

Chapter 8: Transfer to Tribal Criminal Court [Or Other Jurisdictions]

[8.1] Overview

Under some limited circumstance your tribe may feel that certain cases involving youth should be handled by the tribal criminal court, where the youth is treated as an adult. Common candidates for transfer include older adolescents who have not been responsive to past juvenile court supervision and who commit serious crimes. A tribe may want to balance the concerns for public safety with the recognition of immaturity of adolescents as a mitigating factor in the crime. Generally, a youth transferred and convicted in a criminal court will have a criminal record and may be subject to longer sentences and incarceration in a prison.

At times the federal government or state government may seek to prosecute a youth as an adult in federal or state court. The sentences in tribal juvenile court may not be longer than in tribal criminal court, but sentences in federal or state court can be significantly longer. Often tribal juvenile courts consider whether the juvenile court has the resources to rehabilitate the youth. Once the youth is transferred to tribal criminal court, the tribal juvenile court will no longer have jurisdiction over that case.

Judicial waiver, statutory exclusion, and direct file are three mechanisms used to transfer juvenile offenders to adult criminal court. Generally, juvenile court has original jurisdiction and reviews a particular case to determine whether certain factors established by the code or by precedent have been met and whether the crime and the characteristics of the youth justify adult treatment. If it finds sufficient cause, it will waive juvenile court jurisdiction.

However, some state and tribal laws permit a prosecutor to directly file a case in adult criminal court and then the judge in that court determines at a hearing if the case is an appropriate case for the criminal court. There are also some statutes that legislatively mandate a transfer to adult criminal court for certain crimes. States have increasingly allowed transfer of juveniles to adult criminal courts at lower ages and for more offenses, but tribes should examine their values, customs, and concerns to make these important decisions. Some states have passed “once waived, always waived” statutes, which require that once juvenile court jurisdiction has been waived, it is waived in the future for other offenses committed by the juvenile. This is not recommended, but merely acknowledged.

Some tribes do not have sufficient resources to work with youth offenders with serious problems and may consider transferring a juvenile case to state or federal juvenile jurisdiction if the state/federal system has more resources. The next section describes transfers to state or federal juvenile courts to allow for expanded resources and cooperation with federal or state programs through memorandums of understanding (MOU).

It may be helpful to review [Chapter 4: Criminal Offenses](#).

[8.2] Model Code Examples

[\(1989\) BIA Tribal Juvenile Justice Code](#) [1-3 TRANSFER TO TRIBAL COURT](#)

1-3 A. Transfer Petition

An officer of the court may file a petition requesting the juvenile court to transfer the child to the jurisdiction of the adult tribal court if the child is sixteen (16) years of age or older and is alleged to have committed an act which would have been considered a serious crime if committed by an adult.

1-3 B. Transfer Hearing

The juvenile court shall conduct a hearing to determine whether jurisdiction of the child should be transferred to tribal court. The transfer hearing shall be held within ten (10) days of receipt of the petition by the court. Written notice of the time, place and purpose of the hearing is to be given to the child and the child's parent, guardian, or custodian at least three (3) days before the hearing. At the commencement of the hearing, the court shall notify the child and the child's parent, guardian or custodian of their rights under chapter 1-7 of this code.

1-3 C. Deciding Factors in Transfer Hearing

The following factors shall be considered when determining whether to transfer jurisdiction of the child to tribal court:

1. the nature and seriousness of the offense with which the child is charged;
2. the nature and condition of the child, as evidenced by his age, mental and physical condition; and
3. the past record of offenses.

1-3 D. Standard of Proof in Transfer Hearing

The juvenile court may transfer jurisdiction of the child to tribal court only if the court finds clear and convincing evidence that both of the following circumstances exist:

1. there are no reasonable prospects for rehabilitating the child through resources available to the juvenile court; and
2. the offense(s) allegedly committed by the child evidence a pattern of conduct which constitutes a substantial danger to the public.

1-3 E. Pre-Hearing Report in Transfer Proceedings

At least three (3) days prior to the transfer hearing, the petitioner shall prepare a pre-hearing report for the juvenile court and make copies of that report available to the child and the child's advocate, parent, guardian or custodian. The pre-hearing report shall address the issues described in sections 1-3C and 1-3D above.

1-3 F. Written Transfer Order

A child may be transferred to tribal court only if the juvenile court issues a written order after the conclusion of the transfer hearing which contains specific findings and reasons for the transfer in accordance with sections 1-3C and 1-3D above. This written order terminates the jurisdiction of the juvenile court over the child with respect to the juvenile offense(s) alleged in the petition. No child shall be prosecuted in the tribal court for a criminal offense unless the case has been transferred to tribal court as provided in this chapter.

[8.3] Tribal Code Examples

Sault Ste. Marie Tribal Code

Chapter 36 Juvenile Code

SUBCHAPTER II: JURISDICTION OF THE JUVENILE DIVISION

(36.201 Omitted)

36.202 Transfer Petition.

The prosecutor may file a petition requesting the Juvenile Division to transfer the child to the jurisdiction of the adult Tribal Court if the tribal child is fifteen (15) years of age or older and is alleged to have committed an act which would have been considered a serious crime if committed by an adult.

36.203 Transfer Hearing.

The Juvenile Division shall conduct a hearing to determine whether jurisdiction of the child should be transferred to Tribal Court. The transfer hearing shall be held within ten (10) days

of receipt of the petition by the Court. Written notice of the time, place, and purpose of the hearing is given to the child and the child's parent, guardian, or custodian at least three (3) days before the hearing. At the commencement of the hearing, the Court shall notify the child and the child's parent, guardian, or custodian of their rights under '36.402 of this Chapter.

36.204 Deciding Factors in Transfer Hearing.

The following factors shall be considered when determining whether to transfer jurisdiction of the child to Tribal Court:

- 1) The nature and seriousness of the offense with which the child is charged.
- 2) The nature and condition of the child, as evidenced by his age, mental and physical condition.
- 3) The past record of offenses.

36.205 Standard of Proof in Transfer Hearing.

The Juvenile Division may transfer jurisdiction of the child to Tribal Court only if the Court finds clear and convincing evidence that both of the following circumstances exist:

- 1) There are no reasonable prospects for rehabilitating the child through resources available to the Juvenile Division.
- 2) The offense(s) allegedly committed by the child evidence a pattern of conduct which constitutes a substantial danger to the public.

36.206 Prehearing Report in Transfer Proceedings.

At least three (3) days prior to the transfer hearing, the petitioner shall prepare a prehearing report for the Juvenile Division and make copies of that report available to the child and the child's advocate, parent, guardian, or custodian. The prehearing report shall address the issues described in '36.204 and '36.205 above.

36.207 Written Transfer Order.

A child may be transferred to Tribal Court only if the Juvenile Division issues a written order after the conclusion of the transfer hearing which contains specific findings and reasons for the transfer in accordance with '36.204 and '36.205 above. This written order terminates the jurisdiction of the Juvenile Division over the child with respect to the juvenile offense(s)

alleged in the petition. No child shall be prosecuted in the Tribal Court for a criminal offense unless the case has been transferred to Tribal Court as provided in this Chapter.

36.208 Noncriminal Proceedings.

No adjudication upon the status of any child in the jurisdiction of the Juvenile Division shall be deemed criminal or be deemed a conviction of a crime unless the Juvenile Division transfers jurisdiction to the Tribal Court according to '36.207 of this Chapter.

36.209 Rules of Procedure.

The procedures in the Juvenile Division shall be governed by the rules of procedure for the Tribal Court which are not in conflict with this Chapter.

Laws of the Confederated Salish and Kootenai Tribes, Codified

Title III, Chapter 3 YOUTH

Part 2: Transfer to Adult Tribal Court or State District Youth Court

3-3-201. Transfer of Jurisdiction to Adult Tribal Court.

The Youth presenter shall have discretionary authority to file the cause in Adult Tribal Court, based on input provided by the Juvenile Probation Office and consistent with the factors set forth in subsection 2 below.

- 1) A juvenile offender may be transferred to Adult Tribal Court only if:
 - a) the offender is sixteen (16) years of age or older,
 - b) is alleged to have committed a serious crime, and
 - c) is an enrolled member of the CS&KT or other federally recognized tribe.
- 2) The Youth presenter shall consider the following factors to determine transfer.
 - a) the nature and seriousness of the alleged offense,
 - b) the youth's nature and condition as evidenced by his/her age, mental and/or physical condition,
 - c) the youth's past record of offenses, and
 - d) the youth's contact with the Tribe.

- 3) **Transfer report.** The juvenile officer shall prepare a transfer report for the Youth Court Presenter to consider that addresses the issues described in subsections 1 and 2 above. This report shall be attached to the motion of transfer.

Warm Springs Tribal Code

Chapter 360 Juveniles

I. GENERAL

360.130 Remand to Tribal Court.

1. Upon motion a juvenile may be remanded to the Tribal Court for disposition as an adult if, following a hearing, the Juvenile Court determines by a preponderance of the evidence that:
 - a. The juvenile at the time of remand is sixteen (16) years of age or older; and
 - b. The juvenile committed or is alleged to have committed an act which would constitute a criminal violation if committed by an adult; and
 - c. The juvenile is not amenable to rehabilitation in facilities or programs available through the Juvenile Court; and
 - d. Retaining jurisdiction will not serve the best interests of the juvenile.
2. The following factors shall be considered by the Juvenile Court when determining whether to remand a juvenile to Tribal Court under this section:
 - a. The juvenile at the time of remand is sixteen (16) years of age or older; and
 - b. The juvenile committed or is alleged to have committed an act which would constitute a criminal violation if committed by an adult; and
 - c. The juvenile is not amenable to rehabilitation in facilities or programs available through the Juvenile Court; and
 - d. Retaining jurisdiction will not serve the best interests of the juvenile;
 - e. The nature and seriousness of the offense with which the juvenile is charged;
 - f. The nature and condition of the juvenile, as evidenced by his age, mental and physical condition; and
 - g. The past record of offenses and Juvenile Court efforts at rehabilitation.

Zuni Tribal Code

Title IX. Zuni Children's Code

CHAPTER 3. CHILDREN'S COURT

Section 9-3-4. Transfer to Tribal Court of Alleged Juvenile Offender

- A. **Petition**—The prosecutor may file a petition requesting the court to transfer an alleged juvenile offender to the jurisdiction of the Tribal Court if the minor is at least 16 years of age, and is alleged to have committed an act, which if committed by an adult, would be a Class A offense under the Criminal Code or a felony under the laws of another jurisdiction.
- B. **Hearing**—The Court shall conduct a hearing within 10 days of filing to determine whether the matter should be transferred.
- C. **Report**—The Juvenile Probation Officer shall prepare and present a written report to the court at least three days before the transfer hearing containing information on the alleged offense; and the minor's condition as evidenced by his age, mental and physical condition; past record of offenses; and rehabilitation efforts. Within the same time limit, the prosecutor and other parties may also file written recommendations.
- D. **Deciding Factors**—The following factors shall be considered by the Court in determining whether to transfer jurisdiction:
1. The nature and seriousness of the offense as set forth in the petition;
 2. The minor's emotional maturity, mental condition as indicated in the reports provided to the Court; and
 3. The past record of offenses and rehabilitation efforts.
- E. **Standard of Proof and Findings**—The Court may transfer the matter to the Tribal Court, if it finds by a preponderance of the evidence no reasonable prospect for rehabilitating the minor through resources available to the Court, and either of the following exists:
1. The past offenses committed by the minor indicate a pattern of conduct constituting a substantial danger to the public; or
 2. The offense with which the minor is charged indicates conduct that constitutes substantial danger to the public.
- F. The Court's order is a final order for purposes of appeal.

G. The Children's Court Judge may not preside over a case that has been transferred to the Tribal Court.

[8.4] Tribal Code Commentary

We note that a good number of tribes have used the 1989 [BIA Tribal Juvenile Justice Code](#) transfer provisions as a starting point. The 1989 BIA Tribal Juvenile Justice Code transfer language includes clear standards and fair process for tribal judges to use in determining whether or not to transfer a case out of the tribal juvenile court and into a tribal adult criminal court (or, potentially with modifications, to a state or federal court). However, there is growing concern among juvenile justice advocates and legal scholars nationally that such transfer provisions are unwarranted by the data on youth offending, harmful to youth, and expensive for juvenile justice systems. Consequently, the drafters of the recently completed University of Washington's Center of Indigenous Research and Justice [Model Tribal Juvenile Code](#) omitted completely the statutory provisions authorizing transfers from tribal juvenile court to adult criminal courts. However, because each tribe operates in its own unique context given its needs, resources, and priorities, we have provided the comparative statutory provisions and analysis here.

The Sault Ste. Marie Tribal Code requires that a transfer petition be filed in the juvenile division by the prosecutor and that a hearing be held within ten days of receipt of the petition. Notice to the child and the child's parent/guardian is required at least three days before the hearing. This is an example of the judicial waiver method of transfer. The only difference between Sault Ste. Marie and the 1989 BIA Tribal Juvenile Justice Code on this point is that the 1989 BIA Tribal Juvenile Justice Code allows any officer of the court to file a petition for transfer.

The factors considered at the transfer hearing are the nature and seriousness of the offense and the child's condition and past record. A child must be at least fifteen years of age to be transferred under Sault Ste. Marie's statute, while the 1989 BIA Tribal Juvenile Justice Code has a minimum age of sixteen. The juvenile court may transfer to adult court only if the court finds clear and convincing evidence that there are no reasonable prospects for rehabilitating the child through resources available to the juvenile court and the offense evidenced a pattern of conduct that constitutes a substantial danger to the public. Transfer to an adult court occurs by written order of the juvenile division with the findings and the reasons for transfer. The jurisdiction of the juvenile division is terminated upon transfer. This statute (following the 1989 BIA Tribal Juvenile Justice Code) attempts to keep the child in juvenile court unless the juvenile court simply cannot rehabilitate the child and the child is dangerous. However, many tribal courts have a minimum age requirement of sixteen.

The confederated Salish and Kootenai Nation gives the Youth Presenter (similar to a prosecutor) the discretionary authority to file a case in (adult) tribal court, based on input from the probation office. This is an example of the direct file method of transfer. The juvenile officer is required to prepare a written report for the Youth Presenter to consider. The factors the Youth Presenter is

required to consider include that the youth must be sixteen years old or older; he or she must have committed a serious crime; and he or she must be a member of a federally recognized tribe. The code defines a “serious crime” as a felony that seriously damages persons or property or involves dangerous drugs. The youth presenter is required to consider the nature and seriousness of the offense; the child’s nature and condition based on age, mental health, and physical condition; and past offenses and contacts with the tribe. The youth has a right to a hearing and a right to understand the consequences of a transfer to tribal criminal court.

The Warm Springs Code requires a motion in juvenile court. The child must be at least sixteen years old, the offense must be a criminal violation, and the child must *not* be amenable to rehabilitation in facilities or programs available through the juvenile court. The court needs to find that retention of jurisdiction by the juvenile court would not be in the best interest of the juvenile. Warm Springs looks at the nature and seriousness of the offense, but does not require a serious crime; it merely needs to be an adult crime, and not a status offense. The court also looks at the nature and condition of the youth, and the past record and efforts at rehabilitation in making its determination. Because it also must look at the best interests of the youth, there must be some balancing against the negative impact of a criminal conviction for the youth and the inability of the juvenile system to provide rehabilitation programs or facilities for the youth.

In the Zuni Juvenile Court, a petition is filed by the prosecutor and a hearing held within ten days. The youth must be at least sixteen years of age and the crime that the youth is alleged to have committed must be a Class A offense or a felony in another jurisdiction. A report is prepared by the juvenile probation officer, which includes information relative to the condition of the youth, the past record, and past rehabilitation efforts. A finding is required on a preponderance of evidence that there is no reasonable prospect for rehabilitation of the youth with the juvenile courts resources and there either exist a pattern of past conduct that constitutes a substantial danger to the public or the offense alleged constitutes a danger to the public. A preponderance of evidence is a low threshold, requiring only a demonstration that it is more likely than not.

Juvenile justice system reformers, in other contexts, argue that status offenders should not be treated as juvenile offenders merely to access services. A similar argument may be made with respect to Native youth who have their cases moved into the state or federal system where the juvenile dispositions and placements are more severe (e.g., placement in a secure detention facility) and/or where the potential to be transferred to adult criminal court are substantially greater.

[8.5] Exercises

The following exercises are meant to guide you in developing the transfer to adult criminal court sections of the tribal juvenile code.

- Find and examine your juvenile code to see if it has provisions for the transfer of youth to adult criminal court—what are the criteria for transfer?
- Make a list of reasons for transferring youth (or letting the following assume jurisdiction) to each of the following:
 - Tribal adult criminal court,
 - State juvenile court,
 - Federal court, and
 - Other tribal courts.
- Make a list of reasons to prohibit transfer to any of the above (or for assuming your juvenile court's jurisdiction to handle the case).

Read and Discuss*

Does your tribe have concurrent jurisdiction with the federal government?

How does this impact decisions to exercise your tribe's juvenile court jurisdiction?

In order to better understand the processing of tribal youth cases and the factors involved in cases handled at the federal level, a study team interviewed more than thirty federal and tribal officials familiar with these issues, conducted site visits, and reviewed relevant documents. Key factors and issues identified included the following:

- **Many different tribal, federal, state, and local law enforcement agencies may be involved in investigating Indian Country cases.** The two federal agencies most often involved in investigations in Indian Country are the Department of Justice's Federal Bureau of Investigation and the Department of the Interior's Bureau of Indian Affairs. Tribes also may operate law enforcement agencies with their own criminal investigators. Tribal police are typically the first to respond to an incident and will contact federal law enforcement if the case seems serious enough to constitute a federal crime.
- **Cases that may warrant federal prosecution are referred to the appropriate U.S. Attorney's Office, which then elects to accept or decline the case based on several factors.** If the federal government decides to proceed with a prosecution, it may prosecute the defendant as a juvenile delinquent or seek to transfer the juvenile to adult status. The decision to prosecute a juvenile case at the federal level is based on a number of considerations. These include the seriousness of the crime, the youth's age and criminal

history, strength of the evidence, and the tribe's capacity to prosecute and appropriately sentence the offender. While the final decision to prosecute a case federally rests with the U.S. Attorney, tribal preference is also often taken into account. In general, tribal youth cases processed in the federal system tend to be egregious crimes committed by older offenders (those close to the age of majority) with more extensive criminal histories. Importantly, this reflects the types of cases referred to and accepted by federal prosecutors, rather than the underlying pattern of offending by tribal youth. Less serious offenses tend to be handled at the tribal level. Similarly, a number of factors influence whether a juvenile is processed as a juvenile delinquent or transferred to adult status. Federal law specifies the factors that must be considered in determining whether to transfer a case, including the type of offense and the offender's age, criminal history, and maturity. Relevant factors differ by type of transfer, although cases meeting certain criteria must be transferred. District practice also influences whether a juvenile is transferred to adult status; the prevalence of transfer varies across districts, occurring more frequently in some districts than in others.

- **Tribal youth cases may be prosecuted in both tribal and federal court.** The tribal case may be initiated first and dropped once the federal case begins, or both jurisdictions can pursue the cases to completion.
- **Federal cases against tribal youth face many processing challenges.** These challenges, some of which apply to Indian Country cases generally, include the physical and cultural distances between many reservations and federal actors, as well as the lack of federal detention facilities for juveniles.
- **The federal justice system is not designed for juveniles, yet it may sometimes be the best option available.** A consistent theme that emerged throughout the interviews was that, in both the federal and tribal systems, there is a lack of facilities, programs, and services to address the needs of tribal youth. Facilities for housing juveniles sentenced to detention in the federal system are limited and are often located far from the juvenile's home and family. Community-based treatment programs available to these youth are also very limited and are rarely located on or near a juvenile's reservation. Furthermore, these programs may not take into account the beliefs and traditions of the youth's culture. Although many of the officials (both tribal and federal) we interviewed indicated that the federal justice system is not designed for juveniles, they explained that it is sometimes the best option available. Despite its limitations, the federal system can sometimes access or fund services for juveniles that are unavailable to tribal communities. The federal system is also better able to address serious offenders due to its ability to sentence defendants for longer periods of time, given that the sentencing options available to tribal courts are limited by both federal law and, frequently, a lack of tribal detention facilities. Thus the decision of whether to proceed against a juvenile in the federal or tribal system is often based in part upon the nature and resources of the particular tribal system concerned. The availability of local (tribal) resources and the ability of

the federal system to access a wide range of treatment, services, programming, and detention settings were consistently cited by federal and tribal stakeholders as important considerations regarding whether and how to adjudicate an American Indian youth at the federal level.

* Taken from William Adams and Julie Samuels, “Tribal Youth in the Federal System,” Final Report (Revised), Urban Policy Institute, May 2011. Go to <http://www.urban.org/publications/412369.html>.

Read and Discuss*

Should we be transferring youth to the adult criminal system?

Elizabeth Scott and Laurence Steinberg in the book *Rethinking Juvenile Justice* believe that a model juvenile justice system should take these three key lessons based on scientific literature on adolescence.

1. Adolescents’ choices to get involved in criminal activity are shaped by developmental forces that contribute to immature judgment, and thus are less culpable than are those of adults.
2. Because of these developmental influences, normal adolescents, particularly those growing up in high-crime neighborhoods, may get involved in criminal activity, but most are likely to mature out of these inclinations.
3. Because social context plays a key role in the accomplishment of essential developmental tasks during adolescence, the correctional settings and interventions that constitute society’s response to juvenile crime will likely affect when delinquent youths make a successful transition to adulthood.

* Taken from Elizabeth Scott and Laurence Steinberg, *Rethinking Juvenile Justice*, Cambridge, Massachusetts: Harvard University Press (2008).