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Guidelines for Statutes for Transfer of Juveniles to Criminal Court

ELIZABETH W. BROWNE*

The juvenile court was founded in the early 1900's, premised on the hypothesis that children who had committed misdeeds were more malleable and could be directed to good citizenship and responsibility more easily than adult offenders. This was to be accomplished by separating children from hardened criminals and by barring them from being placed in adult institutions. It was felt that because children are susceptible to guidance, the possibility of a brighter future would lie before them if they were given humane treatment under the direction of experts in child care and child behavior.¹ However, most juris-

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1. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

dictions provided a method for transferring² particular juveniles from juvenile court to criminal court after it had been determined that the juvenile was not an apt subject for rehabilitation through the resources of the juvenile court.

The Department of Health, Education and Welfare³ and the President's Crime Commission⁴ in the 1960's pointed out many defects in the juvenile justice system, including the procedure for transferring juveniles to the criminal courts, and recommended changes to better realize the original goals of the juvenile justice system.

At the outset it should be noted that the juvenile court can no longer transfer a juvenile to an adult court for prosecution after the juvenile court has conducted an adjudicatory hearing.⁵ The United States Supreme Court held that such a procedure violated the Constitutional prohibition against double jeopardy. Therefore, obviously, it must be a matter considered before the adjudicatory hearing.

Transfer

Bringing children before criminal courts is accomplished in different ways. Some states simply lower the age of juvenile court jurisdiction so that the prosecution of children above that age in criminal courts is automatic. Others enumerate certain crimes over which the criminal courts always have original jurisdiction.⁶ Prosecutors are given the discretion in some jurisdictions to choose the forum in which to bring the charge.⁷ But

2. Although the statutes in other jurisdictions employ a variety of terms for this process, most authorities seem to agree that "transfer" is an accurate and descriptive word. The following sources use the word "transfer" in describing the procedure: STANDARD JUVENILE COURT ACT; § 13 LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS, § 31 published by the Children's Bureau of the U. S. Department of Health, Education and Welfare (1969); MODEL RULES FOR JUVENILE COURTS, ART. IV prepared by the Council of Judges of the National Council on Crime and Delinquency (1959); *Uniform Juvenile Court Act*, § 34 approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association (1968); and LAW AND TACTICS IN JUVENILE CASES ch. 11 (2nd Ed., 1974), published by the National Juvenile Law Center, St. Louis University School of Law, JUVENILE LAW DIGEST published by National Council of Juvenile Court Judges.

3. STANDARDS FOR JUVENILE AND FAMILY COURTS (1966).

4. REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, ch. 3 at 79-82 (1967).

5. *Breed v. Jones*, 421 U.S. 519, 535-536 (1975).

6. *Walker v. State of Florida*, 466 F.2d 485 (5th Cir. 1972); *United States v. Bland*, 330 F. Supp. 34 (D.D.C. 1971).

7. ILL. ANN. STAT. ch. 37 §702-707 (Smith-Hurd); 18 U.S.C. 5032; *Meyers v.*

the majority of states provide that only the juvenile court can make the determination as to whether to retain jurisdiction of the child or transfer jurisdiction to the criminal court.

*Kent v. United States*⁸ was the first significant case to reach the United States Supreme Court which dealt in depth with portions of the transfer procedure. Some state courts have construed *Kent* as having been decided solely on statutory grounds,⁹ while the majority of state courts regard it as being of constitutional dimensions. There are indications that some of the justices on the United States Supreme Court regarded *Kent* as having constitutional implications.¹⁰ It was in *Kent* that the United States Supreme Court pierced the veil of *parens Patraie* for the first time.

Kent was sixteen and had been charged with housebreaking, robbery, and rape. His mother retained counsel who opposed a transfer of the boy when the service director of the juvenile court indicated that the procedure was being considered. Counsel moved for a hearing, a psychiatric examination of the boy and access to the social files. He also offered to prove that Kent was a fit subject for juvenile rehabilitation. No ruling was made on the motions nor was any hearing held. Nevertheless, an *ex parte* order was entered which stated that after "full investiga-

District Court for Fourth Judicial District, 184 Col. 181, 518 P.2d 836 (1974); *State v. Grayer*, 191 Neb. 523, 215 N.W. 2d 859 (1974).

8. 383 U.S. 541 (1966).

9. Although the consensus is by no means universal, a majority of commentators and jurisdictions now agree that the *Kent* decision has constitutional basis. The United States Court of Appeals, Ninth Circuit, referring to *In re Gault*, 387 U.S. 1 (1966), decided after *Kent*, stated "We join a growing list of courts that interpret *Kent* in the light of *Gault* as establishing certain minimum constitutional rights of juveniles at such hearings." *Powell v. Hocker*, 453 F.2d 652, 654 (9th Cir. 1971). *See, e.g.*, *B. v. Superior Court of Los Angeles County*, 3 Cal. 3d 718, 478 P.2d 37, 91 Cal. Rptr. 605 (1970); *State ex rel T.D.H. v. Bills*, 504 S.W.2d 76 (Mo. 1974); *Davis v. State*, 297 So. 2d 289 (Fla. 1974); *Hayes v. Gardner*, 95 Idaho 137, 504 P.2d 810 (1972); *In re Doe*, 86 N.M. 37, 519 P.2d 133 (1974); *State v. McArdle*, 194 S.E.2d 174 (W. Va. 1973); *State v. Yard*, 109 Ariz. 198, 507 P.2d 123 (1973); *Whitaker v. Commonwealth*, 479 S.W.2d 592 (Ky. 1972); *Bouge v. Reed*, 254 Or. 418, 459 P.2d 869 (1969); *Kempner v. State of Maryland*, 428 F.2d 169 (4th Cir. 1970). *But see*, *People v. Handley*, 51 Ill. 2d 229, 282 N.E. 2d 131 (1972); *In re Bullard*, 22 N.C. App. 245, 206 S.E. 2d 305 (1974); *Lijam v. District Court of Fourth Judicial District*, 161 Mt. 287, 505 P.2d 896 (1973).

10. *In re Gault*, 387 U.S. 1 (1966). There has been some dispute about the constitutional basis for the *Kent* decision, but in *Gault* the Court noted that *Kent* "[I]ndicated agreement with the United States Court of Appeals for the District of Columbia that the assistance of counsel is essential for purposes of waiver proceedings." 387 U.S. at 36.

tion I [the court] hereby waive"¹¹ jurisdiction of the prisoner. Kent was convicted in the adult court by a jury and sentenced to thirty to ninety years in prison.

The United States Supreme Court held that Kent was entitled to a transfer hearing, to representation by counsel who had full access to the child's social records, to findings of fact and to a statement of reasons for transferring him.¹²

11. 383 U.S. at 546.

12. In deciding that a District of Columbia order waiving jurisdiction of a juvenile was entered without compliance with required procedures, the United States Supreme Court first pointed out that the facts and the contentions of counsel raised a number of disturbing questions concerning the administration by the police and the juvenile court authorities of the District of Columbia laws relating to juveniles. Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which were not within judicial competence, the case presented important challenges to the procedure of the police and juvenile court officials upon apprehension of a juvenile suspected of serious offenses. *Id.* at 542-43. From the facts, the Supreme Court assumed that the juvenile court judge denied, *sub silentio*, motions for a hearing; a recommendation for hospitalization for psychiatric observation; a request for access to the Social Service file and an offer to prove that the juvenile was a fit subject for rehabilitation under the juvenile court's jurisdiction. Shortly after the juvenile court order waiving its jurisdiction was entered, the juvenile was indicted by a grand jury of the United States District Court for the District of Columbia. The district court denied a motion to dismiss the indictment, ruling that it would not go behind the juvenile court judge's recital that his order was entered "after full investigation."

Aside from other issues raised, in view of its ruling, the Supreme Court confined itself to the issue regarding the alleged infirmity of the proceedings by which the juvenile court waived its otherwise exclusive jurisdiction. While agreeing that the Juvenile Court Act contemplates that the juvenile court should have considerable latitude in determining whether it should retain jurisdiction over a child or—subject to the statutory delimitation—should waive jurisdiction, the Supreme Court pointed out that this latitude is not without limits.

Disregarding the question whether the juvenile, on the merits, should have been transferred, the Supreme Court said that there was "[N]o place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure . . . (and) it does not It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." *Id.* at 556.

Accordingly, the Supreme Court concluded that, as a condition to a valid waiver order, the juvenile was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably were considered by the court, and to a statement of reasons for the juvenile court's decisions. This "result" is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel. *Id.* at 557.

As to the review of the waiver order, the Supreme Court held that it was incumbent upon the juvenile court to accompany its waiver order with a statement of the reasons or considerations therefor. While the statute did not require that this statement be formal or that it should necessarily include conventional findings of fact, it should be sufficient to demonstrate that the statutory require-

Age

The initial step which a transfer statute must address is the age at which a juvenile may be eligible for transfer to a criminal court. Obviously involved in this decision is the concept of diminished responsibility; the statutes of thirteen states now mandate that sixteen is the minimum age at which a motion for transfer may be filed.¹³

An additional factor to consider is whether the specified statutory age means the age at which the act was committed or the age at which the person is tried for the charged offense.¹⁴

ments of "full investigation" have been met, and that the question has received the careful consideration of the juvenile court. Furthermore, it must set forth the basis for the order with sufficient specificity to permit meaningful review. Also, the Court correspondingly concluded that an opportunity for a hearing, which may be informal, must be given the juvenile prior to entry of a waiver order. Also, the juvenile was entitled to counsel in connection with the waiver proceeding, and counsel was entitled to see the child's social records. Appointment of counsel without affording an opportunity for hearing on a "critically important" decision was tantamount to denial of counsel. While the hearing to be held need not conform with all of the requirements of a criminal trial or even of the usual administrative hearing, it must measure up to the essentials of due process and fair treatment.

As to access by the juvenile's counsel to the social records of the child, it was deemed obvious that, since these were to be considered by the juvenile court in making its decision to waive jurisdiction, they must be made available to the child's counsel. The Supreme Court further pointed out that if a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge—which is protected by the statute only against "indiscriminate" inspection—be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation. While the juvenile court judge may, of course, receive *ex parte* analyses and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise.

Also, the Supreme Court, even though the juvenile had reached the age of twenty-one and the juvenile court no longer had jurisdiction, refused to vacate the conviction and dismiss the indictment. Rather, it remanded the case to the District Court for a *de novo* hearing on the waiver issue.

13. California, Delaware, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, and Wisconsin.

14. A majority of states base jurisdiction on the age of the child at the time of the alleged proscribed conduct, not the age at the time of apprehension or the age at the time of the filing of the petition. Examples include: IOWA CODE ANN. § 232.62 (West 1941); LA. REV. STAT. ANN. § 13.1569(3) (West 1974); W. VA. CODE § 49-5-3 (West 1974); and KAN. STAT. § 38-808(b). STANDARD JUVENILE COURT ACT § 13, prepared by the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Judges and the U.S. Children's Bureau (6th Ed. 1959), states that "(n)o child under sixteen years of age at the time of commission of the act" shall be transferred to adult court.

Where the age of the child at the time of trial determines the forum, it is possible for prosecutors to delay initiating actions in order to avoid juvenile jurisdiction. The majority position, that the age at the time of the act is the decisive age, is more desirable because it avoids delayed prosecutions and guarantees the right to a speedy trial. The upper age limit of juvenile court jurisdiction should be an additional factor in the decision to retain juvenile jurisdiction; an evaluation of the efficiency of the services available to determine whether rehabilitative treatment was likely to be completed within the time available should be made.

Offense

Ignoring minor traffic and fish and game offenses, legislatures must promulgate standards concerning the types or series of offenses or other circumstances which may warrant a finding that a child is not amenable to rehabilitative treatment in the time remaining before termination of the juvenile court's jurisdiction. One who commits an egregious, heinous offense may legitimately be considered to be beyond the juvenile court's capacity to help him. A history of repeated, violent conduct after prior juvenile court intervention has failed may also trigger a juvenile's transfer to criminal court.

However, a "course of conduct" transfer should not be lightly undertaken as the conduct might have been attributable to an averred lack of resources within the juvenile justice system.¹⁵

15. *Welfare of J.E.C.*, 225 N.W. 2d 245 (1975). The Supreme Court of Minnesota framed the question as follows:

The crucial question then in this case is whether the court may refer appellant for adult prosecution for the reason that no program exists or has been designed which can rehabilitate respondent, with adequate protection for the public, prior to his twenty-first birthday. In other words, is this reason sufficient to sustain the conclusion that appellant is therefore not amenable to treatment as a juvenile and must be referred for prosecution as an adult? . . .

We cannot help but sympathize with a judge of the juvenile court who has tried conscientiously to find a solution to the vexing problem of what to do with this small minority of hard-core juveniles who cannot be corrected under our present facilities and for whom there are no other adequate facilities.

. . . It appears that the juvenile court has under these circumstances only two alternatives, namely, to retain jurisdiction over him as a juvenile, with the knowledge that no matter what action is taken the offender will soon again be turned loose on society to continue his depredations, or to refer him as an adult for prosecution and probably subject him to a lengthy sentence with doubtful rehabilitative sources available. *Id.* at 251.

. . . The question confronting us is: What power do the courts have to solve this problem? We can, to be sure, refuse to permit reference for adult prosecution, but is the welfare of society served by temporarily restraining him under a juvenile court system where the best hope will

Perhaps treatment for the diagnosed condition of the child does not exist. On the other hand, the absence or prior failure of treatment may be due to a public reluctance to provide what is needed for rehabilitation. It would seem obvious that misdemeanors and many less serious felonies should not be transferable if the juvenile court is given both the jurisdiction and the resources to treat the child until age twenty-one.

Probable Cause Hearing

One of the first requirements of a transfer proceeding should be a probable cause hearing.¹⁶ The lack of such a hearing was deplored in *Kent*.¹⁷ The probable cause hearing should be held within a proscribed period of time after the child has been taken into custody so that he is not deprived of his liberty without due process. Further, it should coincide with the detention hearing since most children accused of serious offenses (which will raise the issue of transfer) will be held in detention facilities as bail is usually unavailable to juveniles. Establishing probable cause at the detention hearing was recommended by the United States District Court in *Baldwin v. Lewis*.¹⁸

be that he will soon be turned loose again to prey on society? Can the courts mandate the Department of Corrections to establish a rehabilitative system for this small percentage of juveniles who cannot be rehabilitated under our present program? If we cannot mandate such action, we can at least urge that an examination be made of it by the authority which can establish such a system. *Id.* at 249-251. The case was remanded to the juvenile court to: Inquire into (1) whether there is presently any program available for treatment for this and other similar juveniles; (2) if no program is available, whether it is feasible and possible to put together an effective program which could treat this and other similar juveniles; (3) if so, why has the Department of Corrections failed to make such a program available? The answer to this question may involve such things as the unavailability of funds, the establishment of priority between programs, and the time it would take to establish such program. *Id.* at 253. Browne, Elizabeth, *A Right to Treatment for Civilly Committed Persons* (1975 National Council of Juvenile Court Judges, Reno, Nevada).

16. Eighteen states require the juvenile court to make a probable cause finding before transfer. Among them are ME. REV. STAT. tit. 15 § 2611 (3) (1964); N.C. GEN. STAT. § 7A-280 (1969); U.T.C.A. FAMILY CODE § 54.02(f) (1973); and MICH. STAT. ANN. § 27.3178 (598.4) (West Supp. 1976). *But see*: United States ex. rel. Bombacino v. Bensinger, 498 F.2d 875 (7th Cir. 1974) cert. denied 419 U.S. 1019 (1974); Stephenson v. State, 204 Kan. 80, 460. P.2d 442 (1969).

17. 383 U.S. at 551.

18. *Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wisc. 1969). Also, the United States Supreme Court said, in dictum in *Breed v. Jones*, 421 U.S. 519, 538:

We note that nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he

Separation of the probable cause hearing from the transfer hearing would save the child the painful choice of deciding whether to testify himself at the transfer hearing. If he appears contrite and willing to accept treatment at the transfer hearing, he may also ironically have resolved the probable cause determination against his own interest.

If the child is transferred to a criminal court, the finding of probable cause in the juvenile court should be certified to the criminal court and could be substituted for the preliminary hearing required there. The child would not have sacrificed any of his rights to discovery or to fifth and fourteenth amendment privileges.

If probable cause is not established the child may be free from a long period of detention. But, equally important, he will not be subjected to the massive invasion of his privacy and that of his family's which is an adjunct to transfer hearing investigations. The transfer investigation should and will reach into all aspects of his life and behavior. His school conduct, associates, contacts with justice organizations, his physical, mental and emotional health, religious inclinations and complete family history will all be probed.

Counsel should be appointed in adequate time to prepare for the detention—probable cause hearing.¹⁹ *Kent*, in pointing out that the juvenile is deprived of significant juvenile rights as a result of transfer,²⁰ mandated the assistance of counsel at this stage.

Present Criteria

The insidious frailty of most statutes under which juvenile judges decide whether to retain jurisdiction over, or transfer a

committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding. (Citations omitted.) The instant case is not one in which the judicial determination was simply a finding of, e.g., probable cause. Rather, it was an adjudication that respondent had violated a criminal statute.

19. In re Gault, 387 U.S. 1 (1966) *supra* note 10; *Kent v. United States*, 383 U.S. 541 (1966) *supra* note 12.

20. "[J]uvenile Court is vested with original and exclusive jurisdiction of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents unless his welfare and the safety and protection of the public cannot be adequately safeguarded without . . . removal. The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." 383 U.S. at 536-557.

child to, adult court reflects the lack of legislative standards in the juvenile court statutes. One frequently found criteria which often stands alone in the statutes directs the juvenile judge to base his finding on "the best interests of the child." "The best interests of the child" appears to be a phrase borrowed from family law practice where the issue before the court is to whom the award of custody should be made. The normal presumption in divorce cases is that a child will be placed in the more satisfactory home environment available as between his parents. When the choice is between a "benevolent" juvenile care system and an adult penal system, however, the "best interests of the child" criterion is not an acceptable one. An addendum is often "and if the transfer is in the best interest of the public." If the juvenile court is indeed fulfilling its mandate to treat the child, the latter is superfluous. A statute with provisions similar to those stated above has been successfully attacked as being void for being overly vague.²¹

Statutes should set a limited time within which the transfer hearing must be held and permit a specific postponement by either party only upon a showing of good cause. The court's failure to expeditiously hear the motion would continue to impose upon the child's liberty as, in most cases, the child will have been placed in detention. Delay also prevents the initiation of rehabilitative treatment.

Parties

The persons who could file a motion for transfer should be limited to the district attorney, the child and the child's attorney.²²

21. *People v. Fields*, 388 Mich. 66, 199 N.W.2d 217 (1972).

22. The concept that the district attorney and the child have the right to request transfer is derived from Section 28, Assembly Bill 795, State of Wisconsin (1975), and the Federal Juvenile Delinquency Act, 18 U.S.C. § 5032. The proposed WIS. STAT. ANN. § 48.18 (2) reads in part: "Jurisdiction of the juvenile court may be waived by the court upon application of the child or of the district attorney." Under the Federal Juvenile Delinquency Act, 18 U.S.C. § 5032, a "[j]uvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult . . ." The Attorney General may also file a motion to transfer in the appropriate U.S. District Court in the case of a child who is accused of having committed a serious offense after having reached the age of 16.

The district attorney can evaluate the known facts and decide whether he has a case worthy of prosecution in criminal court. As the responsible legal officer of the juvenile court, it is his duty to be aware of the state and local resources available to the child and he should also be able to formulate an intelligent judgment as to whether such resources are sufficiently adequate to justify the child's retention by the juvenile court system. If a district attorney lacks personal knowledge of the resources available for the juvenile's treatment, he will nevertheless have access to experts within the court's counseling staff and the children's correctional services.

Provision should also be made to enable the child's attorney or guardian to file the motion (with the child's consent) pursuant to the United States Supreme Court decision of *Faretta v. California*²³ which provides that a defendant may represent himself. There is little doubt that this ruling will be extended to include children involved in transfer hearings. Allowing the child's attorney to file for transfer has not generally been allowed. Nevertheless, allowing him to do so may provide the child some strategic advantages.²⁴

It is proposed that juvenile judges no longer be permitted to transfer on their own motion since transfer will no longer be a dispositional alternative.²⁵ This preserves the role of the judge as an arbitrator. It also, in the eyes of the child, maintains the judge in the role of an impartial trier of fact rather than as prosecutor or as one who imposes sentence before all the facts are known.

Further, because experts are available to the state on the issues before the court at a transfer hearing, the child, in fairness, should also have access to experts of his own.

Any party should also have the right to disqualify the judge who conducted either the detention-probable cause hearing or

23. 422 U.S. 806 (1975).

24. There may be occasions when children who are 16 years of age or older and have been accused of serious offenses may decide, in consultation with their attorneys, that access to adult due process rights would be more beneficial to them than the protections of the juvenile justice system. On such occasions they should be able to file motions to transfer.

The author of *LAW AND TACTICS IN JUVENILE CASES* points out: ". . . [T]here may be some benefits to a transfer decision. The juvenile frequently has a better chance for a dismissal of the charge prior to trial, and, if the case goes to trial, may have a better chance for acquittal since a trial by jury is not available in most juvenile courts. If the young defendant or his friends have financial resources it may be easier to obtain a release on bail prior to trial in the criminal system since juveniles have a right to bail in only a very few states." —, *Law and Tactics in Juvenile Cases*, ch. 11 at 252.

25. *Breed v. Jones*, 421 U.S. 519, *supra* note 5.

the transfer hearing from participating in the adjudication hearing or in the criminal trial which may result.²⁶

Statements made by the child at the transfer hearing should be inadmissible in subsequent criminal or adjudication proceedings.²⁷ This is consistent with the usual practice of preserving the confidentiality of juvenile proceedings in any other forum other than for purposes of preparing presentencing reports. If the district attorney has moved for transfer the child should be able, at the transfer hearing, to express his contrition and the manner in which he would aspire to cooperate with a juvenile court plan for his rehabilitation. The *parens patriae* atmosphere should not be allowed to mislead the child or to lure him into a trap in a subsequent criminal proceeding.

The child at a transfer hearing, should be able to address his testimony to the transfer criteria which the court will consider without fear of compromising his right to remain silent at a trial on the merits of the allegations.

Criteria

The United States Supreme Court appended to its opinion in *Kent* criteria formulated by the judge of the Juvenile Court of the District of Columbia. This unusual procedure by the United States Supreme Court has significance in itself.²⁸ The Michigan

26. Uniform Juvenile Court Act (U.L.A.) § 34(e). The Commissioner's Note to Section 34 of the Uniform Juvenile Court Act states: ". . . [O]n a hearing to transfer, the judge of necessity must hear and consider matters relating adversely to the child which would be inadmissible in a hearing on the merits of the petition. Hence, the need of avoiding their prejudicial effect by requiring on motion that another judge hear the charges made in the petition or in the criminal court if the case is transferred."

27. 18 U.S.C. § 5032 (West Supp. 1976).

28. 383 U.S. at 563-568. 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, D.C. CODE* § 11-914. 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 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

Supreme Court also held that the state's statute was insufficient because it lacked standards. The court listed suggested standards. Standards were subsequently adopted by the Michigan Legislature.²⁹ The Maryland Legislature has also adopted de-

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.

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 any 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.

29. *People v. Fields*, 399 Mich. 66, 188 N.W. 2d 217 (1972). Andrew Fields was almost 17 years old, was married, and his wife was expecting a baby. He had failed on juvenile probation and was charged with breaking and entering and uttering and publishing checks. After an extensive hearing, in which a prima facie case was made and findings were made by the juvenile court, Fields was transferred to adult criminal court. The circuit court affirmed the transfer order, noting its reservation concerning the lack of standards for transfer set forth in the statute. The statute, MICH. STAT. ANN. § 27.31 78 (598.4) reads as follows:

In any case where a child over the age of 15 years is accused of any act the nature of which constitutes a felony, the judge of probate of the county wherein the offense is alleged to have been committed may, after investigation and examination, including notice to parents if address is known, and upon motion of the prosecuting attorney, waive jurisdiction; whereupon it shall be lawful to try such child in the court having general criminal jurisdiction of such offense.

The court of appeals denied leave to appeal. The Supreme Court granted leave to appeal and remanded the matter to the court of appeals, which concluded:

After a careful review of the record, we are of the opinion that the waiver proceedings in the instant case were in accord with the basic requirements of due process and fairness, as well as our juvenile court act. 30 Mich. App. 390, 186 N.W.2d 115 (1972).

The Supreme Court had granted leave to appeal solely on the issue of whether the transfer statute was unconstitutional for lack of standards. The Supreme Court noted:

The principal issue being argued in this case is the extent to which the legislature may delegate power to another body or agency. *Such delegation must include sufficient standards so as to obviate any delegation of legislative power.* The legislature may not delegate the power to make laws. (Emphasis added.)

The amicus brief, also citing the above chapter, argues that the juvenile code must be considered as a whole, and states:

In addition to those set forth above, the statutory standards include the following:

(a) The subject must be a child over the age of 15. Further, a person is charged as an adult in the event he is charged with a criminal offense and has reached his 17th birthday.

(b) The subject must be accused of an act the nature of which constitutes a felony. (A petition is described in . . . (the statutes).)

(1) the definition of a felony is provided in the criminal law statutes and cases.

(2) the definition of the alleged felony in question is contained in the criminal law statutes and cases.

(c) The officer to hear the matter must be the judge of probate of the county wherein the act is alleged to have taken place.

(d) An investigation must be made.

(e) A motion must have been made by the prosecuting attorney.

(f) Notice must be given.

(1) the manner of giving notice is set forth more fully in . . . (the statutes).

(g) An examination (hearing) must be held.

(h) The child's right to have an attorney present is described in . . . (the statutes). 199 N.W.2d at 220, 221.

The Supreme Court Stated:

While all of the above are in accord with general concepts of due process none of the enumerations go to the issue of standards except the age of the child and the nature of the offense . . .

It is important to understand the precise issue in this case. It is not whether the constitutional requirements of due process stated in *Kent v. United States* . . . were met. Rather, it is whether the lack of standards in the statute preclude a waiver proceeding. *Id.* at 221.

The child's welfare and the best interest of the state, the court held, were too vague to be considered as standards. The Supreme Court held that the statute was unconstitutional, stating:

If the legislature is to treat some persons under the age of 17 differently from the entire class of persons, excluding them from the beneficent processes and purposes of our juvenile courts, the legislature must establish suitable and ascertainable standards whereby such persons

are to be deemed adults and treated as such subject to the processes and penalties of our criminal law. The statute is unconstitutional because it lacks standards. *Id.* at 222.

The dissent by Justice Black observed that standards were set forth in the Juvenile Court Rules adopted in 1969 and prepared by Judge James Lincoln. He stated:

It is unnecessary to reproduce Rule 11 here beyond pointing to the italicized headings of each division and the primary subdivisions thereof.

The Rule is headed *Hearing; Quantum of Proof; Criteria for Waiver*. Subdivisions (a) and (b) of .1 are headed respectively Phase 1: *Showing of Probable Cause* and Phase 2: *Criteria for Waiver*.

.2 is headed *Notice of Waiver Hearing*.

.3 is headed *Right to Counsel*.

.4 is headed *Access to Social Reports*.

.5 is headed *Waiver Hearing Procedure*.

.6 is headed *Waiver Order; Written Statement . . .*

By the foregoing, I do not mean to suggest that a statute, invalid for want of standards according to the constitutional rule, may be validated by any rule of Court which, although in itself well within the constitutional powers of the Court, undertakes to supply what the statute does not. It is submitted only that Section 712A.4 comes within and is authorized by a well recognized exception to the rule prohibiting delegation of legislative powers.

Here that exception is made by an express mandate of the Constitution declaring that the probate court and the judges thereof 'shall have original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law [,]' . . . in pursuance of which the legislature by Section 712A.4 has not attempted to delegate to the probate court the power to make a law or laws but, rather, has conferred upon that court a mere legal discretion which is exercised in discerning the course prescribed by law and which, when discerned, it is the duty of the court to follow. *Id.* at 223-224.

30. In re Toporzycki, 14 Md. App. 298, 287 A.2d 66 (1972). A 17 year-old mentally retarded boy had an extensive history of anti-social behavior. On February 13, 1969, jurisdiction over a car stealing charge was properly transferred pursuant to the then effective transfer statute and the matter was handled as a criminal case. On June 21, 1971, in reference to another matter, jurisdiction was summarily transferred on the basis of the 1969 action.

The court held that the second transfer was invalid because the prior transfer, conducted in accordance with a statute which had since been repealed, did not comply with the conditions set forth in the new law.

The pertinent section of the new statute provides, *inter alia* that, for a summary waiver of jurisdiction to be valid, there must have been a prior court transfer "under this section" which requires consideration of the following factors:

- (1) Age of child.
- (2) Mental and physical condition of child.
- (3) The child's amenability to treatment in any institution, facility, or program available to delinquents.
- (4) The nature of the offense.
- (5) The safety of the public.

In deciding that the first waiver could not serve as the basis for the second, the court said:

. . . We reach this conclusion not only as compelled because of the explicit expression of legislative intent manifested by the plain words of the statute but as proper because of the criteria which the court must consider in making a just determination as to waiver of jurisdiction under . . . (the new statute) compared to the ambiguous requirements

The correct criterion on which to base the decision of whether to transfer is primarily the child's amenability to juvenile court rehabilitation facilities. Elements which may be considered in establishing amenability in addition to age and the nature of the offense should be enunciated in a statute for the direction of the court and the parties.

Among such elements should be a) the maturity (as distinguished from the chronological age), of the child and his sophistication and judgment (this factor may be established in part by tests administered by psychiatrists and psychologists); b) his participation in public and private social and youth agency activities; c) peer group relations; d) leadership ability; e) school record; f) family history; g) church attendance; h) environment; and i) his mental, physical and emotional health. Further, his police record should be examined, his contacts with law enforcement agencies should be evaluated, and his past history (or lack thereof) with the juvenile court should also be considered. A child with no record of arrests or other contacts with law enforcement agencies has a rehabilitative potential that another child with a record may not have.

If the record reveals contacts with the juvenile court, the child's efforts at responsible behavior should also be weighed. Amenability to rehabilitation is closely related to both past and present motivation and the reasons for that motivation which the case history may reveal.³¹

Finding of Fact and Appeal

The order to transfer (or the refusal to order a transfer) should be a final appealable order. The same parties who are entitled to file the motion should also have the right to appeal. Further, the appeal should be expedited if the child is in detention.

under . . . (the repealed statute). In other words, we feel in any event that waiver after summary review may be made only after a waiver under the authority of and in accordance with . . . (the new statute). Within this frame of reference we hold that the orders of waiver of 21 June 1971 were improper and therefore an abuse of judicial discretion. 287 A.2d at 71.

31. In addition to *Kent, Fields*, and *Toporzycki*, the above criteria are derived from the Policy Statement of the Council of Judges of the National Council on Crime and Delinquency, *Transfer of Cases Between Juvenile and Criminal Courts: A Policy Statement*, 8 CRIME AND DELINQUENCY (1962).

Transfer hearings are proceedings in equity and, as such, they are reviewed *de novo*. As sound procedure and as an assistance to appellate courts it is recommended that the juvenile court be required to buttress its decisions by findings of fact.³² *Kent* certainly seems to mandate findings.³³ Because findings indicate the particular evidence the juvenile judge relied upon, requiring them would simplify the review. The appealing parties' preparation for appeal would also be aided if they knew what evidence the court relied upon in reaching its decision.

Quantum of Evidence

Since *Kent* has held that the transfer proceeding is a critical juncture in a child's life, the quantum of evidence required ought to be clear and convincing proof that the child is not amenable to juvenile court treatment. No statute so directs at the present time.³⁴ An Idaho case³⁵ held that "a valid waiver must be based on a specific finding, supported by substantial and competent evidence obtained in the 'full investigation,' required by statute, that the defendant is not amenable to rehabilitative treatment under juvenile court jurisdiction."

The Indiana Supreme Court has held that there was a presumption that favored the juvenile court retaining jurisdiction,³⁶ and the Kansas Supreme Court has required that there be "substantial" evidence.³⁷ The issue was raised in Oregon but was not resolved.³⁸ Other states have approved the "preponderance" standard.³⁹

The quality of evidence and the records and social histories have not been dealt with herein; they are worthy of an independent investigation. However, the United States Supreme Court held in *Kent* in 1966 that transfer was a "critical stage" of the proceedings.⁴⁰ It subsequently held in *In re Winship*⁴¹ in 1970

32. *Summers v. State*, 248 Ind. 551, 230 N.E.2d 320 (1967); *see*, 383 U.S. 541, 566 (1966); U.T.C.A., FAMILY CODE § 54.02(f) (1975); and A.B. 795, State of Wisconsin (1975), D.C. CODE § 16-2307 (4).

33. 383 U.S. at 557.

34. As the United States Supreme Court pointed out in *Breed v. Jones*, ". . . the Court has never attempted to prescribe . . . the nature and quantum of evidence that must support a decision to transfer a juvenile for trial in adult court." 421 U.S. 519, 537 (1975).

35. *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972).

36. *Atkins v. State*, 290 N.E.2d 411 (Ind. 1972).

37. *In re Patterson*, 210 Kan. 245, 499 P.2d 1131 (1972).

38. *State ex rel Juvenile Dept. v. Mathis*, 21 Or. App. 740, 537 P.2d 148 (1975).

39. *State v. Carmichael*, 35 Ohio St. 2d 1, 298 N.E.2d 568 (1973); *Claunch v. Page*, 427 F.2d 841 (10th Cir. 1970).

40. 383 U.S. at 546.

41. 397 U.S. 358 (1970).

that, where a possibility exists that a child might be incarcerated, the quantum of evidence required must be evidence "beyond a reasonable doubt."⁴² This requirement was followed by *Breed v. Jones*⁴³ which held that an adjudication of guilt in a juvenile court before transfer to an adult court constituted double jeopardy. From these cases it is possible to deduce that the nature of the transfer proceedings is so serious that a high quantum of evidence must be required in order to justify a transfer.

42. *Id.* at 368.

43. *Breed v. Jones*, 421 U.S. 519, 535, *supra*, note 5.

