KENT REVISITED: ALIGNING JUDICIAL WAIVER CRITERIA WITH MORE THAN FIFTY YEARS OF SOCIAL SCIENCE RESEARCH

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INTRODUCTION

Although some form of transfer—allowing certain youths' cases to be tried in criminal court rather than in juvenile court—has existed since the early years of separated juvenile systems,[1] the Supreme Court did not establish mandatory procedural protections for youth facing a transfer decision until 1966. In *Kent v. United States*, the Court held that judicial waiver of juvenile court jurisdiction decisions are "critically important," and, therefore, youth facing such transfer determinations must receive an adversarial hearing, effective assistance of counsel, and a statement of reasons for the judge's final decision.[2] The Court declined to prescribe substantive considerations for juvenile court judges to consider when making waiver decisions; however, it did include, as an appendix to the decision, a list of eight factors in use by the Juvenile Court of the District of Columbia at the time of Morris Kent's transfer decision.[3] In the years following the *Kent* decision, many states adopted some or all of these criteria, often referred to as the "*Kent* factors," as part of their judicial waiver statutes.[4] However, given *Kent*'s recent 50-year anniversary, these criteria should be re-evaluated in light of more than 50 years' worth of social science research—often cited and endorsed by the Supreme Court[5]—

1. David S. Tanenhaus, *The Evolution of Transfer out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13, 15, 19–21 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

2. Kent v. United States, 383 U.S. 541, 560–62 (1966).

3. *Id.* at 546 n.4, 565–67. However, the Court also noted that the memo implementing these factors in the District of Columbia had been rescinded prior to its decision in *Kent*. *Id.* at 546 n.4.

4. PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3–4 (1998), https://www.ncjrs.gov/PDFFILES/172836.PDF.

5. *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) (relying on studies indicating that a child's lack of maturity, vulnerability, and transient character distinguishes him or her from an adult for purposes of sentencing); J.D.B. v. North Carolina, 564 U.S. 261, 269, 273 n.5 (2011) (noting several instances where the Supreme Court cited to social science research in its opinions, particularly in the context of juveniles); Graham v. Florida, 560 U.S. 48, 68 (2010) (citing psychology and brain science to discuss the relationships among brain development, adolescent behavior, and juvenile offenders); Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (citing social science research suggesting that youth lack maturity and have an underdeveloped sense of responsibility, thus limiting their culpability).

examining adolescents, their capabilities as defendants in the juvenile and criminal justice systems, and their relevant differences from adults.[6]

I. HISTORY OF JUVENILE COURTS AND THEIR UNDERLYING ASSUMPTIONS

Prior to the mid-1800s in the United States, all offenders above a certain age—typically seven years old[7]—were thought to have essentially the same capacities, and were therefore eligible to receive the same punishments, including public whippings, incarceration with other adult criminals, and, in some cases, even execution.[8] As the nation industrialized and urbanized, many Progressive Era reformers demanded increased protections for youth, arguing, among other things, that youth should be shielded from adult criminals' corrupting influence during incarceration.[9] These "Child-Savers"[10] relied upon the *parens patriae* doctrine—the idea that the government had not only the right, but the duty, to intervene in the lives of all children who, because of their parents' inability or unwillingness

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6. *See, e.g.*, Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992) (presenting a developmental theory of adolescent reckless behavior in which sensation seeking and adolescent egocentrism are prominent factors); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756 (2000) (concluding that "antisocial decision-making was more strongly influenced by psychosocial maturity than by age," finding it important to also consider perceived responsibility, perspective, and temperance when discussing one's maturity of judgment); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 APPLIED DEVELOPMENTAL PSYCHOL. 257, 271 (2001) ("[T]here are important differences in decision-making competence between early adolescents and adults . . . ."); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 221–22 (1995) (identifying limitations to previous conceptualizations of adolescent decision-making and emphasizing the need for more research in this area); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249, 249 (1996) [hereinafter *Maturity of Judgment*] (discussing the treatment of adolescents under the law).

7. Offenders ages seven and under were typically presumed to be incapable of criminal responsibility and, therefore, were exempted from prosecution and penalty under the common law defense of infancy. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509–10 (1984).

8. ARNOLD BINDER ET AL., JUVENILE DELINQUENCY: HISTORICAL, CULTURAL AND LEGAL PERSPECTIVES 199, 202 (3d ed. 2001).

9. Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CALIF. L. REV. 2477, 2481 (2000); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189 (1970).

10. *See* Anthony Platt, *The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform*, 381 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 22, 27 (1969) (describing the "child-savers" as those with "pessimistic views about the intractability of human nature and the innate moral defects of the working class").

to provide custodial functions, would likely become a community crime problem.[11]

In 1899, Chicago-area social reformers, lawyers, and lawmakers worked together to establish the first juvenile court, grounded in the *parens patriae* doctrine, in Cook County, Illinois.[12] Less than 30 years later, all but two states had established juvenile courts separate from adult courts.[13] A key tenet behind the newly created juvenile courts was the fact that young people, because of their incomplete development, were less responsible for their behavior than adults.[14] Further, these courts attempted to incorporate then-emerging criminology theories about the causes of criminal behavior.[15] In contrast with prior prevailing theories that criminal behavior was the result of an offender's rational choice, progressive theorists of the time attributed such behavior to internal factors—such as a biological predisposition to criminal behavior—and how those internal factors interacted with external factors, such as association with delinquent peers or a lack of education.[16] These theories implicated a deterministic aspect to criminal behavior, thereby lessening the blame on offenders themselves.[17] As a result, juvenile courts, as originally designed, focused on rehabilitating

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11. *See Ex parte* Crouse, 4 Whart. 9, 9–10, 11 (Pa. 1839) (holding that it is the state's duty, as community guardian, to prevent youth from "confirmed depravity" by removing them from their parents' homes and reforming them in a "House of Refuge" rather than a common jail). Additionally, application of this doctrine often includes reference to the fact that, rather than a right to liberty like adults, youth have the right to *custody*—provided either by parents or by the state. *See, e.g.*, Commonwealth v. Fisher, 213 Pa. 198, 200 (Pa. 1905) ("The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home . . . nor is the state, when compelled, as parens [patriae], to take the place of the father for the same purpose, required to adopt any process as a means of placing its [hands] upon the [child] to lead it into one of its courts."); Curtis C. Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A. J. 719, 720 (1962) ("The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.").

12. JUVENILE JUSTICE SOURCEBOOK: PAST, PRESENT, AND FUTURE 165 (Albert R. Roberts ed., 2004); Barry Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 193–95 (2007).

13. ROLANDO V. DEL CARMEN & CHAD R. TRULSON, JUVENILE JUSTICE: THE SYSTEM, PROCESS, AND LAW 6 (2006).

14. *See* Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1069 (2006) (stating that children are "not morally accountable for their behavior due to their limited cognitive, social, and moral development").

15. Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 475 (1987) [hereinafter *Principle of the Offense*].

16. *Id.*

17. *Id.*; DONALD J. SHOEMAKER, THEORIES OF DELINQUENCY: AN EXAMINATION OF EXPLANATIONS OF DELINQUENT BEHAVIOR 27–28 (6th ed. 2010); John H. Laub, *A Century of Delinquency Research and Delinquency Theory*, *in* A CENTURY OF JUVENILE JUSTICE 179, 179 (Margaret K. Rosenheim et al. eds., 2002).

juvenile offenders by identifying and removing youth from corrupting influences.[18]

In accordance with this focus on rehabilitation, judges presiding over juvenile hearings were meant to use the juvenile system to protect, nurture, and reform youth into worthy citizens.[19] Because these goals were very different from those of the adult criminal system, juvenile court procedures were intentionally made less formal and less adversarial than adult courtroom proceedings.[20] For example, juvenile court judges were encouraged *not* to focus on determining whether "this boy or girl committed a specific wrong," but, rather, were implored to determine "[w]hat is he, how has [he] become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[21] In pursuit of this individualized determination, juvenile judges and probation officers were meant to examine a child's "entire past . . . finding out what the child has done before . . . the child's physical and mental condition, the environment[], [and] the home surroundings" in a way that goes "way beyond that [of the adult system], entirely contrary to the rules of evidence regarding criminal proceedings . . . ."[22] However, because all parties involved in the juvenile court purported to share a goal of rehabilitating the wayward youth, protections like the rules of evidence and other such "ordinary trappings of the court-room" were deemed "out of place" in juvenile courts.[23] As a result, youth often had no right to counsel or to a jury; juvenile proceedings and any subsequent records were typically kept confidential; and juvenile systems used different terminology from

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18. *See* AM. BAR ASS'N, PART 1: THE HISTORY OF JUVENILE JUSTICE 4, 5 (2007), https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf (discussing the development of a system for juvenile offenders focused on guiding offenders toward a more responsible life); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693–95 (1991) ("Because a youth's offense was only a symptom of her 'real' needs, sentences were indeterminate, nonproportional, and potentially continued for the duration of minority."); Fox, *supra* note 9, at 1189 (citing an 1822 report that "called public attention to the corruptive results of locking up children with mature criminals").

19. Allison Boyce, *Choosing the Forum: Prosecutorial Discretion and* Walker v. State, 46 ARK. L. REV. 985, 986 (1994); Feld, *supra* note 12, at 194–96 (discussing the "Rehabilitative Ideal" underlying the juvenile court and other Progressive reforms of the era).

20. Boyce, *supra* note 19, at 987.

21. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1910). Mack, one of the first juvenile court judges in Chicago, also encouraged judges "to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by [the] authorities[.]" *Id*. at 107.

22. Julian W. Mack, *The Juvenile Court: The Judge and the Probation Officer*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 123, 128 (Alexander Johnson ed., 1906).

23. Mack, *supra* note 21, at 120.

adult courts—for example, youth were adjudicated delinquent rather than found guilty—in an attempt to prevent youth from experiencing the stigma associated with a criminal conviction.[24]

Although the informal structure of the early juvenile courts was presumed to be more conducive to judges providing an individualized, offender-focused plan of reform for each youth, it also provided few opportunities for youth to adequately defend themselves, as youth rarely received the benefit of legal representation.[25] Therefore, information gathered by court personnel was rarely challenged, and cases as a whole were rarely contested.[26] Further, because the juvenile process was meant to be less harsh than criminal proceedings, charges that may have never been brought prior to the creation of a separate juvenile system were not only brought, but were disposed of via removal of the offending youth from the home and placing him or her in a training school where conditions were sometimes worse than those of adult prisons.[27] Additionally, because judges were afforded great discretion to assign dispositions that were in the "best interests" of the child, youth involved in the justice system often received dramatically different dispositions from other, similarly situated youthful defendants, *and* from adults charged with similar criminal behavior.[28] Advocates who perceived this disparity as injustice argued that, rather than achieving a rehabilitative ideal, juvenile courts imposed criminal-like punishments on youth without providing due process rights guaranteed by the Constitution.[29]

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24. AM. BAR ASS'N, *supra* note 18, at 5; SHAY BILCHIK, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 1999 NAT'L REPORT SERIES: JUVENILE JUSTICE BULLETIN, JUVENILE JUSTICE: A CENTURY OF CHANGE 2–3 (1999), https://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf.

25. AM. BAR ASS'N, *supra* note 18, at 5; BILCHIK, *supra* note 24, at 3.

26. *See* Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 11–12 (1965) (noting that research also indicates juvenile hearings at the time were typically about half as long as necessary for proper consideration of the youth and his or her issues).

27. Fox, *supra* note 9, at 1232–33; ALBERT DEUTSCH, OUR REJECTED CHILDREN 15 (1950) ("[S]ometimes these veritable cell blocks were more forbidding than adult prisons . . . . Whips, paddles, blackjacks and straps were 'tools of control.' Isolation cells were 'meditation rooms.'").

28. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 262–63 (2007).

29. *See* Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1161 (1968) (stating that constitutionalists believe the juvenile court system violates the right to due process for adolescents and is therefore more like a criminal court in function); *see also* Kent v. United States, 383 U.S. 541, 556 (1966) ("There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 320–21 (1967) (recognizing arguments of advocates asserting that "the rehabilitative aspirations of the juvenile court scheme are not being fulfilled…").

These constitutional arguments reached the Supreme Court in 1967 after an Arizona court sent a 15-year-old defendant to an Industrial School for delinquent youth, until age 21, for making a lewd phone call—a charge that would have resulted in a fine and up to two months in jail for an adult.[30] The Court found merit to the argument that "fairness, impartiality and orderliness" provided more benefit to youth defendants than informal proceedings with a "fatherly judge," and held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[31] and mandated that juveniles receive the procedural rights to notice, counsel, and confrontation, as well as the privilege against self-incrimination.[32] A landmark decision, *In re Gault* was the first in a line of several cases that provided juveniles with more of the procedural rights used to protect adults in criminal court. This line of cases created modern juvenile justice systems that more closely mirror the adult criminal system, but still identify rehabilitation as a major goal.[33]

II. RESEARCH SUPPORTING DISTINCTIONS BETWEEN JUVENILE AND ADULT COURTS

Before and since the creation of juvenile courts, behavioral science research has continuously produced findings that suggest juveniles are fundamentally distinct from adults in ways that reduce culpability.[34]

30. In re Gault, 387 U.S. 1, 4 (1967). The Court also noted that Gault's parents were provided no notice of their son's arrest, the petition used to bring Gault to court contained no facts, the complainant was not required to appear in court or speak to the judge, no record of the proceedings was made, and no appeal was permitted following Gault's lengthy disposition. *Id.* at 5–8.

31. *Id.* at 13, 26. The Court also asserted that "the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

32. *Id.* at 26, 33–34, 41, 55–56.

33. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 529, 541 (1975) (holding that juveniles are also protected against double jeopardy, which attaches when a juvenile court hears evidence); *see also* In re Winship, 397 U.S. 358, 360–61 (1970) (holding that a juvenile's delinquency adjudication must be found beyond a reasonable doubt rather than by a preponderance of the evidence). Further mirroring criminal courts, more legislatures have amended statutes to identify community protection and youth accountability as goals of their juvenile justice systems—a departure from the Rehabilitative Ideal's singular focus on youth rehabilitation. PATRICIA TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 11 (1996); Donna Bishop, *Public Opinion and Juvenile Justice Policy: Myths and Misconceptions*, 5 CRIMINOLOGY & PUB. POL'Y 653, 656–57 (2006) (noting that polls of public opinion often endorse a juvenile justice system with a dual focus on rehabilitation and punishment).

34. *See* Praveen Kambam & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & L. 173, 173–74 (2009) (reviewing recent research on the development of decision-making capacities as relevant to children and adolescent defendants); *Maturity of Judgment*, *supra* note 6, at 249–50 (describing the psychosocial development of adolescents); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & HUM. BEHAV.

Additionally, similar research demonstrates that juveniles as a group are more capable of character change than adults, suggesting that they are better able to become rehabilitated.[35] The Supreme Court has relied on such research in several recent cases in which it has prohibited states from imposing certain types of punishment on juveniles, and mandated that courts consider an offender's age when making certain constitutionally relevant decisions—these cases have developed into what some scholars call the "kids are different" jurisprudence.[36]

A. Juveniles Are Less Mature than Adults

In its "kids are different" cases, the Supreme Court has repeatedly looked to social science research to support what "any parent knows," namely, that youth are less mature than adults.[37] Therefore, they are not as culpable for their conduct and not as morally reprehensible as an adult who has committed similar acts.[38] Early cases in this jurisprudence cited to disproportionate rates of reckless behaviors—such as risky driving, unsafe sexual practices, and illicit drug use—among adolescents as evidence of such immaturity.[39] More recently, the Court has cited to biological and

253, 273 (2005) (concluding that juveniles were more likely than adults to waive legal protections and less likely to be influenced by legally relevant information).

35. *See* Brent Roberts & Kate E. Walton, *Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies*, 132 PSYCHOL. BULL. 1, 14–15 (2006) ([P]ersonality traits changed more often in young adulthood than any other period of the life course . . . ."); 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) [hereinafter *Less Guilty*] (asserting that adolescents should not be held to the same criminal responsibility standards as adults given their still-changing characters and lack of personal identity).

36. *See* Miller v. Alabama, 567 U.S. 460, 471–72 (2012) (holding that the Eighth Amendment prohibits mandatory sentencing of life in prison without the possibility of parole for juvenile homicide offenders); J.D.B. v. North Carolina, 564 U.S. 261, 265, 269, 272, 273 (2011) (reiterating that, because children are generally less mature and responsible than adults, they are at greater risk of succumbing to pressures while in custody); Graham v. Florida, 560 U.S. 48, 74–75 (2010) (holding that the Eighth Amendment prohibits life sentences without parole for juvenile non-homicide offenders); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment prohibits imposing capital punishment for offenses committed under 18 years of age); *see also* Mary E. Berkheiser, *Death Is Not So Different After All:* Graham v. Florida *and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 1 (2011) (asserting that juveniles are different from adults, and courts should adapt to those differences).

37. *Roper*, 543 U.S. at 569.

38. *Id.* at 571.

39. For example, in *Roper*, the Court cited third-party research reporting that, although 16–24-year olds comprised 18.7% of licensed drivers in the United States, they comprised 38.7% of drunk drivers in fatal accidents, and that 12–25-year olds were five to six times more likely to use several different illicit substances than someone older than 26. *Id.* at 569 (citing Arnett, *supra* note 6, at 342).

environmental factors that contribute to an increased likelihood that young people will engage in risky behaviors.[40] For example, youth's amygdalae—associated with intense emotions and aggression as part of the limbic system—tend to be overactive, while the areas of their brains responsible for short- and long-term planning, impulse control, and other executive functions are typically underdeveloped.[41] As an individual grows older, matures, and gains life experience, the connections within these key sections of the brain will grow stronger, resulting in further development of these and other psychosocial skills.[42] As a result, many scientists believe that, for most individuals, psychosocial maturity continues to develop past age 18 and into the mid-20s.[43]

A broad concept, psychosocial maturity typically breaks down into three aspects: responsibility (reliance on oneself and resistance to peer influence); temperance (impulse control and aggression suppression); and perspective (the ability to consider others and take future outcomes into account).[44] Research has indicated that deficits in these areas are linked to a

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40. *See* Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513, 515 (2013) (summarizing the behavioral science and neuroscience evidence cited by the Supreme Court to support findings that youth are less mature, more vulnerable to peer influence, less culpable for behavior, and more capable of change and reform).

41. *Id.* at 516; ACT FOR YOUTH UPSTATE CTR. OF EXCELLENCE, RESEARCH FACTS AND FINDINGS: ADOLESCENT BRAIN DEVELOPMENT 2–3 (2002), http://www.actforyouth.net/resources/rf/rf_brain_0502.pdf; WIS. COUNCIL ON CHILDREN & FAMILIES, RETHINKING THE JUVENILE IN JUVENILE JUSTICE 4 (2006), http://www.njjn.org/uploads/digital-library/resource_1132.pdf; B.J. Casey et al., *The Adolescent Brain*, 1124 ANNALS N.Y. ACAD. SCI. 111, 112 (2008). Taken together, these biological factors limit adolescents' abilities to regulate their moods, impulses, and behavior compared to adults, which may contribute to the observed increase in impulsivity and sensation-seeking during adolescence. *Less Guilty*, *supra* note 35, at 1013. This increase in impulsivity seems to reverse once an individual reaches early adulthood. *Id.*

42. *See Maturity of Judgment*, *supra* note 6, at 267 (citing the "psychosocial characteristics that are likely to influence maturity of judgment"); *see also Less Guilty*, *supra* note 35, at 1011, 1014, 1016 (establishing that reasoning capabilities improve with age as one gains more knowledge and personal experience).

43. Casey et al., *supra* note 41, at 112. Sections of the brain associated with psychosocial maturity develop more slowly than the areas implicated in cognitive and intellectual functioning. For example, research indicates that adolescents as young as 16 can possess cognitive abilities similar to those of adults. Kathryn C. Monahan et al., *Psychosocial (Im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persisting Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY, 1093, 1094 (2013). However, in addition to developed cognitive abilities, mature judgments also require well-developed psychosocial abilities, which do not fully mature until much later in life. Cauffman & Steinberg, *supra* note 6, at 744–45; Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLIN. PSYCHOL. 459, 467–68, 472 (2009).

44. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 334 (2003) (suggesting that young defendants do not comprehend the consequences of waiving certain rights due to their immaturity); Monahan et al., *supra* note 43, at 1094 (suggesting that maturity and personality

reduced ability to engage in mature decision making and an increase in antisocial behavior—especially if an individual's rates of maturation in these areas are impeded or depressed compared to average youth.[45] For example, limitations of future-time perspective present as a reduced ability to consider long-term consequences during decision-making and, therefore, an increased tendency to act in pursuit of immediate gratification—perhaps regardless of the act's legality.[46] Further contributing to youth immaturity, the onset of adolescence corresponds with an increase in neurotransmitters that heighten responsiveness to rewards; as a result, youth often prioritize immediate positive outcomes and ignore long-term negative outcomes more than adults, who, in turn, are more likely to consider both long-term gains and potential losses when making decisions.[47]

In addition to developmental limitations implicating immaturity and impulsivity, researchers have shown that peer influence can further increase a juvenile's likelihood of making risky decisions and engaging in antisocial behavior.[48] As a group, youth are much more susceptible to peer pressure; this vulnerability seems to peak at age 14, slowly decreases throughout later adolescence, and remains relatively constant after age 18.[49] Studies using fMRI technology have demonstrated that areas of the brain associated with reward processing were activated in juvenile participants when they were told that peers were watching their task performance, suggesting that social approval serves as a powerful motivator for adolescents—one that often outweighs any identified potential risks.[50] Given that juveniles are much more likely than adults to succumb to direct or indirect peer pressure to

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development continues into the mid-twenties and that ceasing anti-social behaviors also correlates with outward "maturity" in the traditional sense); *see also Maturity of Judgment*, *supra* note 6, at 252 (articulating the "three categories of overarching dispositions" and how these play a role in adolescent brain development).

45. *Maturity of Judgment*, *supra* note 6, at 252; Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 DEVELOPMENTAL PSYCHOL. 1654, 1656 (2009).

46. Monahan et al., *supra* note 45, at 1655; *Maturity of Judgment*, *supra* note 6, at 266.

47. Steinberg, *supra* note 43, at 466, 469. Adolescents are also much less likely to place adequate weight on potential risks during decision-making processes, further suggesting that juvenile decision making is much more driven by potential rewards than potential risks. *See also Less Guilty*, *supra* note 35, at 1012 (comparing adult and adolescent responses to various questions to better understand factors considered during decision making).

48. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 630, 632, 634 (2005) (finding that 13–16-year olds and 18–22-year olds were significantly more likely than adults 24 years of age or older to engage in risky behavior when around their peers).

49. ELIZABETH SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 38 (2008).

50. Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1, F2 (2010); Steinberg, *supra* note 43, at 468–69.

engage in antisocial behavior, it is no surprise that a considerable proportion of antisocial acts are perpetrated by youth in social settings.[51] The Supreme Court has recognized that such negative environmental influences—which may arise from peers as well as from relatives and other community members—are especially relevant for youth who "lack the ability to extricate themselves from horrific, crime-producing settings."[52]

B. Juveniles Are More Capable of Reform than Adults

Social science research demonstrating that personalities go through significant change as a person ages from adolescence to adulthood also supports the idea that juveniles' characters are "not as well formed" as those of adults, and, therefore, are more responsive to rehabilitation efforts.[53] Specifically, personality researchers have consistently found that individuals' personalities stabilize over time, such that more change occurs during adolescence and young adulthood than during adulthood.[54] These researchers point to the large number of novel life experiences occurring in relatively quick succession during adolescence and young adulthood as one factor that contributes to such changeability, and they acknowledge that, although personality development may still occur among adults and even elderly adults, such changes are less likely in adults than in adolescents.[55]

Like patterns of other risky behaviors that achieve peak frequency during adolescence and decrease in prevalence afterward, a decrease in delinquent and criminal behavior also demonstrates this change and growth

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51. MARK WARR, COMPANIONS IN CRIME: THE SOCIAL ASPECTS OF CRIMINAL CONDUCT 32–44 (2002); *see also* Thomas J. Dishion & Kenneth A. Dodge, *Peer Contagion in Interventions for Children and Adolescents: Moving Towards an Understanding of the Ecology and Dynamics of Change*, 33 J. ABNORMAL CHILD PSYCHOL. 395, 395, 397 (2005) (introducing a special journal issue focused on examining how youth are influenced by their peers).

52. Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

53. Graham v. Florida, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 569–70).

54. *See* Avshalom Caspi & Brent W. Roberts, *Personality Development Across the Life Course: The Argument for Change and Continuity*, 12 PSYCHOL. INQUIRY 49, 51 (2001) (summarizing evidence supporting theories of personality change); *see also* Brent W. Roberts & Daniel Mroczek, *Personality Trait Change in Adulthood*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 31, 33 (2008) (acknowledging that most personality changes occur during young adulthood, but also noting that some evidence of personality change occurs in old age as well).

55. *See* Caspi & Roberts, *supra* note 54, at 62 (concluding that with time and age, people "become more adept at interacting with their environment," promoting more consistent personalities); Brent W. Roberts & Wendy F. DelVecchio, *The Rank-Order Consistency of Personality Traits from Childhood to Old Age: A Quantitative Review of Longitudinal Studies*, 126 PSYCHOL. BULL. 3, 4, 5 (2000) (concluding that younger adults have more personality changes because they are engaging in more novel experiences then older adults).

as an individual transitions into adulthood.[56] For example, research suggests that more than 90% of justice-involved youth will no longer engage in criminal behavior by the time they reach their mid-20s.[57] These individuals are often identified as adolescent-limited offenders, whose antisocial behavior typically starts in adolescence and declines as they mature into adulthood.[58] Thus, less than 10% of justice-involved youth will continue to engage in criminal behavior past their mid-20s.[59] Supported by these findings, the Supreme Court held, both in *Roper* and in *Graham*, that even a heinous crime committed by a juvenile cannot consistently be seen as evidence of an "irretrievably depraved character."[60] Further, the Court noted that experts themselves cannot reliably predict which adolescent offenders will continue to commit crimes as adults—even amongst those youths who commit the most serious of crimes.[61] This uncertainty can be attributed to the fact that most juveniles will outgrow antisocial behavior as a part of experimentation associated with normal development.[62] The established trajectory of reduced offending leads many scholars to advocate for policies that divert many youth from the justice system altogether, as they are likely to desist from criminal behavior over time

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56. *See* Shawn D. Bushway et al., *Are Risky Youth Less Predictable as They Age? The Dynamics of Protection During Adolescence and Young Adulthood*, 30 JUST. Q. 84, 85 (2013) (exploring the ways in which age can affect the likelihood of youth committing violent crime).

57. SCOTT & STEINBERG, *supra* note 49, at 52–53.

58. For an introduction to this method of distinguishing youthful offenders, see Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 674 (1993). Under this theory, antisocial behaviors that emerge during adolescence are linked to puberty—when healthy youth mimic their delinquent peers in an attempt to show autonomy, impress their friends, and appear to be more mature. Terrie E. Moffitt et al., *Males on the Life-Course-Persistent and Adolescence-Limited Antisocial Pathways: Follow-Up at Age 26 Years*, 14 DEV. & PSYCHOPATHOLOGY 179, 180 (2002). These youth eventually decrease such antisocial behaviors as they develop psychosocial maturity, enter adulthood, and take on more adult-like responsibilities. *Id.*

59. These individuals are often called "life-course-persistent" offenders, and their behavior has been attributed to the exacerbation of childhood neuropsychological concerns (i.e., "subtle cognitive deficits, difficult temperament, or hyperactivity") by high-risk external factors like abuse or neglect, poor familial relationships, and low socioeconomic status. Moffitt et al., *supra* note 58, at 180; Monahan et al., *supra* note 45, at 1655.

60. Roper v. Simmons, 543 U.S. 551, 570 (2005).

61. *See* Graham v. Florida, 560 U.S. 48, 68 (2010) (acknowledging the challenge experts face in determining whether young offenders will continue to offend into adulthood); *Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."); Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEVELOPMENTAL PSYCHOL. 453, 471 (2010) ("[O]ur ability to predict which high-frequency offenders desist from crime and which do not is exceedingly limited . . . .").

62. Mulvey et al., *supra* note 61, at 471.

without any state intervention.[63] Given the evidence that youthful misconduct often reflects transitory characteristics rather than fixed traits, even those juveniles who engage in antisocial behaviors will likely have a greater capacity for reform than their adult counterparts, whose antisocial behaviors may have already become fixed.[64]

Taken together, these factors regarding adolescent development and behavior have bolstered arguments for maintaining a juvenile justice system completely separate from the adult criminal system.[65] However, such research has yet to be universally applied to juvenile transfer determinations via judicial waiver.

III. APPLYING ADOLESCENT RESEARCH TO JUDICIAL WAIVER: UPDATING THE *KENT* CRITERIA[66]

Although the distinction between adult and juvenile courts finds support in the premise that youth, as a group, are less culpable and more malleable than adults and, therefore, are more deserving of protection and more easily rehabilitated, the policy of juvenile transfer to criminal court suggests a legislative belief that not all youth deserve such protection and confidence in their ability for reform.[67] Policies allowing for transfer have existed since the creation of juvenile courts, but their popularity drastically increased during the 1980s and 1990s when concerns about increases in violent crime among adolescent "superpredators" encouraged policymakers

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63. These suggestions are especially relevant to youth with a low risk of future offending. MARK W. LIPSEY ET AL., IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE 12 (2010), https://ncfy.acf.hhs.gov/sites/default/files/docs/19740-Improving_the_Effectiveness_of.pdf. In fact, meta-analyses suggest that providing certain interventions for low-risk youth can actually increase their likelihood of recidivism. Mark W. Lipsey, *The Primary Factors That Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124, 129 (2009); Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOCIAL SCI. 297, 312–13 (2007).

64. Caspi & Roberts, *supra* note 54, at 51.

65. *But see* Robert O. Dawson, *The Future of Juvenile Justice: Is It Time to Abolish the System?*, 81 J. CRIM. L. & CRIMINOLOGY 136, 136 (1990) (arguing that the juvenile justice system is outdated and may require abolishing); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1998) (arguing that criminalization of the juvenile courts has made them obsolete and, therefore, they should be abolished).

66. *See infra* App'x B (providing a complete list of updated criteria).

67. JOHN D. & CATHERINE T. MACARTHUR FOUND., RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, EXECUTIVE SUMMARY: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 1, 2 (Jeffrey Fagan & Franklin E. Zimring eds., 2000), http://www.njjn.org/uploads/digital-library/resource_197.pdf.

to "get tough" on juvenile crime.[68] Under such transfer policies, certain youth are tried as adults in criminal court, rather than as children in juvenile courts; national statistics indicate that about 1% of cases originally petitioned in juvenile court are judicially waived to criminal court each year, but those reports do not account for those youth whose cases, because of other forms of juvenile transfer, originate in criminal court despite the fact that the defendant has not yet reached age 18.[69]

More than fifty years ago, the Supreme Court issued its opinion in *Kent v. United States*, a landmark case relevant to juvenile transfer.[70] In *Kent*, the Court held that judicial waiver of juvenile court jurisdiction was a "critically important" decision with serious consequences for youth, and, as a result, waiver proceedings must allow for "meaningful review" and include an adversarial hearing, the right to counsel, the right to access records available to the judge, and a waiver decision supported by explicit reasoning.[71] The Court also included, as an appendix to its decision, a

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68. Tanenhaus, *supra* note 1; *see* James C. Howell, *Superpredators and Other Myths About Juvenile Delinquency*, *in* PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK 3, 4–5 (2009) (discussing the origin of the "superpredator" and its role in raising concerns of an increase in juvenile crimes); Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156, 1157 (1998) (discussing how the "superpredator" characterization stressed the absence of morality among radically impulsive, remorseless juveniles). In accordance with these new "get tough" policies, many states added deterrence and retribution to their juvenile justice systems' stated goals. TORBET ET AL., *supra* note 33, at 11.

69. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2014, at 42 (2017), http://www.ncjj.org/pdf/jcsreports/jcs2014.pdf. These other forms of juvenile transfer include statutory exclusion, where the legislature amends the jurisdiction of its juvenile courts to exclude youth above a certain age and/or youth who are charged with certain crimes, as well as prosecutorial discretion, where the prosecutor can choose to petition the youthful offender in either the juvenile or criminal court. RICHARD E. REDDING, JUVENILE JUSTICE BULLETIN, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 1–2 (2010) [hereinafter REDDING, JUVENILE TRANSFER LAWS], https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf. Reports incorporating other types of transfer provisions estimate that more than 200,000 youth per year are tried in adult court. CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM 2–3 (2010), http://cfyj.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf.

70. Kent v. United States, 383 U.S. 541, 541–43 (1966). In that case, Morris Kent, eligible for transfer via judicial waiver because he was 16 years old and his alleged offenses would have been felony charges for an adult, asked that the juvenile court retain jurisdiction and requested access to the records made available to the judge by the prosecution prior to the waiver hearing. *Id.* at 543, 545–46. Not only did the juvenile court deny these requests, it held no hearing and declared that, "after full investigation," it would waive jurisdiction to the criminal court, without making findings or identifying the reasons for its decision. *Id.* at 565 (internal quotations omitted).

71. *Id.* at 556–57, 560–62. The Court noted the serious consequences that would result from Kent's transfer to criminal court, most notably "the difference between five years' confinement and a death sentence . . . ." *Id.* at 557. It is important to note that, although the *Kent* decision only applies to judicial waiver cases—not cases in which legislative exclusion or prosecutorial discretion result in a youth's transfer to criminal court—nearly all 50 states still have judicial waiver procedures available,

Policy Memorandum that applied to the D.C. Juvenile Court at the time of the defendant's original waiver decision.[72] This Memorandum listed several factors that juvenile court judges in the District of Columbia should consider during their "full investigation" into the case of a youth eligible for such transfer.[73] This memorandum instructed juvenile court judges to waive jurisdiction over cases that have "prosecutive merit" and include charges that are "heinous or of an aggravated character," or "represent[] a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action."[74]

Although the factors listed in the Policy Memorandum cited in *Kent* were not explicitly endorsed by the Supreme Court, states nationwide adopted some or all of these so-called "*Kent* factors" into their judicial waiver statutes,[75] endorsing the presumption that some youth—especially older adolescents charged with certain crimes or certain patterns of delinquent acts—are more culpable and less amenable to rehabilitation in the juvenile court than the average youth.[76] However, in the years since these factors were identified and adopted nationwide, social and behavioral scientists have continued to examine the ways in which youth and adults differ, as well as the theoretical and practical implications these differences create for juvenile transfer policies.[77] As a result, the *Kent* factors should be

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and it is often identified as the most common form of juvenile transfer. TORBET ET AL., *supra* note 33, at 4.

72. *Kent*, 383 U.S. at 565–68. For the full text of that Memorandum (listing the "determinative factors" for making juvenile waiver decisions in the District of Columbia Juvenile Court), see *infra* App'x A. Although rarely discussed, it is important to observe that the memo implementing these factors in the District of Columbia had been rescinded prior to the Court's decision in *Kent*. *Kent*, 383 at 546 n.4.

73. *Kent*, 383 U.S. at 565–67.

74. *Id.* at 566.

75. Forty-four states and the District of Columbia currently include judicial waiver as a mechanism for transferring youth from juvenile court to criminal court. *See infra* App'x C (listing the statutes of those states with judicial waiver as a transfer mechanism, while also making note of those states that have not adopted the transfer mechanism). However, only seven states seem to apply all eight factors from the *Kent* appendix: Florida, New Hampshire, Oregon, South Carolina, Utah, Washington, and Wisconsin. FLA. STAT. § 985.556 (2017); N.H. REV. STAT. ANN. § 169-B:24 (2016); OR. REV. STAT. § 419C.349 (2017); S.C. CODE ANN. § 63-19-1210 (2018); UTAH CODE ANN. § 78A-6-703 (2017); WASH. REV. CODE § 13.40.110 (2017); WIS. STAT. § 938.18 (2017). The remaining states apply at least two of the identified *Kent* factors, with the majority applying several. For more information, see *infra* App'x C (describing the language from each state's waiver provision).

76. *Principle of the Offense*, *supra* note 15, at 490 n.83.

77. *See generally* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100 (2010) (describing how the arguments used in *Graham* could be used to further lead reform in the juvenile and criminal justice systems); John Matthew Fabian, *Applying* Roper v. Simmons *in Juvenile Transfer and Waiver Proceedings: A Legal and Neuroscientific Inquiry*, 55 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 732, 733 (2011) (applying the Court's reasoning

updated to reflect such developments and better incorporate modern understanding of youth, their behaviors, and the best ways to effectively facilitate their development into healthy, prosocial adults.

A. Considering the Circumstances of the Alleged Offense

In the Policy Memorandum appended to the *Kent* decision (i.e., the origin of the "*Kent* factors"), the first three criteria which judges "will" consider implicate the alleged offense with which the youth is charged.[78] The fact that these criteria are the first presented and make up more than one-third of the factors prescribed imports great significance, suggesting that offense-based characteristics should be afforded more weight than the factors that follow.[79] Accordingly, studies investigating predictors of juvenile transfer reveal that the seriousness of the offense and other similar factors are frequently identified as some of the most significant predictors

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in *Roper* to suggest the inappropriateness of trying juveniles in adult court). Many opponents of juvenile transfer policies cite their failure to satisfy penological purposes; however, the prevailing view of juvenile transfer is that it does not constitute punishment. *See also* United States v. Bland, 472 F.2d 1329, 1333 (D.C. Cir. 1972) (rejecting Due Process and Equal Protection attacks to a direct-file statute). Further, such a drastic abolition seems unfeasible, as many advocates for juvenile transfer policy reform acknowledge that some categories of youth should not be treated separately, a notion supported by public opinion as well. *See* Brandon K. Applegate et al., *Reconsidering Child Saving: The Extent and Correlates of Public Support for Excluding Youths from the Juvenile Court*, 55 CRIME & DELINQ. 51, 70 (2009) (demonstrating the public's desire to use transfer "sparingly" and "selectively" for a limited number of circumstances); JEFFREY A. BUTTS & ADELE V. HARRELL, THE URBAN INST., DELINQUENTS OR CRIMINALS: POLICY OPTIONS FOR YOUNG OFFENDERS 8–13 (1998), https://www.urban.org/sites/default/files/publication/70546/307452-Delinquents-or-Criminals-.PDF (suggesting that legislators further investigate what works and what does not work in current juvenile justice systems before abolishing the practice of separating juvenile and adult court systems).

78. *Kent*, 383 U.S. at 565–67. These three factors were: (1) "The seriousness of the alleged offense to the community and whether the protection of the community requires waiver"; (2) "Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner"; and (3) "Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted." *Id.*; *see also infra* App'x A (presenting the full Policy Memorandum from *Kent*).

79. Two states (Michigan and Minnesota) go so far as to instruct judges to afford "greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria . . . ." MICH. COMP. LAWS § 712A.4(4) (2017); MINN. STAT. § 260B.125A (2017). Statutes in Colorado and Idaho explicitly note that judges have discretion as to the appropriate weight for each factor. COLO. REV. STAT. § 19-2-518(3)(c) (2017); IDAHO CODE § 20-508(8)(g) (2017) ("The amount of weight to be given to each of the factors . . . is discretionary with the court . . . ."). The remaining states seem to indicate discretion by remaining silent on the issue; however, many of these states, like the *Kent* appendix, include several more factors related to the seriousness of the crime and the youth's prior record of delinquency than factors related to the youth's developmental maturity or amenability to rehabilitation. *See, e.g.*, WYO. STAT. ANN. § 14-6-237 (2017) (including four factors related to the alleged crime and the youth's prior record of delinquency out of a total of seven prescribed factors for consideration).

of a youth's transfer to adult court via judicial waiver.[80] However, such focus on the offense conflicts with an individualized examination of a specific youth and his or her needs—a practice endorsed by the Supreme Court in *Miller* for youth charged with even the most heinous of offenses.[81] In fact, a desire to assign greater, adult-like punishments to certain crimes serves more of a retributive function than a rehabilitative function, foregoing the hallmark of the juvenile system itself.[82]

Additionally, instilling such import into consideration of offense-based characteristics presupposes that youth charged with particularly "serious" types of crimes possess the requisite maturity necessary to commit such harmful acts and are, therefore, beyond the possibility of reform in the juvenile system.[83] However, longitudinal research indicates that even youth characterized as "serious offenders" will desist from such behavior over

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80. Dia N. Brannen et al., *Transfer to Adult Court: A National Study of How Juvenile Court Judges Weigh Pertinent* Kent *Criteria*, 12 PSYCHOL. PUB. POL'Y & L. 332, 335, 346–47 (2006) (finding that judges deem "dangerousness" as implied, at least in part, from certain characteristics of the alleged offense as the most important factor in waiver decisions); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY, 314, 341–42 (1990); Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 312–15 (1999). As noted previously, Minnesota's transfer statute even instructs judges to "give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision." MINN. STAT. § 260B.125(4)(6) (2017).

81. Miller v. Alabama, 567 U.S. 460, 477 (2012). The *Miller* Court specifically discusses individualized consideration in the context of mandatory sentencing for juveniles; however, similar offender-based considerations—rather than an emphasis on the characteristics of the alleged offense—should be provided to youth defendants facing transfer to criminal court given the "tremendous consequences" that result from a decision to waive juvenile court jurisdiction. *Kent*, 383 U.S. at 553–54. *See also Principle of the Offense*, *supra* note 15, at 472–73 ("The waiver of a serious offender into the adult system on the basis of his offense rather than an individualized evaluation of the youth's 'amenability to treatment' or 'dangerousness' is both an indicator of and a contributor to the substantive as well as procedural criminalization of the juvenile court.").

82. *See* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1557–58 (2004) (noting that the purpose of a separate juvenile system was based on youth-competence limitations and advocating that juvenile justice systems should not be based on retribution); Christina DeJong & Eve Schwitzer Merrill, *Getting "Tough on Crime": Juvenile Waiver and the Criminal Court*, 27 OHIO N. U. L. REV. 175, 182 (2001) (describing how "tough on crime" policies have affected the juvenile system); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 693–95 (1991) (discussing the rehabilitative focus of the juvenile justice system). Given that a transfer-eligible youth remains under the care and control of the juvenile justice system until a juvenile court judge issues a waiver of jurisdiction, such youth should still benefit from the juvenile system's protections during the transfer hearing process.

83. Brink, *supra* note 82, at 1557. However, the definition of a "serious" offense can be varied and often include non-violent drug offenses or property crimes. *See* Slobogin, *supra* note 80, at 307 ("In general, the more serious the offense, the less likely a youth will be considered amenable to juvenile court disposition.").

time as they progress into adulthood.[84] Further, research investigating the efficacy and effectiveness of juvenile rehabilitation programs indicates that, through the use of scientifically supported intervention methods, even youth initially determined to have a high risk for committing future offenses can demonstrate reduced recidivism risk.[85] Such findings contradict the notion that "nothing works" for rehabilitating justice-involved youth and suggest that even those youth charged with the most serious offenses can benefit from evidence-based programs available in a growing number of juvenile justice systems.[86] As a result, the updated *Kent* criteria will condense the three original factors into one and relegate it to the last entry on the list, to acknowledge and emphasize the other, arguably more relevant, factors that precede it.[87]

B. Considering Prosecutive Merit and Judicial Efficiency

The fourth and fifth original *Kent* factors ask judges to consider the prosecutive merit of the complaint against a juvenile and the desirability of trying a juvenile in the same court as his co-defendants.[88] These factors have no bearing on the proper forum for a young defendant because an individual examination of the youth's risks and needs as they relate to treatment amenability and likelihood of future offending would be affected by neither the strength of the state's case nor the desire to try multiple co-defendants in the same criminal court.[89] Further, if concerns about the

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84. *See* Delbert S. Elliott, *Serious Violent Offenders: Onset, Developmental Course, and Termination—The American Society of Criminology 1993 Presidential Address*, *in* 32 CRIMINOLOGY 1–21 (1994) (noting that the prevalence of serious violent offenses sharply declines from its peak in adolescence to adulthood); Mulvey et al., *supra* note 61, at 468, 470 (reporting "very low" rates of antisocial behavior among a sample of "very serious offenders" during a three-year follow-up period).

85. LIPSEY ET AL., *supra* note 63, at 12. For example, programs for justice-involved youth that incorporate a therapeutic orientation and facilitate behavior change have shown positive outcomes, even for serious offenders. *Id.* In contrast, popular programs that emphasize deterrence, discipline, and punitive consequences (e.g., "Scared Straight" programs and wilderness boot camps) tend to have no effect on recidivism rates on average—and can perhaps even increase them. *Id.*

86. Mark Soler et al., *Juvenile Justice: Lessons For A New Era*, 16 GEO. J. POVERTY L. & POL'Y 483, 484–86, 492 (2009).

87. Reference to community protection in the original version of these factors will be included in a broader discussion on risk assessment. *See infra* notes 110–12 and accompanying text (discussing the *Kent* criteria in the context of modern-day risk assessment). Consideration of offense-based characteristics will not be entirely removed from the updated list of factors because it may serve as a further limitation on youth who will be transferred to criminal court.

88. Kent v. United States, 383 U.S. 541, 567 (1966).

89. *See* Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness and Race*, 14 L. & INEQ. 73, 83 (1995) (noting that judicial waiver statutes often emphasize assessment of youth's "dangerousness" and "amenability to treatment"). Additionally,

prosecutive merit of the case exist, they should weigh in favor of dismissing the case altogether, rather than allowing it to continue as a petition in juvenile court, where the defendant does not have the benefit of a grand or petit jury. Subjecting youth to the documented negative outcomes that arise solely from trial in criminal court cannot be justified in the name of judicial efficiency.[90] As a result, these factors are removed from the list of updated *Kent* criteria to reflect the fact that the decision-maker should focus on the youth's individual needs and *not* on the ease of prosecution.

C. Considering the Circumstances of the Defendant

The final three criteria of the original *Kent* factors require examination of the juvenile defendant as an individual, considering his or her "sophistication and maturity," "record and previous history," and "likelihood of reasonable rehabilitation . . . ."[91] Given advancements in relevant social science research and case law, these factors likely require the greatest number of revisions—starting with their location within the list of criteria. To signal the importance of an individualized examination of a transfer-eligible defendant, such defendant-based elements should appear first on any list of judicial waiver factors. Additionally, these criteria should make explicit reference to the ideas endorsed in the Supreme Court's "kids are different" jurisprudence and reflect modern trends in social and behavioral science research.

1. Limits of Maturity and Responsibility

Although the D.C. Juvenile Court administrators responsible for the 1959 Policy Memorandum suggested judges consider the "sophistication and maturity" of a transfer-eligible defendant, this construct was ill-defined, citing "his home, environmental situation, emotional attitude and pattern of

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only ten states currently include the desirability to try offenders in one court as a factor in their judicial-waiver provisions. *See infra* App'x C (detailing state juvenile-transfer statutes).

90. Not only does transfer to criminal court often result in harsher sentences, fewer opportunities for rehabilitation, and an increased risk for assault and abuse in adult detention and correctional facilities, but transferred youth face increased barriers to successful re-entry to society after their time in criminal court compared to youth who remain in juvenile court. UCLA SCH. OF LAW, JUVENILE JUSTICE PROJECT, THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL SYSTEM: A REVIEW OF THE LITERATURE 3 (2010); REDDING, JUVENILE TRANSFER LAWS, *supra* note 69, at 7 (highlighting, for example, that juveniles in adult prisons are "more fearful of being victimized than they had been when incarcerated in juvenile facilities").

91. *Kent*, 383 U.S. at 567.

living" as proper considerations for such a determination.[92] Modern behavioral science and neuroscience research has since informed legal decision-makers of the specific functional limitations that youth exhibit when compared to adults, and can therefore better focus this maturity analysis.[93] Specifically, the Supreme Court has repeatedly cited studies showing that juveniles have a "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking,"[94] and it has concluded that "those findings—of transient rashness, proclivity for risk, and inability to assess consequences . . . lessen[] a child's 'moral culpability.'"[95] These studies indicate a lack of neurological development among adolescents, especially in the areas regulating future planning, impulse control, and resistance to peer influence, and judicial waiver criteria should include explicit reference to consideration of a defendant's abilities in these areas.[96] Further, the presentation of this criterion should acknowledge the fact that most youth have reduced executive function capabilities compared to adults, and, therefore, youth defendants should be presumed to lack maturity and responsibility unless assessment of these abilities suggests otherwise.[97]

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92. *Id.* Although these factors may be relevant to other criteria (like risk assessment, discussed *infra* Part III.C.4), they do not coincide with modern understandings of maturity. Of note, transfer provisions in ten states—Alaska, Connecticut, Delaware, Indiana, Iowa, Michigan, Minnesota, Rhode Island, South Dakota, and Tennessee—fail to include any reference to sophistication and maturity, even one utilizing the somewhat inaccurate descriptors used in the *Kent* appendix. *See infra* App'x C (describing the specific elements of each state's juvenile transfer criteria). Given that the Supreme Court has repeatedly identified the importance of considering sophistication and maturity when making individualized assessments of youth, see Miller v. Alabama, 567 U.S. 460, 471–72, 477–78 (2012) (discussing the need to consider the various gaps between juveniles and adults in pursuing individualized sentencing); J.D.B. v. North Carolina, 564 U.S. 261, 272–73 (2011) (identifying factors that must be considered when determining whether a child is in custody for the purposes of *Miranda* rights), this omission should be viewed as a major oversight and should be remedied to align with Supreme Court jurisprudence.

93. *See Miller*, 567 U.S. at 471 (noting that a lack of maturity in children translates to a lack of culpability); *J.D.B.*, 564 U.S. at 269, 273, 275 (noting studies that support the commonsense idea that children are not necessarily of the proper mindset to make informed legal decisions); Graham v. Florida, 560 U.S. 48, 68 (2010) (emphasizing the differences between adult and juvenile minds that stem from continuing brain development throughout adolescence); Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (finding that key developmental factors allow juveniles to be more susceptible to negative pressures, making them less culpable).

94. *Miller*, 567 U.S. at 471 (citing *Roper*, 543 U.S. at 569).

95. *Id.* at 472 (citing *Graham*, 560 U.S. at 68).

96. *See supra* Part II.A (describing how juveniles are less mature than adults); *see supra* Part II.B (noting the ways in which juveniles are more amenable to reform than adults).

97. Given their lack of expertise in adolescent development and psychosocial maturity, it is important to note that judges should *not* attempt to infer maturity from alleged acts or behaviors. Instead, they should utilize an expert on the subject to provide insight on a particular youth's abilities and limitations in these critical areas.

2. Increased Potential for Reform

Similar to another major finding from the Supreme Court's "kids are different" jurisprudence, the original *Kent* criteria prescribe consideration of youth's "likelihood of reasonable rehabilitation" only after consideration of "[t]he prospects for adequate protection of the public."[98] Although both are important to the judicial waiver decision, these factors represent two unique concepts, and, therefore, they will be separated in the updated list of *Kent* factors. Given that a focus on the defendant as an individual aligns with the underlying principles of the juvenile justice system—and that the Supreme Court has often favorably cited research evidence demonstrating this idea—a youth's greater capacity for change will appear first on the updated list of factors.[99] As noted above, findings from personality and behavioral research depict adolescence as a time of transience, where youth experiment—often with risky and/or delinquent behaviors—in pursuit of an identity.[100] Over time, as they mature and take on additional responsibilities, most youth will stop engaging in these risky activities—even if those activities might have been classified as serious offenses—and, thus, such behavior does not indicate an "irretrievably depraved character."[101] To further remind decision-makers of this tendency in adolescents, the updated *Kent* criteria will make explicit reference to the greater capacity for reform among youth; the new criterion will also identify some evidence-based factors that may contribute to an individual youth's likelihood for rehabilitation to better define the concept and subsequently ease judges' decision-making.

However, two caveats must temper the discussion of a youth's potential for rehabilitation. First, although clinical evaluators and courts alike have utilized remorse and acceptance of responsibility as elements of a justice-involved youth's amenability to treatment, judges should be instructed that they may *not* find that a transfer-eligible youth's refusal to admit responsibility for the alleged offense weighs in favor of transfer:

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98. Kent v. United States, 383 U.S. 541, 567 (1966).

99. *See Miller*, 567 U.S. at 473 (noting that life without parole sentences for youth are "at odds with a child's capacity for change"); J.D.B. v. North Carolina, 564 U.S. 261, 272–73 (2011) (noting that a child's age has long been a factor in considering his or her legal capacities); *Graham*, 560 U.S. at 68 ("Juveniles are more capable of change than are adults . . . ."); *Roper*, 543 U.S. at 570 (noting that youth are often still defining their identities and therefore are less likely to have an "irretrievably depraved character"); *see also infra* Part IV.D.1 (describing how mental health issues may affect the methods courts use to work with justice-involved youth).

100. *See* Bushway, *supra* note 56, at 87 (noting that risky behavior among teenagers can change over time).

101. *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570).

doing so would be in violation of the child's right against self-incrimination.[102] Additionally, although the court should look to previous attempts at rehabilitation to help determine the likelihood of treatment success within the juvenile court system, judges should also be instructed to do more than just note whether there were prior reform efforts and, if so, how many.[103] Instead, they should consider the nature and quality of the previous attempts at rehabilitation—especially given the fact that many available programs for at-risk and justice-involved youth have not been shown to improve outcomes for youth—and look for progress and improvement on a continuum rather than in absolute terminology.

3. Incompetencies Disadvantaging Juvenile Defendants

In its more recent "kids are different" cases, the Supreme Court has referenced the ways in which "incompetencies associated with youth" can put juvenile defendants at a "disadvantage in criminal proceedings."[104] For example, youth often misinterpret the rights afforded to them during multiple stages of processing (e.g., during police interrogation), misunderstand the role of defense counsel, and demonstrate increased susceptibility to suggestion and compliance with authority figures.[105] Further, even when youth do demonstrate adequate understanding of their rights, they are less likely than adults to invoke those rights, for example by requesting a lawyer before deciding whether to speak to police.[106] Such limitations—along with youth's immature decision making, which often fails to account for long-term negative outcomes—can result in a loss of opportunity for youth to receive less severe consequences at various stages of the juvenile justice process.[107] Given that the Supreme Court has

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102. *See* Commonwealth v. Brown, 26 A.3d 485, 495 (Pa. Super. Ct. 2011) (explaining that a majority of courts find the Fifth Amendment applies to juvenile transfer hearings); *see also* In re Gault, 387 U.S. 1, 49–50 (1967) (holding that youth have a constitutional right against self-incrimination).

103. *See* Slobogin, *supra* note 80, at 314 (noting that it is not clear how much weight courts afford to past treatment attempts and their effects when making transfer decisions).

104. *Miller*, 567 U.S. at 477; *Graham*, 560 U.S. at 78.

105. *See, e.g.*, Naomi E. Sevin Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 361 (2003) (demonstrating youth's suggestibility during interrogations); Grisso, *supra* note 44, at 334, 335, 350, 355 (demonstrating that adolescents make more choices in compliance with authority figures than young adults).

106. *See, e.g.*, Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. L. 175, 177–78 (2003) (stating that many juveniles misunderstand a lawyer's role as an advocate within the judicial system).

107. For example, youth who fail to invoke their rights to silence and counsel early on may provide incriminating information to police and subsequently be charged and convicted of a more serious offense with that information. *See Miller*, 567 U.S. at 477–78 (noting that neglecting the specific

recognized these limitations and how they might coalesce to hinder effective participation for juvenile defendants,[108] it is important for judges making judicial waiver decisions to consider how such limitations—potentially further influenced by mental health, substance abuse, or intellectual disability concerns—may have affected the child's path to transfer eligibility.[109]

4. Risk Assessment Results

Several factors included in the original Policy Memorandum from *Kent* made reference to concepts that implicate modern-day risk assessment principles.[110] The updated version of the *Kent* criteria will fuse these concepts together into a new factor that aligns with major developments in risk assessment over the past fifty years. Rather than relying solely on unstructured professional judgment of perceived risks to make a determination of a youth's potential for "dangerousness" or future offending, modern psychometrically validated tools examine static and dynamic risk factors shown to influence risk for recidivism, as well as the criminogenic needs (i.e., targets for intervention that, if successfully addressed, may reduce risk of future offending) specific to the youth in question.[111] Encouraging use of these modern assessment tools should allow courts to gain a better understanding of an individual defendant, identify the best ways to provide support and reduce risk for recidivism,

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characteristics of youth offenders can result in harsher outcomes due to youth's inability to effectively interact with officers, prosecutors, and attorneys).

108. The *Miller* Court noted that youth charged with homicide crimes may have been charged and convicted of lesser crimes if not for the limitations of youth that negatively affect their ability to take advantage of opportunities available within the juvenile justice system. *Id.*

109. For example, a judge might ask: did the child provide a statement to police after only a cursory presentation of the *Miranda* rights, which he or she did not fully understand? Or, did the child's mistrust of government officials prevent him or her from honestly communicating with the court-appointed attorney? And, if so, how might those challenges have prevented the defendant from taking advantage of opportunities to avoid trial in a criminal court?

110. Kent v. United States, 383 U.S. 541, 567 (1966). For example, Factor 7 discusses a juvenile's previous offending history, Factor 8 discusses community protection, and Factor 6—under the guise of defining "sophistication and maturity"—identifies several internal and external risk and protective factors used in many validated risk assessments. *Id*.

111. D. A. Andrews & James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL'Y, & L. 39, 45–46 (2010); *see also* JAMES BONTA & D. A. ANDREWS, PUB. SAFETY CAN., RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION 4–5 (2007), http://publications.gc.ca/collections/collection_2012/sp-ps/PS3-1-2007-6-eng.pdf (explaining the fourth generation of risk assessment that incorporates dynamic criminogenic needs to help quantify and identify the factors that influence recidivism).

and determine the appropriate forum for providing such support, thereby improving community safety.[112]

IV. ADDRESSING ADDITIONAL WAIVER FACTORS FOUND IN STATE TRANSFER STATUTES

As noted above, the vast majority of jurisdictions with discretionary juvenile waiver statutes include reference to many of the original *Kent* factors.[113] However, many states have also created additional factors for judges to consider during a juvenile transfer decision—some of which have more empirical support than others.[114]

A. Consideration of a Youth's Gang Involvement

Discretionary transfer statutes in five states currently prescribe explicit consideration of a youth defendant's involvement in a criminal street

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112. It is important to note here—and perhaps in any comments accompanying the list of updated factors—that studies examining the connection between forum choice and rates of recidivism have found that youth tried in criminal court are typically *more* prone than youth tried in juvenile court to commit future delinquent or criminal acts, leading some scholars to argue that juvenile transfer fails to serve its purpose as a method of protecting the community. *See* REDDING, JUVENILE TRANSFER LAWS, *supra* note 69, at 5–6, 8 ("The practice of transferring juveniles for trial and sentencing in adult criminal court has . . . produced the unintended effect of increasing recidivism, particularly in violent offenders, and thereby of promoting life-course criminality."). Judges should keep these findings in mind when they determine whether community safety *requires* transfer.

113. *See* Podkopacz & Feld, *supra* note 89, at 83–84 (noting that several states "legislatively or judicially adopted the substantive criteria that the Supreme Court appended to its *Kent* decision…"); *see infra* App'x C (listing each state's juvenile transfer statutes, many of which include original *Kent* elements such as the nature of the crime, the past record of the juvenile, and the juvenile's maturity).

114. A review of each state's statutory transfer criteria has revealed several added factors, including consideration of: (1) any mental illness or intellectual disability the youth experiences (twelve states); (2) the extent of the youth's participation in the criminal act (ten states); (3) a youth's gang involvement (five states); (4) the victim's wishes or the impact of the offense on the victim (five states); (5) whether the child was acting alone or with others (four states); (6) whether the alleged act is part of a repetitive pattern of offenses (four states); (7) the youth's criminal sophistication (four states); (8) any psychological, probation, or institutional reports (three states); (9) history of neglect or abuse (three states); (10) whether the offense was committed on school property (two states); (11) the adequacy of punishment or services available and whether they would diminish the gravity of the offense (two states); (12) the number of alleged offenses pending against the child (two states); (13) the youth's desire to be treated as an adult (two states); (14) the youth's personality or demeanor (two states); (15) racial disparities in the transfer process (one state); (16) a child's competence to proceed in court (one state); (17) the potential rehabilitative effect of providing parenting classes or family counseling (one jurisdiction); and (18) whether the alleged offense occurred while or after escaping from an institution for delinquent children (one state). *See infra* App'x C (listing each state's specific transfer criteria).

gang.[115] States might implement such provisions under the impression that gang-involved youth are more violent than non-gang-involved youth and, therefore, are "inherently of bad moral character."[116] However, the label of "gang member" has often been applied to youth who simply live in a certain neighborhood and/or associate with certain individuals, but do not self-identify as belonging to a gang.[117] Rather than deter such youth from engaging in gang activity, prematurely labeling youth as gang members—and subsequently treating them as such—may actually encourage them to align themselves with that gang.[118]

Results of research investigating risk factors for gang involvement also suggest that implementation of "gang-transfer" provisions will likely disproportionately affect youth of color and youth from economically

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115. These states include Arizona, Kentucky, Ohio, Tennessee, and Utah. *See* ARIZ. REV. STAT. ANN. § 8-327(d)(6) (2017) (stating the court shall consider a youth's involvement with a street gang); KY. REV. STAT. ANN. § 640.010 (2)(b)(8) (2017) ("If the District Court determines probable cause exists, the court shall consider [evidence of a child's participation in a gang] before determining whether the child's case shall be transferred to the Circuit Court . . . ."); OHIO REV. CODE ANN. § 2152.12 (2017) (stating the court shall consider whether the defendant allegedly committed the act as part of a gang); TENN. CODE ANN. § 37-1-134 (2017) ("Whether the child's conduct would be a criminal gang offense . . . ."); UTAH CODE ANN. § 78A-6-703 (2017) ("[F]or the benefit of, at the direction of, or in association with any criminal street gang . . . ."). Some states find that gang-related activity is sufficient support for transfer to criminal court. *See, e.g.*, 705 ILL. COMP. STAT. 405/5-805 (2017) (explaining that if the juvenile judge finds probable cause to believe the gang-related allegation, "there is a rebuttable presumption that the minor is not a fit and proper subject" to be in juvenile court and should be transferred). North Carolina recently attempted to expand this trend, proposing legislation that would have required juvenile court judges to transfer youth 16 years or older if the alleged offense was related to his or her confirmed membership in a gang. H.R. 399, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015).

116. *See* Alexes Harris, *The Social Construction of "Sophisticated Adolescents": How Judges Integrate Juvenile and Criminal Justice Decision-Making Models*, 37 J. CONTEMP. ETHNOGRAPHY 469, 486 (2008) (finding that courts use gang activity "as [a] quick and simple assessment[] of criminal-like behavior").

117. *Id.* at 486, 502 n.13. Experts in the study of gang behaviors routinely point out that no consensus exists regarding the definition of a "gang." *See, e.g.*, Beth Bjerregaard, *Self-Definitions of Gang Membership and Involvement in Delinquent Activities*, 34 YOUTH & SOC'Y 31, 31–33 (2002) (noting that gang-member terminology in social research is inclusive of non-criminal behavior and focuses on the group-behavior aspects of a gang); Jane Wood & Emma Alleyne, *Street Gang Theory and Research: Where Are We Now and Where Do We Go from Here?*, 15 AGGRESSION & VIOLENT BEHAV. 100, 101 (2010) (providing a review on gang research and noting the difficulties in defining "gang").

118. *See* Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 263–64 (2010) (describing how adolescents are more susceptible to create gang affiliations when the police "prematurely classify[] them as gang members"). Even treating low-level or "peripheral" gang members as full-fledged, active members—for example, by transferring them to adult court and sentencing them to adult prisons—may result in a strengthened connection to the gang, whereas such peripheral members would otherwise become less involved over time as they mature. *Id.* at 264–66 (providing an example of a youth with familial connections to a gang who was assumed to be a gang member and sent to an adult jail, where he was forced to ally with gang members for protection).

disadvantaged backgrounds.[119] Further, given evidence that environmental factors often contribute to the likelihood of youth gang involvement,[120] the fact that youth are less able to remove themselves from harmful environments should direct states to ensure that their statutes account for the difficulties many youth from certain areas face when attempting to avoid gang activity.[121] Finally, research indicating that factors such as familial neglect, physical and sexual victimization, lower IQ, learning difficulties, early substance use, and mental health issues often serve as predictors of gang involvement suggests that youth in gangs likely need *more* support and rehabilitative services, not less, and, therefore, should have the opportunity to benefit from relevant programs within the juvenile system.[122]

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119. *See, e.g.*, Karl G. Hill et al., *Childhood Risk Factors for Adolescent Gang Membership: Results from the Seattle Social Development Project*, 36 J. RES. CRIME & DELINQ. 300, 301, 308 (1999) (presenting results from a study that demonstrate youth of color are more at risk for gang involvement than those of European descent); Benjamin B. Lahey et al., *Boys Who Join Gangs: A Prospective Study of Predictors of First Gang Entry*, 27 J. ABNORMAL CHILD PSYCHOL. 261, 267 (1999) (finding a higher likelihood of gang entry among African American boys than white boys); Jill D. Sharkey et al., *The Protective Influence of Gangs: Can Schools Compensate?*, 16 AGGRESSION & VIOLENT BEHAV. 45, 47 (2011) (identifying poverty as a risk factor for future gang membership); *but see* Wood & Alleyne, *supra* note 117, at 103 (cautioning against too much concentration on "areas where the socio-economically deprived and ethnic populations live," given "a danger that explanations of gang membership will be framed solely by socio-economic deprivation and ethnicity").

120. *See* Hill et al., *supra* note 119, at 308 (finding that youth ages 10–12 living in neighborhoods with increased availability of marijuana were more likely to join a gang between the ages of 13 and 16); Sharkey et al., *supra* note 119, at 46 (identifying residence in a disadvantaged neighborhood where delinquent behavior is approved, as well as family disorganization, low socioeconomic status, and economic deprivation as predictors of gang involvement); Wood & Alleyne, *supra* note 117, at 103 ("Where there are street gangs there is also likely to be poverty, . . . social disorganization . . . and low socioeconomic status."). *But see* Lahey et al., *supra* note 119, at 46 (failing to confirm earlier findings that youth from high-crime neighborhoods are more likely to join gangs).

121. As the Supreme Court noted in *Miller v. Alabama*, "children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." 567 U.S. 460, 471 (2012) (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).

122. *See, e.g.*, Hill et al., *supra* note 119, at 309, 312, 315 (finding that parental attitudes toward violence, learning disabilities, low academic achievement, and early marijuana and alcohol use were all childhood predictors of adolescent gang membership); Sharkey et al., *supra* 119, at 49 (discussing research that found youth with a history of physical maltreatment were 2.35 times more likely to join a gang; youth with a history of sexual abuse were 1.77 times more likely to join a gang; and youth with a history of both physical and sexual abuse were nearly 4 times more likely to join a gang); Wood & Alleyne, *supra* note 117, at 106 (reviewing research that identified lower IQ levels, learning difficulties, and mental health problems as risk factors for gang membership).

B. Consideration of a Youth's Personality or Demeanor

Although just two states—Alabama [123] and Wisconsin [124] —have provisions referencing the youth's personality or demeanor in their discretionary transfer statutes, specific discussion is warranted here because of the ambiguity of such terms and the potential that their application could result in a disproportionate effect on certain groups of youth. A lack of clear definition for *personality* or *demeanor* allows for subjective assessment of these factors, such that judges' opinions could vary drastically and result in opposite outcomes for similarly situated youth. [125] Additionally, examination of how these provisions are applied in Alabama and Wisconsin reveals that much of the evidence used to support a *personality* or *demeanor* determination would apply to other identified transfer factors, such as sophistication and maturity or amenability to rehabilitation. [126] Moreover, like utilizing *gang membership* as a factor to consider during the transfer decision, utilizing *demeanor* would likely result in a disproportionate number of negative outcomes (i.e., transfer to criminal court) for adolescent defendants from racial/ethnic minority backgrounds. Approximately fifty years of research investigating police contact with young people has indicated that police officers are more likely to view minority youth as disrespectful troublemakers or as having a criminal-like demeanor. [127] More recently, research has focused on juvenile court

123. ALA. CODE § 12-15-203(d) (2017).

124. WIS. STAT. § 938.18 (2017).

125. *See, e.g.*, M.W.B. v. State, 714 So. 2d 996, 1001 (Ala. Crim. App. 1996) (Cobb, J., concurring in part and dissenting in part) ("The juvenile court described the child's demeanor as 'not good,' but the probation officer stated that M.W.B. 'carried himself well' and that he is generally well liked by his peers at school."). Additionally, the ambiguity of these characteristics—combined with appellate deference—seems to allow reviewing courts to accept conclusory statements as sufficient evidence of consideration without further discussion. *See* In re Elmer J.K., III, 591 N.W.2d 176, 180 (Wis. Ct. App. 1999) (finding, without providing additional information, that the trial "court stressed that Elmer's 'motives and patterns of living . . . obviously challenge[] authority [and are] sort of an adult-type thing'").

126. *See, e.g.*, In re Juwon B., 2015 WI App 28, ¶ 7 (Wis. Ct. App. 2015) ("First, regarding the personality of the juvenile, the court acknowledged that Juwon was a 'good kid who made a mistake.' The court indicated that Juwon 'is acting as a typical 16 year old child.'"); H.A.M. v. State, 83 So. 3d 577, 580, 582 (Ala. Crim. App. 2011) ("[T]he licensed psychologist who had evaluated H.A.M. for the juvenile court's determination of whether H.A.M.'s demeanor and level of mental maturity precluded transfer . . . . He found that H.A.M. was competent, emotionally and intellectually, to stand trial as an adult."); L.L.J. v. State, 746 So. 2d 1052, 1059 (Ala. Crim. App. 1999) (noting that a letter used as evidence of the youth's demeanor "tended to suggest, among other things, that the appellant lacked remorse").

127. *See, e.g.*, Irving Piliavin & Scott Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206, 212 (1965) (concluding that police officers stopped minority youth more frequently based on delinquent stereotypes); Richard J. Lundman et al., *Police Control of Juveniles: A Replication*, 15 J.

personnel.[128] Aggregate findings suggest that probation officers are also prone to racial bias when evaluating youth's demeanor. Specifically, studies have shown that, compared to White youths, Black youths' delinquent behaviors are more often attributed to negative personality traits, and Black youths are more likely to be described as "adult-like" in nature and more culpable for their delinquent acts.[129]

Finally, research investigating the effects of trauma on youth has consistently revealed a link between trauma exposure and delinquency, as demonstrated by the fact that diagnoses of posttraumatic stress disorder (PTSD) are up to eight times more common among justice-involved youth than community youth.[130] Symptoms of PTSD often include emotional numbing, which may develop to protect the child as he or she avoids the painful emotions associated with past trauma; however, juvenile justice personnel may view this emotionlessness as a *lack of empathy or remorse*

RES. CRIME & DELINQUENCY 74, 74 (1978) (discussing rates of arrests among minority youth); Donna Bishop & Michael J. Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 445, 460–61 (Barry C. Feld & Donna M. Bishop eds., 2012) (indicating that an adolescent's external demeanor—such as a showing of hostility, noncompliance, or toughness—plays a direct role in police decision making and in an officer's observation of relevant risk factors).

128. *See* George Bridges & Sara S. Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 554 (1998) (observing court personnel's perceptions toward youth offenders); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 483 (2004) (examining "unconscious racial stereotypes of decision makers in the juvenile justice system").

129. One analysis of probation officer reports revealed that these officers describe Black and White youth differently, referring more often to negative internal personality traits for Black youth and referring more often to negative external environmental influences for White youth, even after controlling for severity of the presenting offense and prior offending history. Bridges & Steen, *supra* note 128, at 555. The authors examined narrative reports written by juvenile probation officers; as an example, they described differences in reports of two youths who committed similar crimes with two friends (i.e., first-degree robbery involving a firearm), neither of whom presented with previous criminal involvement. *Id*. at 564. The Black youth was described by his probation officer as having "unremorseful attitudes and an amoral character" and the White youth was described by his probation officer as "a victim of external circumstances." *Id.* In another study, police officers and probation officers who were subliminally exposed to words like "Harlem," "segregation," and "afro" later rated a hypothetical offender (whose race was not stated) more negatively and endorsed harsher punishments than officers who were primed with race-neutral words. *See* Graham & Lowery, *supra* note 128, at 489–90, 500 ("Officers who were induced to think about African Americans were especially likely to judge hypothetical juvenile offenders as *not* vulnerable, impressionable, gullible, and naïve.").

130. *See* JENNIFER MELTZER WOLPAW & JULIAN D. FORD, NAT'L CHILD TRAUMATIC STRESS NETWORK JUVENILE JUSTICE WORKING GRP., ASSESSING EXPOSURE TO PSYCHOLOGICAL TRAUMA AND POST-TRAUMATIC STRESS IN THE JUVENILE JUSTICE POPULATION 3 (2004) (acknowledging that "[e]stimates of the prevalence of post-traumatic stress disorder (PTSD) in the juvenile justice population vary widely depending on several key factors"). More severe PTSD symptoms have also been linked to increased frequency and severity of youth delinquency engagement. Stephen P. Becker & Patricia K. Kerig, *Posttraumatic Stress Symptoms Are Associated with the Frequency and Severity of Delinquency Among Detained Boys*, 40 J. CHILD & ADOLESCENT PSYCHOL. 765, 768–69 (2011).

or *detachment* when evaluating a youth's demeanor.[131] As a result, juvenile court judges and other personnel might instead view a child's emotional withdrawal as an indication that he or she may have suffered a significant trauma, warranting further investigation into his or her background and history. Such youth would likely be further traumatized by involvement in the criminal system and would likely benefit from specialized, trauma-informed services provided in the juvenile system.

C. Consideration of a Youth's Involvement in the Alleged Offense

Absent from the factors listed in the *Kent* appendix, reference to a youth defendant's alleged involvement in the initiating offense has been added to ten states' transfer statutes.[132] This consideration may be an important safeguard for those youth who have little involvement in the planning and/or execution of an alleged offense—although the offense itself appears criminally sophisticated—and may only be involved as a result of peer influence.[133] However, caution is warranted for implementing such factors, as courts evaluating the youth's participation in the alleged act often ignore the environment from which a youth *becomes* involved. For example, even when a child appears to be a major participant in an alleged offense, the series of events that lead up to the offense are rarely devoid of other youth or young adults, thus implicating youth's increased vulnerability to negative influences from peers.[134] Further, any "decisions"

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131. Patricia K. Kerig & Stephen P. Becker, *From Internalizing to Externalizing: Theoretical Models of the Processes Linking PTSD to Juvenile Delinquency*, *in* POSTTRAUMATIC STRESS DISORDER (PTSD): CAUSES, SYMPTOMS, AND TREATMENT 33, 37, 43, 58 (Sylvia J. Egan ed., 2010); *see also* Maureen A. Allwood et al., *Posttrauma Numbing of Fear, Detachment, and Arousal Predict Delinquent Behaviors in Early Adolescence*, 40 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 659, 666 (2011) ("Our study indicates that the detachment, unemotionality, or callousness often observed to accompany delinquent behavior may reflect trauma-related emotional numbing."); Mary E. Dankowski et al., *Affect Regulation and the Cycle of Violence Against Women: New Directions for Understanding the Process*, 21 J. FAM. VIOLENCE 327, 335 (2006) ("[C]hildren in abusive and chaotic families . . . . may not have good strategies for managing emotions such as shame, fear, rejection, sadness, or anxiety, and they may then act out aggressively and/or withdraw and turn inward.").

132. These states include Arizona, Arkansas, California, Georgia, Maryland, Michigan, Minnesota, New Jersey, Ohio, and Virginia. Similarly, four states—California, New Jersey, North Dakota, and Pennsylvania—include the youth's "criminal sophistication" as a criterion in their transfer statutes. For the specific language of these statutes, see *infra* App'x C (listing the elements of each state's transfer criteria, including the four states that feature the "criminal sophistication" criteria).

133. *See* Gaines v. State, 28 A.3d 706, 714 (Md. App. 2011) (using, as an example, "a case where a fourteen-year-old child has been induced by those older than he into acting as a lookout in an armed robbery that results in a felony murder" to illustrate the importance of courts taking note of a youth defendant's "minor and limited role" in an alleged offense).

134. *See* Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 119 (2007) (citing numerous studies demonstrating that youth are

to engage in criminal activity must be understood within the context of youth's immaturity, impulsivity, and limited ability to consider long-term consequences.[135]

D. Consideration of Promising Factors

In addition to some of the more troubling provisions described above, some states have augmented their transfer statutes with one or more of several promising factors that take into account relevant characteristics specific to justice-involved youth. Inclusion of these criteria likely protect many children from inappropriate transfer to criminal court and should become more prevalent among state transfer statutes.

1. Mental Illness or Intellectual Disability

Although judges would presumably allow a youth's mental illness or intellectual disability to inform a transfer determination, twelve states indicate the importance of this consideration by making explicit reference to it in their transfer statutes.[136] Inclusion of such a provision suggests states recognize that justice-involved youth experience significantly more mental health and intellectual disability issues than children and adolescents in the

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influenced by peers, in part, because of underdeveloped cognitive abilities); Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 120–21 (2013) (summarizing often-cited research regarding peer-group influence on juvenile delinquency).

135. *See, e.g.*, George E. Higgins et al., *Impulsivity and Offending from Childhood to Young Adulthood in the United States: A Developmental Trajectory Analysis*, 8 INT'L J. CRIM. JUST. SCI. 182, 182 (2013) (examining childhood development of impulsivity and its link to offending during adolescence and young adulthood); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 53 (1998) (discussing how adolescents, as a class, have a stronger preference for risk; assess negative consequences less unfavorably; tend to be impulsive; assess the passage of time and time periods as longer; and are more susceptible to peer pressure); Scott et al., *supra* note 6, at 222–23, 229, 231–32, 238–39 (analyzing adolescent "criminal and delinquent conduct" under a framework that acknowledges specific youth development factors); Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE CHILD. 15, 15, 20–22 (2008) (proposing a developmental model for juvenile justice policy based on scientific evidence about adolescence); Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 389 (1999) (discussing how the criminal justice system redefines crimes for youth to account for children's impulsive behavior).

136. These states include Alabama, California, Connecticut, Hawaii, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, and Wisconsin. *See infra* App'x C (listing the elements of transfer criteria concerning mental illness for each of these 12 states). Some of these states simply make reference to a child's potential mental illness or intellectual disability; other states' statutes explicitly prohibit transfer to criminal court if there are "reasonable grounds to believe the child is committable to an institution, department, or agency for individuals with an intellectual disability or mental illness . . . " ALA. CODE § 12-15-203(b) (2017).

general population.[137] Allowing a child's mental illness or intellectual disability to weigh against transfer will help states avoid sending already vulnerable youth to a criminal system in which they are far more likely to be a victim of or witness to violence.[138] Additionally, the frequent lack of programming designed to meet the unique mental health needs of juvenile offenders in adult systems further cautions against allowing courts to transfer youth with mental health disorders and/or intellectual disabilities.[139] Research indicating that youth processed in criminal court demonstrate similar rates of mental health diagnoses as youth processed in juvenile court suggests that current transfer frameworks do not adequately limit the transfer of youth with mental health or intellectual ability concerns.[140] As a result, these considerations are included in the updated version of the *Kent* factors in hopes that other states will choose to add them to their own transfer statutes.[141]

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137. Estimates of mental health disorder prevalence among children and adolescents worldwide suggest that between 25% and 33% of community youth meet criteria for at least one mental health disorder. Kathleen Ries Merikangas et al., *Epidemiology of Mental Disorders in Children and Adolescents*, 11 DIALOGUES CLINICAL NEUROSCIENCE 7, 9–10, 14 (2009). In comparison, prevalence rates of mental health disorders among justice-involved youth typically range from about 45% to 75%. *See, e.g.*, Jennie L. Shufelt & Joseph J. Cocozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study*, NAT'L CTR. FOR MENTAL HEALTH & JUV. JUST. 1, 3, 5 (June 2006), https://www.ncmhjj.com/resources/youth-mental-health-disorders-juvenile-justice-system-results-multi-state-prevalence-study/ (asserting that decisions about effective intervention with justice-involved youth should consider the fact that these youth demonstrate significantly high rates of mental health issues); Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1133 (2002) (concluding substantial psychiatric morbidity exists among juvenile detainees); Gail A. Wasserman et al., *Gender Differences in Psychiatric Disorders at Probation Intake*, 95 AM. J. PUB. HEALTH 131, 134, 136 (2005) (citing to specific mental and physical characteristics of juveniles with conduct problems). Similarly, national estimates suggest that approximately 1.6% of school-age children have an intellectual disability diagnosis, compared to a justice-involved youth prevalence somewhere between 3.4% and 12.6%. ROBERT B. RUTHERFORD, JR. ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 18 (2002), https://files.eric.ed.gov/fulltext/ED471213.pdf.

138. *See* Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 227, 258–59 (Jeffrey Fagan & Donald Zimring eds., 2000) (discussing studies indicating that youth transferred to the criminal system lack the experience to cope with a predatory environment).

139. *See* Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE & JUV. JUST. 128, 139–44 (2003) [hereinafter Redding, *Effects*] (finding that adult correctional facilities generally failed to address the needs of incarcerated juveniles).

140. *See, e.g.*, Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 PSYCHIATRIC SERVICES 965, 969 (2008) (finding that 66% of youth processed in criminal court met criteria for at least one psychiatric disorder, compared to 68% of youth processed in juvenile court).

141. *See infra* App'x B (including mental health, intellectual disability, and substance dependence concerns in the updated list of *Kent* factors).

2. History of Neglect or Abuse

Three states have created a specific transfer criterion dedicated to a youth defendant's history of neglect or abuse.[142] Mandating judicial consideration of this issue ensures that courts inquire about the existence of such a history, which affects justice-involved youth with significant frequency.[143] Given the long-term negative impacts of childhood trauma on neurological and psychosocial development, contemplation of youth's experiences of abuse and neglect is fundamental to a comprehensive, individualized assessment.[144] As a result, youth with a reported history of neglect or abuse should receive additional assessment prior to a transfer decision to investigate the extent of this history, the degree to which it may have affected the child's development, and his or her need for trauma-informed care. To address the growing need for specialized treatment in this area, juvenile justice systems across the country have been enhancing their commitment to provide trauma-informed services.[145] Such changes to juvenile systems—combined with the lack of similar programming and the increased likelihood of retraumatization in the adult system—suggest that

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142. These states include California, Illinois, and New Jersey. *See infra* App'x C (providing the language from each of these states' waiver provisions).

143. *See* Carly B. Dierkhising et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Guild Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY (2013), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3714673/ (noting that 49.4% of justice-involved youth surveyed reported emotional abuse victimization; 38.6% reported physical abuse victimization; 30% reported experiencing neglect; and about 25% reported sexual abuse victimization).

144. Children with histories of abuse and/or neglect often present with significantly underdeveloped regions of the brain compared to age- and gender-matched children without such histories. *See* Frank W. Putnam, *The Impact of Trauma on Child Development*, 57 JUV. & FAM. CT. J. 1, 7, 11 (2006) (noting differences in overall brain size as well as in the corpus callosum, the frontal lobes, and the anterior cingulate gyrus). Further research suggests that cortisol—a potent stress hormone—increases circulation with repeated stress and trauma so much that it damages neurons in various regions of the brain. *Id.* at 7.

145. *See* Ed Finkel, *Juvenile Jails Adopting ACE and Trauma-Informed Practices*, ACES TOO HIGH (Mar. 29, 2015), http://acestoohigh.com/2015/03/29/juvenile-jails-adopting-ace-and-trauma-informed-practices/ (discussing state, local, and private efforts to treat youth with a history of trauma); *see also* CARLY B. DIERKHISING ET AL., NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA-INFORMED JUVENILE JUSTICE ROUNDTABLE: CURRENT ISSUES AND NEW DIRECTIONS IN CREATING TRAUMA-INFORMED JUVENILE JUSTICE SYSTEMS 2–3 (2013) (discussing the importance of educating stakeholders and providing skills-based trauma training for the benefit of individuals within the juvenile justice system); SHAWN C. MARSH ET AL., NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, PREPARING FOR A TRAUMA CONSULTATION IN YOUR JUVENILE AND FAMILY COURT (2015) (outlining a "trauma consultation protocol for juvenile and family court settings"); AM. BAR ASS'N HOUSE OF DELEGATES, ABA POLICY ON TRAUMA-INFORMED ADVOCACY FOR CHILDREN AND YOUTH 2–3 (2014), http://www.americanbar.org/content/dam/aba/administrative/child_law/ABA%20Policy%20on%20Trauma-Informed%20Advocacy.authcheckdam.pdf ("[T]he American Bar Association urges the development of trauma-informed, evidence-based approaches and practices on behalf of justice system-involved children and youth who have been exposed to violence….").

youth with a history of trauma will be better served in the juvenile courts.[146] Accordingly, this consideration should weigh *against* transfer to the criminal system.[147]

3. Rehabilitative Effect of Providing Family-related Services

The District of Columbia includes a provision in its transfer statute that instructs judges to consider the "potential rehabilitative effect on the child of providing parenting classes or family counseling for one or more members of the child's family or for the child's caregiver or guardian."[148] Although other jurisdictions adopt wording from the original *Kent* factors regarding the "likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court," [149] this explicit reference to family-related services indicates recognition of the significant influence a child's home and familial environment has on his or her behavior.[150] Further, this provision suggests an understanding that providing evidence-based counseling services for justice-involved youth and their families typically reduces recidivism.[151] Such a provision also ensures that judges adequately consider

146. *See* Redding, *Effects*, *supra* note 139, at 143–44 ("Once juveniles are incarcerated in adult prison, they typically receive fewer age-appropriate rehabilitative, medical, mental health, and educational services than they would in a juvenile facility and are at far greater risk for physical abuse, sexual abuse, and suicide.").

147. *See infra* App'x B (listing the updated *Kent* factors, including an explicit reference to trauma history that could be better treated in the juvenile system).

148. D.C. CODE § 16-2307(e)(6) (2018). This provision was added to the statute as part of the Parental Responsibility Amendment Act of 1994, which also provided D.C. courts with the "explicit discretionary authority to order parenting classes and family counseling as deemed necessary in aid of its jurisdiction over children involved in neglect, delinquency, and person in need of supervision proceedings." § 10-227 (1994).

149. Kent v. United States, 383 U.S. 541, 567 (1966).

150. *See* David P. Farrington, *Family Influences on Delinquency*, *in* JUVENILE JUSTICE AND DELINQUENCY, 203, 207–14 (David W. Springer & Albert R. Roberts eds., 2011) (summarizing research that suggests family-related factors, such as poor supervision, poor discipline, parental conflict, parental stress, and parental substance abuse, often predict youth delinquency); Joan McCord, *Family Relationships, Juvenile Delinquency, and Adult Criminality*, 29 CRIMINOLOGY 397, 411–12 (finding that parents' provision of consistent, nonpunitive discipline, affection, and high expectations for youth reduced the probability of juvenile delinquency); JULIE SAVIGNAC, FAMILIES, YOUTH AND DELINQUENCY: THE STATE OF KNOWLEDGE, AND FAMILY-BASED JUVENILE DELINQUENCY PREVENTION PROGRAMS 3–6 (2009), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/fmls-yth-dlnqnc/fmls-yth-dlnqnc-eng.pdf (identifying several negative characteristics of family functioning and family structure as risk factors for juvenile delinquency) .

151. *See* Leah Brogan et al., *Applying the Risk-Needs-Responsivity (RNR) Model to Juvenile Justice*, 40 CRIM. JUST. REV. 277, 286–88 (2015) (identifying three promising family-based interventions to reduce youth delinquency); Michelle Evans-Chase & Huiquan Zhou, *A Systematic Review of the Juvenile Justice Intervention Literature: What It Can (and Cannot) Tell Us About What*

the relevant treatment options available to the juvenile court that would improve youth's chances at rehabilitation, thus encouraging them to keep young defendants under juvenile court jurisdiction.[152]

4. Racial Disparities in Transfer Decisions

Despite a nearly thirty-year effort to reduce disproportionate minority contact (DMC) within the juvenile justice system,[153] research still typically reveals disparities between White and racial/ethnic minority youth at nearly all contact points of juvenile justice system involvement,[154] including transfer to criminal court.[155] Missouri's transfer statute appears to attempt addressing this disproportionality, as it instructs judges to consider "[r]acial disparity in certification" when making a transfer determination.[156]

Works with Delinquent Youth, 60 CRIME & DELINQ. 451, 460–64 (2012) (describing several best practices for interventions to reduce recidivism, including therapeutic services directed at youth and their families); Scott W. Henggeler & Ashli J. Sheidow, *Empirically Supported Family-Based Treatments for Conduct Disorder and Delinquency in Adolescents*, 38 J. MARITAL & FAM. THERAPY 30, 34, 36–37 (2012) (reviewing the breadth of successful family-based treatments of conduct disorder and delinquency in adolescents).

152. Factors 2 and 5 of the updated *Kent* criteria include "whether the child could benefit from treatment or rehabilitative programs available to the juvenile court" and "available resources that might provide additional support to the youth and thereby facilitate rehabilitation within the juvenile system." *See infra* App'x B (listing a version of the *Kent* factors that has been updated to align with existing social science research).

153. *See* Andrea R. Coleman, *A Disproportionate Minority Contact (DMC) Chronology: 1988 to Date*, OFF. JUV. JUST. & DELINQ. PREVENTION, http://www.ojjdp.gov/dmc/chronology.html (last visited Apr. 17, 2018) (tracking the efforts to address disproportionate minority contact since 1988).

154. Such contact points include arrest, diversion, and disposition decisions. *See, e.g.*, Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, *in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 29, 33, 48 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (discussing in detail how each point of contact with the judicial system features racial disparities); Kimberly Kempf-Leonard, *Minority Youths and Juvenile Justice: Disproportionate Minority Contact After Nearly 20 Years of Reform Efforts*, 5 YOUTH VIOLENCE & JUV. JUST. 71, 73 (2007) (noting that African American youths are overrepresented during all but one stage of the juvenile justice system, and that disparity becomes more drastic for violent delinquent offenses); Alex R. Piquero, *Disproportionate Minority Contact*, 18 FUTURE CHILD. 59, 61–62 (2008) (discussing how youth of color are found in disproportionate numbers at every stage of the juvenile justice system).

155. *See, e.g.*, PATRICIA ALLARD & MALCOLM YOUNG, THE SENTENCING PROJECT, PROSECUTING JUVENILES IN ADULT COURT: PERSPECTIVES FOR POLICYMAKERS AND PRACTITIONERS 9 (2002) (finding that 67% of juvenile defendants in adult court are Black); Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 FUTURE CHILD. 81, 98 (2008) (demonstrating racial disparities in juvenile transfer decisions); Marisa Slaten, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 841–44 (2003) (articulating several different theories explaining racial disparities within the juvenile justice system).

156. MO. ANN. STAT. § 211.071(6)(10) (2017). This provision was added to the statute in 1995; one sponsor of the amendment reported that the legislature meant to encourage judges to consider "the factors that might have resulted in different treatment of the individual before them, and hopefully lead[]

Although judges making transfer decisions likely do not intentionally discriminate against youth of color, such a provision would likely remind judges of existing racial/ethnic disparities throughout the juvenile system. Thus, this provision might encourage judges to consider the potential for such disparities to have negative effects on youth at earlier points of contact (i.e., prior to his or her appearance at the transfer hearing), and to be mindful of propagating such disproportionality when making their transfer decisions.

CONCLUSION

As the debate rages on regarding the appropriate method for transferring justice-involved youth into criminal court—or even whether the practice should exist at all—thousands of juvenile defendants each year will continue to face judicial waiver proceedings.[157] In most states, the judges presiding over these proceedings will utilize decision-making criteria appended to a Supreme Court decision from more than fifty years ago.[158] Updating those criteria to keep pace with the substantial progress made in the field of adolescent development research over the past few decades will properly align judicial waiver standards with insight into adolescent capacities gained from behavioral science research and work to continue the juvenile justice system's tradition of individualized, rehabilitation-focused determinations.

APPENDIX A: POLICY MEMORANDUM INCLUDED IN THE *KENT* APPENDIX[159]

The authority of the Judge of the Juvenile Court of the District of Columbia to waive or transfer jurisdiction to the U.S. District Court for the District of Columbia is contained in the Juvenile Court Act (§ 11–914 D.C. Code, 1951 Ed.). This section permits the Judge to waive jurisdiction "after full investigation" in the case of any child "sixteen years of age or older [who is] charged with an offense which would amount to a felony in the

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to more results where race was not a deciding factor in the certification decision." Kenneth J. Cooper, *Despite Law on Racial Disparities, Black Teens Are Overly Tried as Adults*, ST. LOUIS BEACON (May 10, 2011), http://law.wustl.edu/clinicaled/documents/CJC-JR-REP/Beacon-051011-CertificationDisparities.pdf (including quotes from former representative Steve Gaw, a sponsor of the amendment that added this provision to the statute).

157. *See* CAMPAIGN FOR YOUTH JUSTICE, *supra* note 69, at 3 ("200,000 youth are tried, sentenced, or incarcerated as adults every year across the United States.").

158. *See supra* Part III (introducing the *Kent* criteria and how they were integrated into the juvenile system).

159. Kent v. United States, 383 U.S. 541, 565–68 (1966).

case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment."

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U.S. District Court for the District of Columbia, to the United States Attorney and his assistants, and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U.S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U.S. District Court for the District of Columbia for trial under the adult procedures of that Court.

APPENDIX B: UPDATED *KENT* FACTORS

1. Whether the juvenile—like most youth—lacks sophistication and maturity, especially in the areas of future planning, impulse control, and vulnerability to negative influence and outside pressures.

2. The juvenile's potential for reform (i.e., whether the child could benefit from treatment or rehabilitative programs available to the juvenile court). Assessment of this factor may include motivation for treatment, empathy, and acceptance of responsibility generally; however, requiring a defendant to admit responsibility for the alleged offense to demonstrate amenability to treatment would violate the child's Fifth Amendment right against self-incrimination.

3. The nature of, response to, and effect of prior treatment efforts, whether in or out of the juvenile justice system. The fact that the youth was exposed to some form of "prior treatment" may not be enough—judges should specifically consider the methods attempted and ensure that the youth did not receive treatment in name only.

4. Individual limitations that could affect the child's abilities as a defendant (i.e., lack of competence; misunderstanding of legal rights and procedures; and increased suggestibility), the presence of which should weigh against transfer to criminal court. Similarly, judges should consider whether past traumas (i.e., a history of neglect or abuse), mental health concerns, substance dependence issues, and/or intellectual disabilities exist for the child and could be better treated in the juvenile system.

5. Whether assessments identifying both risk factors for future offending and protective factors that reduce the likelihood of future offending suggest that community protection requires waiver. Such assessments should also consider available resources that might provide additional support to the youth and thereby facilitate rehabilitation within the juvenile system.

6. The seriousness of the alleged offense and whether it was against persons or against property. Assessment of this factor might also include consideration of the youth's alleged level of planning and/or participation in the offense.

APPENDIX C: TRANSFER CRITERIA ACROSS THE UNITED STATES

STATE	**STATUTE**	**TRANSFER CRITERIA**
Alabama	ALA. CODE § 12-15-203 (2017).	(d) Evidence of the following and other relevant factors shall be considered in determining whether the motion shall be granted: (1) The nature of the present alleged offense. (2) The extent and nature of the prior delinquency record of the child. (3) The nature of past treatment efforts and the nature of the response of the child to the efforts. (4) Demeanor. (5) The extent and nature of the physical and mental maturity of the child. (6) The interests of the community and of the child requiring that the child be placed under legal restraint or discipline. [Subsection (b) requires that there be no reasonable grounds to believe that a transferred child could be committed to an institution, department, or agency for intellectual disability or mental health reasons; subsection (f) requires the judge to state the reasons for transfer, including a finding of probable cause]

Alaska	ALASKA STAT. § 47.12.100 (2017).	(a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as an adult. (b) A minor is unamenable to treatment under this chapter if the minor probably cannot be rehabilitated by treatment under this chapter before reaching 20 years of age. In determining whether a minor is unamenable to treatment, the court may consider the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the department for treating the minor.
Arizona	ARIZ. REV. STAT. ANN. § 8-327 (2017).	C. If the judge finds by a preponderance of the evidence that probable cause exists to believe that the offense was committed, that the juvenile committed the offense and that the public safety would best be served by the transfer of the juvenile for criminal prosecution, the judge shall order that the juvenile be transferred for criminal prosecution to the appropriate court having jurisdiction of the offense. The judge shall state on the record the reasons for transferring or not transferring the juvenile for criminal prosecution. D. The court shall consider the following factors in determining if the public safety would be served by the transfer of a juvenile for criminal prosecution: 1. The seriousness of the offense

		involved. 2. The record and previous history of the juvenile, including previous contacts with the courts and law enforcement, previous periods of any court ordered probation and the results of that probation. 3. Any previous commitments of the juvenile to juvenile residential placements and secure institutions. 4. If the juvenile was previously committed to the department of juvenile corrections for a felony offense. 5. If the juvenile committed another felony offense while the juvenile was a ward of the department of juvenile corrections. 6. If the juvenile committed the alleged offense while participating in, assisting, promoting or furthering the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise. 7. The views of the victim of the offense. 8. If the degree of the juvenile's participation in the offense was relatively minor but not so minor as to constitute a defense to prosecution. 9. The juvenile's mental and emotional condition. 10. The likelihood of the juvenile's reasonable rehabilitation through the use of services and facilities that are currently available to the juvenile court.
Arkansas	ARK. CODE ANN. § 9-27-318 (2017).	(g) In the transfer hearing, the court shall consider all of the following factors: (1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court; (2) Whether the alleged offense was

		committed in an aggressive, violent, premeditated, or willful manner; (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted; (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense; (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence; (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult; (7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday; (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense; (9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and (10) Any other factors deemed relevant by the judge.
California	CAL. WELF. & INST. CODE § 707(a)(2) (2017).	(2) [T]he juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. In making its decision, the court shall consider the [following] criteria . . . . [:] (A)(i) The degree of criminal

		sophistication exhibited by the minor. (ii) When evaluating the criterion specified in clause (i), the juvenile court may give weight to any relevant factor, including, but not limited to, the minor's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor's actions, and the effect of the minor's family and community environment and childhood trauma on the minor's criminal sophistication. (B)(i) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. (ii) [T]he juvenile court may give weight to any relevant factor, including, but not limited to, the minor's potential to grow and mature. (C)(i) The minor's previous delinquent history. (ii) [T]he juvenile court may give weight to any relevant factor, including, but not limited to, the seriousness of the minor's previous delinquent history and the effect of the minor's family and community environment and childhood trauma on the minor's previous delinquent behavior. (D)(i) Success of previous attempts by the juvenile court to rehabilitate the minor. (ii) [T]he juvenile court may give weight to any relevant factor, including, but not limited to, the adequacy of the services previously provided to address the minor's needs. (E)(i) The circumstances and gravity of the offense alleged in the petition to

		have been committed by the minor. (ii) [T]he juvenile court may give weight to any relevant factor, including, but not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development.
Colorado	COLO. REV. STAT. § 19-2-518 (2017).	(3) At the transfer hearing, the court shall consider: (a) Whether there is probable cause to believe that the juvenile has committed a delinquent act for which waiver of juvenile court jurisdiction over the juvenile and transfer to the district court may be sought pursuant to subsection (1) of this section; and (b) Whether the interests of the juvenile or of the community would be better served by the juvenile court's waiving its jurisdiction over the juvenile and transferring jurisdiction over him or her to the district court. (4)(b) In considering whether or not to waive juvenile court jurisdiction over the juvenile, the juvenile court shall consider the following factors: (I) The seriousness of the offense and whether the protection of the community requires isolation of the juvenile beyond that afforded by juvenile facilities; (II) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (III) Whether the alleged offense was against persons or property, greater weight being given to offenses against persons; (IV) The maturity of the juvenile as determined by considerations of the juvenile's home, environment, emotional

		attitude, and pattern of living; (V) The record and previous history of the juvenile; (VI) The likelihood of rehabilitation of the juvenile by use of facilities available to the juvenile court; (VII) The interest of the community in the imposition of a punishment commensurate with the gravity of the offense; (VIII) The impact of the offense on the victim; (IX) That the juvenile was twice previously adjudicated a delinquent juvenile for delinquent acts that constitute felonies; (X) That the juvenile was previously adjudicated a juvenile delinquent for a delinquent act that constitutes a crime of violence, as defined in section 18-1.3-406, C.R.S.; (XI) That the juvenile was previously committed to the department of human services following an adjudication for a delinquent act that constitutes a felony; (XII) That the juvenile is sixteen years of age or older at the time of the offense and the present act constitutes a crime of violence, as defined in section 18-1.3-406, C.R.S.; (XIII) That the juvenile is sixteen years of age or older at the time of the offense and has been twice previously adjudicated a juvenile delinquent for delinquent acts against property that constitute felonies; and (XIV) That the juvenile used, or possessed and threatened the use of, a deadly weapon in the commission of a delinquent act.
Connecticut	CONN. GEN.	(b)(1) The court shall not order that the

	STAT. § 46b-127(b)(1) (2017).	case be transferred under this subdivision unless the court finds that (A) such offense was committed after such child attained the age of fifteen years, (B) there is probable cause to believe the child has committed the act for which the child is charged, and (C) the best interests of the child and the public will not be served by maintaining the case in the superior court for juvenile matters. In making such findings, the court shall consider (i) any prior criminal or juvenile offenses committed by the child, (ii) the seriousness of such offenses, (iii) any evidence that the child has intellectual disability or mental illness, and (iv) the availability of services in the docket for juvenile matters that can serve the child's needs.
Delaware	DEL. CODE ANN. tit. 10, § 1010 (2017).	(c)(1) In determining whether a child is amenable to the rehabilitative processes of the Court, the Court shall take into consideration, among others, the following factors which are deemed to be nonexclusive: a. Whether, in view of the age and other personal characteristics of the child, the people of Delaware may best be protected and the child may best be made a useful member of society by some form of correctional treatment which the Family Court lacks power to assign; or b. Whether it is alleged death or serious personal injury was inflicted by the child upon anyone in the course of commission of the offense or in immediate flight therefrom; or c. Whether the child has been convicted of any prior criminal offense; or d. Whether the child has previously been subjected to any form of correctional treatment by the Family Court; or

		e. Whether it is alleged a dangerous instrument was used by the child; or f. Whether other participants in the same offense are being tried as adult offenders.
District of Columbia	D.C. CODE § 16-2307 (2017).	(d)(2)(A) The Division shall order the transfer if it determines that it is in the interest of the public welfare and protection of the public security and there are no reasonable prospects for rehabilitation of the child. (e) Evidence of the following factors shall be considered in determining whether there are reasonable prospects for rehabilitating a child prior to his majority and whether it is in the interest of the public welfare to transfer for criminal prosecution: (1) the child's age; (2) the nature of the present offense and the extent and nature of the child's prior delinquency record; (3) the child's mental condition; (4) the child's response to past treatment efforts including whether the child has absconded from the legal custody of the Mayor or a juvenile institution; (5) the techniques, facilities, and personnel for rehabilitation available to the Division and to the court that would have jurisdiction after transfer; and (6) The potential rehabilitative effect on the child of providing parenting classes or family counseling for one or more members of the child's family or for the child's caregiver or guardian.
Florida	FLA. STAT. § 985.556 (2017).	(c) The court shall conduct a hearing on all transfer request motions for the purpose of determining whether a child should be transferred. In making its determination, the court shall consider:

		1. The seriousness of the alleged offense to the community and whether the protection of the community is best served by transferring the child for adult sanctions. 2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner. 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted. 4. The probable cause as found in the report, affidavit, or complaint. 5. The desirability of trial and disposition of the entire offense in one court when the child's associates in the alleged crime are adults or children who are to be tried as adults. 6. The sophistication and maturity of the child. 7. The record and previous history of the child, including: a. Previous contacts with the department, the Department of Corrections, the former Department of Health and Rehabilitative Services, the Department of Children and Families, other law enforcement agencies, and courts; b. Prior periods of probation; c. Prior adjudications that the child committed a delinquent act or violation of law, greater weight being given if the child has previously been found by a court to have committed a delinquent act or violation of law involving an offense classified as a felony or has twice previously been found to have committed a delinquent act or violation of law involving an offense classified as a misdemeanor; and d. Prior commitments to institutions.

		8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child, if the child is found to have committed the alleged offense, by the use of procedures, services, and facilities currently available to the court.
Georgia	GA. CODE ANN. § 15-11-562 (2017).	(a) The criteria that the juvenile court shall consider in determining whether to transfer an alleged delinquent child . . . to superior court . . . includes, but shall not be limited to: (1) The age of such child; (2) The seriousness of the alleged offense, especially if personal injury resulted; (3) Whether the protection of the community requires transfer of jurisdiction; (4) Whether the alleged offense involved violence or was committed in an aggressive or premeditated manner; (5) The impact of the alleged offense on the alleged victim, including the permanence of any physical or emotional injury sustained, health care expenses incurred, and lost earnings suffered; (6) The culpability of such child including such child's level of planning and participation in the alleged offense; (7) Whether the alleged offense is a part of a repetitive pattern of offenses which indicates that such child may be beyond rehabilitation in the juvenile justice system; (8) The record and history of such child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions, and other placements; (9) The sophistication and maturity of such child as determined by consideration

		of his or her home and environmental situation, emotional condition, and pattern of living; (10) The program and facilities available to the juvenile court in considering disposition; and (11) Whether or not a child can benefit from the treatment or rehabilitative programs available to the juvenile court.
Hawaii	HAW. REV. STAT. § 571-22 (2017).	(a) The court may waive jurisdiction and order a minor or adult held for criminal proceedings after full investigation and hearing where . . . the court finds that: (1) There is no evidence the person is committable to an institution for individuals with intellectual disabilities or the mentally ill; (2) The person is not treatable in any available institution or facility within the State designed for the care and treatment of children; or (3) The safety of the community requires that the person be subject to judicial restraint for a period extending beyond the person's minority. (c) The factors to be considered in deciding whether jurisdiction should be waived under subsection (a) or (b) are as follows: (1) The seriousness of the alleged offense; (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or wilful manner; (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted; (4) The desirability of trial and disposition of the entire offense in one

		court when the minor's associates in the alleged offense are adults who will be charged with a crime; (5) The sophistication and maturity of the minor as determined by consideration of the minor's home, environmental situation, emotional attitude, and pattern of living; (6) The record and previous history of the minor, including previous contacts with the family court, other law enforcement agencies, courts in other jurisdictions, prior periods of probation to the family court, or prior commitments to juvenile institutions; (7) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the minor (if the minor is found to have committed the alleged offense) by the use of procedures, services, and facilities currently available to the family court; and (8) All other relevant matters.
Idaho	IDAHO CODE 5 § 20-508 (2017).	(8) In considering whether or not to waive juvenile court jurisdiction over the juvenile, the juvenile court shall consider the following factors: (a) The seriousness of the offense and whether the protection of the community requires isolation of the juvenile beyond that afforded by juvenile facilities; (b) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (c) Whether the alleged offense was against persons or property, greater weight being given to offenses against persons; (d) The maturity of the juvenile as determined by considerations of his home, environment, emotional attitude, and pattern of living; (e) The juvenile's record and previous

		history of contacts with the juvenile corrections system; (f) The likelihood that the juvenile will develop competency and life skills to become a contributing member of the community by use of facilities and resources available to the court; (g) The amount of weight to be given to each of the factors listed in subsection (8) of this section is discretionary with the court, and a determination that the juvenile is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one (1) or a combination of the factors set forth within this section, which shall be recited in the order of waiver.
Illinois	705 ILL. COMP. STAT. 405/5-805 (2017).	(3) Discretionary transfer. (a) If a petition alleges commission by a minor 13 years of age or over of an act that constitutes a crime under the laws of this State and, on motion of the State's Attorney to permit prosecution of the minor under the criminal laws, a Juvenile Judge assigned by the Chief Judge of the Circuit to hear and determine those motions, after hearing but before commencement of the trial, finds that there is probable cause to believe that the allegations in the motion are true and that it is not in the best interests of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws. (b) In making its determination on the motion to permit prosecution under the criminal laws, the court shall consider among other matters: (i) the age of the minor; (ii) the history of the minor, including: (A) any previous delinquent or

		criminal history of the minor, (B) any previous abuse or neglect history of the minor, and (C) any mental health, physical, or educational history of the minor or combination of these factors; (iii) the circumstances of the offense, including: (A) the seriousness of the offense, (B) whether the minor is charged through accountability, (C) whether there is evidence the offense was committed in an aggressive and premeditated manner, (D) whether there is evidence the offense caused serious bodily harm, (E) whether there is evidence the minor possessed a deadly weapon; (iv) the advantages of treatment within the juvenile justice system including whether there are facilities or programs, or both, particularly available in the juvenile system; (v) whether the security of the public requires sentencing under Chapter V of the Unified Code of Corrections: (A) the minor's history of services, including the minor's willingness to participate meaningfully in available services; (B) whether there is a reasonable likelihood that the minor can be rehabilitated before the expiration of the juvenile court's jurisdiction; (C) the adequacy of the punishment or services. In considering these factors, the court shall give greater weight to the seriousness of the alleged offense, and the minor's prior record of delinquency than to the other factors listed in this subsection.

Indiana	IND. CODE § 31-30-3-2 (2017).	Sec. 2. Upon motion of the prosecuting attorney and after full investigation and hearing, the juvenile court may waive jurisdiction if it finds that: (1) the child is charged with an act that is a felony: (A) that is heinous or aggravated, with greater weight given to acts against the person than to acts against property; or (B) that is a part of a repetitive pattern of delinquent acts, even though less serious; (2) the child was at least fourteen (14) years of age when the act charged was allegedly committed; (3) there is probable cause to believe that the child committed the act; (4) the child is beyond rehabilitation under the juvenile justice system; and (5) it is in the best interests of the safety and welfare of the community that the child stand trial as an adult.
Iowa	IOWA CODE § 232.45 (2017).	6. At the conclusion of the waiver hearing the court may waive its jurisdiction over the child for the alleged commission of the public offense for the purpose of prosecution of the child as an adult if all of the following apply: a. The child is fourteen years of age or older. b. The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute the public offense. c. The court determines that the state has established that there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction over the child and the child is adjudicated to have

		committed the delinquent act, and that waiver of the court's jurisdiction over the child for the alleged commission of the public offense would be in the best interests of the child and the community. 7. a. At the conclusion of the waiver hearing and after considering the best interests of the child and the best interests of the community the court may, in order that the child may be prosecuted as a youthful offender, waive its jurisdiction over the child if all of the following apply: (1) The child is twelve through fifteen years of age or the child is ten or eleven years of age and has been charged with a public offense that would be classified as a class "A" felony if committed by an adult. (2) The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute a public offense under section 232.8, subsection 1, paragraph "c", notwithstanding the application of that paragraph to children aged sixteen or older. (3) The court determines that the state has established that there are not reasonable prospects for rehabilitating the child, prior to the child's eighteenth birthday, if the juvenile court retains jurisdiction over the child and the child enters into a plea agreement, is a party to a consent decree, or is adjudicated to have committed the delinquent act. b. The court shall retain jurisdiction over the child for the purpose of determining whether the child should be released from detention under section 232.23. If the court has been apprised of conditions of an agreement between the

		county attorney and the child which resulted in a motion for waiver for purposes of the child being prosecuted as a youthful offender, and the court finds that the conditions are in the best interests of the child, the conditions of the agreement shall constitute conditions of the waiver order. 8. In making the determination required by subsection 6, paragraph "c", the factors which the court shall consider include but are not limited to the following: a. The nature of the alleged delinquent act and the circumstances under which it was committed. b. The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts. c. The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult. 9. In making the determination required by subsection 7, paragraph "a", subparagraph (3), the factors which the court shall consider include but are not limited to the following: a. The nature of the alleged delinquent act and the circumstances under which it was committed. b. The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.

		c. The age of the child, the programs, facilities, and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities, and personnel which would be available to the district court after the child reaches the age of eighteen in the event the child is given youthful offender status.
Kansas	KAN. STAT. ANN. § 38-2347 (2017).	(d) In determining whether or not prosecution as an adult should be authorized or designating the proceeding as an extended jurisdiction juvenile prosecution, the court shall consider each of the following factors: (1) The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult or designating the proceeding as an extended jurisdiction juvenile prosecution; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against a person or against property. Greater weight shall be given to offenses against persons, especially if personal injury resulted; (4) the number of alleged offenses unadjudicated and pending against the juvenile; (5) the previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender under this code or the Kansas juvenile justice code and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence; (6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living or

		desire to be treated as an adult; (7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction under this code; and (8) whether the interests of the juvenile or of the community would be better served by criminal prosecution or extended jurisdiction juvenile prosecution.
Kentucky	KY. REV. STAT. ANN. § 640.010 (2017).	(a) At the preliminary hearing, the court shall determine if there is probable cause to believe that an offense was committed, that the child committed the offense, and that the child is of sufficient age and has the requisite number of prior adjudications, if any, necessary to fall within the purview of KRS 635.020. (b) If the District Court determines probable cause exists, the court shall consider the following factors before determining whether the child's case shall be transferred to the Circuit Court: 1. The seriousness of the alleged offense; 2. Whether the offense was against persons or property, with greater weight being given to offenses against persons; 3. The maturity of the child as determined by his environment; 4. The child's prior record; 5. The best interest of the child and community; 6. The prospects of adequate protection of the public; 7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system; and 8. Evidence of a child's participation

		in a gang.
Louisiana	LA. CHILD. CODE ANN. art. 862(A) (2017).	A. In order for a motion to transfer a child to be granted, the burden shall be upon the state to prove all of the following: (1) Probable cause exists that the child meets the requirements of Article 857. (2) By clear and convincing proof, there is no substantial opportunity for the child's rehabilitation through facilities available to the court, based upon the following criteria: (a) The age, maturity, both mental and physical, and sophistication of the child. (b) The nature and seriousness of the alleged offense to the community and whether the protection of the community requires transfer. (c) The child's prior acts of delinquency, if any, and their nature and seriousness. (d) Past efforts at rehabilitation and treatment, if any, and the child's response. (e) Whether the child's behavior might be related to physical or mental problems. (f) Techniques, programs, personnel, and facilities available to the juvenile court which might be competent to deal with the child's particular problems.
Maine	ME. REV. STAT. ANN. tit. 15, § 3101(4) (2017).	D. The Juvenile Court shall consider the following factors in deciding whether to bind a juvenile over for prosecution as an adult: (1) Seriousness of the crime: the nature and seriousness of the offense with greater weight being given to offenses against the person than against property; whether the offense was committed in an aggressive, violent, premeditated or intentional manner; (2) Characteristics of the juvenile: the record and previous history of the juvenile;

		the age of the juvenile; the juvenile's emotional attitude and pattern of living; (3) Public safety: whether the protection of the community requires commitment of the juvenile for a period longer than the greatest commitment authorized; whether the protection of the community requires commitment of the juvenile to a facility that is more secure than any dispositional alternative under section 3314; and (4) Dispositional alternatives: whether future criminal conduct by the juvenile will be deterred by the dispositional alternatives available; whether the dispositional alternatives would diminish the gravity of the offense. E. The Juvenile Court shall bind a juvenile over for prosecution as an adult if it finds: (1) That there is probable cause to believe that a juvenile crime has been committed that would constitute murder or a Class A, Class B or Class C crime if the juvenile involved were an adult and that the juvenile to be bound over committed it; and (2) After a consideration of the seriousness of the crime, the characteristics of the juvenile, the public safety and the dispositional alternatives in paragraph D, that: (a) If the State has the burden of proof, the State has established by a preponderance of the evidence that it is appropriate to prosecute the juvenile as if the juvenile were an adult; or (b) If the juvenile has the burden of proof, the juvenile has failed to establish by a preponderance of the evidence that it is not appropriate to prosecute the juvenile as if the juvenile were an adult.

Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06 (2017).	(d)(1) The court may not waive its jurisdiction under this section unless it determines, from a preponderance of the evidence presented at the hearing, that the child is an unfit subject for juvenile rehabilitative measures. (2) For purposes of determining whether to waive its jurisdiction under this section, the court shall assume that the child committed the delinquent act alleged. (e) In making its determination, the court shall consider the following criteria individually and in relation to each other on the record: (1) Age of the child; (2) Mental and physical condition of the child; (3) The child's amenability to treatment in any institution, facility, or program available to delinquents; (4) The nature of the offense and the child's alleged participation in it; and (5) The public safety.
Massachusetts	N/A	Does not use judicial waiver as a transfer mechanism.
Michigan	MICH. COMP. LAWS § 712A.4 (2017).	(4) Upon a showing of probable cause under subsection (3), the court shall conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction. In making its determination, the court shall consider all of the following criteria, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria: (a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by

		the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim. (b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines. (c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior. (d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming. (e) The adequacy of the punishment or programming available in the juvenile justice system. (f) The dispositional options available for the juvenile.
Minnesota	MINN. STAT. § 260B.125 (2017).	Subd. 4. Public safety. In determining whether the public safety is served by certifying the matter, the court shall consider the following factors: (1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim; (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines; (3) the child's prior record of

		delinquency; (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming; (5) the adequacy of the punishment or programming available in the juvenile justice system; and (6) the dispositional options available for the child. In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision.
Mississippi	MISS. CODE. ANN. § 43-21-157 (2017).	(3) The transfer hearing shall be bifurcated. At the transfer hearing, the youth court shall first determine whether probable cause exists to believe that the child committed the alleged offense. For the purpose of the transfer hearing only, the child may, with the assistance of counsel, waive the determination of probable cause. (4) Upon such a finding of probable cause, the youth court may transfer jurisdiction of the alleged offense and the youth if the youth court finds by clear and convincing evidence that there are no reasonable prospects of rehabilitation within the juvenile justice system. (5) The factors which shall be considered by the youth court in determining the reasonable prospects of rehabilitation within the juvenile justice system are: (a) Whether or not the alleged offense constituted a substantial danger to the public; (b) The seriousness of the alleged offense; (c) Whether or not the transfer is

		required to protect the community; (d) Whether or not the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (e) Whether the alleged offense was against persons or against property, greater weight being given to the offense against persons, especially if personal injury resulted; (f) The sophistication, maturity and educational background of the child; (g) The child's home situation, emotional condition and life-style; (h) The history of the child, including experience with the juvenile justice system, other courts, probation, commitments to juvenile institutions or other placements; (i) Whether or not the child can be retained in the juvenile justice system long enough for effective treatment or rehabilitation; (j) The dispositional resources available to the juvenile justice system; (k) Dispositional resources available to the adult correctional system for the child if treated as an adult; (l) Whether the alleged offense was committed on school property, public or private, or at any school-sponsored event, and constituted a substantial danger to other students; (m) Any other factors deemed relevant by the youth court; and (n) Nothing in this subsection shall prohibit the transfer of jurisdiction of an alleged offense and a child if that child, at the time of the transfer hearing, previously has not been placed in a juvenile institution.
Missouri	MO. REV. STAT.	6. A written report shall be prepared in accordance with this chapter developing

	§ 211.071 (2017).	fully all available information relevant to the criteria which shall be considered by the court in determining whether the child is a proper subject to be dealt with under the provisions of this chapter and whether there are reasonable prospects of rehabilitation within the juvenile justice system. These criteria shall include but not be limited to: (1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction; (2) Whether the offense alleged involved viciousness, force and violence; (3) Whether the offense alleged was against persons or property with greater weight being given to the offense against persons, especially if personal injury resulted; (4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code; (5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements; (6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living; (7) The age of the child; (8) The program and facilities available to the juvenile court in considering disposition; (9) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court;

		and (10) Racial disparity in certification.
Montana	Reverse waiver: MONT. CODE ANN. § 41-5-206 (2017).	[Does not use judicial waiver as a transfer mechanism, but does utilize "reverse waiver" or "decertification" to transfer cases directly filed in criminal court to juvenile court.] (3) The district court may not transfer the case back to the youth court unless the district court finds, by a preponderance of the evidence, that: (a) a youth court proceeding and disposition will serve the interests of community protection; (b) the nature of the offense does not warrant prosecution in district court; and (c) it would be in the best interests of the youth if the matter was prosecuted in youth court.
Nebraska	Juvenile and County courts have concurrent jurisdiction; but there is reverse waiver: NEB. REV. STAT. § 43-276 (2015).	[Does not use judicial waiver as a transfer mechanism, but does utilize "reverse waiver" or "decertification" to transfer cases directly filed in criminal court to juvenile court.] (1) [Court] shall consider: (a) The type of treatment such juvenile would most likely be amenable to; (b) whether there is evidence that the alleged offense included violence; (c) the motivation for the commission of the offense; (d) the age of the juvenile and the ages and circumstances of any others involved in the offense; (e) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court; (f) the best interests of the juvenile; (g) consideration of public safety; (h) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct; (i) whether the best interests of the juvenile

		and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (j) whether the victim agrees to participate in mediation; (k) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; (l) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm; (m) whether a juvenile court order has been issued for the juvenile pursuant to section 43-2,106.03; (n) whether the juvenile is a criminal street gang member; and (o) such other matters as the parties deem relevant to aid in the decision.
Nevada	NEV. REV. STAT. § 62B.390 (2017).	(3) [Upon motion, the court must certify youth for criminal proceedings when 16+ and charged with certain crimes; however, the juvenile court] shall not certify a child for criminal proceedings as an adult . . . if the juvenile court specifically finds by clear and convincing evidence that: (a) The child is developmentally or mentally incompetent to understand the situation and the proceedings of the court or to aid the child's attorney in those proceedings; or (b) The child has substance abuse or emotional or behavioral problems and the substance abuse or emotional or behavioral problems may be appropriately treated through the jurisdiction of the juvenile court.
New Hampshire	N.H. REV. STAT. ANN. § 169-B:24	(I) The court shall conduct a hearing on the question of transfer and shall consider, but not be limited to, the

	(2017).	following criteria in determining whether a case should be transferred: (a) The seriousness of the alleged offense to the community and whether the protection of the community requires transfer. (b) The aggressive, violent, premeditated, or willful nature of the alleged offense. (c) Whether the alleged offense was committed against persons or property. (d) The prospective merit of the complaint. (e) The desirability of trial and disposition of the entire offense in one court if the minor's associates in the alleged offense were adults who will be charged with a crime. (f) The sophistication and maturity of the minor. (g) The minor's prior record and prior contacts with law enforcement agencies. (h) The prospects of adequate protection of the public, and the likelihood of reasonable rehabilitation of the minor through the juvenile court system.
New Jersey	N.J. STAT. ANN. § 2A:4A-26.1(3) (2017).	(3) The court may deny a motion by the prosecutor to waive jurisdiction of a juvenile delinquency case if it is clearly convinced that the prosecutor abused his discretion in considering the following factors in deciding whether to seek a waiver: (a) The nature and circumstances of the offense charged; (b) Whether the offense was against a person or property, allocating more weight for crimes against the person; (c) Degree of the juvenile's culpability; (d) Age and maturity of the juvenile;

		(e) Any classification that the juvenile is eligible for special education to the extent this information is provided to the prosecution by the juvenile or by the court; (f) Degree of criminal sophistication exhibited by the juvenile; (g) Nature and extent of any prior history of delinquency of the juvenile and dispositions imposed for those adjudications; (h) If the juvenile previously served a custodial disposition in a State juvenile facility operated by the Juvenile Justice Commission, and the response of the juvenile to the programs provided at the facility to the extent this information is provided to the prosecution by the Juvenile Justice Commission; (i) Current or prior involvement of the juvenile with child welfare agencies; (j) Evidence of mental health concerns, substance abuse, or emotional instability of the juvenile to the extent this information is provided to the prosecution by the juvenile or by the court; and (k) If there is an identifiable victim, the input of the victim or victim's family.
New Mexico	N/A	Does not use judicial waiver as a transfer mechanism.
New York	N.Y. CRIM. PROC. LAW § 210.43 (2017).	[Does not use judicial waiver as a transfer mechanism; does use reverse waiver for directly filing with the following criteria:] (a) the seriousness and circumstances of the offense; (b) the extent of harm caused by the offense; (c) the evidence of guilt, whether admissible or inadmissible at trial; (d) the history, character and condition of the defendant;

		(e) the purpose and effect of imposing upon the defendant a sentence authorized for the offense; (f) the impact of a removal of the case to the family court on the safety or welfare of the community; (g) the impact of a removal of the case to the family court upon the confidence of the public in the criminal justice system; (h) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion; and (i) any other relevant fact indicating that a judgment of conviction in the criminal court would serve no useful purpose.
North Carolina	N.C. GEN. STAT. § 7B-2203 (2017).	(b) In the transfer hearing, the court shall determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court and shall consider the following factors: (1) The age of the juvenile; (2) The maturity of the juvenile; (3) The intellectual functioning of the juvenile; (4) The prior record of the juvenile; (5) Prior attempts to rehabilitate the juvenile; (6) Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts; (7) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and (8) The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as

		an adult. [Proposed addition to include waiver if involved in a street gang, effective in 2020.]
North Dakota	N.D. CENT. CODE § 27-20-34 (2017).	(4) [Shall transfer if 14+ and the court] finds that there are reasonable grounds to believe that: (a) The child committed the delinquent act alleged; (b) The child is not amenable to treatment or rehabilitation as a juvenile through available programs; (c) The child is not treatable in an institution for individuals who are intellectually disabled or who are mentally ill; (d) The interests of the community require that the child be placed under legal restraint or discipline; and (e) If the child is fourteen or fifteen years old, the child committed a delinquent act involving the infliction or threat of serious bodily harm. 3. In determining a child's amenability to treatment and rehabilitation, the court shall consider and make specific findings on the following factors: a. Age; b. Mental capacity; c. Maturity; d. Degree of criminal sophistication exhibited; e. Previous record; f. Success or failure of previous attempts to rehabilitate; g. Whether the juvenile can be rehabilitated prior to expiration of juvenile court jurisdiction; h. Any psychological, probation, or institutional reports; i. The nature and circumstances of the

		acts for which the transfer is sought; j. The prospect for adequate protection of the public; and k. Any other relevant factors.
Ohio	OHIO REV. CODE ANN. § 2152.12 (2017).	(B) [A]fter a complaint has been filed alleging that a child is a delinquent child for committing an act that would be a felony if committed by an adult, the juvenile court at a hearing may transfer the case if the court finds all of the following: (1) The child was fourteen years of age or older at the time of the act charged. (2) There is probable cause to believe that the child committed the act charged. (3) The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed. (C) Before considering a transfer under division (B) of this section, the juvenile court shall order an investigation into the child's social history, education, family situation, and any other factor bearing on whether the child is amenable to juvenile rehabilitation, including a mental examination of the child by a public or private agency or a person qualified to make the examination . . . . (D) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the

		following relevant factors, and any other relevant factors, in favor of a transfer under that division: (1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act. (2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim. (3) The child's relationship with the victim facilitated the act charged. (4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity. (5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm. (6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction. (7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system. (8) The child is emotionally, physically, or psychologically mature enough for the transfer. (9) There is not sufficient time to rehabilitate the child within the juvenile

		system. (E) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, against a transfer under that division: (1) The victim induced or facilitated the act charged. (2) The child acted under provocation in allegedly committing the act charged. (3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person. (4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged. (5) The child previously has not been adjudicated a delinquent child. (6) The child is not emotionally, physically, or psychologically mature enough for the transfer. (7) The child has a mental illness or intellectual disability. (8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.
Oklahoma	OKLA. STAT. tit. 10A, § 2-2-403 (2017).	A. Except as otherwise provided by law, if a child is charged with a delinquent act as a result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney shall conduct a preliminary hearing to determine whether or not there is prosecutive merit to the complaint. If the

		court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an investigation and further hearing to determine if the child should be held accountable for acts of the child as if the child were an adult if the child should be found to have committed the alleged act or omission. Consideration shall be given to: 1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; 2. Whether the offense was against persons or property, greater weight being given to transferring the accused person to the adult criminal justice system for offenses against persons and, if personal injury resulted, the degree of personal injury; 3. The sophistication and maturity of the juvenile and capability of the juvenile of distinguishing right from wrong as determined by consideration of a psychological evaluation of the juvenile, home, environmental situation, emotional attitude and pattern of living; 4. The record and previous history of the accused person, including previous contacts with community agencies, law enforcement agencies, schools, juvenile or criminal courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions; 5. The prospects for adequate protection of the public; 6. The likelihood of reasonable rehabilitation of the juvenile if the juvenile is found to have committed the alleged offense, by the use of procedures and

		facilities currently available to the juvenile court; and 7. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.
Oregon	OR. REV. STAT. § 419C.349 (2017).	The juvenile court, after a hearing . . . may waive a youth to a circuit, justice or municipal court of competent jurisdiction for prosecution as an adult if: (1) The youth is 15 years of age or older at the time of the commission of the alleged offense; (2) The youth . . . is alleged to have committed [certain serious crimes]; (3) The youth at the time of the alleged offense was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved; and (4) The juvenile court, after considering the following criteria, determines by a preponderance of the evidence that retaining jurisdiction will not serve the best interests of the youth and of society and therefore is not justified: (a) The amenability of the youth to treatment and rehabilitation given the techniques, facilities and personnel for rehabilitation available to the juvenile court and to the criminal court which would have jurisdiction after transfer; (b) The protection required by the community, given the seriousness of the offense alleged; (c) The aggressive, violent, premeditated or willful manner in which the offense was alleged to have been committed; (d) The previous history of the youth, including: (A) Prior treatment efforts and out-of-

		home placements; and (B) The physical, emotional and mental health of the youth; (e) The youth's prior record of acts which would be crimes if committed by an adult; (f) The gravity of the loss, damage or injury caused or attempted during the offense; (g) The prosecutive merit of the case against the youth; and (h) The desirability of disposing of all cases in one trial if there were adult co-offenders.
Pennsylvania	42 PA. CONS. STAT. § 6355 (2017).	[The court may transfer the case if the child was 14+ at the time of the alleged offense and] (4) The court finds: (i) that there is a prima facie case that the child committed the delinquent act alleged; (ii) that the delinquent act would be considered a felony if committed by an adult; (iii) that there are reasonable grounds to believe that the public interest is served by the transfer of the case for criminal prosecution. In determining whether the public interest can be served, the court shall consider the following factors: (A) the impact of the offense on the victim or victims; (B) the impact of the offense on the community; (C) the threat to the safety of the public or any individual posed by the child; (D) the nature and circumstances of the offense allegedly committed by the child; (E) the degree of the child's culpability;

		(F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors: (I) age; (II) mental capacity; (III) maturity; (IV) the degree of criminal sophistication exhibited by the child; (V) previous records, if any; (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction; (VIII) probation or institutional reports, if any; (IX) any other relevant factors; and (iv) that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.
Rhode Island	14 R.I. GEN. LAWS §§ 14-1-7, 14-1-7.1, 14-1-7.2 (2017).	§ 14-1-7(b)-(c) [Two types of certification depending on type of offense and age of child]; § 14-1-7.1(a) [For an offense punishable by life imprisonment for adults or for a 16+ child charged with a felony,] it shall be the duty of the attorney general to produce evidence to enable the court to determine: (1) That probable cause exists to believe that the offense charged has been committed and that the child charged has committed it . . . ; and

		(2) That the child's past history of offenses, history of treatment, or the heinous or premeditated nature of the offense is such that the court finds that the interests of society or the protection of the public necessitate the waiver of jurisdiction of the court over the child. § 14-1-7.2(a) [For a child younger than 16 charged with a felony,] it shall be the duty of the attorney general to produce evidence to enable the court to determine: (1) Probable cause exists to believe that the offense charged has been committed and that the child charged has committed it; (2) The child's past history of offenses, history of treatment, or the heinous or premeditated nature of the offense is such that the court finds that the interests of society or the protection of the public necessitate the certification; and (3) The jurisdiction of the court but for the exercise of certification is in all likelihood an insufficient period of time in which to accomplish a rehabilitation of the child.
South Carolina	S.C. CODE ANN. § 63-19-1210(4) (2018).	(4) [I]f the court, after full investigation, considers it contrary to the best interest of the child or of the public to retain jurisdiction . . . [it] may bind over the child for proper criminal proceedings . . . .
South Dakota	S.D. CODIFIED LAWS § 26-11-4 (2017).	At the transfer hearing, the court shall consider only whether it is contrary to the best interest of the child and of the public to retain jurisdiction over the child. The following factors may be considered by the court in determining whether a child should be transferred: (1) The seriousness of the alleged felony offense to the community and

		whether protection of the community requires waiver; (2) Whether the alleged felony offense was committed in an aggressive, violent, premeditated, or willful manner; (3) Whether the alleged felony offense was against persons or property with greater weight being given to offenses against persons; (4) The prosecutive merit of the complaint. The state is not required to establish probable cause to show prosecutive merit; (5) The desirability of trial and disposition of the entire felony offense in one proceeding if the child's associates in the alleged felony offense are adults; (6) The record and previous history of the juvenile; (7) The prospect for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile, if the juvenile is found to have committed the alleged felony offense, by the use of procedures, services, and facilities currently available to the juvenile court.
Tennessee	TENN. CODE ANN. § 37-1-134 (2017).	(a) The disposition of the child shall be as if the child were an adult if: (4) The court finds that there is probable cause to believe that: (A) The child committed the delinquent act as alleged; (B) The child is not committable to an institution for the developmentally disabled or mentally ill; and (C) The interests of the community require that the child be put under legal restraint or discipline. (b) In making the determination required by subsection (a), the court shall consider, among other matters:

		(1) The extent and nature of the child's prior delinquency records; (2) The nature of past treatment efforts and the nature of the child's response thereto; (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (4) Whether the offense was committed in an aggressive and premeditated manner; (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.
Texas	TEX. FAM. CODE ANN. § 54.02 (2017).	(a) The juvenile court may waive its exclusive original jurisdiction and transfer a child . . . if: (3) after a full investigation and a hearing, the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings. (d) Prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. (f) In making the determination required by Subsection (a) of this section, the court shall consider, among other matters: (1) whether the alleged offense was

		against person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.
Utah	UTAH CODE ANN. § 78A-6-703 (2017).	(2) At the preliminary hearing the state shall have the burden of going forward with its case and the burden of establishing: (a) probable cause to believe that a crime was committed and that the defendant committed it; and (b) by a preponderance of the evidence, that it would be contrary to the best interests of the minor or of the public for the juvenile court to retain jurisdiction. (3) In considering whether or not it would be contrary to the best interests of the minor or of the public for the juvenile court to retain jurisdiction, the juvenile court shall consider, and may base its decision on, the finding of one or more of the following factors: (a) the seriousness of the offense and whether the protection of the community requires isolation of the minor beyond that afforded by juvenile facilities; (b) whether the alleged offense was committed by the minor under circumstances which would subject the minor to enhanced penalties under Section 76-3-203.1 if the minor were adult and the offense was committed: (i) in concert with two or more persons;

		(ii) for the benefit of, at the direction of, or in association with any criminal street gang as defined in Section 76-9-802; or (iii) to gain recognition, acceptance, membership, or increased status with a criminal street gang as defined in Section 76-9-802; (c) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (d) whether the alleged offense was against persons or property, greater weight being given to offenses against persons, except as provided in Section 76-8-418; (e) the maturity of the minor as determined by considerations of the minor's home, environment, emotional attitude, and pattern of living; (f) the record and previous history of the minor; (g) the likelihood of rehabilitation of the minor by use of facilities available to the juvenile court; (h) the desirability of trial and disposition of the entire offense in one court when the minor's associates in the alleged offense are adults who will be charged with a crime in the district court; (i) whether the minor used a firearm in the commission of an offense; and (j) whether the minor possessed a dangerous weapon on or about school premises . . . .
Vermont	VT. STAT. ANN. tit. 33, § 5204 (2017).	(c) Upon the filing of a motion to transfer jurisdiction under subsection (b) of this section, the Family Division of the Superior Court shall conduct a hearing in accordance with procedures specified in subchapter 2 of this chapter to determine whether:

		(1) there is probable cause to believe that the child committed the charged offense; and (2) public safety and the interests of the community would not be served by treatment of the child under the provisions of law relating to the Family Division of the Superior Court and delinquent children. (d) In making its determination as required under subsection (c) of this section, the court may consider, among other matters: (1) the maturity of the child as determined by consideration of his or her age, home, environment; emotional, psychological and physical maturity; and relationship with and adjustment to school and the community; (2) the extent and nature of the child's prior record of delinquency; (3) the nature of past treatment efforts and the nature of the child's response to them; (4) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (5) the nature of any personal injuries resulting from or intended to be caused by the alleged act; (6) the prospects for rehabilitation of the child by use of procedures, services, and facilities available through juvenile proceedings; (7) whether the protection of the community would be better served by transferring jurisdiction from the Family Division to the Criminal Division of the Superior Court.
Virginia	VA. CODE ANN. § 16.1-269.1	A. Any transfer to the appropriate circuit court shall be subject to the following conditions:

	(2017).	1. Notice as prescribed in §§ 16.1-263 and 16.1-264 shall be given to the juvenile and his parent, guardian, legal custodian or other person standing in loco parentis; or attorney; 2. The juvenile court finds that probable cause exists to believe that the juvenile committed the delinquent act as alleged or a lesser included delinquent act which would be a felony if committed by an adult; 3. The juvenile is competent to stand trial. The juvenile is presumed to be competent and the burden is on the party alleging the juvenile is not competent to rebut the presumption by a preponderance of the evidence; and 4. The court finds by a preponderance of the evidence that the juvenile is not a proper person to remain within the jurisdiction of the juvenile court. In determining whether a juvenile is a proper person to remain within the jurisdiction of the juvenile court, the court shall consider, but not be limited to, the following factors: a. The juvenile's age; b. The seriousness and number of alleged offenses, including (i) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; (ii) whether the alleged offense was against persons or property, with greater weight being given to offenses against persons, especially if death or bodily injury resulted; (iii) whether the maximum punishment for such an offense is greater than 20 years confinement if committed by an adult; (iv) whether the alleged offense involved the use of a firearm or other dangerous weapon by brandishing, threatening, displaying or

		otherwise employing such weapon; and (v) the nature of the juvenile's participation in the alleged offense; c. Whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation; d. The appropriateness and availability of the services and dispositional alternatives in both the criminal justice and juvenile justice systems for dealing with the juvenile's problems; e. The record and previous history of the juvenile in this or other jurisdictions, including (i) the number and nature of previous contacts with juvenile or circuit courts, (ii) the number and nature of prior periods of probation, (iii) the number and nature of prior commitments to juvenile correctional centers, (iv) the number and nature of previous residential and community-based treatments, (v) whether previous adjudications and commitments were for delinquent acts that involved the infliction of serious bodily injury, and (vi) whether the alleged offense is part of a repetitive pattern of similar adjudicated offenses; f. Whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity in this or any other jurisdiction; g. The extent, if any, of the juvenile's degree of intellectual disability or mental illness; h. The juvenile's school record and education; i. The juvenile's mental and emotional maturity; and j. The juvenile's physical condition and physical maturity.
Washington	WASH. REV.	(3) The court after a [waiver] may

	CODE § 13.40.110 (2017).	order the case transferred for adult criminal prosecution upon a finding that the [waiver] would be in the best interest of the juvenile or the public. The court shall consider the relevant reports, facts, opinions, and arguments presented by the parties and their counsel. [The Washington Supreme Court adopted the *Kent* factors to govern waiver hearings. *State v. Williams*, 453 P.2d 418, 420 (Wash. 1969); *State v. H.O.*, 81 P.3d 883, 887 n.18 (Wash. 2003).]
West Virginia	W. VA. CODE § 49-4-710 (2017).	(g) The court may, upon consideration of the juvenile's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors, transfer a juvenile proceeding to criminal jurisdiction if there is probable cause to believe that [the youth committed certain crime and meets certain age requirements].
Wisconsin	WIS. STAT. § 938.18 (2017).	(5) Criteria for waiver. If prosecutive merit is found, the court shall base its decision whether to waive jurisdiction on the following criteria: (a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile's physical and mental maturity, and the juvenile's pattern of living, prior treatment history, and apparent potential for responding to future treatment. (am) The prior record of the juvenile, including whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile's

		motives and attitudes, and the juvenile's prior offenses. (b) The type and seriousness of the offense, including whether it was against persons or property and the extent to which it was committed in a violent, aggressive, premeditated or willful manner. (c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048. (d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in the court of criminal jurisdiction.
Wyoming	WYO. STAT. ANN. § 14-6-237 (2017).	(b) The court shall order the matter transferred to the appropriate court for prosecution if after the transfer hearing it finds that proper reason therefor exists. The determinative factors to be considered by the judge in deciding whether the juvenile court's jurisdiction over such offenses will be waived are the following: (i) The seriousness of the alleged offense to the community and whether the protection of the community required waiver; (ii) Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (iii) Whether the alleged offense was against persons or against property, greater weight being given to offenses against

		persons especially if personal injury resulted; (iv) The desirability of trial and disposition of the entire offense in one (1) court when the juvenile's associates in the alleged offense are adults who will be charged with a crime; (v) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living; (vi) The record and previous history of the juvenile, including previous contacts with the law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this court, or prior commitments to juvenile institutions; (vii) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.