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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Colorado Court of Appeals, 04 CA 1156 El Paso County District Court, No. 97 CR 1014 Honorable Steven T. Pelican, Judge **Plaintiff - Appellee:** The People of the State of Colorado **Defendant - Appellant:** Gary Lavon Flakes	▲ COURT USE ONLY ▲
Attorney for *Amicus Curiae*: Marsha L. Levick Laval Miller-Wilson Vincent Herman Juvenile Law Center 1315 Walnut Street, Suite 400 Philadelphia, PA 19107 Telephone: 215-625-0551 Fax number: 215-625-2808 E-mail: mlevick@jlc.org Atty. Reg. #: 06 PHV 1200	Case Number: 05 SC 593 Div.: Ctrm.:
Brief of Juvenile Law Center, National Juvenile Defender Center, Center on Children and Families, Southern Juvenile Defender Center, Pendulum Juvenile Justice, Northeast Juvenile Defender Center, The Center for Children's Law and Policy and the Southern Poverty Law Center as *Amicus Curiae*	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICUS CURIAE

The organizations submitting this brief work with, and on behalf of, adolescents to ensure that they are treated fairly in both the juvenile and criminal justice systems. *Amici* are advocates and researchers who bring a unique perspective and a wealth of experience in providing for the care, treatment, and rehabilitation of youth in the child welfare and juvenile justice systems. *Amici* believe strongly that the legislative response to youth who commit criminal and delinquent acts must emphasize accountability but must also be developmentally appropriate.

IDENTITY OF *AMICI*[1]

Juvenile Law Center; National Juvenile Defender Center; Center on Children and Families; Southern Juvenile Defender Center; Pendulum Juvenile Justice; Northeast Juvenile Defender Center; Center for Children's Law and Policy and Southern Poverty Law Center.

[1] A brief description of each of the organizations listed herein appears at Appendix A.

ISSUE ANNOUNCED BY THE COURT

Whether the direct file statute, C.R.S. § 19-2-517, is unconstitutional on its face and as applied for requiring adult sentencing of 16-17 year-old juveniles based on the seriousness of the crime charged, despite an acquittal of such crime, and a conviction of lesser charges outside the scope of the direct file statute.

STATEMENT OF THE CASE

Amici adopt the statement of facts set forth in the brief of Appellant-Petitioner, Gary Lavon Flakes.

SUMMARY OF ARGUMENT

Colorado's direct file statute, C.R.S. § 19-2-517, must be struck because it violates equal protection guarantees in both the United States and Colorado Constitutions, contravenes separation of powers principles, and denies Gary Flakes and other similarly situated youth due process.

Colorado's statutory scheme violates equal protection because it prescribes different penalties for identical conduct without rational or legislative justification. The statutory scheme provides for adult sentences

for some juvenile offenders, like Gary Flakes, but not others convicted of the same level of and class of felonies. These arbitrary distinctions between and among teenage offenders also fail in light of the U.S. Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), a case about the constitutional limits on sentencing juveniles as adults. That Court's findings, with respect to the features of adolescence for *all* persons under eighteen, are relevant here as well, even where the sentences at issue fall short of the death penalty. Colorado's sentencing scheme allows for no consideration of adolescent characteristics but rather mandates adult sentences for adolescents like Gary Flakes.

The statutory scheme violates the doctrine of separation of powers by effectively allowing the prosecutor to define the jurisdiction of the juvenile court. The persuasive reasoning of the Supreme Courts of the United States, Utah, Delaware, and West Virginia should compel this Court to confine its grant of expansive prosecutorial discretion. Thus, to the extent Colorado's current direct-file statute accords prosecutors not only the discretion to decide what charges to file, but also where to file a particular charge - in juvenile court or district (adult) court - thereby extending to prosecutors the discretion to determine both the jurisdictional boundaries of juvenile and

district court as well as what constitutes a "crime," it is beyond the scope of conduct traditionally protected by the doctrine of prosecutorial discretion.

Finally, Colorado's direct-file provision violates due process because it offers no procedural safeguards to check prosecutors' exercise of their discretion. As discussed above, it unlawfully delegates the power to choose the forum in which juvenile offenders are to be prosecuted to the executive branch, with no appropriate standards to guide that choice, no required statement of reasons for that choice, and no opportunity for review of that choice. This scheme thus creates an additional constitutional defect - Gary Flakes was deprived of due process, as no hearing whatsoever was held to determine the appropriateness of his prosecution and sentencing as an adult.

ARGUMENT

I. Introduction

The specific issue presented by this appeal – whether Colorado may sentence Gary Flakes as an adult following conviction for a crime that would not itself have made him eligible for adult prosecution – necessarily requires a thorough consideration of the purposes and goals of Colorado's transfer scheme, and how those purposes and goals can be constitutionally

achieved.

Nationwide, the pressure to remove cases from juvenile court, which peaked in the 1990's, reflects universal concerns about the limited capacity of juvenile court to punish teenage offenders who commit particularly serious, violent crimes.[2] By specifying which young people should be tried as adults, transfer laws serve the vital function of preserving access to the programs and policies of the juvenile court for offenders still considered likely to benefit from those programs. At the same time, these transfer policies raise broader questions about the status of adolescence, including how transfer affects the continuing status of child criminals as 'children,' how 'childhood' should be taken into account in the adult court, and on what bases the decision to transfer children to adult court should be made.[3]

Colorado, like every state, has opted to maintain a juvenile court for the prosecution and sentencing of young offenders below the age of 18 and, like every state, has also provided for exceptions to juvenile court jurisdiction. In establishing the boundaries of its juvenile and criminal courts, the Colorado legislature has relied upon age and offense as the

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[2] Franklin E. Zimring, *The Punitive Necessity of Waiver*, THE CHANGING BORDERS OF JUVENILE JUSTICE, eds. Jeffrey Fagan and Franklin E. Zimring 208 (2000) [hereinafter Zimring, CHANGING BORDERS].

[3] Zimring, CHANGING BORDERS 2-3.

principal basis for transfer. As the transfer laws make clear, Colorado has determined that particular juvenile offenders between the ages of 12 and 17 who are charged with certain serious-level felonies should be eligible for prosecution in adult court. As this appeal demonstrates, however, Colorado's *sentencing* scheme for serious juvenile offenders does not track its bases for transfer, but rather mandates that serious juvenile offenders receive adult sentences even though the legislature has determined that these they do not warrant *prosecution* as adults. [4] This disconnect between prosecution and sentencing – ultimately between policy and law – makes Colorado's transfer scheme an illogical and irrational mechanism for managing juvenile offending. More importantly, its inconsistent sentencing policies for similarly situated juvenile offenders places Colorado's law in

[4] Colorado appears to stand virtually alone in providing for both unfettered and un-reviewable prosecutorial discretion in deciding where and how juvenile offenders shall be prosecuted *and* in providing for certain juvenile offenders to receive adult sentences based on that initial prosecutorial decision. *Amici* have identified only two other states which provide for adult sentencing despite acquittal on the 'adult' charge. See IND. CODE § 31-30-1-4(The court having adult criminal jurisdiction over an excluded offense also has jurisdiction over any offense that may be joined to it. The adult court retains jurisdiction even if the child is convicted or pleads guilty to a lesser included offense); LA. CHILD. CODE, art. 305 (The adult court's jurisdiction encompasses both the charged offenses and any lesser included offenses of which the child might be convicted. "A plea to or conviction of a lesser included offense shall not revest jurisdiction in the court exercising juvenile jurisdiction over such a child.").

violation of equal protection guarantees in both the U.S. and Colorado Constitutions, violates separation of powers principles and denies Gary Flakes and other similarly situated youth due process. Further, by imposing adult sentences on "juvenile offenders" who have not violated any of the laws designated as adult offenses, Colorado improperly exposes these juveniles to the harsh consequences of adult sentences while improperly denying them the benefits of juvenile programs, with no added public safety benefit.[5]

Colorado Transfer Law

Under Colorado law, except as otherwise provided, the juvenile court maintains exclusive jurisdiction in proceedings concerning any juvenile between the ages of 10 and 17 who has violated, or is charged with violating, the law. C.R.S. § 19-2-104 (1)(a).[6] The statutory scheme

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[5] Donna Bishop & Charles Frazier, *Consequences of Transfer in* THE CHANGING BORDERS OF JUVENILE JUSTICE 227-65 (Jeffrey Fagan & Franklin Zimring eds.) (2000)(stating that "as a crime control policy, transfer tends to be counterproductive.") Studies suggest that transfer laws tend to aggravate recidivism because of "the sense of injustice of young offenders associated with criminal court processing, the multiple criminal effects of incarceration in the adult system (*e.g.*, exposure to negative shaming, opportunities for criminal socialization, modeling of violence) and the stigmatization and opportunity blockage that flow from a record of criminal conviction." Id. at 264-65.

[6] See generally, C.R.S. § 19-2-101 through § 19-3-703.

provides that all children shall be treated as juveniles as they enter and proceed through the juvenile justice system, until and unless criminal charges are filed in or transferred to district court. C.R.S. § 19-2-104.[7]

Colorado law provides two mechanisms for the prosecution of juveniles as adults - judicial transfer, C.R.S. § 19-2-518, and direct file, C.R.S. § 19-2-517. These laws provide for concurrent jurisdiction between the juvenile and district court over all juveniles accused of committing crimes enumerated in the transfer and direct file statutes. However, while both statutes are triggered by prosecutorial action, each statute operates with significantly different procedures and provides for different and inconsistent sentencing consequences. As set forth below, both the operation of these transfer and direct file provisions and the extent to which they treat similarly situated juvenile offenders differently with respect to sentencing

[7] Whenever a child is charged in district court, the child is exposed to all of the circumstances and consequences which attend adult prosecutions: the juvenile is transferred to an adult jail which requires segregated confinement but not education or rehabilitation (C.R.S. § 19-2-508(4)); arrest and criminal records become open to the general public for certain crimes (C.R.S. § 19-1-304(5)); criminal proceedings are conducted in district court in the same manner as adults under Title 16; the juvenile faces the same possible sentencing as an adult under the Criminal Code (including a lengthy adult prison sentence)(C.R.S. §§ 19-2-517(3)(a), 19-2-518(1)(d)); and the juvenile becomes ineligible for record expungement regardless of the crime of conviction (C.R.S. § 19-1-306 (7)(c)).

violate the due process and equal protection provisions of the both the Colorado and United States Constitutions, as well as constitutional separation of powers principles.

A. The Judicial Transfer Statute

Under the judicial transfer statute, a prosecutor may file a delinquency petition in juvenile court requesting a transfer to district court, but the judge retains comprehensive discretion both with respect to whether the juvenile is ultimately transferred, and whether the juvenile, if convicted in district court, is sentenced as a juvenile or an adult. C.R.S. § 19-2-518. The judicial transfer statute thus provides judicial oversight of the juvenile's fitness for prosecution as a juvenile or as an adult, and the juvenile's fitness for sentencing as a juvenile or as an adult. C.R.S.§ 19-2-518(1)(a) *as amended by* 2006 Colo. Legis. Serv., Ch.122 (BH26-1102)(West), provides that a juvenile court may enter an order certifying a juvenile to be held for proceedings in district court if:

(I) A petition filed in juvenile court alleges the juvenile is:

> (A) Twelve or thirteen years of age at the time of the commission of the alleged offense and is a juvenile delinquent by virtue of having committed a delinquent act that constitutes a class 1 or class 2 felony or a crime of violence…; or

> (B) 14 years of age or older at the time of the commission of the alleged offense and is a juvenile delinquent by virtue of having committed a delinquent act that constitutes a felony; and
>
> (II) After investigation and a hearing, the juvenile court finds it would be contrary to the best interests of the juvenile or of the public to retain jurisdiction.

Generally, in judicial transfers where the offender has no prior record, the burden of persuasion is on the prosecution to establish probable cause for the crimes alleged and offer evidence convincing the juvenile court judge to waive jurisdiction. People v. Juvenile Court, City and County of Denver, 813 P.2d 326, 328-30 (Colo. 1991). Even if the juvenile court elects to waive jurisdiction, the case cannot be transferred unless the district attorney files an information in district court within five days of the juvenile court's order. C.R.S. § 19-2-518(7)(a).

In accordance with Kent v. United States, 383 U.S. 541 (1966), the judicial transfer statute requires the juvenile court to conduct an investigation and hearing. C.R.S. § 19-2-518(1)(a)(II). The statute provides a list of fourteen Kent-type factors the juvenile court must consider, although the weight to be given to each factor is discretionary with the court. C.R.S. § 19-2-518(4)(b), (c). The list of factors includes the nature of the alleged offense, the maturity of the juvenile, the likelihood of rehabilitation

of the juvenile by use of facilities available to the juvenile court, the impact of the offense on the victim, and the record and previous history of the juvenile. C.R.S. § 19-2-518(4)(b)(I)-(XIV).

In addition to the procedural requirement that a hearing be conducted, judicial transfer entitles the juvenile to representation by counsel. C.R.S. § 19-2-518(4)(a); Kent, 383 U.S. at 562. If any written reports or materials regarding the juvenile are prepared for the court, the statute provides that the person or agency preparing the report be subject to cross-examination. C.R.S. § 19-2-518(6); Kent, 383 U.S. at 563. Additionally, the juvenile court's order waiving jurisdiction is subject to review on appeal. People v. Armand, 873 P.2d 7 (Colo. App. 1994); cf., Kent, 383 U.S. at 552-553.

If a juvenile is convicted in district court after judicial transfer, the juvenile must be sentenced as provided by the transfer statute. C.R.S. § 19-2-518(1)(d). The statute requires the district court to sentence the juvenile as an adult if the juvenile is convicted of a class 1 felony, crime of violence, or if the juvenile was previously adjudicated as a mandatory, violent or aggravated juvenile offender. C.R.S. § 19-2-518(1)(d)(I). In all other cases, the statute provides that the district court judge shall have the power to impose any disposition that juvenile court could impose, or to remand the

case to juvenile court for disposition at its discretion. C.R.S. § 19-2-518(1)(d)(III).

B. The Direct File Statute

Under C.R.S. § 19-2-517(1)(a)(I), a juvenile such as Gary Flakes, who is fourteen years of age or older and is alleged to have committed a class 1 or class 2 felony may be direct filed or charged as an adult solely at the prosecutor's discretion, or "direct-filed." The direct file statute gives prosecutors the power to charge juveniles fourteen years of age or older as adults by filing an information in district court based on the seriousness of the charge or the juvenile's record. Importantly, the statute affords the prosecutor the option of filing the same charges by delinquency petition in juvenile court.

Under the direct file statute, the district court jurisdiction is achieved simply by a prosecutor's decision to charge a juvenile by information. See, People v. Davenport, 602 P.2d 871, 872 (Colo. App. 1979)(the General Assembly intended the indictment, and not the subsequent conviction, to trigger the allocation of district court jurisdiction). The district court's power to sentence juveniles as adults also derives from the fact that a prosecutor filed an information in district court. C.R.S. §19-2-517(3).

Unlike judicial transfer, the district court maintains jurisdiction over juveniles like Gary Flakes regardless of the crime of conviction. See, People v. Hughes, 946 P.2d 509 (Colo. App. 1997)(*overruled on other grounds by* Valdez v. People, 966 P.2d 587 (Colo. 1998).

The sentencing provisions of the current direct file statute state:

> Whenever criminal charges are filed by information or indictment in the district court pursuant to this section, the district judge shall sentence the juvenile as follows:
>
> (I) As an adult; or
>
> (II) To the youthful offender system in the department of corrections in accordance with section 18-1.3-407, C.R.S., if the juvenile is convicted of an offense described in subparagraph (II) or (V) of paragraph (a) of subsection (1) of this section…; or
>
> (III) Pursuant to [the Children's Code] if the juvenile is less than 16 years of age at the time of the commission of the crime and is convicted of an offense other than a class 1 or class 2 felony, a crime of violence, and is not a habitual juvenile offender, and the judge makes a finding of special circumstances.

C.R.S. §19-2-517(3)(a). Subsection (3)(c) states: "The district court judge may sentence a juvenile pursuant to the [the Children's Code] if the juvenile is convicted of a lesser included offense for which criminal charges could

not have been originally filed by information or indictment in the district court pursuant to this section." C.R.S. §19-2-517(3)(c).

Subsections (3)(a)(III) and (3)(c) are the only provisions of the direct file statute which permit juvenile sentencing after conviction. Subsection (3)(a)(III) offers juvenile sentencing for a broad scope of lesser crimes, including some crimes enumerated in the direct file statute,[8] but the provision only applies to 14-15 year old juveniles; subsection (3)(c) offers juvenile sentencing for any aged juvenile, but its application is expressly restricted to juveniles convicted of "lesser included" offenses.

In the instant appeal, petitioner Gary Flakes was convicted of two counts of accessory to murder, C.R.S. §18-8-105, which are lesser *non-included* offenses; and one count of criminally negligent homicide, C.R.S. §18-3-105, which is a lesser included offense of first degree murder. People v. Shaw, 646 P.2d 375, 379-382 (Colo. 1982). Therefore, neither statutory exception applies. See, Scoggins v. Unigard Ins. Co., 869 P.2d 202, 205 (Colo. 1994)(if the plain language of the statute is clear, it is controlling, and the Court will not read a statute to accomplish something not in the plain language). According to the plain language of subsection (3)(c), Gary is

[8] See, C.R.S. §19-2-517 (1)(a)(II)(B) and (D). (3)(a)(III) sentencing excludes class 1 and 2 felonies, crimes of violence and habitual juvenile offenders.

ineligible for juvenile sentencing because two of the offenses of which he was convicted are lesser non-included offenses. Had Gary been charged with only the offenses for which he was ultimately convicted, he would have be eligible for juvenile sentencing, and ineligible for direct file adult prosecution. Likewise, had Gary been judicially transferred to district court under Colorado's transfer scheme, he would have been eligible for a juvenile court disposition.

II. Colorado's Direct-File Statute Violates The Equal Protection Clauses Of Both The U.S. and Colorado Constitutions

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides in part that no state "shall deny to any person within its jurisdiction the equal protection of the laws." The U.S. Supreme Court interprets this clause as "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (citing Plyer v. Doe, 457 U.S. 202, 216 (1982)); see also, People in the Interest of D.G., 733 P.2d 1199, 1202 (Colo. 1987) (Equal protection doctrine under United States and Colorado law requires that "all parties who are similarly situated receive like treatment by the law"). Thus, the threshold question of any equal protection challenge is whether the persons allegedly subjected to disparate treatment are

in fact similarly situated. A.C., IV v. People, 16 P.3d 240, 245 (Colo. 2001); People v. Black, 915 P.2d 1257, 1260 (Colo. 1996). Where no suspect class or fundamental right is at issue, a governmental classification must pass rational basis review to satisfy equal protection. D.G., 733 P.2d at 1203. That is, any differential treatment must have a "reasonable relation to a proper legislative purpose" and cannot be "arbitrary or discriminatory." Id. While Colorado's classification scheme would plainly fail under strict scrutiny,[9] *Amici* submit that the Colorado scheme cannot even survive rational basis scrutiny under the U.S. and Colorado Constitutions.

[9] According to the U.S. Supreme Court decision in City of Cleburne v. Cleburne Living Ctr., Inc., it is well settled that there are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis review. 473 U.S. 432, 440-41 (1985); see, Evans v. Romer**,** 854 P.2d 1270, 1275-76 (Colo. 1993). Under a rational basis review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. Id. Strict scrutiny review is reserved for legislation that discriminate against members of traditionally suspect classes such as immigrants, racial or ethnic minorities. Id. Laws that are subject to strict scrutiny review will be sustained only if they are supported by a compelling state interest and narrowly drawn to achieve that interest in the least restrictive manner possible. Cleburne, 473 U.S. at 440-41; Plyer v. Doe, 457 U.S. 202, 217 (1982). Intermediate review requires a showing that the law in question is substantially related to a sufficiently important governmental interest and has been applied in the context of laws which draw distinctions based on gender. Cleburne, 473 U.S. at 440-41.

Additionally, in the area of criminal sentencing, the Colorado Constitution as interpreted by this court provides even greater protection than the U.S. Constitution under its equal protection clause.[10] Colorado courts have held that equal protection is offended when a criminal statute provides different penalties for identical conduct "unless there are reasonable differences or distinctions between the proscribed behavior ."[11] People v. Stewart, 55 P.3d 107, 114 (Colo. 2002) (stating that the Supreme Court of Colorado "has consistently held that if a criminal statute proscribes different penalties for identical conduct, a person convicted under the harsher penalty is denied equal protection") (citing People v. Richardson, 983 P.2d 5, 6-7 (Colo. 1999). Thus, when a statute creates classifications

[10] COLO. CONST. Art. II, Sect. 25; see, Heninger v. Charnes, 613 P.2d 884, 887 (Colo. 1980)("Although the Colorado Constitution does not contain an explicit equal protection clause, equal treatment under the laws is a right constitutionally afforded Colorado citizens and is included within the due process clause").

[11] "A statute which proscribes different degrees of punishment for the same acts committed under like circumstances by persons in like situations is violative of a person's right to equal protection of the laws." People v. Calvaresi, 534 P.2d 316, 318 (Colo. 1975); see, People v. Calvaresi, 534 P.2d 316, 319 (Colo. 1975)(finding that the legislative distinction between recklessness and criminal negligence was semantic and was thus an insufficient basis for the conviction of a felony rather than a misdemeanor); People v. McKenzie, 458 P.2d 232 (Colo. 1969); compare, United States v. Batchelder, 442 U.S. 114, 125 (1979)(holding that equal protection is not offended when statutes proscribe identical conduct but authorize different penalties).

involving identical criminal conduct, the differential treatment must be based on differences "that are both real in fact and also reasonably related to the general purposes of the criminal legislation." Stewart, 55 P.3d at 114.

As the Colorado Children's Code was amended over time to address rising juvenile crime in the late 1980's and early 1990's, it has become a patchwork transfer and direct file scheme that now establishes five different classes of juveniles whose sentencing alternatives are different, despite the fact that they have all been found to have committed the same level crimes. These facial statutory classifications are as follows:[12]

> (1) juveniles who are 16-17 years old at the time of the offense, including Gary Flakes, charged with enumerated crimes pursuant to the direct file statute, convicted of lesser non-included class 4 felony offenses, who must be sentenced as adults. C.R.S. § 19-2-517(3);
>
> (2) juveniles who are 16-17 years old at the time of the offense, charged with enumerated crimes pursuant to the direct file statute, convicted of lesser included class 4 or class 5 felony offenses, who may be sentenced as juveniles. C.R.S. § 19-2-517(3)(c);
>
> (3) juveniles who are 14-15 years old at the time of the offense, charged with enumerated crimes pursuant to the direct file statute, convicted of

[12] These classifications exclude juveniles categorized as violent or habitual juvenile offenders.

> lesser non-included class 4 felony offenses, and may be sentenced as juveniles in district court. C.R.S. § 19-2-517(3)(a)(III);
>
> (4) juveniles who are 16-17 years old at the time of the offense, charged with the same class 4 felony offenses by delinquency petition, transferred to district court (after a hearing and representation by counsel), convicted of the same offenses in district court, and who may be sentenced as a juvenile in district or juvenile court. C.R.S. § 19-2-518(d)(III); and
>
> (5) juveniles who are 16-17 years old at the time of the offense, charged with the same class 4 felony offenses by delinquency petition, adjudicated of the same offenses in juvenile court, and must be sentenced as juveniles. C.R.S. §§ 19-2-701 through 19-2-805.

The first three of these provisions all present scenarios in which the juveniles are direct filed in adult court, tried and convicted in adult court of the same classes of felonies, but only a subset of them remain eligible for juvenile sentencing, while others must be sentenced as adults. The fourth provision presents the scenario in which juveniles are judicially transferred to adult court, tried and convicted in adult court of the same classes of felonies as their direct file peers, but all of them remain eligible for juvenile dispositions. The last provision applies to juveniles tried and adjudicated in

juvenile court of the same classes of felonies, who may only be sentenced as juveniles.

A. Colorado's Statutory Scheme Violates Equal Protection By Foreclosing Juvenile Sentences For Some, But Not All Juvenile Offenders Convicted As Adults In District Court

For those juveniles tried in district court as a result of being charged with one of the designated offenses subject to direct filing by the prosecutor, C.R.S. § 19-2-517 creates an arbitrary sentencing classification by mandating the sentencing of some of these youth to the adult system or youthful offender system, while others are sentenced according to the Children's Code. C.R.S. § 19-2-517(3)(c).

Thus, a youth who is charged with first degree murder in district court but convicted solely of criminally negligent homicide, a lesser included offense, can be sentenced according to the provisions of the Children's Code. However, a youth like Gary Flakes, who is also charged with first-degree murder in district court but convicted of accessory to murder as well as negligent homicide, cannot be sentenced according to the Children's Code because accessory to murder is not a lesser included offense of murder. C.R.S. § 19-2-517(3)(c).

C.R.S. § 19-2-517(3)(c) prescribes different penalties for identical conduct, without rational or legitimate justification, and thus violates equal protection guarantees. By providing for adult sentences for some juvenile offenders but not others convicted of the same level of and class of felonies, the statutory scheme requires that some juvenile offenders be sentenced in accordance with the legislative determination of the seriousness of the crime, but not others. This violation arbitrarily deprives a certain class of juvenile offenders of sentencing options according to the provisions of the Children's Code and randomly exposes those youth to the harshness of the adult criminal system. Nicholas v. People, 973 P.2d 1213, 1217 (Colo. 1999)("the overriding purposes of the Children's Code have remained unchanged… [to] secur[e] a child's welfare, to draw a distinction between adults and children who violate the law, and to protect and rehabilitate juveniles who violate the law"), superseded by statute C.R.S. § 19-2-511(2); People in the Interest of B.M.C. v. M.C. , 506 P.2d 409, 410 (Colo. 1973)(the underlying purpose of the Children's Code is to distinguish between children and adults who violate the law).

Similarly, C.R.S. § 19-2-517(3)(a)(I-III) violates equal protection by unreasonably distinguishing between juvenile offenders 16 and 17 years old,

and juvenile offenders who are 14 or 15 years of age. Under C.R.S. § 19-2-517(3)(a)(I-II), a direct-filed juvenile who is tried and convicted in district court shall be sentenced as an adult or to the youthful offender system. However, if the juvenile is less than sixteen years of age at the time of the commission of the crime, and is convicted of a crime **other than** a class 1 or 2 felony, a crime of violence, or a crime which would lead to his designation as a habitual offender, the juvenile shall be sentenced according to the provisions of the Children's Code. C.R.S. § 19-2-517(3)(a)(III).[13] Under this provision, a youth like Gary Flakes, who was 16 at the time of the alleged crime faces adult sentencing even though he was acquitted of the direct file charge, while a youth 15 or younger convicted of the identical conduct is eligible to be sentenced according to the provisions of the Children's Code, after a finding of "special circumstances." C.R.S. § 19-2-517(3)(a)(III).

Although such arbitrary distinctions between and among teenage offenders for the purposes of sentencing on their face appear to violate equal

[13] In order to sentence a youth according to the provisions of the Children's Code, the judge must also make a finding of "special circumstances." C.R.S. § 19-2-517(3)(a)(III). Neither the statute nor corresponding case law elaborate as to what the conditions or parameters of "special circumstances" may be.

protection, they must be viewed even more critically in light of the United States Supreme Court's decision last term in Roper v. Simmons, 543 U.S 551(2005), a sentencing case that relied on developmental research about adolescents under 18 to hold the juvenile death penalty unconstitutional under the Eighth Amendment's cruel and unusual punishments clause. Roper reversed the Court's 1989 ruling in Stanford v. Kentucky, 492 U.S. 361 (1989), which upheld the constitutionality of the death penalty for 16 and 17 year olds, despite a ruling one year earlier in Thompson v. Oklahoma, 487 U.S. 815 (1988), that juveniles under 16 could not be deemed eligible for the death penalty under the Eighth Amendment.

Roper's extension of the prohibition against the juvenile death penalty to *all* youth under eighteen was supported, *inter alia*, by developmental research which showed that all juveniles are categorically less culpable than the average adult criminal. Roper, 543 U.S. at 569; see, Atkins v. Virginia, 536 U.S. 304, 319 (2002).[14] The Roper Court concluded that "the

[14] In Atkins the U.S. Supreme Court held that the Eighth Amendment of the U.S. Constitution prohibited the execution of mentally retarded persons. Atkins, 536 U.S. at 316. The Atkins Court relied on "objective indicia of contemporary values" that were revealed by the fact that the majority of states had rejected capital punishment for retarded persons, reduced its use or demonstrated a trend towards abolition of the practice. Id. at 313-15, 324. This observation led the Court to conclude that society viewed mentally

differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." Roper, 543 U.S. at 572-73. Specifically, the Court found that juveniles of any age are less culpable and cannot be classified among the worst offenders because they (1) lack maturity and responsibility, (2) are more vulnerable and susceptible to outside influences, particularly negative peer influences, and (3) are not as well formed in character and personality as an adult, and thus much more likely to be rehabilitated. Id. at 569-570. Importantly, while the Court acknowledged these distinctive characteristics of adolescence in the context of reviewing a challenge to the juvenile death penalty, the research findings apply generally to all adolescents under the age of eighteen. Roper, 543 U.S. 569-70.

Because Roper is, *inter alia*, a case about the constitutional limits on sentencing juveniles as adults, its findings with respect to the salient features

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retarded persons as "categorically less culpable than the average criminal." Id. at 315-16. The Court also noted that because mentally retarded persons have impaired intellectual functioning and adaptive skills, the twin goals of capital punishment – retribution and deterrence – were not served by the execution of mentally retarded persons. Id. at 320. Furthermore, the lesser capacity of mentally retarded persons places them at a special risk of wrongful execution. Id. at 320-21. In Roper the Supreme Court applied the same rationale to abolish the juvenile death penalty and held that a national consensus regarding juveniles revealed that they too were "categorically less culpable." Roper, 543 U.S. 563-64, 567-68.

of adolescence that inform those limits are relevant here as well, even where the sentences at issue fall short of the death penalty. Thus, where Roper drew a bright line at 18 years to categorically bar a particular sentence based on those adolescent characteristics, its reasoning suggests that states must consider how the reduced culpability and impaired decision-making of youth bear upon the applicability of other adult sentences to youthful offenders. In other words, in the context of the death penalty, the individual characteristics of adolescent offenders are so marked as to justify excluding all adolescents from eligibility for this penalty. As the severity of the adult sentence drops below the ultimate penalty of death, adolescent differences must still be taken into account, but in a more individualized way. Thus, while the categorical approach of Roper may not apply to all adult sentences, state sentencing schemes that give no consideration to youth's impairments but rather mandate adult sentences for certain classes of adolescents now run afoul of the spirit, if not the letter, of Roper. While this is plainly obvious with respect to Colorado's disparate treatment of similarly situated 16 and 17 year olds, C.R.S. § 19-2-517(3) and C.R.S. § 19-2-517(3)(c), it applies as well to Colorado's disparate treatment of 14 and 15 year old youth convicted

in district court, and 16 and 17 year old youth convicted in district court. See, C.R.S. § 19-2-517(3)(a)(III); C.R.S. § 19-2-517(3).

With respect to its first finding, that juveniles lack maturity and responsibility, the Court noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Roper, 543 U.S. at 569 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REVIEW 339 (1992)). Further, the Court recognized that "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Roper, 543 U.S. at 574. Indeed, the Court referenced and appended an extensive list of state and federal statutes which categorically bar youth under 18 from participating in adult activities, including voting, serving on juries, enlisting in the military or marrying without parental consent. Id. at 578-86.[15] Colorado civil law likewise explicitly recognizes the lack of capacity of *all* youth and sets eighteen as the age of competence regarding the ability to form contracts, to manage estates, to sue and independently be sued, and to control decisions regarding their own bodies. C.R.S. § 13-22-

[15] For a more complete list of state laws limiting the participation of youth under 18 in myriad "adult" activities, see, *State Age Requirements for Various Activities, available at* www.jlc.org/agerequirements/default.php.

101; see, Nicholas, 973 P.2d at 1219. Persons under the age of eighteen in Colorado cannot vote and must get parental consent in order to be married. Colo. Const. art. VII, § 1; C.R.S. § 14-2-106(1)(a)(I).

Colorado criminal law also recognizes the categorical immaturity of youth under the age of 18. For example, C.R.S. § 19-2-511 generally prohibits the entering into evidence of any admission by a juvenile concerning delinquent acts that is made as result of an interrogation in the absence of a parent, guardian or custodian. See, Colo. R. Juv. Pro. 3(a); Nicholas, 973 P.2d at 1218 (*superseded* by statute)(holding that the parental presence rule 'reflects the General Assembly's recognition that juveniles generally lack the capacity to make important legal decisions alone'").

The Court's second finding, that "juveniles are more vulnerable or susceptible to negative influences and outside pressures including peer pressure," Roper, 543 U.S. at 569; see, Eddings v. Oklahoma, 455 U.S. 110, 115 (1982), was amply supported by research presented to the Court. "[Y]outh is more than a chronological fact. It is a *time and condition* of life when a person may be most susceptible to influence and to psychological damage." Roper, 543 U.S. at 569(citing Eddings, 455 U.S. at 115) (emphasis added); see, Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason*

of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003). Here, where Gary Flakes was charged with another teen-aged co-defendant, the issue of peer influence is squarely presented, and highlights the importance of taking these aspects of adolescent development into account in devising sentencing schemes for adolescents charged in adult court and therefore subject to adult sentences.

Finally, the Court noted that juveniles of all ages are not as well formed in character and personality as adults. Roper, 543 U.S. at 570 (citing Erik Erikson, IDENTITY: YOUTH AND CRISIS (1968)). The relevance of youth as a mitigating factor "derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[16] Id. (citing

[16] In addition, new research into the structure and function of the teenage brain suggests that significant brain development occurs during adolescence through the late teens and into the early twenties. Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 SCIENCE 596 (July 30, 2004). The resulting immaturity in the adolescent brain contributes to the poor decision making capacity of all juveniles. Thomas Grisso, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 105 (2004). Such research gives a medical and "hard evidence" edge to the information above describing the distinct psychological development of teens and further demonstrates that the distinctions drawn between 15 year olds and 16 year olds are unreasonable and not real in fact.

Johnson v. Texas, 509 U.S 350, 368 (1993)); see, Steinberg & Scott at 1014. Moreover, the Court acknowledged that even experts in psychology struggle to differentiate between "transient immaturity" and "irreparable corruption" in juvenile offenders. Roper, 543 U.S. at 573. As a result psychologists are forbidden from diagnosing youth with "antisocial personality disorder" because it is difficult to ascertain whether the behaviors which characterize the disorder as *observed in adolescents* are of a temporary, or permanent nature. Id. (citing American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701-706 (4th ed. text rev. 2000)); see, Hervey Checkley, THE MASK OF SANITY 270 (5th 3d. 1976); John F. Edens et al., *Assessment of "Juvenile Psychopathy" and its Association with Violence: A Critical Review*, 19 BEHAV. SCI. & L. 53, 77 (2001). To the extent that Colorado's direct file law entrusts prosecutors alone to decide which adolescent offenders are suffering from a *permanent* antisocial personality disorder, and thus warranting not only adult prosecution but also adult sentencing, there is a high probability that some prosecutors inevitably will misjudge. Unfortunately, prosecutorial direct file of the type available under Colorado law is the only statutory scheme in which this error is incapable of being fixed.

B. C.R.S. § 19-2-517 Violates Equal Protection Because It Creates A Sentencing Distinction Between 15 And 16 Year-Old Youth With No Legitimate Government Purpose

The statutory classification of crimes must be based not only on differences that are "real in fact" but must also be "reasonably related to the general purposes of the criminal legislation." Stewart, 55 P.3d at 114; see, Richardson, 983 P.2d at 7; District Court, 964 P.2d at 501. Again, the Supreme Court's decision in Roper demonstrates that a statute which arbitrarily distinguishes between 15 and 16 year-old youth for the purposes of criminal sentencing is not reasonably related – explicitly or implicitly – to a reasonable government purpose. Roper, 543 U.S. at 569; Stewart, 55 P.3d at 114.

The purpose of C.R.S. § 19-2-517, as interpreted in People v. Trujillo, 983 P.2d 124 (Colo. App. 1999), is to discourage recidivism and deter juvenile crime by threatening adult penalties, while encouraging law-abiding behavior and – for those who have prior charges – the opportunity to reform. 983 P.2d at 126. Yet C.R.S. § 19-2-517(3)(c) adopts a sentencing classification based on age which is not reasonably related to any of these goals and is unlikely to accomplish these purposes.

First, with respect to the goal of deterrence, Roper expressly held that the traditional goals of "retribution and deterrence" apply with less force to adolescents because the very characteristics "that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Roper, 543 U.S. at 571.

Second, available research suggests that transfer and direct file laws such as C.R.S. 19-2-517 do not actually reduce juvenile crime. Christina DeJong & Eve Schwitzer Merrill, *Getting "Tough on Crime:" Juvenile Waiver and the Criminal Court*, 27 OHIO N.U.L.REV. 175, 176 n.10 (2001) ("Assessing general deterrence has always been a difficult task"); Ellie D. Shefi, *Waiving Goodbye, Incarcerating Waived Juveniles in Adult Correctional Facilities Will Not Reduce Crime*, 36 U. MICH. J. LAW & REFORM 653, 665 (2003) ("While incarcerating waived juveniles in adult facilities quenches the public's thirst for "justice" and provides the community with a sense of security, incarcerating juveniles with adults does not, in fact, increase public safety"); Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQ. 171, 184-85 (1996); Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41

BRANDEIS L.J. 977, 993 (2003) ("Studies clearly show that juveniles adjudicated in the adult system are more likely to re-offend, are more likely to suffer from the terrible consequences of being incarcerated in adult facilities… and are less likely to be rehabilitated than juveniles adjudicated in juvenile court").

Third, there is, in fact, evidence that "adult time for adult crime" laws actually increase recidivism because juveniles sentenced as adults are vulnerable to adult criminals and are mentored by more powerful inmates. Coalition for Juvenile Justice, CHILDHOOD ON TRIAL: THE FAILURE OF TRYING & SENTENCING YOUTH IN ADULT CRIMINAL COURT 17 (2005); Ctr. for the Study and Prevention of Violence, *CSPV Fact Sheets: Judicial Waivers: Youth in Adult Courts*, CSPV Online, *available at* www.colorado.edu/cspv/publications/factsheets/cspv/FS-008.html.

Despite little or no evidence in support of its goals, C.R.S. § 19-2-517(3)(c) today denies Gary Flakes access to sentencing under the Children's Code because he was 16, not 15, when he committed a crime. In the wake of Roper and the underlying developmental research supporting it, imposing such radically different sentences on teenage youth convicted of the same criminal conduct without any examination of their developmental

differences lacks any rational basis. Indeed, the Colorado scheme is particularly irrational in that it allows juvenile sentencing for other 16 year old offenders convicted of the same class felonies based simply on the fact that they were judicially transferred rather than direct-filed to district court. Thus, juveniles *whose fitness for adult prosecution has been determined by a judge* remain eligible for juvenile sentencing nevertheless, while juveniles like Gary who have had no consideration of their developmental characteristics and immaturity are foreclosed from the possibility of receiving a juvenile sentence.

In reversing Stanford v. Kentucky, the Supreme Court rejected its own prior line-drawing between older and younger adolescents, recognizing for the first time that all adolescents possess the same characteristics and impairments that directly bear on their blameworthiness, judgment and decision-making capabilities. This categorical view of the developmental immaturity of adolescents is increasingly reflected in the growing body of federal and state laws restricting minors' ability to engage in all sorts of 'adult' activities, from the significant, like serving in the military, 10 U.S.C.A § 505, to the trivial, like body-piercing, tattooing or indoor tanning. 720 ILL. COMP. STAT. 5/12-10 (tattooing); UTAH CODE ANN. § 76-10-2201

(body-piercing); TEX. HEALTH & SAFETY CODE ANN. § 146.0125 (body-piercing); WYO. STAT AN.. § 14-3-107 (body art *e.g.*, piercing, branding or scarification). Colorado's current statutory scheme treats adolescent offenders *convicted in adult court of equally serious criminal conduct* differently based upon where they fall on the adolescent timeline and what route they took to district court. This legislative scheme flies in the face of *Roper* and cannot stand.[17]

[17] For example, an adult who commits first degree assault (defined as "an assault committed without the sudden heat of passion caused by serious provocation") is sentenced under Colorado law to a minimum sentence of 4 years imprisonment, a maximum sentence of 12 years with a 5 year mandatory period for parole. C.R.S. § 18-1.3-406; C.R.S. § 18-3-202; C.R.S. § 18-1.3-401. A 16 year-old who commits and is adjudicated delinquent for the exact same crime will be placed or committed by the juvenile court for not less than one year unless the court finds than an alternative sentence or commitment of less than one year out of the home which would be more appropriate. C.R.S. § 19-2-908. Such out of home placement might include commitment to the department of human services, community corrections, detention, legal custody with a relative or hospital. C.R.S. § 19-2-907, C.R.S. § 19-2-516. An adult convicted of first degree burglary involving a controlled substance is sentenced according to the guidelines for class 2 felonies. Class 2 felonies carry a minimum sentence of 8 years, a maximum sentence of 24 years and a mandatory parole period of 5 years. C.R.S. § 18-4-202; C.R.S. § 18-1.3-401. A 16 year-old convicted of the same crime in juvenile court will be committed to the custody of the department of human services for a maximum of five years and a minimum of three years. C.R.S. § 19-2-601(5)(a)(I)(B).

C. The Equal Protection Analysis Set Forth Above Is Consistent With Case Law From Other Jurisdictions, And Not Foreclosed By Prior Decisions Of This Court

Case law from other jurisdictions support the reasoning set forth above; to the extent other courts have rejected equal protection challenges to direct file statutes, *amici* submit those cases are distinguishable from the case at bar.

In State v. Mohi, 901 P.2d 991, 997, 1004 (Utah 1995), the Utah Supreme Court, employing a similar rational basis test, overturned that state's discretionary direct-file statute because it "treat[ed] similarly situated juveniles in an unreasonably different fashion." Though it technically based its decision on Utah's uniform operation of laws provision, the Mohi Court's reasoning in support of its holding is relevant to this Court's equal-protection analysis of the Colorado statute.

First, the court found that Utah's statute entailed differential treatment of similarly situated juveniles. Children of the same age, accused of the very same crime, faced "radically different penalties and consequences without any statutory guidelines for distinguishing between them." Id. at 998. Second, mirroring Colorado's and the Supreme Court's equal-protection analysis, the court found no reasonable relationship between this standardless differentiation among a potential class of juvenile offenders and the state's

asserted legitimate purpose of balancing public safety with the needs of children. Id. at 1002.

As the Mohi Court explained, "[l]egitimacy of a goal cannot justify an arbitrary means" and a system in which a prosecutor "may choose for any reason or no reason" to subject a particular juvenile to the adult criminal justice system is certainly arbitrary. Id. at 999. The court warned that "[s]uch unguided discretion opens the door to abuse without any criteria for review or for insuring evenhanded decision making." Id. at 1002. The Mohi Court concluded, "[t]he legislature may not create a scheme which permits the random and unsupervised separation of all such violent juveniles into a relatively privileged group on the one hand and a relatively burdened group on the other." Id. at 1003.

In Hughes v. State, 653 A.2d 241, 252 (Del. 1994), the Delaware Supreme Court found its state law, which provided similar unbridled prosecutorial discretion, unconstitutional on equal protection and due process grounds. The Delaware statute required the automatic transfer to adult court of any juvenile accused of a felony who became eighteen pending trial. Id. at 247; see, DEL. CODE. ANN. tit. 10, sec. 1002. Thus, by charging a juvenile who was to turn eighteen before trial with a felony, a prosecutor could

effectively establish jurisdiction over that child in adult court. While the prosecutorial discretion at issue focused on charging rather than forum selection, this decision was also un-reviewable, despite the tremendous consequences associated with adult jurisdiction rather than juvenile jurisdiction. Id. at 252. Further, as in Mohi, the Delaware Court held that the statute failed rational basis review, finding it to be "patently arbitrary" and lacking any constitutional safeguards. Hughes, 653 A.2d at 252. As the Hughes Court emphasized, "[t]he good faith of the [prosecutor] . . . is not sufficient to protect a child's constitutional rights." Id. at 250.

Even where direct file statutes have been upheld in other cases, these rulings are distinguishable on several grounds. Most relevantly, in People v. Thorpe, 641 P.2d 935 (Colo. 1982), this Court upheld the predecessor to Colorado's current direct-file statute, C.R.S. § 19-1-104(4)(c), C.R.S.1973 (1978 Repl. Vol. 8). Thorpe is distinguishable from the current challenge before the Court, because the prior statute gave district courts the option to sentence child defendants as juveniles or to remand their cases to juvenile jurisdiction, 641 P.2d at 940; thus, the categorical bar to juvenile sentencing imposed by the legislature under the current statute for only certain juveniles was not before this Court in Thorpe.

Likewise, in State v. Robert K. McL., 496 S.E.2d 887, 892 (W. Va. 1997), the West Virginia Supreme Court found that West Virginia's automatic transfer provision did not violate equal protection due to a similar judicial "safety valve." In People v. Hughes, discussed above, the Delaware Supreme Court stressed that its decision would have been different had the state legislature not eliminated the requirement of a reverse amenability hearing, which provided judicial counterweight to any prosecutorial excess. Id.; see, Hansen v. Pappan, 904 P.2d 811, 822-23 (Wyo. 1995) (finding constitutional a Wyoming discretionary direct-file statute which, upon a transfer motion by a juvenile defendant, required a hearing where the court had to consider a series of statutory factors derived from Kent, 383 U.S at 541); Bishop v. State, 462 S.E.2d 716, 718 (Ga. 1995) (upholding a Georgia discretionary direct-file statute that reserved adult courts the power to transfer the cases of child defendants to juvenile jurisdiction); State v. Cain, 381 So.2d 1361, 1367 (Fla. 1980) (holding a Florida discretionary direct-file statute to be constitutional in part because "[b]efore imposing judgment, the trial court must conduct a disposition hearing to determine whether juvenile or adult sanctions are appropriate . . . . and must consider the [statutory] criteria").

Finally, in Manduley v. Superior Court, 41 P.3d 3, 23-25 (Cal. 2002) while the California Supreme Court rejected an equal protection challenge to California's Proposition 21, which gave prosecutors discretion to decide whether to file charges against certain juveniles in juvenile or adult court, the court distinguished between statutes which result in disparate sentencing based solely on the exercise of the prosecutor's charging function, and statutory classifications which provide for disparate sentencing based upon legislative classifications dictating different outcomes for similarly situated juveniles. Colorado's direct-file statute on its face mandates disparate treatment for similarly situated juveniles based on *legislatively* drawn classifications that permit no exceptions. Children of the same age, or broader classes of adolescent youth, face significantly different consequences for convictions of the same crimes – or same class of crimes -- triggered by the exercise of unbridled discretion by prosecuting attorneys which then locks in the court's sentencing options. For youth like Gary Flakes, adult sentencing is the only option because he was 16, not 15 at the time of the crime; he was convicted of a *lesser non-included offense* rather than a *lesser included offense*; and he was direct-filed, rather than judicially transferred, to adult criminal court. Such arbitrary distinctions cannot

survive even rational basis scrutiny under the equal protection clauses of the U.S. and Colorado Constitutions.

III. Colorado's Direct File Statute Violates the Separation of Powers Doctrine

The power of a prosecutor to exercise discretion in determining what charges shall be brought against a defendant flows from the doctrine of the separation of powers implicitly embedded within the federal Constitution and explicitly mandated by Article III of the Colorado Constitution. Colo. Const. art. III; People v. Thorpe, 641 P.2d 935, 938 (Colo. 1982). The rationale behind this doctrine is fundamental to the American system of government. Powers are separated so that they may act as a check on the exercise of the powers of the co-extensive branches of government. In other words, the state and federal constitutions create a system of "checks and balances." Smith v. Miller, 384 P.2d 738, 741 (Colo. 1963); see**,** Marbury v. Madison, 5 U.S. 137, 176 (1803); Springer v. Philippine Islands 277 U.S. 189 (1928); In Interest of J.E.S., 817 P.2d 508, 511 (Colo. 1991).

Prosecutors are accorded broad discretion under federal and state constitutions with respect to their *charging* function -- that is, *whether* to file criminal charges, *what* charges to file and *against whom.* In Wayte v. United States, 470 U.S. 598 (1985), the Supreme Court explained that "[i]n

our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (internal citations omitted). The Court went on to elaborate that, "'[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in his discretion.'" Id. (internal citations omitted). The Court explained further, however, that even within this sphere of general permissiveness there are constitutional limitations, as "the decision whether to prosecute may not be based on an 'unjustifiable standard such as race, religion, or other arbitrary classification.'" Id. (internal citations omitted). Colorado's direct-file statute, C.R.S. §19-2-517, goes beyond this traditional arena of constitutional protection by delegating to prosecutors unfettered and un-reviewable discretion to also decide *where* to file criminal charges against certain classes of youth under the age of eighteen.

The U.S. Supreme Court has articulated two primary rationales for prosecutorial discretion. First, the Court should not "unnecessarily impair the performance of a core executive constitutional function." U.S. v. Armstrong, 517 U.S. 465 (1996). But forum selection, unlike determinations regarding whether, what, and whom to charge, is not a core

executive function. Rather, it is the legislature and the judiciary that are traditionally responsible for deciding jurisdictional and forum-related matters. Second, the Court found the prosecutors' charging function supported by "an assessment of the relative competence of prosecutors and courts." Id. Similarly, courts and legislatures routinely make jurisdictional evaluations, so a relative-competence assessment does not point to greater competence on the part of prosecutors to make such jurisdictional choices.

While the U. S. Supreme Court strongly implied that protection of prosecutorial discretion should not apply in contexts like Colorado's direct-file statute, the Utah Supreme Court explicitly so held in State v. Mohi, 901 P.2d 991 (1995). In striking down the statute, the Mohi Court emphasized that "[t]he type of discretion incorporated in the Act is unlike traditional prosecutor discretion." Id. at 1002-03. The Court explained that "[s]electing a charge to fit the circumstances of a defendant and his or her alleged acts is a necessary step in the chain of any prosecution." Id. at 1002. Unlike the decision of where to bring charges, the fulfillment of this necessary selection of a charge "requires a legal determination on the part of the prosecutor as to which elements of an offense can likely be proved at trial." Id. As an added advantage such discretion "allows prosecutors to plea-bargain with offenders

in some cases, saving the public the expense of criminal prosecutions." Mohi, 901 P.2d at 1002. But, according to *Mohi*, "none of these benefits accompany the discretion to choose which juveniles to prosecute in adult rather than in juvenile court." Id. The court then concluded, "[t]he elements of the offense are determined by the charging decision, and it is only the charging decision that is protected by traditional notions of prosecutor discretion." Id. (original emphasis).

The Supreme Courts of Delaware and West Virginia have also indicated that a prosecutor's decision to pursue charges in adult court rather than juvenile court is not entitled to the same deference traditionally accorded the prosecutor's charging function. In Hughes v. State, 653 A.2d 241 (Del. 1994), in addition to finding the statute vulnerable on equal protection grounds, the Delaware Supreme Court also found the law unconstitutional on state and federal grounds. The court relied in part on the fact that the automatic-transfer provision "grant[ed] the charging authority the unbridled discretion to unilaterally determine which forum has jurisdiction over every child who will reach eighteen years of age before being adjudicated in Family Court." Hughes, 653 A.2d at 249. Prosecutors in Colorado are given the same unbridled authority under C.R.S. § 19-2-517.

In State v. Robert K. McL., 476 S.E.2d 887 (W.Va. 1997), the West Virginia Supreme Court agreed "with the reasoning of the Hughes and Mohi opinions . . . that substantial equal protection and due process concerns are implicated by the statutory grant of authority to a prosecuting attorney of the standardless and unreviewable power" to choose adult court as the jurisdiction in which to prosecute a juvenile. McL., 496 S.E.2d at 892. The McL. Court ultimately upheld the West Virginia law because the statute did not grant prosecuting attorneys the broad unfettered discretion at issue in Mohi and Hughes. Id. at 893. Rather, there was a built-in "safety valve" throughout the process, as the adult court retained the discretion to return child defendants to juvenile jurisdiction. Id.

The present case is distinguishable from People v. Thorpe. In Thorpe this Court suggested that the prosecutor's decision to file in district court is not distinct from a prosecutor's charging function for purposes of protected prosecutorial discretion. 641 P.2d at 938-39. Thorpe upheld the predecessor to Colorado's current direct-file statute, Section 19-1-104(4)(c), C.R.S.1973 (1978 Repl. Vol. 8) which included a safety valve similar to that in McL. Since under the prior statute judges retained the discretion to sentence child

defendants as juveniles or remand their cases to juvenile court, id.,[18] any forum-selection discretion granted to prosecuting attorneys was effectively reviewable and therefore not absolute. The Thorpe Court, like the McL. Court, never faced the current question of unfettered prosecutorial discretion.

Additionally, the reasoning of Thorpe is limited to protecting prosecutorial discretion where adult sentences can be imposed on juveniles *convicted* of what they were charged with *as adults,* id. at 940, as compared to imposing adult sentences without an actual conviction on the adult charge, as in this case. The distinction is crucial; a sentence in the American legal system must be based on a conviction, not simply on charges. As the court recognized in Canter v. Commonwealth, 843 S.W.2d 330, 337 (Ky. 1992), "we cannot accept the proposition that the final disposition of any offender is dependent upon the original charge rather than the ultimate conviction. We will not presume guilt, and particularly not after acquittal." (Ordering a juvenile disposition, pursuant to Kentucky Revised Statute § 640.040(4),

[18] As the Court observed in Thorpe, "We also note that even when a district attorney elects to file criminal charges against a juvenile in district court the court retains the power 'to make any disposition of the case that any juvenile court would have and shall have the power to remand the case to the juvenile court for disposition at its discretion.'" Thorpe, 641 P. 2d at 940, n.4.

where a juvenile was charged with a capital offense, but convicted of a Class C felony, which fell outside the purview of adult sentencing).

The persuasive reasoning of the Supreme Courts of the United States, Utah, Delaware, and West Virginia should compel this Court to confine its grant of expansive prosecutorial discretion to situations in which prosecutors are exercising their charging function only. Thus, to the extent Colorado's current direct-file statute accords prosecutors not only the discretion to decide what charges to file, but also where to file a particular charge - in juvenile court or district (adult) court - thereby extending to prosecutors the discretion to determine both the jurisdictional boundaries of juvenile and district court as well as what constitutes a 'crime,' it is beyond the scope of conduct traditionally protected by the doctrine of prosecutorial discretion.[19]

[19] Because Colorado's transfer law, as applied to Gary, mandates an adult sentence based upon the crime with which he was *charged*, rather than the crime for which he was *convicted*, Colorado's law may also run afoul of the judiciary's authority to determine appropriate sentences, likewise protected under the separation of powers doctrine. While other courts have rejected this separation of powers argument, see, *e.g.*, Manduley, 41 P. 3d 3, 12-19 (2002), the statutory schemes at issue in those jurisdictions did not tie the judiciary's hands at the outset, based upon the prosecutor's unfettered and un-reviewable discretion to alone decide what to charge the juvenile with and in which forum.

IV. Colorado's Direct-File Provision Violates Due Process Because It Offers No Procedural Safeguards To Check Prosecutors' Exercise of Their Discretion

The difference between juvenile and adult prosecution and juvenile and adult sentencing is profound, resulting in life-altering consequences for the juveniles treated as adults. As discussed above, C.R.S. § 19-2-517 unlawfully delegates the power to choose the forum in which juvenile offenders are to be prosecuted to the executive branch, with no appropriate standards to guide that choice, no required statement of reasons for that choice, and no opportunity for review of that choice. This scheme thus creates an additional constitutional defect—Gary Flakes is deprived of due process of law as guaranteed by both the United States and Colorado Constitutions. In fact, Flakes was deprived of all process, as no hearing whatsoever was held to determine the appropriateness of his prosecution and sentencing as an adult.

In Kent v. United States, 383 U.S. 541 (1966), the Supreme Court declared a statutory scheme that subjected a particular child to adult, criminal jurisdiction violative of the due process rights of the minor. The Court wrote:

> We agree … that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation." The statute ... does not confer upon the Juvenile Court a license for arbitrary procedure.... [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.

Id. at 552-554, (citations and footnotes omitted) (emphasis added).

Kent teaches that "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness" is constitutionally required when the legislature creates a juvenile court by statute. Id. at 553. Such procedural regularity does not exist in Section 517 of the Colorado Children's Code. While Kent dealt with a judicial decision to waive juvenile jurisdiction and transfer a child defendant's case to adult court, its reasoning should be as applicable, if not more so, to a prosecutor's decision to prosecute a juvenile in adult court. First, the jurisdictional choice between juvenile and adult court is critically important for a child defendant, regardless of whether a judge or a prosecutor makes the decision. Here, the significant and highly consequential difference between adult and

juvenile treatment is at stake. There could hardly be a greater interest to Gary Flakes than the decision unilaterally made by the prosecution to deem him unsuitable for juvenile treatment.

Second, since this is a matter of *forum selection*, not *charging*, prosecutorial discretion does not provide any special justification here for the denial of process. The State has societal interests in bringing all offenders to justice; however, Section 517 does not preclude Gary Flakes from being charged in juvenile court; it just gives the prosecutor the power to unilaterally make the jurisdictional decision.

Finally, the need for process is even greater when a prosecutor, who is inherently adversarial, rather than a judge, who is inherently neutral, chooses adult court over juvenile court. The public has the right to expect that its officials will make determinations on the basis of merit. The way to insure a merits-based determination is through due process standards. "Absolute and uncontrolled discretion invites abuse." Hornsby v. Allen 326 F.2d 605, 610 (5th Cir. 1964). Freedom from arbitrary official action is the hallmark of due process of law.[20]

[20] Section 517 grants a license for arbitrary procedure; precisely the evil that the due process principle of "procedural regularity" is designed to eliminate. Kent, at 552-554. In no adult case is sentencing based upon the crime

A number of courts have rejected the extension of Kent to the prosecutorial waiver context, but the statutes at issue in many of those cases are distinguishable from Colorado's direct-file provision. For example, Thorpe, 641 P.2d at 939-40, McL., 496 S.E.2d at 892-93; Hansen, 904 P.2d at 822, Bishop, 462 S.E. 2d at 718, and Cain, 381 So.2d at 1368, all rejected procedural due process and equal protection challenges but, as discussed above, the statutory scheme upheld in each of those cases provided at least minimal procedural safeguards.

In sharp contrast, Colorado's discretionary direct-file statute grants no process whatsoever - rather, it leaves the decision to prosecute a juvenile in adult court to the near-absolute discretion of the prosecutor. There are no procedural safeguards to ensure the fairness of the jurisdictional determination, no safety valve to protect against potential abuse; judicial transfer, in contrast, provides many safety valves to ensure accurate and

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alleged. If the prosecutor over-charges an adult with a serious felony, and the adult is convicted of a lesser crime, that adult is in no different position at sentencing than if she or he had been charged with the lesser crime. In contrast, an older juvenile who is charged with a serious crime under the direct file statute, but convicted of a lesser non-included offense is in a substantially different position at sentencing than if she or he had been charged with the lesser crime by delinquency petition or had been transferred to district court by a different method.

appropriate decision-making.[21] Thus, due to its failure to provide any process surrounding the critically important decision to pursue charges against a juvenile in adult court, Colorado's discretionary direct-file statute violates federal and state procedural due process requirements.

[21] By comparison, the fitness process in juvenile court (to determine whether a youth should be transferred to adult, criminal court) provides the opportunity for the decision to be made before a neutral judge, in an adversary hearing, where the minor may present expert testimony from psychologists, school officials, program directors, *etc.*, review school, health and medical records, and hear from the juvenile. There is no need to elaborate on the superiority of the above two decision-making processes.

CONCLUSION

For the reasons stated above, Gary Flakes' adult sentence under the direct file statute for non-enumerated crimes is unconstitutional, as is the direct file statute itself. The sentence must be vacated and *amici* join Petitioner's request that the case be remanded.

Respectfully submitted this 5th day of June, 2006.

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APPENDIX A

IDENTITY OF *AMICUS CURIAE*

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC advocates in particular on behalf of children involved in the juvenile justice and child welfare systems and, increasingly, children involved in the adult criminal justice system. JLC works to ensure children are treated fairly by these systems, and that children receive the treatment and services that these systems are supposed to provide, including, at a minimum, adequate and appropriate education, and physical and mental health care. In addition to litigation and appellate advocacy, JLC has participated as amicus curiae in state and federal courts throughout the country, as well as the United States Supreme Court, in cases in which important rights and interests of children are at stake. Of particular relevance, JLC was lead counsel for over 50 advocacy groups nationwide who participated as *amici* in Roper v. Simmons, 543 U.S. 551(2005), in which the Supreme Court ruled that it was unconstitutional to impose an adult punishment, there the death penalty, upon children.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Center offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **National Center for Youth Law** (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, *Youth Law News*, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. As part of the organization's juvenile justice agenda, NCYL works to ensure that youth in trouble with the law are treated as adolescents and not adults, in a manner that is consistent with their developmental stage and capacity to change.

The **Center on Children and Families** (CCF) at University of Florida's Fredric G. Levin College of Law was established in 2001, to coordinate the classroom, research and clinical programs relating to children at Florida's oldest and largest law school. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Child Welfare Clinic and Gator TeamChild juvenile law clinic. Based on extensive research, we believe that sentencing juveniles as adults is not in the public interest or in the interests of juveniles.

The **Southern Juvenile Defender Center** (SJDC) works to ensure excellence in juvenile defense and secure justice for children in delinquency

and criminal proceedings in the southeastern United States. SJDC provides training and resources to juvenile defenders, and advocates for systemic reforms designed to give children the greatest opportunities to grow and thrive. Through public education and advocacy, SJDC encourages attorneys and judges to rely upon scientific research concerning adolescent brain development in cases involving youthful defendants. SJDC is based at the Southern Poverty Law Center ("SPLC") in Montgomery, Alabama. Founded in 1971, SPLC has litigated numerous civil rights cases on behalf of incarcerated children and other vulnerable populations.

Pendulum Juvenile Justice (PJJ) is a Colorado non-profit, 501(c)(4). It was started in 2005 to assertively lobby legislators, and during the legislative session, get the message to the community about particular bills regarding how children are tried as adults, especially how they are sentenced to mandatory Life Without Parole. PJJ is an arm of the Pendulum Foundation, whose goal is the same, yet the Foundation's efforts are dedicated to publicity and to securing funding for programming for children who are in adult prison so they might grow and be educated, preparing them for parole (those whom are parole eligible). PJJ believes that even some of the most serious violent child offenders may be resocialized and safely reintegrated into society, and that the best place for that treatment is in a juvenile facility. Those child offenders currently serving Life Without Parole should be given an opportunity to prove themselves, and therefore some should be given a second chance in life.

The **Northeast Regional Juvenile Defender Center**, a regional affiliate of the National Juvenile Defender Center, is dedicated to improving the quality of legal representation afforded young people in juvenile proceedings in New York, New Jersey, Pennsylvania, and Delaware. The NRJDC provides training, back-up, and support to juvenile defenders throughout the region. Recent initiatives include programs focusing on the nexus between adolescent development research and juvenile justice policy and practice, particularly with regard to waiver.

The **Center for Children's Law and Policy** (CCLP) is a new public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP capitalizes on its Washington, DC location by working on juvenile justice and education reform efforts in DC, Maryland, and Virginia; partnering with other Washington-based system reform and advocacy organizations such as the Justice Policy Institute, National Juvenile Defender Center, and Campaign 4 Youth Justice; engaging in legislative advocacy with Congress; and associating with major Washington law firms which provide assistance on a pro bono basis. CCLP also works in other states and on national initiatives such as MacArthur Foundation's Models for Change initiative and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative. CCLP staff attorneys have long experience working on the issue of transfer of youth to the adult criminal justice system in several states across the country.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2006, I served a true and correct copy of the foregoing on the following via U.S. Mail:

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