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# CRIMINOLOGY

## THE BACK-DOOR TO PRISON: WAIVER REFORM, "BLENDED SENTENCING," AND THE LAW OF UNINTENDED CONSEQUENCES

MARCY R. PODKOPACZ\* AND BARRY C. FELD\*\*

### I. INTRODUCTION

In the late 1980s and early 1990s, the arrest rates of juveniles for violence and homicide surged dramatically.<sup>1</sup> The esca-

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<sup>1</sup> FRANKLIN ZIMRING, *AMERICAN YOUTH VIOLENCE* 37 (1998); Alfred Blumstein, *Youth Violence, Guns, and the Illicit Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 10 (1995) [hereinafter Blumstein, *Youth Violence*] (analyzing changing patterns of age-specific homicide rates in conjunction with proliferation of guns and illegal drug industry); Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME & JUSTICE 27, 28 (1998). Cook and Laub write:

[T]here has been an explosion in the rates at which adolescents commit and are victimized by serious crimes of violence. The increase was concentrated among black males: between 1984 and 1993, the homicide victimization rate more than tripled for thirteen- to seventeen-year-old adolescents, and the homicide-commission rate increased by a factor of 4.5, reaching levels with no precedent in this century.

*Id.*

lation of homicide, especially among young African-American males in the late 1980s, provided the impetus for legislative strategies to "get tough" and "crack down" on youth crime and accelerated punitive policy trends to "criminalize" juvenile justice.<sup>2</sup> Public fear of youth crime and politicians' desire to "get tough" motivated policies to transfer more young offenders to criminal courts for prosecution as adults and to strengthen the sanctioning powers of juvenile courts.<sup>3</sup> During the early 1990s,

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The juvenile violence and homicide arrest rates increased at a faster pace than those of adults, and the average age of juvenile arrestees decreased. Alfred Blumstein & Daniel Cork, *Linking Gun Availability to Youth Gun Violence*, 59 LAW & CONTEMP. PROBS. 5 (1996) [hereinafter Blumstein & Cork, *Linking Gun Availability*]. The proliferation of handguns among youths exacerbated the recent increase in juvenile homicide rates. Blumstein attributes the changing patterns of age-specific homicide rates among adolescents to the availability of guns in conjunction with the "crack" cocaine drug industry that emerged in the mid-1980s. Blumstein, *Youth Violence*, *supra* at 10; *see also* Blumstein & Cork, *Linking Gun Availability*, *supra* at 5. Blumstein hypothesizes that the drug distribution industry attracts youths, especially urban, African-American males who lack alternative economic opportunities, that youths in the drug industry take more risks than would adults, and that they arm themselves for self-protection and to resolve disputes. Blumstein, *Youth Violence*, *supra* at 30. Although guns constitute a "tool of the trade" in the drug industry, their diffusion into the broader youth population for self-defense and status accounts for many of the "excess homicides" among urban black males recorded in the late 1980s and early 1990s. *Id.*; *see, e.g.*, 1 UNDERSTANDING AND PREVENTING VIOLENCE (Albert J. Reiss Jr. & Jeffrey Roth eds., 1993).

<sup>2</sup> Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 161-63 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*]. Even prior to the late 1980s, a discernible trend was evident to transfer more youths to criminal court and to base waiver decisions on the seriousness of the offense rather than the characteristics of the offender, was evident. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 472-73 (1987) [hereinafter Feld, *Juvenile Waiver Statutes*]. There was similar legislative trend to impose determinate or mandatory minimum sentences in juvenile courts based on the seriousness of the offense rather than the "real needs" of the offender. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 821-22 (1988) [hereinafter Feld, *Punishment, Treatment*]. Although the rate and scope of statutory changes have accelerated dramatically within the past decade, these developments represent continuations of the prior convergence of juvenile and criminal courts' sentencing policies. Significantly, because of the substantial differences in violent offense arrest rates by race, policies that increase sanctions for youth violence inevitably have a disproportionate impact on young black males.

<sup>3</sup> Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965 (1995) [hereinafter Feld, *Violent Youth and Public Policy*], PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 3-9 (1996); *see also* Barry C. Feld, *Juvenile*

most states revised their waiver laws to restrict judges' discretion or to encourage them to transfer more youths to criminal court, to expand prosecutors' authority to transfer youths, or legislatively to remove certain categories of offenses from the jurisdiction of juvenile courts.<sup>4</sup> These various legal trends have resulted in the prosecution of more and younger youths in the criminal justice system.

In 1995, Minnesota, like many other states, revised its juvenile waiver laws, focused judges' attention primarily on offense-based "public safety" criteria rather than a youth's "amenability to treatment" when they make transfer decisions, and mandated the criminal prosecution of older juveniles charged with first degree murder.<sup>5</sup> Unlike most other states which sought increased criminal prosecutions of youths, Minnesota also expanded the authority of juvenile court judges to impose longer juvenile dispositions and to provide more extensive treatment than previously available to ordinary delinquents. The Minnesota innovation, "Extended Jurisdiction Juvenile Prosecution (EJJ)," allowed judges simultaneously to impose a delinquency disposition *and* an adult criminal sentence, the execution of which the judge stayed pending successful completion of the delinquency sentence.<sup>6</sup> Several other jurisdictions now employ some type of "blended sentencing" statute which authorizes a judge to impose both a juvenile and criminal sentence.

This article analyzes the implementation of Minnesota's new EJJ blended sentencing law in Hennepin County (Minneapolis), the largest metropolitan county in the state. First, we describe the legal framework for judicial waiver and EJJ decisions and briefly summarize prior research on waiver practices. Second, we analyze the cases of 504 youths against whom prosecu-

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*and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUSTICE 189, 189 (1998) [hereinafter Feld, *Responses to Youth Violence*].

<sup>4</sup> TORBET ET AL., *supra* note 3, at 59-61; Feld, *Responses to Youth Violence*, *supra* note 3, at 205-12; see Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 83 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

<sup>5</sup> MINN. STAT. ANN. §§ 260.125, 260.121-260.126 (West 1998), *repealed by* Laws 1999, c. 139, art. 4, § 3; see MINN. STAT. ANN. § 260B.125 (West Supp. 2001). See generally Feld, *Violent Youth and Public Policy*, *supra* note 3.

<sup>6</sup> MINN. STAT. ANN. § 260.126 (West 1998), *repealed by* Laws 1999, c. 139, art. 4, § 3; see § MINN. STAT. ANN. § 260B.130 (West Supp. 2001). See generally Feld, *Violent Youth and Public Policy*, *supra* note 3.

tors filed waiver and EJJ motions between 1995 and 1997 to identify the offender and offense variables that affect prosecutorial charging and judicial sentencing decisions. In our analyses, we compare and contrast the characteristics of the EJJ and certification youths with those of juveniles in an earlier study against whom Hennepin County prosecutors previously filed certification motions to transfer youths to criminal court.<sup>7</sup> Comparing current waiver and EJJ practices with our previous certification study baseline enables us to evaluate how the change in the law affected prosecutorial and judicial policies. The current study also examines the subsequent juvenile court processing, sentencing, and probation revocation experiences of those youths whom prosecutors designated or upon whom judges conferred the intermediate EJJ status. Based on our evaluations of the implementation of the EJJ law, we consider the "net-widening" and policy implications of this blended juvenile and criminal court sentencing option.

## II. JUDICIAL WAIVER AND EXTENDED JURISDICTION JUVENILE PROSECUTION

From the juvenile court's inception, judges could deny some young offenders its protective jurisdiction and transfer them to adult court.<sup>8</sup> Nationally and in Minnesota, the recent escalation in youth violence provoked extensive legislative amendments to transfer more chronological juveniles to criminal courts. States employ several different statutory alternatives to transfer youths: judicial waiver, legislative exclusion of specific offenses, and prosecutorial choice of forum between concurrent jurisdictions.

Judicial waiver is the most common transfer mechanism and reflects juvenile courts' traditional approach to deciding whether the state should treat a youth as a juvenile or punish him as an adult. Until recent amendments, a juvenile court judge typically waived juvenile court jurisdiction after a hearing

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<sup>7</sup> Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness, and Race*, 14 LAW & INEQ. J. 73 (1995) [hereinafter Podkopacz & Feld, *Judicial Waiver*]; see Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449 (1996) [hereinafter Podkopacz & Feld, *End of the Line*].

<sup>8</sup> DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205-37 (1980).

to determine whether a youth was "amenable to treatment" or posed a threat to public safety. Judges' case-by-case assessment of a youth's rehabilitative potential and dangerousness reflected the individualized sentencing discretion characteristic of juvenile courts.

Two United States Supreme Court cases provide the constitutional framework for making these individualized judicial waiver decisions. In *Kent v. United States*,<sup>9</sup> the Court held that states must provide juveniles with some procedural due process protections in waiver hearings and thereby formalized this special sentencing decision. In *Breed v. Jones*,<sup>10</sup> the Court applied the Fifth Amendment's double jeopardy provisions to the adjudication of delinquents and required states to decide whether to try a youth in juvenile or criminal court before proceeding on the merits of the charge.

Although *Kent* and *Breed* provide the procedural framework for judicial waiver decisions, the substantive bases for these decisions pose much greater difficulties. Until recent reforms, most jurisdictions allowed juvenile court judges to waive jurisdiction based on an individualized assessment of a youth's "dangerousness" or "amenability to treatment." In practice, judges assess "amenability" and "dangerousness" by focusing on three sets of variables: the offender's age and the amount of time left to treat the youth within juvenile jurisdiction; the youth's treatment prognoses as reflected in clinical evaluations; and the juvenile's threat to others as reflected in the seriousness of the present offense and prior record. Juvenile court judges waive older youths more readily than younger offenders.<sup>11</sup> A youth's age in relation to the juvenile court's maximum dispositional jurisdiction limits the court's dispositional authority and provides the impetus to waive or exclude some older juveniles if the seriousness of the offense deserves a longer sentence than those available in juvenile court.<sup>12</sup> The second set of "amenabil-

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<sup>9</sup> *Kent v. United States*, 383 U.S. 541 (1966).

<sup>10</sup> *Breed v. Jones*, 421 U.S. 519 (1975).

<sup>11</sup> U.S. GEN. ACCOUNTING OFFICE, *JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS* (1995); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinates of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 336-42 (1990); Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 121-23; Podkopacz & Feld, *End of the Line*, *supra* note 7, at 479-80.

<sup>12</sup> For example, judges in states where juvenile court dispositions can continue until age twenty-one waive youths at about half the rate as judges in states where juvenile

ity" factors include the youth's treatment prognosis based on clinical evaluations and prior correctional experiences. Once a youth exhausts the available juvenile correctional resources, transfer becomes increasingly more likely.<sup>13</sup> Finally, judges assess a youth's "dangerousness" and threat to others based on his or her present offense and prior record. Factors such as the seriousness of the offense, whether the youth used a weapon, and the length of the prior record provide indicators of "dangerousness."<sup>14</sup> Balancing these factors entails a trade-off between offense seriousness and offender persistence.

Asking a judge to decide a youth's "amenability to treatment" or "dangerousness" implicates many of the most fundamental issues of juvenile jurisprudence.<sup>15</sup> Such laws assume that effective treatment programs exist for at least some serious or chronic young offenders and presuppose that classification systems exist with which to differentiate among youths' treatment potentials or dangerousness. These laws also presume that clinicians or judges possess valid and reliable diagnostic tools with which to determine the appropriate disposition for a particular youth. Evaluation research challenges these legislative assumptions and questions whether programs exist to systematically reduce the risks of recidivism among chronic or violent young offenders and whether judges or clinicians possess the instruments with which to identify which youths will or will not respond to treatment.<sup>16</sup> Statutes that authorize judges to waive a

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court jurisdiction ends at ages eighteen or nineteen. HOWARD N. SNYDER & JOHN L. HUTZLER, NAT'L CENTER FOR JUVENILE JUSTICE, *THE SERIOUS JUVENILE OFFENDER: THE SCOPE OF THE PROBLEM AND THE RESPONSE OF JUVENILE COURTS* (1981); THOMAS S. VEREB & JOHN L. HUTZLER, NAT'L CENTER FOR JUVENILE JUSTICE, *JUVENILES AS CRIMINALS: 1981 STATUTES ANALYSIS* (1981).

<sup>13</sup> See generally Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

<sup>14</sup> See Fagan & Deschenes, *supra* note 11; see also James C. Howell, *Juvenile Transfers to the Criminal Justice System: State of the Art*, 18 LAW & POL'Y 17 (1996); Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 121-31; Podkopacz & Feld, *End of the Line*, *supra* note 7, at 467-71.

<sup>15</sup> Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978) [hereinafter Feld, *Unanswerable Questions*].

<sup>16</sup> See *id.*; Barry C. Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195 (1983) [hereinafter Feld, *Delinquent Careers*]; Feld, *Juvenile Waiver Statutes*, *supra* note 2; Lee B. Sechrest, *Classification for Treatment*, 9 CRIME & JUSTICE 293 (1987); Steven P. Lab & John T. Whitehead, *An Analysis of Juvenile Correctional Treatment*, 34 CRIME & DELINQ. 60 (1988) [hereinafter Lab & White-

youth who poses a threat to the public require judges to predict "dangerousness" even though clinicians and judges lack the technical capacity reliably to predict serious future criminal behavior.<sup>17</sup>

Judicial waiver criteria framed in terms of "amenability to treatment" or "dangerousness" give judges broad, standard-less discretion. Lists of substantive factors such as those appended in *Kent* do not provide adequate guidance.<sup>18</sup> Rather, catalogues of contradictory factors reinforce judges' discretion and allow them selectively to emphasize one element or another to justify any decision. The subjective nature of waiver decisions, the absence of effective guidelines to structure outcomes, and the lack of objective indicators or scientific tools with which to classify youths allows judges to make unequal and disparate rulings without any effective procedural or appellate checks. Empirical analyses provide compelling evidence that judges apply waiver statutes in an arbitrary, capricious, and discriminatory manner.<sup>19</sup> States' waiver rates for similar types of offenders vary extensively.<sup>20</sup> A youth's race also may affect waiver decisions.<sup>21</sup> Even

head, *Juvenile Correctional Treatment*]; Steven P. Lab & John T. Whitehead, *From "Nothing Works" to "The Appropriate Works": The Latest Stop on the Search for the Secular Grail*, 28 CRIMINOLOGY 405 (1990) [hereinafter Lab & Whitehead, *The Latest Stop*].

<sup>17</sup> See also Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415 (1996). See generally JOHN MONOHAN, *PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES* (Sage Libr. of Soc. Res., Vol. 114, 1981); Norval & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUSTICE 1 (1985).

<sup>18</sup> TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* (1978); Franklin E. Zimring, *Notes Toward a Jurisprudence of Waiver*, in READINGS IN PUBLIC POLICY (John C. Hall et al. eds., 1981).

<sup>19</sup> DONNA HAMPARIAN ET AL., U.S. DEP'T OF JUSTICE AND DELINQUENCY PREVENTION, *YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS* (1982); Fagan & Deschenes, *supra* note 11; Barry C. Feld, *Bad Law Makes Hard Cases: Reflections on Teen-Aged Axe-Murderers, Judicial Activism, and Legislative Default*, 8 LAW & INEQ. J. 1 (1990) [hereinafter Feld, *Teen-Aged Axe-Murderers*].

<sup>20</sup> HAMPARIAN ET AL., *supra* note 19; U.S. GEN. ACCOUNTING OFFICE, *supra* note 11.

<sup>21</sup> Joel Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in READINGS IN PUBLIC POLICY (John Hall et al. eds., 1981) [hereinafter Eigen, *Jurisdictional Transfer*]; Joel Eigen, *Punishing Youth Homicide Offenders in Philadelphia*, 72 J. CRIM. L. & CRIMINOLOGY 1072 (1981) [hereinafter Eigen, *Youth Homicide Offenders*]; HAMPARIAN ET AL., *supra* note 19; Jeffrey Fagan et al., *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 CRIME & DELINQ. 259 (1987). In analyses in four states in which the U.S. General Accounting Office could control for the effects of race on *Judicial Waiver* decisions, it found that judges trans-



within a single jurisdiction, judges do not administer or apply waiver statutes consistently from county to county or court to court.<sup>22</sup> Research in several states reports a contextual pattern of "justice by geography" in which where youths lived, rather than what they did, determined their juvenile or adult status.<sup>23</sup> Even within a single urban county, judges in the same court decide cases of similarly-situated offenders differently.<sup>24</sup> These differences influence both the characteristics of youths waived and the sentences they received as adults. Differences in judicial philosophies, the location of a waiver hearing, a youth's race, or organizational politics may explain as much about transfer decisions as do a youth's offense or personal characteristics.

#### A. WAIVER IN MINNESOTA

Prior to the 1995 legislative revisions, Minnesota employed a typical judicial waiver law that authorized a judge to transfer jurisdiction if the court found that "the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts."<sup>25</sup> In practice, implementation of this broad mandate suffered from two interrelated problems: the highly discretionary, idiosyncratic nature of individualized sentencing decisions and the disjunction between the criteria for transfers from juvenile court and those for sentences in adult criminal courts. Juvenile court judges attempted to assess a youth's "amenability to treatment" or "dangerousness" without valid clinical indicators to identify which serious young offenders might respond to intervention. They often transferred juveniles upon whom criminal court judges subsequently

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ferred black youths charged with violent, property, or drug offenses more readily than comparable white offenders. U.S. GEN. ACCOUNTING OFFICE, *supra* note 11.

<sup>22</sup> HAMPARIAN ET AL., *supra* note 19; Feld, *Juvenile Waiver Statutes*, *supra* note 2; Feld, *Teen-Aged Axe-Murderers*, *supra* note 19.

<sup>23</sup> JAMES PAUL HEUSER, OREGON DEP'T OF JUSTICE CRIME ANALYSIS CENTER, JUVENILES ARRESTED FOR SERIOUS FELONY CRIMES IN OREGON AND "REMANDED" TO ADULT CRIMINAL COURTS: A STATISTICAL STUDY (1985); HAMPARIAN ET AL., *supra* note 19; Feld, *Teen-Aged Axe-Murderers*, *supra* note 19; Feld, *Violent Youth & Public Policy*, *supra* note 3. In some states, for example, rural judges waive jurisdiction over youths more readily than urban judges. HAMPARIAN ET AL., *supra* note 19; Feld, *Teen-Aged Axe-Murderers*, *supra* note 19; Tammy Meredith Poulos & Stan Orchowsky, *Serious Juvenile Offenders: Predicting the Probability of Transfer to Criminal Court*, 40 CRIME & DELINQ. 3 (1994).

<sup>24</sup> Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

<sup>25</sup> MINN. STAT. ANN. § 260.125(2)(d) (West 1992).

imposed shorter sentences as adults than they could have received as delinquents.

In 1992, the Minnesota Legislature, Governor, and Supreme Court jointly appointed a Juvenile Justice Task Force to examine and propose revisions of the statutes governing certification of juveniles to criminal courts, and procedural safeguards and sentencing options available in juvenile courts.<sup>26</sup> The Juvenile Justice Task Force recommended (and the legislature enacted) the 1995 law to provide a stronger and more consistent response to serious and violent juvenile offenders, to give judges clearer guidelines within an individualized sentencing process, and to improve the congruence between judicial waiver decisions and criminal court sentencing practices.<sup>27</sup> The new law simplified certification procedures, used the "presumptive commitment" offenses in the adult Sentencing Guidelines to define serious juvenile offenders whom juvenile court judges presumptively should waive, and created an intermediate category of young offenders who could receive extended sentences in juvenile court. The Sentencing Guidelines, which apply to adult criminal defendants, presume that judges should commit to prison offenders convicted of certain violent crimes.<sup>28</sup> The new certification law used the Sentencing Guidelines' presumptive offense framework to structure juvenile court waiver and sentencing decisions. The law used the Guidelines' presumptive offense criteria to make certification easier and more consistent, integrated juvenile court waiver and criminal court sentencing practices, emphasized "public safety" over treatment considerations, and enhanced the sentencing authority of juvenile courts.

The new law provides that a prosecutor may file a motion to transfer only against juveniles charged with felony-level offenses.<sup>29</sup> The new statute still retains a revised version of the ju-

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<sup>26</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 997.

<sup>27</sup> *Id.* at 1024.

<sup>28</sup> MINN. SENTENCING GUIDELINES § V offense severity reference table (1999). The table includes in severity level VII-X offenses such as: second and third degree murder, first degree assault, first degree criminal sexual conduct, and aggravated robbery.

<sup>29</sup> The new statute provides that "[w]hen a child is alleged to have committed, after becoming 14 years of age, an offense that would be a felony if committed by an adult, the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations." MINN. STAT. ANN. § 260B.125(1) (West Supp. 2001).

dicial waiver process. For juveniles aged fourteen to seventeen and charged with any felony offense, the prosecutor must prove by "clear and convincing evidence" that protection of "public safety" requires the juvenile's transfer to criminal court.<sup>30</sup> For youths aged sixteen or seventeen whom prosecutors charge with a Sentencing Guidelines' presumptive commitment to prison, the new waiver law presumes that the juvenile court judge should transfer the youth to criminal court.<sup>31</sup> While a prosecutor bears the burden of proof in an "ordinary" certification proceeding, the statutory presumption shifts the burden to older juveniles charged with serious offenses to show by "clear and convincing" evidence that retaining their case in juvenile court serves "public safety." Under the new law, older juveniles charged with a serious offense bear the risk of non-persuasion, and if they fail to meet that burden, waiver is non-

<sup>30</sup> MINN. STAT. ANN. § 260B.125(2) provides that:

[T]he juvenile court may order a certification [to district court] only if: . . .

(2) a motion for certification has been filed by the prosecuting authority; . . .

(5) the court finds that there is probable cause . . . ; and

(6) the court finds either:

(i) that the presumption of certification created by subdivision 3 applies and the child has not rebutted the presumption by clear and convincing evidence demonstrating that retaining the proceeding in the juvenile court serves public safety; or

(ii) that the presumption of certification does not apply and the prosecuting authority has demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety. If the court finds that the prosecutor has not demonstrated by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety, the court shall retain the proceeding in juvenile court.

<sup>31</sup> The statute states:

It is presumed that a proceeding involving an offense committed by a child will be certified [to district court] if:

(1) the child was 16 or 17 years old at the time of the offense; and

(2) the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the sentencing guidelines and applicable statutes, or that the child committed any felony offense while using, whether by brandishing, displaying, threatening with, or otherwise employing a firearm.

If the court determines that probable cause exists to believe the child committed the alleged offense, the burden is on the child to rebut this presumption by demonstrating by clear and convincing evidence that retaining the proceeding in the juvenile court serves public safety. If the court finds that the child has not rebutted the presumption by clear and convincing evidence, the court shall certify the proceeding.

discretionary.<sup>32</sup> The legislature expected that creating a presumption for waiver based on an allegation of a serious crime and shifting the burden of persuasion to the youth would increase the number of youths certified to criminal court.

To further expedite transfer to criminal court, the new law amended the waiver criteria from "amenability to treatment" to give primacy to "public safety." The emphasis on "public safety" reflects the political reality that control of serious youth crime, rather than a child's responsiveness to treatment, is the real reason for waiver. The legislative definition of the "public safety" criteria further strengthens the connection between serious juvenile offenses and the adult Sentencing Guidelines' framework:

In determining whether the public safety is served by certifying the matter, the court shall consider the following factors:

- (1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm, and the impact on any victim;
- (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the sentencing guidelines;
- (3) the child's prior record of delinquency;
- (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
- (5) the adequacy of the punishment or programming available in the juvenile justice system; and
- (6) the dispositional options available for the child.

In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision.<sup>33</sup>

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<sup>32</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1027-28.

<sup>33</sup> MINN. STAT. ANN. § 260B.125(4). *See generally* Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1031-33 (analyzing policy rationale for "public safety" criteria).

Under the "public safety" criteria, a juvenile court judge effectively must decide whether a youth's offense severity, criminal history, and "unamenability to probation" warrant adult imprisonment.<sup>34</sup>

The new law still requires a juvenile court judge to conduct a waiver hearing whether the prosecutor charges a youth with a presumptive-certification offense or seeks certification on "public safety" grounds.<sup>35</sup> A prosecutor initiates a certification proceeding by filing a motion. Because the charges filed determine whether the presumption for certification applies and thus which party bears the burden of proof, the court must make a threshold determination of probable cause.<sup>36</sup>

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<sup>34</sup> Legislatively linking presumptive certification with the Sentencing Guidelines also implicates many court decisions interpreting the Guidelines' policy and jurisprudence. For example, adult defendants may rebut the Sentencing Guidelines' presumption of commitment to prison by showing that they are "amenable to probation." See generally Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent's Structuring Criminal Sentences: The Evolution of Minnesota's Sentencing Guidelines*, 75 MINN. L. REV. 727, 740 (1991) (discussing the operation of Minnesota's sentencing guidelines). In *State v. Wright*, 310 N.W.2d 461, 461 (Minn. 1981), the defendant faced a presumptive prison term of twenty-four months, but the trial court stayed the term, made a mitigated dispositional departure, and ordered probation with six months in a workhouse jail then release to a treatment program. The Minnesota Supreme Court upheld the departure because the defendant was "particularly unamenable to incarceration" and he was "particularly amenable to individualized treatment in a probation-setting." *Id.* at 462-63. The court found that because of his immaturity, Wright would be easily victimized in prison or misled into criminal activity by other inmates. The court also found that he needed psychiatric treatment that would not be available in an institutional setting and that he would not endanger public safety if he received appropriate treatment on an out-patient basis. *Id.* at 462. Subsequently, in *State v. Trogg*, 323 N.W.2d 28, 31 (Minn. 1982), the court upheld a mitigated downward departure based solely on a finding that the defendant was "amenable to probation." Thus, to the extent that the Sentencing Guidelines' rebuttable presumption jurisprudence shapes interpretation of the analogous presumptive-certification provisions, trial judges in certification hearings must still determine whether a youth is amenable to an EJJ probationary disposition.

<sup>35</sup> MINN. STAT. ANN. § 260B.125(2).

<sup>36</sup> MINN. STAT. ANN. § 260B.125(2), (4); see also MINN. R. CRIM. P. 11.03 (1983) ("A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part."); MINN. R. JUV. P. 18.04(3)(B) (probable cause determination made pursuant to MINN. R. OF CRIM. P. 11).

## B. EXTENDED JURISDICTION JUVENILE PROSECUTIONS—BLENDED SENTENCING

One fundamental limitation of any waiver law is its binary quality—either treatment as a juvenile or punishment as an adult—even though adolescents and criminal careers develop along a continuum and require an array of graduated controls. In addition to changing the waiver provisions, the 1995 law created a new, intermediate category—Extended Jurisdiction Juvenile Prosecutions (EJJ)—in which juvenile courts could try some serious young offenders in juvenile court, provide them with all adult criminal procedural safeguards (including the right to a jury trial), and then impose both a juvenile court sentence *and* a stayed adult criminal sentence.<sup>37</sup> Several other jurisdictions also provide “blended” juvenile-criminal sentences for intermediate categories of serious young offenders as an alternative to waiver.<sup>38</sup>

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<sup>37</sup> MINN. STAT. ANN. § 260B.130 (West Supp. 2001); Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1038-51.

<sup>38</sup> New Mexico recently created a “youthful offender” status for juveniles charged with serious crimes, N.M. STAT. ANN. § 32A-2-3(I) (1999). Juveniles in New Mexico enjoy the right to a jury trial. *Id.* at § 32A-2-16. The statute authorizes either an adult criminal sentence, or a juvenile disposition with extended jurisdiction until age 21 with a waiver hearing to decide whether to sentence the juvenile as an adult or youthful offender. *Id.* at § 32A-2-20.

In Texas, for example, juveniles may be indicted for certain serious crimes, tried in juvenile court with all adult criminal procedural safeguards, including the right to a jury trial, and sentenced to up to forty years of confinement with their term beginning in juvenile facilities and, if not released from the Youth Commission, continuing in an adult correctional facility. TEX. FAM. CODE ANN. §§ 53.045, 54.04, 54.11 (West 1996 & Supp. 1999). The Texas determinate sentencing law subjects children 10 to 16 years of age to sentences of up to 40 years in prison if they are indicted for one of six designated felonies. *Id.* at § 54.04(d)(3). Juveniles receive the same procedural guarantees as do adult criminal defendants. *Id.* at § 53.045(a). Juveniles begin their sentences in juvenile facilities, and at age 18 a court conducts a hearing to decide if they will be retained within the juvenile correctional system for the duration of their minority (until age 21), or complete their determinate sentence in the Texas Department of Corrections. *Id.* at §§ 54.04(d)(3), 54.11. Challenges to the law have been unsuccessful. The Texas legislation greatly increases the sanctioning power of juvenile courts to respond to youths below 15 years old, the minimum age to transfer juveniles to criminal courts, and provides prosecutors with a powerful alternative to adult prosecution. See Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943, 946 (1989) (explaining that the primary focus of the determinate sentencing system is on violent offenses committed by 13 and 14 year-olds as well as on providing prosecutors with alternatives to discretionary transfer for older violent juveniles); Robert O. Dawson, *The Violent Juvenile Offender: An Empirical Study of Juvenile*

Currently, most waived juveniles are sixteen or seventeen years old.<sup>39</sup> Prior to the 1995 amendments, juvenile courts' dispositional authority over delinquents ended when a youth reached age nineteen.<sup>40</sup> The termination of dispositional jurisdiction at the age of nineteen restricted juvenile courts' authority to impose appropriate sanctions on older youths and encouraged judges to certify some older juveniles who did not necessarily require extended adult incarceration. A juvenile's time remaining within the jurisdiction of juvenile courts often provides the impetus for judges to waive older youths to criminal court.<sup>41</sup> Thus, increasing juvenile courts' dispositional jurisdiction could reduce the pressure to certify some youths.

The 1995 law created an intermediate Extended Jurisdiction Juvenile (EJJ) status.<sup>42</sup> When a prosecutor files a delinquency petition alleging a felony offense, a motion must accompany the petition indicating whether the prosecutor also seeks an EJJ designation or adult certification.<sup>43</sup> As Table 1 in-

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*Determinate Sentencing Proceedings as an Alternative to Criminal Prosecution*, 21 TEX. TECH. L. REV. 1897, 1921-24 (1990) (examining the age distribution of the juveniles handled under the Texas determinate sentencing statute); see also Connie Hickman Tanner, *Arkansas' Extended Juvenile Jurisdiction Act: The Balance of Offender Rehabilitation and Accountability*, 22 U. ARK. LITTLE ROCK L. REV. 647 (2000) (analyzing Arkansas' Extended Juvenile Jurisdiction law); Randi-Lynn Smalheer, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259 (1999) (analyzing alternative forms of blended sentencing in juvenile and criminal court); Mary E. Spring, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, J. M. L. REV. 31, 1351 (1998) (analyzing Illinois Extended Jurisdiction Juvenile Prosecution statute).

<sup>39</sup> HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: A NAT'L REPORT (1995); Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

<sup>40</sup> MINN. STAT. ANN. § 260.181 (West 1992). The 1982 amendment of § 260.181 shortened the period of juvenile court jurisdiction from age 21 to age 19. 1982 MINN. LAWS 615, § 4.

<sup>41</sup> See, e.g., Fagan & Deschenes, *supra* note 11, at 341 (youth's age at the time of offense was the most consistent factor in waiver decisions, with older youths transferred more often); Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

<sup>42</sup> See MINN. STAT. ANN. § 260.126(1) (West 1992), *repealed* by Laws 1999, c. 139, art. 4, § 3; see MINN. STAT. ANN. § 260B.130(1) (West Supp. 2001).

<sup>43</sup> See MINN. STAT. ANN. § 260B.141(4) (West Supp. 2001); see also §§ 260B.141, 260C.141.

dicates, the new statute provides several methods to subject a youth to an EJJ prosecution.<sup>44</sup>

One gateway to EJJ is an unsuccessful attempt to certify a youth. In an ordinary certification hearing involving a youth fourteen to seventeen years of age and charged with any felony (Option 3, Table 1), if the judge does not certify the youth for criminal prosecution, then she may designate the subsequent juvenile court proceeding as either an EJJ prosecution or an ordinary delinquency hearing.<sup>45</sup> A second gateway concerns a presumptive-certification proceeding (Option 4, Table 1) which involves a sixteen or seventeen year-old youth charged with an offense for which the Sentencing Guidelines presume commitment to prison. In these proceedings, if the judge does not certify the youth, then she *must* designate the subsequent juvenile proceeding as an EJJ prosecution.<sup>46</sup> Because the law assumes that judges will certify the "worst of the worst" to criminal court, the *mandatory* EJJ dispositions for older, presumptive commitment offenders subjects the "less bad of the worst" to more stringent controls than those available in ordinary delinquency proceedings. Effectively, a judge's decision not to certify a presumptive-certification sixteen or seventeen year-old youth entails a determination that the youth is "amenable to probation" under the juvenile court's strengthened EJJ provisions.

A third gateway to EJJ status arises when a prosecutor charges a youth sixteen or seventeen years of age with a presumptive-certification offense *and* designates the case as an EJJ prosecution automatically without any further judicial review (Option 2, Table 1).<sup>47</sup> Because the only alternative to waiver available to a judge following a presumptive-certification hearing is to designate the case as an EJJ prosecution (Option 4, Table 1),<sup>48</sup> the law allows the prosecutor efficiently to designate the case as an EJJ proceeding. Thus, prosecutors need not file *pro forma* certification motions when they do not really desire adult

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<sup>44</sup> See *id.* § 260B.130(1).

<sup>45</sup> *Id.* § 260B.130(1)(1). The rules of procedure for the juvenile court provide that "[i]f the court does not order certification in a case in which certification is not presumed, the court may consider designating the proceeding an extended jurisdiction juvenile prosecution." To do so, the prosecution must prove that "public safety" requires such designation. MINN. R. JUV. P. § 18.05(5)(B) (West 2001).

<sup>46</sup> MINN. STAT. ANN. § 260B.130(1)(2); MINN. R. JUV. P. § 18.05(5)(A) (West 2001).

<sup>47</sup> See MINN. STAT. ANN. § 260B.130(1)(2) (providing for this procedure).

<sup>48</sup> See *id.* § 260B.125(5).

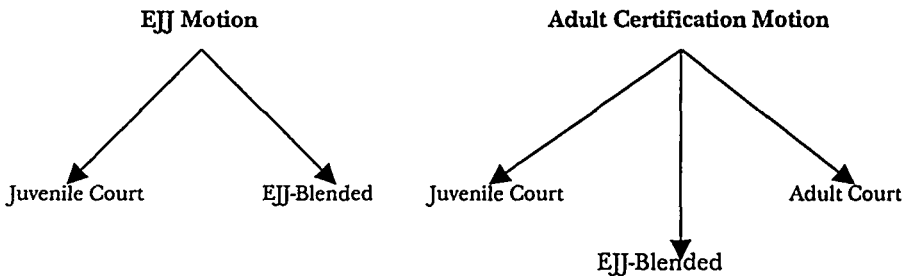


**TABLE 1.**

**MINNESOTA'S ADULT CERTIFICATION AND BLENDED SENTENCING PROCESS  
(Extended Juvenile Jurisdiction-EJJ)**

PROSECUTOR PETITIONED EXTENDED JUVENILE JURISDICTION (EJJ) MOTION		PROSECUTOR PETITIONED ADULT CERTIFICATION MOTION		
Option 1	Option 2	Option 3	Option 4	Option 5
EJJ Motion (Non- Presumptive)	EJJ Designate (Presumptive)	Non- Presumptive Certification	Presumptive Certification	Mandatory Certification
a. 14-17 years old and b. Any felony	a. 16-17 years old and b. Presumptive offense	a. 14-17 years old and b. Any felony	a. 16-17 years old and b. Presump- tive offense	a. 14-17 years old and b. Prior successful certification AND a new felony charge or c. First degree mur- der charge

POSSIBLE RESULTS OF THESE MOTIONS



POSSIBLE DISPOSITIONS IF CONVICTED

**Juvenile Court Dispositions**—all traditional correctional/treatment options, including probation, restitution, worksquad, fines.

**EJJ-Blended Sentencing Dispositions**—adult prison sentence stayed on condition that juvenile disposition is completed successfully. EJJ probation is intensive supervision including multiple weekly contact.

**Adult Court Dispositions**—all traditional correctional/treatment options, including probation, restitution, community service, fines.

criminal status and they obtain greater plea bargaining leverage in the most serious juvenile cases.

Finally, the legislation provides a fourth gateway to EJJ prosecution for other serious and younger offenders. Instead of filing a certification motion against a non-presumptive-certification youth, a prosecutor may file a motion for the court to designate the youth for EJJ prosecution (Option 1, Table 1).<sup>49</sup> Just as a judge may deny a motion to certify and designate a fourteen to seventeen-year-old charged with any felony as an EJJ when "public safety" requires, similarly a judicial hearing on a prosecutor's motion for an EJJ designation provides for the same result.<sup>50</sup> At the EJJ hearing, the prosecution must prove by "clear and convincing evidence" that "public safety" warrants designating the proceeding as an EJJ prosecution, using the same "public safety" criteria specified in the certification legislation.<sup>51</sup> Table 1 summarizes the alternative pathways to an EJJ status and the various dispositions available to a judge pursuant to each pathway. Significantly, the alternative criteria for certification and for EJJ status are identical—sixteen or seventeen years of age (Table 1, Options 2 and 4), and charged with a presumptive commitment to prison offense and fourteen to seventeen years of age and charged with any felony (Table 1, Options 1 and 3).

Regardless of the mechanism by which a county attorney commences an EJJ prosecution, an EJJ youth receives greater procedural protections than those available in ordinary juvenile delinquency prosecutions, including the right to a jury trial.<sup>52</sup> The right to a trial by jury is an essential component of this new quasi-adult status, because a court imposes both a juvenile disposition and a criminal sentence which the court stays pending

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<sup>49</sup> MINN. STAT. ANN. § 260B.130(1)(3).

<sup>50</sup> See MINN. STAT. ANN. § 260B.130(2) (requiring prosecutor to show by clear and convincing evidence that an EJJ prosecution serves public safety); MINN. R. JUV. P. § 19.01(3) (West 2001).

<sup>51</sup> MINN. STAT. ANN. § 260B.130(2); see MINN. R. JUV. P. § 19.05 (West 2001) (setting forth factors to be considered in determining whether an EJJ prosecution serves public safety).

<sup>52</sup> MINN. STAT. ANN. § 260B.130(3) (child prosecuted as an EJJ has the right to jury trial and effective assistance of counsel); *Id.* § 260B.155(1)(a) (child prosecuted as an EJJ has the right to jury trial on the issue of guilt).

compliance with the conditions of juvenile probation.<sup>53</sup> The legislation also includes all EJJ convictions in a youth's Sentencing Guidelines criminal history score in the same manner as for adult offenses.<sup>54</sup> It requires juvenile courts to retain EJJ records for as long as they would retain those of adult offenders.<sup>55</sup> Using juvenile convictions to enhance subsequent adult criminal sentences arguably requires providing to juveniles all adult criminal procedural safeguards.<sup>56</sup>

The new law also includes some provisions to restrict prosecutorial over-charging of juveniles as presumptive-certification EJJs.<sup>57</sup> The EJJ statute distinguishes between findings of guilt on

<sup>53</sup> See *id.* § 260B.130(4) (allowing court to impose both a juvenile and an adult sentence); MINN. R. JUV. P. § 19.08 (West 2001). Adult criminal procedural safeguards constitute a constitutional prerequisite to imposing a valid adult sentence. Feld, *Violent Youth and Public Policy*, *supra* note 3.

<sup>54</sup> See MINN. STAT. ANN. § 260B.245 (West Supp. 2001). This, in turn, requires amendment of the juvenile court record keeping and reporting provisions, and of the Sentencing Guidelines. 1994 MINN. LAWS 576, § 60 ("The sentencing guidelines commission shall modify the guidelines to take effect January 1, 1995, to provide that an extended jurisdiction juvenile conviction is treated under the guidelines in the same manner as a felony conviction of an adult.")

<sup>55</sup> MINN. STAT. ANN. § 260B.171(1) (West Supp. 2001).

<sup>56</sup> See generally Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1063-65; David Dormont, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1793-94 (1991) ("[C]ourts should not interpret *McKeiver* to justify using juvenile convictions with reduced procedural protections for punitive purposes at the adult level. Interpreted in this manner, *McKeiver* would not allow courts to enhance an adult's sentence based on juvenile sentences obtained during proceedings governed by the lower 'fundamental fairness' standard.").

<sup>57</sup> See Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1042-43 (discussing that Juvenile Justice Task Force members were concerned that allowing prosecutors to designate "presumptive certification" juveniles as EJJ's without filing a certification motion or judicial review could lead to abuse through prosecutorial overcharging); 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 (1991). Although the Task Force endorsed prosecutorial designation of presumptive-certification juveniles as EJJ's, members feared that:

allowing prosecutors to designate EJJ's without judicial review could result in adult confinement of inappropriate youths if courts revoked their EJJ probation status. They concluded, however, that restricting EJJ eligibility to older, presumptive-certification juveniles, requiring prosecutors to use adult criminal procedures to try EJJ cases, and removing the EJJ designation from youths convicted of lesser, non-presumptive offenses, would foster realism in charging and provide adequate checks on prosecutorial designation of EJJ cases.

Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1043.

a lesser-included, non-presumptive-commitment offense after trial and after a guilty plea.<sup>58</sup> If, after a trial, the judge or jury convicts the youth of a lesser-included, non-presumptive-commitment offense, then the juvenile court may only sentence the youth as an ordinary delinquent because the trial verdict establishes that the prosecutor incorrectly assessed the seriousness of the offense when she originally designated the juvenile as an EJJ. However, to expedite plea bargaining, a youth may enter a guilty plea to a non-presumptive-commitment offense and still receive an EJJ disposition.<sup>59</sup> Finally, the law raised juvenile courts' dispositional jurisdiction from age nineteen for ordinary delinquents to age twenty-one for EJJ youths.<sup>60</sup>

The legislature "regarded an EJJ prosecution as 'one last chance at success in the juvenile system' and discussed how to prevent 'one last chance' from becoming two, or three, or four more chances."<sup>61</sup> While some legislators wanted any juvenile probation violation or new offense to result in automatic execution of the stayed adult sentence, others feared that mandatory revocation for technical violations or trivial offenses would be excessively rigid and could remit many inappropriate youths to prison. Ultimately, the law instructed judges to treat EJJ probation violations in the same manner as they would treat subsequent offenses or probation violations by adult probationers. If an EJJ youth allegedly violated the conditions of the stayed sentence or committed a new offense:

the court may, without notice, revoke the stay and probation and direct that the offender be taken into immediate custody. The court shall no-

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<sup>58</sup> See MINN. STAT ANN. § 260B.130(4)(b) (West Supp. 2001):

If a child prosecuted as an extended jurisdiction juvenile after designation by the prosecutor in the delinquency petition is convicted of an offense after trial that is not an offense described in subdivision 1, clause (2) [presumptive commitment], the court shall adjudicate the child delinquent and order a disposition under Section 260B.198. If the extended jurisdiction juvenile proceeding results in a guilty plea for an offense not described in subdivision 1, clause (2), the court may impose a[n EJJ] disposition under paragraph (a) if the child consents.

<sup>59</sup> *Id.* This provision allows juveniles to plea-bargain for non-presumptive-commitment adult offenses to avoid incarceration and to protect their criminal history scores. It also allows prosecutors to avoid judicial hearings at which they would have to prove that public safety requires an EJJ designation for a youth charged with a non-presumptive-commitment felony. See *id.* § 260B.130(3).

<sup>60</sup> MINN. STAT. ANN. § 260B.193(5) (West Supp. 2001).

<sup>61</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1047-49.

tify the offender in writing of the reasons alleged to exist for revocation of the stay of execution of the adult sentence. If the offender challenges the reasons, the court shall hold a summary hearing on the issue at which the offender is entitled to be heard and represented by counsel.<sup>62</sup>

The provisions for written notice, appointment of counsel, and a summary hearing correspond to adult probation revocation procedures.<sup>63</sup> Significantly, even if a court finds by clear and convincing evidence that an offender violated the conditions of probation or committed a new offense, it need not execute a previously stayed criminal sentence and may continue the stay or place other conditions of probation on the offender.<sup>64</sup> To avoid stretching "one last chance" into several chances and thereby diminishing the significance of an EJJ designation, however, the legislature strengthened probation revocation procedures for presumptive certification or prosecutor-designated EJJ's. If an EJJ youth convicted of a presumptive-commitment-to-prison offense commits a new offense or violates the conditions of the stayed sentence, "the court must order execution of the previously imposed sentence unless the court makes written findings regarding the mitigating factors that justify continuing the stay."<sup>65</sup> For these youths, the court *must execute* the stayed sentence unless it finds mitigating circumstances such as would justify a downward departure under the Sentencing Guidelines. Because the Sentencing Guidelines require courts to provide "substantial and compelling" reasons to justify downward departures from presumptive sentences, courts would require justifications at least as strong to depart from the even stronger presumption in the EJJ revocation provision.<sup>66</sup>

"Although provisions to revoke probation and execute the adult sentences are essential elements of the EJJ status, some

<sup>62</sup> MINN. STAT. ANN. § 260B.130(5) (West Supp. 2001).

<sup>63</sup> Compare MINN. R. JUV. P. § 19.09 (West 2001) (regarding juvenile probation revocation), with MINN. R. CRIM. P. § 27.04 (1990) (regarding adult probation revocation).

<sup>64</sup> See MINN. R. CRIM. P. § 27.04(3)(3)(b) (West 1990).

<sup>65</sup> MINN. STAT. ANN. § 260B.130(5) (West 2001); see also MINN. R. JUV. P. § 19.09(3)(C)(2) (West 1995) ("[T]he court shall order the execution of the sentence or make written findings indicating the mitigating factors that justify continuing the stay.").

<sup>66</sup> See MINN. SENTENCING GUIDELINES § II.D.2.a (1999) (non-exclusive list of mitigating factor that may be used as reasons for departure from presumptive sentence); MINN. SENTENCING GUIDELINES § II.D.03 cmt. (1999).

[proponents of the law] feared that many youths might enter adult correctional facilities through this procedural back door."<sup>67</sup> An EJJ youth is one whom a judge or a prosecutor already has determined can remain in juvenile court consistently with "public safety." Proponents feared that even if a probation violation is not a presumptive-commitment-to-prison offense, an EJJ youth whose probation is revoked likely will be incarcerated as an adult offender. Thus, even if an initial offense clearly would not warrant certification and a subsequent offense or probation violation would not in itself justify imprisonment, for an EJJ youth, the two in combination may result in a more severe outcome than either a juvenile or criminal court judge would impose if asked directly whether imprisonment is appropriate. While there must be limits to "one last chance," some juveniles' "adult" criminal status now may be decided in the context of summary probation revocation hearings rather than via full-blown certification hearings. Although the legislature and the Sentencing Guidelines Commission recognized that the EJJ provisions could have the largest potential bedspace-impact on adult facilities, they were unable to estimate the precise effect of the changes because they had no basis to determine the rate at which judges would revoke EJJ youth's probation and execute their stayed adult prison sentences.<sup>68</sup> This study provides a partial answer to various questions about the administration of these EJJ provisions.

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<sup>67</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1050.

<sup>68</sup> See MINN. SENTENCING GUIDELINES COMM'N, BED-SPACE IMPACT ANALYSIS: JUVENILE JUSTICE BILL 2 (1994). The Minnesota Sentencing Guidelines Commission candidly noted that "because this bill includes new policies which are substantially different than the existing system, it is difficult to precisely estimate the impact. Estimating the impact of the legislation is further complicated by the difficulty in predicting prosecutorial and judicial practices for these cases." *Id.* With respect to EJJ probation revocations, the Guidelines Commission cautioned: "The impact of this [EJJ] provision on the adult prison system will depend on the frequency with which the juveniles violate their conditions or commit new offenses. It is estimated that the impact could range from 130 beds (if 10% are revoked) to 326 (if 25% are revoked)." *Id.* at 4.

The 1994 Minnesota Legislature requested the Legislative Audit Commission to evaluate recidivism rates for youthful offenders released from state juvenile correctional facilities. While recidivism rates varied somewhat for different facilities, the Legislative Auditor found very high rates of re-offending by juveniles and certified adults, and cautioned that even the higher EJJ bed-space impact may under-estimate the likely rates of probation violations and adult confinement. See OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., RESIDENTIAL FACILITIES FOR JUVENILE OFFENDERS 62-75 (1995).

## III. DATA AND METHODS

This study evaluates the implementation of the certification and blended sentencing laws in Hennepin County (Minneapolis), Minnesota. Hennepin County is the most populous county in the state, experiences the largest volume and rate of youth crime, and accounts for about one-third of all of the EJJ and certification cases in Minnesota.<sup>69</sup>

Our data begins at the point at which the prosecuting attorney decides to file either an EJJ motion or a certification motion in conjunction with a delinquency petition. To be eligible for either an EJJ or waiver disposition, a youth must be fourteen to seventeen years of age and charged with a felony-level crime. We identified juveniles by the type of motion—EJJ or certification—that prosecutors filed initially. As Table 1 indicated, prosecutors and judges could certify or designate a youth for an EJJ prosecution under five separate pathways. Each youth's juvenile court file contained information about the particular route or pathway to certification or EJJ status, the judicial decision or plea agreement, the level, type and degree of current offense, prior delinquency offenses, court services reports and evaluations, and any subsequent revocation and re-sentencing information. Trained graduate students read and electronically recorded court files. In addition, the coders used computerized systems in both juvenile and criminal courts to check subsequent revocation proceedings and recidivism.

This study reports complete analyses of data for the first three years—1995 through 1997—during which the new law has been in effect in order to allow sufficient time to elapse to include revocation information. We have collected initial information on the first four years of juveniles motioned in Hennepin County and will follow and analyze data from subsequent years (1998 and later) after enough time has passed to include post-disposition outcomes.

The indicators and data we collected parallel closely our previous research on youths against whom prosecutors filed motions for transfer under the traditional judicial waiver statute and enable us to evaluate how the new law affected the charac-

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<sup>69</sup> See, e.g., MINN. SUPREME COURT, STATE COURT ADMINISTRATOR'S OFFICE, JUVENILE JUSTICE ISSUES: STATISTICAL OVERVIEW OF EJJ AND ADULT CERTIFICATION DATA 1996, 1997, & 1998 (2000). In 1998, for example, Hennepin County accounted for 34.4% of all EJJ cases and 30.3% of all certification cases in Minnesota. *Id.* at tbl.8.

teristics of waived youths and their subsequent court careers.<sup>70</sup> We collected extensive information on offense, socio-demographic, and court processing variables: current offense (degree, type and level of severity of alleged offense, role of the defendant in the offense, victim injury, weapon use and dispositional information), delinquency history (degree, type and level of adjudicated offenses, affiliated sanctioning, prior out-of-home placements or treatment opportunities), demographic information on the defendant (age, gender and race), and justice system variables (which judge heard the case, whether the hearing involved a trial or plea agreement, recommendations of probation officer and psychologist). In addition, we conducted group interviews with juvenile court judges, legislators, task force members, prosecutors, defense attorneys, probation officers, and court psychologists. We explored with the juvenile justice personnel the aspects of the presumptive certification and EJJ laws with which they were satisfied and dissatisfied.

Our analysis begins with an examination of the implementation of the new legislation. We then compare what occurred under the previous waiver legislation and under the new blended sentencing and certification laws. We compare the characteristics of youths against whom prosecutors currently filed waiver or EJJ motions with the previous transfer practice in order to assess whether the new presumptive certification and EJJ laws or prosecutorial practices identified a different type of youth than those whom prosecutors or judges previously transferred. We also compare the characteristics of youths against whom prosecutors currently filed EJJ versus certification mo-

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<sup>70</sup> MARCY RASMUSSEN PODKOPACZ, HENNEPIN CITY DEP'T OF COMMUNITY CORRECTIONS, JUVENILE REFERENCE STUDY (1994); Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

One area we excluded for the current population of youth was the in-depth open-ended assessment of all significant life events prominent in the juvenile's family life. The reason we chose to omit these indicators was based on the fact that previously we found little variance in the family stability/instability scales. In general all of the youth motioned under the old legislation fell closely together on the instability end of the continuum. In addition, collecting this information added an extra 2 hours to each file examined.

Other differences include additional information we chose to collect for this population including the culpability of the defendant (were they a main perpetrator of the crime or not). We also collected arrest and detention (A&D) information and bench warrant (BW) information on the current population since these could lead to revocations of stayed prison sentences.



tions to discern the differences between the youths identified for enhanced juvenile sanctions and those whom they deemed appropriate of adult prosecution. We compare judicial decisions under both laws to assess whether the new juvenile procedures continue to reflect the subjectivity characteristic of the prior waiver process. Finally, we analyze revocation rates for both EJJ and transferred youths to assess the effectiveness of this alternative sentencing strategy.

#### IV. FINDINGS

During the seven years encompassed in our previous sample (1986-1992), Hennepin County prosecutors filed motions for adult certification against a total 330 youth.<sup>71</sup> These youth all faced the possibility of transfer to adult criminal court. Under the new blended sentencing laws, prosecutors selected 504 youth to face adult sentences in the first three years alone (1995-1997). During this period, prosecutors filed motions for adult certification against 323 youths who faced the initial possibility of transfer, and they filed an additional 181 EJJ motions against youths who faced the possibility of adult sanctions only if they failed their juvenile probationary dispositions. Our analyses will compare both types of youths—EJJ and certification—with each other and with those against whom prosecutors previously filed transfer motions.

##### A. NEW OPTIONS AVAILABLE TO PROSECUTORS UNDER BLENDED SENTENCING

Table 1 shows the pathways or options that a prosecuting attorney can choose for delinquent youths. The EJJ and certification criteria for Options 1 and 3—ages 14 through 17 and charged with any felony—are identical to each other, as are the criteria for Options 2 and 4—ages 16 through 17 and charged with a presumptive commitment to prison offense. Despite the similarity of criteria, the Juvenile Justice Task Force that recommended the presumptive certification and EJJ laws and the legislature expected that prosecutors would differentiate among youths charged with similar offenses for EJJ versus certification on the basis of their age, the qualitative seriousness of their of-

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<sup>71</sup> See Podkopacz & Feld, *End of the Line*, *supra* note 7, at 463 tbl.1; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 118 tbl.1

fense, their degree of criminal participation, and their prior delinquency history.<sup>72</sup> The Task Force expected that prosecutors would file certification motions against older youth with more serious crimes and more extensive delinquency histories and file EJJ motions against younger juveniles or those with less serious or no delinquency history.

Although youths against whom prosecutors filed a certification motion faced the immediate prospect of criminal conviction and sentencing, the most severe sentence youths against whom prosecutors filed an EJJ motion was a *stayed* adult prison sentence. Table 2 shows that prosecutors chose to file only a motion for Extended Jurisdiction Juvenile prosecution against 181 youth, or 36%, of the total offenders in our sample (Options 1 and 2). These youth remain in juvenile court if they successfully meet the juvenile placement criteria and fulfill the conditions of their juvenile probation, which can continue until age 21. The ninety-five (95) youth against whom prosecutors filed EJJ motions under Option 1 enjoy the right to a judicial hearing on their threat to "public safety" and face two possible outcomes: (a) remaining in juvenile court as an ordinary delinquent until age 19, or (b) having the court designate the youth as an EJJ with a stayed criminal sentence and juvenile court dispositional jurisdiction continuing until age 21. Under Option 2, the prosecutors designate as EJJs those youths aged 16 or 17 and charged with a presumptive commitment to prison offense without any additional judicial review. Under this option, prosecutors designated eighty-six (86) youths as EJJs without any additional judicial evaluation of their threat to "public safety."

In addition to the 181 EJJ motions, prosecutors filed certification motions against an additional 323 youths (Options 3 - 5), or about 108 per year. This represents a substantial increase over previous waiver practices, which averaged about 47 certification motions per year.<sup>73</sup> The possible outcomes of these certification motions vary, depending upon in which category the prosecutor charges the youth. For the 82 youths against whom prosecutors filed certification motions under Option 3—ages 14 through 17 and any felony—three possible outcomes obtained: (a) remaining in juvenile court as an ordinary delinquent; (b)

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<sup>72</sup> See Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1038-51.

<sup>73</sup> See Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

TABLE 2.  
NUMBER OF MOTIONS FILED EACH YEAR BY TYPE OF MOTION

Year	Extended Juvenile Jurisdiction Motion		Adult Certification Motion				TOTAL
	1. EJJ Motion (Non-Presumptive)	2. EJJ Designate (Presumptive)	3. Non-Presumptive Certification	4. Presumptive Certification	5. Mandatory Certification**	TOTAL	
1995	16 10.4%	41 26.6%	36 23.4%	60 39%	1 0.6%	154 100.0%	
1996	35 20.0%	35 20.0%	23 13.1%	82 47.4%	0	175 100.0%	
1997	44 25.1%	10 5.7%	23 13.1%	98 56.0%	0	175 100.0%	
TOTAL	95 18.8%	86 17.1%	82 16.3%	240 47.6%	1 0.2%	504 100.0%	

\* There are two other cases that are pending at this point due to the defendants being fugitives. Additionally, 6 juveniles were transferred to another county for venue. This can occur when it is determined that the residence of the juvenile is in another county's jurisdiction (5) or when the juvenile faces more serious charges in another county (1 juvenile was charged with aggravated robbery in Hennepin but faced murder charges in Ramsey County (St. Paul, Minnesota)).

\*\* There were three additional defendants that were first motioned under the old certification laws and re-motioned under this new blended sentencing legislation. These three defendants have been taken out of any subsequent analyses. The one defendant listed here under the category of mandatory certification was charged with first-degree murder.

having the juvenile court sentence the youth in the EJJ category; or (c) transferring the youth to criminal court for prosecution as an adult. For the 240 youths against whom prosecutors filed presumptive certification motions under Option 4—ages 16 through 17 and a presumptive commitment to prison offense—only two possible outcomes were available, unless the prosecutor withdraws the motion and proceeds against the child as an ordinary delinquent: (a) the juvenile court could designate the juvenile as an EJJ prosecution; or (b) transfer the youth to adult court. For the one youth whom prosecutors charged under the mandatory certification provision, Option 5, adult criminal prosecution was the only possible outcome. The various EJJ and certification options enable prosecutors to select the outcome they deem most desirable (criminal court or EJJ status) based on considerations of the individual characteristics of the offender, the seriousness of the offense and prior record, and “public safety” factors.

### *1. Prosecutors' Charging Practices*

Table 2 indicates that prosecutors changed the way they charged and filed certification and EJJ motions against youth during the first three years of implementation. Prosecutors who charged youths aged 14 through 17 with a non-presumptive offense could file either an EJJ “public safety” motion or a non-presumptive certification motion (Options 1 or 3). In the first year of implementation, prosecuting attorneys filed a certification motion against nearly one-quarter (23.4%) of those youths and filed an EJJ motion against only 10.4%. The county attorneys had reversed this pattern, however, by 1997. Youth aged 14 through 17 whom prosecutors charged with a non-presumptive felony offense were more likely to be placed on the EJJ motion path. By 1997, prosecutors filed non-presumptive certification motions primarily against 14- or 15-year old youths charged with a presumptive-commit offense but who were ineligible for presumptive certification by virtue of their younger age.

Similarly, for juveniles aged sixteen or seventeen years and charged with a presumptive commitment to prison offense, prosecutors either could automatically designate them as EJJs or file presumptive certification motions (Table 2, Options 2 and 4). Over the three year span, the number and percentage of youths whom prosecutors automatically designated as EJJs declined dramatically, from 41 in 1995 to 10 in 1997, while the

number of youths against whom they filed presumptive certification motions increased by virtually the same amount, from 60 to 98.<sup>74</sup> Of the youths who met the presumptive criteria, prosecutors increased the number of certification motions they filed from less than 60% of the youths to more than 90% in the three years.<sup>75</sup>

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<sup>74</sup> See Kathryn A. Santelmann & Kari L. Lillesand, *Extended Jurisdiction Juveniles in Minnesota: A Prosecutor's Perspective*, 25 WM. MITCHELL L. REV. 1303, 1315 (1999), which stated that:

It is also not surprising that very few cases were designated EJJ as a result of a motion for designation brought by the prosecutor. From a prosecutor's perspective, it is often preferable to bring a motion for certification, even in those cases where the statute would allow for automatic EJJ designation. The certification motion provides an opportunity to investigate the child's delinquency history and psychological profile. In Ramsey County [St. Paul] it is the policy that for every motion for certification a probation officer's report and a psychological evaluation will be done . . . . In addition, the Minnesota Juvenile Rules of Procedure provide a disincentive for a prosecutor to designate a juvenile as EJJ. The Rules require a jury trial to be commenced within thirty days of the EJJ designation if the child is in custody . . . . Bringing a certification motion means that the case is set for a certification hearing within thirty to sixty days. This additional time gives prosecutors, defense counsel and the court an opportunity to evaluate the juvenile to determine whether an EJJ designation would be appropriate. It also gives the parties time to prepare for trial, which is advantageous to all concerned.

<sup>75</sup> In part, the EJJ and certification statutes and rules give prosecutors an incentive to file certification motions rather than to designate youth as EJJ. The "public safety" criteria for either an EJJ or certification decision are the same. If prosecutors file an EJJ motion, the court must hold an EJJ "public safety" hearing within 30 days of the filing of the EJJ motion, unless extended for good cause. MINN. STAT. ANN. § 260B.130(2) (West Supp. 2001). Similarly, if the prosecutor files a certification motion, the court must conduct the waiver hearing within 30 days of the filing of the motion, unless extended for good cause. MINN. STAT. ANN. § 260B.125(2)(4) (West Supp. 2001). Thus, the time table envisioned by the rules requires prosecutors to conduct clinical evaluations, to assess the merits of the case, to obtain evidence of a juvenile's prior record, and the like, whether they file a certification motion or petition for an EJJ hearing. However, if a prosecutor designates a youth aged sixteen or seventeen and charged with a presumptive commitment to prison offense as an EJJ, there is no hearing to evaluate the youth's EJJ status and therefore the "hearing" for which the prosecutor must be prepared within 30 days is the trial on the merits of the petition. By contrast, if the prosecution files a certification motion, the time period within which the youth must be brought to trial starts to run only after the court decides the youth's EJJ or certification status. Given the time until the waiver or EJJ hearing and the court's ruling, effectively, prosecutors would have about 90 days before they would have to be ready for a trial on the merits. Thus, as a matter of docket-control and administrative convenience, they have a strong incentive to file a certification motion rather than to designate a youth an EJJ. In addition, if prosecutors file a certification motion for a presumptive commitment offense (Table 1, Option 4), then judges either may certify the youth or only may sentence them as an EJJ. Thus, prosecutors have an incentive to over-motion in order to preserve both the certifica-

## B. JUDICIAL DECISIONS

After the prosecutor filed either an EJJ or certification motion, Table 3 examines the decisions that judges made in response to the cases placed on these various paths. In Table 3, we combine all EJJ motions (Table 1, Options 1 and 2) and combine all certification motions (Table 1, Options 3, 4, and 5) in order to show the changes in implementation over the first three years. Recall from Table 2 that the number of juveniles whom prosecutors charged with a non-presumptive commitment offense (Option 1) increased over the three years of our study from 16 juveniles in 1995 to 44 by 1997. As the numbers of youths whom prosecutors charged in this manner increased, the numbers of youths whom juvenile court judges could sentence as ordinary delinquents increased. Reflecting the changes in charging practices, in the first year, juvenile court judges retained in juvenile court as ordinary delinquents about one-third (35.1%) of the youth whom prosecutors placed on one of the EJJ paths. In 1996, judges retained in juvenile court as ordinary delinquents more than half (56.5%) and, by 1997, fully two-thirds (66.7%) of those youths against whom prosecutors filed EJJ motions.

Of the youths against whom prosecutors filed some type of certification motion, juvenile court judges retained and sentenced about one-fifth (19.5%) as ordinary delinquency cases. Judges placed about half (between 46.4% and 52.8%) of these certification cases in the "blended sentence" EJJ category each year. Finally, the judges transferred between one-quarter (26.8%) and one-third (33.3%) of these certification motion cases to adult criminal court.

### 1. *Comparison of Current Judicial Decisions with Previous Waiver Decisions*

Over a seven year period prior to the adoption of the new blended sentencing law, the Hennepin County Attorney's office filed an average of 47 certification motions per year to transfer youths to adult criminal court.<sup>76</sup> Table 4 reports that in the first three years after the adoption of the blended sentencing law,

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tion and EJJ sentencing options and thereby preclude judges from sentencing these youths as ordinary delinquents.

<sup>76</sup> See Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

**TABLE 3.**  
**HOW THE CASE BEGAN AND HOW IT WAS DISPOSED BY YEAR**

Court That Handled the Case	Type of Disposition	1995		1996		1997		Total of Each Court
		Type of Motion		Type of Motion		Type of Motion		
		A. Both Types EJJ Motion	B. All Types Certification Motion	A. Both Types EJJ Motion	B. All Types Certification Motion	A. Both Types EJJ Motion	B. All Types Certification Motion	
Juvenile Court	Juvenile	20 (35.1%)	20 (20.6%)	39 (56.5%)	17 (16.0%)	35 (66.7%)	26 (22.0%)	157 (31.2%)
	Blended Sentence	37 (64.9%)	45 (46.4%)	31 (44.3%)	55 (52.8%)	19 (33.3%)	62 (51.2%)	
Adult Court	Adult	-	32 (33.3%)	-	33 (31.1%)	-	33 (26.8%)	98 (19.4%)
Total		57 (100.0%)	97 (100.0%)	70 (100.0%)	105 (100.0%)	54 (100.0%)	121 (100.0%)	504 (100.0%)
								406 (80.67%)

**TABLE 4.**  
**COMPARISON OF HANDLING SERIOUS JUVENILES UNDER TWO**  
**DISTINCT LAWS**  
 Average Number of Motions Filed, Juveniles Retained in Juvenile Court and  
 Juveniles Referred to Adult Court

	TRADITIONAL CERTIFICATION LAWS 1986-1992 TOTAL (N=330)	BLENDED SENTENCING LAWS 1995-1997		
		BEGAN AS AN EJJ MOTION (N=181)	BEGAN AS A CERTIFICATION MOTION (N=323)	TOTAL (N=504)
Average Number of Youth for whom Prosecutors Filed Motions	47	60	108	168
Average Number of Youth Retained in Juvenile Court	16	31 Juvenile Court	21 Juvenile Court	52 Juvenile Court
		29 Blended EJJ	54 Blended EJJ	83 Blended EJJ
Average Number of Youth Referred to Adult Court	31	Not a possibility	33	33

prosecutors filed an average of 168 motions per year—60 EJJ motions and 108 certification motions to transfer youths to criminal court. Thus, prosecutors filed more than twice as many transfer motions as they did under the previous statute. Significantly, prosecutors filed delinquency petitions against about 450 delinquents each year charged with presumptive commitment to prison offenses. Although prosecutors filed 168 EJJ and certification motions annually and charged most of those youths with presumptive commitment to prison offenses, significant screening decisions obviously occurred at the outset because prosecutors filed motions against only about one-third of those juveniles whom they alleged committed these serious offenses. Our future research will examine the determinants of prosecutors' initial gate-keeping and screening decisions and the factors that lead them to file EJJ and certification motions



against some presumptive commitment offenders but not against others.

At the time the legislature adopted the revised certification and EJJ statutes, some analysts expressed concern that the new laws could have a "net-widening" effect and subject more young offenders to the possibility of adult criminal sentences than occurred under the traditional judicial waiver law.

[T]he question of whether the new legislation ultimately provides serious young offenders with one last chance at rehabilitation, or whether it consigns less serious youths to the adult corrections system without the benefit of a certification hearing poses a second unknown feature. EJJ may provide judges with a sentencing alternative for some youths who otherwise would have been certified. If courts, however, use EJJ more extensively for many youths who would not be certified either previously or under the new regime, and these youths violate their juvenile probations, then EJJ may have a net-widening effect and increase the number of youths consigned to adult facilities. Ironically, in these cases, a juvenile court judge already has determined that EJJ youths do not pose a threat to "public safety" requiring adult incarceration. And yet, a new offense, which itself would not warrant certification, may provide the basis to revoke probation and execute the adult sentence.

Although proponents of alternative punishments contend that judges will impose them on offenders who otherwise would receive a jail or prison terms, "net-widening" occurs when prosecutors and judges instead draw the pool of offenders sentenced to the "alternative" not from those whom they otherwise would have sentenced to prison, but from those who otherwise would have received a less restrictive punishment.<sup>78</sup>

Our analyses suggest that the presumptive waiver and EJJ laws do seem to have produced a substantial net-widening effect. Recall that under the previous waiver statute, prosecutors filed 47 certification motions and juvenile court judges transferred an average of 31 juveniles per year and retained about one-third (34%) of motioned youths as ordinary delinquents.<sup>79</sup> Under the new blended sentencing and waiver law, the average

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<sup>77</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1124.

<sup>78</sup> See Norval Morris & Michael Tonry, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENT IN A RATIONAL SENTENCING SYSTEM 157-58 (1990); Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, in 17 CRIME & JUSTICE 281 (Michael Tonry ed., 1993).

<sup>79</sup> See Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

number of certification motions more than doubled (108 vs. 47). Despite this enormous increase in the pool of youths whom prosecutors deemed eligible for transfer to criminal courts, the juvenile court judges transferred about the same number of youths as they had previously. The raw numbers of juveniles judicially transferred under the previous waiver provisions annually averaged 31 youths. Under the new, "streamlined" presumptive waiver law, the judges transferred an average of 33 juveniles per year, an insignificant difference. The remarkable stability in the absolute numbers of youths transferred annually suggests a kind of waiver "equilibrium"—the judicial culture had identified the numbers and characteristics of youths appropriate for adult criminal prosecution and this equilibrium persisted despite the substantive changes in the waiver law's criteria, presumptions, and procedures.

Under the previous waiver law, judges transferred two-thirds (65%) of the youths against whom prosecutors filed waiver motions to adult criminal court.<sup>80</sup> Under the new law, the judges transferred less than one-third (30.6%) of the eligible<sup>81</sup> youths to adult court. Although judges continued to transfer about the same numbers of youths to criminal court as previously despite the dramatic increase in the number of waiver motions filed, they now sentenced half (50%) of all youths against whom prosecutors filed a certification motion under the new blended sentencing EJJ law rather than as ordinary delinquents as under the previous practice. On the average, an additional 54 juveniles each year received a stayed adult criminal sentence and the possibility of an adult sanction if they failed on their juvenile probation disposition. It is these youths, who previously only would have been sentenced as ordinary delinquents, for whom the threat of adult sanctions represents a potential "net-widening."

In addition to increasing the average number of waiver motions from 47 to 108, prosecutors filed additional 60 EJJ motions annually which exposed an even larger pool of youths to the

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<sup>80</sup> See Podkopacz & Feld, *End of the Line*, *supra* note 7, at 466 tbl.2; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 132 tbl.17.

<sup>81</sup> Eligible, here, refers to those 323 youths against whom prosecutors originally filed a certification motion rather than an EJJ motion. Juveniles against whom prosecutors filed an EJJ motion (Table 1, options 1 or 2) did not face the immediate possibility of transfer to criminal court.

secondary possibility of adult sentences if they failed on their juvenile probationary dispositions. Juvenile court judges sentenced about half (48.3%) of the youths against whom prosecutors filed an EJJ motion under the enhanced blended sentencing option rather than as ordinary delinquents. As under the previous practice, judges continued to sentence about one-third (31.2%) of juveniles as ordinary delinquents. However, because of the increase in the total number of waiver motions and the adoption of the EJJ option, juvenile court judges sentenced half (49.4%) of all youths against whom prosecutors filed either waiver or EJJ motions to the EJJ option and thereby greatly expanded the pool of youths over whom hung the threat of an adult criminal sentence.

The blended sentencing option had a substantial net-widening impact. Although the judges transferred directly about the same number of youths per year as previously (33 vs. 31), they imposed stayed adult criminal sentences on an additional 54 youths per year against whom prosecutors filed transfer motions. Judges also imposed an additional average 29 per year stayed adult criminal sentences on those youths against whom prosecutors initially filed EJJ motions. Although the numbers of youths transferred directly remained virtually constant, an average of 83 additional youths each year entered the EJJ status, received stayed adult sentences, and faced the prospect of probation revocation and adult imprisonment. And, as we shall see, judges subsequently revoked the juvenile probation of a substantial proportion of those EJJ juveniles and confined them as adults.

## 2. *Comparison of Youths' Characteristics under Prior Judicial Waiver and Under New Presumptive Certification and Blended Sentencing law*

Because our data reveals a widening of the pool of youths exposed to the possibility of adult sanctions as a result of the presumptive certification and EJJ sentencing laws, our next analyses compare the characteristics of youths whom prosecutors previously identified as appropriate candidates for transfer with those youths whom they subsequently deemed appropriate for transfer or for the enhanced EJJ sanctions. We report the similarities and differences in the characteristics of youths in Tables 5, 6, and 7.

## a) Personal Characteristics

The age at which juveniles commit their first offense or make their first court appearance constitutes "one of the best predictors . . . of the future course of the criminal career."<sup>82</sup> The younger the age of onset of offending, the greater the likelihood he or she will continue and commit additional offenses. In Table 5, we report the age of a youth's first juvenile court appearance.<sup>83</sup> In our earlier waiver study, more than one-quarter (28.5%) of youths had appeared in juvenile court prior to the age of twelve. In the current study, only about one in seven (15.3%) juveniles had appeared at such an early age and a somewhat larger proportion made their first juvenile court appearance at ages 14 or 15 (29.8% vs. 21.5%) or at age 16 or older (25.6% vs. 17.9%). Previously, nearly 61% of the juveniles had appeared in juvenile court by the age of thirteen, whereas under the blended sentencing laws only 45% had appeared in court by that age. The differences in age of on-set of delinquency of youths against whom prosecutors previously filed waiver motions and now file EJJ or transfer motions were significant. By contrast, the age-of-onset of youths against whom prosecutors currently filed EJJ motions versus transfer motions did not differ significantly on this indicator.

A juvenile's age at the time of the present offense constitutes an important variable in the waiver process because it indicates the length of time remaining to treat and control the youth within the juvenile system. Indeed, the primary rationale for the EJJ law was to enhance the authority of juvenile courts to impose longer dispositions on juveniles than previously available and thereby obviate the need to transfer some older delinquents. Accordingly, we examined the juveniles' age at the time of the offense that led to the filing of the motion to transfer to criminal court and EJJ motion. Under both the prior and current laws, the minimum age at which a prosecutor could file a waiver or EJJ motion is fourteen years of age. Previously, prosecutors filed very few transfer motions against fourteen- (3.0%)

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<sup>82</sup> David P. Farrington et al., *Advancing Knowledge About the Onset of Delinquency and Crime*, in 13 *ADVANCES IN CLINICAL CHILD PSYCHOLOGY* 283, 283 (1991).

<sup>83</sup> A youth's age at her first court appearance may not necessarily relate to a delinquency offense. Juveniles also may appear initially for matters related to dependency or neglect, CHIPS (Children in Need of Protective Services), status offenses, termination of parental rights or adoption issues.

or fifteen-year-old juveniles (7.3%) and lodged the majority of motions against seventeen-year-old youths (60.0%) whose dispositions at that time only could continue until age nineteen. By

**TABLE 5.**  
**CHARACTERISTICS OF OFFENDERS IN BOTH SAMPLES**

VARIOUS OFFENDER INDICATORS	TRADITIONAL CERTIFICATION LAWS	BLENDED SENTENCING LAWS		
	1986-1992 (N=330)	1995-1997		
		BEGAN AS AN EJJ MOTION (N=181)	BEGAN AS A CERTIFICATION MOTION (N=323)	TOTAL (N=504)
<b>AGE AT FIRST COURT APPEARANCE</b>				
Less than 12 years old	28.5%	14.4%	15.8%	15.3%
12 or 13 years old	32.1%	29.8%	29.1%	29.4%
14 or 15 years old	21.5%	34.8%	26.9%	29.8%
16 or older	17.9%	21.0%	28.0%	25.6%
<b>AGE AT PRESENT OFFENSE</b>				
14 years old	3.0%	17.2%	2.5%	4.1%
15 years old	7.3%	24.3%	9.0%	14.6%
16 years old	29.7%	30.9%	33.7%	32.8%
17 years old	60.0%	37.6%	54.8%	48.4%
<b>RACE OF JUVENILE</b>				
White	28.2%	23.2%	18.9%	20.4%
African American	55.2%	60.2%	63.8%	62.5%
Other Minority	16.7%	16.5%	17.3%	17.1%
<b>GENDER OF JUVENILE</b>				
Female	3.6%	11.6%	7.1%	8.6%
Male	96.4%	88.4%	92.9%	91.3%

contrast, after the adoption of the presumptive waiver and EJJ laws, prosecutors filed a larger proportion of transfer motions against somewhat younger juveniles (45.2% vs. 40.0%) and an even greater proportion of the previously-unavailable-EJJ motions against younger juveniles. More than two-out-of-five (41.5%) youths against whom prosecutors filed EJJ motions were only fourteen- or fifteen-years of age at the time of their offenses. The difference between the youths' age at offense for

which prosecutors filed EJJ motions versus transfer motions also was significant. Prosecutors filed EJJ motions more frequently against younger juveniles (41.5% vs. 11.5% of fourteen- and fifteen-year olds) and lodged certification motions against older youths (68.5% vs. 88.5% of sixteen- and seventeen-year olds). Taken together, the prosecutors' implementation of the new waiver and EJJ laws identified a significantly younger offender population than had the previous waiver practices (51.6% under age seventeen vs. 40%) for eligibility for transfer and for the imposition of EJJ stayed adult sentences.

Under the traditional certification law, prosecutors selected a disproportionate number of minority youths (72%) to face the threat of transfer to criminal court. Because the filing of a transfer or EJJ motion defines our samples, we were unable to examine whether there were racial disparities in the prosecutors' selection of youths against whom to file these motions. However, after we controlled for the seriousness of the offense, the use of a weapon, and other legally relevant variables, we did not find evidence of racial discrimination in judicial waiver decisions.<sup>84</sup> Under the new blended sentencing provisions, the racial disparity in the filing of transfer and EJJ motions became even more pronounced. Over 79% of the youth against whom prosecutors filed waiver and EJJ motions were members of racial minorities. Moreover, African American juveniles comprised almost the entire increase (7.3%) in the expanded filings against minority youths.<sup>85</sup> In our earlier research, we noted that

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<sup>84</sup> See Podkopacz & Feld, *End of the Line*, *supra* note 7, at 481; Podkopacz & Feld, *Judicial Waiver Policy and Practice*, *supra* note 7, at 155. We noted that:

In view of the disproportionate overrepresentation of minority youths against whom prosecutors filed reference motions, the fact that we did *not* find a positive effect for racial minorities [in transfer decisions] is an important finding. Our result is consistent with other multivariate analysis reporting that race did not appear to influence the reference decision, but which cautioned that the homogenous violent offender population in their study may have obscured the independent significance of race. Our research sample included a more heterogeneous group of offenders, and, like other recent multivariate analyses, we did not find racial bias in waiver decisions.

Podkopacz & Feld, *Judicial Waiver Policy and Practice*, *supra* note 7, at 155; *see also* Tammy Meredith Poulos & Stan Orchowsky, *Serious Juvenile Offenders: Predicting the Probability of Transfer to Criminal Court*, 40 *CRIME & DELINQ.* 3, 15 (1994) ("[O]ne of the more interesting results was that race did not emerge as a significant predictor of the transfer decision.").

<sup>85</sup> One caveat is that the information systems have not kept up with the migration/immigration patterns in Hennepin County. We are unable to distinguish be-

"[b]ecause minority, especially African-American, youths commit violent crimes at significantly higher rates than do white juveniles, proportionally even more minority juveniles will be eligible for and presumptively certified under the new law than under the previous discretionary system in which judges emphasized persistence rather than seriousness."<sup>86</sup> Apparently, this occurred, because the "other" racial category remained relatively constant between the two samples (16.7% previously and 16.2% currently). Under the new law, no significant differences appeared between the proportion of minority youths against whom prosecutors filed certification motions versus EJJ motions.

Although the vast majority of youths whom prosecutors sought to transfer were male, the percentage of females against whom they filed waiver and EJJ motions increased significantly under the new law and followed similarly national trends.<sup>87</sup> Under traditional certification laws, prosecutors filed only 3.6% of waiver motions against females; this proportion increased to 7.1% under the amended waiver law accompanied by the filing of 11.6% EJJ motions against female offenders. There was no significant difference by gender among the youths against whom prosecutors filed certification versus EJJ motions.

#### b) Present Offense

Table 6 reports the types of offenses with which prosecutors charged the youths against whom they filed certification and EJJ motions. Under the previous practice, prosecutors charged a few juveniles (2.7%) only with misdemeanors and the vast majority with felony level offenses. One amendment to the law limited prosecutors' authority to file certification or EJJ motions only for felony-level offenses. Under the previous law, prosecutors charged less than two-thirds (63.3%) of juveniles against whom they filed a certification motion with a felony offense against the person either alone or in conjunction with other felonies. By contrast, in our current sample they charged more than four-out-of-five (83%) of juveniles against whom they filed

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tween American blacks and East Africans who recently have moved into Hennepin County. However, discussions with probation officers indicate that this change in population composition is not reflected in the serious juvenile offender population.

<sup>86</sup> Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 176.

<sup>87</sup> See generally HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NAT'L REPORT (1999).

a certification motion with crimes against the person, a significant change in charging practices. Similarly, prosecutors charged about two-thirds (69.6%) of the youths against whom they filed EJJ motions with felonies against the person. Thus, the new waiver and EJJ laws' emphases on "public safety" and presumptive commitment offenses focused prosecutors' motioning practices primarily on violent offenders. Off-setting the significant increase in the filings of petitions and certification and EJJ motions alleging felony offenses against the person was a corresponding decrease in the proportions of youths charged with property felonies. Previously, prosecutors filed certification motions against about one-quarter (24.8%) of youths for offenses such as burglary whereas subsequently they filed less than one-in-twelve (7.7%) transfer motions against youthful property offenders.

The offenses with which prosecutors charged youths when they filed waiver motions versus EJJ motions differed significantly from each other. While prosecutors charged 83% of youths against whom they filed certification motions with felonies against the person, they only charged about two-thirds (69.6%) of youths against whom they filed EJJ motions with such offenses. By contrast, they charged proportionally about twice as many EJJ youths as certification youths with property felonies (15.5% vs. 7.7%), drug felonies (11.6% vs. 7.4%), and other felonies.

We used the presumptive commitment to prison criteria as another indicator of the seriousness of the current offense of juveniles against whom prosecutors filed certification and EJJ motions. In the past, prosecutors charged slightly more than half (55%) of the youths against whom they filed certification motions with presumptive commitment to prison offenses. Following the legislative adoption of the Sentencing Guidelines' presumptive waiver framework, prosecutors charged more than four-out-of-five (83.9%) youths against whom they filed waiver motions with presumptive commitment to prison offenses, a statistically significant increase in the seriousness of offenses. Similarly, prosecutors charged more than two-thirds (70.2%) of the youths against whom they filed EJJ motions with presumptive commitment to prison offenses. Corresponding to the prosecutorial emphasis on presumptive commitment to prison offenses and crimes against persons in the current group of youth, prosecutors also charged a larger proportion of youths with the



use of a weapon (67.2%) than under the previous practice (48.2%). Clearly, the adoption of the Sentencing Guidelines” presumptive commitment to prison framework and the “public safety” criteria for filing waiver and EJJ motions focused prosecutorial energy primarily on those youths who committed violent crimes.

**TABLE 6.**  
CHARACTERISTICS OF THE OFFENSE IN BOTH SAMPLES

VARIOUS OFFENSE INDICATORS	TRADITIONAL CERTIFICATION LAWS	BLENDED SENTENCING LAWS		
	1986-1992 (N=330)	1995-1997		
		BEGAN AS AN EJJ MOTION (N=181)	BEGAN AS A CERTIFICATION MOTION (N=323)	TOTAL (N=504)
<b>PRESENT OFFENSE—TYPE OF CHARGES</b>				
Misdemeanor offenses	2.7%	-	-	-
Other Felony	0.9%	3.3%	1.9%	2.4%
Drug Felony	8.2%	11.6%	7.4%	8.9%
Property Felony	24.8%	15.5%	7.7%	10.5%
Person Felony only	42.4%	54.1%	60.4%	58.1%
Person Felony plus other type of felonies	20.9%	15.5%	22.6%	20.0%
<b>PRESENT OFFENSE—NUMBER AND LEVEL OF CHARGES</b>				
Misdemeanor	2.7%	-	-	-
One Felony Charge	31.2%	48.1%	35.9%	40.3%
Two Felony Charges	24.2%	35.9%	31.3%	32.9%
Three Felony Charges	15.5%	8.8%	18.3%	14.9%
Four or More Felony Charges	26.4%	7.2%	14.6%	11.9%
<b>PRESENT OFFENSE—USE OF A WEAPON</b>				
Yes	48.2%	51.9%	67.2%	61.6%
No	51.8%	48.1%	32.8%	38.4%
<b>PRESENT OFFENSE—PRESUMPTIVE COMMIT OFFENSE</b>				
Female	55.0%	70.2%	83.9%	79.0%
Male	45.0%	29.8%	16.1%	21.0%

Despite this clear policy focus, prosecutors filed a larger proportion of waiver motions than EJJ motions against youths charged with presumptive offenses (83.9% vs. 70.2%) and weapons offenses (67.2% vs. 51.9%).

Another indicator of seriousness of the current offense includes the number of charges pending against the youth.<sup>83</sup> In the past, prosecutors charged over one-fourth (26.4%) of the youths against whom they filed certification motions with four or more felony charges compared with only one-seventh (14.6%) of the youths against whom they subsequently filed certification motions. Similarly, prosecutors charged nearly half (48.1%) of the youths against whom they filed EJJ motions with only a single felony offense, a substantial increase over the previous certification practice (31.2%). Unlike previous practice, under the "presumptive commitment" and "public safety" criteria, even one single violent crime apparently could trigger the filing of a certification or EJJ motion. However, prosecutors apparently did distinguish among youths when they filed EJJ and certification motions, charging a larger proportion of the latter youths with multiple offenses (51.9% vs. 64.1%).

### c) Prior Delinquency History

Although prosecutors charged more juveniles under the new law with serious current offenses, they filed transfer and EJJ motions against youths with much less extensive delinquency backgrounds than they had under the previous waiver law. Our earlier analyses of Hennepin County waiver practices emphasized the policy trade-off between a focus on persistence versus seriousness of offending and predicted that this would be the likely consequence of the legislative amendments. Specifically, we found that:

Under the former "prima facie case" discretionary reference statute, . . . the juvenile court primarily waived older chronic offenders with less regard to whether their present offense was a property felony or a crime of violence. The new presumptive certification statute accentuates "public safety," violent offenses, and weapons use, and shifts the waiver deci-

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<sup>83</sup> See Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185 (1989) (arguing that the number of offenses with which the state charges a youth provides one indicator of the seriousness of the case against the youth).

sion's focus from the cumulative<sup>89</sup> record of persistent offending to the seriousness of the present offense.

Under the previous practices, prosecutors filed certification motions against only 15.5% of youths with no prior delinquency adjudications and only 16.4% of those with only a prior misdemeanor record.<sup>90</sup> By contrast, two-thirds of juveniles had one or more prior felony convictions and more than one-quarter (27.0%) had three or more prior felony adjudications.<sup>91</sup> As we anticipated, the adoption of the "public safety" criteria in the certification and EJJ statutes, shifted prosecutors' emphases from persistence to seriousness. Under the new law, about one-third of youths against whom prosecutors filed waiver motions (32.8%) and EJJ motions (34.8%) had *no* prior delinquency adjudications and an additional fifth (waiver, 18.3% and EJJ, 20.4%) had only prior misdemeanor adjudications (Table 7). Thus, more than half of the youths against whom prosecutors filed certification motions (51.1%) and EJJ motions (55.2%) had never been convicted of a felony in the past. Conversely, while almost half (46.7%) of youths against whom prosecutors filed certification motions in the past had two or more prior felony convictions, only about one-quarter of the youths against whom prosecutors filed waiver motions (28.8%) or EJJ motions (22.6%) had substantial delinquency histories. While the youths in our current sample differed significantly from those in our previous study on the basis of their prior record of delinquency adjudications, the youths against whom prosecutors filed EJJ versus certification motions did not differ significantly from each other on this dimension. Thus, it does not appear that prosecutors identified a more chronic or sophisticated group of youths for certification rather than for EJJ motions.

We also examined the number of prior out-of-home placements youths received as delinquents because our previous research indicated that once youths exhausted the treatment resources available to the juvenile court, their likelihood of transfer increased.<sup>92</sup> Once youths received more than three out-of-home placements, their odds of transfer increased

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<sup>89</sup> Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 176.

<sup>90</sup> See Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

<sup>91</sup> See *id.*

<sup>92</sup> See *id.* at 172.

TABLE 7.  
CHARACTERISTICS OF PRIOR RECORD IN BOTH SAMPLES

VARIOUS PRIOR DELINQUENCY INDICATORS	TRADITIONAL CERTIFICATION LAWS	BLENDED SENTENCING LAWS		
	1986-1992 (N=330)	1995-1997		
		BEGAN AS AN EJJ MOTION (N=181)	BEGAN AS A CERTIFICATION MOTION (N=323)	TOTAL (N=504)
<b>PRIOR RECORD—PAST ADJUDICATIONS</b>				
None	15.5%	34.8%	32.8%	33.5%
Misdemeanor Only	16.4%	20.4%	18.3%	19.0%
One Felony	21.5%	22.1%	20.1%	20.8%
Two Felony	19.7%	11.6%	17.0%	15.1%
Three Felonies	27.0%	11.0%	11.8%	12.0%
<b>PRIOR RECORD—PRESUMPTIVE ADJUDICATIONS</b>				
No Prior Presumptive Adjudications	85.0%	92.8%	90.7%	91.5%
One or More Prior Presumptive Adjudications	15.0%	7.2%	9.3%	8.5%
<b>PRIOR RECORD—TYPE OF PRIOR ADJUDICATIONS</b>				
None	15.5%	34.8%	33.1%	33.7%
Misdemeanor Only	16.4%	14.4%	14.2%	14.3%
Other Felony	.9%	6.6%	5.0%	5.6%
Weapon Felony	Not coded	4.4%	4.6%	4.6%
Drug Felony	3.9%	1.1%	4.6%	3.4%
Property Felony	35.5%	21.5%	22.9%	22.4%
Person Felony	8.8%	7.2%	6.2%	6.5%
Person Felony plus other Felonies	19.1%	9.9%	9.3%	9.5%
<b>PRIOR RECORD—DELINQUENT OUT OF HOME PLACEMENTS</b>				
None	33.6%	55.2%	51.4%	52.8%
One Prior Out of Home Placement	13.9%	17.7%	17.0%	17.2%
Two Prior Out of Home Placements	10.0%	13.3%	12.1%	12.5%
Three Prior Out of Home Placements	10.3%	4.4%	9.3%	7.5%
Four Prior Out of Home Placements	13.0%	3.3%	5.3%	4.6%
Five or More Prior Out of Home Placements	19.1%	6.1%	5.0%	5.4%

significantly.<sup>93</sup> Previously, about one-third (33.6%) of the youths against whom prosecutors filed transfer motions had not received a delinquency disposition placement outside of their homes and nearly one-third (32.1%) had received four or more prior out-of-home placements. By contrast, under the new laws, more than half of the youths against whom prosecutors filed waiver motions (51.4%) and EJJ motions (55.2%) had received *no* prior out-of-home delinquency dispositions and fewer than one in ten (10.3%, waiver, and 9.4%, EJJ) had “exhausted” juvenile treatment resources and received four or more prior out-of-home dispositions. Quite clearly, prosecutors’ emphasis on the seriousness of the current offense was matched by a corresponding de-emphasis of youths’ records of persistent offending and prior treatment.

Although the legislature intended the EJJ statute to give serious young offenders “one last chance” for rehabilitation, the Hennepin County prosecutors apparently have converted the EJJ law into one that is both a “first and last chance” for over half of the youths against whom they filed motions. Under the new blended sentencing laws, prosecutors filed waiver and EJJ motions against younger and less chronic offenders but whom they more often charged with committing a serious felony against the person. Again, although the youths in our current sample differed significantly from those in the previous study on the basis of their prior exposure to delinquency dispositions, the certification and EJJ juveniles did not differ significantly from each other on this dimension.

### *3. Effect of Presumptive Waiver and EJJ Laws on Juvenile Justice Administration*

Our previous research examined the administrative process by which juvenile court judges made waiver decisions and the role of clinical and psychological evaluations on those judgments. Again, our analyses of the implementation of the new laws compare how they affected juvenile justice administration.

#### a) Court Services Reports

An analysis of the 1995 legislative changes predicted that the adoption of the presumptive waiver and EJJ sentencing pro-

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<sup>93</sup> *Id.* at 153.

visions would not obviate the need for individualized clinical assessments similar to those that occurred under the previous "amenability to treatment" framework. "[T]rial judges in certification hearings must still determine whether a youth is amenable to an EJJ probationary disposition. Despite the legislature's emphasis on 'public safety' and 'proportional sentencing,' a substantial degree of individualized sentencing discretion remains inherent in presumptive certification."<sup>94</sup>

In fact, juvenile court judges requested more resources from court service departments (Probation and Psychological Services) under the new laws than they had previously under traditional certification laws. Under the prior waiver law, judges requested full probation studies in fewer than half (43%) of the waiver cases.<sup>95</sup> By contrast, judges requested probation studies for more than half (56%) of those juveniles against whom prosecutors filed EJJ motions and more than three quarters (78%) of those against whom they filed transfer motions (Table 8). In addition, of the youths previously considered for certification, judges received full psychological evaluations on fewer than half (46%) as compared with about half (49%) of the youths against whom prosecutors filed EJJ motions and three quarters (75%) of those against whom they filed transfer motions. The use of these clinical and court resources to make transfer and EJJ decisions represent a significant *increase* over the previous waiver practice. The judicial system used these resources significantly more often to make waiver decisions than EJJ decisions. Apparently, the "stream-lined" presumptive waiver process did not obviate the need for individualized clinical inquiries and actually increased it.

The introduction of more clinical evaluations into the EJJ sentencing and waiver process also appears to have fostered more dissensus among the professionals about appropriate disposition. Under the previous waiver practice, probation officers and psychologists offered dispositional recommendations in less than half the cases (46%), but agreed with each other on the proper outcome in the vast majority of cases in which they of-

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<sup>94</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1033.

<sup>95</sup> Podkopacz & Feld, *End of the Line*, *supra* note 7, at 466 tbl.2; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 137 tbl.10.

ferred recommendations and differed only 3% of the time.<sup>96</sup> As clinicians made more recommendations about more possible dispositional outcomes—ordinary delinquent, EJJ and waiver—the opportunities for professional disagreement increased as well with disagreements about waiver recommendations occurring 10% of the time.<sup>97</sup>

TABLE 8.  
COURT SERVICES REPORTS

ANCILLARY COURT SERVICES INDICATORS	TRADITIONAL CERTIFICATION LAWS	BLENDED SENTENCING LAWS		
	1986-1992	1995-1997		
	(N=330)	BEGAN AS AN EJJ MOTION (N=181)	BEGAN AS A CERTIFICATION MOTION (N=323)	TOTAL (N=504)
<b>PROBATION FIELD STUDY COURT ORDERED AND CONDUCTED</b>				
Yes	43%	56%	78%	70%
No	57%	44%	22%	30%
<b>PSYCHOLOGICAL EVALUATION COURT ORDERED AND CONDUCTED</b>				
Yes	46%	49%	75%	66%
No	54%	51%	25%	34%
<b>AGREEMENT/DISAGREEMENT AMONG COURT PROFESSIONALS</b>				
Juvenile Court Recommendations	16%	17%	3%	8%
Blended Sentencing—EJJ Recommendation	Not available	31%	41%	37%
Adult Court Recommendation	26%	Not available	19%	12%
Professionals disagree	3%	5%	10%	8%
No recommendation	54%	48%	27%	35%

<sup>96</sup> Podkopacz & Feld, *End of the Line*, *supra* note 7, at 466 tbl.2; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 137 tbl.10.

<sup>97</sup> Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 147 tbl.16.

## b) Type of Juvenile Dispositions

Recall from Table 3 that juvenile court judges imposed "blended sentence" EJJ dispositions on about half (49.4%) of all youths against whom prosecutors filed certification or EJJ motions. This sentencing option significantly "widened the net" for enhanced sentencing of youths whom judges previously would not have transferred to criminal courts.

TABLE 9.

## TYPE OF JUVENILE DISPOSITIONS FOR THOSE YOUTH HANDLED IN JUVENILE COURT

(Includes only those youth adjudicated delinquent)

JUVENILE DISPOSITIONAL OPTIONS	TRADITIONAL CERTIFICATION LAWS	BLENDED SENTENCING LAWS	
	1986-1992	1995-1997	
	ORDINARY JUVENILES (N=99)	ORDINARY JUVENILES (N=105)	BLENDED SENTENCING EJJ JUVENILES (N=240)
<b>TYPE OF DISPOSITIONAL PLACEMENT</b>			
Correctional Placement <sup>a</sup>	63%	40%	58%
Residential Treatment Center <sup>b</sup>	23%	45%	33%
Probation (fines, worksquad, etc.)	14%	15%	9%

<sup>a</sup> Secure, long-term (18 months or more) juvenile facility such as: MN State training schools, Hennepin County Home School (JMOP and Sex Offender programs) and all out-of-state facilities are included in this category.

<sup>b</sup> Residential Treatment Centers include non-secure placements such as work camps, short-term county facilities.

Table 9 compares the dispositions of those youths who received juvenile dispositions either as ordinary delinquents or as EJJ's under both laws. We grouped the juvenile dispositions into three categories: correctional (i.e., secure, long-term facilities), residential treatment centers (RTC) (shorter-term, less-secure), and probation. Both of the first two options include a significant treatment component for juveniles. In the past, juvenile court judges placed the vast majority (63%) of the youth whom



they retained in juvenile court in a correctional setting—a secure, longer-term (18 months or more) facility. Under the new legislation, a far smaller proportion of ordinary delinquents (40%) and a somewhat smaller proportion of EJJ youths (58%) received the most severe juvenile placement. Clearly, the court recognized a difference between the EJJ youths and ordinary juveniles in their ultimate dispositions under the new legislation. However, the juvenile court judges imposed less severe dispositions on the EJJ youths than they previously had given to ordinary juveniles, even though they deemed these EJJ youths serious enough to impose a stayed adult prison sentence.

The youths for whom judges use the blended sentencing alternative receive more extensive juvenile court resources than do ordinary delinquents. The Hennepin County probation office staffed a special unit to supervise youths sentenced in the EJJ category and likened the allocation of probation resources to parole supervision rather than regular juvenile probation. The office assigned a probation officer and a community specialist to each juvenile sentenced under the EJJ provisions.<sup>98</sup> As a condition of juvenile probation, judges can sentence EJJ youths to an out-of-home placement. Although the probation officer contacts the EJJ youth during program placement, probation supervision begins following release and during aftercare. Initially, probation officers contact EJJ youths a minimum of four times per week and gradually decrease contacts with the passage of time and based on good behavior. During the course

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<sup>98</sup> See pamphlet prepared by HENNEPIN COUNTY DEP'T OF COMMUNITY CORRECTIONS, EXTENDED JURISDICTION JUVENILE (on file with authors), describing the characteristics of EJJ programming:

EJJ clients will receive supervision and services from a team consisting of a probation officer and a community specialist. Clients will be highly supervised by multiple face-to-face contacts and phone contacts. Additionally, clients are subject to supervision with electronic monitoring and probation visits from a team consisting of a probation officer and a police officer.

EJJ clients will have an individualized contract that will detail expectations, which will include, but are not limited to the following:

- may be expected to successfully complete both residential and/or community based treatment programs
- are required to attend weekly group sessions that focus on education, accountability, and support
- are required to work toward a high school diploma or GED and are encouraged to work towards a secondary degree
- are required to maintain employment for the duration of the EJJ program.

of the extended juvenile court jurisdiction supervision, probation arranges placement in job training programs, mentor programs, and transitional living facilities to help youths acquire educational, vocational and life skills and to prepare for independent living. Community specialists were created to include community resources and the parents in the decision-making process.<sup>99</sup> They identified community resources and collaborated with probation officers. In these respects, EJJ supervision reflects many elements characteristic of intensive probation and supervised parole release programs which emphasize control as well as rehabilitation.<sup>100</sup>

### c) Contested Hearings

Our earlier research on transfer practices reported that contested waiver hearings occurred in less than one-in-twelve (8%) of the cases in which prosecutors filed waiver motions. The vast majority of juveniles entered into plea agreements which resolved both the waiver or retention decision and the adult criminal sentence or juvenile disposition. Typically, the litigated reference hearings involved younger offenders charged with the most serious crimes and with very few prior exposures

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<sup>99</sup> See pamphlet prepared by HENNEPIN COUNTY DEP'T OF COMMUNITY CORRECTIONS, EXTENDED JURISDICTION JUVENILE (on file with authors), describing the role of the Community Specialist:

The community specialist was created to involve both community resources and parents of EJJ clients into the decision-making process. Their input in case planning incorporates the voices and viewpoints of the community.

Primary responsibilities are:

- to collaborate with the juvenile probation officer to provide a second opinion and/or viewpoint at each phase
- to assist the parents or guardian with information gathering, clarifying expectations, developing clear lines of communication with the probation office and the Court system, and helping the parents become a part of the decisions that affect their sons and daughters
- to identify community resources such as transitional housing, educational programs, mentoring programs, etc., and present options for the EJJ clients, parent, probation officer and the Court to consider.

<sup>100</sup> See, e.g., Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, in 17 CRIME & JUSTICE 281, 282 (1993) (discussing the elements of a generic intensive supervision program include "some combination of multiple weekly contacts with a supervising officer, unscheduled drug testing, strict enforcement of probation or parole conditions, and requirements to attend treatment, to work, and to perform community service.")

to juvenile correctional resources.<sup>101</sup> We concluded that the negotiated "waiver" package-deals reflected the courtroom working group's understanding of the "going rate" for waiver outcomes based on age, offense, and prior record, and juveniles litigated reference hearings when no working-group consensus existed about the appropriate "going rate."

Although contested waiver and EJJ hearings remain the exception, rather than the rule, they have become significantly more prevalent under new "stream-lined" presumptive laws. Of those youths against whom prosecutors filed EJJ motions, thirteen percent sought a judicial hearing on their status. Recall from Table 2, that prosecutors designated about half of the youths (47.5%) against whom they filed EJJ motions under the presumptive criteria (Option 2) which did not entitle them to any judicial hearing on their EJJ status. So, about one-quarter (25.2%) of those youths eligible for a judicial hearing on their threat to "public safety" actually received a contested EJJ determination replete with clinical evaluations. Similarly, the proportion of youths who litigated the transfer decisions nearly doubled (8% versus 15%) after the adoption of the "stream-lined" presumptive waiver framework (Table 10).

This increase in contested proceedings is consistent with our earlier waiver analyses that reported that the younger juveniles charged with very serious offenses and without substantial

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<sup>101</sup> See Podkopacz & Feld, *Judicial Waiver*, *supra* note 7, at 135, where we noted that:

The contested cases typically involved younger offenders, charged with very serious crimes, and who had very little prior exposure to juvenile treatment resources. . . . Prosecutors charged with presumptive offenses virtually all (96%) of the juveniles who requested contested hearings and charged more than two-thirds (70%) of them with homicide. These juveniles also faced more criminal charges . . . . Because most of these juveniles had less extensive prior records, they also experienced less juvenile court treatment intervention.

Our earlier analyses concluded that:

the vast majority of reference cases (over 90%) are plea-bargained "package deals" in which the prosecutor, defense attorney, and judge informally negotiated and decided whether or not to waive, and the subsequent juvenile and adult sentences. In part, these negotiations take place under the shadow of the courtroom working group's understanding of the "going rate" for different patterns of age, offense, and prior record. The litigated reference hearings, by contrast, occur in instances in which the "going rate" is less clear. Because age and prior program placements established the "going rate," litigated waiver hearings more often involved younger juveniles with fewer prior adjudications or program placement who were charged with a very serious offense.

*Id.* at 174.

delinquency histories or correctional interventions challenged their transfer motions more frequently. As Tables 5, 6 and 7 indicated, prosecutors filed a significantly larger proportion of transfer motions against younger juveniles charged with serious crimes and with fewer prior delinquency dispositions.

TABLE 10.  
METHOD OF REACHING COURT CONCLUSION

LITIGATED FULL HEARINGS	TRADITIONAL CERTIFICATION LAWS  1986-1992  (N=330)	BLENDED SENTENCING LAWS 1995-1997	
		BEGAN AS AN EJJ MOTION  (N=181)	BEGAN AS A CERTIFICATION MOTION  (N=323)
METHOD OF REACHING COURT CONCLUSION			
Litigated Hearing	8%	13%	15%
Child Waived Hearing	92%	87%	96%

C. SIGNIFICANT VARIABLES IN JUDICIAL DECISION TO CERTIFY AND TO IMPOSE EJJ DISPOSITION

Our previous research reported that characteristics of the offense, the offender, and the judicial system all produced independent and significant influences on which youths would remain in the juvenile justice system and which youths judges would transfer to adult court. Specifically, we found that youths who were seventeen years old, those whom prosecutors charged with a felony offense against the person and who used a firearm, those with more charges on the present offense, and those who had four or more prior out-of-home placements all had significantly higher odds of being transferred to adult court.<sup>102</sup> In addition, we reported that if the probation officer and court psychologist agreed that the youth should be transferred and if

<sup>102</sup> Podkopacz & Feld, *End of the Line*, *supra* note 7; Podkopacz & Feld, *Judicial Waiver*, *supra* note 7.

one judge, in particular, heard the case, then the odds of a youth's transfer to adult court also increased. Even though a disproportionate number of male and minority youths faced waiver motions, race and gender did not significantly affect decisions at this stage in the juvenile justice system after controlling for other variables.

Under the presumptive certification and EJJ legislation, some of these variables remained significant, some factors changed, and some we could not compare directly due to the differences introduced by the new laws. Table 11 describes the factors that remained significant following adoption of the presumptive certification and blended sentencing laws. These variables reflect offender, offense, and justice system characteristics. Table 11 shows each indicator by the type of motion originally chosen by the prosecutor and by the final court decision.

### *1. Beginning as an EJJ Motion*

Recall that prosecutors could file an EJJ motion either to presumptively designate older serious offenders as EJJ's or to initiate a judicial "public safety" hearing to determine a youth's EJJ or delinquency status (Table 1, Options 1 and 2; Table 2). A larger proportion of those youths who remained under juvenile court jurisdiction as ordinary delinquents were younger (14 or 15 years old) than those youth placed in the EJJ category, many by prosecutorial designation. Similarly, court services professionals were less likely to have recommended an EJJ disposition for those youths whom judges sentenced as ordinary delinquents. Moreover, youths sentenced as ordinary delinquents were far more likely to be charged with a non-presumptive commitment offense than were those youths sentenced as EJJ's (38.3% vs. 20.7%) and to have had fewer prior correctional placements (.91 vs. 1.21) (Table 11). By contrast, the youths sentenced under the EJJ blended sentencing provisions more often were charged with a presumptive commitment to prison offense and had used a weapon (60.9% vs. 40.4%), had a higher average number of prior out-of-home placements, and were older than those youths disposed of as ordinary delinquents (85.0% vs. 58.5% were sixteen or seventeen years of age).

2. *Beginning as a Certification Motion*

Recall that prosecutors could file a waiver motion either to presumptively certify an older serious offender or to obtain a judicial "public safety" hearing to determine a youth's adult, EJJ or delinquency status (Table 1, Options 3 and 4; Table 2). Recall that for those youths against whom prosecutors filed a presumptive certification motion, an EJJ blended sentence remained the only alternative disposition to adult criminal prosecution. In our sample, prosecutors charged 240 youths under the presumptive certification law and 82 under the non-presumptive certification section.

**TABLE 11.**  
VARIABLES USED IN MULTIVARIATE ANALYSIS OF JUDICIAL DECISION  
UNDER BLENDED SENTENCING

INDICATORS USED IN MULTIVARIATE ANALYSIS	BEGAN AS A EJJ MOTION N=181		BEGAN AS A CERTIFICATION MOTION N=323		
	JUVENILE COURT DECISION	BLENDED SENTENCE DECISION	JUVENILE COURT DECISION	BLENDED SENTENCE DECISION	ADULT COURT DECISION
<b>AGE</b>					
14-15 years old	41.5%	14.8%	12.7%	9.9%	5.1%
16 years old	20.2%	37.9%	20.6%	42.0%	19.4%
17 years old	38.3%	47.2%	66.7%	48.1%	75.5%
<b>COURT SERVICES RECOMMENDATION</b>					
EJJ recommendation	18.1%	44.8%	25.4%	64.8%	10.2%
Non-EJJ recommendation	81.9%	55.2%	74.6%	35.2%	89.8%
<b>PRESUMPTIVE OFFENSE- WEAPON</b>					
Non-presumptive offense	38.3%	20.7%	30.2%	4.9%	25.5%
Presumptive-No weapon	21.3%	18.4%	20.6%	18.5%	22.4%
Presumptive-Weapon Use	40.4%	60.9%	49.2%	76.5%	52.0%
<b>PRIOR OUT-OF-HOME PLACEMENTS</b>					
Average number of placements	.91	1.21	.98	.91	1.93

Those youths whom judges placed in the EJJ category rather than waived to criminal court were most often 16 years old and the probation and psychological services departments

agreed that this was the appropriate placement. Prosecutors charged most of these EJJ youths with presumptive commit offenses with weapon use, although they had fewer prior correctional placements than either the transferred youths or those sentenced as ordinary delinquents.

By contrast, the youths whom judges transferred to adult court were most often seventeen-year olds and for whom the court professionals did not recommend an EJJ disposition. Prosecutors charged over half of these youth with presumptive commit to prison offenses with use of a weapon, and the waived juveniles had the highest average prior out-of-home placement of any of the groups identified.

The cases of youth who remained in juvenile court as ordinary delinquents following the filing of a certification typically presented evidentiary problems that necessitated the prosecutors to withdraw their transfer motion. In 81% of the cases of youths who remained in juvenile court as ordinary delinquents, prosecutors initially filed a certification motion and then subsequently withdrew it. The significant indicators for these "ordinary delinquents" look very similar to the youth transferred to adult court—they are older (17 years old), court professionals did not recommend an EJJ disposition for three-quarters (74.6%) of them, and prosecutors charged about half (49.2%) with a presumptive commit to prison offense with weapon use. These youth had a higher average number of prior out-of-home placements (.98) than the youth kept in the EJJ blended category (.91) but not as many as the transferred youth (1.93).

### 3. *Multivariate Analysis of Judicial Decision*

Because prosecutors' choice of EJJ or waiver motions implicate different dispositional options, we analyzed two separate logistic regression equations. For youths who began the process as an EJJ motion, a binary logistic regression is appropriate because the dependent variable has only two options: retain the youth in juvenile court as an ordinary delinquent or place him in the blended EJJ category. By contrast, the youth against whom prosecutors file certification motions face three distinct judicial outcomes: retain in juvenile court as an ordinary delinquent, place in the blended EJJ category, or transfer to adult court. For this analysis, multinomial logistic regression is appropriate. Table 12 shows the results of using the same indicators for the two different populations in our study.

## a) EJJ Motions

The column on the left shows the results for those youths against whom prosecutors filed an EJJ motion. As we saw in Table 11, fourteen and fifteen year old youths had significantly increased odds (1.853) of being sentenced in juvenile court as ordinary delinquents rather than as EJJs when compared with seventeen year-old juveniles after controlling for the other factors in the model. Youths for whom court professionals recommended placement in the blended EJJ category had significantly decreased odds (-1.918) of being sentenced in juvenile court as ordinary delinquents. Youths whom prosecutors charged with non-presumptive commit to prison offenses enjoyed significantly increased odds (2.016) of being sentenced in juvenile court as ordinary delinquents. Finally, youths who had more prior out-of-home placements had significantly decreased odds (-.298) of being sentenced in juvenile court as ordinary delinquents. Thus, when prosecutors filed EJJ motions, the youths sentenced as delinquents rather than as EJJs tended to be: younger, charged with a non-presumptive commit to prison present offense, with fewer out-of-home placements prior to this offense, and for whom court professionals recommended sentencing as ordinary delinquents. In part, this pattern reflects the fact that prosecutors automatically designated nearly half (47.5%) of the EJJ youths under the presumptive commitment criteria (Table 2).

## b) Certification Motions

Table 12 presents three columns for those youths against whom prosecutors filed certification motions—one for each of the possible comparison outcomes. First, we compare the youths whom judges placed in the blended EJJ category and those whom they transferred to adult court (the middle category). Sixteen year-old youths had significantly increased odds (.818) of being placed in the EJJ category rather than being transferred when compared with seventeen year-old youths. If the court services professionals recommended a youth's placement into the blended EJJ category, then the youth had significantly increased odds (2.513) of receiving an EJJ disposition rather than being transferred. The youth with more previous out-of-home placements had reduced odds (-.172) of being placed in the EJJ category rather than being transferred. Those youths who did not use a weapon or whom prosecutors did not



**TABLE 12.**  
**MULTIVARIATE ANALYSES UNDER BLENDED SENTENCING**

Judicial Decision	Starting as an EJJ Motion Binomial Logistic Regression N=181		Starting as a Certification Motion Multinomial Logistic Regression N=323											
	Juvenile Versus EJJ		Juvenile Versus Adult		EJJ Versus Adult		EJJ Versus Juvenile							
	B	Exp (B)	B	Exp (B)	B	Exp (B)	B	Exp (B)						
Intercept	-1.64													
Age at Offense														
14-15 years old at offense	1.853 <sup>a</sup>	6.381	.347	1.415	.009	.999	-.348	.706						
16 years old at offense	-.323	.724	.104	1.110	.818 <sup>a</sup>	2.266	.714 <sup>a</sup>	2.042						
17 years old (comparison)	0	.	0	.	0	.	0	.						
Court Services Recommendation														
Blended Sentence Agreement	-1.918 <sup>a</sup>	.147	.993 <sup>b</sup>	2.700	2.513 <sup>a</sup>	12.345	1.520 <sup>a</sup>	4.572						
Other (comparison)	0	.	0	.	0	.	0	.						
Offense Characteristics														
Non-presumptive offense	2.016 <sup>a</sup>	7.508	.649	1.914	-1.250 <sup>a</sup>	.286	-1.900 <sup>a</sup>	.150						
Presumptive offense- No weapon	.562	1.754	-.134	.875	-.735 <sup>b</sup>	.480	-.601	.548						
Presumptive-Weapon (comparison)	0	.	0	.	0	.	0	.						
Prior out-of-home placements	-.298 <sup>a</sup>	.742	-.286 <sup>a</sup>	.752	-.172 <sup>a</sup>	.842	.114	1.121						
-2 Log Likelihood	118.158		226.950											
Chi-Square	57.691		129.132											
p (Chi-Square)	.000		.000											

<sup>a</sup> p<.01, <sup>b</sup> p<.05, <sup>c</sup> p<.10

charge with a presumptive commit offense had reduced odds (-1.250 and -.735, respectively) of being sentenced in the EJJ category rather than being transferred.

The next column compares those juveniles sentenced as EJJ youths with those sentenced in juvenile court as ordinary delinquents. Sixteen year-old youths had increased odds (.714) of being placed in the EJJ category rather than sentenced as delinquents compared with seventeen year-old youths. When court services professionals recommended a youth's placement in the EJJ category, the odds of that happening increased significantly (1.520). Finally, youth whom prosecutors charged with a non-presumptive offense had significantly reduced odds (-1.900) of being placed in the EJJ category.

When we compared those youth retained in juvenile court as ordinary delinquents and those transferred to adult criminal court, only two variables appeared significant: court service recommendations and prior out-of-home placements. When the probation officer and court psychologist recommended an EJJ placement, the odds (.993) increased significantly that the judge would retain the youth in juvenile court. When a youth had a higher number of prior delinquent out-of-home placements, the odds (-.286) decreased significantly that the judge would retain the youth in juvenile court. This comparison of juvenile versus adult status contains youths whose legal and offense characteristics—age, presumptive commitment offense, weapon use—suggest that judges would be more likely to transfer them to criminal court (Table 11). Recall that when prosecutors filed a certification motion against older juveniles charged with a presumptive commitment offense (Table 1, Option 4), the judge did not retain the option to sentence the youth in juvenile court as an ordinary delinquent. For these presumptive certification youths, the juvenile court only could sentence these offenders as juveniles if the prosecutor withdrew the certification motion, for example, if the prosecutor's case was substantially weakened because of evidentiary deficiencies such as the absence of a crucial witness, loss of evidence, or an inability to introduce evidence. Apparently, many of these youths against whom prosecutors initially filed a certification motion ultimately remained in juvenile court for evidentiary or trial reasons unrelated to their appropriateness for transfer after prosecutors withdrew their transfer motions.

When prosecutors filed certification motions, juvenile court judges generally placed into the EJJ category youths who were sixteen years of age, whom prosecutors charged with a presumptive commitment present offense with weapon involvement, and who had fewer prior out-of-home placements and for whom the court professionals recommended EJJ probation. Those youths whom judges transferred to adult court tended to be seventeen years old, to have had significantly more prior out-of-home placements, and for whom court services recommended that adult court was the more appropriate option. Thus, within the constraints created by prosecutors' charging and motions policies, judicial transfer practices appeared to reflect the legislature's intent to reserve waiver for older, more sophisticated youths and EJJ dispositions for somewhat younger and more "amenable" juveniles.

Both models—the binary and the multinomial—show a significant Chi-Square, which indicates that the final model is significantly better than the intercept-only model.<sup>103</sup> In addition, as in our previous analyses of traditional waiver legislation, race and gender are not significant variables in judicial decision-making. Although our earlier waiver research reported a "judge effect,"<sup>104</sup> under the new law, the judge who handled the case did not appear to be a significant factor in the processing of juveniles. Rather, it appears that the "presumptive certification" law produced more consistent and standardized decisions. In part, this standardization likely reflects the imposition of the Sentencing Guidelines' structure on juvenile case charging, processing, and dispositional decision-making. In addition, during the period of this study, judges rotated from criminal court to juvenile court more frequently than had occurred in the past. This judicial rotation and their shorter juvenile court tenure may have influenced juvenile sentencing philosophies because these judges brought their adult court sentencing practices with them from the criminal court. Finally, the number of charges

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<sup>103</sup> ALFRED DEMARIS, *LOGIT MODELING: PRACTICAL APPLICATIONS* (1992).

<sup>104</sup> See Podkopacz & Feld, *End of the Line*, *supra* note 7, at 472-73 (explaining that under the traditional, individualized waiver law, the philosophy and policies of the presiding judge affected waiver rates). We concluded that "within the same urban county and court, the various judges decided the cases of similarly-situated offenders significantly differently. These judicial differences influenced both the characteristics of youths waived or retained, and the subsequent sentences imposed on them as juveniles or adults." *Id.* at 492.

against youth no longer appeared as a significant factor. We attribute this finding to the reduced variation in the present offense category. Under the prior certification law, prosecutors charged nearly 25% of the youths with property felonies and typically alleged more offenses when a property felony was the most serious crime they charged. Under the new law, prosecutors filed certification motions against nearly 80% of the youth for felonies against people.

#### D. YOUTHS SENTENCED AS DELINQUENTS, EJJ, AND AS ADULTS IN CRIMINAL COURT

Recall from Table 3, prosecutors filed certification and EJJ motions against a total of 504 juveniles. Over the three year period of our study, juvenile court judges transferred 98 (19.4%) youths to criminal court and retained 406 (80.6%) in juvenile court for disposition either as ordinary delinquents or as EJJ. Of those retained in juvenile court, judges sentenced 157 (38.7%) as ordinary delinquents and more than half, 249 (61.3%), in the new EJJ category. Table 13 reports the subsequent conviction, sentence, sentence modification, and probation revocation experiences of those youths processed as ordinary delinquents, EJJ, and adults.

The juvenile court convicted about two-thirds (66.9%) of those youths retained in juvenile court and processed as ordinary delinquents. We attribute this low proportion of convictions to certain case characteristics. Recall from our interpretation of Tables 11 and 12, juvenile courts retained as ordinary delinquents some youths against whom prosecutors initially filed presumptive certification motions and then subsequently withdrew their motions for evidentiary deficiencies. Prosecutors did not seek to have these cases transferred or subject to an EJJ jury trial for the same reasons as eventually led to dismissals or acquittals in juvenile court.

Of those youths who received delinquency dispositions, juvenile court judges "re-tuned" one-fifth (20%) of those initial sentence within two years. "Re-tuning" does not imply a subsequent offense or probation violation but rather an adjustment in the disposition to assure a better fit between the juvenile's treatment needs and the characteristics of the program to which the court sentenced the youth originally. For example, judges may transfer youths from one facility to another program, which

TABLE 13.  
PERCENT CONVICTED, REVOKED OR RE-TUNED BY TYPE OF SENTENCE IMPOSED

Type of Disposition Imposed	Percent Convicted	Percent Re-tuned* After Two Years	Percent Stayed Sentence Imposed (Number)	Percent Revoked After Two Years	Average Number of Warrants Filed by Probation***
Juvenile Sentences Only (N=157)	66.9% (105)	20% (21)	-NA-	-NA-	.65
Blended Sentences (N=249)	96.4% (240)	22.9% (55)	100.0% (240)**	35.3% (84)	1.2
Adult Sentences Only (N=98)	93.9% (92)	8.7% (8)	44.6% (41)	43.9% (18)	1.3

\* Re-tuned indicates a change of disposition to a second placement due to a lack of fit between the program and the youth. In the Juvenile realm, this would be a second juvenile program. In the Blended realm, this would also be a second juvenile program but NOT an adult program. In the Adult realm, re-tuning might be adding other court conditions (fines, urinalysis testing, community service) or changing to a second treatment program.

\*\* Although 240 youth were designated as EJJ, two youth did not have the opportunity to be revoked due to their death/vegetative state. Therefore the revocation percentages for the EJJ categories are based on 238 youth.

\*\*\* No statistical difference between the average number of warrants filed for EJJ-Blended Sentences youth and those youth certified to adult court but given a stayed sentence. The average number of warrants for those youth retained in Juvenile Court were significantly lower than either the EJJ youth or the certified youth.

is more appropriate for treatment or if they discover that rival gang members already are placed in the first facility.

In contrast with the ordinary delinquents, the juvenile and criminal courts subsequently convicted virtually all of the youths processed as EJJ's (96.4%) or as adults (93.9%). Under the blended sentencing statute, the youths convicted as EJJ's received two dispositions—a juvenile probationary disposition and a stayed adult criminal sentence. For virtually all these EJJ youths (91%), the juvenile treatment disposition included commitment to a correctional placement or residential treatment center (Table 9). Because the purpose of the juvenile probationary disposition was to provide EJJ youths with "one last chance" for treatment, juvenile court judges subsequently "re-tuned" one-fifth (22.9%) of these dispositions, a rate similar to that for ordinary delinquency sentences. By contrast, criminal court judges "re-tuned" less than one-in-ten (8.7%) of the sentences they imposed on youths convicted in criminal court.

Every EJJ youth received a stayed adult criminal sentence in addition to their juvenile probationary disposition, which was the legislative purpose of the EJJ status. By contrast, criminal court judges immediately sentenced to prison more than half (55.4%) of youths tried as adult, and stayed the criminal sentences of fewer than half (44.6%) of the transferred youths.

### *1. EJJ Probation Revocation*

When Minnesota adopted the EJJ law, the members of the Juvenile Justice Task Force, the legislature, and the Sentencing Guidelines Commission recognized that of all of the statutory changes enacted, the EJJ provisions had the largest potential bed-space impact on adult facilities depending upon patterns of probation violations and judicial revocation practices. However, because no previous history existed by which to estimate the rate at which judges would revoke EJJ youths' juvenile probation and execute their stayed adult prison sentences, the Sentencing Guidelines Commission could not estimate the precise effect of these changes.

The Minnesota Sentencing Guidelines Commission candidly noted that "because this bill includes new policies which are substantially different than the existing system, it is difficult to precisely estimate the impact. Estimating the impact of the legislation is further complicated by the difficulty in predicting

prosecutorial and judicial practices for these cases.” With respect to EJJ probation revocations, the Guidelines Commission cautioned: “The impact of this [EJJ] provision on the adult prison system will depend on the frequency with which the juveniles violate their conditions or commit new offenses. It is estimated that the impact could range from 130 beds (if 10% are revoked) to 326 (if 25% are revoked).”<sup>105</sup>

Table 13 reports the subsequent revocation experience of youths sentenced under the EJJ provisions. Probation officers filed an average of 1.2 warrants against youths sentenced as EJJs, a rate comparable to that filed against youths convicted in criminal court (1.3), and about double the number of warrants filed against youths sentenced as ordinary delinquents (.65). Of those youths against whom probation officers filed warrants, juvenile courts judges revoked the probation of more than one-third (35.3%) of those youths sentenced as EJJs. This proportion was somewhat lower than the proportion of certified youths whose probation judges revoked within two years (43.9%), but substantially higher than the rate of revocation anticipated by the Juvenile Justice Task Force, the legislature, or the Sentencing Guidelines Commission.<sup>106</sup>

Table 14 reports the reasons why judges revoked the probation of EJJ youths and youths convicted as adults. The reasons for which judges revoked the probation of EJJ youths and those convicted as adults differed substantially. The legislature intended for EJJ dispositions to give youths “one last chance” for treatment. Judges subsequently revoked the probation of EJJ youths for leaving or refusing treatment only about half as often as they did youths certified as adults (17.9% vs. 33.3%), which suggests that EJJ youths availed themselves of the rehabilitative opportunities their juvenile probationary dispositions afforded. Similarly, judges revoked the probation of EJJ youths for committing new offenses at a much lower rate than they did the probation of youths certified as adults (23.8% vs. 38.9%). Significantly, however, judges revoked EJJ youths’ probation for

<sup>105</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1050 n. 371.

<sup>106</sup> This revocation rate is consistent with the revocation experience for EJJ juveniles throughout the state. Of all Minnesota youths sentenced as EJJs in 1996, judges had revoked their probation in 45% of the cases by 1998. MINN. SUPREME COURT, STATE COURT ADMINISTRATOR’S OFFICE, JUVENILE JUSTICE ISSUES: STATISTICAL OVERVIEW OF EJJ AND ADULT CERTIFICATION DATA 1996, 1997, & 1998 tbl.21 (2000).

committing other technical violations of probation—failure to meet with probation officer, positive urine samples, smoking marijuana or using alcohol—at a rate more than double that of youths certified as adults (58.3% vs. 27.8%). Thus, judges revoked the majority (76.23%) of EJJ's youths' probation for probation violations rather than for the commission of new offenses.<sup>107</sup>

TABLE 14.  
REASONS FOR REVOCATION

REASON FOR REVOCATION		EJJ- BLENDED SENTENCING JUVENILES	CERTIFIED ADULTS	TOTAL
Probation Violations	Leaves, Loses, Refuses Treatment	15 17.9%	6 33.3%	21 20.6%
	Other Probation Viola- tions	49 58.3%	5 27.8%	54 52.9%
New Offenses	New Charges	20 23.8%	7 38.9%	27 26.5%
Total		84 100.0%	18 100.0%	102 100.0%

\*These include failing to keep in contact with probation officers, failing to make meetings, dirty urinalysis, getting caught smoking pot or drinking alcohol, or failing to meet other court conditions (attending a gun program, counseling, etc.).

These EJJ youths were juveniles whom prosecutors or judges previously had determined did not constitute a threat to "public safety" and who were "amenable to probation." Their technical probation violations did not constitute serious new offenses for which prosecutors typically would have sought or judges granted

<sup>107</sup> A statewide analysis of the reasons for revoking EJJ youth's probation reported that 77% of the revocations in 1997 were for probation violations, *id.* at tbl.26, as were 81% in 1998, *id.* at tbl.25.



a motion to transfer them for adult prosecution. And yet, the combination of a non-certifiable prior offense and a non-criminal probation violation exposed these youths to the possibility of an adult criminal sentence. The high rates of revocation of EJJ probationers are characteristic of other "Intensive Supervision Programs" (ISP) which also report a substantial "net-widening" effect of intermediate sanction policies.

The higher rate of commitments from the experimental programs to jail and prison results mostly from higher rates of technical violations. Intensive supervision programs attempt to increase the credibility of community-based sanctions by making certain that conditions ordered by the court—including those considered "technical" in nature—are monitored and enforced and violations punished. Depending on how severely ISP staff (and their respective courts) choose to treat ISP infractions, commitments to prison and jails may rise significantly.<sup>108</sup>

Revocations for technical violations more likely represent the effects of intensive supervision rather than additional criminal activity. "Intensive supervision program clients are subject to much closer surveillance than others under supervision, and more of their violations may come to official attention."<sup>109</sup>

When judges revoke a youth's probation, they have the option of imposing new conditions of probation, for example, a commitment to the county workhouse—a county jail-like facility for a period of confinement of one year or less—or executing the stayed adult criminal sentence and committing the youth to prison for the duration of the stayed sentence. Table 15 reports the sentences that EJJ and certified youths received after judges revoked their prior probation. Recall that fewer than half (44.6%) of youths convicted as adults received stayed prison sentences and judges revoked the probation of nearly half (43.9%) of those adult probationers within two years (Table 13). Every EJJ youth received a stayed adult criminal sentence and judges revoked the probation of more than one-third (35.3%) of those youths within two years.

When judges revoked certified youths' adult probation, they sentenced nearly three-quarter (72.2%) of those youths to prison. By contrast, when judges revoked EJJ youths' probation,

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<sup>108</sup> Petersilia and Turner, *Intensive Probation and Parole*, *supra* note at 76, at 306-07.

<sup>109</sup> *Id.* at 311-12.

TABLE 15.  
PRISON VERSUS JAIL SENTENCE FOR REVOCATION

Reason for Revocation		EJJ-Blended Sentencing Juveniles			Certified Adults		Total
		Revoked to Prison	Revoked to Workhouse	Revoked to Prison	Revoked to Workhouse		
		Number Row % Column %	Number Row % Column %	Number Row % Column %	Number Row % Column %		
Probation Violations	Leaves, Losses, Refuses Treatment	6 28.7% 14.5%	9 42.8% 20.9%	4 19.0% 30.7%	2 9.5% 40.0%	21 100.0% 20.6%	
	Other Probation Violations*	24 44.4% 58.5%	25 46.3% 58.1%	4 7.4% 30.7%	1 1.9% 20.0%	54 100.0% 52.9%	
New Offenses	New Charges	11 40.7% 26.8%	9 33.3% 20.9%	5 18.5% 38.5%	2 7.4% 40.0%	27 100.0% 26.5%	
		41 40.2% 100.0%	43 42.2% 100.0%	13 12.7% 100.0%	5 4.9% 100.0%	102 100.0% 100.0%	

\*These include failing to keep in contact with probation officers, failing to make meetings, dirty urinalysis, getting caught smoking pot or drinking alcohol, or failing to meet other court conditions (attending a gun program, counseling, etc.)

they committed about half of the youths (51.2%) to the workhouse and sent the other half (48.8%) to prison.<sup>110</sup> Interestingly, the reasons why judges revoked EJJ youths' probation did not appreciably affect whether they subsequently sentenced them to prison or the workhouse. For example, judges sentenced about half (55%) of the EJJ youths whose probation was revoked because of the filing of new charges to prison and committed the other half (45%) to the workhouse. Similarly, judges sentenced about half (49%) of the EJJ youths whose probation was revoked for committing probation violations to prison and the other half to the work house (51%). By contrast, for every category of probation revocation of certified youths, judges sentenced two-thirds or more to prison rather than the workhouse, including four-of-five (80%) of those revoked for technical probation violations. On the one hand, this suggests that judges' revocation practices were somewhat more tolerant of EJJ youths' violations than they were of certified adults. On the other hand, however, judges did sentence about half of the EJJ youths whose probation they revoked to prison and imposed nearly three-quarters (73.2%) of these imprisonments for non-criminal probation violations.

## 2. *EJJ Probation Revocation, "Net-Widening," and the Back Door to Prison*

It is important to emphasize that the EJJ status apparently has widened-the-net and created a "back door" to prison for youths who likely would never have been certified. At the time the legislature adopted this provision, some analysts warned of this possible effect:

Although provisions to revoke probation and execute the adult sentences are essential elements of the EJJ status, some Task Force members feared that many youths might enter adult facilities through this procedural back door. An EJJ youth is one whom a judge or a prosecutor already determined can be retained in juvenile court consistently with public safety. And yet, even if a new probation violation is not a pre-

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<sup>110</sup> Data on EJJ probation revocations throughout the state report comparable results. For example, of the adult sentences executed in 1997 EJJ revocations, 77% were for probation violations and 23% were for new offenses. Of the probation violation, judges sentenced 43% to prison and 50% to a jail or workhouse. Of those revoked for a new offense, half were sentenced to prison and the other half to jail or a workhouse. MINN. SUPREME COURT, STATE COURT ADMINISTRATOR'S OFFICE, JUVENILE JUSTICE ISSUES: STATISTICAL OVERVIEW OF EJJ AND ADULT CERTIFICATION DATA 1996, 1997, & 1998 tbl.28 (2000).

sumptive-commitment-to-prison offense, he or she will likely be incarcerated as an adult offender. While there must be limits to "one last chance," some juveniles' "adult" status may now be decided in the context of summary probation revocation hearings rather than certification hearings.<sup>111</sup>

Our findings confirm these concerns. Judges initially sentenced youths against whom prosecutors filed certification motions to EJJ blended sentences because they had determined that they did not constitute a threat to "public safety" and were "amenable to probation." And the types of violations for which judges subsequently revoked their probation were for technical probation violations rather than for offenses for which prosecutors initially would have filed a certification motion or for which judges initially would sentence an offender to prison. But, the combination of an initial EJJ status and a subsequent probation revocation consigned a substantial number of juveniles to prison who likely would not have been waived or imprisoned under the previous waiver law or in the context of a "public safety" certification hearing.

Recall, judges certified for criminal prosecution an average of about 33 youths each year (98 total). During the same period, through the "back door" of a probation revocation hearing, judges sentenced nearly as many (84) youths who never received a certification hearing to the workhouse or to prison and thereby nearly doubled the total numbers of youths confined in adult correctional facilities as under the previous practice.

Table 16 summarizes the characteristics of certified youths imprisoned under the traditional waiver statute, under the new "presumptive" certification statute, and those EJJ youths whose probation judges revoked and then incarcerated as adults. As we noted earlier, the youths against whom prosecutors currently filed certification motions tended to be somewhat younger and with fewer prior correctional interventions than under the previous waiver practice (Tables 5, 6, and 7). Despite the certified youths' somewhat less chronic record than previously, juvenile court judges transferred virtually identical numbers of youths previously, 31, and currently, 33 (Tables 4 and 16). Our analyses of the characteristics of youths against whom prosecutors filed EJJ and certification motions emphasized the extent to

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<sup>111</sup> Feld, *Violent Youth and Public Policy*, *supra* note 3, at 1050.

**TABLE 16.**  
**CHARACTERISTICS OF YOUTH SENT TO ADULT COURT UNDER JUDICIAL WAIVER AND BLENDED SENTENCING**

Various Indicators	Certified Adults Under Traditional Certification Laws 1986-1992 N=215	Certified Adults Under Blended Sentencing Laws 1995-1997 N=98	Revoked EJJ Under Blended Sentencing Laws 1995-1997 N=84
<b>Personal Characteristics</b>			
Percent Female	2.8	4.1	4.8
Percent White	30.7	34.5	20.2
Percent African American	53.0	61.2	58.3
Percent 16 or 17 when charged	96.3	89.8	84.5
<b>Background Delinquency Characteristics</b>			
Percent with at least one felony adjudication	74.4	63.3	63.1
Percent with felony against person	28.8	25.5	20.2
Percent with property felony	40.5	24.5	32.1
Percent at least 14 at first court experience	35.3	37.8	41.7
Average number of delinquency points*	3.1	2.4	2.1
<b>Current Offense Characteristics</b>			
Percent Presumptive commit charge	57.2	74.5	83.3
Percent felony against person	67.0	77.6	78.6
Percent with weapon involved	52.6	54.1	70.2
Percent using a firearm	25.5	32.7	51.2
Percent committed with an accomplice	61.9	52.0	65.5
<b>Sentencing Options</b>			
Percent with executed prison sentence	25.1	32.7	48.8+
Average number of youth put in adult system	31	33	28

\* Prior delinquency points calculated by summing past adjudications: each past felony adjudication received one point and each gross misdemeanor or common misdemeanor adjudication received a half point.

+ This percentage is a result of a revocation of adult portion of the blended sentence.

which the former were even younger (Table 5) and had committed less serious offenses (Table 6) than the latter. Moreover, we noted that judges revoked the probation of EJJ youths primarily for probation violations (76.2%) rather than for new offenses (23.8%) (Table 14).

When we compare the characteristics of youths previously certified and currently certified with those of juveniles incarcerated as adults following revocation of their EJJ probationary status, some disturbing findings emerge. Recall that EJJ youths were younger at the time of their motioned offense than were certified youths (Table 5). And a smaller proportion of the revoked EJJ youths were sixteen- or seventeen-years of age at the time of their offense than either the previous or current certification populations (96.3% vs. 89.8% vs. 84.5%). They also had somewhat less extensive prior records and were somewhat older at the time of their first juvenile court appearance than the certification populations, evidencing a somewhat less serious criminal background. On the other hand, a larger proportion of the revoked EJJs had been charged with presumptive commitment to prison offenses and with using a weapon. Thus, the prosecutors' practice of routinely filing "presumptive certification" motions meant that many youths who would not have been certified in the past and whom judges determined were inappropriate for transfer would be relegated automatically to an EJJ status. Because every EJJ youth received a stayed criminal sentence, when the judges revoked their probation, they sent nearly half (48.8%) of these youths to prison. And recall, too, that the vast majority of these revocations were not the result of new criminal charges. As a result, judges sent nearly as many youths to jail or prison following judicial revocations of EJJ probation as they did directly through certification proceedings (28 vs. 33). And, these EJJ youths were offenders whom judges already had concluded in the context of a waiver hearing were inappropriate candidates for adult criminal prosecution and sentencing.

## V. CONCLUSION

The 1995 amendments of the Minnesota juvenile code marked a fundamental reorientation in the jurisdiction, jurisprudence, and procedures of juvenile courts. Part of these changes entailed the use of the "modified just deserts" presumptive framework of the Minnesota Sentencing Guidelines to

structure the most important juvenile court sentencing decision—waiver to criminal court. If a prosecutor charges an older youth with a crime for which the Sentencing Guidelines presume commitment to prison, the new statute creates a presumption of certification. It shifts judicial focus from clinical subjectivity and an offender's "amenability to treatment" to more objective "public safety" offense criteria that mirror the Sentencing Guidelines' emphases on the seriousness of the present offense and prior record. During a time when other states contracted the jurisdiction and authority of their juvenile courts, the Minnesota "blended sentencing" law strengthened and enhanced juvenile courts' powers. The new law created an intermediate category of EJJ offenders whom judges initially tried and sentenced as juveniles while providing all adult criminal procedural safeguards including the right to a jury trial. The EJJ legislation uses the offense criteria of the Sentencing Guidelines to determine which youths would enter this blended juvenile-criminal jurisdictional status. Trying youths with adult criminal procedural safeguards in juvenile court preserves both access to juvenile treatment resources and the possibility of adult sentences if a youth fails as an EJJ or re-offends. A court executes the adult criminal sentence only if an EJJ youth fails in juvenile probation.

The novelty of the new laws, the incorporation of the Sentencing Guidelines' "just deserts" jurisprudence, and the interaction between the presumptive certification law and the EJJ provisions created a number of uncertainties about their implementation:

While presumptive certification pushes youths into criminal court, EJJ furnishes a counter-pull to retain them in juvenile court. . . . Because of the many variables, most conspicuously youthfulness, there is no way to anticipate how many more, or fewer, youths will be certified as a result of the new legislation.

Depending on the resolution of the tension between certification as an adult or sentencing as an EJJ, the question of whether the new legislation ultimately provides serious young offenders with one last chance at rehabilitation, or whether it consigns less serious youths to the adult corrections system without the benefit of a certification hearing poses a second unknown feature. EJJ may provide judges with a sentencing alternative for some youths who otherwise would have been certified. *If courts, however, use EJJ more extensively for many youths who would not be certified either previously or under the new regime, and these youths violate their juvenile probations, then EJJ may have a net-widening effect and increase the numbers*

*of youths consigned to adult facilities. Ironically, in these cases, a juvenile court judge already has determined that EJJ youths do not pose a threat to "public safety" requiring adult incarceration. And yet, a new offense, which itself would not warrant certification, may provide the basis to revoke probation and execute the adult sentence.* Again, how often this will occur cannot be predicted in advance.<sup>112</sup>

Our data enables us to answer some of these questions and to compare waiver practices under the previous statute with the new certification and EJJ provisions. Under the prior waiver law, which focused on "amenability to treatment," a youth's age and prior record of program placements significantly affected waiver decisions. Other things being equal, judges transferred older youths and those with several prior correctional program placements. These variables provide a rational judicial operationalization of "amenability to treatment." A youth's age determines the amount of time remaining within juvenile court jurisdiction and thus the "length" of the court's potential intervention. Exhaustion of treatment resources, as indicated by prior program placements, provides a reasonable indicator of non-responsiveness to treatment. Whether or not a youth used a weapon when he committed the motioned offense affected the outcome of waiver decisions. The evaluations and recommendations of court services personnel—psychologists and probation officers—strongly influenced waiver outcomes.

The changes in waiver jurisprudence embodied in the new law were reflected in changes in waiver practice as well. The presumptive certification and EJJ statutes accentuate "public safety," violent offenses, and weapons use, and shifts the prosecutorial and judicial focus from criminal maturity and the cumulative record of persistent offending to the seriousness of the present offense. Because police arrest minority, especially African-American, youths at significantly higher rates for violent offenses than they do white juveniles, we anticipated that proportionally even more minority juveniles would be eligible for and presumptively certified under the new law than under the previous discretionary system in which judges emphasized persistence rather than seriousness.

The youths against whom prosecutors filed waiver and EJJ motions under the new law differed significantly from those whom they previously sought to transfer. Under the presump-

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<sup>112</sup> *Id.* at 1124 (emphasis added).



tive certification and blended sentencing laws, prosecutors filed motions against a younger group of youths who began their delinquent careers somewhat later than our previous sample. They also filed motions against an even larger proportion of minority, almost exclusively African-American, and female youths than the previous practice. Prosecutors and judges emphasized the seriousness of youths' offenses rather than their persistence of delinquency. Prosecutors charged a significantly larger proportion of these youths than in our previous study with presumptive commitment to prison offenses, and with the use of a weapon in the commission of their crimes. Although prosecutors charged the vast majority of these youths with violent crimes, they also filed fewer charges than under the previous practice. In short, one serious crime was sufficient to trigger the filing of a certification or EJJ motion. Because the prosecutors emphasized primarily serious, violent offenses, the youths against whom they filed certification and EJJ motions had significantly less extensive prior records than did the juveniles in our previous sample—fewer prior felony adjudications, fewer prior adjudications for felonies against the person or presumptive commitment to prison offenses, and correspondingly fewer prior out-of-home placements or other treatment interventions.

When we compared those youths against whom prosecutors filed certification motions versus EJJ motions, several similarities and differences emerged. The two groups did not differ significantly on the basis of race, gender, or age-of-onset of delinquency. Prosecutors differentiated somewhat between EJJ and certification youths on the basis of the seriousness of their present offenses with certification motions more likely against youths charged with felonies against the person, multiple felonies, the use of a weapon, and presumptive commitment to prison offenses. The two groups also differed significantly on the basis of age—prosecutors filed more certification motions against older youths and more EJJ motions against younger offenders. Arguably, this differentiation on the basis of age is consistent with the legislative intent, although one reason for extending juvenile courts' jurisdiction was to provide the option to treat older juveniles for a longer period of time. Although prosecutors filed more certification motions against older youths, the youths against whom they filed EJJ versus waiver motions did not differ significantly on the basis of their prior de-

linquency histories or treatment interventions. In short, age and the seriousness of the present offense provided the primary rationale to distinguish between these two groups of young offenders.

The apparent differences between the EJJ and certification youths also encouraged us to examine more closely the subsequent dispositions of these two categories. Clearly, the introduction of the EJJ law has widened the net of criminal social control. "Net widening" occurs when reformers introduce a new sanction intended to be used in lieu of another sanction which is more severe,<sup>113</sup> in this instance, EJJ blended sentencing in lieu of certification and imprisonment as an adult. As an alternative to a system of binary sanctions such as presented by traditional waiver—either juvenile or adult, either treatment or punishment—judges more often impose Intermediate Sanctions not on those who previously would have been waived or punished, but rather on those who previously would have been treated less severely than the new sanction permits. Accordingly:

By and large, judges do not wish to impose the more severe sanction when a lesser would in their view suffice. When an intermediate choice is offered [such as EJJ] it will tend to be filled more by those previously treated more leniently than by those previously treated more severely; if judges in effect have given the benefit of doubt, and a probation sentence, to the offender for whom imprisonment seemed too severe and probation too lenient, the newly available intermediate punishment will be just what's wanted. And, regrettably, there seems to be an amplitude of convicted offenders to fill all these slots, hence "net-widening."<sup>114</sup>

Analysts contend that public officials and practitioners often use intermediate sanctions for less serious offenders than those for whom the program initially was envisioned because they are risk averse and do not want to be held responsible for the new crimes some offenders inevitably will commit.<sup>115</sup>

Prior to the adoption of the EJJ law, prosecutors filed an average over 47 transfer motions per year (Table 4). Following

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<sup>113</sup> NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 225 (1990) (quoting CANADIAN SENTENCING COMM'N, *SENTENCING REFORM: A CANADIAN APPROACH* (1987)).

<sup>114</sup> *Id.*

<sup>115</sup> See Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 *CRIME & JUSTICE* 99, 101 (1996).

the adoption of the presumptive waiver and EJJ statutes, prosecutors filed an average of 168 motions that exposed youths either to the immediate or secondary possibility of criminal sanctions. Judges previously transferred an average of 31 youths for criminal prosecution and subsequently transferred about 33 youths each year. Significantly, however, judges sentenced an average of 83 additional youths each year under the EJJ provisions, which included a stayed adult criminal sentence. These EJJ youths were considerably younger than those juveniles against whom prosecutors previously or presently filed waiver motions and appeared to be somewhat less serious offenders. Despite their relative lack of criminal maturity or seriousness, a sizeable proportion of these EJJ youths (35.3%) failed during their juvenile probationary period (Table 13). And the majority of these failures (76.2%) consisted of probation violations rather than serious new offenses (Table 14). This experience with EJJ is consistent with a substantial body of research on "intermediate sanctions" which also reports higher rates of violation of technical conditions of probation than for comparable offenders subject to ordinary probation or punishment. One researcher states that, "[m]ost observers agree that the raised violation (and related raised revocation) rates result from the greater likelihood that violations will be discovered in intensive programs, and not from greater underlying rates of violation."<sup>116</sup> And, when judges revoked these EJJ youths' probation, they sentenced substantial numbers of them to the workhouse and to prison for violations which ordinarily would not warrant certification or incarceration in the first instance. "If a new correctional program is justified and funded to serve as an alternative to incarceration and is instead used for people who would otherwise not have been incarcerated, patently, it has been misapplied."<sup>117</sup> As a result, it appears that the blended sentencing law which the legislature hoped would give juveniles "one last chance" for treatment has instead become their "first and last chance" for treatment, widened the net of criminal social control, and moved larger numbers of younger and less serious or chronic youths into the adult correctional system indirectly through the "back door" of probation revocation proceedings rather than through certification hearings.

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<sup>116</sup> *Id.* at 105.

<sup>117</sup> *Id.* at 227.

Although prosecutors charge most EJJ youths with serious offenses, prior to the enactment of the blended sentencing law, the juvenile justice system adequately dealt with most of these youths as ordinary delinquents. The adoption of the EJJ provisions and the creation of an intermediate sanction appears to sentence more severely offenders who otherwise would have been dealt with as ordinary delinquents rather than those who previously were bound for prison. And the new "back door" of revocation proceedings consigns to prison youths whom judges previously and currently would deem inappropriate for prison in the context of a certification hearing. Instead of remitting EJJ youths' adult status to probation revocation proceedings, the legislature should amend the statute to require judges to consider whether a youth's earlier offense and subsequent violations pose a threat to "public safety" warranting imprisonment using the same procedures and criteria employed to certify youths for criminal prosecution.

In addition, under the new "blended sentencing" provision, juvenile court judges are placing larger numbers of younger, less experienced delinquents with significantly fewer prior correctional treatment exposures into expensive juvenile treatment facilities. It is possible that sending younger, less experienced youths to juvenile treatment facilities and subjecting them to the intensive EJJ probation may prove beneficial and reduce future crime and delinquency. On the other hand, recall that prosecutors frequently filed a certification or EJJ motion on the basis of a single serious offense. As a consequence, prosecutors may be filing motions against and using expensive treatment placements for youths who would not have recidivated in any event and for whom the ordinary, less expensive dispositions of the juvenile court would be appropriate. At this early stage, we simply do not know whether these EJJ placements are necessary, appropriate, or efficacious. A research design that carefully matches youths against whom prosecutors file EJJs and certification motions with those whom they do not select and analyzes their subsequent dispositions and recidivism is necessary to answer these questions. This type of study could also help to answer the ultimate policy questions about what types of sentencing policies and interventions will reduce violent juvenile crime and help youth to desist from their criminal careers.

