

TABLE OF CONTENTS

INTRODUCTION.....	63
I. THE HISTORY AND PUBLIC-HEALTH CONSEQUENCES OF JUVENILE TRANSFER.....	64
<i>A. The historical development of juvenile transfer</i>	64
<i>B. The public-health consequences of juvenile transfer</i>	65
II. JUVENILE TRANSFER IN OREGON: A STATUTORY ANALYSIS.....	68
<i>A. Oregon's statutory exclusion of juveniles</i>	69
<i>B. Oregon's waiver provisions</i>	69
III. <i>APPRENDI V. NEW JERSEY</i> : A CONSTITUTIONAL REMEDY TO EASE THE PUBLIC-HEALTH CONSEQUENCES OF JUVENILE TRANSFER IN OREGON	71
<i>A. The Constitutional Requirements of Apprendi v. New Jersey</i>	72
<i>B. The Apprendi</i>	

INTRODUCTION

“Juvenile transfer” is the judicial, legislative, or prosecutorial decision to move a juvenile from the juvenile-justice system to the adult criminal-justice system to face criminal prosecution.² Some form of transfer exists in every state, and collectively these legal mechanisms make up the contemporary “juvenile transfer regime.”³ States utilize the following laws to facilitate transfer: (1) judicial-waiver statutes that allow a judge to waive a juvenile to adult court; (2) statutory exclusions or automatic-transfer statutes that strip juvenile courts of jurisdiction over a class of juvenile offenders or mandate that a class of juvenile offenders be prosecuted in adult court; and (3) prosecutorial-discretion statutes that permit prosecution of a class of juvenile offenders in adult court.⁴ Oregon’s juvenile

I. THE HISTORY AND PUBLIC-HEALTH CONSEQUENCES OF JUVENILE
TRANSFER

A. The historical development of juvenile transfer

The current juvenile transfer mechanisms represent a sharp and recent departure from historical notions of juvenile justice. Beginning with the first juvenile court in 1899, states created separate legal systems for juveniles throughout the early twentieth century,⁵ accepting their *parens patriae* responsibility to protect and supervise children whose parents had failed to do so.⁶

murder or other capital crimes.¹¹ Laws providing prosecutors with the discretionary ability to charge juveniles in adult court were also rare.¹²

In the late 1980s and early 1990s the collective social and political mood began to change in reaction to an uptick in national youth violence and heightened media rhetoric regarding that increase.¹³ Between 1987 and 1994, youth violence peaked and legislative enactments broadening juvenile transfer authority from judges to prosecutors or automatic statutory mechanisms followed in nearly every state.¹⁴ The public-health consequences of the widespread growth in juvenile transfer have been severe.

B. The public-health consequences of juvenile transfer

Juvenile crime, especially violence, is a pressing public-health concern.¹⁵ An exhaustive review of the public-health effects of juvenile transfer is beyond the scope of this article, yet two easily identifiable and interrelated issues highlight the public-health consequences of the contemporary transfer regime: (1) juvenile victimization and suicide in adult prisons and jails, and (2) modern deterrence of juvenile crime. An

to protect young offenders.¹⁸ Additionally, youth in adult facilities suffer from rampant mental instability because frequent sexual abuse and violence drives them to desperation.¹⁹ While mental distress also exists in juvenile facilities, these problems are more prevalent in adult facilities.²⁰ For example, juveniles in adult facilities are five times more likely than adult offenders, and eight times more likely than juvenile offenders in juvenile facilities, to commit suicide.²¹

While deterrence has been the primary rationalization for the structure of the current nationwide transfer regime,²² studies confirm

that .56 384.5989 5.mb.2(i)-1d(driv)11Tw -21.Tc 0.0i.3(52:Tw -2 -1fn6 384.5989 5.mb.2(2in a)8(d

2015]

APPLYING APPRENDI

67

1995, it fell steadily until 2004 before leveling out.²⁸ However, while juvenile violence temporarily stabilized in the late 1990s and early 2000s, it rose between 8%–11% from 2004 to 2007, and has yet to fall below the pre-1988 numbers (the year prior to the spike).²⁹ Instead, roughly 90,000 juveniles are arrested for violent crimes

2015]

APPLYING APPRENDI

69

The latter is the primary focus of this article, as it involves judicial fact-finding—the core concern of the *Apprendi* line.⁴³

A. Oregon's statutory exclusion of juveniles

In 1994, Oregon voters passed Ballot Measure 11, which dictated stern mandatory minimums for sixteen violent and sexual felonies and commanded automatic adult prosecution of certain juveniles who committed those crimes.⁴⁴ In recent years, the Oregon legislature has amended the law by adding six more offenses and increasing sentences.⁴⁵ Under Ballot Measure 11, two statutes, read together, exclude certain juvenile offenders from juvenile court jurisdiction.⁴⁶ The first statute commands that fifteen-, sixteen-, and

variety of Class C felonies, is granted a hearing where the juvenile

A. *The Constitutional Requirements of Apprendi v. New Jersey*

In *Apprendi v. New Jersey*, the defendant pled guilty to two counts of possession of a firearm for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb after firing indiscriminately into an African-American family's home.⁶³ At the plea hearing, the trial judge heard police testimony that the defendant did not want the family in the neighborhood because they were "black."⁶⁴ Based on this testimony the judge found by a preponderance of the evidence that the crime "was motivated by racial bias."⁶⁵ The judge sentenced the defendant under New Jersey's hate-crime law to a prison term that exceeded the statutory maximum for the two charges.⁶⁶ On appeal, the Supreme Court rejected the enhanced sentence as constitutionally repugnant.⁶⁷

The Supreme Court in *Apprendi* held that any fact, other than a prior conviction, that "exposes a defendant to a sentence in excess of the statutory maximum must be found by a jury, not a judge, and must be established beyond a reasonable doubt."⁶⁸ The Court refused to draw a distinction between elements of the offense and a sentencing factor; instead, it held that the Sixth and Fourteenth Amendments apply to both.⁶⁹ Justice Stevens, writing for the majority, reasoned that due process jury protections extend to determinations that go not only to the defendant's guilt or innocence but also to the length of his sentence.⁷⁰ Therefore, any fact that increases a defendant's punishment is treated as an element of the crime and must be found by the jury beyond a reasonable doubt.⁷¹

Two years later in *Ring v. Arizona*, a defendant was convicted by jury trial of first-degree murder, armed robbery, and conspiracy to

63. *Apprendi v. New Jersey*, 530 U.S. 466, 469–70 (2000).

64. *Id.* at 469.

65. *Id.* at 471.

66. *Id.* at 470.

67. *Id.* at 476–77.

68. *Id.*; Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishments, and Adult Process*, 61 HASTINGS L.J. 175, 180 (2009).

69. *Apprendi*, 530 U.S. at 476–77, 490.

70. *Id.* at 484.

71. *Id.* at 506–09, 511.

2015]

APPLYING APPRENDI

73

commit armed robbery.⁷² The statutory scheme in Arizona allowed the trial judge to impose either life in prison or increase the punishment to death if the judge found certain aggravating circumstances.⁷³ The judge in *Ring*

2015]

APPLYING APPRENDI

75

jury's findings in a particular case and under the dominant sentencing scheme, regardless of its label.⁹⁴

defendant of illegally storing liquid mercury for a period of ten days.¹⁰³ The verdict supported a fine of \$50,000 to be levied against the defendant, yet the trial judge imposed a fine of six million dollars after finding the violation occurred for 762 days.¹⁰⁴ In reviewing the case, the First Circuit held that *Apprendi* did not apply to criminal fines.¹⁰⁵ The Supreme Court reversed, holding the *Apprendi* rule prohibits a judge from basing a nonpetty fine on facts found by the court rather than the jury.¹⁰⁶

The dissent in *Southern Union Co.* emphasized the policy ramifications of the majority's holding, stating that applying *Apprendi* to fines would hinder legislative attempts to reduce sentencing disparity, create confusion, violate federalism, and harm defendants.¹⁰⁷ The majority countered with their own policy arguments, stating that legislatures would still be able to constrain sentencing discretion and that the burden of applying *Apprendi* to fines would fall equally on the federal government and state governments.¹⁰⁸ Moreover, the majority argued that "even if [the government's and dissent's] predictions are accurate, the rule the government espouses is unconstitutional," and that is enough to conclude the matter.¹⁰⁹

Lastly, the Court narrowed the lone exception to the *Apprendi* rule in the complicated case *Descamps v. United States*.¹¹⁰ In *Apprendi*, the Court held that a judge may find the existence of a prior conviction without a jury determination.¹¹¹ Faced with the scope of that exception—and most pertinent to the discussion here—the *Descamps* Court limited a judge's ability to examine a prior conviction in order to enhance a defendant's sentence under the Armed Career Criminal Act.¹¹² The Court struck down the Ninth Circuit's "modified categorical approach" that permitted a trial judge

103. *Id.* at 2349.

104. *Id.*

105. *United States v. S. Union Co.*, 630 F.3d 17, 33–36 (1st Cir. 2010) *rev'd*, 132 S. Ct. 2344 (2012).

106. *S. Union Co.*, 132 S. Ct. at 2348–49.

107. *Id.* at 2360–61, 2369–71 (Breyer, J., dissenting).

108. *Id.* at 2356–57.

109. *Id.* at 2357.

110. *Descamps v. United States*, 133 S. Ct. 2276, 2288 (2013).

111. *Apprendi v. New Jersey*, 530 U.S. 466, 490–91 (2000).

112. Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (2014); *Descamps*, 133 S. Ct. at 2281–82.

2015]

APPLYING

2015]

APPLYING

consider a statutory sentence to be a mandatory minimum if it gives the sentencing court some discretion, rather than imposing a required

adult parole or postprison supervision, only around 5% actually received age-appropriate juvenile services.¹⁶² If a juvenile violates parole or postprison supervision conditions, the juvenile will be sanctioned according to the senten

takes years to expunge,¹⁷¹ and all Class A and many Class B felony convictions cannot be expunged.¹⁷² If a juvenile with an adult conviction is not convicted of another crime, the juvenile's original adult conviction may be expunged after a three-year waiting period.¹⁷³ If the juvenile is convicted again, the juvenile must wait ten years before the initial conviction is eligible to be expunged.¹⁷⁴

For example, imagine a sixteen-year-old who is waived to adult court and convicted of a Class C felony. During that waiver process the juvenile judge issued an order permanently placing that juvenile within adult jurisdiction. If that juvenile was later convicted of a low-level misdemeanor in adult court, he or she would have to wait ten years—until the age of twenty-six—to expunge his or her felony conviction. Moreover, consider a fifteen-year-old waived to adult court and convicted of a Class A felony. That fifteen-year-old will likely carry that felony conviction on his record for the remainder of his life.

Third, a criminal record can directly reduce a juvenile's future employment prospects.¹⁷⁵ A large portion of employers use criminal background checks to help make hiring decisions, and employers increasingly bar individuals with a criminal record from even applying.¹⁷⁶ Studies show that having a criminal record reduces the amount of time per year that an individual is able to retain employment.¹⁷⁷ Notably, one study concluded that time in jail or prison cut employment by about five weeks per year for young white men and eight weeks per year for young African-American and Latino men.¹⁷⁸ A 2007 study found that only about 40% of prospective employers would be willing to hire someone with a criminal record.¹⁷⁹

171. OR. REV. STAT. § 137.225 (2013).

172. *Id.* § 137.225(5).

173. *Id.* § 137.225.

174. *Id.*

175. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 2 (2010), <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

176. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, 65 MILLION "NEED NOT APPLY" 1–3 (2011), http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf.

177. SCHMITT & WARNER, *supra* note 175, at 9.

178. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 119 (2006).

179. HARRY J. HOLZER, COLLATERAL COSTS: THE EFFECTS OF INCARCERATION ON THE EMPLOYMENT AND EARNINGS AMONG YOUNG MEN 14 (2007), <http://repec.iza.org>

Considering that Oregon youth are already disadvantaged in the current job market, an adult criminal conviction severely compounds

3. A hearing that strips a juvenile of a rehabilitative system and exposes the juvenile to the adult system's direct and collateral punishments falls within the reach of *Apprendi*

Once a separate juvenile system has been established¹⁸⁹—much like application of the sentencing guidelines in *Blakely* and *Booker*, or the mandatory minimum in *Alleyne*—its jurisdiction over a juvenile is statutorily presumed.¹⁹⁰ During a waiver proceeding, a judge makes factual determinations by a preponderance-of-the-evidence standard in order to waive a juvenile to adult criminal court, where the juvenile will face a litany of primary and secondary consequences.¹⁹¹ Thus, under Oregon's waiver laws, the facts that a judge determines are analogous to facts that trigger sentence enhancements or the application of more severe mandatory minimums.¹⁹²

Apprendi applies to waiver hearings even though an Oregon

189. State *ex rel.* Juvenile Dep't of Wash. Cty. v. Fitch (*In re Fitch*), 84 P.3d 190, 192–95 (Or. Ct. App. 2004) (describing the existence and objectives of Oregon's juvenile-justice system).

190. The Supreme Court described the presumptive jurisdiction of the juvenile court in this way:

It is clear beyond dispute that the waiver of jurisdiction is a “critically important” action determining vitally important statutory rights of the juvenile. . . . The Juvenile Court is vested with *original and exclusive jurisdiction* of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. . . . The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment.

Kent v. United States, 383 U.S. 541, 556–57 (1966) (emphasis added) (internal quotations omitted). Oregon's juvenile-justice system shares many of these attributes. The juvenile court has exclusive jurisdiction over a juvenile until the juvenile is waived by the judge. OR. REV. STAT. § 419C.005(1) (2013). Juveniles are to be detained under Oregon Youth Authority's custody and not where adults are detained. *Id.* § 419C.130. All juvenile dispositions terminate at age twenty-five. *Id.* § 419C.005(4)(d). All juvenile proceedings are confidential and not available to employers or other parties except for narrow circumstances. *Id.* § 419A.255.

191. See *id.* § 137.707(5)(b)(A); *id.* § 419C.349; *id.* § 419C.352; *id.* § 419C.364.

192. For example, the trial judge in *Apprendi* found the defendant's actions were motivated by racial bias in order to apply the hate-crime sentence enhancement. *Apprendi v. New Jersey*, 530 U.S. 466, 469–70 (2000). Additionally, in *Alleyne*, the judge determined that the defendant had brandished a firearm in order to raise the mandatory minimum. *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013).

judge may sentence a juvenile to a range of incarceration that would have been permitted had the juvenile remained in juvenile court, because the parameters of punishment are still fundamentally altered by waiver.¹⁹³ Additionally, an adult conviction in Oregon—even if it provides a similar period of incarceration—carries consequences that a juvenile conviction does not, and, therefore, it constitutes a departure from the “standard range” of juvenile sanctions.¹⁹⁴

The Oregon Court of Appeals has recognized that these collateral punishments still invoke *Apprendi*,¹⁹⁵ as did the Supreme Court in *Southern Union Co.*¹⁹⁶ In *State v. Hopson*, the Oregon Court of Appeals held that the trial judge’s determination that the defendant was a “sexually violent dangerous offender” was impermissible because that designation would prohibit him from residing in places where children are the primary occupants and expose the defendant to lifelong postprison supervision (rather than the presumptive three-year term) and severer punishment if he violated the terms of postprison supervision.¹⁹⁷ The court held that “application of *Blakely* and *Apprendi* [was] straightforward” due to these added punishments, and the “sexually violent dangerous offender” sentence could not be imposed without a jury finding.¹⁹⁸

Considering the *Hopson* decision, the Oregon courts are only a logical step away from recognizing *Apprendi*’s application in juvenile-waiver proceedings, something Massachusetts’s highest court has already done. The Massachusetts Supreme Court held that “once the Legislature enacted a law providing that the maximum punishment for delinquent juveniles is commitment to the Department of Youth Services . . . for a defined time period,” any facts that would increase the penalty, including those that require transfer to the adult system, “must be proved to a jury beyond a reasonable doubt.”¹⁹⁹

193. See *Alleyne*, 133 S. Ct. at 2157–60. The Court held that a judge “increasing either end of the sentencing range produces a new penalty and constitutes an ingredient of the offense,” and thus, even though the judge does not “alter the maximum sentence to which [the defendant] is exposed,” the sentence violates *Apprendi*. *Id.*

194. See *Blakely v. Washington*, 542 U.S. 296, 299, 303–04 (2004) (holding the defendant’s sentence that was within the statutory maximum, but in excess of the “standard range” by more than three years, violated *Apprendi*).

195. *State v. Hopson*, 186 P.3d 317, 318–19 (Or. Ct. App. 2008), *modified on other grounds*, 206 P.3d 1206 (Or. Ct. App. 2009).

196. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2349 (2012).

197. *Hopson*, 186 P.3d at 319.

198. *Id.* at 321.

199. *Commonwealth v. Quincy Q.*, 753 N.E.2d 781, 787–89 (Mass. 2001), *overruled on*

Regarding the Sixth Amendment jury-trial right, Justice Scalia stated:

“[T]he criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*. . . .

. . . .

[rather than] by a single employee of the State.”²⁰⁰

Similarly, the Oregon Supreme Court stated that the Framers intended the jury “to serve as the people’s check on judicial power at the trial court level.”²⁰¹ If a safeguard against a judge’s bureaucratic rigidity is necessary for society’s most hardcore offenders, it is even more so for juveniles. Because the juvenile’s decision-making skills, ability to control impulses, and foresight are less developed than the adult offender’s, the juvenile is less culpable.²⁰²

In conclusion, a decision to waive a juvenile to adult court in Oregon should fall “within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge

other grounds sub nom. Commonwealth v. King, 834 N.E.2d 1175 (Mass. 2005).

200. Apprendi v. New Jersey, 530 U.S. 466, 498 (Scalia, J., concurring).

201. State v. Harris, 118 P.3d 236, 243 (Or. 2005).

202. Adolescence is a transitional stage where rapid changes to an individual’s physical, social, and emotional capabilities take place. Anthony R. Holtzman, Comment, *Juvenile Justice? The Increased Propensity for Juvenile Transfer to the Criminal Court System in Pennsylvania and the Need for a Revised Approach to Juvenile Offenders*, 109 PENN ST. L. REV. 657, 679–80 (2004). It is also a period where individuals are greatly adaptable, and experiences with peers are likely to influence future behavior and development. *Id.* Finally, it is a period where developmental characteristics become firmly established and difficult to alter. *Id.* Juveniles’ limited development, susceptibility to peer pressure, and poor decision-making skills also mean they are less culpable for their actions. See Lisa M. Flesch, Note, *Juvenile Crime and Why Waiver is Not the Answer*, 42 FAM. CT. REV. 583, 590–91 (2004); Gerard Glynn & Ilona Vila, *What Should States Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 317–19 (2012). Due to the biological immaturity of their developing brain systems, juveniles lack mature capacity for self-regulation in emotionally charged contexts. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 2 (2012). Moreover, juveniles have heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives. *Id.* Finally, juveniles have less ability than adults to make sound judgments and decisions that require future orientation. *Id.*

determining where the preponderance of the evidence lies.”²⁰³ Yet one last issue exists. As the Supreme Court has broadened the reach of the *Apprendi* rule, it has done so with policy considerations in mind.²⁰⁴ A hypothetical examination of the mechanics of a jury hearing and a beyond-a-reasonable-doubt standard for juvenile-waiver proceedings reveals positive policy consequences.

C. Requiring jury determinations in waiver proceedings would assuage some of the negative public-health consequences of juvenile transfer

With the standard of proof elevated from the preponderance-of-the-evidence standard to a beyond-a-reasonable-doubt standard, evaluation of the nature of the juvenile’s alleged offense and the juvenile’s amenability to rehabilitation, along with the other factors, would require a more searching inquiry. At the end of a waiver hearing, it would be more difficult for a fact-finder to conclude beyond a reasonable doubt that retaining jurisdiction is not justified.²⁰⁵ Therefore, the net number of juveniles waived would be reduced, which in turn would alleviate some of the negative public-health effects of juvenile transfer.

Moreover, as judicial-waiver decisions are often arbitrary,²⁰⁶ a jury would more effectively honor the purpose of the waiver statutes by weeding out hardcore and nonamenable juveniles. Idiosyncratic differences in judicial philosophies, geographic divisions, and a juvenile’s race can all affect a judge’s waiver decisions.²⁰⁷ In contrast, a panel of individuals making findings, rather than one judge, likely would reduce the random nature of waiver.²⁰⁸ Finally,

203. *Cunningham v. California*, 549 U.S. 270, 273 (2007).

204. *See, e.g., S. Union Co. v. United States*, 132 S. Ct. 2344, 2356–57 (2012).

205. *See In re Winship*, 397 U.S. 358, 363–64 (1970) (internal quotations omitted) (“[T]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual

2015]

APPLYING APPRENDI

91

the jury's involvement in waiver decisions would also give the community a voice in the juvenile-justice system and a role in mitigating the public-health effects created by juvenile crime and the judicial response.²⁰⁹

Since the Supreme Court has considered policy ramifications in its broadening of *Apprendi*,²¹⁰ the public-health consequences of applying *Apprendi* to juvenile-waiver hearings in Oregon provide more support for its application.

IV. UNDERSTANDING JUDICIAL RELUCTANCE TO APPLYING *APPRENDI* TO JUVENILE WAIVER PROCEEDINGS

The Oregon appellate courts have never squarely decided the issue of *Apprendi*'s application in waiver hearings. The Oregon Supreme Court has held that juries are not required for juvenile-delinquency determinations.²¹¹ The court reasoned that the jury-trial right does not apply because rehabilitation-based juvenile dispositions are fundamentally different than criminal prosecutions.²¹² The court closely confined its holding to delinquency determinations. And the court's reasoning falls away when a juvenile is facing transfer to adult court to face punitive punishment rather than a determination of responsibility by the juvenile court.

juvenile transfer shows judicial fact-finding is constitutional.²¹³ These arguments and others are addressed in the following section.

A. Juvenile-waiver hearings only determine initial jurisdiction

The majority of state courts facing the issue have held that juvenile waiver is a pretrial, jurisdictional decision that does not invoke *Apprendi*.²¹⁴ However, this position is unsupported; as the Supreme Court has never indicated that *Apprendi* is limited to certain proceedings or certain prosecutorial stages.²¹⁵ Rather, in many of its recent cases, the Court has applied *Apprendi* broadly.²¹⁶

An analogy is helpful to show why the stage or timing of a proceeding does not affect the *Apprendi* calculus. Say for example a state established two separate courts to handle petty-theft cases. In

213. See *State v. Andrews*, 329 S.W.3d 369, 374 (Mo. 2010). The court in *Andrews* denied the application of *Apprendi* to juvenile transfer hearings, *id.*, and reasoned that “Justice Ginsberg’s majority opinion in *Ice* signals a change in the Court’s Sixth Amendment right-to-jury-trial analysis in that it emphasizes and embraces for the first time these historical and sovereignty-based arguments expressed by the previous dissenting opinions in the *Apprendi* line of cases,” *id.* at 379 n.3. *State v. Rudy B.*, 216 P.3d 810, 818 (N.M. Ct. App. 2009), *rev’d*, 243 P.3d 726 (N.M. 2010) (documenting state court reluctance); see also *Rudy B.*, 243 P.3d at 739 (“Clearly, we can conclude that the amenability determination is not an ‘encroachment . . . by the judge upon facts historically found by the jury’” (quoting *Oregon v. Ice*, 555 U.S. 160, 169 (2009))).

214. See, e.g., *United States v. Miguel*, 338 F.3d 995, 1004 (9th Cir. 2003) (“*Apprendi* does not require that a jury find the facts that allow the transfer to district court. The transfer proceeding establishes the district court’s jurisdiction over a defendant.”); *United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000) (internal quotations omitted) (holding that the transfer of a juvenile to an adult court “merely establishes a basis for district court jurisdiction”); *State v. Kalmakoff*, 122 P.3d 224, 227 n.29 (Alaska Ct. App. 2005) (finding that the weight of authority indicates that transfer proceedings are mere determinations of the court’s jurisdiction and therefore *Apprendi* protections do not apply); *State v. Rodriguez*, 71 P.3d 919, 928 (Ariz. Ct. App. 2003) (citation omitted) (holding that the state juvenile-transfer statute in question is not a sentence-enhancement scheme because “it does not subject [a] juvenile to enhanced punishment, it subjects [a] juvenile to the adult criminal justice system”); *People v. Beltran*, 765 N.E.2d 1071, 1076 (Ill. App. Ct. 2002) (holding that transfer establishes jurisdiction and therefore is “dispositional, not adjudicatory”); *Caldwell v. Commonwealth*, 133 S.W.3d 445, 452–53 (Ky. 2004) (adopting the argument that juvenile transfer is merely jurisdictional); *State v. Lopez*, 196 S.W.3d 872, 875–76 (Tex. App. 2006) (holding that a decision allowing “prosecution of a juvenile as an adult” only “involves the determination of which system will be appropriate for a juvenile offender”).

215. Carroll, *supra* note 68, at 202.

216. See *Blakely v. Washington*, 542 U.S. 296, 346 (2004) (Breyer, J., dissenting) (recognizing the majority’s broad application of *Apprendi*

2015]

APPLYING APPRENDI

95

apply to juvenile waiver hearings. In prescribing due-process protections for the juvenile facing transfer, the Court in *Kent* identified the fundamental difference between juvenile and adult court, focusing especially on the rehabilitative nature of the juvenile-

jury hearings for judicial waiver, rather than all juvenile dispositions, the widespread administrative burden the *McKeiver*

retributive punishment, or at least as the invocation of a higher maximum or minimum sentence. And the latter historical formulation squarely invokes *Apprendi*.²⁴² Moreover, after *Southern Union Co.*, *Alleyne*, and *Descamps* eroded the importance of *Oregon v. Ice*'s twin considerations, state courts can no longer rely upon historical practice to avoid application of *Apprendi*.²⁴³

As shown above, the arguments supporting state courts' rejection of *Apprendi*'s application to juvenile waiver are fully refuted by the *Apprendi* line. From *Blakely* to *Alleyne* and beyond, the Supreme Court has shown the principles of *Apprendi* apply broadly, and thus state courts should no longer be able to evade application of those principles.

CONCLUSION

The negative public-health consequences of juvenile transfer are personified by the continued prevalence of juvenile violence and recidivism. In the name of remedying those negative public-health consequences, constitutional challenges should be used to reform Oregon's juvenile transfer provisions. In that vein, a detailed argument that *Apprendi* applies to juvenile waiver in Oregon has been formulated here, and counterarguments have been addressed. By forcing juvenile waiver to occur through a jury hearing, and under a higher standard of proof, the net number of juveniles transferred in

