



## Maryland State's Attorneys' Association

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**DATE:** February 8, 2022

**BILL NUMBER:** HB 294

**POSITION:** Unfavorable

The Maryland State's Attorney's Association (MSAA) opposes HB 294.

### **I. Introduction**

Juvenile jurisdiction involves multiple statutes, rules, and administrative procedures and is more complex and interrelated than commonly understood. The collateral consequences of eliminating automatic adult jurisdiction involve the disruption of many of these facets that will certainly create unintended (or perhaps intended) effects. These effects will compromise certain aspects of public safety and ultimately expose some weaknesses in the juvenile justice system. Below are just a few of the potential issues that arise from such a complete repeal.

#### **A. Arrest Warrants**

Obtaining a juvenile arrest warrant is cumbersome for law enforcement. Like most procedures, each jurisdiction has some variances in actual practice, but the essential methodology is governed by statute. Pursuant to Courts and Judicial Proceedings Article § 3-8A-14.1(a), in order for an arrest warrant to be issued against a child, a law enforcement officer must make an application to a Department of Juvenile Services ("DJS") Intake Worker. That worker then has up to 25 days to conduct an inquiry under Courts and Judicial Proceedings Article § 3-8A-10(c) to determine whether "judicial action is in the best interests of the public or the child." If the allegation is a felony, the worker must forward the application to the State's Attorney's Office for the jurisdiction where the alleged delinquent act occurred.<sup>1</sup>

If the intake officer approves the filing of a petition, the intake officer "may" file the application for an arrest warrant with the court. A judge may only issue a warrant if the judge finds (based

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<sup>1</sup> Courts and Judicial Proceedings Article § 3-8A-10(c)(1)-(4)

on the affidavit filed by a law enforcement officer) that there is probable cause to believe that: (1) the suspect child has committed a delinquent act; and (2) unless the suspect child is taken into custody, the child may do one of the following things: leave the jurisdiction of the court, avoid apprehension, cause physical injury or property damage to another, or tamper with, dispose of, or destroy evidence.<sup>2</sup> In practice, all of the above review is conducted during business hours.

For juveniles charged as adults, the process is much simpler. Pursuant to Courts and Judicial Proceedings Article, § 2-607, a law enforcement officer must make an application to a District Court Commissioner who may issue an arrest warrant if there is probable cause to believe an individual has committed a qualifying crime, the whereabouts of the defendant are unknown, and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court or the defendant poses a danger to another person or to the community.<sup>3</sup> District Court Commissioners are typically available 24 hours and law enforcement officers have unlimited access. Additionally, pursuant to recent legislative action, a Commissioner's authority is not without limits as, upon a finding of good cause, a judge may recall an arrest warrant issued by a District Court Commissioner.<sup>4</sup>

The main issue with the juvenile warrant process is speed. Under the current system, a juvenile suspect who police have probable cause to believe has committed a direct file<sup>5</sup> offense, which are very serious and might involve a victim, may be apprehended quickly, so long as a law enforcement officer satisfies the requirements for commissioner-based warrants. Arrest warrants are typically disseminated rapidly throughout a law enforcement network so that all officers are apprised and can take action swiftly to prevent any additional harm to the community or another victim.

If direct file is eliminated, law enforcement will have to rely on the juvenile warrant process, which involves multiple levels of review that take time to accomplish. For juveniles accused of violent crimes such as murder, rape or armed carjacking, waiting for the review process and warrant to be complete risks public safety and could result in another person being harmed.

## **B. Detention**

Pursuant to Courts and Judicial Proceedings Article § 3-8A-15, a DJS intake officer has discretion to determine whether a youth may be detained from the point at which that youth is taken into custody. If the intake worker determines that a youth be detained or subject to an alternative to detention, such as community detention, electronic monitoring or shelter care, that decision must be reviewed by a judge the next business day.<sup>6</sup>

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<sup>2</sup> Courts and Judicial Proceedings Article § 3-8A-14.1 (b)

<sup>3</sup> Courts and Judicial Proceedings Article § 2-607(c)(6)(iii)

<sup>4</sup> See Chs. 594 and 595 (2021), Courts and Judicial Proceedings Article § 2-607(e)

<sup>5</sup> All of the offenses excluded from juvenile jurisdiction as listed in Courts and Judicial Proceedings Article § 3-8A-03(d)(1)-(5) are collectively referred to in juvenile delinquency practice vernacular as "direct file" or "automatic adult."

<sup>6</sup> Courts and Judicial Proceedings Article § 3-8A-15(d)(1)-(2)

However, if the intake worker decides not to detain, or utilize any alternatives to detention, that decision may not be reviewed, even if the underlying offense is a felony. This means that the State would be precluded from requesting detention until the matter is forwarded to the State's Attorney's Office for authorization to file a Petition under Courts and Judicial Proceedings Article § 3-8A-10(c)(3), which may take up to 25 days.

As such, the State or any law enforcement officer has no remedy to challenge the decision by a DJS intake worker to not detain. If direct file were eliminated, a DJS intake worker would essentially retain judicial authority to determine detention where the underlying offense is murder, manslaughter, carjacking or a serious assault, which exposes a serious flaw that could impact public safety.

### **C. Waiver**

Proponents of the elimination of direct file often address public safety concerns by asserting that, if all cases begin in juvenile jurisdiction, prosecutors can simply use the process outlined in Courts and Judicial Proceedings § 3-8A-06 to waive the most violent juvenile offenders to adult court. That process, however, contains some alarming deficiencies that hamstring prosecutors.

The recent Court of Appeals' decision in *Davis v. State*, 474 Md. 439, 255 A.3d 56 (2020) dramatically altered the manner in which courts decide transfer motions – and by extension, waiver hearings. Generally, a “transfer” involves moving a case from adult to juvenile court, while a “waiver” involves moving a case from juvenile to adult court.<sup>7</sup> A court must consider five statutory factors in any waiver<sup>8</sup> or transfer<sup>9</sup> decision: (1) the age of the child; (2) the child's physical and mental condition; (3) the child's amenability to treatment in any institution, facility, or programs available to delinquents; (4) the nature of the offense(s); and (5) public safety. To assist in the consideration of these factors, the transfer statute provides for a court-ordered study, usually conducted by DJS, that “concern[s] the child, the family of the child, the environment of the child, and other matters concerning the disposition of the case.”<sup>10</sup> Curiously, such a study is not required for waivers. Rather, Maryland Rule 11-113(b) mandates that upon the filing of a waiver, “the court shall order that a waiver investigation be made. The report of the waiver investigation shall include all social records that are to be made available to the court at the waiver hearing.”<sup>11</sup>

There is also a critical difference between transfer and waiver hearings regarding the burden of proof. In transfer hearings, the burden of persuasion lies with the defendant<sup>12</sup> in that the Court must be persuaded by a preponderance of the evidence that “a transfer of jurisdiction is in the interest of the child or society.”<sup>13</sup> In waiver hearings, conversely, the burden of persuasion falls

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<sup>7</sup> At times a transfer hearing is referred to as a “reverse waiver” hearing, although such terminology is colloquial and not legally accurate.

<sup>8</sup> Courts and Judicial Proceedings Article § 3-8A-06(e)

<sup>9</sup> Criminal Proceedings Article § 4-202(d)

<sup>10</sup> Criminal Proceedings Article § 4-202(e)

<sup>11</sup> COMAR 16.16.01.03 directs DJS on the components of any transfer or waiver report, but other than such guidance, there is no other authority.

<sup>12</sup> See *In re Ricky B*, 43 Md. App. 645 (1979)

<sup>13</sup> Criminal Procedure Article § 4-202(b)(3)

on the State<sup>14</sup> to prove by a preponderance of the evidence that “the child is an unfit subject for rehabilitative measures.”<sup>15</sup>

Pragmatically, a court’s waiver or transfer decision typically hinges on the “amenability” factor, and, in fact, the Court of Appeals in *Davis* noted that: “[t]he five considerations are not in competition with one another. They all must be considered but they are necessarily interrelated and, analytically, they all converge on amenability to treatment.”<sup>16</sup> The Court noted, however, that there had been little to no guidance or definition of that factor. To address that issue, the *Davis* Court provided very specific guidelines when considering amenability:

To determine amenability to treatment, the court needs to know what treatment is or will be available to meet the child’s needs and address the child’s problems. Presumably, the State, through DJS or other entities, would have that information as part of a waiver/transfer study, even if it is in the form of options that may depend on further evaluations and the child’s progress. The court needs to determine whether those programs would, in fact, be available to the child, for if not, as to that child, they do not exist. Evidence that there were, in fact, DJS programs that could address petitioner’s needs and problems was presented to the court in considerable detail and was not contradicted. With an eye both toward the welfare of the child and public safety, which, in our view are inter-related, the court needs to make an assessment of whether it is likely that the child would benefit from an available DJS program better than he or she would from anything likely to be available in the adult system and whether that would reduce the likelihood of recidivism and make the child a more productive law-abiding person. Those are quality assessments that can be based on evidence of how those programs or kinds of programs have worked with other children, from actual data or from reliable studies.<sup>17</sup>

In short, the Court held that, when assessing “amenability,” a lower court must consider the following factors married the factors into an assessment of “amenability” as follows: (1) whether there are there programs available for the specific needs of the defendant; (2) whether the defendant would benefit from the available programs more than what’s available in the adult system; and (3) whether that would reduce the likelihood of recidivism and make the defendant a more productive law-abiding person.

In practice, this edict from the Court of Appeals requires intensive studies of the psychological, physical, and environmental conditions of the subject defendant/respondent. In response to *Davis*, and in recognition of its role in providing the required information to the courts, DJS, enacted a policy that expanded the Transfer/Waiver Summary to include an analysis by an “Assessment Staffing Team” that will include a psychological evaluation of the youth prior to

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<sup>14</sup> See *In re Ricky B*, 43 Md. App. 645 (1979)

<sup>15</sup> Courts and Judicial Proceedings Article 3-8A-06(d)(1)

<sup>16</sup> *Davis v. State*, 255 A.3d at 71

<sup>17</sup> *Davis v. State*, 255 A.3d at 71

the transfer/waiver hearing. The goal is for the Team to answer the “what are the specific needs” and the “what’s available” questions.

In transfer hearings, where the defendant carries the burden, such assessments are helpful to defense counsel who have direct access to the defendant and can ensure participation should the expanded report require additional studies by outside experts. Even in waiver cases, where the burden lies with the State, defense counsel may, and in many instances do, employ outside experts.

The problem is that, in a waiver hearing, where the burden is on the State, the DJS report is the only report a prosecutor can use. That report is not by law the same as a transfer report, and a prosecutor cannot compel an independent assessment because the respondent has a Fifth Amendment right against self-incrimination and does not have to cooperate with the State, nor can that lack of cooperation be utilized against them. In theory, a youth may refuse to cooperate with DJS altogether and the same Fifth Amendment rights would apply. Simply put, in waiver hearings, the State is placed at a disadvantage from the beginning, as they are effectively barred from conducting independent evaluations even if a DJS “Assessment Staffing Team” report is generated and the State disagrees with the conclusions generated by such a team.

In a transfer case, the disparities in access are balanced through the respective burdens of the parties, as there is an incentive for a defendant to cooperate with DJS and outside experts in the hopes of meeting the burden necessary to remove the case to juvenile court. There is no such incentive in waiver matters. If waiver is the only mechanism to get juveniles charged with violent crimes, such as murder, rape, carjacking and first-degree assaults with significant injuries, into adult court, the State will be at a monumental disadvantage. It is far more likely that these matters will remain in the juvenile system simply because the State had less available resources to meet its burden. As such, the fundamental fairness principles involved in any advocacy proceeding would be compromised.

For these reasons, the MSAA requests an unfavorable report on HB 294.