly unable to talk.

For me, Latasha’s testimony in court was a major success. Latasha had come so far, tried so hard, and she did indeed feel pain. We felt it next to her at the counsel table. For the jury, though, she didn't work well. Shellow, the attorney experienced with children, told me this happens all the time.

Cross examination was another nightmare. Mark Williams, a seasoned prosecutor, didn't raise his voice or shout or yell. He was simply "nice" and "gentle" with Latasha. She

wanted to please him, and wanted to believe that a man who was nice would not hurt her. Under his encouraging questioning, Latasha denied that she could recall the particulars of giving her statement to the police. As a result, she could not explain to the jury as she had many times to us how the police had led her into saying that she had "planned" the crime with her boyfriend and that she "knew" there would be a crime of some sort. What the jury heard through Latasha's statements to the police were, we believed, the words suggested by the police, not by Latasha. Much as had the prosecutor in court, so too had the police succeeded in leading and suggesting the answers they wanted in order to make their case. The prosecution would use those words to make their case that this 13 year-old girl had the degree of intent required to convict her of murder. Adults admit facts and make statements to the police as well. But their words are less likely to be someone else's.

Children like to talk to police. They feel protected. They are told that if they get lost, the only person to talk to is a police officer, that a police officer will help them. But after they have answered questions, and the police have written down what they say, children quickly forget what it was they said. If the police talk to them a second time, there will be a second, different story shaped not so much on a desire to lie but on the wish to please the adult asking the questions. The police will write the second story down as well. Now with multiple different statements in the police reports, the prosecutors can prepare for trial armed with "impeaching" statements to "prove" that the child was lying.

I saw this in the case of "J. P," who shot his uncle. The police obtained at least seven different accounts of what he said happened in his uncle's small house. Did the changing stories mean that he was guilty and concealing the truth about how he came to shoot his uncle? We didn't think so because this boy, like so many others his age, couldn't seem to tell the same story about anything, whether it was important to him or not. He was famous for denying taking a Coke out of the refrigerator even if the evidence was right there in front of

him and his inquisitor. Ordinarily, this penchant for indefensible lying is a trait that one can grow out of. In a criminal trial children, who can't tell the same story twice, are often completely disabled from testifying in their own defense because of their inconsistent statements. If they do testify, the prosecutor will have a field day on cross examination.

Children make poor witnesses in their defense for other reasons. In part of her testimony Latasha was to use a diagram representing the face and neck of the woman who was killed to demonstrate her actions. In hours of preparation, we were not able to get her to use this graphic aid for the jury. She lacked the adult experience in interpreting abstract or representative drawings. Influenced by Latasha's own difficulty in using the diagram to explain what she was struggling to describe about a terrible event, the judge denied our use of the diagrams. We were at least spared the possibility that Latasha would simply freeze up when presented with them in front of the jury.

When adults testify, the witness stand is a fairly powerful revelation of character. When children testify, the witness stand is a place where truth about character and human dimension is concealed or distorted. Nathaniel Brazill testified in his own defense at his trial. A month later people who saw him on television were still talking about how cold and calculating he appeared. We heard time and again: "The boy has no feelings!"

A week after we started working with Nathaniel, the reason for his cool appearance became quite clear. The boy suffered some kind of learning or communication disability (which was actually diagnosed for the first time in the jail). To compensate, it seems that he had learned to politely ask to have a question repeated while he "processed" what was asked of him the first time. His reply would be deliberate, slow. Teachers loved his demeanor. To them he seemed to be a learner, and respectful. Actually he was having a hard time grasping what was going on around him. In any case, the pattern of behavior that favorably impressed teachers looked absolutely terrible in a child on the witness stand.

The rules of evidence and taking testimony work against a child in adult court. At a trial, a lawyer usually cannot "lead" his or her own witness. You can't suggest the answer to your own witness with the question. For adults this is fair. For children, testifying without a bit of direction is difficult. Interestingly, in most states attorneys are allowed to ask leading questions of child victims of sexual offenses. For that matter, the children can be given anatomical dolls or other visual aids to help them testify. But testifying as if she were adult, in the court that considered her an adult, Latasha was not allowed the use of a simple visual aid to help explain what happened during a violent, painful crime.

On the other hand, the opposing side can cross examine the witness with leading questions, those that do suggest answers or challenge the previous answer given by the witness. Children, as Latasha before Prosecutor Williams, want to please and will follow the lead of a gentle cross-examiner all the way to the moon. It is as if children, even bright ones, lack the instinctive senses that guide older persons who are in the criminal court system. Children lack the sense of self-preservation or the alarms that go off in a person who is older when he or she is asked questions that clearly will "get them into trouble." My observation is that children lack the ability to preserve consistency in the story they tell. That is why, when a child is caught alone in the kitchen with the top off the empty cookie jar, the story goes quickly from "What cookie jar?" to "My sister ate them" to "I only had one." With each question the child looks to see if the new story worked. If not, then it is on to another. In a kitchen this is funny; in the trial of a serious crime, it is not.

Sitting next to a child on trial in an adult courtroom provides a score of reminders that, regardless of what the child was involved in, he or she is still just a child. Defendants are supposed to elect whether they want a jury or a judge trial, a serious decision that requires weighing many factors. A child will decide on the basis of the fiction that "the judge likes me," or doesn't, as the case may be.

A child will be more interested in whether a former boyfriend will say, if called to testify, that he still loves her, than if the boyfriend will claim he heard her threaten to kill him.

Although defendants are supposed to assist and advise their lawyers in the selection of a jury, a child will decide on the basis of the color of a dress or because a juror looks like Uncle Fred. A child cannot grasp that a juror's life experience or comments during jury selection might indicate how receptive he or she is to the defendant's situation.

And in Latasha's case, the most important question in her mind was whether her mother had come to court. "No," her attorneys had to say, "the mother who abandoned you for the streets and never visited you in detention isn't going to be here, and now please listen to the police officer's testimony so you can help us ask questions." But the child isn't listening. She continues to mourn after her missing mother as the trial swirls on around her, straining her head around to search the audience for the person whose approval she always sought.

We have all just recently had a glimpse of the disadvantage a child faces, compared to an adult, in criminal court. Lionel Tate was convicted of first degree murder in 1999 in south Florida, for the death of Tiffany Eunick. Lionel was 12 when he killed Tiffany, aged six. Before trial, he turned down a plea offer that would have incarcerated him for three years. Under Florida law, his sentence following conviction for first degree murder was natural life – no possibility of parole. After a jury convicted Lionel of first degree murder, he was in fact sentenced to natural life in prison.

Press reports indicate that Lionel Tate's mother rejected the original pre-trial plea offer, and that Lionel appeared inattentive during his trial.

Tate appealed his conviction and sentence to Florida's Fourth District Court of Appeals. In a decision issued December 10, 2003, the appellate court weighed a challenge to the decision of the trial judge not to hold a full competency examination and a hearing on Lionel's competency, under the law, to proceed to trial. The appellate court cited the claim

that Lionel had rejected a plea offer so out of balance with the possible sentence that his ability to understand the meaning of it all was put to doubt. The appellate court cited descriptions of Lionel's behavior as described by new counsel at a post trial proceeding, "…Lionel drawing pictures, hasn't listened to one word and had no idea what's going on." The appellate court reported, as well, that in post-trial proceedings Lionel followed his mother's advice on waiving the attorney client privilege against the advice of his appellate counsel, with the result that the post-trial hearing on competency was restricted in scope.

From what I have seen, these are the normal behaviors of a child in a criminal court.

The Fourth District Court of Appeals reversed Lionel's conviction. The court found that a competency evaluation was "constitutionally mandated to determine whether Tate had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational, as well as factual, understanding of the proceedings against him. We conclude that it was." (2003 Fla. App. LEXIS 18750). This is an important decision, likely to make trial courts far more responsive to questions about the legal competency of children in adult criminal court. But consider the actual holding: the court only required that the trial court order a traditional examination and hearing on the question of competency. The child-like behavior and the deference to a surrogate, Lionel's mother, are not of themselves grounds for a finding of incompetence. The Tate decision will not change what we know from general practice: the fact of being a child will not, in many cases, result in a finding of incompetence.[1] It will, however, render the child far less capable

[1] I base this assessment on the observed reluctance of courts to find juveniles, even those with severe impairments, incompetent to proceed to trial. There is, however, serious evidence that a very significant number of juveniles under 15 are in fact seriously impaired in their ability to undergo prosecution and trial. A research-based report prepared by The MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice, "Juvenile's Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants." (March 2003) reported findings that juveniles aged 11 to 13 were more than three times likely as young adults aged 18-24 to be "seriously impaired" on the evaluation of competence-relevant abilities Juveniles aged 14 to 15 were twice as likely as young adults aged 18-24 to be "seriously impaired."

of coping with the requirements that fall upon a defendant in a criminal case than is his or her adult counterpart.

We will never know more about Lionel Tate's own "competency," for he has pleaded guilty and will soon be released. His case is a victory for advocates, some of whom are in this hearing room, and for himself. My concern is that the Florida Appellate Court decision in Tate will not do much to protect children against the injustice and fundamental lack of fairness of being put to trial in an adult criminal court. That protection must come from the legislature –from this committee and Council.

<u>In adult court, important questions are not asked or answered, and the lessons about how to reduce juvenile crime are lost</u>

Nathaniel Brazill's trial was a year in preparation. The prosecutor interviewed all the students and staff at the school who saw anything. There were forensic tests and reviews of police reports. The trial itself took several weeks. All this was done to prove that a boy who was recorded on a school security video tape and standing in sight of more than 25 students when he pulled a gun that he later confessed to bringing to school, shot his teacher.

And yet at the end of the trial, no one could answer the question, "Why had he done it."

Attorney Shellow and I tried to answer the question.

A middle school teacher provided the most convincing explanation. She learned that Nathaniel was experiencing his "first love," having been kissed by a girl for the first time one week before the shooting. He was afraid of not being able to see her over summer vacation. But his acts were irrational, not part of a plan to hurt anyone. The teacher testified to this in court at sentencing. When she did, I saw teachers from Nathaniel's school nodding their heads

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The study's results suggest that many states permit or mandate transfer to adult court juveniles who are at great risk for incompetence to stand trial.

in recognition of the terrible way a child's confusion can turn to seemingly inexplicable violence. A teacher asked for a copy of our report. I felt as if a weight had been lifted from the minds of many who had suffered for a year, not knowing "why" Nathaniel had "done it."

There was nothing unique about the fact that an adult court trial for Nathaniel Brazill utterly failed to answer the question that was most on the minds of school officials, the family of the man who was killed, and people concerned with violence among our youth: "Why?" The criminal trial is not set up to reveal this kind of information. In fact the opposite it true.

Criminal law and court trials are rooted in the hypothesis that one can be presumed to be responsible for the logical consequences of his or her actions. The laws of accountability, the instructions given a jury that is to decide the level of intent or state of mind of the defendant, are all based on this premise. This hypothesis works, more or less, for adults. The task for the prosecutor at trial is to show where the defendant was and what the defendant did leading up to the crime. The task for the defense is to either show that the defendant wasn't there or didn't do it, or that what he did was different, from what the prosecutor attempts to show.

For adults, this is often enough.

But children cannot be said to understand the consequences of their acts. That is why we have signs that warn drivers against "Children Playing." A child will dart into the street; an adult is expected not to do so.

When children do dramatic or surprising things, we know we have to plumb their background and experience to understand why. We thought that Latasha Armstead's background, which included being raped multiple times at a very young age, being abandoned by her mother, and then taking care of an elderly and bed-ridden grandmother, might have had something to do with her attachment to the older boy who actually took the life of the victim

and Latasha's ability to make a decision about what she should have done. Under the trial judge's application of rules of evidence, very little of that background information came before the jury. The trial focused on the immediate actions, not the background of the girl.[2]

In Nathaniel Brazill's case, the prosecution seems to have built its case around the presumption that a person who goes into a school, points a gun at someone and pulls the trigger intends to kill that person. This is logical for an adult. The trial defense attempted to counter this with an image of Nathaniel Brazill as a model student from a good family home. The jury convicted Nathaniel of a lesser included offense to First Degree Murder, so the defense strategy was partly successful.

However, the trial defense unintentionally obscured the fact that Nathaniel Brazill's academic performance was dropping dramatically, and that he came from a home where he had witnessed violence and domestic discord, lived in fear of his mother's death from cancer, and where alcohol was a family weakness. All these things were contrary to the image of the defendant that the attorneys were trying to project, so they avoided them.

Similarly, the girl who was charged with hiring a hit man to kill her boyfriend went to trial portrayed as a "good" girl who got in with the wrong crowd. The opposite was true: she had been involved in sex and drugs without her parents knowledge for several years, was highly dependent, capable of a high degree of fantasy and drama which she could put in motion without any apparent sense of what might transpire as a result. Typically she was more interested in preserving her parents' image of her as "good" than in raising a strong defense to a serious criminal charge.

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[2] The recently-concluded trial of John Malvo provides an example of conflict between the rules of evidence and the desire to learn about a defendant's state of mind. On the government's motion, the trial court kept out of evidence letters Malvo had written to relatives which arguably revealed his state of mind at the time he was in the company of John Mohammed. Whether or not the trial judge's decision was legally correct, it did keep from the jury Malvo's own description of his mental condition during a time when few people observed or spoke to him.

Should anyone care that criminal trials seem to be such poor vehicles for revealing the backgrounds and histories that might help explain serious, violent acts by juveniles? In my opinion, our best hope for curbing violence and serious crime, and probably a lot of the less serious crime among children, lies first in competent, capable programming, counseling, and treatment. It is apparent to anyone with even a passing knowledge of the Jerry M. litigation history, that in the District of Columbia, youth services, particularly residential treatment, are lacking. Some of us had thought that the recommendations of the Mayor's Blue Ribbon Commission would open the door to action and solutions in this area. We can hope that is still the case. My point to this committee would be that the problems and shortcomings of services and institutions intended to respond to and treat violent or troubled youth will not be overcome by resort to prosecuting children as adults and placing them in adult correctional facilities. These, as I am sure others will testify, offer even less for the offending child.

Our best hope for curbing violence and serious crime lies as well in increasing our understanding about why children do bad things in the first place. I suppose, if another person believes that tough adult sentences will do more to reduce crime, the nuances of a criminal court trial are of little interest, and it matters not if we continue to bury or conceal the information that explains what goes on in the lives of children involved in serious crime.

But one can have doubts about the utility of tough adult sentences alone.

As I mentioned, I was lately involved in the defense of a child who got caught up in a terrible group beating murder in Milwaukee, Wisconsin, in the fall of 2002. My client was only 15. He was only ten when I was on trial and then facing sentencing with Latasha, in the same city.

Not surprisingly, the life sentence imposed on Latasha failed to make an impression on the ten year old who was charged with murder some five year's later. The notion that access to long sentences for children will make our communities safer in the future is sheer

speculation at best. Latasha Armstead's life sentence was hardly a factor in whatever it was that turned a group of young men into killers. For my client, the explanation of how he became involved in a terrible beating death had much more to do with his having been abandoned by his parents, placed in a foster care home that proved to be violent and abusive, and that he has very little to do on any given evening. The availability of long, adult-time sentences, indeed the prospect of transfer to adult court, failed completely to prevent the violence that occurred in Milwaukee, five years after another child was sentenced to a potential lifetime in prison.

What should be done?

In my opinion, the best steps to take are those that adhere to the more traditional practice of transferring children to adult court jurisdiction only after findings by a judge that transfer is required for a narrow set of reasons, and that the maturity and mental ability of the child will be sufficient to allow a fair trial. The guidelines for transfer (or "waiver") hearings were established in Kent v. United States 383 U. S. 541 (1966) and in the intervening years most jurisdictions had little problem in applying them. With this in mind, legislation recently drafted by Council Member Adrian Fenty goes very much in the right direction

Unless there is a judicial determination based on established criteria, children's cases should stay in juvenile court. It is the right place for a child to be. It is the court that is better suited to answer the questions we really need to know if we are to reduce or prevent serious juvenile crime.

I should also like to add, since it appears to be an issue in the legislation that has been offered to the Council, that in my view the presumption of guilt should never be shifted to the juvenile defendant. Children need more, not less, protections from the rigors of criminal judicial process. The government does not, in my opinion, need a greater advantage than it

already has in prosecuting children. When it comes to children, as opposed to adults, the dice are loaded in the government's favor as it is. Where there are procedural or practical frustrations, as in the case of obtaining reports from experts or preparing for hearings, the solution should be administrative rather than to abandon a time tested and workable system built around limited transfers to adult court that require judicial approval.

Thank you very much for the opportunity to appear today.

Respectfully submitted,

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