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COMMENTARY

THE ATTORNEY GENERAL OF MASSACHUSETTS' BILL RELATIVE TO THE TRIAL AND SENTENCING OF SERIOUS JUVENILE OFFENDERS

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I. INTRODUCTION: THE ATTORNEY GENERAL'S PROPOSAL FOR PROSECUTION OF SERIOUS JUVENILE OFFENDERS

For several years, Massachusetts has been engaged in a narrowly focused debate regarding the future of the juvenile justice system. State law makers are contemplating a shift in the law to require "automatic transfer" of serious juvenile offenders to the adult criminal court for trial.¹ Focusing primarily upon the question of in which court a young offender will be tried, however, has obscured the true goals of meaningful juvenile justice reform. The intensity of the debate itself has become an obstacle to the development of innovative and effective approaches to the problem of an increase in youth violence.

A key component of any juvenile justice policy reform must be to ensure that all juvenile offenders² are held accountable for their actions. In essence, accountability has two elements: (1) swift resolution which ensures that young offenders understand that their actions have consequences; and (2) imposition of an appropriate sentence that adequately addresses both long term public

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¹ "Automatic transfer," also referred to as "statutory exclusion," would require that certain juvenile offenders be tried in the adult criminal court in the first instance based upon the offense charged and the age of the offender. *See infra* Section II. The current law provides for an initial "juvenile transfer hearing" in juvenile court, whereby a judicial determination is made whether to try the offender in adult court or in juvenile court. *See MASS. GEN. L. ch. 119, § 61 (1993)*.

² This article employs the term "juvenile offender" to refer to a "delinquent child," defined under Massachusetts law as a child between the ages of seven and seventeen who violates any city ordinance or town by-law or who commits any offense against a law of the Commonwealth. *MASS. GEN. L. ch. 119, § 52 (1993)*.

safety concerns and the rehabilitative potential of the juvenile.

In September of 1995, the Office of the Attorney General proposed legislation to improve the juvenile justice system's response to serious, violent and habitual juvenile offenders. This legislative proposal, entitled "An Act Relative to the Trial and Sentencing of Youthful Offenders,"³ has three primary components: (1) "trial first," which reverses the current transfer process so that a trial on the factual allegations precedes a hearing on whether the child should be sentenced as a juvenile or as an adult; (2) elimination of the trial *de novo*, a process by which a juvenile is entitled to two full trials on the merits of a factual allegation; and (3) a permanent adult status determination. These provisions of the bill seek to streamline the current juvenile transfer process, thereby improving the efficiency and effectiveness of the juvenile justice system's response to serious juvenile crime.⁴ To frame this discussion, this article will discuss the differences between the juvenile justice system and the criminal justice system, examine the concept of "transfer" generally as a mechanism to deal with serious youthful offenders, and describe the current transfer process in Massachusetts. This article will then analyze the legislative proposal in detail.

II. THEORETICAL UNDERPINNINGS

Since 1899, when the first juvenile court was established in Cook County, Illinois, there has been widespread recognition that age is a mitigating factor which requires that the justice system treat children differently than adults.⁵ A separate and distinct juvenile justice system, comprised of juvenile courts and youth correctional agencies, was founded primarily on the "rehabilitative ideal," which considered a "unique blending of jurisprudence and the social welfare philosophy."⁶ In many ways, a separate juvenile justice system is a symbol of society's belief that it should bear the responsibility of providing delinquent children with a range of individualized services in addition to punishment, with the goal of attaining long term public safety in return.

To this day critical differences between the juvenile justice system and the criminal justice system exist. The goal of the adult system is largely retributive, focusing primarily on the nature of the offense and the need to insure public safety. On the other hand, the juvenile justice system historically has been structured to allow for consideration of both the circumstances of the offense and the needs of the offender on a case-by-case basis at many critical junctures.⁷ These goals are accomplished by placing equal emphasis upon

³ The full text of this legislative proposal appears in the Appendix, *infra*.

⁴ The juvenile transfer process is discussed in detail, *infra* Section V.

⁵ See IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 150-51 (1989).

⁶ DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE 38 (1991).

⁷ For example, the Massachusetts Department of Youth Services, not the court,

accountability, appropriate sanctions and individualized rehabilitative services.

In Massachusetts, this emphasis on rehabilitation in addition to sanctions has been maintained by the state youth corrections agency, the Department of Youth Services (DYS). DYS has been acclaimed nationally as a model agency, based on the low rate of recidivism of juveniles committed to its care in comparison to juvenile corrections agencies in other states.⁸ The success of DYS is largely attributed to the fact that it is comprised of small, intensively staffed secure facilities and a system of community-based programs that offers a wide range of sanctions and services.⁹

While the central goal of rehabilitation by the juvenile justice system is important and can be achieved for most juveniles, the juvenile justice system is not equipped to handle all juvenile offenders. A small proportion of juvenile offenders are not amenable to rehabilitation and pose such a high risk to public safety that they need to be incarcerated in the adult system. This fact, along with the current widespread public perception of a crisis in youth violence, has generated concern that the juvenile justice system is too lenient and has intensified the demand to "get tough" on juvenile offenders.¹⁰

III. THE TRANSFER ISSUE

As a result of the growing public sentiment that tougher treatment for juveniles is required, the juvenile transfer process, the system used to determine whether a juvenile offender should be tried as a juvenile or as an adult, has become the focus of attention and debate in Massachusetts and across the nation. The national trend in response to juvenile crime is to amend the transfer process in order to increase the number of juveniles being tried and convicted as adults.¹¹ In general, the decision to try a juvenile as an adult may be

determines in which facility a juvenile committed to its custody is placed, and the length of the stay in such placement. *See* MASS. GEN. L. ch. 120, §§ 5, 6 (1993).

⁸ *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, COMPREHENSIVE STRATEGY FOR SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS, PROGRAM SUMMARY 37, 38 (1993) (citing BARRY KRISBERG ET AL., NATIONAL COUNCIL ON CRIME & DELINQUENCY, UNLOCKING JUVENILE CORRECTIONS: EVALUATING THE MASSACHUSETTS DEPARTMENT OF YOUTH SERVICES (1989)).

⁹ *See* MICHAEL JONES & BARRY KRISBERG, NATIONAL COUNCIL ON CRIME & DELINQUENCY, IMAGES AND REALITY: JUVENILE CRIME, VIOLENCE AND PUBLIC POLICY 39 (1994).

¹⁰ Juvenile arrests for violent crime increased 45% in the ten-year period between 1982-1992. The National Council on Crime and Delinquency notes that this increase was characteristic of violent crime generally, as adult arrests increased 41% during the same time period. Thus, the *proportion* of violent crime committed by juveniles as compared to adults has not risen significantly. In 1982, juveniles represented 17.2% of arrests for violent crime, and in 1992, juveniles represented 17.5% of arrests for violent crime. *See id.* at 10-12 (citing FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES (1992)).

¹¹ *See id.* at 32.

decided in one of three ways, depending on the jurisdiction: by a juvenile court judge after a transfer or "waiver" hearing; by a prosecutor who determines in which court to bring the case ("direct-file"); or by the legislature, through statutory exclusion of certain designated offenses and/or age groups from the juvenile court's jurisdiction.

The transfer hearing process, sometimes referred to as "judicial waiver," is a court-based hearing in which a judge determines whether or not a juvenile should be transferred for trial to the adult court. In a transfer hearing, juveniles are entitled to be represented by counsel, and the state and the defense are each given an opportunity to present evidence regarding whether the juvenile should be tried as an adult.¹²

In contrast to the transfer hearing process, the decision maker in a "direct file" jurisdiction is the prosecutor. The prosecutor has the authority to determine whether a juvenile should be tried in juvenile court or adult court simply by initiating, or "filing," the case in the adult court.¹³

The third transfer model, known as "automatic transfer" or the "statutory exclusion" model, is a decision by the legislature to limit the jurisdiction of the juvenile court over offenders meeting certain statutorily enacted criteria. Offenders excluded from the jurisdiction of the juvenile court are automatically tried in the adult criminal court. Typically, the criteria include the offense charged, such as serious, violent felonies, and the age of the offender, such as lowering the maximum age for juvenile court jurisdiction. Legislative waiver expresses the view that certain crimes, such as murder or rape, warrant adult sentences and that no offender charged with these crimes should be treated as a juvenile.¹⁴

Although automatic transfer of serious juvenile offenders may seem to be best suited to ensure maximum public protection, there are potential dangers in this approach if juvenile offenders are sent to the adult system inappropriately. Research studies suggest that juveniles tried in the adult court typically do not receive lengthier or more severe sentences than juveniles tried in the juvenile court.¹⁵ Young offenders inappropriately transferred to the adult sys-

¹² See *Kent v. United States*, 383 U.S. 541, 561-68 (1966) (holding that before a juvenile is transferred, he is entitled to a hearing meeting the essentials of due process, and articulating several factors that judges should consider in making the transfer decision).

¹³ See CHAMPION & MAYS, *supra* note 6, at 70-72. See also IRA M. SCHWARTZ ET AL., CENTER FOR THE STUDY OF YOUTH POLICY, A STUDY OF NEW MEXICO'S YOUTHFUL OFFENDERS 141 (1995) (indicating that the state of Florida, a "direct-file" state, waives approximately 5,000 youth per year into its criminal courts).

¹⁴ See CHAMPION & MAYS, *supra* note 6, at 70. Several states have adopted some form of automatic transfer, including New York, which automatically transfers many offenses to criminal court, including murder, rape, kidnapping, and burglary. *Id.* at 71 (citing Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78:3 Nw. J. L. CRIMINOLOGY 512-14 (1987)).

¹⁵ See JONES & KRISBERG, *supra* note 9, at 24-26 (finding that in California in 1992

tem frequently end up back on the streets, either on probation with no incarceration, or on parole, after a brief exposure to the adult prison system.¹⁶ In addition, other studies have found that juveniles tried as adults have significantly higher rates of future criminal activity than juveniles with similar personal profiles who are charged with similar offenses and tried in the juvenile courts.¹⁷ Thus, the individualized assessment function of an "amenability hearing," which is present only in the transfer hearing model, can play a key role in protecting the long term public safety interests of the community. It allows the juvenile court judge to separate "hard core" violent juvenile offenders, for whom only lengthy adult sentences are appropriate, from those juvenile offenders who possess the potential to be rehabilitated in the juvenile justice system.

IV. THE TRANSFER DEBATE IN MASSACHUSETTS

In Massachusetts, the juvenile transfer debate has been narrowly framed around one controversial question: whether to permit "automatic transfer" for certain juvenile offenders based upon the offense charged and the age of the offender. While Massachusetts adopted the judicial waiver model twenty years ago,¹⁸ in recent years there has been intense pressure to shift to the statutory exclusion model.

The impetus for the shift to automatic transfer is, in large part, due to the time-consuming and burdensome nature of the transfer hearing process as it currently exists in the Commonwealth.¹⁹ A transfer hearing must be held before the case can be scheduled for trial, and can take from several months to nearly a year to complete. Delaying the actual trial for a lengthy period of time is inefficient and potentially detrimental to public safety for several reasons. First, as time lapses, witnesses may be difficult to locate or their memories may fade, and the potential for physical evidence to be compromised increases, thus making a successful prosecution less likely. Second, the passage of time undermines the ability of the juvenile justice system to communicate clearly and directly to a young offender, the critical message that he or she will be held accountable for his or her actions.

The "automatic transfer" controversy in the Commonwealth has also been fueled recently by two tragic cases of violence committed by juveniles in 1990

youth adjudicated for violent offenses and confined in the California Youth Authority, the youth corrections agency, served longer periods of incarceration than juveniles and adults sentenced for the same crimes to the Department of Corrections, the adult corrections agency). See also JEFFREY FAGAN, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE COMPARATIVE IMPACTS OF JUVENILE AND CRIMINAL COURT SANCTIONS ON ADOLESCENT FELONY OFFENDERS 41-67 (1991).

¹⁶ *Id.*

¹⁷ See FAGAN, *supra* note 15, at 63-67.

¹⁸ See 1975 Mass. Acts 840, § 1.

¹⁹ See *infra* Section V for a discussion of Massachusetts transfer law.

and 1991, which led to two significant revisions of the state's transfer law.²⁰ These revisions were enacted to make it easier to transfer young offenders to adult court for trial.²¹ Despite significant restructuring of the transfer law to increase the likelihood that a juvenile would be transferred to adult court, the debate over the central question — whether to adopt “automatic transfer” — persists.

V. TRANSFER HEARINGS: THE CURRENT LAW

Under current Massachusetts law, a transfer hearing is a two-part judicial hearing to determine whether a juvenile offender should be tried in juvenile or adult court.²² At the first hearing, which is often referred to as the “Part A hearing,” the judge determines whether probable cause to believe that the juvenile has committed the crime or crimes charged exists.²³ At the second hearing, known as the “Part B hearing,” the court makes two determinations: whether or not the juvenile presents a danger to the public; and, whether or she is amenable to rehabilitation within the juvenile justice system.²⁴ At each hearing, the burden of proof is on the Commonwealth to demonstrate that the juvenile should be tried in the adult court.

Massachusetts statutory law requires the court to consider several factors when deciding whether to transfer the juvenile. Many of these factors focus on characteristics of the offender, such as the child's court and delinquency record, age and maturity, and family, school and social history. The remaining factors relate to public safety, such as the nature, circumstances, and seriousness of the offense, as well as the adequate protection of the public.²⁵ No single factor is controlling, although the court may attach substantial significance

²⁰ On October 31, 1990, Kimberly Rae Harbour was murdered after being repeatedly raped, beaten and stabbed by a group of youth offenders. Five of her attackers were under the age of 17. On December 5, 1990, the legislature enacted amendments to the transfer law.

In the second case, on April 20, 1991, two young boys, Charles Copney and Corey Grant, were shot to death on the steps of an apartment building in Boston. Three juveniles were accused of the murder. In the fall of 1991, the juvenile accused of firing the gun used in the murder was not transferred to adult court after a transfer hearing. As a result, the second set of amendments, named the Copney-Grant amendments, was passed on December 31, 1991.

²¹ See 1991 Mass. Acts 488; 1990 Mass. Acts 267. For a discussion of these provisions, see *infra* notes 27-35 and accompanying text.

²² See MASS. GEN. L. ch. 119, § 61 (1993).

²³ *Id.*

²⁴ *Id.*

²⁵ The relevant provision requires the court to consider the nature, circumstances and seriousness of the alleged offense; the child's court and delinquency record; the child's age and maturity; the child's family, school and social history; the success or lack of success of any past treatment efforts of the child; the nature of services available through the juvenile justice system; the adequate protection of the public; and the likelihood of rehabilitation of the child. *Id.*

to the seriousness of the offense.²⁶ If at the conclusion of the Part B hearing the court finds that the juvenile is both dangerous and not amenable to rehabilitation within the juvenile justice system, the juvenile is "bound over" to the adult court for trial and sentencing.²⁷ A juvenile convicted in adult court may be sentenced to an adult correctional facility for the term of years provided in the criminal code.

Alternatively, if the court finds that the juvenile is *not* dangerous and *is* amenable to rehabilitation within the juvenile justice system, he or she is retained in the juvenile system. The trial and subsequent sentencing are conducted in the juvenile court, and the court may only impose a sentence within the juvenile justice system, such as commitment to DYS.

Prior to 1990, the law provided that the Commonwealth or the court could request a transfer hearing in any case as long as several conditions were met. In order to be eligible for transfer, a juvenile had to be between fourteen and seventeen years of age when the offense was committed. In addition, a juvenile must have been previously committed to DYS and charged with an offense punishable by imprisonment in state prison if committed by an adult, or the juvenile had to be charged with an offense involving the infliction or threat of serious bodily harm.²⁸ In practice, this scheme provided the state with the opportunity to seek an adult trial and to obtain a sentence to an adult correctional facility in nearly every case involving serious violence, or those involving a habitual juvenile offender.

Amendments enacted in 1990 created a "mandatory transfer hearing" which required the Commonwealth to conduct a transfer hearing in every case involving an allegation of murder in the first or second degree, manslaughter, rape, kidnapping or armed robbery resulting in serious bodily injury.²⁹ Thus, under the new statutory scheme, a juvenile with no prior history of violent behavior would automatically be subjected to a transfer hearing if accused of one of the listed offenses. The new law also created a rebuttable presumption that a juvenile charged with murder was dangerous and not amenable to rehabilitation within the juvenile justice system. It also reduced the Commonwealth's burden of proof from a standard of clear and convincing evidence, to a preponderance of the evidence.³⁰

The 1991 amendments added several new offenses to the "mandatory transfer hearing" category, bringing the total offenses to eight.³¹ The 1991 amend-

²⁶ See *Ward v. Commonwealth*, 407 Mass. 434, 439, 554 N.E.2d 25, 28 (1990) (citing *Two Juveniles v. Commonwealth*, 381 Mass. 736, 743, 412 N.E.2d 344, 348 (1980)).

²⁷ See MASS. GEN. L. ch. 119, § 61 (1993).

²⁸ See 1975 Mass. Acts 840 (setting forth the threshold criteria for transfer); Rule 208 of the Special Rules of the District Court, Massachusetts Rules of Court (permitting the court to order a transfer hearing when the threshold criteria are met).

²⁹ See 1990 Mass. Acts 267.

³⁰ See 1990 Mass. Acts 267, § 3.

³¹ See 1991 Mass. Acts 488, § 2. This provision specifies that a transfer hearing

ments also applied the rebuttable presumption of dangerousness and lack of amenability and the lesser standard of proof to all eight offenses.³²

By way of example, when a juvenile offender is charged with one of the eight designated offenses, the Commonwealth must hold a "Part A" or probable cause hearing. If probable cause is established at the Part A hearing, the case proceeds to a "Part B" hearing. At this phase, the "rebuttable presumption" requires the juvenile to present evidence that he or she is not dangerous and is amenable to rehabilitation. The burden of proof still remains with the Commonwealth to prove that the juvenile is dangerous and is not amenable to rehabilitation within the juvenile justice system, but only by a preponderance of the evidence — the traditional civil standard.

Significantly, the 1991 amendments created "split sentences." Under this sentencing structure, a juvenile retained in the juvenile justice system for murder in the first degree is required to serve a minimum sentence of fifteen years imprisonment.³³ The minimum sentence for a juvenile adjudicated for murder in the second degree is ten years imprisonment.³⁴ Thus, juveniles convicted of murder in the juvenile system serve the initial part of their sentences in the Department of Youth Services and at the age of twenty-one, are transferred to an adult correctional facility within the Commonwealth's Department of Corrections (DOC) for the balance of the term.³⁵

Ironically, while these legal provisions were designed to facilitate the transfer of juveniles to adult court, the number of juveniles transferred for trial in the adult court has remained relatively static since 1989 — eleven juveniles were transferred in 1989; eleven in 1990; seventeen in 1991; ten in 1992; twelve in 1993; and thirteen in 1994.³⁶ Since the 1990 amendments took effect, an average of thirteen juveniles per year have been transferred, or only two more than the number transferred in 1989. This result lends credence to the statistical findings of researchers in this field that only a small proportion of juvenile offenders are truly "hard core" and responsible for a majority of juvenile crime.³⁷

must be held when a juvenile is charged with murder in the first or second degree (MASS. GEN. L. ch. 265, § 1 (1993)); manslaughter (MASS. GEN. L. ch. 265, § 13); armed assault with intent to rob or murder (MASS. GEN. L. ch. 265, § 18); rape (MASS. GEN. L. ch. 265, § 22); forcible rape of a child (MASS. GEN. L. ch. 265, § 22A); kidnapping (MASS. GEN. L. ch. 265, § 26); or armed burglary (MASS. GEN. L. ch. 266, § 14).

³² See 1991 Mass. Acts 488, § 6.

³³ See 1991 Mass. Acts 488, § 7 (imposing mandatory sentences of 15-20 years imprisonment if the adjudication is for murder in the first degree, and 10-15 years imprisonment if the adjudication is for murder in the second degree).

³⁴ *Id.*

³⁵ See 1991 Mass. Acts 488, § 7.

³⁶ Research & Planning Dep't, Office of the Comm'r of Probation of Mass. (1996) (statistical analysis, on file with authors).

³⁷ See generally PAUL TRACY ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, DELINQUENCY IN TWO BIRTH COHORTS: EXECU-

While the delays associated with transfer proceedings are significant, other aspects of the juvenile justice system in Massachusetts contribute to the inefficient processing of juvenile cases. Most notably, under current Massachusetts law, all juveniles tried in the juvenile system, even those who have had a transfer hearing, have the right to *two* full trials — a bench trial and a jury trial — in a two-tiered trial system called “trial *de novo*.” While the *de novo* system was abolished in 1992 in the adult criminal justice system,³⁸ it remains in effect in the juvenile system, for every case, including murder.³⁹ Thus, when a lengthy transfer hearing has occurred but has not resulted in transfer to adult court, the trial *de novo* system delays even further a timely resolution of the case. This needlessly prolongs the imposition of a final sentence, and demonstrates an extremely inefficient use of juvenile justice resources.

The fact that the jurisdiction of the juvenile court over an offender terminates when the offender attains the age of nineteen⁴⁰ amplifies concerns about the trial *de novo* system. The law makes no exception for a case that remains unresolved or involves serious charges.⁴¹ Thus, the importance of the need for statutory modifications to enable timely resolution of juvenile cases cannot be over-emphasized.

VI. TRIAL FIRST

The transfer debate has been responsible for piecemeal reform of the existing juvenile transfer process. In the meantime, attention has been diverted from the important task of promoting innovative and balanced juvenile justice reform. Against this backdrop, in 1995 the Office of the Attorney General proposed legislation entitled, “An Act Relative to the Trial and Sentencing of Youthful Offenders.”⁴² This bill presents an alternative to the “get tough” approach and unsatisfactory outcomes of automatic transfer,⁴³ as well as the time-exacting process of the status quo, by streamlining and enhancing the efficiency of the current transfer process, without sacrificing public protection safeguards.

This legislation challenges the prevailing assumption that the critical issue for improving the justice system’s response to serious cases of youth violence is

TIVE SUMMARY (1985).

³⁸ See 1992 Mass. Acts 379, §§ 139-141.

³⁹ See *Patrick P. v. Commonwealth*, 421 Mass. 186, 188-94, 655 N.E.2d 377, 381 (1995).

⁴⁰ See MASS. GEN. L. ch. 119, § 72 (1993).

⁴¹ See *Johnson v. Commonwealth*, 409 Mass. 712, 717-18, 569 N.E.2d 790, 793-94 (1991) (indicating that no court may expand this express jurisdictional limitation imposed by the legislature).

⁴² The bill is commonly referred to as “trial first.”

⁴³ Specifically, findings indicate that juveniles inappropriately transferred to adult court typically do not receive lengthier or more severe sentences than juveniles tried in juvenile court, and they may have higher rates of future criminal activity. See *supra* notes 14-16 and accompanying text.

the decision regarding in which forum — juvenile or adult — the trial will be held. Instead, this bill aims to achieve the most appropriate sentence for the offender in an efficient manner, without eliminating the individual screening mechanism of the judicial waiver process. The main components of the bill are “trial first,” the elimination of trial *de novo* in the juvenile court system, and a permanent adult status determination. The bill reduces a four-step process to two steps for those juvenile cases where evaluation of the appropriateness of a juvenile sentence versus an adult sentence is the paramount issue.

The centerpiece of the bill, “trial first,” addresses one of the major problems with the current transfer hearing process: the inability to try and appropriately sentence juveniles as adults in a swift manner. “Trial first” involves a fairly simple change: it reverses the order in which the trial and the transfer hearing are held. The trial on the merits *precedes* an amenability/sentencing hearing, with *all* cases, even those involving the most serious crimes, tried in the juvenile court. Once guilt is determined, juvenile court judges are given the power to sentence an adjudicated offender either as an adult or as a juvenile. The amenability or Part B hearing under current law, is preserved and merged with a sentencing hearing.

The bill classifies a juvenile who would be subject to transfer under current law as a “youthful offender.”⁴⁴ A youthful offender may be sentenced as a juvenile *or* as an adult, in accordance with the findings of the amenability/sentencing hearing. After trial and an amenability hearing, an adjudicated youthful offender may be given one of three possible sentences: (1) the adult sentence provided by law; (2) the juvenile sentence provided by law; or (3) an extended commitment to DYS until the age of twenty-one.⁴⁵

⁴⁴ Section one of the bill defines a youthful offender as a person charged as a delinquent child subject to adult or juvenile sanctions who is between fourteen and seventeen years of age at the time the offense is committed, and:

1) is charged with murder in the first or second degree, manslaughter, or a violation of section eighteen, twenty-two, twenty-two A, or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six and the commonwealth has filed a notice of the intent to seek an adult sentence pursuant to section sixty-one of this chapter; or

2) is charged with an offense against a law of the commonwealth, which, if he were an adult, would be punishable by imprisonment in the state prison, and the child had previously been committed to the department of youth services, or such offense involved the threat or infliction of serious bodily harm, and the commonwealth has filed a notice of the intent to seek an adult sentence pursuant to section sixty-one of this chapter.

See *infra* Appendix.

⁴⁵ This represents a significant change from the current law, which provides that a juvenile may only be committed to the Department of Youth Services until the age of 18, or 19 in the case of a juvenile whose case is disposed of after he has attained his eighteenth birthday. MASS. GEN. L. ch. 119, § 58 (1993). An exception provides that juveniles adjudicated for manslaughter must be committed to DYS until the age of twenty-one. MASS. GEN. L. ch. 119, § 72 (1993). In addition, under current law DYS

Questions have been raised as to whether a trial as a juvenile that results in an adult sentence after an adjudication is fundamentally fair to the juvenile. This scheme is largely defensible because the procedural safeguards that exist in juvenile delinquency cases are virtually identical to those provided for adult criminal defendants.⁴⁶ These safeguards include the right to representation by counsel, advance notice of the charges, the privilege against self-incrimination and the right to confront and cross-examine witnesses.⁴⁷ While the Supreme Court of the United States has held that the Constitution does not guarantee juveniles the right to a trial by jury,⁴⁸ Massachusetts statutory law affords juvenile offenders that right.⁴⁹ Thus, the juvenile justice system affords juvenile offenders all of the procedural protections available in the adult system.

The one procedural issue that remains is the ability to impose a state prison term at a proceeding initiated in juvenile court. In Massachusetts, an individual may not be subjected to "infamous penalty," or imprisonment in state prison, without first having his or her case presented to a grand jury.⁵⁰ Since the "trial first" proposal subjects youthful offenders to the possibility of imprisonment in state prison, those juveniles retain the right to indictment. The "trial first" proposal thus requires the Commonwealth to proceed by indictment in any case in which an adult sentence is sought.

Because a probable cause hearing on a complaint and a hearing before a grand jury seeking an indictment are alternative means for establishing probable cause to hold a juvenile for trial,⁵¹ utilizing the indictment mechanism in the "trial first" proposal resolves constitutional questions that may arise and streamlines the processing of serious juvenile cases. The indictment takes the place of the lengthier Part A hearing in current transfer proceedings, and is significantly less time-consuming than conducting an adversarial probable cause hearing before a judge in the juvenile court. As a result, "trial first"

may petition a court to obtain an extension of a juvenile's commitment from age 18 to age 21, but only in cases in which the juvenile is believed to be dangerous to the public. MASS. GEN. L. ch. 120, §§ 17-19 (1993).

⁴⁶ See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 692 (1991).

⁴⁷ See *Breed v. Jones*, 421 U.S. 519, 541 (1975) (applying the ban against double jeopardy to juvenile offenders tried in the juvenile court and the adult court for the same offense); *In re Winship*, 397 U.S. 358, 368 (1970) (mandating that juvenile delinquency cases be proven by the criminal standard of beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 57 (1966).

⁴⁸ See *McKeiver v. Pennsylvania*, 403 U.S. 528, 547-51 (1971).

⁴⁹ See MASS. GEN. L. ch. 119, § 56 (1993) (providing juveniles the right to a trial by a jury of six persons in delinquency cases, except where the trial would be on an indictment if the child were an adult, in which case the trial is by a jury of twelve persons).

⁵⁰ See *Brown v. Commissioner of Corrections*, 394 Mass. 89, 93-94, 474 N.E.2d 1059, 1061-62 (1985); *Jones v. Robbins*, 74 Gray 329 (1857).

⁵¹ See *Charles C. v. Commonwealth*, 415 Mass. 58, 68, 612 N.E.2d 229, 235 (1993) (quoting *Lataille v. District Court of E. Hampden*, 366 Mass. 525, 530-31, 320 N.E.2d 877, 881 (1974)).

eliminates one phase of the current transfer process — the Part A hearing — in a constitutionally sound manner.⁵²

A significant difference between trial in the adult court and trial in the juvenile court is that delinquency proceedings are closed to the public in all cases but murder.⁵³ Traditionally, exclusion of the public from delinquency cases has been maintained to reduce stigmatization, and thereby further the capacity for rehabilitation of juvenile offenders.⁵⁴ While the principle of confidentiality is important, it is not based upon a fundamental due process right and ought to be balanced with the interests of public safety.⁵⁵ The "trial first" proposal addresses this issue by opening juvenile courtrooms to the public for hearings on the most serious offenses in which an adult sentence is sought, and allows the court to remain closed in all other cases.⁵⁶ The bill provides the judge with discretion to exclude the public if the court determines that certain information should remain confidential in the interest of the juvenile.⁵⁷

Restructuring the system to have the trial take place first is as much a matter of common sense as it is a tool to streamline the process. If enacted, "trial first" will ensure that victims and witnesses no longer wait countless months and participate in multiple hearings before the issue of guilt or innocence is resolved. Furthermore, inverting the process is fundamentally more fair for juvenile defendants who are quite often detained in secure custody during the pendency of the transfer proceedings and the trial.

VII. ABOLITION OF TRIAL DE NOVO

Elimination of the two-tiered trial process from the juvenile justice system is an important aspect of the proposed legislation. As previously mentioned,⁵⁸ the trial *de novo* system affords juvenile offenders the unique opportunity to receive two trials for the same case. The legislative proposal eliminates the two-tiered system, thereby increasing the efficiency of processing juvenile delinquency cases. Juveniles still maintain the right to a jury trial in every case, including the right to a jury of twelve members for any case that would be tried only upon an indictment if the juvenile were an adult.

⁵² See *id.* at 68, 612 N.E.2d at 235.

⁵³ See MASS. GEN. L. ch. 119, § 65 (1993).

⁵⁴ See CHAMPION & MAYS, *supra* note 6 at 38.

⁵⁵ See *News Group Boston, Inc. v. Commonwealth*, 409 Mass. 627, 632, 568 N.E.2d 600, 603 (1993) (holding that a legislative amendment to provide that public cannot be excluded from juvenile proceedings when offender is charged with murder does not abridge any due process or equal protection rights)

⁵⁶ Specifically, the bill provides that juvenile proceeding are open to the public if the offender is charged with murder in the first or second degree, manslaughter, armed assault with intent to rob or murder, rape, forcible rape of a child, kidnapping or armed burglary.

⁵⁷ See *infra* Appendix § 6. See also *News Group Boston, Inc.*, 409 Mass. at 633, 568 N.E.2d at 604.

⁵⁸ See *supra* Section V.

The abolition of trial *de novo* in the juvenile system is a necessary step toward improving the court system's overall response to juvenile delinquency. In providing two trials the current statutory scheme fails to hold a juvenile accountable for his actions in a meaningful and timely manner. Furthermore, it confers upon juvenile offenders a benefit that is no longer available to adult defendants: "two bites at the apple." Finally, the current system needlessly subjects victims and witnesses of crimes committed by juveniles to two court proceedings on the same charges, the same facts, and the same evidence.

In cases where the Commonwealth intends to seek an adult sentence, the elimination of trial *de novo*, in conjunction with "trial first," reduces a four-step process in juvenile transfer cases to a two-step process. Under existing law, a juvenile subject to a transfer proceeding may participate in four separate hearings: (1) a Part A or probable cause hearing; (2) a Part B or amenability hearing, (3) a trial; and (4) a trial *de novo*, if the juvenile is retained in the juvenile system.⁶⁰ Under the proposed legislation, the process would entail: (1) the trial, and if the juvenile is adjudicated a youthful offender, (2) an amenability/sentencing hearing.

VIII. PERMANENT STATUS DETERMINATION

Another key component of the proposed legislation is a permanent determination of the juvenile's status as an adult. Once a youthful offender has been sentenced as an adult after a trial and an amenability hearing,⁶⁰ he or she will be tried as an adult on any future criminal charges.⁶¹

This provision marks a significant change from the current requisites under the law. Presently, as long as an offender has not attained the age of seventeen, a case must be brought initially in the juvenile court, even if the offender has previously been transferred to the adult court after a transfer hearing.⁶² Therefore, the Commonwealth is required to conduct another transfer hearing each time a juvenile who has already been transferred to the adult criminal justice system faces a new charge.⁶³

This permanent status determination is a mechanism to sift out those

⁶⁰ In cases in which the juvenile is transferred to the adult court, three separate hearings must be held: (1) Part A; (2) Part B; and (3) a trial.

⁶¹ In order to sentence a juvenile as an adult after an amenability hearing under the "trial first" bill, the court must find that the juvenile presents a danger to the public and is not amenable to rehabilitation within the juvenile justice system.

⁶² An example of this provision in practice is as follows: A youthful offender has been tried and adjudicated in the juvenile court. An amenability hearing is held, at which the court finds the offender is both dangerous and not amenable to rehabilitation within the juvenile justice system, and sentences the offender to adult prison. Thereafter, the offender, who is still under the age of seventeen, commits another crime (e.g., a violent assault upon a prison staff member). The new criminal charges will be tried in the adult criminal court in the first instance.

⁶³ MASS. GEN. L. ch. 119, §§ 52, 74 (1993).

⁶³ See *id.*

juveniles who clearly do not belong in the juvenile system. It advances the principle that the limited resources of the juvenile justice system should be allocated to juveniles who may be able to benefit from its rehabilitative programs, and not to those who may not, as determined by a court. From a public policy perspective, this provision communicates a warning to serious youthful offenders that the opportunities to be treated as juveniles have been exhausted, and age will no longer ameliorate the consequences of their actions.

IX. TRIAL FIRST IN PRACTICE: THE NEW MEXICO MODEL

The "trial first" component of the legislative proposal is based upon a model implemented in New Mexico, on July 1, 1993.⁶⁴ Like the Massachusetts "trial first" proposal, the New Mexico law mandates that the trial precede the amenability hearing, and creates a new category of "youthful offenders" who may be sentenced as juveniles or as adults after the amenability hearing.⁶⁵

⁶⁴ See 1993 N.M. Laws 77.

⁶⁵ New Mexico law defines youthful offender as follows:

"[Y]outhful Offender" means a delinquent child subject to adult or juvenile sanctions who is:

(1) fifteen to eighteen years of age at the time of the offense and who is adjudicated for at least one of the following offenses

(a) second degree murder, as provided in Section 30-2-1 NMSA 1978;

(b) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(c) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(d) aggravated battery, as provided in Section 30-3-5 NMSA 1978;

(e) shooting at a dwelling or occupied building, or shooting at or from a motor vehicle, which results in great bodily harm to another person, as provided in Section 30-9-11 NMSA 1978;

(f) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(g) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(h) robbery, as provided in Section 30-16-4 NMSA 1978;

(i) aggravated burglary, as provided in Section 30-17-6 NMSA 1978; or

(j) aggravated arson, as provided in Section 30-17-6 NMSA 1978;

(2) fifteen to eighteen years of age at the time of the offense and adjudicated for any felony offense and who has had three prior, separate felony adjudications within a two-year time period immediately preceding the instant offense. The felony adjudications relied upon as prior adjudications shall not have arisen out of the same transaction or occurrence or series of events related in time and location. Successful completion of consent decrees are not considered a prior adjudication for the purposes of this paragraph; or

(3) fifteen years of age and adjudicated for first degree murder.

N.M. STAT. ANN. § 32A-2-3(I) (Michie 1995). New Mexico also includes a category of "serious youthful offenders," which is an individual sixteen or seventeen years of age who is charged with and indicted or bound over for trial for first degree murder. A "serious youthful offender" is not a delinquent child. *Id.* § 32A-2-3(H). These offend-

Current indications are that New Mexico's law has resulted in more juveniles being sent to prison.⁶⁶ Prior to adopting a trial first approach, figures from New Mexico demonstrated that between 1992 and June 30, 1993, only seven youth, ages fifteen to eighteen, were sentenced to an adult (Department of Corrections) facility.⁶⁷ Between July 1, 1993 and June 30, 1994, after New Mexico's trial first legislation became effective, nineteen youthful offenders were sentenced to the Department of Corrections.⁶⁸ Moreover, as of October 28, 1994, five more youthful offenders had been sentenced to adult corrections.⁶⁹ According to a report issued by the Center for Youth Policy, this dramatic increase in the number of youth waived has occurred even though there was no significant increase in the proportion of youthful offender adjudications during this time, nor was there an increase in the number of youth adjudicated for a Youthful Offender offense.⁷⁰

At a minimum, the New Mexico system has been responsible for ensuring that a greater proportion of serious juvenile offenders, deemed to be no longer amenable to treatment within the juvenile system, are sentenced appropriately as adults while at the same time preserving the essential aspects of the juvenile justice system.⁷¹

X. CONCLUSION

The recent legislative proposal including the "trial first" concept has shifted the debate on how to respond to youth violence by challenging the prevailing view that automatic transfer and similar "get tough" solutions are the only avenues for addressing juvenile crime.

As mentioned earlier, accountability has two elements: (1) swift resolution of the case, which ensures that young offenders understand that their actions have consequences; and (2) imposition of an appropriate sentence that adequately addresses both long-term public safety concerns and the rehabilitation potential of the juvenile. The proposed legislation advances these principles by streamlining the current transfer process and eliminating excessive delays which dilute the critical message of accountability, while at the same time preserving the unique capacity of the juvenile justice system to examine both the offender and the offense in crafting an appropriate sentence. By abolishing trial *de novo* in the juvenile justice system, the bill strengthens the ability to hold juvenile offenders accountable in each and every delinquency case. The permanent status determination ensures that the resources of the juvenile jus-

ers are tried automatically in adult court.

⁶⁶ See CENTER FOR THE STUDY OF YOUTH POLICY, *supra* note 13, at 19. At present, it does not appear that studies have been conducted to test the rate at which cases proceed through the system after the trial first approach was adopted in New Mexico.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

tice system are not wasted on offenders already determined to be not amenable to rehabilitation within that system. Finally, if preliminary results from New Mexico are a valid indicator, "trial first" has the potential to refine the decision-making involved in sentencing juveniles to ensure sentencing as adults when appropriate for public safety purposes.

The proposed legislation enables the determination as to whom should be sentenced as an adult to be made in an expeditious and procedurally fair manner. The bill enhances the integrity of the juvenile justice system and improves its ability to work on behalf of those juveniles who can best benefit from its services. It constitutes a critical component of a strategy designed to promote long-term public safety.

APPENDIX

AN ACT RELATIVE TO THE TRIAL AND SENTENCING OF YOUTHFUL OFFENDERS

SECTION ONE.

Section fifty-two of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by inserting the following paragraph and the end of said section:—

"Youthful Offender", a person charged as a delinquent child subject to adult or juvenile sanctions who is between fourteen and seventeen years of age at the time the offense is committed, and:

1) is charged with murder in the first or second degree, manslaughter, or a violation of section eighteen, twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six and the commonwealth has filed a notice of the intent to seek an adult sentence pursuant to section sixty-one of this chapter; or

2) is charged with an offense against a law of the commonwealth, which, if he were an adult, would be punishable by imprisonment in the state prison, and the child had previously been committed to the department of youth services, or such offense involved the threat or infliction of serious bodily harm and the commonwealth has filed a notice of the intent to seek an adult sentence pursuant to section sixty-one of this chapter.

SECTION TWO.

Section fifty-four of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out in lines 1-5 the following words, "If complaint is made to any court that a child between seven and seventeen years of age is a delinquent child, said court shall examine, on oath, the complainant and the witnesses, if any, produced by him, and shall reduce the complaint to writing, and cause it to be subscribed by the complainant." and inserting in place thereof the words, "If a complaint is made to any court that a person has committed an offense or violation while such person was between seven and seventeen years of age, said court shall

examine, on oath, the complainant and the witnesses, if any produced by him, and shall reduce the complaint to writing, and cause it to be subscribed by the complainant.”

SECTION THREE.

Section fifty-eight of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking said section and replacing it with the following:—

Section 58. Adjudication as a delinquent child or youthful offender:

At the hearing of a complaint against a child the court shall hear the testimony of any witnesses that appear and take such evidence relative to the case as shall be produced. If the allegations against a child are proved beyond a reasonable doubt, he may be adjudicated a delinquent child, or a youthful offender in the event that the commonwealth has filed a notice of intent to seek an adult sentence pursuant to section sixty-one, or in lieu thereof, the court may continue the case without a finding and, with the consent of the child and at least one of the child's parents or guardians, place said child on probation; provided, however, that any such probation may be imposed until such child becomes age eighteen, or age nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday. Said probation may include a requirement, subject to agreement by the child and at least one of the child's parents or guardians, that the child do work or participate in activities of a type and for a period of time deemed appropriate by the court.

If a child is adjudicated a delinquent child, the court may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services, but the probationary or commitment period shall not be for a period longer than until such child attains the age of eighteen, or age nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday.

If a child is adjudicated a youthful offender, and the court fails to make the findings that the child presents a danger to the public and is not amenable to rehabilitation within the juvenile justice system in accordance with the provisions of section sixty-one of this chapter, the court shall sentence said youthful offender as a delinquent child, and may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services, but the probationary or commitment period shall not be for a period longer than until such child becomes age twenty-one.

If a child is adjudicated a youthful offender by reason of having violated section one of chapter two hundred and sixty-five, and the court fails to make the finding that the child presents a danger to the public and is not amenable to rehabilitation within the juvenile justice system in accordance with the provisions of section sixty-one of this chapter, and if the adjudication is for murder in the first degree such child shall be committed to a maximum confine-

ment of twenty years. Such confinement shall be to the custody of the department of youth services in a secure facility until a maximum age of twenty-one years and thereafter shall be to the custody of the department of correction for the remaining portion of the commitment but in no case shall the confinement be for less than fifteen years and said child shall not be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven until said child has served fifteen years of said confinement. Thereafter said child shall be subject to the provisions of law governing the granting of parole permits by the parole board. If said child is adjudicated a youthful offender by reason of having violated section one of chapter two hundred and sixty-five, and the court fails to make the finding that the child presents a danger to the public and is not amenable to rehabilitation within the juvenile justice system, and if that adjudication is for murder in the second degree such child shall be committed to a maximum confinement of fifteen years. Such confinement shall be to the department of youth services in a secure facility until a maximum age of twenty-one years and thereafter to the custody of the department of correction for the remaining portion of that sentence, but in no case shall the confinement be for less than ten years and said child shall not be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven until said child has served ten years of said confinement. Thereafter said child shall be subject to the provisions of law governing the granting of parole permits by the parole board. Notwithstanding any other provisions of this section, if said adjudication is for manslaughter said child shall be committed to the custody of the department of youth services until he reaches twenty-one years of age.

The court shall not suspend the commitment of a child adjudicated to be a youthful offender by reason of having violated section one of chapter two hundred and sixty-five; nor shall the provisions of section one hundred and twenty-nine, one hundred and twenty-nine C or one hundred and twenty-nine D of chapter one hundred and twenty-seven apply to such commitment.

If a child is adjudicated a youthful offender, and the court makes the findings that the child presents a danger to the public and is not amenable to rehabilitation within the juvenile justice system in accordance with the provisions of section sixty-one of this chapter, the child shall be sentenced in the same manner as for any criminal offense. If such youthful offender is placed on probation by the court, he may be placed in the care of an adult probation officer of a division of the district court department for the judicial district in which such child resides.

The court may commit a delinquent child to the department of youth services, but, except as provided for youthful offenders herein, it shall not commit such child to a jail or house of correction, nor to any institution supported by the commonwealth for the custody, care and training of delinquent children or juvenile offenders.

If it is alleged in the complaint upon which the child is adjudged a delinquent child or youthful offender, that a penal law of the commonwealth, a city ordinance or a town by-law has been violated, the court may commit such

child to the custody of the commissioner of youth services and authorize him to place such child in the charge of any person, and if at any time thereafter the child proves unmanageable, to transfer such child to that facility which best serve the needs of the child. The department of youth services shall provide for the maintenance, in whole or in part, of any child so placed in the charge of any person.

The court may make an order for payment by the child's parents or guardian from the child's property, or by any other person responsible for the care and support of said child, to the institution, department, division, organization or person furnishing care and support at times to be stated in an order by the court of sums not exceeding the cost of said support after ability to pay has been determined by the court; provided, that no order for the payment of money shall be entered until the person by whom payments are to be made shall have been summoned before the court and given an opportunity to be heard. The court may from time to time, upon petition by, or notice to the person ordered to pay such sums of money, revise or alter such order or make a new order, as the circumstances may require.

SECTION FOUR.

Section sixty-one of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out said section and replacing it with the following:—

Section 61. Dispositional Hearing for Youthful Offender.

The commonwealth may file a notice of intent to seek an adult sentence whenever it is alleged that a child, who is between fourteen and seventeen years of age at the time the offense is committed, has committed an offense against a law of the commonwealth, which, if he were an adult, would be punishable by imprisonment in the state prison, and the child had previously been committed to the department of youth services, or such offense involved the threat or infliction of serious bodily harm.

The commonwealth shall file a notice of intent to seek an adult sentence in every case in which it is alleged that a child, who is between fourteen and seventeen years of age at the time the offense is committed, has committed murder in the first or second degree, manslaughter, or a violation of section eighteen, twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six. The commonwealth shall file a notice to seek an adult sentence within ten court business days of the child's first appearance before the court following the date of the complaint.

In all cases in which the commonwealth intends to seek an adult sentence, the commonwealth may proceed by filing a complaint in juvenile court or in a juvenile session of a district court, as the case may be, or by indictment as provided by chapter two hundred and seventy-seven. In such proceedings initiated by the filing of a complaint, a probable cause hearing shall be held within fifteen days of the child's first appearance before the court following the date

of the complaint, unless the commonwealth shall have proceeded by indictment prior to such hearing. If the commonwealth has proceeded by indictment, no probable cause hearing shall be held. In all cases brought pursuant to the provisions of this section, the child shall have the right to an indictment proceeding under section four of chapter two hundred and sixty-three, unless such child, upon advice of counsel, duly waives indictment.

If the commonwealth has filed a notice of intent to seek an adult sentence and the child is adjudicated a youthful offender after the hearing of a complaint or indictment against said child as provided in section fifty-eight, the court shall conduct a hearing to determine whether the child presents a danger to the public, and whether the child is amenable to rehabilitation within the juvenile justice system. In making such determination the court shall consider, but shall not be limited to, evidence of the nature, circumstances, and seriousness of the alleged offense; the child's court and delinquency record; the child's age and maturity; the family, school and social history of the child; the success or lack of success of any past treatment efforts of the child; the nature of services available through the juvenile justice system; the adequate protection of the public; and the likelihood of rehabilitation of the child. Such hearing shall be held within thirty days of the date on which the child is adjudged to be a youthful offender, provided, however, that a failure to hold such hearing within said thirty days shall not prohibit such hearing from being held at a later time as determined by the court.

There shall exist a rebuttable presumption that the youthful offender presents a significant danger to the public and that such child is not amenable to rehabilitation within the juvenile justice system. If, at the hearing, the court enters a written finding based upon a preponderance of the evidence that the youthful offender presents a significant danger to the public and is not amenable to rehabilitation within the juvenile justice system, the youthful offender shall be treated as an adult offender and sentenced in accordance with the provisions of section fifty-eight. If the court fails to make such findings the court shall state its reasons in writing and, prior to the imposition of a sentence, the commonwealth shall be afforded an opportunity to appeal the decision of the court under the provisions of section twenty-eight E of chapter two hundred and seventy-eight. Any such appeal shall be taken within ten days after the court's failure to make said findings and imposition of a sentence shall be stayed pending the entry of an order of the appellate court. If the time for the commonwealth to appeal expires, or if such appeal is denied then the court shall proceed to sentence the youthful offender within the juvenile justice system, pursuant to section fifty-eight.

SECTION FIVE.

Section sixty-five of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out in line 11 the words, "with murder in the first or second degree" and replacing them with the words, "as a youthful offender by reason of murder in the first

or second degree, manslaughter, or a violation of section eighteen, twenty-two, twenty-two A or twenty-six of chapter two hundred and sixty-five, or section fourteen of chapter two hundred and sixty-six”.

SECTION SIX.

Section sixty-five of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby further amended by inserting in line 14 after the word, “case,” the words, “The court may exclude the general public from any portion of a hearing conducted pursuant to section sixty-one, if it is determined that certain information should be kept confidential in the interest of the juvenile.”

SECTION SEVEN.

Section seventy two of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out said section and replacing it with the following:—

The divisions of the juvenile court department shall continue to have jurisdiction over children who attain their seventeenth birthday pending a hearing under section sixty-one of this chapter, or adjudication of their cases, or during continuances or probation, or after their cases have been placed on file; and if a child commits an offense prior to his seventeenth birthday, and is not apprehended until between his seventeenth and eighteenth birthdays, the court shall deal with such child in the same manner as if he has not attained his seventeenth birthday, and all provisions and rights applicable to a child under seventeen shall apply to such child. The divisions of the juvenile court department, shall continue to have jurisdiction over persons who attain their eighteenth birthday pending the determinations allowed under section sixty-one of this chapter or pending adjudication of their cases, or during continuances or probation, or after their cases have been placed on file. Except as provided herein, nothing shall authorize the commitment of a person to the department of youth services after he has attained his nineteenth birthday, or give any division of the juvenile court department any power or authority over a person after he has attained his nineteenth birthday.

If a child is alleged to be a youthful offender and the commonwealth has filed a notice to seek an adult sentence, the divisions of the juvenile court department shall continue to have jurisdiction over such persons pending the adjudication of their cases, or pending the determinations allowed under section sixty-one and such persons may be committed to the department of youth services as provided in section fifty-eight.

SECTION EIGHT.

Section seventy-two A of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out in line 2, the words, “prior to his seventeenth birthday” and inserting in

place thereof the words, "between his seventh and seventeenth birthdays."

SECTION NINE.

Section seventy-two A of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by inserting after the word "inclusive" in line 5, the words, ", notwithstanding any age limitations set forth in said sections."

SECTION TEN.

Section seventy-four of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking said section and replacing it with the following:—

Section 74. (a) Except as provided in (b) and (c) herein, no criminal proceeding shall be begun against any person who prior to his seventeenth birthday commits an offense against the law of the commonwealth or who violates any city ordinance or town by-law unless proceedings against him as a delinquent child have been begun and dismissed as required by section seventy-two A. No criminal penalty may be imposed against any person who prior to his seventeenth birthday commits an offense against the law of the commonwealth or who violates any city ordinance or town by-law, unless proceedings against him as a delinquent child or youthful offender have been completed pursuant to section sixty one or seventy-two A.

(b) A criminal proceeding may be begun, and criminal penalty imposed, against a child who prior to his seventeenth birthday commits an offense against the law of the commonwealth or who violates any city ordinance or town by-law without first conducting a hearing pursuant to section sixty-one or seventy-two A if the child has previously been adjudicated a youthful offender and the court has made the findings that the child presents a danger to the public and is not amenable to rehabilitation within the juvenile system pursuant to section sixty-one.

(c) A criminal complaint alleging violation of any city ordinance or town by-law regulating the operation of motor vehicles, which is not capable of being judicially heard and determined as a civil motor vehicle infraction pursuant to the provisions of chapter ninety C may issue against a child between sixteen and seventeen years of age without first proceeding against him as a delinquent child or youthful offender.

SECTION ELEVEN.

Section eighty-three of chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out said section and replacing it with the following:—

The indictment of any person bound over under section seventy-two A shall be tried before the superior court in the same manner as any criminal proceeding and, upon conviction, such person may be sentenced to such punishment as

is provided by law for the offense, or placed on probation, with or without a suspended sentence for such period of time and under such conditions as the court may order.

SECTION TWELVE.

Section eleven of chapter one hundred and twenty of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by inserting in line 5 after the word "delinquents" the words, ", youthful offenders".

SECTION THIRTEEN.

Section sixteen of Chapter one hundred and twenty of the General Laws as appearing in the 1992 official edition, is hereby amended by inserting in line 9 after the words "delinquent child" the words, "or youthful offender".

SECTION FOURTEEN.

Section twenty-one of chapter one hundred and twenty of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by deleting in lines 1-2 the words "wayward child or delinquent child" and replacing them with the words, "delinquent child or youthful offender".

SECTION FIFTEEN.

Section twenty-seven of chapter two hundred and eighteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out said section and replacing it with the following:—

Section 27. Imposition of Penalties.

They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison; provided, however, that the divisions of the juvenile court department, shall have the power to sentence a child adjudicated a youthful offender and sentenced in accordance with the provisions of section fifty-eight of chapter one hundred and nineteen.

SECTION SIXTEEN.

Chapter one hundred and nineteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out section fifty-five A, and inserting in place thereof the following:—

Section 55A. Trial of a child complained of as a delinquent child in a division of the juvenile court department shall be by a jury, unless the child files a written waiver and consent to be tried by the court without a jury. Such waiver shall not be received unless the child is represented by counsel or has filed, through his parent or guardian, a written waiver of counsel. No decision on such waiver shall be received until after the completion of a pretrial conference and a hearing on the results of such conference and until after the dispo-

sition of any pretrial discovery motions and compliance with any order of the court pursuant to said motions. Such waiver shall be filed in accordance with the provisions of section six of chapter two hundred and sixty-three; provided, however, that defense counsel shall execute a certificate signed by said counsel indicating that he has made all the necessary explanations and determinations regarding such waiver. The form of such certificate shall be prescribed by the chief justice for the juvenile court department.

In the juvenile court department upon the motion of a child consistent with criminal procedure, or upon the court's own motion, the judge shall issue an order of discovery requiring any information to which the child is entitled and also requiring that the defendant be permitted to discover, inspect, and copy any material and relevant evidence, documents, statements or persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody, or control of the prosecutor or persons under his direction and control. Upon motion of the defendant the judge shall order the production by the commonwealth of the names and addresses of the prospective witnesses and the production by the probation department of the record of prior convictions of any such witnesses.

Trial by jury in the juvenile court department shall be in those jury sessions designated in accordance with section fifty-six. Where the child has properly filed a waiver and consented to be tried without a jury, as hereinbefore provided, trial shall proceed in accordance with the provisions of law applicable to jury-waived trials in the superior court; provided, however, that at the option of the child, the trial may be before a judge who has not rejected an agreed recommendation or disposition request made by the child pursuant to the provisions of section fifty-five B. Review in such cases may be had directly by the appeals court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the superior court.

The justice presiding over such jury-waived delinquency trial in the juvenile court department shall have and exercise all of the powers which a justice sitting in the superior court department has and may exercise in the trial and disposition of criminal cases including the power to report questions of law to the appeals court.

The justice presiding at such jury-waived session in the juvenile court department shall, upon the request of the child, appoint a stenographer; provided, however, that where the child claims indigence, such appointment is determined to be reasonably necessary in accordance with the provisions of sections twenty-seven A to twenty-seven G, inclusive, of chapter two hundred and sixty-one. Such stenographer shall be sworn, and shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the juvenile court department; provided, further, that such rate shall not exceed the rate provided pursuant to section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and services of

stenographers appointed for sessions in his department and any other matter relative to stenographers. The compensation and expenses of a stenographer shall be paid by the commonwealth.

The request for the appointment of a stenographer to preserve the testimony at a trial in the juvenile court department shall be given to the clerk of the court by the child in writing no later than forty-eight hours prior to the proceeding for which the stenographer has been requested. The child shall file with such request an affidavit of indigence and request for payment by the commonwealth of the cost of the transcript and the court shall hold a hearing on such request prior to appointing a stenographer, in those cases where the child alleges that he will be unable to pay said cost. Said hearing shall be governed by the provisions of sections twenty-seven A to twenty-seven G, inclusive, of chapter two hundred and sixty-one, and the cost of such transcript shall be considered an extra cost as provided therein. If the court is unable, for any reason, to provide a stenographer, the proceedings may be recorded by electronic means. The original recording of proceedings in the juvenile court department made with a recording device under the exclusive control of the court shall be the official record of such proceedings. Said record or a copy of all or a part thereof, certified by the presiding justice or his designee, to be an accurate electronic reproduction of said record or part thereof, or a typewritten transcript of all or part of said record or copy thereof, certified to be accurate by the court or by the preparer of said transcript, or stipulated to by the parties, shall be admissible in any court as evidence of testimony given wherever proof of such testimony is otherwise competent. The child may request payment by the commonwealth of the cost of said transcript subject to the same provisions regarding a transcript of a stenographer as provided hereinbefore.

Section 55B. A child who is before the juvenile court on a delinquency complaint within the court's jurisdiction shall plead not delinquent or delinquent, or with the consent of the court, *nolo contendere*. Such plea of delinquent shall be submitted by the child and acted upon by the court; provided, however, that a child with whom the commonwealth cannot reach agreement for a recommended disposition shall be allowed to tender a plea of delinquent together with a request for a specific disposition. Such request may include any disposition or dispositional terms within the court's jurisdiction including, unless otherwise prohibited by law, a disposition request that a delinquent finding not be entered, but rather the case be continued without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions or that the child be placed on probation pursuant to the provisions of section fifty-seven of chapter one hundred and nineteen. If a plea, with an agreed upon recommendation or with a disposition request by the child, is tendered, the court shall inform the child that it will not impose a disposition that exceeds the terms of the agreed upon recommendation or the disposition request by the child, whichever is applicable, without giving the child the right to withdraw the plea.

If a child, notwithstanding the foregoing requirements, attempts to enter a

plea or statement consisting of an admission of facts sufficient for a finding of delinquent, or some similar statement, such admission shall be deemed a tender of plea of delinquent for purposes of the procedures set forth in this section.

Any pretrial motion filed in a delinquency case pending in the juvenile court and decided before entry of the child's decision on waiver of the right to jury trial shall not be refiled or reheard thereafter, except in the discretion of the court as substantial justice requires. Any such pretrial motion not filed or filed but not decided prior to entry of the child's decision on waiver of the right to jury trial may be filed thereafter but not later than twenty-one days after entry of said decision on waiver of the right to jury trial, except for good cause shown.

SECTION SEVENTEEN.

Said chapter one hundred and nineteen is hereby further amended by striking out section fifty-six, as amended by section nine of chapter twelve of the acts of 1993, and inserting in place thereof the following section:—

Section 56. Hearings upon cases arising under sections fifty-two to sixty-three, inclusive, may be adjourned from time to time. Section thirty-five of chapter two hundred and seventy-six relative to recognizance in cases continued shall apply to cases arising under sections fifty-two to sixty-three, inclusive.

(a) Every division of the juvenile court department is authorized to hold jury sessions for the purpose of conducting jury trials of cases commenced in the several courts of delinquency offenses over which the juvenile courts have original jurisdiction.

(b) The chief justice for the juvenile court department shall designate at least one division in each county or an adjoining county for the purposes of conducting jury trials.

The chief justice of the juvenile court department may also designate one or more divisions in each county for the purposes of conducting jury-waived trials of cases commenced in any court of said county consistent with the requirements of the proper administration of justice.

(c) A child in any division of the juvenile court who waives his right to jury trial as provided in section fifty-five A shall be provided a jury-waived trial in the same division.

A child in any division of the juvenile court who does not waive his right to jury trial as provided in section fifty-five A shall be provided a jury trial in a jury session in the same division if such has been established in said division. If such session has not been so established, the child shall be provided a jury trial in a jury session in an adjoining county as designated by the clerk in the division where the case is pending. In cases where the child declines to waive the right to jury trial, the clerk shall forthwith transfer the case for trial in the appropriate jury session. Such transfer shall be governed by procedures to be established by the chief justice for the juvenile court department.

(d) The justice presiding over a jury session shall have and exercise all the powers and duties which a justice sitting in the superior court department has and may exercise in the trial and disposition of criminal cases including the power to report questions of law to the appeals court. No justice so sitting shall act in a case in which he has sat or held an inquest or otherwise taken part in any proceeding therein.

(e) Trials by jury shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court except that the number of preemptory challenges shall be limited to two to each child. The commonwealth shall be entitled to as many challenges as equal the whole number to which all the children in the case are entitled. Trial by jury shall be by juries of six persons, except that in those cases where trial would be only upon an indictment were the child an adult, said child shall be entitled to a jury of twelve.

(f) For the jury sessions, jurors shall be provided by the office of jury commissioner in accordance with the provisions of chapter two hundred and thirty-four A.

(g) The district attorney for the district in which alleged offense or offenses occurred shall appear for the commonwealth in the trial of all cases in which the right to jury trial has not been waived and may appear in any other case. The chief justice for the juvenile court department shall arrange for the sittings of the jury sessions and shall assign justices thereto, to the end that speedy trials may be provided. Review may be had directly by the appeals court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the superior court.

(h) The justice presiding at such jury session in the juvenile court department shall, upon the request of the child, appoint a stenographer; provided, however, that where the child claims indigence, such appointment is determined to be reasonably necessary in accordance with the provisions of sections twenty-seven A to twenty-seven G, inclusive, of chapter two hundred and sixty-one. Such stenographer shall be sworn, and shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the juvenile court department; provided, further, that such rate shall not exceed the rate provided pursuant to section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and services of stenographers appointed for sessions in his department and any other matter relative to stenographers. The compensation and expenses of a stenographer shall be paid by the commonwealth.

The request for the appointment of a stenographer to preserve the testimony at a trial in the juvenile court department shall be given to the clerk of the court by the child in writing no later than forty-eight hours prior to the proceeding for which the stenographer has been requested. The child shall file with such request an affidavit of indigence and request for payment by the

commonwealth of the cost of the transcript and the court shall hold a hearing on such request prior to appointing a stenographer, in those cases where the child alleges that he will be unable to pay said cost. Said hearing shall be governed by the provisions of sections twenty-seven A to twenty-seven G, inclusive, of chapter two hundred and sixty-one, and the cost of such transcript shall be considered an extra cost as provided therein. If the court is unable, for any reason, to provide a stenographer, the proceedings may be recorded by electronic means. The original recording of proceedings in the juvenile court department made with a recording device under the exclusive control of the court shall be the official record of such proceedings. Said record or a copy of all or a part thereof, certified by the presiding justice or his designee, to be an accurate electronic reproduction of said record or part thereof, or a typewritten transcript of all or part of said record or copy thereof, certified to be accurate by the court or by the preparer of said transcript, or stipulated to by the parties, shall be admissible in any court as evidence of testimony given wherever proof of such testimony is otherwise competent. The child may request payment by the commonwealth of the cost of said transcript subject to the same provisions regarding a transcript of a stenographer as provided hereinbefore.

SECTION EIGHTEEN.

Section sixty-three of said chapter one hundred and nineteen, as amended by section ten of chapter twelve of the acts of 1993, is hereby amended by striking out, in the third sentence, the words "appeal and".

SECTION NINETEEN.

Section sixty-six of said chapter one hundred and nineteen, as appearing in the 1992 Official Edition, is hereby amended by striking out, in lines 9 and 10, the words "or pending the prosecution of an appeal to the juvenile appeals session".

SECTION TWENTY.

Section sixty-eight of said chapter one hundred and nineteen, as appearing in the 1992 Official Edition, is hereby amended by striking out in line 4, the words ", or to prosecute an appeal to a juvenile appeals session".

SECTION TWENTY-ONE.

Said section sixty-eight of said chapter one hundred and nineteen, as so amended, is hereby further amended by striking out, in line 41, the words "a district court or a juvenile appeals session", and inserting in place thereof the following words "or a district court".

SECTION TWENTY-TWO.

Said section sixty-eight of said chapter one hundred and nineteen, as so amended, is hereby further amended by striking out, in line 50, the words "to prosecute appeals to a juvenile appeals session,".

SECTION TWENTY-THREE.

Section sixty-eight A of said chapter one hundred and nineteen, as so appearing, is hereby amended by striking out, in lines 4 and 5, the words ", or to prosecute an appeal to a juvenile appeals session,".

SECTION TWENTY-FOUR.

Section fifty-seven of chapter two hundred and eighteen of the General Laws, as appearing in the 1992 Official Edition, is hereby amended by striking out in line 183, the words "and fifty-six".

SECTION TWENTY-FIVE.

The provisions of this act shall apply to delinquency proceedings commenced on or after the effective date of this act. For the purposes of this section commencement of a delinquency proceeding shall be defined as the date of arrest, or in cases not initiated by arrest the date of issuance of a delinquency complaint.

