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# Juvenile or Adult? Lost in Interpretation: The Split on Interpreting a "Prior Record" Under the Federal Juvenile Delinquency Act

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# JUVENILE OR ADULT? LOST IN INTERPRETATION: THE SPLIT ON INTERPRETING A "PRIOR RECORD" UNDER THE FEDERAL JUVENILE DELINQUENCY ACT

Ashley N. Longcor*

## I. Introduction

Few things are more damming to a child than making the decision to transfer them from a juvenile court to an adult court. Sentencing as an adult can result in longer prison sentences, harsher conditions, and incarceration with adult criminals who exploit them. Our system's adult institutions do little to rehabilitate juvenile offenders and often lead to further criminal lifestyles.

With the limited number of juveniles in federal jurisdiction, few people understand how federal court retain jurisdiction over a juvenile. Juveniles arrested by federal law enforcement agencies "may be prosecuted and sentenced in the U.S. District Courts and even committed to the Federal Bureaus of Prisons."[1] The federal agencies that arrest the most juveniles are the Border Patrol, Drug Enforcement Agency, U.S. Marshals Services, and FBI. Following a federal arrest of an individual under the age of twenty-one (21), an investigation is done.[2]

This investigation will determine one of three possibilities for the juvenile: state juvenile court takes jurisdiction, automatic transfer to federal criminal court by statute, or discretionary judicial waiver to federal criminal court.[3] In the third scenario, the decision of whether to waive a juvenile to adult status rests on judicial discretion. [4] Although federal law directs district court judges to consider six factors in making this determination, interpretation of one of these crucial factors has been far from uniform.[5] When determining what constitutes a "prior delinquency record" circuit courts' have employed various methods of examination resulting in wide variations in the outcomes of waiver hearings. The courts have adopted approaches of allowing all prior unadjudicated arrests, allowing the unadjudicated arrests in

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[1] Melissa Sickmund and Charles Puzzanchera (eds.), Juvenile Offenders and Victims 2014 National Report 109 (National Center for Juvenile Justice December, 2014), available at https://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.

[2] *Id*.

[3] *Id*. at 110.

[4] Jessica L. Anders, *Bad Children or a Bad System: Problems in Federal Interpretation of a Delinquent's Prior Record in Determining the Appropriateness of a Discretionary Judicial Waiver*, 50 VILL. L. REV. 227, 228 (2005); 18 U.S.C. § 5032.

[5] [1] the age and social background of the juvenile; [2] the nature of the alleged offense; [3] the extent and nature of the juvenile's prior delinquency record; [4] the juvenile's present intellectual development and psychological maturity; [5] the nature of past treatment efforts and the juvenile's response to such efforts; [6] the availability of programs designed to treat the juvenile's behavioral problems. *Infra* note 67.

under a different factor, or not allowing them in at all.[6] The effect this one decision can have is life-altering and is why a uniform and consistent interpretation of the Federal Juvenile Delinquency Act ("FJDA") discretionary waiver factors is of the upmost importance.

The evidence supports the notion that courts should adopt a narrow reading of this "prior delinquency record" factor to not include prior unadjudicated events and return to the original rehabilitative purpose of the juvenile courts. Not only does this method hinder the risk of any due process violations a juvenile could be exposed to, but it is clear these incidents were not meant to be included by looking at the reading of the Act that outlines the factors and traditional notions.

Before examining the effects of a judicial waiver, it is equally critical to understand the history of the juvenile courts and the still evolving balance between rehabilitation and punishment juvenile courts are striving to achieve. This article next turns to the FJDA and the amendments made to it in response to the due process protections the Court found juveniles were entitled to. This article then analyzes the criteria included in this the FJDA for when a judicial waiver should take place and how the circuits have differently interpreted one of those criteria. This article concludes by addressing why the waiver of juveniles to adult court can be so detrimental and why uniformity is necessary, before finally addressing why courts should in fact not be allowed to take into consideration prior unadjudicated events.

## II. THE BEGINNING OF JUVENILE COURTS AND JUDICIAL WAIVERS

### A. "PROTECTING THE CHILDREN:" FROM REHABILITATION TO PUNISHMENT

In 1899, the creation of the first juvenile court in Chicago, Illinois, was viewed as a pivotal moment in the area of juvenile delinquency.[7] "As the progressive view of family and children continued to become focused, '[t]he juvenile court movement in the United States gathered momentum in the final years of the nineteenth century.'"[8] Illinois passed the first juvenile court act in April of 1899.[9] The act was driven by reformers who were deeply interested in a variety of social causes including protecting children from the disadvantages of a criminal conviction.[10] Prior to this act, juveniles deemed delinquent were locked up with adult criminals and exposed to the same harsh prison conditions.[11]

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[6] *See* discussion *infra* Part III. A. 1-3.

[7] Wright S. Walling & Stacia Walling Driver, *100 Years of Juvenile Court in Minnesota--A Historical Overview and Perspective*, 32 WM. MITCHELL L. REV. 883, 889 (2006).

[8] *Id*. (quoting Monrad G. Paulsen & Charles H. Whitebread, *Juvenile Law and Procedure* 1 (N. Corinne Smith ed., 1974)).

[9] Walling, *supra* note 7, at 889-90.

[10] *Id.* at 890.

[11] Randie P. Ullman, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329, 1331 (2000).

Since the court aimed to focus on rehabilitation rather than punishment, this new court operated "with great procedural informality—in the absence of a jury trial, public trial, and constitutionally guaranteed rights of any kind."[12] These courts believed that charges should not be filed *against* a child but rather "in his [best] interest."[13] The court originally intended to determine the cause for a child's misbehavior and offer treatment. As noted by juvenile court Judge Julian Mack of Illinois, the question is, "[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[?]"[14] The court's goals included meeting the child's needs, serving the child's best interests, and rehabilitating, rather than punishing the child.[15] Focusing on rehabilitation, the original juvenile court system adopted the principle of *parens patriae*,[16] or the court's role as a guardian who makes a reasonable decision on the part of a person who is unable to make one for himself.[17] "Juvenile court personnel believed that the court's rehabilitative purpose made the formal protections of due process unnecessary."[18] The process was intended to be "'more of an information-gathering and problem-solving session to serve the best interests of the child, [rather] than an adversarial-type of proceeding seen in a criminal court.'"[19] By the late 1920s, nearly every state passed a statute similar to that of Illinois and created its own juvenile court system.[20]

Juvenile court proceedings were "'anti-legal' in the sense that [they] encouraged minimum procedural formality."[21] Criminal procedures and due process protections did not apply as juvenile cases were classified as civil matters.[22] For example, in many states a prosecutor's burden of proof for a case against

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[12] Walling, *supra* note 7, at 890 (citing Paulsen & Whitebeard, *Juvenile Law and Procedure* at 2).

[13] *Id*.

[14] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909).

[15] Walling, *supra* note 7, at 892.

[16] Julie J. Kim, Note, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843, 846 (2010) (citing Sacha M. Coupet, Comment*, What To Do With The Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1308 (2000)).

[17] BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

[18] Kim, *supra* note 16, at 847 (citing Hon. W. Don Reader, *The Laws of Unintended Results*, 29 AKRON L. REV. 477, 479 (1996)).

[19] *Id.* (alteration in original) (quoting Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focuses Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1161 (2001)).

[20] *E.g*., Walling, *supra* note 7, at 889; Kim, *supra* note 16, at 846-47.

[21] Bradley T. Smith, *Interpreting "Prior Record" Under the Federal Juvenile Delinquency Act*, 67 U. CHI. L. REV. 1431, 1434 (2000) (citations omitted).

[22] Howard N. Snyder & Melissa Sickmund, Office of Juvenile Justice and Delinquency Prevention, Juvenile Offenders and Victims: 1999 National Report, 86, 88 (1999) ("In this benevolent court . . . due process protections afforded criminal defendants were deemed unnecessary.").

a minor was by a preponderance of the evidence.[23] Juries were not used, and many statutes did not require appointment of counsel, appeals, or even formal procedures.[24] The parties including the judge, prosecutor, and the child "conversed freely about the appropriate resolution."[25] This informality simultaneously protected minors from the "'stigma of a criminal record,' as juvenile hearings were sealed from the press and public."[26]

Contributing to the informal nature of these courts was the vast discretion held by juvenile courts judges when making a disposition.[27] With these judges stepping into the role of a parent or guardian, the courts "enjoyed enormous discretion to make dispositions in the 'best interests of the child.'"[28] One scholar noted, "Early reformers of juvenile court were not unduly concerned about the 'lawless dimension' of discretion. Caught up in the optimism of the era and convinced of the strength of professionalism, they trusted that judges would use it wisely."[29]

Beyond the disparity of what was in "the best interest of the child," few guidelines existed for determining an appropriate treatment for a juvenile.[30] Subsequently, vast disparity in the sentencings existed from one case to another.[31] This discretion could even mean excluding them from the juvenile courts altogether. "If a juvenile judge determined a 'youth was not amenable to . . . rehabilitative treatment,' the court could waive jurisdiction over the juvenile, at which point the minor would enter the criminal justice system and be tried as an adult."[32] As with other juvenile court proceedings, such determinations were largely discretionary.[33] One study, noted: "Transfer decisions were made on a case-

[23] Smith, *supra* note 16.

[24] *Id*.

[25] Sarah Freitas, Comment, *Extending the Privilege against Self-Incrimination to the Juvenile Waiver Hearing*, 62 U. CHI. L. REV. 301, 304 (1995).

[26] Smith, *supra* note 21 (citations omitted).

[27] Since juvenile proceedings are civil and not criminal, a minor is not technically "sentenced" in juvenile court. Rather, the youth's status is adjudicated. If a minor is found to have committed an illegal act, he is "adjudicated" a delinquent and instead of being sentenced, received a disposition plan.

[28] Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 477 (1987).

[29] Smith, *supra* note 21, at 1435.

[30] Feld, *supra* note 23 ("As reflected in juvenile sentencing practices, an extremely wide frame of relevance and an absence of controlling rules or norms characterized this type of decision-making.").

[31] Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 695 (1991).

[32] Smith, *supra* note 21, at 1435 (quoting Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Cour*t, 69 N.C. L. REV. 1083, 1109-11 (1991)).

[33] Feld, *supra* note 28.

by-case basis using a 'best interests of the child and public' standard, and were thus within the realm of individualized justice."[34]

## B. THE FEDERAL JUVENILE DELINQUENCY ACT OF 1938

By 1925, nearly two-thirds of the states had adopted their own juvenile justice system; following suit, in the late 1930s, the federal government enacted the Federal Juvenile Delinquency Act (FJDA) to establish how juvenile offenders will be treated in the federal system.[35] The Act, similarly, provided that a juvenile—defined as anyone under the age of eighteen-charged with violating federal law—would be processed as a delinquent rather than tried as an adult criminal.[36] "The purpose of the FJDA [was] to transfer youthful offenders to the criminal justice system when deemed in the best interests of the child and society, and retain those juveniles capable of rehabilitation in the juvenile justice system in order to avoid the stigma of being a convicted criminal."[37]

The FJDA permits federal jurisdiction only under specifically enumerated circumstances.[38] Because of a strong presumption against trying juveniles in the federal system, and a preference to state jurisdiction, the FJDA allows only three instances in which the "Attorney General may assert jurisdiction over a juvenile in federal court: (1) the juvenile state court does not have jurisdiction or refuses to assume it; (2) the state does not have the available programs or services; or (3) the crime is a drug offense or violent felony."[39]

However, at the time and unlike most states, the decision to waive juvenile jurisdiction and try a minor as an adult, rested entirely with the Attorney General, as opposed to the courts.[40] The FJDA granted the Attorney General unlimited discretion to prosecute a child under eighteen as a juvenile if that child had not been surrendered to state officials or charged with an offense punishable by death or life in prison.[41] While some states permitted a prosecutor to waive a juvenile into adult court initially, "most juvenile courts had exclusive original jurisdiction over all youth who were charged with violating criminal laws.

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[34] Snyder, *supra* note 22.

[35] 18 U.S.C. § 5031.

[36] *Id.*

[37] Anders, *supra* note 4, at 238.

[38] *See* 18 U.S.C. § 5032.

[39] *Id.* Anders, *supra* note 4, at 239.

[40] 18 U.S.C. § 5032 (stating that a "juvenile . . . shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court").

[41] William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY'S L.J. 509, 518-19 (1983).

Only if the juvenile court waived its jurisdiction in a case could a child be transferred to criminal adult court and tried as an adult."[42]

## C. PARENS PATRIAE TAKES ON DUE PROCESS

Immediately following the creation of juvenile courts, "concern arose over the paternalistic position of the courts, and the limitations on what many viewed as constitutional requirements for courts' involvement in the lives of individuals."[43] The law granted courts clear discretionary power to make what decision they thought was best for a child and their family.[44] In many cases, the power extended to removing children from their homes or families and placing them in disciplinary institutions.[45] As stated by one author,

> The fact that the juvenile court exercised the power to take children from their parents and to commit children to state training schools by procedures that did not involve a jury or a public trial, the right to remain silent, the right to counsel and the rest, raised serious questions of constitutional law.[46]

With many children in this system facing repercussions involving a form of removal from their families or homes, people began questioning if taking away these due process rights and placing the discretion into the hands of the courts was the best decision or not.

### 1. *Kent* Era

After a number of years, the conflict between *parens patriae* and due process reached the U.S. Supreme Court in the revolutionary case of *Kent v. United States*.[47] With its 1966 decision in *Kent v United States,* the United States Supreme Court held, for the first time, that juveniles were entitled to the "essentials of due process."[48] Morris Kent, a sixteen-year-old boy, confessed to breaking and entering, robbery, and rape.[49] In spite of a motion for a hearing on the waiver of jurisdiction that had been filed by Kent's attorney, the judge determined a "full investigation" had been completed and waived jurisdiction over

[42] Snyder, *supra* note 22.

[43] Walling, *supra* note 7, at 893.

[44] *See* Mason P. Thomas Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. Rev. 293, 327 (1972).

[45] *Id*.

[46] Walling, *supra* note 7, at 893-94 (citations omitted).

[47] 383 U.S. 541 (1966).

[48] *Id.* at 562.

[49] *Id.* at 543-44.

Kent's case without providing any findings or rationale.[50] As a result of the transfer, Kent was sentenced as an adult to serve five to fifteen years on each count, for a total prison term of 30 to 90 years.[51]

On review, the Supreme Court reversed Kent's conviction while addressing the notion of *parens patriae*. Although recognizing that the "Juvenile Court . . . ha[d] considerable latitude within which to determine whether it should retain jurisdiction over a child," the Court found such discretion "d[id] not confer upon the Juvenile Court a license for arbitrary procedure."[52] Criticizing the *parens patriae* theory, the Court found that a minor could "receive[ ] the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[53] Rejecting arguments that informality was necessary to adequately address the individual needs of juveniles, the Court declared that when transferring a minor to adult status "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony--without hearing, without effective assistance of counsel, without a statement of reasons."[54] Consequently, the Court held that any minor facing waiver to the criminal system was entitled to a hearing, access to social records, probation reports and a statement by the judge stating the reasons for the waiver.[55]

With this ruling, the Supreme Court also outlined various "determinative factors" for district court judges to use in discretionary waiver decisions.[56] The Supreme Court listed eight factors for general guidance, that are loosely mirrored by the current FJDA factors for discretionary waiver, including:

> (1) the seriousness of the alleged offense in relation to protecting the community's safety; (2) whether the nature of the alleged offense was aggressive, violent, or willful manner premeditated; (3) whether the alleged offense was against persons or property; (4) the merits of the complaint; (5) the need to try the entire case in one court; (6) maturity of the charged; (7) record and previous history; and (8) the prospect of rehabilitation.[57]

While these factors appear to create the perception of uniformity in waiver determinations, some argue the application of the eight factors actually "confused lower courts and resulted in the differential waiver process that exists today."[58] Moreover, the introduction of procedural safeguards and "determinative

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[50] *Id.* at 546-47.

[51] *Id.* at 550.

[52] *Id.* at 552-53 (discussing how judges must stay within constitutional limits when determining judicial waiver).

[53] *Id.* at 556.

[54] Smith, *supra* note 21, at 1439.

[55] *Kent,* 383 U.S. at 561-63 (elaborating factors and requirements that district court judges must evaluate prior to decision to waive juvenile proceeding). The Court pointedly held that "[m]eaningful review requires that the reviewing court should review. It should not be remitted to assumptions." *Id*. at 561.

[56] *Id.* at 566-67.

[57] *Id.*

[58] Anders, *supra* note 4, at 236-37; Feld, *supra* note 28, at 474.

factors" in transfer decisions made the juvenile justice system "more akin to its adult criminal counterpart."[59] Thus, the *Kent* decision marked a significant shift away from the traditional theoretical underpinnings of rehabilitation in the juvenile court system and movement towards introducing a more punitive ideology.[60]

### 2. *Gault* Era

In 1967, the United States Supreme Court, in *In Re Gault,* announced further protections for juveniles facing "loss of [their] liberty" and further departure from the rehabilitative nature of the courts.[61] This case came to the U.S. Supreme Court after a 15-year-old minor was sentenced to the State Industrial School until the age of 21 for making "Lewd Phone Calls."[62] During the hearings involved, the minor and his parents were denied a number of certain constitutional rights.[63] This case forced the Supreme Court to determine what procedural rights a juvenile defendant in delinquency proceedings has, specifically when there is a possibility of any removal from the home.[64] The Court, ultimately, held that juveniles are entitled to all rights Gault and his parents had been denied during his trial: "(1) notice of the charges, (2) right to counsel, (3) right to confrontation and cross-examination, (4) privilege against self-incrimination, (5) right to a transcript of the proceedings, and (6) right to appellate review."[65]

*In re Gault* affirmed that juveniles are afforded certain basic constitutional due process protections in hearings that could result in commitment to an adult institution. The majority found that:

> There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. . . . A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.[66]

Looking at the evolution of the juvenile courts, today, many agree the majority and dissenting opinions from this case reflect the current split in ideologies of the purpose of the juvenile courts, as well as the fact that this case was the first step away from a rehabilitative purpose and towards a more punitive one. As stated by one author, the added protections the Supreme Court defined here "pushed the ideology behind the juvenile justice system closer to punishment and farther from the importance of a child's

[59] Anders, *supra* note 4, at 237.

[60] *Id*.

[61] 387 U.S. 1, 36 (1967).

[62] *Id.* at 7.

[63] *Id.* at 9-10.

[64] *Id.* at 10.

[65] *Id.*

[66] *Id.* at 36.

amenability to rehabilitation."[67] In contrast, Justice Stewart's dissenting opinion remained rooted in the same beliefs the original juvenile courts had been founded on:

> Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. . . . [A] juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.[68]

In sum, Justice Stewart contended that the Court's opinion, "serve[d] to convert a juvenile proceeding into a criminal prosecution."[69] Justice Stewart's words against the ruling from the Court in this case, from over 40 years ago, reflect the contrasting perspectives regarding the purpose of the juvenile courts today.

## III. AMENDING THE FEDERAL JUVENILE DELINQUENCY ACT AND ITS INTERPRETATION

In response to *Kent* and *Gault*, the U.S. Congress amended the FJDA to "provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes and court decisions."[70] Adhering with *Kent* and *Gault*, the amendments require that any transfer decision be made on the record, the right to a speedy adjudication, and the right to counsel.

These revisions went a step beyond *Kent*, though, by altering the criteria for transferring juveniles within the federal court system. The revisions remove the prior discretion of the Attorney General to transfer a juvenile to adult status and shift the responsibility to federal district courts. The FJDA further limits the discretion of district courts to authorize such transfers in the first place.

> First, it provides that only those juveniles who, after turning fifteen, are charged with committing a crime of violence that would be a felony if committed by an adult, or who are accused of violating certain narcotic laws, may be transferred. Secondly, the FJDA requires a court to determine, after a hearing, that removing the minor from the juvenile justice system "would be in the interest of justice."[71]

When determining whether a transfer would be in the interest of justice, Section 5032 of the federal delinquency proceedings and transfer for criminal prosecution statute specifies six factors that courts must not only consider, but also make specific findings for. These factors --include:

> [1] the age and social background of the juvenile; [2] the nature of the alleged offense; [3] the extent and nature of the juvenile's prior delinquency record; [4] the juvenile's present intellectual development and psychological maturity; [5] the nature of past

[67] Anders, *supra* note 4, at 237-38.

[68] *Gault,* 387 U.S. at 79 (Stewart, J. dissenting).

[69] *Id.*

[70] S. Rep. No. 1011, 93d Cong., 2d Sess. 199 (1974).

[71] Smith, *supra* note 21, at 1441-42 (quoting 18 U.S.C § 5032).

> treatment efforts and the juvenile's response to such efforts; [6] the availability of programs designed to treat the juvenile's behavioral problems.[72]

The government bears the burden of demonstrating all six factors. If fails to prove even one of the six factors, the juvenile may not be transferred to adult status.[73]

Federal courts' holdings that under the amended FJDA, a juvenile has the right to an immediate appeal of any transfer order reflects courts' awareness that a transfer carries severe consequences.[74] Multiple circuits have emphasized that the purpose of the revised FJDA "is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[75] Courts seem to recognize that by removing the minor from the juvenile justice process, the juvenile will face "publicity, the possibility of incarceration amongst adults, stiffer penalties, and a felony record."[76] As one commentator observed, "criminal court transfer offers a drastic and permanent solution for an offender thought to be beyond redemption. It is the court's way of saying, 'there are no more second chances for you.'"[77] As such, a transfer is properly granted only when a court, after considering the six statutory factors, "determines that the risk of harm to society posed by affording the defendant more lenient treatment within the juvenile justice system outweighs the defendant's chance for rehabilitation."[78]

Traditionally, the impact of the FJDA has been limited because of state jurisdictional deference. Nevertheless, because the federal and state juvenile justice systems have incorporated the eight subjective "determinative factors" into each system's juvenile waiver statutes, both systems face many of the same problems with interpretation. Further, the problems that federal court judges have when attempting to properly apply the six waiver factors under the FJDA reflect the same difficulties faced by state court judges when interpreting and applying state waiver statutes. Therefore, while the FJDA does not currently have a massive impact on juveniles, problems with its interpretation highlight the same need to reform waiver factors, which exists in both the state and federal juvenile justice systems.

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[72] 18 U.S.C. § 5032.

[73] United States v. Anthony Y., 172 F.3d 1249, 1252 (10th Cir 1999) (noting that "the government must present evidence on each factor.").

[74] *See, e.g.*, United States v. Leon D.M., 132 F.3d 583, 587-88 (10th Cir. 1997) (citing cases in each of the federal circuits that allowed for an interlocutory appeal of a juvenile transfer order).

[75] *See, e.g.*, United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990).

[76] Smith, *supra* note 21, at 1443.

[77] Jeffrey A. Butts & Adele V. Harrell, *Delinquents or Criminals: Policy Options for Young Offender*s 7 (Urban Institute 1998).

[78] United States v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994).

## A. CONTRADICTING DEFINITIONS OF A PRIOR JUVENILE DELINQUENCY RECORD

Since incorporation of the six waiver factors, the circuit courts have taken three different approaches in applying "the extent and nature of the juvenile's prior delinquency record."[79] While most allow review of unadjudicated contact, some courts fail to explicitly address whether the contact should come in under the prior record factor or another one. As a result there is a split between circuits with some states fully allowing unadjudicated contact under this factor,[80] others fully excluding these uncharged crimes,[81] and the majority excluding it under this specific factor but allowing it under a different one.[82]

### 1. Only Prior Adjudicated Arrests

The D.C. Circuit became the first circuit to express concerns about the inclusion of unadjudicated prior police contact; in *In re Sealed Case*, the court found that it was in the interest of justice and within the meaning of the FDJA to exclude evidence of uncharged crimes based on "the nature of the alleged offense," factor.[83] The seventeen-year-old juvenile in this case was charged with three counts of cocaine distribution. The government moved to transfer the minor to adult status "so that it could prosecute him criminally."[84] Seeking transfer, the government used the "nature of the offense" factor to introduce evidence of uncharged conduct through a police officer's affidavit.[85] Relying heavily upon this evidence, the district court granted the motion to transfer the minor to adult court.[86]

On appeal, the circuit court held that the FDJA's language and the fundamental principles of due process prohibited the consideration of uncharged conduct in the waiver hearing.[87] The court stated that, "Congress was concerned with limiting the kind of information that comes before a judge at a transfer hearing" and therefore, it was proper to exclude certain types of evidence.[88] The court, further, concluded that considering uncharged conduct within the "nature of the alleged offense" factor would violate the

[79] 18 U.S.C. § 5032.

[80] *See infra* note 107, 108.

[81] *See infra* note 80, 98, 99.

[82] See infra note 118, 119, 120.

[83] In re Sealed Case (Juvenile Transfer), 893 F.2d 363, 368 (D.C. Cir. 1990).

[84] *Id.* at 365.

[85] *Id.* (describing transfer hearing).

[86] *Id.*

[87] *Id.* at 368 ("The plain language of the phrase, the text surrounding it and principles of due process make clear that Congress did not intend § 5032's 'the nature of the alleged offense' category to encompass evidence of other uncharged crimes.").

[88] *Id.* at 368-69.

juvenile's due process rights.[89] Under the FJDA, a judge "is entitled to assume that the juvenile committed the offense charged for the purpose of the transfer hearing."[90] However, the court held that the trial judge may not make assumptions about the remaining factors, and a juvenile must be able to challenge the government's position regarding those factors at the transfer hearing.[91] If the "nature of the alleged offense" category were extended to include uncharged criminal offenses, the juvenile court would be able to make unchallenged assumptions about certain activity that ultimately "[would] not be corrected at trial."[92] Thus, allowing "the transfer hearing judge to presume those [uncharged] allegations true . . . would violate a juvenile's due process rights."[93]

Prior to this ruling, the court's argument only seemed to extend to the narrow concerns over the "nature of the alleged offense" factor; "[t]he definition of prior conduct did not seem to be implicated."[94] "Yet the court proceeded to claim that the six transfer factors were intended to limit "'the kind of information that comes before a judge at a transfer hearing.'"[95] "Based on this principle, the court suggested that regardless of due process concerns, considering evidence of unadjudicated and uncharged conduct would be inappropriate."[96] "'(S)ince . . . the purpose of the Act is rehabilitation and not punishment,' the court argued that 'Congress could not have contemplated the hearing to focus on a plethora of uncharged and unproven offenses.'"[97]

Although the D.C. Circuit never expressly stated that the scope of "prior delinquency record" was limited to adjudicated conduct, its holding in *In re Sealed Case* implicitly stands for that proposition.[98] Discussing the six waiver factors, the court found that only two factors--the nature of the offense and the prior record--relate to actual violations of the law, thereby limiting the types of admissible unadjudicated conduct.[99]

> If such conduct could not be reviewed under either the prior record or nature of offense factor, the court implied that it could not be reviewed at all. The court suggested that only

[89] *Id.* at 369.

[90] *Id.*

[91] *Id.* at 360 n.10 (citing *Kent*, 383 U.S. at 563, and noting that "a juvenile can contest evidence offered by the government" for the other five categories).

[92] *Sealed Case,* 893 F.2d at 369.

[93] *Id.*

[94] Smith, *supra* note 21, at 1446.

[95] *Id.* (quoting *Sealed Case,* 893 F.2d at 369).

[96] *Id.*

[97] *Id.* (quoting *Sealed Case,* 893 F.2d at 369).

[98] In re Sealed Case, 893 F.2d at 369.

[99] *Id.*

> the nature of the offense and prior delinquency record factors specifically allow for the contemplation of violations of the law, while the remaining factors (that is, social background, intellectual maturity, and past treatment efforts) require 'a transfer judge to make findings . . . entirely unrelated to the juvenile's alleged violations of the law.'[100]

Other courts have also held that the "plain language of the term 'the juvenile's prior *delinquency record*' cannot plausibly be interpreted to encompass evidence of *un* recorded acts, nor . . . conduct which has not been adjudicated."[101]

In 1998, the Seventh Circuit upheld the ruling that arrests that do not result in convictions are not part of the "juvenile court records" that the government is required to submit.[102] In *United States v. Jarrett*, a seventeen-year-old was transferred to adult status in the "interest of justice" and convicted of ten counts of possessing heroin with intent to distribute.[103] The minor had previously been arrested for criminal trespass to a vehicle, trespass to state land, battery, aggravated sexual assault, possession of cannabis, mob action, and heroin possession - none of which resulted in convictions.[104] Ironically, the juvenile claimed the government's failure to introduce his prior, unadjudicated arrests violated certain provisions of Section 5032 that require the government to submit a minor's juvenile records to the court before the transfer hearing.[105] The court held that because the other records alluded to by Jarrett did not lead "to a conviction or punishment" they did not have to be reviewed by the district court.[106]

Advocates for narrowly reading a prior delinquency record argue that if unadjudicated conduct is admissible, a juvenile could be unduly prejudiced in a waiver hearing because a judge may assume waiver is proper based on conduct never before heard or proved in any court.[107] Advocates further claim that a broad reading of the statute, allowing for the admission of uncharged conduct, violates the fundamentals of due process because of the juvenile's inability to correct inaccuracies possibly contained in the record.[108]

**2. All Prior Police Contact**

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[100] Smith, *supra* note 21, at 1446.

[101] United States v. Juvenile LWO, 160 F.3d 1179, 1183 (8th Cir. 1998) (emphasis in original).

[102] United States v. Jarrett, 133 F.3d 519, 537 (7th Cir. 1998), *cert. denied*, 523 U.S. 1112 (1998).

[103] *Id.* at 527.

[104] *Id*. at 537.

[105] *Id*.

[106] *Id*.

[107] *See LWO,* 160 F.3d at 1183 (noting that "allowing a district judge to consider evidence of uncharged crimes . . . would violate the juvenile's due process rights").

[108] *Id.* (explaining violation of due process argument).

Advocates for considering all of a juvenile's prior police contacts in determining the suitability of transfer to adult status maintain that all juvenile interaction with law enforcement has the potential to educate a district court judge as to a child's criminal tendencies.[109] All prior police contacts include charges, arrests, and convictions documented by law enforcement officials. Courts taking this position have held that district court judges, in conducting transfer hearings, should limit their review to the record itself and not inquire into the circumstances surrounding the alleged prior offenses.[110] These courts indicate that it is improper to litigate the merits of a previous arrest in the context of a transfer hearing.[111] Thus, even those espousing a broader reading of "prior delinquency records" limit their analysis to written police and court reports.[112]

In *United States v. Wilson*, for example, the Seventh Circuit discussed the scope of a juvenile's prior delinquency record in the case of then sixteen-year-old Wilson who, was charged with three counts of distributing cocaine and one count of distributing crack.[113] At the transfer hearing, in response to the government's motion to try Wilson as an adult, the district court considered Wilson's prior delinquency record in determining that Wilson should be transferred to adult status.[114] While Wilson's record was void of convictions for any serious offenses, he had been charged with, but never convicted of, more than eighteen separate offenses.[115]

Citing *In re Sealed Case*, Wilson asserted the government could only consider prior convictions when looking at his "juvenile record."[116] The Government argued that Wilson's prior delinquency record consisted of all prior police contacts, not solely adjudicated conduct.[117] Wilson's counsel argued that the court could not consider arrests that did not result in convictions.[118] The Seventh Circuit rejected this argument. Noting the "paucity of case law interpreting this part of the transfer statute," and without defining what constituted a juvenile record, the court concluded: "Congress could have limited the inquiry to the juvenile's prior convictions, but it did not."[119] Without offering reasons for its interpretation, the

[109] Ullman, *supra* note 11, at 1355.

[110] *United States v. Wilson*, 149 F.3d 610, 613 (7th Cir. 1998).

[111] United States v. TLW, 925 F. Supp. 1398, 1403 (C.D. Ill. 1996), *aff'd sub nom.* United States v. Wilson, 149 F.3d 610 (7th Cir. 1998).

[112] Ullman, *supra* note 11, at 1355.

[113] Wilson 149 F.3d at 611.

[114] *Id*.

[115] *Id*.

[116] *Id*.

[117] *Id.*

[118] *Id.*

[119] *Id*. at 613.

court, in contrast to *In re Sealed Case*, defined "delinquency record" as including "arrests as well as convictions."[120]

### 3. Exclusion under Prior Record but Inclusion under Another Factor

In 1998, the Eighth circuit adopted a slightly different take on interpreting this criterion where they ultimately excluded the prior police contact under a prior record but included it within another factor. In U*nited States v. Juvenile LWO,* the court declared, "it is erroneous for a district court to consider evidence of incidents or behavior for which there has been . . . no conviction. . . . Such evidence may be considered in analyzing the other . . .factors."[121]

In 1999, the Tenth Circuit also took this approach when finding that even if prior arrests could not be considered part of a juvenile's prior delinquency record, they could be weighed under one of the four remaining transfer factors, such as social background.[122] Because of the inclusion of the acts under another factor, they failed to address whether it should be included under prior record or not.

As recently as 2015, a court in the Second Circuit looked to both of these circuits when holding that while unadjudicated conduct shall not be considered in determining the scope of a minor's delinquency record, it can be considered it in assessing the child's psychological maturity and intellectual development.[123] Here, the court determined transferring the juvenile defendant to adult status for prosecution for conspiracy to provide material support to a foreign terrorist organization was in the interest of justice.[124] In spite of the fact that the defendant had never been adjudicated a juvenile delinquent which weighed against transfer, by engaging in theft and forgeries from his employers, the court found this demonstrated psychological maturity and intellectual capacity which weighed in favor of a transfer.[125]

In its analysis, the court discussed the various split in interpretations among the circuits. The court pointed out that the Seventh Circuit has not directly addressed whether unadjudicated conduct may be considered in evaluating a juvenile's prior delinquency record on a motion to transfer but has given implicit support to the notion that a juvenile's previous arrests may be relevant under that factor.[126] It also pointed to the contrast between the Eight Circuit finding a judge is not authorized to consider evidence of other crimes in assessing the nature of the alleged offense[127] and the Seventh Circuit finding that the

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[120] *Id*.

[121] *Juvenile LWO*, 160 F.3d at 1184.

[122] *Anthony Y*., 172 F.3d at 1253-54.

[123] United States v. Doe, 145 F. Supp. 3d 167, 186 (E.D.N.Y. 2015).

[124] *Id*. at 189.

[125] *Id*. at 185-186.

[126] *Id.* at 185.

[127] The court here interprets *Juvenile LWO* has not allowing in the prior contact, and while they did affirm not allowing the prior contact in under that factor, they did allow it in under another factor.

factor encompasses arrests and convictions, as seen in *Wilson*. The court finally discussed the Tenth Circuit's unwillingness to explicitly adopt an approach, but even limiting the evidence to adjudicated conduct the behaviors was relevant to other statutory factors of psychological maturity and intellectual development or the nature of, and response to, psychological treatments.[128]

In finality, it adopted the approach from the Eight Circuit and *Juvenile LWO*. While similarly allowing it under another factor, like the Tenth Circuit in *Anthony Y*, it did not avoid the issue at hand.[129] The court firmly stated that prior unadjudicated contact should not be considered within a prior record, but it is appropriate to include it under present psychological maturity and intellectual development.[130]

In sum, decisions from several circuits point the courts in different directions. The D.C. Circuit has suggested that unadjudicated and uncharged conduct may not be considered under the FJDA. In contrast, the Eighth Circuit has indicated that while such conduct may not be examined as part of a juvenile's prior delinquency record, it may be considered under other statutory factors. The Tenth Circuit, declining to consider the definition of prior delinquency record, has also allowed unadjudicated and uncharged conduct to be reviewed under other transfer factors. Meanwhile, the Seventh Circuit, addressing only the narrower question of unadjudicated arrests, has resisted the trend to hold that arrests are part of a juvenile's prior record. As the Sixth Circuit explicitly noted, "[t]he scope of § 5032's reference to the 'juvenile record' is indeed unclear."[131]

## IV. JUVENILES IN AN ADULT SYSTEM: IMPACTS OF PUNITIVE REFORM

"Transferring a juvenile to adult status is a sentencing decision that represents a choice between the punitive disposition of criminal court and the rehabilitative disposition of juvenile court."[132] This choice is one that can have drastic implications regarding a juvenile's intellectual and psychological development, and even on his/her own personal safety.

### A. ADULT FACILITIES V. JUVENILE FACILITIES

#### 1. Lacking Rehabilitative Focus

Transferring a juvenile to adult status is a decision that can mean the difference between a lengthy prison sentence or programs aimed at helping target what was causing the delinquency behavior. While the current purpose of the adult criminal is deterrence and punishment, the purpose of the original juvenile

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[128] *Id.*

[129] *Id*. at 185.

[130] *Id*. at 185-186.

[131] United States v. A.R., 203 F.3d 955, 961 (6th Cir. 2000).

[132] Ullman, *supra* note 11 at 1346.

justice system was rehabilitation.[133] Thus, waiver of juvenile jurisdiction to adult court subjects juveniles to the adult criminal system, imprisonment with adults, and the consequences that stem from that imprisonment.

Based simply on its contrasting purposes, the environment of an adult court is not sensitive to the needs of juvenile defendants. Juvenile defendants face a more unfathomable legal environment in adult court than in juvenile court.

> The degree of the child's inability to comprehend the adult system will inevitably result in challenges to [the] youngsters' fitness to stand trial based upon developmental considerations, an issue which juvenile courts can sometimes avoid. . . . [C]hildren do not grasp 'abstract legal concepts' such as 'rights' generally understood by adults[,] . . . [and] children's understanding of the trial process is poorer than that of adults. Children often have difficulty 'separating defense attorney functions from court authority.' Finally, 'pre-adolescents are significantly less capable of imagining risky consequences of decisions.'[134]

When deciding whether to go to trial in adult court or take a negotiated plea bargain, juveniles often do not understand the consequences of such decisions due to their inability to measure the likelihood of conviction or the impact of the length of a sentence upon their lives. Additionally, judges, prosecutors, and defense attorneys in adult court often do not have the specialized training to meet the special needs of juveniles as they often do in juvenile court. Because federal juvenile proceedings are less common than state proceedings, there is minimal binding authority on interpreting the federal transfer provision.[135] The federal justice system has no distinct juvenile court, no judges exclusively educated in the problems associated with juvenile delinquency, and no specialized probation officers.[136] In determining whether waiver is suitable, district court judges are expected to determine the best interests of a juvenile defendant using only the guidelines provided by statute.

Though public institutions vary from state to state, juvenile institutions are generally located in rural areas with a campus-style layout.[137] Housing is generally broken down into "cottage units" creating small groups for professionals to come in and work with the juveniles.[138] Nearly all delinquency institutions

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[133] Christine Chamberlin, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. Rev. 391, 394 (2001).

[134] Thomas F. Geraghty, *Justice for Children: How Do We Get There*?, 88 J. CRIM. L. & CRIMINOLOGY 190, 222 (1997).

[135] *TLW*, 925 F. Supp. at 1400.

[136] See Federal Juvenile Delinquency Act, Pub. L. No. 75-666, § 18.01, 52 Stat. 764, 765 (1938) (codified as amended at 18 U.S.C. § 5031 (1994)). Additionally, the Federal Bureau of Prisons has no distinct juvenile facilities. *See* United States v. Dion L., 19 F. Supp. 2d 1224, 1227 (D.N.M. 1998). The federal government is forced to contract with state and private juvenile facilities that provide counseling and rehabilitation services. *Id*. Unfortunately, "juveniles are often assigned depending on where space is then available" and there is no guarantee that they will be incarcerated conveniently for family members. *Id*.

[137] Larry J. Siegel & Joseph J. Senna, *Juvenile Delinquency: Theory, Practice and Law* 308, 448 (1981).

[138] *Id.*

include group or individual counseling, educational and vocational training, recreational programs, and religious counseling.[139] Through the emphasis on the counseling programs, there is also a far greater effort to improve and retain familial relations.[140]

As a result of these circumstances, upon release these juveniles are at a higher risk to re-offend and continue to be a part of the adult criminal system[141]. A 1987 study revealed that upon release, juveniles incarcerated in adult facilities had higher rates of re-arrest, committed more serious re-arrest offenses, and were re-arrested more promptly than those housed in juvenile facilities.[142]

**2. Risks to Juveniles in Adult Facilities**

In spite of the fact that the Juvenile Justice and Delinquency Prevention Act ("JJDPA") Act of 1974 mandates that juveniles be separated from adults in "[s]ight and sound" during every stage of a judicial proceeding,[143] juveniles who are waived into the adult system do not receive these protections.[144] A juvenile offender convicted in adult court may be subject to straight adult incarceration, graduated incarceration, or segregated incarceration.

> In straight adult incarceration, juveniles are placed in adult prisons and subject to the same treatment and programs as adult convicts. Graduated incarceration places the juvenile in a separate institution from adults until they reach a specified age, as dictated by statute. Upon reaching that age, the juveniles are removed from the separate facility and placed into an adult facility. The segregated system of incarceration isolates the youthful offenders from older offenders by housing them in separate facilities for the term of their stay. Juveniles under the segregated system will never co-habitate with adult offenders, even after they have reached the age of majority.[145]

Housing juveniles in adult facilities often puts their safety at an increased risk.[146] In almost every state, a juvenile offender sentenced as an adult is incarcerated in an adult institution with other adults.[147] Juvenile offenders in adult institutions face serious physical and emotional harm at the hands of their adult

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[139] *Id*. at 450.

[140] Robert E. Shepherd, Jr., *The Rush to Waive Children to Adult Court*, 10 CRIM. JUST. 39, 42 (1995).

[141] *See* Snyder, *supra* note 22, at 182.

[142] *Id*.

[143] James Austin et al., *Juveniles in Adult Prisons and Jails: A National Assessment*, U.S. Dep't of Jus, Bureau of Just. Assistance, 9 (Oct. 2000).

[144] *Id.*

[145] Jennifer A. Chin*, Baby-Face Killers: A Cry for Uniform Treatment for Youths Who Murder, From Trial to Sentencing*, 8 J.L. & POL'Y 287, 332 (1999).

[146] *Supra* note 140.

[147] *Id*.

counterparts.[148] Statistics reveal that juveniles transferred to adult court and housed in adult facilities are "five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than minors in juvenile facilities."[149] In addition, suicide attempts are 7.7 times more likely by juveniles in adult institutions than juveniles in juvenile facilities.[150]

As a result of such abuse, disillusioned juvenile offenders often return to society in a worse condition than when they entered the adult institution.[151] When many adult institutions fail to provide juveniles in those institutions educational facilities or resources, they are "schooled" in crime by older inmates who instruct the juvenile offenders in advanced criminal skills and share criminal contacts.[152] In turn, juveniles in adult institutions are more likely to reoffend than juveniles placed in juvenile facilities.[153]

## V. MOVING TOWARDS A NARROW INTERPRETATION OF "PRIOR DELINQUENCY RECORD"

Narrowly construing the meaning of FJDA's "prior delinquency record" factor to include only prior adjudications would create the most uniform, efficient and constitutionally sound method for determining discretionary waivers.[154] Evaluating only those incidents in which a juvenile has been adjudicated a delinquent still allows judges to exercise discretion while balancing the six factors, but also provides a sensible limit to that discretion.[155] Further, the type of evidence admitted is limited, creating a more streamlined and uniform evaluation process for judges making discretionary waiver decisions.[156] Courts interpreting the scope of "prior delinquency record" have discussed possible due process violations with

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[148] *See* Robert E. Shepherd, Jr., The Rush to Waive Children to Adult Court, 10 Criminal Justice 39, 42 (1995).

[149] Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 821-22 (2000); Shepherd, *supra* note 125.

[150] Jarod K. Hofacket, *Justice or Vengeance: How Young is Too Young for a Child to Be Tried and Punished as an Adult?*, 34 TEX. TECH. L. REV. 159, 173 (2002).

[151] Beresford, *supra* note 149, at 819.

[152] Hofacket, *supra* note 150, at 173.

[153] Beresford, *supra* note 149, at 819.

[154] In re Winship, 397 U.S. 358, 362-64 (1970) (explaining fundamental principles of American legal system); *Gault*, 387 U.S. at 21 (describing constitutional due process requirements for juveniles); *Kent,* 383 U.S. at 561-62 (detailing conditions of valid waiver to adult status).

[155] *See, e.g.*, *One Juvenile Male*, 40 F.3d at 845-46 (citing United States v. Hemmer, 729 F.2d 10, 17 (1st Cir. 1984)) (holding that FJDA does not instruct the court to weigh one factor more than another because court has discretion to balance factors).

[156] *See, e.g.*, Juan Alberto Arteaga, Note, *Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants,* 102 COLUM. L. REV. 1051, 1082-87 (2002) (discussing protecting procedural rights of juveniles by clearly defining uniform guideline to create better system).

the admission of evidence of uncharged conduct.[157] If courts narrowly interpret the scope of prior record, however, juveniles will be treated in a more uniform manner, dispelling any due process violation arguments.[158] This uniformity at the federal level also serves as guidance for the same issue faced by state courts.

The FJDA sets out specific factors for the district courts to consider when assessing a discretionary waiver.[159] While each factor allows federal judges to consider certain evidence in waiver hearings, Congress drafted the FJDA to exclude some types of conduct from the waiver determination--specifically, unadjudicated incidents.[160] Congress's decision to enumerate six specific factors, and thereby preclude a judicial waiver solely in the "interest of justice," also supports a narrow construction of "prior delinquency record."[161]

Traditional definitions of a criminal law record also support a narrow interpretation of a juvenile's "prior delinquency record."[162] These traditional definitions refer to "criminal records" as prior convictions.[163] Therefore, if "delinquency records" are analogized to "criminal records," only adjudications, which are similar to convictions, would be properly considered in a judge's discretionary decision.[164]

If Congress intended for federal judges to have total discretion in the hearings, they could have simply drafted the statute to say "in the interest of justice" without elaborating further, but such is not the case.[165] Therefore, in order to stay within the proscribed congressional limitations, judges should consider only prior adjudications, and not all prior police contacts, under "prior delinquency record" when evaluating the appropriateness of a discretionary judicial waiver.

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[157] *See*, e.g., *Sealed Case*, 893 F.2d at 369 (noting due process arguments under FJDA).

[158] Anders, *supra* note 4, at 255.

[159] *See* 18 U.S.C. § 5032.

[160] *See Juvenile LWO*, 160 F.3d at 1183 (concluding that Congress would have specified if courts were supposed to consider all prior police contacts through specific statutory language).

[161] *See Jarrett*, 133 F.3d at 539 (noting that Congress specifically drafted statute "to assign different responsibilities to different actors in the transfer process").

[162] Anders, *supra* note 4, at 253.

[163] Camitsch v. Risley, 705 F.2d 351, 353-54 (9th Cir. 1983).

[164] *See Juvenile LWO*, 160 F.3d at 1183 ("Because we conclude the plain language of the term 'the extent and nature of the juvenile's delinquency record' is unambiguous, we do not inquire further about Congress' intent in using the term.").

[165] *See id.* (noting definitional limits of "prior delinquency record" based on statute's language); *Jarrett*, 133 F.3d at 539 (noting importance of specifically delineating six factors for waiver); *In re Sealed Case*, 893 F.2d at 368-69 (holding that Congress did not intend FJDA to include uncharged crimes based on way statute was drafted).

Moreover, in the United States, criminal defendants are presumed innocent until proven guilty.[166] Past arrests do not automatically equate to a past violation of the law unless proven beyond a reasonable doubt.[167] Despite that fact, waiver hearings currently do not uphold those two fundamental concepts. Although juveniles are not afforded full constitutional protections, they are guaranteed the essentials. The essentials include requiring the prosecution to prove charges beyond a reasonable doubt.[168] If unadjudicated conduct is admitted and used to make waiver determinations, the juvenile is, in essence, being found "guilty" of unproven conduct without the protections of due process.[169] When courts allow evidence of unproven conduct in waiver hearings, courts may deprive juveniles of the basic protections that the Constitution affords criminal defendants.[170]

Courts that construe "prior delinquency record" to include past arrests and other unadjudicated conduct are disregarding the fundamental presumption of innocence. If a judge is allowed to consider past incidents that never resulted in adjudications, a juvenile's rights are violated because that child never had the ability to defend against the charges.[171] Even if, as some circuits hold, the waiver proceedings provide an opportunity to correct errors, the damage is done because the "stigma of the past conduct may remain in the judge's mind, tainting the ultimate determination of whether to waive jurisdiction."[172]

Finally, consistency at the federal judicial level could have a drastic impact on the same issue faced by state courts. As previously addressed, federal juvenile jurisdiction is limited – between 1999 and 2008, an average of 320 juveniles were arrested each year by federal agencies.[173] By contrast, in 2010 U.S district courts handles an estimated 1.4 million juvenile delinquency offenses.[174] Each state has similar, if not the exact, statutory factors that must be determined when waiving a minor to criminal court.[175] As a result, the states have taken the assorted approaches taken by the federal courts.[176] Permitting

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[166] *See In re Winship*, 397 U.S. at 363 (noting "bedrock" principle of presumption of innocence).

[167] *Id*. at 363-64.

[168] *Id.* at 362-64 (discussing fundamental beliefs of American criminal justice system and reasons for their existence).

[169] Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy*? 10 VA. J. SOC. POL'Y & L. 231, 243-44 (2002).

[170] *In re Winship*, 397 U.S. at 361.

[171] Anders, *supra* note 4, at 257.

[172] *Id*.

[173] *Supra* note 1 at 110.

[174] *Id*. at 151.

[175] *See* Minn. Stat. §260B.125 subd. 4; Mich. Comp. Laws Ann. §712A.4(4); Wis. Stat. Ann. § 938.18(5).

[176] Compare In re Welfare of N.J.S., 753 N.W.2d 704, 710 (Minn. 2008) (concluding that "prior record of delinquency" unambiguously refers to records of petitions to juvenile court and the adjudication of alleged violations of the law by minors) with In re Welfare of J.G.G., No. A15-0865, 2015 WL 7357605, at *3 (Minn. Ct.

unadjudicated conduct impacts only a marginal number of federal juvenile delinquents annually; permitting unadjudicated conduct at a state level impacts millions of juvenile delinquents annually. As such, it is critical that the federal system serves as a guide for how state courts should be addressing this issue faced by millions of children. Therefore, Congress must change the current federal system to provide consistency, to make the juvenile justice system focus not only on the individual needs of the child, but also on upholding the Constitution, and to serve as a model for how to address this issue on a larger scale.

## VI. CONCLUSION

The primary goal of the juvenile justice system should be the prevention of juvenile crime. Law enforcement agencies must not give up on today's youth. Courts and law enforcement agencies must strike a balance between rehabilitative and punitive approaches to adjudicating juvenile crime. We should learn from the past and develop rehabilitation programs with the potential to effectively treat juvenile offenders. Simultaneously, the system must be taken seriously such that sanctions are proportional to the delinquent acts committed.

Transfer proceedings should be conducted based on uniform, fair criteria. As Congress increasingly targets youth violence and federalizes more crimes, federal courts will undoubtedly see an increase in the number of discretionary judicial waivers to the criminal justice system. With that, the way judges make waiver decisions is of the utmost importance because of the devastating effects a waiver to the criminal system may have on a youth. In its current state, juveniles face a system that could potentially undermine fundamental legal principles because of conflicting interpretations of the FJDA's discretionary judicial waiver factors, specifically "prior delinquency record." A uniform standard is imperative for evaluating which juvenile cases should be waived to the criminal justice system and which should remain in juvenile court.

If Congress only enacts harsher new punishments for juvenile offenders without further delineating the factors that judges are to apply in waiver decisions, the future of the federal juvenile justice system is bleak. On the other hand, hope remains for juveniles facing a discretionary waiver; congressional reform aimed at refining waiver factors would decrease the broad discretion district court judges hold, therefore, creating a system more in line with the original progressive philosophy to save those juveniles capable of being saved.

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App. Nov. 23, 2015) (concluding that under the N.J.S. decision, it was proper to consider a juvenile petition which was resolved with a continuance for dismissal).