IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MORGAN VICTOR MANDULEY, *et al.*, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, SAN DIEGO COUNTY, Respondent THE PEOPLE OF THE STATE OF CALIFORNIA, by PAUL J. PFINGST, District Attorney of San Diego, Real Party in Interest	Case No. S095992 4th DCA D036356/D036456 Super. Ct. No. 154096

BRIEF OF AMICI CURIAE YOUTH LAW CENTER, JUVENILE LAW CENTER, CHILDREN'S DEFENSE FUND, CHILD WELFARE LEAGUE OF AMERICA, NATIONAL COUNCIL OF LA RAZA, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL URBAN LEAGUE, AND THE SENTENCING PROJECT IN SUPPORT OF PETITIONERS MORGAN VICTOR MANDULEY, *et al.*

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INTERESTS OF AMICI CURIAE

Amici curiae are leading organizations in this country that work with and on behalf of children and adolescents at risk, particularly young people in the justice system. Amici come at the issues in this case from a variety of perspectives – child welfare, mental health, civil rights, community empowerment, research and policy development, child advocacy – but are united in their concern that provisions which increase prosecution of youth in adult criminal court, such as

those in Section 26 of Proposition 21, do not increase public safety and are harmful to young people. Amici are especially concerned about racial disparities in the treatment of youth throughout the justice system, and the likelihood that such disparities will be exacerbated by Proposition 21.

Youth Law Center

The Youth Law Center (YLC) is a national public interest law firm with offices in San Francisco and Washington, DC, that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates in California and throughout the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked for more than two decades to promote individualized treatment and rehabilitative goals in the juvenile justice system, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system.

The Youth Law Center coordinates the *Building Blocks for Youth* initiative, a nationwide campaign to reduce racial disparities for youth of color in the justice system and to promote rational and effective juvenile justice policies. The *Building Blocks for Youth* initiative is a diverse alliance of researchers, judicial and law enforcement professionals, academics, children's attorneys, and other advocates for youth that supports new research on transfer to adult court and other issues, analyzes front-line decisionmaking by juvenile justice professionals, works with

national, state, and local organizations concerned with the treatment of minority youth in the justice system, and provides public education materials and resources to policymakers, journalists, and the public.

Juvenile Law Center

The Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC believes the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care.

JLC's staff attorneys concentrate their efforts to protect children while reforming the systems meant to serve them, by engaging in the following efforts: litigating key cases in state and federal court, including appellate advocacy; writing amicus briefs in support of important issues affecting children; training lawyers, judges and professionals who work with children; educating the public by distributing a wide range of publications, participating in conferences, and testifying at public forums; advising the executive and legislative branches of state and federal governments on the effects that proposed legislation or regulations will have on children; serving as a resource to the media; and answering telephone inquiries or questions asked to our

web site. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

Children's Defense Fund

The mission of the Children's Defense Fund (CDF) is to Leave No Child Behind® and to ensure every child a *Healthy Start,* a *Head Start,* a *Fair Start,* a *Safe Start,* and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. CDF provides a strong, effective voice for *all* the children of America who cannot vote, lobby, or speak for themselves. CDF pays particular attention to the needs of poor and minority children and those with disabilities. CDF educates the nation about the needs of children and encourages preventive investment before they get sick, into trouble, drop out of school, or suffer family breakdown. CDF began in 1973 and is a private, nonprofit organization supported by foundations and corporate grants and individual donations. CDF has never taken government funds.

CDF has a long history of advocacy in support of the rehabilitative approach to juvenile justice, including providing treatment and appropriate services for delinquent youth. Believing that children and teens are fundamentally different from adults, CDF also opposes the transfer of minor offenders to the adult criminal justice system. In the early 1970s, CDF staff visited more than 500 adult jails across the country and reported on the widespread practice of jailing children with adults. Staff found that many of these children were suicidal and victims of sexual and physical abuse by adult inmates. In 1974, CDF filed a successful lawsuit to separate children from adult prisoners in South Carolina. Five of the six plaintiffs – two of them truants – had been brutally raped and beaten by adult prisoners. CDF also testified before Congress about the serious harm in detaining youthful offenders with adult inmates and helped to secure passage of

the Juvenile Justice and Delinquency Prevention Act of 1974, which requires that states separate juvenile and adult offenders as a condition of receiving federal funds. In 1976, CDF published *Children in Adult Jails*, documenting the dangerous practice of housing children with adult prisoners. For more than 25 years, CDF has worked to advance public policies that invest in youth before they get into trouble, promote racial fairness in the criminal justice systems, and support the humane treatment of youthful offenders.

Child Welfare League of America

The Child Welfare League of America (CWLA) is the nation's oldest and largest membership-based child welfare organization. CWLA is committed to engaging people everywhere in promoting the well-being of children, youth, and their families, and protecting every child from harm. CWLA envisions a future in which families, neighborhoods, communities, organizations, and governments ensure that all children and youth are provided with the resources they need to grow into healthy, contributing members of society.

CWLA is an association of more than 1,100 public and not-for-profit agencies devoted to improving life for more than 3.5 million at-risk children and youths and their families. Member agencies are involved with prevention and treatment of child abuse and neglect, and they provide various services in addition to child protection -- kinship care, juvenile justice, family foster care, adoption, positive youth development programs, residential group care, child care, family-centered practice, and programs for pregnant and parenting teenagers. Other concerns of member agencies include managed care, mental health, chemical dependency, housing and homelessness, and HIV/AIDS.

The Juvenile Justice Division of CWLA is committed to working with and through its member agencies in activities that work towards reducing the incidence of juvenile delinquency nationwide; reducing reliance on incarceration for accused or adjudicated delinquent youth by developing community-based alternatives that promote positive youth development while ensuring public safety; and by developing and disseminating standards of practice as benchmarks for high-quality services that enhance positive youth development, strengthen families, neighborhoods, and communities and improve integration and coordination of the juvenile justice and child welfare systems.

CWLA supports and advocates for a fair and effective juvenile justice system that treats children as children and focuses on prevention, treatment and rehabilitation. CWLA urges the California Supreme Court to consider the issues raised in this brief, particularly the racial disparities for youth of color prevalent at every point of contact within the juvenile justice system.

National Council of La Raza

The National Council of La Raza (NCLR) is the largest national Latino civil rights organization, established in 1968 to reduce poverty and discrimination among, and improve life opportunities for, Hispanic Americans. NCLR serves as an "umbrella organization" for more that 250 local affiliate community-based organizations (CBO's) and 30,000 individual associate members. In addition to providing capacity-building assistance to its affiliates and essential information to individual associates, NCLR serves as a voice for Hispanics on issues of public policy. In recent years NCLR has begun to pay close attention to criminal justice issues, spurred in part by the disproportionate representation of Latinos in the criminal justice system.

NCLR believes Latino youth experience disproportionate rates of incarceration compared to similarly situated white youth. Moreover, NCLR believes that youth incarceration and recidivism levels in the criminal justice system will decrease if youth offenders receive appropriate treatment, education, and rehabilitation in a safe environment free of physical and sexual abuse. Thus, NCLR has a profound interest in and urges this court to consider the issues raised in this brief. In particular, NCLR urges the court to closely examine two issues – one that allows prosecutors to make certain charging and sentencing decisions and the other that increases transfers of youth to adult criminal court. In NCLR's judgment, neither effectively addresses the causes of crime, and both tend to exacerbate racial and ethnic disparities in the justice system.

National Mental Health Association

The National Mental Health Association (NMHA) is the country's oldest and largest nonprofit organization addressing all aspects of mental health and mental illness. With more than 340 affiliates, NMHA works to improve the mental health of all Americans through advocacy, education, research and service. NMHA launched its Justice for Juveniles Program in 1998 to highlight the critical unmet needs of the hundreds of thousands of young people with mental health and substance abuse problems caught up in America's juvenile justice system. Most states and communities have failed to adequately invest in services for children and families that can prevent arrest and incarceration. Many also fail to systematically identify and treat the mental health and substance abuse problems of children who enter their juvenile justice systems. NMHA is committed to helping states and communities develop policies and services for vulnerable young people, rather than punishing them.

NMHA believes provisions to increase the transfer of youth to adult criminal court, such as those in California's Proposition 21, do not promote public safety. In fact, several studies demonstrate that such transfers actually increase recidivism. At the same time, youth art exposed to the increased possibility of physical and/or sexual abuse in adult facilities. Studies also show that the suicide rate for juveniles in adult facilities greatly exceeds the rate for the general youth population and is several times higher than the rate for youths in juvenile detention centers. Children with mental health needs are especially at risk in such an environment. In addition, it has been shown that the use of prosecutorial discretion in such transfers serves to exacerbate the problem of disproportionate minority confinement. With these concerns in mind, NMHA urges this court to consider the issues raised in this brief and to hold that Proposition 21violates the applicable legal principles.

National Urban League

The National Urban League is the nation's oldest and largest community-based movement devoted to empowering African-Americans to enter the economic and social mainstream. Founded in 1910, the heart of the Urban League movement is the professionally staffed Urban League affiliates in more than 100 cities (including Los Angeles, Oakland, Sacramento, and San Diego, CA) in 34 states and the District of Columbia. The Urban League movement carries out its mission at the local, state, and national levels through direct services, advocacy, research, policy analysis, community mobilization, collaboration, and communications.

The National Urban League is calling for a comprehensive national investigation of the blatant patterns of racism at every level of the criminal justice system and to begin to rectify

them by exhortation and/or litigation. The Urban League is a strong advocate for requiring states to address juvenile delinquency prevention and to reducing and eliminating the overrepresentation of minority juveniles at every contact point of the juvenile justice system.

The Sentencing Project

The Sentencing Project is a national non-profit organization which since 1986 has challenged over-reliance upon the use of jails and prisons and promoted alternatives to incarceration. Its staff, advisors and consultants have closely observed all aspects of the criminal justice and corrections processes. The Sentencing Project has published some of the most widely-read research and information about sentencing and incarceration, including documentation of a highly disproportionate minority representation in the criminal justice system, the unprecedented growth of the American prison population within the last 30 years, and the relative benefits of using therapeutic treatment, rehabilitation, and social programs to reduce crime. In recent years, as direct, non-judicially-reviewed referral to adult criminal court of juvenile-aged defendants has increased, The Sentencing Project has provided guidance to advocates and information to policymakers intended to limit this practice. The Sentencing Project is particularly concerned that children in criminal court are disadvantaged not only when compared to children in juvenile court, but in comparison to adults charged with the same offense, including by the effective denial of due process rights, their relative inability to present a defense, and the harsh impact of adult sentencing provisions upon them. For these reasons The Sentencing Project urges this court to consider the issues raised in this brief.

I. INTRODUCTION

On March 7, 2000, Proposition 21, the Gang Violence and Prevention Act of 1998, was approved by ballot initiative. Among other things, Proposition 21 provides for increased prosecution of juveniles in adult criminal court, increased incarceration of youth in adult correctional facilities, "direct filing" by prosecutors in adult criminal court for certain specified offenses by juveniles, and determination by prosecutors of both formal charges against juveniles and available sentencing options.

Proponents of Proposition 21 argued that passage would enhance public safety. In point of fact, empirical research demonstrates that prosecution of juveniles in adult criminal court actually *increases* recidivism, thereby reducing public safety. In addition, prosecuting young people in criminal court and incarcerating them in adult facilities places them at significant risk of physical and emotional injury. Moreover, Section 26 of Proposition 21 provides no guidelines for prosecutors in making decisions which youth to transfer to adult court, and thereby allows prosecutors to ignore developmental differences between adolescents and adults, as well as individual differences among adolescents. In this brief, amici present the empirical research on these issues.

Amici are also concerned that prosecution of juveniles in adult criminal court, particularly as authorized by Section 26 of Proposition 21, will exacerbate racial disparities for youth in the justice system. Section 26 allows prosecutors to decide both the formal charges to file against a juvenile and – because prosecutors can charge in juvenile court or "direct file" in adult criminal court" – the sentencing options available to the juvenile. This is important because youth of color are overrepresented throughout the justice system, and empirical research demonstrates that minority youth receive different and more severe treatment than white youth,

even when charged with similar offenses. Moreover, the disparities accumulate, so that racial disparities at the point of arrest are added to the racial disparities at the point of determining whether to detain a youth before adjudication, which in turn are added to the disparities that occur when formal charging decisions are made by prosecutors, which in turn are added to the disparities that occur when prosecutors make decisions whether to waive youth for prosecution in adult criminal court, and which are finally added to the disparities that occur at disposition and in decisions whether to incarcerate. As a result, the most authoritative empirical analysis demonstrates that youth of color are more than three times as likely as white youth to be arrested, processed through the system, and ordered into residential placement.

Empirical research in California indicates that these accumulated racial disparities occur in the justice system in this state. Allowing prosecutors to make the decisions at two critical points in the justice system, to assume both the executive charging function and the judicial sentencing function, is inimical to the administration of justice and is likely to exacerbate racial disparities in the system. One check on racial disparities in the system is the diversity of decisionmakers at key points in the system – police, prosecutors, judges, corrections agencies. Consolidation of multiple functions into a single office, particularly the office most directly responsible in the legal system for obtaining convictions of alleged offenders, is a recipe for potential abuses of discretion.

II. PROVISIONS TO INCREASE TRANSFER OF YOUTH TO ADULT CRIMINAL COURT, SUCH AS SECTION 26 OF PROPOSITION 21, DO NOT IMPROVE PUBLIC SAFETY, BUT INSTEAD REDUCE PUBLIC SAFETY AND SUBJECT CHILDREN TO HARM.

Despite official crime statistics that show youth crimes rates falling significantly,[1] *fear* of out-of-control juvenile crime has undermined the traditional practice of treating young offenders as different from adult criminals. Proposition 21 makes the California justice system more punitive toward youth by, among other things, increasing prosecution of youth in adult criminal court, housing more youth in adult correctional facilities, narrowing probation eligibility, and making it easier to revoke a minor's probation. Proponents of Proposition 21 claimed harsher penalties are more effective at lowering crime than other strategies.[2] This is plainly untrue. The

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[1] Since 1991, serious youth crime in California has fallen 25 percent (compared to only 11 percent for adults). A recent analysis of official California crime statistics show that today's teenagers are not more criminally prone than past generations. Crime by children today is less frequent than twenty years ago. Of the 68,200 children arrested for an offense in 1978-80, 34.9 % were for felonies. Of the 56,700 children arrested in 1996-98, in a much larger child population, 30.6% were for felonies. Daniel Macallair and Michael Males (2000), Justice Policy Institute, *Dispelling the Myth: An Analysis of Youth and Adult Crime Patterns in California Over the Past 20 Years.*

[2] Proponents of Proposition 21 consistently argued that harsher measures against today's youth would lower crime. A typical quote came in the aftermath of the passage of Proposition 21 from former California Governor Peter Wilson, who said that voters "acted decisively to retake California's neighborhoods, schools and businesses from vicious street gangs who for too long have hidden behind a lenient and outdated juvenile justice system." *Authorities Fear Fallout, But Weigh Options,* Los Angeles Times, March 14, 2000.

An op-ed in the San Jose Mercury News provides another typical quote: "...youth is no excuse for murder, rape, or any other crime....the current juvenile justice system was originally designed in the 1940s to fight minor offense like truancy and curfew violations. It was not designed to handle gang members, murderers and rapists." *Crack Down on Kids? Vote Yes,* San Jose Mercury News, January 20, 2000.

research shows that increased prosecution of juveniles in criminal court does not increase public safety and instead places troubled youth at great risk of harm.

A. Prosecuting Youth as Adults Undermines Public Safety.

Section 26 of Proposition 21 allows the prosecutor to make two critical decisions affecting youth in the justice system: the decision which formal charges to bring, and the decision which sentencing options are available. Under Section 707(d) of the Welfare and Institutions Code, as amended by Section 26 of Proposition 21, if a youth is 16 years old or older at the time of the offense, and the charge is a specified qualifying offense identified in section 707(d), or if a youth is 14 years or older and the charge is a specified qualifying offense identified in section 707(d), the prosecutor may either (1) file a petition against the youth in juvenile court or (2) prosecute the youth as an adult in criminal court. If the prosecutor chooses to file a petition in juvenile court, the court must, on motion, conduct a fitness hearing to determine whether the juvenile, if adjudicated on the charge, is subject to juvenile sanctions or adult penalties. If the prosecutor instead chooses to "direct file" against the juvenile in adult criminal court, the court does not have the option to impose a juvenile disposition; instead, it must sentence the juvenile as an adult to adult penalties. Pen. Code, Section 1170.17 (a).

Proponents of Proposition 21 claimed that prosecution in criminal court will motivate young offenders to reform: the threat of transfer to adult court is the quintessence of the "scared straight" approach to crime control. Yet there is scant evidence to support the proposition that punitive measures reduce crime. In fact, a panel of leading researchers on juvenile crime established by the National Research Council recently concluded, "Research to date shows that juveniles transferred to adult court may be *more likely to recidivate* than those who remain under juvenile court jurisdiction" (emphasis added). Panel on Juvenile Crime: Prevention, Treatment,

and Control, National Research Council (2001), *Race, Crime, and Juvenile Justice: The Issue of Racial Disparity*, in *Juvenile Crime, Juvenile Justice* 218-226 (Joan McCord, Cathy Spatz Widom, and Nancy A. Crowell, eds.) [hereinafter, National Research Council report].[3] Furthermore, detention and incarceration in criminal settings negatively effect the behavior and future development of young people, and make it difficult if not impossible for them to obtain future employment. Thus, exposing youth to processing and punishment in the adult criminal court increases the likelihood of life-long crime.

The implications of this and other research on the impact of transfer provisions such as Proposition 21 on the crime rate are sobering: as the numbers of youth sent to criminal court increase, so will crime. Significantly, Proposition 21 expands transfer criteria to include a broad range of young offenders who are neither particularly serious nor particularly chronic. Proposition 21 targets a broad range of offenses and offenders, sanctioning transfer of sixteen- and seventeen- year-old first-time offenders charged with certain qualifying offenses as well as fourteen- and fifteen-year-old first-time offenders accused of a narrower list of qualifying felonies.

Moreover, because Proposition 21 allows prosecutors (rather than judges) to decide whether youth should be dealt with in the juvenile justice or adult criminal justice system, more

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[3] The National Research Council was organized in 1916 and is the principal operating agency of the National Academy of Sciences, which was established by an Act of Congress in 1863. The Panel on Juvenile Crime: Prevention, Treatment and Control was established by the National Research Counsel to analyze data on trends in juvenile justice and juvenile justice system processing; review the research literature on individual, familial, social, and community factors that contribute to juvenile crime, as well as the literature on prevention and treatment programs; and examine information on the effects of the mandates of the federal Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. Sections 5601 *et seq*. (JJDPA), such as the Disproportionate Minority Confinement (DMC) mandate, discussed *infra*. National Research Council report, *supra*, at *ix*.

youth will be sent to criminal court. When Florida introduced prosecutorial waiver in 1981, the percentage of delinquency cases transferred to criminal court soared from 1.2% to nearly 9% by 1987. A study of two representative Florida counties revealed that only 28% of the youths prosecutors waived to adult court were for violent crimes. More than half of the youths prosecutors transferred to criminal court were charged with property crime offenses that involved no violence. Vincent Schiraldi and Jason Ziedenberg (2000), Justice Policy Institute, *The Florida Experiment: An Analysis of the Impact of Granting Prosecutors Discretion to Try Juveniles as Adults* 3-4. [4]

1. The ineffectiveness of "general deterrence": the threat of criminal punishment does not motivate young offenders to reform.

Young people are not dissuaded from committing crimes through the threat of severe consequences, including lengthy terms of incarceration in an adult correctional institution. Two studies have evaluated the general deterrent effects of transfer on juvenile crime. Singer and McDowall evaluated the effects of New York's Juvenile Offender Law, which lowered the age of criminal court jurisdiction to thirteen for murder and four other violent offenses. The researchers examined arrest rates for affected juveniles over a four-year-period prior to enactment of the law and for six years following its implementation. Simon I. Singer and David McDowall. (1988), *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & Soc'y Rev. 521. Singer and McDowall report that the law had little if any measurable deterrent impact, even though the law received substantial advance publicity and was fully

[4] Further, though Florida leads the nation in using prosecutorial waiver, five of the other fourteen states which allow prosecutors discretion to send youth to criminal court are among the ten states with the *highest* violent crime arrest rate (age 10 -17). *The Florida Experiment, supra.*

implemented. They concluded that the threat of criminal punishment had no general deterrent effect.

Eric Jensen and Linda Metsger reached similar conclusions when they evaluated the general deterrent effect of an Idaho mandatory transfer statute introduced in 1981. Eric Jensen and Linda Metsger (1994), *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96. The law required the transfer of youth as young as fourteen who were charged with murder, attempted murder, robbery, forcible rape, or mayhem. The researchers examined the arrest rates for the five-year period prior to the new law and for five years following its implementation, and found no evidence of general deterrent effects. Instead, arrests for the target offenses *increased* following the introduction of mandatory transfer.

2. Youth transferred to adult criminal court are more likely to reoffend, and to reoffend more quickly and more often, than those in the juvenile justice system.

A number of studies have shown that youth transferred to criminal court recidivate at a higher rate than they would if retained in the juvenile justice system. The first study was conducted by Jeffrey Fagan, who in 1991 conducted an experiment to evaluate the effects of juvenile versus criminal justice processing. Jeffrey A. Fagan (1991), *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*. Final Report, Grant 87-IJ CX 4044, to the National Institute of Justice. Fagan identified two counties in New York and New Jersey that were very similar on important socioeconomic, demographic and crime indicators. The two states had very similar robbery statutes. The key difference was that in New York fifteen- and sixteen-year-old youth charged with robbery were automatically prosecuted in the adult criminal courts while in New Jersey they remained in the juvenile courts.

The findings showed significant differences between youth in the two jurisdictions. Those retained in juvenile court in New Jersey were significantly less likely to be rearrested and reincarcerated than those prosecuted in criminal court in New York. And of those who did recidivate, the length of time before rearrest was significantly longer for those who remained in juvenile court. Fagan's study provides strong support for retaining young offenders in the juvenile system.

Subsequent studies reinforce Fagan's findings and conclusions. Bishop and Frazier compared case outcomes in Florida, a state that uses prosecutorial waiver almost exclusively. Donna Bishop *et al.* (1996), *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?* 42 Crime & Delinq. 171. Their study showed that youth transferred to criminal court in Florida were one-third more likely to re-offend than those kept in juvenile court who were closely matched for current offense, prior offenses, age, race, and gender. The transferred youths re-offended almost twice as fast as those who were sent to juvenile detention. Of those who committed new crimes, the youth who had been prosecuted as adults committed serious crimes at double the rate of those retained in juvenile court.

A follow-up study in 1997 by the same researchers "indicated that transfer led to more recidivism. Moreover, the transferred youths who subsequently reoffended were rearrested more times and more quickly than were the nontransferred youth who reoffended, regardless of the offenses for which they were prosecuted." Donna Bishop *et al.* (1997), *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term.* 43 Crime & Delinq. 548, 558.

The Florida studies add substantively to Fagan's research. The studies confirm the findings in a different jurisdiction, time frame and sociolegal context using a different transfer method. They also add new offenses to the research. Taken together, and with the evidence of

no general deterrent effect, these studies make a compelling case – in the interests of public safety – against increased use of transfer to adult criminal court.

3. Research comparing the experiences of youth in the juvenile justice system and those transferred to the criminal system indicates that the criminal justice system contributes to criminal behavior.

Comparing the experiences and reactions of adolescents processed in the juvenile system and those transferred to the criminal system reveals that involvement in the criminal justice system contributes to criminal behavior. Bishop and Frazier recently conducted in-depth interviews with ninety-five serious and chronic adolescent male offenders in Florida, of whom forty-nine were transferred to criminal court by Florida prosecutors and either confined in state prisons or placed on probation. The balance had been prosecuted in juvenile court and were incarcerated in maximum-risk juvenile commitment facilities. The researchers inquired into youths' postdisposition experiences in correctional settings, including perceptions of staff, services, and programs. In addition, youth were asked about their experiences in the juvenile and criminal courts, about perceptions of procedural and substantive justice, and about their experiences in and reactions to pre-adjudicatory confinement in detention centers and jails.

Bishop and Frazier found that the youth recognized the rehabilitative strengths of the juvenile justice system in contrast to the criminal system. Sixty percent of those sent to juvenile detention said they expected that they would not reoffend, thirty percent said they were uncertain whether they would reoffend, while three percent said they would likely reoffend. Of those who expected not to reoffend, ninety percent said good juvenile justice programming and services were the reason for their rehabilitation. Most reported at least one favorable contact with a staff person that helped them. The juvenile justice system responses were overwhelmingly positive:

A: "This place is all about rehabilitation and counseling.... This place here, we have people to listen to when you have something on your mind...and need to talk. They understand you and help you."

B: "They helped me know how to act. I never knew any of this stuff. That really helped me, cause I ain't had too good a life."

Donna Bishop *et al.* (1998), *Juvenile Transfers to Criminal Court Study: Phase I Final Report.* [hereinafter, *Phase I Final Report*]. *See, also*, Donna Bishop and Charles Frazier (2000), *The Consequences of Waiver*, in *The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court* (Jeffrey Fagan and Franklin Zimring eds.) [hereinafter, *The Consequences of Waiver*].

Bishop and Frazier concluded that the criminal justice system contributes to criminal behavior. Among their interviewees, the researchers found very negative reactions to criminal court processing. The youths prosecuted as adults overwhelmingly responded in despondent and negative ways:

C: "When I was in juvenile programs, they were telling me that I am somebody and that I can change my ways, and get back on the right tracks. In here, they tell me I am nobody and I never will be anybody."

D: "In the juvenile systems, the staff and I were real close. They wanted to help me. They were hopeful for me here. They think I am nothing but a convict now."

Phase I Final Report, supra. Many youth experienced the criminal court process not so much as a condemnation of their behavior as a condemnation of themselves as individuals. Unlike juvenile court, the criminal court failed to communicate that young offenders retain some fundamental worth. Moreover, the offenders interviewed saw the criminal court and its officers more often as duplicitous and manipulative, malevolent in intent, and indifferent to their needs.

It was common for them to experience a sense of injustice, and then to condemn the condemners. *Id.*

B. Prosecuting Youth as Adults Places Them at Significant Risk of Physical and Emotional Injury

Young offenders face special problems in adult correctional settings which make them susceptible to victimization and ultimately contribute to an increased recidivism. At the outset, when juveniles are transferred to criminal court and institutionalized with adults, they are exposed to an older, stronger, more seasoned, and violent group of offenders over an extended period of time. Many adult facilities are large and overcrowded. Institutional size and overcrowding have been linked to levels of violence and to other negative behavioral and psychological consequences. Kenneth Adams (1992), *Adjusting to Prison Life*, in *Crime and Justice: A Review of Research* (Michael Tonry ed.).

The vast majority of transferred youth remain in jail for several months. Many transferred youth report feeling overwhelmed, confused and depressed. T*he Consequences of Waiver, supra,* at 251-252. Other stressors associated with jail include boredom and anxieties stemming from separation from family and friends, from the unresolved natures of their cases, and from perceived dangers within the jail facilities. Many transferred youths have difficulty adjusting to being jailed together with adult offenders. Several mentioned to Bishop and Frazier that jail officials did not differentiate between them and some of the chronic and violent adult offenders with whom they were housed. Most did not perceive themselves as hardened or dangerous criminals and found it very disquieting when officials viewed them in these terms. In addition the inmate grapevine was riddled with stories of older inmates preying on young boys,

which made them fearful of attack by sexual predators and "crazies." Some responded by isolating themselves as much as they could. *Id.*

The stresses of incarceration in jail are correlated with much higher suicide rates. The suicide rate for youth in jails is almost eight times that of youth in juvenile detention facilities. Michael G. Flaherty (1983), *The National Incidence of Juvenile Suicides in Adult Jails and Juvenile Detention Centers,* 13 Suicide and Life-Threatening Behavior 85.

Transferred young offenders serve sentences in adult prisons. Prisons are dangerous places where inmate norms frequently support violent behavior. In a study comparing the experiences of youth in prisons and those in juvenile training schools, sexual assault was five times more likely among youth in prison, beatings by staff nearly twice as likely, and attacks with weapons nearly 50% more common. One-third of the juveniles in prison reported being assaulted with a weapon. Martin Forst *et al.* (1989), *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy*, 39 Juv. & Fam. Ct J. 1. Displays of verbal and physical aggression "prove" one's toughness and establish social position in a context in which there are few alternative means of earning status. Such displays are also means by which gangs build cohesion and establish position in the social hierarchy.

Young inmates also feel most vulnerable to physical and sexual predation, which contributes to their exploitation: fear is often interpreted as a sign of weakness. *The Consequences of Waiver, supra,* at 254-260. Because of their vulnerability, adolescent inmates are more likely to be placed in protective or "safekeep" custody than older inmates. While this strategy is intended to protect them from harm, protective custody has serious negative consequences. Inmates in protective custody are generally isolated from others around the clock, do not participate in educational or other programming, and have little recreation.

Fear of victimization has also been linked to poor psychological status, especially among those who are unwilling or unable to retaliate against predators. Fearful inmates are frequently anxious and depressed. Thus, not only are young inmates more likely to be placed in protective custody because of their vulnerability to attack, but they are also more likely to be placed in specialized units for treatment of mental health problems. *Id* at 258.

C. Section 26 of Proposition 21 Provides No Guidelines and Thereby Allows Prosecutors to Ignore Developmental Differences Between Adolescents and Adults, As Well As Individual Differences Among Adolescents.

Section 26 contains no guidelines for prosecutors to use in determining whether to charge youth in juvenile court or adult criminal court. The United States Supreme Court has recognized the importance of considering the individual characteristics of youth in determining whether to transfer them to criminal court. *Kent v. United States* (1966), 383 U.S. 541, 561-563. The Utah Supreme Court struck down a statute similar to Section 26 that failed to provide guidelines for prosecutors. *State v. Mohi* (1995), 901 P.2d 991. The court held, "Legitimacy in the purpose of the statute cannot make up for a deficiency in its design. [The statute] is wholly without standards to guide or instruct prosecutors as to when they should or should not use such influential powers." *Id.* at 999.

Section 26 allows prosecutors to ignore developmental differences between adolescents and adults. As the National Research Council noted, "What is often missing from discussions of juvenile crime today is recognition that children and adolescents are not just little adults, nor is the world in which they live the world of adults." National Research Council report, *supra*, at 15. Adolescence is an inherently transitional time during which there are rapid and dramatic changes in youth's physical, intellectual, emotional and social capabilities. Laurence Steinberg and Robert Schwartz (2000), *Developmental Psychology Goes to Court* 9-31, in *Youth on Trial*

(Thomas Grisso and Robert Schwartz, eds.). Although young people can approach some decisions in a manner similar to adults under some circumstances,

> many decisions that children and adolescents make are under precisely the conditions that are hardest for adults – unfamiliar tasks, choices with uncertain outcomes, and ambiguous situations....Further complicating the matter for children and adolescents is that they often face deciding whether or not to engage in a risky behavior, such as taking drugs, shoplifting, or getting into a fight, in situations involving emotions, stress, peer pressure, and little time for reflection.

National Research Council report, *supra*, at 15.

An important difference between young people and adults is that adolescent delinquency generally occurs in a "group context." Franklin Zimring (2000), *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility,* in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 271-289 (Thomas Grisso and Robert Schwartz, eds). Young people are particularly susceptible to peer group influences. Most adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive. Fear of being called "chicken" may be the major cause of death and injury from youth violence in the United States – the explicit or implicit "I dare you" leads adolescents to show off, and deters them from publicly backing out of delinquent behavior even if that would be their personal preference. *Id.* at 281.

Recent research indicates that adolescents may be physiologically less capable than adults of reasoning logically in the face of particularly strong emotions. Research using magnetic resonance imaging of the brain reveals cognitive and emotional differences between adolescents and adults. Adolescents process emotionally charged information in the part of the brain responsible for instinct and gut reactions. Adults process such information in the "rational"

frontal section of the brain. A.A. Baird *et al.* (1999), *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. Am. Acad. Child & Adolescent Psychiatry 195.

Section 26 also allows prosecutors to ignore differences *among* adolescents. Most young people develop the ability to resist peer pressure, but individuals develop that ability to different degrees and at different times during adolescence. Adolescents mature physically, cognitively, emotionally, and socially at different rates: one 16-year-old may be much more emotionally mature than his friend of the same age. Even within individual adolescents there is considerable variability: a teenager may be mature physically but immature emotionally, socially precocious but an intellectual late-bloomer.

For all these reasons, the decision whether to transfer youth to the adult criminal court – a "critically important" action determining "vitally important" rights and consequences for a young person, *Kent v. United States*, *supra*, 383 U.S. at 556 – requires an individualized assessment of their degree of participation, personal responsibility, and culpability in delinquent behavior. Section 26 allows prosecutors to ignore such considerations.

III. PROVISIONS TO INCREASE TRANSFER OF YOUTH TO ADULT CRIMINAL COURT, LIKE THOSE IN SECTION 26 OF PROPOSITION 21, FOSTER RACIAL DISPARITIES IN THE JUSTICE SYSTEM. BY ALLOWING PROSECUTORS TO MAKE CHARGING *AND* SENTENCING DECISIONS, SECTION 26 WILL EXACERBATE THIS PROBLEM.

A. Youth of Color Are Overrepresented in the Justice System.

It has long been evident that minority youth are overrepresented in the justice system. *See, e.g.*, W.E.B. DuBois (1899), *The Negro Criminal, quoted in* Michael Tonry (1995), *Malign Neglect – Race, Crime, and Punishment in America* 53. "Overrepresentation" (or

"disproportionality") exists when the proportion of minority youth at a particular stage of the justice system exceeds the proportion of those youth in the general population. Thus, although African-American juveniles constitute 15% of the U.S. population ages 10-17, they represent 26% of juvenile arrests, 30% of delinquency cases in juvenile court, 45% of delinquency cases involving detention, 40% of juveniles in residential placement, and 46% of cases judicially waived to adult criminal court. Howard N. Snyder and Melissa Sickmund (1999), *Juvenile Offenders and Victims: 1999 National Report* 192 [hereinafter, *Juvenile Offenders and Victims*].

In 1989, the National Coalition of State Juvenile Justice Advisory Groups, which is charged by federal statute with reporting to the President and Congress on significant juvenile justice matters, 42 U.S.C. Section 5651(f)(2)(B)(C)(D)(E), issued a report that focused on the "differential processing of minorities within the juvenile justice system." National Coalition of State Juvenile Justice Advisory Groups (1989), *A Report on the Delicate Balance to the President, the Congress, and the Administrator of the Office of Juvenile Justice and Delinquency Prevention* 1 [hereinafter National Coalition report]. The report noted that issues of racial fairness "tear at the fabric of our society; they are at the heart of problems like poverty, delinquency, substance abuse, child abuse, dependent and neglected children, and violence...." *Id.* The report summarized data on racial disproportionality in the justice system and made detailed recommendations for addressing the problem.

The National Coalition report and other efforts prompted Congress to amend the Juvenile Justice and Delinquency Prevention Act (JJDPA), 42 U.S.C. Sections 5601, 5633. The amendment required states to investigate the problem of disproportionate minority confinement (DMC) in secure facilities and develop action plans to remedy overrepresentation.

In 1990, in a landmark comprehensive analysis, researchers Carl Pope and William Feyerherm reviewed the research conducted between 1970 and 1988 on the relationship between race and juvenile justice processing. Carl Pope and William Feyerherm (1990), *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part 1)*, 22 Crim. J. Abstracts 327-335; Carl Pope and William Feyerherm (1990), *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part 2)*, 22 Crim. J. Abstracts 527-542. They reported that two-thirds of the studies of state and local juvenile justice systems reported a "race effect" at some stage of the juvenile justice process that negatively affected outcomes for youth of color.

In 1992, Congress strengthened the effort to address racial disproportionality in the juvenile justice system by making efforts to address DMC a core requirement of the Juvenile Justice and Delinquency Prevention Act. 42 U.S.C. Section 5633(a)(23). The DMC mandate requires states to (1) identify the extent to which DMC exists, (2) assess the reasons for its existence, and (3) develop intervention strategies to address the causes for DMC. States were required to demonstrate a good faith effort to address DMC issues or risk losing one-fourth of their federal juvenile justice funding.

In 1997, the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) published a national report analyzing the overrepresentation of youth of color at key points in the justice system: arrest, secure detention, disposition to secure corrections, confinement in adult jails and lockups, transfer to adult court, placement on probation. Donna Hamparian and Michael J. Leiber, Community Research Associates (1997), *Disproportionate Confinement of Minority Juveniles in Secure Facilities: 1996 National Report* [hereinafter, *Disproportionate*

Confinement]. The report reviewed data from the states' 1994-1996 JJDPA Comprehensive State Plans and states' DMC assessment reports.

The report used an index numbering system to determine the level of overrepresentation at each stage of the system for each state. An index of 1.00 meant that youth of color were represented in the justice system in the same proportion as they were represented in the general population. The larger the index number the greater the extent of the overrepresentation.

In California, the index rating for African-American youth at the point of arrest was 2.2, at the point of secure detention it was 3.0, and at the point of confinement in secure facilities it was 3.0. *Id.* at 10. Thus, African-American youth were arrested at more than twice their representation in the youth population in the state, and placed in secure detention pre-adjudication, as well as ordered into secure facilities post-adjudication, at three times their proportion in the general population.

The report found that "race is an explanatory factor in the decision to detain a juvenile prior to disposition even when controls for others factors, such as seriousness of offense, are used." *Id.* at 20. The report also noted that "race, through the detention decision, has an indirect effect on commitment." *Id.* The report revealed that in California differential treatment for African-American youth exists even when statistical controls are applied for offense type and prior record. *Id.*

B. Overrepresentation Results From Differences in Delinquent Behavior By Youth of Color, Enhanced Risk Factors For Finority Youth, Selective Law Enforcement Practices, and Biases Among Decisionmakers in the Justice System.

Minority youth are overrepresented in some types of delinquent behavior. National Research Council report, *supra*, at 237. Some have argued that overrepresentation at arrest,

detention, and other points in the system was simply the result of young people of color committing more crimes than whites. 145 Cong. Rec. S5572 (daily ed. May 19, 1999) (statement of Sen. Hatch).

While there are some racial differences in delinquent behavior for some types of offenses, those differences do not explain the significant overrepresentation of youth of color in the justice system. National Research Council report, *supra*, at 237-238. Closer analysis of the justice system, however, reveals that overrepresentation is a complex social problem caused by a variety of factors that criminologists and other scholars have recognized since the early twentieth century. In 1928, criminologist Thorsten Sellin wrote that social factors such as a "lack of formal education, ...the injustice of our agencies of justice, poverty, and a host of other conditions are brought forth as generators" of overrepresentation of African-Americans in the justice system. Thornsten Sellin (1928), *The Negro Criminal: A Statistical Note,* 140 Annals Am. Acad. Pol. & Soc. Sci. 52-64; Gunnar Myrdal (1944), *An American Dilemma – The Negro Problem and Modern Democracy.*

Modern researchers continue to demonstrate that no single factor can explain overrepresentation. Factors such as poverty, joblessness, housing density, and poor health care are more common among people of color and thereby increase the risk for delinquent behavior among minority youth. *See* Eleanor Miller (1986), *Street Women*; Jeffrey Fagan *et al.* (1986), *Violent Delinquents and Urban Youth*, 24 Criminology 439-471; Samuel L. Myers and Margaret C. Simms (1988), *The Economics of Race and Crime*; National Council of Juvenile and Family Court Judges (1990), *Minority Youth in the Juvenile Justice System: A Judicial Response* (Hon. Lindsey G. Arthur, Marie R. Mildon, and Cheri Briggs, eds.); Michael Tonry (1995), *Malign Neglect.*

Overrepresentation also occurs as a result of selective law enforcement practices. Racial profiling by police, leading to the notorious "driving while black" traffic stops, is perhaps the most visible example. Leadership Conference on Civil Rights (2000), *Justice on Trial: Racial Disparities in the American Criminal Justice System* 6 [hereinafter *Justice on Trial*]. Law enforcement officials often target low-income and predominately African-American or Latino urban neighborhoods in their enforcement of drug laws, even though research indicates that white youth aged 12-17 are more than a third more likely to have sold drugs than African-American youth, and white students report cocaine use at 7 times the rate of African-Americans students, crack cocaine use at 8 times the rate of African-Americans students, and heroin use at 7 times the rate of African-Americans students. Office of Applied Studies, Substance Abuse and Mental Health Services Administration (1999), *National Household Survey on Drug Abuse* 71 (Table G); National Institute on Drug Abuse (2000), *Monitoring the Future Report, 1975-1999, Volume I.*

Overrepresentation of minority youth also occurs as a result of biases among other decisionmakers at various points in the justice system. Some decisionmakers are guilty of intentional racial bias. *Justice on Trial, supra.* For others, race-based stereotypes and subjective factors such as perceived attitude and demeanor significantly influence decisions. The National Research Council collected the studies and concluded that disparities exist in arrest (6 of 7 studies), intake (4 of 4 studies), detention (6 of 7), and placement (7 of 7). *Id.* at 247-249.

Few studies directly address the issue of *how* race influences decisionmaking. In an important research effort, Bridges and Steen analyzed probation officers' written accounts of juvenile offenders and their crimes and court records about the offenders in three Washington counties. George S. Bridges and Sara Steen (1998), *Racial Disparities in Official Assessments of*

Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms, 63 American Sociological Review 554. They found pronounced differences in officers' attributions about the causes of crime by white versus minority youth. Probation officers consistently portrayed black youth different than white youth in their written court reports, attributing blacks' delinquency to negative *individual* attitudinal and personality traits, while stressing the *social* environment in their depictions of white youth. These attributions about youth shaped the probation officers' assessments of the threat of future crime, and correspondingly their sentence recommendations, since court officials relied more heavily on negative individual attributions than on severity of the current offense or prior delinquency history. Finally, the research found that these attributions are a mechanism by which race influences judgments of dangerousness and sentencing recommendations: officials in part judge black youths to be more dangerous than white youths as a consequence of negative attitudinal and personality traits, and therefore impose longer sentences on them.

Significant overrepresentation occurs in California. The National Council on Crime and Delinquency (NCCD) prepared a report analyzing overrepresentation in California. James Austin, *The Overrepresentation of Minority Youths in the California Juvenile Justice System: Perceptions and Realities* (1995), in *Minorities in Juvenile Justice* (Kimberly Kempf Leonard *et al.* eds.). The report found that African-American youths in California were overrepresented at every stage of the system, even when statistical controls were applied. Thus, nearly 72% of African-American youth referred for felony drug offenses were detained versus 43% of the white youth in the same offense class. The disparities increased deeper into the system. *Id.* at 165, Table 7.6. Although 11% of African-American youth with violent felony offenses were committed to the California Youth Authority (CYA) in 1989, only 3% of white youth with these

offenses were committed to a CYA facility. *Id.* at 164. This disparity at the commitment stage was true for every offense class except misdemeanor drug offenses. The staggering data led the researchers to conclude that their analysis "unveils a picture of persistent differential treatment for some minority groups after having accounted for prereferral factors such as offense and prior record." *Id.*

In addition, the researchers conducted discussion groups to collect subjective information from representatives of key public agencies involved with the administration of juvenile justice, including district attorneys, public defenders, the court, and the probation department. The discussion groups revealed that many system stakeholders perceived African-American males as "less controllable with limited family support if returned to the community." *Id.* at 169.

C. Racial Disparities Occur Throughout the Justice System Even for Youth Charged With Similar Offenses.

A comprehensive national report prepared by the National Council on Crime and Delinquency went beyond the issue of overrepresentation and demonstrated that racial disparities for youth occur throughout the justice system for youth charged with the same offenses. Eileen Poe-Yamagata and Michael A. Jones (2000), *And Justice for Some: Differential Treatment of Minority Youth in the Justice System* 1 [hereinafter, *And Justice for Some*]. The authors utilized data from U.S. Department of Justice agencies and publications, including the FBI's Uniform Crime Report Program; the Office of Juvenile Justice and Delinquency Prevention's National Juvenile Court Data Archive, Census of Juveniles in Residential Placement, and Juveniles Taken Into Custody Program; and the Bureau of Justice Statistics' National Corrections Reporting Program, as well as research conducted by NCCD and other research organizations. *Id.* at 5.

The report found that minority youth, especially African-American youth, received different and harsher treatment than white youth at each stage of the justice system, *even when white youth and minority youth were charged with the same type of offense* (person, property, drug, public order). Thus, African-American youth were more likely to be detained prior to adjudication, formally charged in juvenile court, waived to adult criminal court; ordered to out-of-home placement at disposition, and incarcerated in juvenile facilities and adult prisons, than white youth charged with the same offenses. *Id.* at 2-3. The authors concluded that the report documents a juvenile justice system that is "separate but unequal." *Id.* at 29.

The data raise serious concerns about racial disparities at the two stages of the justice system at issue in the present case: waiver to prosecution in adult criminal court and sentencing to adult prisons.

At the stage of waiver to prosecution in adult criminal court, the data show that minority youth were "much more likely than White youth to be waived to criminal court even when charged with a similar offense." *Id.* at 13. This was true across all offense categories. Thus, for offenses against persons, white youth constituted 57% of the cases petitioned but only 45% of the cases waived to adult court. African-American youth charged with similar offenses represented 40% of the cases petitioned, but were 50% of the cases waived to adult court. The differences were even more dramatic in drug cases. White youth constituted 59% of cases petitioned but only 35% of cases waived to adult court, while African-American youth charged with similar offenses represented 39% of cases petitioned but were 63% of cases waived to adult court. Consequently, in drug cases, white youth enjoyed a 24% "waiver advantage" and African-American youth carried a 24% "waiver disadvantage." *Id.*

At the stage of sentencing to adult prisons, the data also raise concerns about racial disparities. In 1997, 75% of youth admitted to state prisons were youth of color. *Id.* at 25. In state-by-state data, overrepresentation of minority youth and underrepresentation of white youth were reported in nearly every state reporting data on admissions to adult prisons in 1996.

D. Racial Disparities Accumulate For Youth in the Justice System.

Not only do racial disparities for youth occur at major points in the justice system, but those disparities accumulate, so that as youth process through the system the disparities at arrest are added to the disparities that occur when decisions are made whether to detain youth before adjudication, which are in turn added to the disparities that occur when formal charging decisions are made by prosecutors, which in turn are added to the disparities that occur when prosecutors make decisions whether to waive youth for prosecution in adult criminal court, and which are finally added to the disparities that occur at disposition and in decisions whether to incarcerate.

This phenomenon has been observed for more than 20 years. In 1979 researchers examining juvenile justice studies that considered the relationship between social class, race, and legal decision making concluded that race differences produced "a cumulative effect that changed a heterogenous prearrest population into a nonwhite, homogeneous institutionalized population." A. E. Liska and M. Tausig (1979), *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decisionmaking for Juveniles*, in 20 Soc. Q. (2) 197. *See, also*, William Feyerherm (1981), *Juvenile Court Dispositions of Status Offenders: An Analysis of Case Decisions*, in *Race, Crime, and Criminal Justice* (R.L. McNeeley and C.E. Pope, eds.) (finding cumulated racial differences in processing of status offenders). As the researchers at the National Council on Crime and Delinquency recently stated, "Information contained in this report documents the *cumulative disadvantage* of minority youth across the nation." *And Justice for*

Some at 1 (emphasis added). *See, also, Disproportionate Confinement, supra*, at 27 ("The differences between minority and non-minority juveniles representation become amplified at each decision point from early to later stages of the juvenile justice system.").

The recent review and analysis of research in the field by the National Research Council demonstrates the importance of the accumulation of racial disparities in the justice system.

The National Research Council report noted, in a section entitled "Compound Risk," that "Compound effects, even of small disparities, can produce large differences." National Research Council report, *supra*, at 254. Using national arrest, court, and placement data, the report actually calculates the relative risk for black youth and for white youth of (1) being arrested, (2) referred to court for a delinquency case, (3) the case being handled formally, (4) being adjudicated delinquent or found guilty, and (5) being put in residential placement. The report calculates the relative risk at each point in the system, and the *relative compound risk* as a youth progresses through the system. Thus, the relative risk at each particular point in the system is:

Risk of:	Relative black to white risk:
Being arrested	2:00 to 1:00
Referred to court for delinquency case	1.19 to 1:00
Case being handled formally	1.15 to 1:00
Being adjudicated delinquent or found guilty	0.93 to 1.00
Being put in residential placement	1.23 to 1:00

The compound risk, however, is quite different: as black youth go through the system, their accumulated risk grows significantly:

Risk of:	Relative compound black to white risk:
Being arrested	2:00 to 1:00
Referred to court for delinquency case	2.38 to 1:00
Case being handled formally	2.82 to 1:00
Being adjudicated delinquent or found guilty	2.51 to 1.00
Being put in residential placement	3.12 to 1:00

National Research Council report, *supra*, at 256. Thus, cumulatively, black youth are more than three times as likely as white youth to be arrested, processed through the system, and put in residential placement.

E. Youth in California Who Are Transferred to Adult Criminal Court and Sentenced to Imprisonment Are Subjected to Accumulated Racial Disparities.

An analysis of racial and ethnic disparities in California in the transfer of youths to adult court and sentencing to California Youth Authority (CYA) facilities was completed in January, 2000. Mike Males and Dan Macallair (2000), *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California* [hereinafter *The Color of Justice*]. The researchers utilized data collected from the Los Angeles County Probation Department Research Division, Los Angeles County District Attorney's Office, California Youth Authority Research Division, California Department of Justice Criminal Justice Statistics Center, Department of Finance Demographic Research Division and the U.S. Bureau of the Census. Data from Los Angeles County and the entire state for arrests (1996-1998) and sentencings (1997-1999) were for the most recent years for which data were available. The one-year difference takes into account that sentencings occur substantially after arrests. *Id.* at 5.

The report found that both in Los Angeles and statewide, youth of color charged with violent crimes are much more likely than white youth offenders to be sentenced to incarceration in CYA facilities. In Los Angeles, the arrest rate for violent offenses for youth of color was 2.8 times the violent offense arrest rate of white youth. However, the rate of being tried as an adult for youth of color was 6.2 times the rate of white youth, and the rate of imprisonment for minority youth was 7.0 times the rate for white youth. *Id.* at 8. Statewide, the arrest rate for violent offenses for youth of color was 2.7 times the violent arrest rate for white youth. However, after transfer to and prosecution in the adult system, minority youth were 8.3 times as likely as white youth to be sentenced by an adult court to CYA confinement. *Id.* at 9.

Thus, racial disparities accumulate for youth in California who are charged with violent crimes, prosecuted in adult court, and sentenced to CYA imprisonment: the disparate treatment of minority youth arrested for violent crimes "accumulates within the justice system and accelerates measurably if the youth is transferred to adult court." *Id.* at 10. The racial differentials do not result from more heinous offenses by minority youth: even by the most limited index (homicides), youth of color are significantly more likely to be sentenced to CYA confinement by adult courts than similarly-offending white youth. *Id.* at 11.

F. By Allowing Prosecutors to Make Charging *and* Sentencing Decisions, Section 26 of Proposition 21 Will Exacerbate Racial Disparities For Youth in the Justice System.

The data demonstrate that racial disparities are pervasive for youth in the justice system, nationally and in California, and that the disparities accumulate for youth of color at various decision points in the system. As a consequence, youth of color are subject to significant racial disparities as they go through the system.

As noted *supra*, Section 26 of Proposition 21 authorizes prosecutors to make two critical decisions affecting youth in the justice system: the decision which formal charges to bring, and the decisions which sentencing options are available.

Allowing prosecutors to make the decisions at two critical points in the justice system, to assume both the executive charging function and the judicial sentencing function, is inimical to the administration of justice and will exacerbate racial disparities in the system. One check on racial disparities in the system is the diversity of decisionmakers at key points in the system – police, prosecutors, judges, corrections agencies. Consolidation of multiple functions into a single office, particularly the office most directly responsible in the legal system for obtaining convictions of alleged offenders, is a recipe for potential abuses of discretion.

A prosecutor's ability to determine which individuals are formally charged, and the offenses with which they are charged, is one of the most powerful functions held by any criminal justice official. Angela J. Davis (1998), *Prosecution and Race: The Power and Privilege of Discretion,* 67 Fordham L. Rev. 13, 20; Bennet L. Gershman (1992), *The New Prosecutors,* 53 U. Pitt. L. Rev. 393, 448. Professor Davis, of the Washington College of Law at American University, notes that the discretion of prosecutors raises concerns because it is unregulated. Angela J. Davis (2001), *The American Prosecutor, Independence, Power, and the Threat of Tyranny,* 86 Iowa L. Rev. 393, 435; *see, also*, Tracy L. Meares (1995), *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 862-63.

The U.S. Supreme Court has acknowledged that considerations of race on the part of the prosecutor can infect the justice system. *Swain v. Alabama* (1965), 380 U.S. 202.[5] More recently, in *Batson v. Kentucky* (1986) 476 U.S. 79, the Court stated:

> The reality of practice, amply reflected in many state- and federal-court opinions, shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors.

Id. at 99.

In striking down provisions giving prosecutors "direct file" authority, the Utah Supreme Court spoke in words particularly appropriate to the instant case:

> Such unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decision making. No checks exist in this scheme to prevent such acts as a prosecutor's singling out members of certain unpopular groups for harsher treatment in the adult system while protecting equally culpable juveniles to whom a particular prosecutor may feel some cultural loyalty or for whom there may be broader public sympathy.

State v. Mohi, *supra*, 901 P.2d at 1002.

The research summarized above may not demonstrate deliberate, invidious discrimination based on race or ethnicity in the prosecution of youth of color. *Cf. Oyler v. Boles* (1962), 368 U.S. 448, 456; *Murgia v. Municipal Court* (1975), 15 Cal.3d 286, 290. Nor does the research

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[5] The Court in *Swain* found:

> In these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenged are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. 380 U.S. at 223-24.

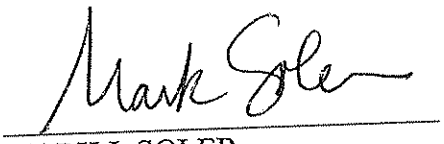
identify any particular individuals who have been selected for prosecution because of their race. *Id.* at 300. Indeed, the research in California and nationwide is limited. The National Research Council report concluded: "Given the importance of the problem of race, crime, and juvenile justice in the United States, the scant research attention that has been paid to understanding the factors contributing to racial disparities in the juvenile justice system is shocking." National Research Council report, *supra*, at 258. Accordingly, the report recommends a comprehensive, systematic, and long-term research agenda. *Id.* at 259.

On the other hand, the evidence of racial disparities affecting youth of color throughout the justice system, nationwide and in California, and the cumulative nature of those disparities from successive decision points in the system, is clear. National Research Council report, *supra*, at 256. The "vast differences" in treatment of white youth and youth of color in the justice system must be "a source of concern" and "disturbing." *People v. Andrews* (1998), 65 Cal.App. 4th 1098, 1102, 1104. Indeed, the research indicates that racial disparities in dispositions to secure confinement are significantly more in adult criminal court (8.3 to 1), *The Color of Justice*, *supra*, at 9, than in juvenile court (3.12 to 1) National Research Council report, *supra*, at 256. Accordingly, this Court should consider the potential impact of Section 26 of Proposition 21

on racial inequities in the justice system, and the likelihood that approval of Section 26 will exacerbate those inequities.

August 31, 2001

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

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On August 31, 2001, I placed in separate sealed envelopes, postage thereon fully prepaid, and deposited in the United States mail, a true and correct copy of the Brief of Amici Curiae to the following:

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I HEREBY CERTIFY under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this August 31, 2001, at Washington, DC.

MICHAEL FINLEY