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Gerrard F. Glynn

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ARKANSAS' MISSED OPPORTUNITY FOR REHABILITATION: SENDING CHILDREN TO ADULT COURTS

*Gerard F. Glynn**

I. INTRODUCTION

While approximately 13,291 delinquent acts are committed by children¹ in Arkansas each year,² the public policy debate over how best to address delinquency is often fueled by the horrendous acts of a few children.³ One of

* Director of Legal Clinic and Assistant Professor of Law, University of Arkansas at Little Rock School of Law. I thank my research assistants Shannon Wilson and Ann Carr who helped make this article possible. I also thank my many friends and colleagues who provided guidance, including Toni Clarke, Justine Dunlap, Donna Gay, Connie Hickman Tanner, J. Leon Johnson, and Spencer Robinson. I also thank my partner in many things more important than this article, Angela Halladay, for her feedback, editing and patience.

Following the writing of this article but shortly before it was printed, the Arkansas Supreme Court issued an opinion that reverses prior precedent and adopts the position expressed in this article that the information alone is not sufficient to justify keeping a child in adult court. *See Thompson v. State*, No. 97-339 (Dec. 11, 1997). I commend the Court for this move. However, there are many other issues raised in this article that need to be addressed by the courts, legislators, and practitioners.

1. This article will refer to persons under the age of 18 as children. Under the law, persons under the age of 18 are not allowed to vote, *see* U. S. CONST., amend. XXVI, § 1; cannot contract, 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN §§10.01-10.06 (2d ed. 1994); must submit to the reasonable commands of their parents, *see, e.g.*, ARK. CODE ANN. § 9-27-303(16)(B) (Michie Supp. 1995), *see also* 2 KRAMER, *supra* § 20.03; must attend school, *see, e.g.*, ARK. CODE ANN. § 6-18-201 (Michie Supp. 1995); *see also* 2 KRAMER, *supra* § 24.04; cannot marry, *see, e.g.*, ARK. CODE ANN. § 9-11-102 (Michie 1993), *see also* KRAMER, *supra* § 14.04; do not have the Constitutional protections of liberty, *see* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); and do not have the same protections of privacy as adults. *See id.* Society deprives those under eighteen years of age of many rights and provides them with extra protection based on a belief that their poor judgment may leave them to make mistakes and also leave them vulnerable to exploitation by others. *See* KRAMER, *supra* §14.03. Thus, they are children.

Under the Arkansas Juvenile Code, persons under the age of 18 are referred to as juveniles. *See* ARK. CODE ANN. § 9-27-303(1)(A) (Michie 1995). This term is used whether the children are victims of abuse and neglect or charged with a delinquent act. The connotation of the term "juvenile" is negative because "juvenile" is often associated with "juvenile delinquent." This negative connotation is made stronger by the political rhetoric surrounding legislative proposals such as the "Violent Youth Predator Act of 1996" United States House Res. 3565.

I choose to describe all persons under the age of 18 as children. They may be children who have committed horrendous acts. They may also be children needing removal from society for a very long time, but they are still children.

2. According to the Arkansas Administrative Office of the Courts data, there were 13,291 petitions for delinquency or petitions for revocation of delinquency probation filed in Arkansas juvenile courts in 1995.

3. *See, e.g.*, Jim Brooks & Jim Kordsmeier, 'I've Been Shot,' *Caller Told Police 4 Boys, Age 12-15, Held In Woman's Slaying*, ARK. DEMOCRAT GAZETTE, July 31, 1994, at 1A (twelve-year-old, fourteen-year-old, and two fifteen-year-olds charged with a murder committed

the responses to these horrendous acts is to remove certain children from the juvenile court process into the adult criminal process.⁴ This process of removal of children to adult court is sometimes called "juvenile transfer," "waiver," "declination of jurisdiction," or "certification."⁵

Arkansas has followed the national trend in sending more and more children to adult courts. While a few children may need to be sent to adult courts and prison, the widespread removal of children to adult courts is a mistake. The juvenile justice system provides the best chance of rehabilitating children. If we send children to adult courts and eventually to adult prisons, they will return to society without the benefit of the rehabilitative programs offered by the juvenile justice system.

This article critiques the justifications for removing children to adult courts, details the impact of this process around the nation, and analyzes the status of Arkansas' system. The article will also provide suggestions for improving the Arkansas system by proposing that we take advantage of the good models around the country while rejecting the faulty models.

during a robbery); Cynthia Howell & Jim Kordsmeier, *Student, 20, Shot Dead on School Bus*, ARK. DEMOCRAT GAZETTE, Oct. 10, 1996, at 1A (fourteen-year-old charged with the shooting death of classmate); Jim Kordsmeier, *12-Year-Old Arrested, Jailed in NLR Killing Police Expect to Make Further Arrests Soon*, ARK. DEMOCRAT GAZETTE, July 30, 1994, at 1A; Joe Stumpe, *Prosecutor: No Kid Gloves When Killer 13*, ARK. DEMOCRAT GAZETTE, Feb. 18, 1996, at 1A (thirteen-year-old killed his father's fiancée and raped her seven-year-old daughter).

While these incidents fuel the debate, most children, even most delinquent children, do not commit violent crimes and most children transferred to adult court are not repeat violent offenders. See generally Robert O. Dawson, *An Empirical Study of Kent Style Juvenile Transfers to Criminal Court*, 23 ST. MARY'S L. J. 975 (1992); Lauren Q. D'Ambra, *A Legal Response to Juvenile Crime: Waiver and Certification Statute in Rhode Island*, R. I. B. J., February 1997, at 5.

There are also horrendous stories of the abuse of children incarcerated in adult jails or prisons. See, e.g., Daphne Davis, *Teen Tells of Abuse by Cellmates 3 Charged After Washington County Jailers Hear of Rape, Torture*, ARK. DEMOCRAT GAZETTE, May 23, 1996, at 1B (fifteen-year-old is tortured for almost a week at the hands of fellow inmates); *Teen Says 3 Raped Him in Jail April 3*, ARK. DEMOCRAT GAZETTE, April 17, 1997, at 3B (seventeen-year-old boy says he was raped by three other boys while being held in the Mississippi County jail); Linda Satter, *5th Man Sentenced for Rape*, ARK. DEMOCRAT GAZETTE, Oct. 11, 1994, at 2B (five men are convicted of gang-raping a seventeen-year-old in the Pulaski County Jail).

4. See generally Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQUENCY, 171 (1996); Catherine R. Guttman, Note, *Listen to the Children: The Decisions to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 507-09 (1995).

5. See 2 KRAMER, *supra* note 1, § 22.16. Throughout this article the terms "waiver," "transfer," and "removal" will be used interchangeably. The use of these terms can be confusing in Arkansas because children are not transferred to adult court. In Arkansas, children are often charged in adult court and the transfer decision involves a decision whether to transfer children to juvenile court. Arkansas is in the minority of states that start this process in adult court. See *infra* part III.B.2.

In the first section, the article discusses the history of juvenile court. In the second section, the article details the social and political debate around the removal of children to adult courts and the structural options adopted by many states. In the third section, the article explains the impact transferring of children has on the state systems around the nation. In the fourth section, the law in Arkansas is critiqued historically and under the modern juvenile code and court jurisprudence. Finally, the article recommends changes for Arkansas that will address some of the socio-political concerns while meeting the goals of rehabilitation.

II. HISTORY OF JUVENILE COURTS THROUGHOUT THE NATION

Prior to the creation of juvenile courts, children were treated as any other persons by the criminal courts;⁶ however, the courts recognized, and presumably still do, the defense of infancy which negated culpability for a crime.⁷ The law provided an irrebuttable presumption that children under the age of seven could not commit a crime, a rebuttable presumption that children between the ages of seven and fourteen could not commit a crime, and a rebuttable presumption that children fourteen through seventeen were able to commit crimes.⁸ This defense was based on a belief that a certain aged child was too immature to understand the likely consequences of his or her act and thus did not have the *mens rea* required for a criminal conviction.⁹

Although there was a defense of infancy, children were still prosecuted as adults and sent to prison in this nation throughout the 1800's. The brutality of incarcerating children alongside hardened adult criminals led to reform efforts in the late 1800's.¹⁰ In response to these efforts, the first juvenile court in the nation was established in Illinois in 1899.¹¹ The goals of these early courts were described by the United States Supreme Court in *In re Gault*:

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the

6. See 2 KRAMER, *supra* note 1, § 21.01; Paula J. Casey, *Arkansas Juvenile Courts: Do Lay Judges Satisfy Due Process In Delinquency Cases?*, 6 U. ARK. LITTLE ROCK L.J. 501 (1983).

7. See 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 175(b) (1984).

8. See 2 KRAMER, *supra* note 1, § 21.01, at n.1. See also, *In re Gault*, 387 U.S. 1, 16 (1967); *Little v. State*, 261 Ark. 859, 878-79, 554 S.W.2d 312, 321 (1977).

9. See 2 ROBINSON, *supra* note 7, § 175(a).

10. See 2 KRAMER, *supra* note 1, § 21.01.

11. See 2 KRAMER, *supra* note 1, § 21.01.

child was "guilty" or "innocent," but "What 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." The child -- essentially good, as they saw it -- was to be made "to feel that he is the object of (the state's) care and solicitude," not that he was under arrest or on trial. . . . The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.¹²

Other states followed the Illinois model and established juvenile courts aimed at protecting and rehabilitating children.¹³ These new juvenile courts did not provide children the same procedural protections afforded adults charged with crimes.¹⁴ These procedural protections were not seen as necessary because the goals of these courts were to protect and rehabilitate children, not punish them.¹⁵ Therefore, juvenile courts were closed to the public, and the records were sealed to protect children from the stigma of criminal convictions. Juvenile proceedings were not seen as adversarial, thus eliminating the need for the rights to counsel or cross-examination.

In the 1960's, this process of handling children was challenged as a violation of the federal constitutional protection of due process. In a series of cases, the Supreme Court concluded that due process mandates that children be provided many of the procedural protections afforded an adult charged with a crime.¹⁶ These holdings led to dramatic changes in the handling of children charged with delinquent acts.¹⁷ Now, many of the procedural protections afforded an adult accused of a crime are provided to children charged with delinquent acts.¹⁸ All fifty states, the District of Columbia, the Commonwealth

12. *In re Gault*, 387 U.S. at 15-16.

13. See 2 KRAMER, *supra* note 1, § 21.01. See also ARKANSAS COMM'N ON JUV. JUST., JUVENILE COURTS IN ARKANSAS, at 3 (1989).

14. See 2 KRAMER, *supra* note 1, § 21.01.

15. These assertions were questioned and in many respects rejected by the United States Supreme Court in *In re Gault*, 387 U.S. at 12-31.

16. See, e.g., *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

These holdings do not convert a juvenile delinquency proceeding into a criminal proceeding. These proceedings continue to be essentially civil procedures with heightened levels of constitutionally mandated due process. See 2 KRAMER, *supra* note 1, § 21.06.

17. These new juvenile courts used terminology different from adult courts. Children were charged with "delinquent acts" not crimes, were "adjudicated" not convicted, and were given "dispositions" not sentences. See 2 KRAMER, *supra* note 1, § 21.01. See also, Arkansas Juvenile Code, ARK. CODE ANN. § 9-27-301, et seq.

18. Children have rights to notice of the delinquency charges, see *In re Gault*, 387 U.S. at 33-44; counsel, see *id.*, confrontation, see *id.* at 41, cross-examination, see *id.* at 56-57, privilege against self-incrimination, see *id.* at 55, determination of guilt beyond reasonable

of Puerto Rico, and the federal government have juvenile court systems which attempt to balance the need for rehabilitation with the rights of the children and their families.¹⁹

Although the nation has not rejected rehabilitation as the main goal of the juvenile justice system, many states have moved to eliminate many of the protections previously afforded children. More states have opened these proceedings to the public, removed the protection provided by the expungement of records, and have moved to try more children as adults.

III. THE NATIONAL MOVEMENT TO REMOVE KIDS TO ADULT COURTS

All state juvenile codes and the federal Juvenile Justice Act provide for a procedure to remove some children from juvenile court jurisdiction to adult court jurisdiction. These procedures can be accomplished through legislative action,²⁰ prosecutorial action,²¹ or judicial action.²² The differences in the states depend on policy choices made regarding the treatment of children.

A. The Political Debate Around the Country

Historically, there has always been debate about whether certain children are beyond rehabilitation and thus should be sent to adult prisons for their crimes. This is still the core of the debate on the juvenile transfer process. The movement to remove children accused of crimes to adult courts started in the 1970's, and has intensified to the present day.²³ The primary justification for this movement has been a need for harsh punishment that will lead to deterrence.²⁴

doubt, *see In re Winship*, 397 U.S. at 369; and protection from double jeopardy, *see Breed*, 421 U.S. at 541.

19. *See* 2 KRAMER, *supra* note 1, § 21.01. The histories of many of these systems including Arkansas' system, are very similar. *See infra* part V. A.

20. *See infra* part III.B.1.

21. *See infra* part III.B.3.

22. *See infra* part III.B.2.

23. Some have suggested that the move to transfer is related to the increased due process procedures mandated for juvenile courts by the U. S. Supreme Court in *In re Gault*, 387 U.S. 1 (1967) and its progeny. *See generally* Bishop et al., *supra* note 4, at 171-73. Whereas there may be a correlation, there is no evidence of a causation. The better explanation for the popularity of the removal of children to adult courts is the rise in the crime rates in the 1970s and 1980s.

24. There are two types of deterrence: specific and general. Specific deterrence is an effort to prevent a specific individual from repeating an act. General deterrence is an effort to send a message to the general population to prevent anyone else from thinking about committing an act that would lead to harsh punishment.

Another justification for the removal of children to the adult corrections system is

1. *Punishment & General Deterrence*

Our nation has not rejected the belief that children who commit crimes can be rehabilitated.²⁵ However, proponents of the removal of children to the adult criminal system argue that children are manipulating the juvenile justice system and the system doesn't deter other children from committing criminal acts. Proponents believe that the threat of the harsher punishment in the adult system will deter others from committing criminal acts.

Although some political rhetoric assumes that children will be treated more harshly in adult court,²⁶ studies on the subject do not always support this conclusion.²⁷ Children transferred to adult court often receive probation, fines or other nonconfinement sentences many times with little or no rehabilitative programs.²⁸ If sentenced to incarceration in the adult system, children are often given shorter sentences than similar offenders confined in juvenile training schools.²⁹ Many have concluded that children are treated more leniently by the criminal courts because they are appearing there for the first time, and juries tend to be more sympathetic to children facing prison.³⁰

incapacitation. Most children sent to the adult corrections system, however, will receive shorter sentences. See Dale Parent et al., *Transferring Serious Juvenile Offenders to Adult Courts*, NAT'L INST. OF JUST. RES. IN ACTION, at 2 (Jan. 1997).

25. See 2 KRAMER, *supra* note 1, § 21.01. See also ARK. CODE ANN. § 9-27-302(3) (Michie Repl. 1995) (One of the purposes of the Juvenile Code is "[t]o protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution . . ."); Guttman, *supra* note 4.

26. See Bishop et al., *supra* note 4, at 172-74.

27. See Dawson, *supra* note 3, at 1030-43. In this study about the Texas process of transferring children to court, only 58% of the children transferred to adult court received a prison sentence. See Dawson, *supra* note 3, at 1031. See also 2 KRAMER, *supra* note 1, § 22.16; Guttman, *supra* note 4.

Ironically, the likelihood of lighter treatment may have been the motivating factor behind the creation of the juvenile justice system in Arkansas. When reviewing the 1907 creation of the juvenile system in Arkansas, Paula Casey wrote:

Removing children from adult prisons was a step forward although some convicted juveniles might have disagreed since the alternatives for the juvenile under the old system were not necessarily prison or reform school but rather prison or freedom. Many courts were understandably reluctant to sentence convicted juveniles to state prisons. Even when a juvenile was sentenced to prison there was an extremely good possibility of a governor's pardon, at least during the terms of one governor. Perhaps the real motivation for the reform school legislation was not so much the rehabilitation and reform of juveniles as it was to get the convicted juveniles off the streets and confine them.

Casey, *supra* note 6, at 502-04.

28. See Parent, *supra* note 24, at 2. But see Bishop, et al., *supra* note 4, at 174-176 (article discussing the mixed results of studies on this subject).

29. See Parent, *supra* note 24, at 2. See also 2 KRAMER, *supra* note 1, § 22.16.

30. See Parent, *supra* note 24, at 2. See also, 2 KRAMER, *supra* note 1, § 22.16; Guttman, *supra* note 4.

Even if one accepts the argument that adult sentences will lead to general deterrence, with the exception of few offenses, these children will someday be released from prison. The question for society is whether they want them released with the benefits of the rehabilitation offered in the juvenile system or released from the harshness of the adult system.

2. *Specific Deterrence*

Proponents of prosecuting children in adult court argue that children are more sophisticated today than in the past and take advantage of the leniency of the juvenile system.³¹ These proponents believe that transferring children to adult court will enhance specific deterrence. There is a sense that some children need to be removed because rehabilitation, if it works at all, would not work for children charged with violent offenses.³² However, sociological evidence tends to negate this proposition.³³ One study found:

Overall, the results suggest that transfer in Florida has had little deterrent value. Nor has it produced any incapacitative benefits that enhance public safety. Although transferred youths were more likely to be incarcerated and to be incarcerated for longer periods than those retained in the juvenile justice system, they quickly reoffended at a higher rate than the nontransferred controls, thereby negating any incapacitative benefits that might have been achieved in the short run.³⁴

If one associates rehabilitation with a reduced likelihood of rearrest, the juvenile system seems to be succeeding.³⁵ This study in Florida compared similarly situated children who had been transferred to adult court with children who remained in the juvenile system.³⁶ The results indicated that children transferred to adult court are more likely to be rearrested, arrested more quickly, and arrested for more severe offenses than are the children who remained in the juvenile system.³⁷ This movement to remove children is an abandonment of hope for children caught in the justice system.³⁸ These

31. See Bishop, *supra* note 4, at 173-174.

32. This stigma of outcasts may lead to a self-fulfilling prophecy. If these children are told, by the decision to transfer them to adult court, that society no longer believes they can be rehabilitated, they may reoffend because they have internalized the lack of hope. See Bishop, *et al.*, *supra* note 4, at 184.

33. See Bishop, *supra* note 4, at 183-85.

34. Bishop, *supra* note 4, at 183.

35. See Bishop, *supra* note 4, at 171. Other studies have also found that children are responsive to rehabilitative treatment. See, e.g., Guttman, *supra* note 4, at 510.

36. See Bishop, *supra* note 4, at 175-77.

37. See Bishop, *supra* note 4, at 181-85.

38. See D'Ambra, *supra* note 3, at 5.

children need the benefits of good rehabilitation programs which can work with most children.³⁹

Furthermore, the categorization of children as a procedure for the removal of groups of children is not consistent with the psychological evidence regarding childhood development. Children develop at different speeds. Some children are more mature at age sixteen than others, and some may never mature. This was the justification for the traditional transfer proceedings which include a review of the maturity of the child.⁴⁰ The wholesale transfer of categories of children, either by lowering the age of juvenile court jurisdiction or by excluding certain crimes from juvenile court, ignores the impact of individual development.⁴¹

B. Structural Options Chosen For Processing Children To Adult Courts

When developing a process for choosing which children to send to the adult court process, states have three alternative decision-makers: legislators, judges, and prosecutors. The choice among these decision-makers raises issues of the balance of power between the branches of government, the community's political confidence in each branch, and issues of competence.⁴²

39. See D'Ambra, *supra* note 3, at 5; Guttman, *supra* note 3, at 510.

40. See, e.g., ALA. CODE § 12-15-34 (Supp. 1996); ARK. CODE ANN. § 9-27-318(e)(2)-(3) (Michie Supp. 1995); CAL. WELF. & INST. CODE § 707 (West Supp. 1997); COLO. REV. STAT. ANN. § 19-3-108 (2)(b)(IV) (West Repl. 1986); DEL. CODE ANN. tit. 10, § 1010(c)(1)(a) (Supp. 1996); FLA. STAT. ANN. § 39.059(7)(c)(4) (West Supp. 1997) (maturity is one of the factors a court considers in deciding whether to impose criminal or juvenile sanctions). TEX. FAM. CODE ANN. § 54.02(f) (West 1996); UTAH CODE ANN. § 78-3a-603(e) (Supp. 1997); VT. CODE ANN. tit. 33, § 5506(d)(1) (1991); VA. CODE ANN. § 16.1-269.1(g-j) (Repl. Michie 1996); MISS. CODE ANN. § 43-21-157(5)(f) (Supp. 1997); MO. ANN. STAT. § 211.071(b)(6) (West 1996). One of the problems is that this evidence is rarely presented in a scientific way. See *infra* part V.A.2.b.iii.

41. An overwhelming majority of these children also come from dysfunctional environments. See Guttman, *supra* note 4, at 516-18. They may be from stressed families or neighborhoods where crime is an accepted way of life. See OFFICE OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEPARTMENT OF JUSTICE, DELINQUENCY PREVENTION WORKS (1995). A mistake that is often made with these children is an assumption that they will recognize the benefit of and avail themselves of the services available in the juvenile justice system. See, e.g., *Holmes v. State*, 322 Ark. 574, 579, 911 S.W.2d 256, 259 (1995). It may not be reasonable to expect any adolescent, even one with a strong support system, to avail himself of services, and it is certainly not reasonable to expect a child from a dysfunctional system to avail himself of services. This does not mean that a child should not be held responsible for a failure to meet clearly defined expectations, but often children are expected to understand their specific need for services and to find services for themselves, which is not a reasonable expectation.

42. See Guttman, *supra* note 4. This article suggests that judicial waiver is like a safety valve which finds those children "who pose too great a threat to public safety to evade long-term confinement." Whereas, prosecutorial and legislative waiver "act less like a safety valve and more like a vacuum, sucking children into the adult system." See Guttman, *supra* note 4

1. *Legislators Decide*

Legislators always make the first decision about children's removal to adult court. Children do not have a constitutional right to proceed in juvenile court.⁴³ Therefore, legislators can decide at what age juvenile court jurisdiction ends. Traditionally, juvenile court jurisdiction ends between the ages of seventeen and nineteen.⁴⁴ If the delinquent act occurs before a child's birthdate that would trigger adult court jurisdiction, juvenile codes generally permit juvenile court to retain jurisdiction throughout the child's treatment until the age of twenty-one.⁴⁵

Legislators have recently pushed for a greater number of young children to be processed in adult court.⁴⁶ This can be mandated by lowering the jurisdictional age limit of juvenile court,⁴⁷ by mandating that certain crimes be

at 509-10.

43. See 2 KRAMER, *supra* note 1, § 21.01.

44. See 2 KRAMER, *supra* note 1, § 21.02.

45. See 2 KRAMER, *supra* note 1, § 21.02. See, e.g., ALA. CODE § 12-15-32 (Supp. 1996); CAL. WELF. & INST. CODE § 607 (West Supp. 1997) (court retains jurisdiction until the age of twenty-one for a person committed to the Department of the Youth Authority); FLA. STAT. ANN. § 39.022(4)(b) (West. Supp. 1997) (court retains jurisdiction until the age of 21 for a habitual offender or a child eligible for intensive residential treatment); UTAH CODE ANN. § 78-3a-104(1)(a) (Repl. 1996); VT. STAT. ANN. tit. 33, § 5504(6) (1991); VA. CODE ANN. § 16.1-242 (Repl. Michie 1996); MO. ANN. STAT. § 211.041 (West 1996).

46. See U.S. DEP'T OF JUST., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME, 3-9 (1996).

47. See, e.g., CONN. GEN. STAT. ANN. § 46b-120 (West 1995) (juvenile court applies to persons under the age of sixteen).

This lowering of the age limit appears to be a rejection of the idea that rehabilitation can work with most adolescents, but the retention of some juvenile court jurisdiction appears to be an acceptance that the rehabilitative model can work with younger children. See 2 KRAMER, *supra* note 1, § 22.17.

waived to adult court,⁴⁸ or by expanding the pool of lower-aged children subject to judicial or prosecutorial waiver into adult court.⁴⁹

2. *Judges Decide*

There are several methods by which states permit or require judicial review of a request to charge children as adults. Some states mandate a judicial hearing when any child under eighteen is threatened with removal from juvenile court jurisdiction.⁵⁰ Other states mandate hearings only upon a motion by a party or the court.⁵¹ Jurisdictions vary as to whether the hearing is held in juvenile court,⁵² in adult court,⁵³ or in either court.⁵⁴ Considering that the

48. See ALA. CODE § 12-15-34 (Supp. 1996) (certain offenses committed by a sixteen or seventeen-year-old lead to adult prosecution with no chance of juvenile court jurisdiction.); ALASKA STAT. § 47.12.030(a) (Michie 1996) (certain felonies committed by a sixteen or seventeen-year-old lead to adult prosecutions with a chance for delinquency disposition if convicted of a lesser offense); CONN. GEN. STAT. ANN. § 46b-127 (West 1995) (children fourteen or older shall be transferred to adult court for capital and serious felony offenses); DEL. CODE ANN. tit. 10, § 1010(a)(1) (Supp. 1996) (murder, unlawful sexual intercourse or kidnaping are tried as adult prosecutions); UTAH CODE ANN. § 78-3a-601 (Repl. 1996) (murder or serious youth offenders are tried as adults); VT. STAT. ANN. tit. 33, § 5502(a)(1)(A) (1991) (children over the age of sixteen charged with enumerated offenses are tried as adults); MINN. STAT. ANN. § 260.015(5)(b) (West Supp. 1997) (a sixteen or seventeen year old child charged with murder is tried as an adult); MISS. CODE ANN. § 43-21-151(a)(1-2) (Supp. 1997) (offenses punishable by life imprisonment or death or offenses committed with a deadly weapon are tried in adult court).

49. See, e.g., CAL. WELF. AND INST. CODE § 707 (West Supp. 1997) (lowered from sixteen to fourteen); DEL. CODE ANN. tit. 10, § 1010(c)(1) (Supp. 1996); MO. ANN. STAT. § 211.071 (West 1996) (twelve year olds can be transferred to adult court).

50. Arkansas law used to require such a hearing for any fourteen or fifteen year old charged with an offense in adult court. See 1989 Ark. Acts 273, § 17(b)(2). However, this procedure was repealed in 1994. See 1994 Ark. Acts 40.

51. See e.g. ALA. CODE § 12-15-34(a) (Supp. 1996) (prosecutor may request a transfer hearing); ARK. CODE ANN. § 9-27-318(d) (Michie Supp. 1995) (any party or the court can move for a hearing); DEL. CODE ANN. tit. 10, §§ 1010 & 1011 (Supp. 1996) (either party or the court may move for consideration of a transfer); TEX. FAM. CODE ANN. § 54.02 (West 1996); VT. STAT. ANN. tit. 33, § 5506(b) (1991); MINN. STAT. ANN. § 260.125 (West Supp. 1997); MISS. CODE ANN. § 43-21-157 (Supp. 1997).

52. See, e.g., ALA. CODE § 12-15-34 (Supp. 1996); CAL. WELF. & INST. CODE § 707 (West Supp. 1997); TEX. FAM. CODE ANN. § 54.02 (West 1996); UTAH CODE ANN. § 78-3a-603 (Supp. 1997); VA. CODE ANN. § 16.1-269.1 (Repl. Michie 1996); MINN. STAT. ANN. § 260.125 (West Supp. 1997); MO. ANN. STAT. § 211.071 (West 1996).

53. There are no juvenile courts in the federal judiciary. All the proceedings occur in federal district courts if the state court does not have or refuses to exercise jurisdiction. See 18 U.S.C. § 5032 (1994).

54. See, e.g., ARK. CODE ANN. § 9-27-318(d) (Michie Supp. 1995); DEL. CODE ANN. tit. 10, §§ 1010-1011 (Supp. 1996).

Although Arkansas applies this method, most hearings occur in circuit court because the prosecutor has the initial discretion to file the charges in either court, and it is usually the defense moving to have the case removed to juvenile court. However, there have been cases

decision is essentially which of the children who commit offenses should be sent to adult court, the logical decision maker is the juvenile judge.⁵⁵ He or she has more experience with the population of children accused of crimes with which to make a valid comparison and would presumably be in the best position to weigh all of the factors set fourth in the transfer statute.⁵⁶

In those cases in which a judge participates in the decision whether to try a child as an adult, he or she normally applies a version of the standards suggested by the U.S. Supreme Court in *Kent v. United States*.⁵⁷ These *Kent* standards have been incorporated into the laws of almost all U.S.

in which a juvenile court has initiated proceedings to remove a child to adult court. *See, e.g., Collins v. State*, 322 Ark. 161, 908 S.W.2d 80 (1995); *Smith v. State*, 307 Ark. 223, 818 S.W.2d 945 (1991). Unless a statute of limitations is about run, it is easier for a prosecutor to enter a *nolle prosequi* in juvenile court and refile the charges in circuit court, than to initiate a transfer from juvenile court to circuit court.

55. *See* KRAMER, *supra* note 1, § 21.01; *see, e.g., Allison Boyce*, Note, *Choosing the Forum: Prosecutorial Discretion and Walker v. State*, 46 ARK. L. REV. 985, 1002-03, 1008-09 (1994); Dawson, *supra* note 3, at 1052. The majority of states follow this procedure that begins in juvenile court. *See, supra* note 52; *See also, CONN. GEN. STAT. ANN. § 46(b)-127* (West 1995); MISS. CODE ANN. § 43-21-157 (Supp. 1997).

56. *See Boyce, supra* note 55, at 1008-09. In some rural jurisdictions, this distinction between a juvenile judge and adult court judge becomes meaningless because one judge will hear all cases, criminal or juvenile.

57. 383 U.S. 541 (1966). Although the Court in *Kent* did not mandate any specific criteria be followed when considering a decision to send a child to adult court, the Court appeared to approve the criteria used by the District of Columbia juvenile judge. These criteria were attached as an appendix to the Supreme Court decision. The criteria were:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
 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.
- Id.* at 566-567.

jurisdictions.⁵⁸ These standards basically mandate a review of the seriousness of the offense, the child's background, and the juvenile system's resources.⁵⁹

3. *Prosecutors Decide*

There are several ways prosecutors can be given discretion to decide which children should be tried in adult court. First, prosecutors can be given complete discretion to decide without judicial review. Second, prosecutors can directly file the case in adult court and be reviewed only upon a motion.⁶⁰ Third, prosecutors can be required to ask a judge's permission to file in adult court.⁶¹

It is assumed that prosecutors choose the most serious offenses to transfer to adult court. There are studies that both affirm and challenge this conclusion.⁶² A Texas study affirmed this belief and concluded that if the transfer statute requires judicial review, prosecutors often consider the *Kent* judicial standards in making their decisions.⁶³ However, a Florida study found that prosecutors used their discretion to charge many nonviolent first time offenders in adult court for minor offenses.⁶⁴

If there is not meaningful judicial review, one of the concerns regarding prosecutorial waiver is a lack of scrutiny.⁶⁵ If a prosecutor wants a child in adult court and is required to meet statutory qualifying offenses, he or she may overcharge to get a child into adult court.⁶⁶ A basic tenet of our criminal justice

58. See Dawson, *supra* note 3, at 981.

59. See Dawson, *supra* note 3, at 981; see, e.g., ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995).

60. See, e.g., ARK. CODE ANN. § 9-27-318 (Michie Supp. 1995).

61. See, e.g., ALA. CODE § 12-15-34(a) (Supp. 1996); CAL. WELF. & INST. CODE § 707 (West Supp. 1997); CONN. GEN. STAT. ANN. § 46b-127(6) (West 1995) (for lower level felonies); VA. CODE ANN. § 16.1-269.1 (Repl. Michie 1996); MINN. STAT. ANN. § 260.125 (West Supp. 1997); MO. ANN. STAT. § 211.071 (West 1997).

62. See Dawson, *supra* note 3, at 985-1009; cf. Boyce, *supra* note 55, at 999-1000 n.91 (evaluating a study conducted by the Center for Studies in Criminology and Law at the University of Florida).

63. See Dawson, *supra* note 3, at 983, 1051-52. This study of transfer decisions in Texas concluded that prosecutors' application of the criteria to be applied by the judge made "further winnowing of cases using the same criteria difficult." Dawson, *supra* note 3, at 1051.

However, in Arkansas, where judges often defer to the prosecutors' waiver decisions, prosecutors may be less likely to meaningfully apply any criteria. See *infra* part V.B.

64. See Boyce, *supra* note 55, at 999-1000.

65. See Stacy Sabo, Note, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2426-27 (1996) "[T]he prosecutor makes the 'critically important' waiver decision outside of the adversarial process, in the privacy of her office, restricted only by the most basic principles of professional ethics and the requirement of probable cause." *Id.* (citations omitted).

66. Often children are charged with offenses that qualify them in adult court but are

system is a belief that public proceedings are necessary to limit the opportunity for abuse of governmental power.⁶⁷ As the U.S. Supreme Court recognized in *Kent*, the decision to transfer children to adult court is "critically important."⁶⁸ If prosecutors are granted the discretion to make this decision, what criteria do they use to decide,⁶⁹ and who will scrutinize their decisions?

IV. THE IMPACT TRANSFERS HAVE HAD AROUND THE NATION

A. Which Children Are Being Sent to Adult Court?

Although the political rhetoric in support of sending children to adult court focuses on the most violent offenders, the reality is that most children sent to adult court are property offenders.⁷⁰ Many believe that these children sent to adult courts have exhausted all opportunities in juvenile court, but the reality is that many children transferred to adult court have never received juvenile court services.⁷¹ One study of the Texas procedures suggests that there are four major factors leading children to be sent to adult court: serious offenses, children who are almost adults, repeat offenses, and local (county) legal cultures or differences.⁷²

Race is often a factor in the criminal justice system,⁷³ and race has been proved to be a factor in the decision to send children to adult court. Minority

convicted of offenses that wouldn't have qualified them for adult court jurisdiction. *See, e.g., Walker v. State*, 309 Ark. 23, 827 S.W.2d 637, 638 (1992) (Walker was charged with first degree murder but convicted of manslaughter.). *See also Boyce, supra* note 55, at 998-1000 (1994).

67. This is the justification for public trials, WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 24.1 (2d ed. 1992); and grand juries, *see Id.* §15.1(a).

68. *Kent*, 383 U.S. at 558 (citations omitted).

69. *See Dawson, supra* note 3, at 983, 1051-52 (study of transfer decisions in Texas concluded that prosecutors use the same statutorily created criteria used by the judges).

70. *See Bishop, supra* note 4, at 174. *But see Dawson, supra* note 3, at 989-90 (showing that prosecutors filed transfer motions at a significantly higher rate against violent offenders).

A study of Arkansas practices under the former code showed that a 92.8% of the offenses filed against children in adult courts were drug and alcohol related or crimes against property. *See Casey, supra* note 6, at 510-11.

71. *See Bishop, supra* note 4, at 174.

72. *See Dawson, supra* note 3, at 1043-51.

73. *See Jeffrey Fagan et al., Blind Justice? The Impact of Race on the Juvenile Justice Process*, 33 *CRIME & DELINQ.* 224 (1987) (showing that racial disparities in decision making throughout the juvenile justice system). *See also McCleskey v. Kemp*, 481 U.S. 279, 314-320 (1987) (rejecting a challenge to the death penalty as racially biased, the U.S. Supreme Court suggests that race may permeate the criminal justice system of the United States).

children are over represented among the children sent to adult court.⁷⁴ Additionally, boys tend to be sent to adult court more than girls.⁷⁵

B. What Is Happening to Children Sent to the Adult System?

It is not clear that children sent to the adult court system are treated more harshly.⁷⁶ Once a child is transferred, he or she is processed through the normal adult criminal system, charged or indicted and provided the procedural rights granted criminal defendants under the Constitution and appropriate statutes. Some of these rights would not have been given to a child who remained in juvenile proceedings.⁷⁷

Once tried, a child may be sentenced as any adult would be sentenced. However, some states allow sentences to juvenile facilities,⁷⁸ split sentences between the systems,⁷⁹ or special sentences for children or young adults.⁸⁰

If ordered incarcerated in an adult facility, children are processed through the adult corrections' system. The National Institute of Justice has published a report highlighting the increased burden on the adult corrections system from the move to transfer children to adult court.⁸¹ Children transferred to adult prisons have different needs with respect to diet and physical exercise, require different forms of discipline, and are at greater risk of being raped and

74. See Dawson, *supra* note 3, at 1022-23. Although minority children were more likely to be chosen by the prosecutor to be transferred to adult court, the judges appeared to be more balanced in their transfer decisions.

75. See Dawson, *supra* note 3, at 1001-03, 1024.

76. See Bishop, *supra* note 4, at 174-75.

77. Children in juvenile proceedings do not have a constitutional right to a jury trial, see *McKeiver*, 403 U.S. 528; a public hearing, see *KRAMER*, *supra* note 1, § 21.13; or bail, see *KRAMER*, *supra* note 1, § 22.06, at 337. Although children are not constitutionally given the right to bail, most states have provided a statutory option for bail to children pending juvenile proceedings. See *KRAMER*, *supra* note 1, § 21.13, at 293. Some states have also provided children with a right to a jury trial and public hearing. See *KRAMER* *supra* note 1, §§ 22.11, at 346, & 21.13, at 293. Often these changes have been prompted by demands for more sanctions which have led to the need to provide more constitutional protections.

The Arkansas Juvenile Code allows for bail, see *ARK. CODE ANN.* § 9-27-326(e)(3) (Michie Supp. 1995), and public hearings in delinquency proceedings, see *ARK. CODE ANN.* § 9-27-325(I) (Michie Supp. 1995), but does not permit jury trials, see *ARK. CODE ANN.* § 9-27-325(a) (Michie Supp. 1995).

78. See, e.g., *FLA. STAT. ANN.* §§ 39.062 and 39.059 (West Supp. 1997); *CAL. WELF. & INST. CODE* § 1731.5 (West 1997); *VA. CODE ANN.* § 16.1-285.1 (Repl. Michie 1996).

79. See, e.g., *ARK. CODE ANN.* § 12-28-403 (Michie 1995) (*But see infra* part VII.B.2); *CAL. WELF. & INST. CODE* § 1731.5 (West 1997); *COLO. REV. STAT. ANN.* § 19-2-601 (West 1997); *CONN. GEN. STAT. ANN.* § 46(b)-133(c) (West 1997); *TEX. FAM. CODE ANN.* § 54.04(3) (West 1996); *VA. CODE ANN.* § 16.1-272(A)(1) (Repl. Michie 1996); *MINN. STAT. ANN.* § 260.126 (West Supp. 1997); *MO. STAT. ANN.* § 211.073 (West 1996).

80. See, e.g., *FLA. STAT. ANN.* §§ 39.062 and 39.059 (West Supp. 1997).

81. See Parent et al., *supra* note 24.

assaulted.⁸² These factors impose additional costs to the corrections systems which are often missed in the political debate.

The National Institute of Justice describes the prison housing problem in the following manner:

In 1994, 36 States dispersed young inmates in housing with adult inmates (half as a general practice and half only in certain circumstances). Nine States house young inmates with those ages 18 to 21 but not with older inmates. Only six States never housed young inmates with people 18 and older; they either have transferred young inmates to their State juvenile training schools until they reached the age of majority or have housed them in segregated living units within an adult prison.

Some believe that housing young inmates with these older populations ensures they will be victimized, assaulted, and abused, both physically and sexually. Young inmates who cannot survive in such a situation have little choice but to enter protective custody, which is usually a separate, secure housing unit in which they spend a great deal of time in isolation - a setting that is especially conducive to suicidal behavior.⁸³

Adolescent prisons demand special services. Adolescent children have special dietary needs due to the changes occurring in their bodies. Behavior control may be difficult without special training for the staff because of normal adolescent patterns that are different than adult behavior. Additional programming considerations are mandated by special laws regarding children. Education is mandatory for children under the age of eighteen, even if they are committed to adult prisons.⁸⁴ If a child has special educational needs, these must be met in prison under federal law.⁸⁵

Prior to 1975, Arkansas law required the separation of children confined to an institution to which adult convicts are sentenced.⁸⁶ Now in Arkansas,

82. See Parent et al., *supra* note 24, at 2.

83. See Parent et al., *supra* note 24, at 3.

84. See ARK. CODE ANN. § 6-18-201 (Michie Supp. 1995). This is part of the reason the Department of Corrections has its own statewide school district.

85. See Individuals With Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1997). Under this act the state must provide a free appropriate public education for all children with disabilities between the ages of three and twenty-one if the state accepts federal funding. See *id.* at §1412. Arkansas accepts the federal funding and is thus bound by the Individuals With Disabilities Education Act of 1995. See *id.*

86. See 1911 Ark. Acts 215, § 11. The Arkansas Juvenile Code of 1975 eliminated this prohibition on the commingling of children with adults within the Department of Corrections. It did, however, continue to prohibit the confining of children with adults in the same cell prior to adjudication. See 1975 Ark. Acts 451, § 22. Although children can be incarcerated with adults, there still is an expressed legislative intent "for the separation of youthful male offenders from the influence of older, more intractable offenders and to provide for appropriate educational and vocational training, counseling, and professional treatment services for youthful

children are segregated by risk factors like any other inmate.⁸⁷ The inmates under the age of twenty-one tend to be located in the Varner Unit but there is no prohibition against the commingling of different aged inmates.⁸⁸ This central location is chosen by the Arkansas Department of Corrections to coordinate the provision of services including special education services.⁸⁹

V. THE LAW IN ARKANSAS

A. Arkansas Statute - A Balance of Power

1. *The History of the Juvenile Code*

The Arkansas juvenile justice system began with the creation of a reform school in 1905.⁹⁰ This first act merely called for the separation of children under the age of eighteen who were convicts in the penitentiary.⁹¹ In 1907, the first juvenile court was created in Arkansas.⁹² County judges were given authority "to have brought before them all children between the ages of three and fifteen years, whom they know, and who are reported to them to live in notorious resorts of bad character"⁹³

The legislative goal of rehabilitation adopted in the 1907 code has remained throughout the years as the goal of the juvenile justice system in

offenders." ARK. CODE ANN. § 12-28-402 (Michie 1995).

Arkansas cases have never addressed the constitutionality of incarcerating children with adults, but an Indiana court recently ruled that incarceration of children with adults violated the Indiana constitution. *See Ratliff v. Cohn*, No. 49A02-9611-CV-739, 1997 WL 242784 (Ind. Ct. App. May 13, 1997) (fourteen-year-old girl was sentenced to twenty-five years for burning down her home and killing her mother and sister. She was committed to the Indiana Women's Prison and filed a lawsuit demanding a transfer to a juvenile facility. The court of appeals found that the "framers of the Indiana Constitution intended to abolish the practice of incarcerating juveniles with adult offenders" and ordered her transferred to a juvenile facility.).

87. Telephone Interview with Dr. Max Mobley, Deputy Director of Health and Correctional programs for the Arkansas Department of Corrections (June 9, 1997).

88. *Id.*

89. *Id.*

90. *See* 1905 Ark. Acts 199.

91. *See id.* § 1.

92. *See* 1907 Ark. Acts 237.

93. *Id.* § 1. The act does not make a distinction between delinquent and dependent children. Both children would be brought before the county judge and the judge would be permitted to either send the child to the reform school or find the child a suitable home. *See id.* *See also* Casey, *supra* note 6, at 503-04. This lack of a distinction as it applied to disposition continued until 1921. In 1921, the legislature passed a law prohibiting the commitment of "any dependent or neglected child or children to an institution or home used for the care, imprisonment or reformation of delinquent children or adult criminals." 1921 Ark. Acts 110.

Arkansas.⁹⁴ The purposes as defined in the 1911 act are very similar to the purposes in the modern juvenile code:

This Act shall be liberally construed to the end that its purpose may be carried out, to-wit: That the care, custody and discipline of the child shall approximate as nearly as may be that which should be given it by its parents, and in all cases of dependency where it can properly be done, that the child shall be placed in an approved family home, and become a member of a home and family by legal adoption or otherwise, and in cases of delinquency, that as far as practicable any delinquent child shall be treated not as a criminal, but as misdirected and misguided and needing aid, encouragement and assistance, and if such child can not be properly cared for and corrected in its own home or with the assistance and help of the probation officers, then that it may be placed in a suitable institution where it may be helped and educated and equipped for industrial efficiency and useful citizenship.⁹⁵

Prior to 1975, adult criminal courts and the county "juvenile" courts had concurrent jurisdiction over all children charged with crimes.⁹⁶ The definitional age of a child changed as the code developed and now is basically an

94. The original 1905 Act which created the first reform school in Arkansas states "[t]hat for the discipline, education, employment and reformation of convicts in the penitentiary, under the age of eighteen years, an institution to be known as the State Reform School shall be, and is hereby established . . ." 1905 Ark. Acts 199, § 1. *See also* 1907 Ark. Acts 237 (explaining that the county judge was to make a dispositional decision that would "be to the best interest of the moral, mental, and physical welfare of such child."); 1911 Ark. Acts 215, § 17; 1921 Ark. Acts 404, § 4 (stating that the prosecutor's role was "to aid in the redemption of such child from delinquency. . ."); *Cantrell v. Goldberger*, 256 Ark. 784, 510 S.W.2d 546 (1974) (Fogelman, J., dissenting). Justice Fogelman explains:

It was not the intention of the act to confer upon the county court the power to institute criminal prosecutions against minors or to punish for alleged violations of law. It did undertake reclamation and reformation, rather than condemnation and punishment and to open the doors of an asylum rather than a jail. Through it, the state, as *parens patriae*, assumes the guardianship of her minors who are under the age of 18 because they come within the terms of the act and need her protection.

Id. at 791, 510 S.W.2d at 550-51 (Fogelman, J., dissenting).

95. 1911 Ark. Acts 215, § 17. *Cf.* ARK. CODE ANN. § 9-27-303 (Michie Supp. 1995).

96. Prior to 1907, the adult criminal courts handled all offenses committed by children. *See Casey*, *supra* note 6, at 502. In 1907, county courts were also given jurisdiction over children aged three to fifteen. *See* 1907 Ark. Acts 237. This act did not mention the jurisdiction of the criminal courts. So, presumably they had concurrent jurisdiction. In 1911, it was made clear that the county courts had concurrent jurisdiction with other courts having "jurisdiction of the offense." 1911 Ark. Acts. 215, § 10. In 1989, the juvenile court was transferred from the county courts to the Juvenile Division of Chancery Courts. *See* 1989 Ark. Acts 273, § 3(8). This was in response to an Arkansas Supreme Court decision that found the county courts could not constitutionally maintain jurisdiction over juvenile proceedings. *See Walker v. Arkansas Dept. of Human Servs.*, 291 Ark. 43, 722 S.W.2d 558 (1987).

individual under the age of eighteen.⁹⁷ In 1975, the juvenile courts were given exclusive jurisdiction of children "less than fifteen (15) years of age at the time of the conduct alleged to constitute the offense."⁹⁸ From 1975 through 1981, the courts retained concurrent jurisdiction over children aged fifteen through seventeen.⁹⁹ In 1981, concurrent jurisdiction was expanded to include fourteen-year-olds who committed certain enumerated offenses.¹⁰⁰ In 1989, the jurisdictional limits were changed to provide exclusive jurisdiction to juvenile court for all misdemeanor offenses committed by children under the age of eighteen.¹⁰¹ For children below the age of fourteen, exclusive jurisdiction was vested in juvenile court regardless of the offense.¹⁰² However, for children aged fourteen through seventeen jurisdiction was concurrent depending on the felony offense and the prosecutor was granted discretion to decide in which court to file charges.¹⁰³

Prior to 1981, the specific offense committed by the child did not affect the question of jurisdiction. The jurisdiction of juvenile courts was based solely on the age of the child at the time the offense was committed. In 1981, the legislature drafted the first list of offenses that qualified fourteen-year-olds for circuit court jurisdiction.¹⁰⁴ Initially, these qualifying offenses included only murder and rape.¹⁰⁵ Since 1989, when the juvenile code had its last major revisions, most of the changes to the transfer section of the code have involved the addition of offenses to the enumerated list of offenses that could be charged

97. The 1907 Act gave county judges jurisdiction of children aged 3 to 15. *See* 1907 Ark. Acts 237. In 1911, the juvenile court was given jurisdiction of all children under the age of 21. *See* 1911 Ark. Acts 215, § 1. In 1963, the age of delinquent children was "limited to children of both sexes under the age of eighteen (18) years, whether married or single." 1963 Ark. Acts 542, § 1. Juvenile court jurisdiction has basically remained at eighteen since that time, but when a child is brought before the juvenile court before his or her eighteenth birthday, the court can maintain jurisdiction until the child turns twenty-one years old. 1989 Ark. Acts 273, § 3(1) (codified at ARK. CODE ANN. § 9-27-303(1) (Michie Supp. 1995)).

98. 1975 Ark. Acts 280, § 617(1).

99. *See id.*

100. *See* 1981 Ark. Acts 793, § 1. *See also* 1983 Ark. Acts 904, § 1 (correcting an error in the 1981 act which actually reduced exclusive jurisdiction of juvenile court to age 13).

101. *See* 1989 Ark. Acts 273, § 17(a)(2).

102. *See id.*

103. *See id.* § 17(b)-(c).

104. *See* 1981 Ark. Acts 793, § 1.

105. *See id.*

If a person fourteen (14) years of age commits capital felony murder, first degree murder, second degree murder or rape such person may be prosecuted by the prosecuting attorney at his discretion, or if the prosecutor does not choose to prosecute such person, proceedings shall be instituted against such person in the appropriate juvenile court.

in adult court against fourteen and fifteen-year-old children.¹⁰⁶ Now there are at least forty-four qualifying offenses that permit prosecution of a fourteen or fifteen-year-old child in adult court.¹⁰⁷

Arkansas has never adopted a rule that the juvenile courts must review every transfer decision.¹⁰⁸ Juvenile courts and the adult criminal courts have always shared this responsibility.¹⁰⁹

Initially, judges in Arkansas were not given any standards to consider when reviewing a transfer case.¹¹⁰ In 1981, the legislature limited the judges' review to the consideration of the following factors:

106. See 1997 Ark. Acts 1299, § 7; 1995 Ark. Acts 797; 1994 Ark. Acts 40; 1993 Ark. Acts 1189, § 5; 1991 Ark. Acts 903.

107. See 1997 Ark. Acts 1299, § 7. In 1995, the legislature also added a serious offender provision that permits the filing of a circuit court case against any child over 14 years old who has been adjudicated delinquent three times in the past two years for offenses that would have been felonies if committed by adults. See 1995 Ark. Acts 797, § 1.

108. The decision of which court would review a case was initially dependent on whether the child was arrested pursuant to a warrant. In 1911, the legislature passed the first act which discusses transfer between the courts:

When . . . a male child under the age of seventeen, or a female child under the age of eighteen years, is arrested without a warrant, it shall be the duty of the officer making the arrest to take said child directly before the juvenile court of the county and it shall be the duty of the court, after having given the notice required by this Act to proceed to examine said case and determine whether said child is a dependent or a delinquent child as defined by this Act and deal with the same as herein provided, or it shall be within the discretion of the judge of the juvenile court to dismiss the cause therein pending and transfer such child to any of the courts of this State having jurisdiction of the offense of which said child may be found to be guilty; if said child be arrested upon a warrant issued out of any of the courts of this State the judge of such court may, in his discretion, if he believes that the said child is either a dependent or delinquent child, dismiss the charge pending in such court and transfer such child to the juvenile court, there to be dealt with according to the provisions and spirit of this Act.

1911 Ark. Acts 215, § 10.

In 1975 the law changed giving prosecutors more authority over this decision. See 1975 Ark. Acts 451, § 18; *State v. Banks*, 271 Ark. 331, 333, 609 S.W.2d 10, 12 (1980) (rejecting the argument that the constitution requires a judicial waiver hearing before a prosecutor can file charges in adult court.); *Sargent v. Cole*, 269 Ark. 121, 598 S.W. 2d 749 (1980).

109. See 1989 Ark. Acts 273, § 17(d); 1911 Ark. Acts 215, § 10. See also *Cantrell*, 256 Ark. 784, 510 S.W.2d 546.

110. See, e.g., 1975 Ark. Acts 451, § 20 (“[T]he judge of the court may, in his discretion, transfer the case to any other court having jurisdiction over the matter”); see also 1953 Ark. Acts 263, § 1

[T]he Circuit Court or the Judge thereof where such charge is pending, may, at his discretion order and direct that the criminal charge and the file and record thereof be transferred to the Juvenile Court of the county where the charge is pending, for such disposition as the Juvenile Court may adjudge and determine:

(a) The seriousness of the offense and whether violence was employed by the juvenile in the commission of the offense.

(b) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts.

(c) The prior history, character traits and mental maturity, and any other factors which reflect on the juvenile's prospects for rehabilitation.¹¹¹

These factors to be considered by the trial judges have basically remained the same. However, in 1989, the language limiting the trial judge's considerations to these factors was removed and semicolons and an "and" were added between the factors.¹¹² These changes implied that, while the trial judges had to consider these three factors at a minimum, they were permitted to consider any relevant material.

Prosecutors did not have a significant role in juvenile proceedings prior to 1975.¹¹³ Prior to this date, their role was to appear "as a defender on behalf of the child for its best interest and to aid in the redemption of such child from delinquency" when requested by the county court judge.¹¹⁴ Although they did not participate in juvenile courts, prosecutors were historically given complete discretion to file charges against a child of any age in either adult or juvenile court. In 1975 their discretion to file charges against children in adult court was limited to children aged fifteen and older.¹¹⁵ In 1989, their discretion was further limited. Prosecutors were only granted discretion to file felony charges in circuit court.¹¹⁶ Although they were given additional enumerated offenses for which they could file circuit court charges against fourteen-year-olds, their

111. 1981 Ark. Acts 398, § 1. This act was clearly intended as a limitation on the judges. The act stated that "the court shall consider *only* the following factors." *Id.* (*emphasis added*).

112. See 1989 Ark. Acts 273, § 17(e).

113. See 1975 Ark. Acts 451, § 12 (defining the prosecuting attorney's duty as follows: "[W]hen requested by the juvenile court, [he or she is] to aid and counsel in the presentation of evidence supporting a petition in any case arising under this Act.>").

114. 1921 Ark. Acts 404, § 4. See also Casey, *supra* note 6 at 504-05.

115. See 1975 Ark. Acts 280, § 617(1)-(2). There was a conflict between the Arkansas Criminal Code and the Arkansas Juvenile Code both passed in 1975. The Criminal Code vested exclusive jurisdiction over children under the age of 15 in the juvenile courts, *See id.* § 617(1), while the Arkansas Juvenile Code of 1975 required the juvenile judge to "notify the appropriate prosecuting authority who shall decide whether to (1) file a petition with the juvenile court, or (2) seek a criminal indictment or file a criminal information" for any child arrested over the age of twelve. 1975 Ark. Acts 451, § 18. This confusion was eliminated in 1975 when the juvenile code was modified to clarify that juvenile court jurisdiction was exclusive for children under the age of fifteen. See 1979 Ark. Acts 815, § 3.

116. See 1989 Ark. Acts 273, § 17(a)(2).

discretion to file charges other than the enumerated ones against fifteen-year-olds was limited.¹¹⁷

The burden of proof in transfer cases was not clear from the earlier acts. In 1975, the burden of proof was first mentioned.¹¹⁸ At that time, the burden was "on the person charged to establish age to the satisfaction of the court."¹¹⁹ In the 1989 revisions of the Act, the burden was not mentioned, but a judge was only permitted to try a child as an adult if the judge found "by clear and convincing evidence that a juvenile should be tried as an adult."¹²⁰ This would imply that the burden is on the state to justify the effort to try a child as an adult.¹²¹

2. *The Code Today*

After this history, Arkansas has a system in which the legislature has maintained the prospects for rehabilitation for any child under eighteen.¹²² However, prosecutors are given discretion to file charges in adult court against certain children who, because of age and offense, qualify for consideration by an adult court.¹²³ This prosecutorial discretion is, at least in theory, balanced by judicial review in either adult or juvenile court.¹²⁴

a. The Prosecutor's Role

If a prosecutor is going to file charges against a child under fourteen years of age for what would be a crime if committed by an adult, he or she must file those charges in juvenile court.¹²⁵ If a prosecutor is going to file misdemeanor

117. In 1989, prosecutors were granted the authority to file the additional offenses of kidnaping and aggravated robbery charges in circuit court against 14 year-olds. See 1989 Ark. Acts 273, §17(b)(1). However, they lost the complete discretion to file any charges against 15 year-olds in circuit courts. In 1989, they were restricted to filing murder, kidnaping, aggravated robbery and rape charges against fourteen or fifteen year-olds. See *id.*

118. See 1975 Ark. Acts 280, § 617(3).

119. *Id.* It would appear that the only burden on the child was to establish his age. At that point, the court was to determine whether "because of age the proceeding is barred or referral to the juvenile court is appropriate" *Id.*

120. 1989 Ark. Acts 273, § 17(f).

121. *But see infra* part V.B.4.

122. Arkansas has not adopted the policy of some states of lowering the jurisdictional age of juvenile court. Juvenile court can still exercise jurisdiction over all children under the age of eighteen. See ARK. CODE ANN. § 9-27-306(a) and 9-27-303(1) (Michie Supp. 1995).

123. See *infra* part V.A.2.a.

124. See *infra* part V.A.2.b.

125. ARK. CODE ANN. § 9-27-318(a)(1) (Michie Supp. 1995) states "A juvenile court has exclusive jurisdiction when a delinquency case involves a juvenile: (1) less than fourteen (14) years old when the alleged delinquent act occurred." *Id.* Although delinquent act is not defined

charges against any person under the age of eighteen, he or she must file those charges in juvenile court.¹²⁶ A prosecutor has discretion to file any felony charges against a child aged sixteen and seventeen in either juvenile or circuit court.¹²⁷ A prosecutor may file charges in circuit court on a fourteen or fifteen-year-old only if the offense is one of the statutorily enumerated offenses¹²⁸ or

by the Code, a delinquent juvenile is defined as:

any juvenile ten (10) years or older who has committed an act other than a traffic offense or game and fish violation which, if such act had been committed by an adult, would subject such adult to prosecution for a felony, misdemeanor, or violation under the applicable criminal law of this state, or who has violated § 5-73-119 [involving the possession of a handgun by a minor].

ARK. CODE ANN. § 9-27-303(11) (Michie Supp. 1995).

A child under the age of ten who has committed what would be a criminal offense if he or she was an adult can be brought before the juvenile court with a family in need of services petition. *See* Byler v. State, 306 Ark. 37, 810 S.W.2d 941 (1991).

126. *See* ARK. CODE ANN. § 9-27-318(a)(3) (Michie Supp. 1995) (stating that “[a] juvenile court has exclusive jurisdiction when a delinquency case involves a juvenile: . . . [l]ess than eighteen (18) years old when he engages in conduct that, if committed by an adult, would be any misdemeanor.”).

127. ARK. CODE ANN. § 9-27-318(b)(1) (Michie Supp. 1995) states that “[a] circuit court and a juvenile court have concurrent jurisdiction and a prosecuting attorney may charge a juvenile in either court when a case involves a juvenile: . . . [a]t least sixteen (16) years old when he engages in conduct that, if committed by an adult, would be any felony.”

128. ARK. CODE ANN. § 9-27-318(b)(2) (as modified by 1997 Ark. Acts 1299, § 7) states:

A circuit court and a juvenile court have concurrent jurisdiction and a prosecuting attorney may charge a juvenile in either court when a case involves a juvenile: . . . [f]ourteen (14) or fifteen (15) years old when he engages in conduct that, if committed by an adult, would be:

- (A) Capital murder, § 5-10-101;
- (B) Murder in the first degree, § 5-10-102;
- (C) Murder in the second degree, § 5-10-103;
- (D) Kidnaping, § 5-11-102;
- (E) Aggravated robbery, § 5-12-103;
- (F) Rape, § 5-14-103;
- (G) Battery in the first degree, § 5-13-201;
- (H) Battery in the second degree in violation of § 5-13-202(a)(2), (3), or (4);
- (I) Possession of a handgun on school property, § 5-73-119(a)(2)(A);
- (J) Aggravated assault, § 5-13-204;
- (K) Terroristic act, § 5-13-310;
- (L) Unlawful discharge of a firearm from a vehicle, § 5-74-107;
- (M) Any felony committed while armed with a firearm;
- (N) Soliciting a minor to join a criminal street gang, § 5-74-203;
- (O) Criminal use of prohibited weapons, § 5-73-104;
- (P) First degree escape, § 5-54-110;
- (Q) Second degree escape, § 5-54-111; or
- (R) A felony attempt, solicitation, or conspiracy to commit any of the following offenses: (i) Capital murder, § 5-10-101; (ii) Murder in the first degree, § 5-10-102; (iii) Murder in the second degree, § 5-10-103; (iv) Kidnaping, § 5-11-102; (v) Aggravated robbery, § 5-12-103; (vi) Rape, § 5-

the child is an habitual juvenile offender as defined in the code.¹²⁹ The triggering date for jurisdiction is the age of the child when he or she committed the offense.¹³⁰ There are no guidelines in Arkansas for a prosecutor to follow in deciding which children to bring to adult court.

Once a prosecutor has made a decision to file charges in circuit court, circuit court jurisdiction attaches from the pleadings.¹³¹ Once a prosecutor files a criminal information or delinquency petition, the circuit or juvenile court maintains jurisdiction unless a request for a transfer is made and granted. Conviction for a lesser included offense that is not among the enumerated offenses does not deprive the circuit court of jurisdiction.¹³² If the prosecutor has filed charges in circuit court and there are related offenses arising out of the same incident for which juvenile court has exclusive jurisdiction, the state must file these related offenses in juvenile court and seek a transfer to circuit court to be joined with any circuit court charges pending at that time.¹³³

14-103; (vii) Battery in the first degree, § 5-13-201; (viii) First degree escape, § 5-54-110; and (ix) Second degree escape, § 5-54-111.

129. See ARK. CODE ANN. § 9-27-318(b)(4) (Michie Supp. 1995):

A circuit court and a juvenile court have concurrent jurisdiction and a prosecuting attorney may charge a juvenile in either court when a case involves a juvenile: . . . [a]t least fourteen (14) years old when he engages in conduct that, if committed by an adult, constitutes a felony and who has, within the preceding two (2) years, three (3) times been adjudicated as a delinquent juvenile for acts that would have constituted a felony [sic] if they had been committed by an adult.

Id.

130. See ARK. CODE ANN. § 9-27-318 (a)-(b) (Michie Supp. 1995).

131. See *Walker*, 309 Ark. at 28, 827 S.W.2d at 640 (ruling that the issue for initial jurisdiction is not what offense the child committed, but what offense the prosecutor has charged).

132. See *Jensen v. State*, 328 Ark. 349, 944 S.W.2d 820 (1997); *Walker*, 309 Ark. 23, 827 S.W.2d 637.

133. See ARK. CODE ANN. § 9-27-318(a) (Michie Supp. 1995). See also *Butler v. State*, 324 Ark. 476, 481-82, 922 S.W.2d 685, 689 (1996).

The most judicially efficient manner for the state to proceed in these cases involving both enumerated and non-enumerated offenses would be for the state to file the enumerated offenses in circuit court and refrain from filing the non-enumerated charges until after a transfer hearing in circuit court. If the case is transferred to juvenile court, the state can ask to amend the petition to add the non-enumerated offenses. If the case remains in adult court, the state can file the non-enumerated offenses in juvenile court and seek a transfer of those offenses to adult court. If a prosecutor files the enumerated offense in circuit court at the same time he or she files the non-enumerated offenses in juvenile court, there could be two conflicting court proceedings occurring at the same time. *Id.*

b. The Judge's Role¹³⁴

A prosecutor's decision to file charges in either circuit or juvenile court is not binding on the judge. Upon a motion of the court or any of the parties, the judge must "conduct a hearing to determine whether to retain jurisdiction or to transfer the case to another court having jurisdiction."¹³⁵ Following such a motion, a judge must find by clear and convincing evidence that the child "should be tried as an adult" before the child can be tried as an adult.¹³⁶ This decision of the court may be appealed by any of the parties.¹³⁷

The judge's responsibilities in the transfer decision making process are detailed in the code:

In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors:

- (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
- (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidence by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
- (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.¹³⁸

i. The Offense

In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors: (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense¹³⁹

The Arkansas Code requires the judge to consider both whether the offense is serious and whether the child used violence in commission of the offense. These are separate factors that can and should be considered separately.¹⁴⁰ This statutory language would appear to require a specific

134. When reading the appellate cases on transfers in Arkansas, it is important to remember that the majority of these cases are appeals from proceedings in circuit court and the request for transfer is a request for the case to be transferred to juvenile court.

135. ARK. CODE ANN. § 9-27-318(d) (Michie Supp. 1995).

136. ARK. CODE ANN. § 9-27-318(f) (Michie Supp. 1995).

137. See ARK. CODE ANN. § 9-27-318(h) (Michie Supp. 1995).

138. ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995).

139. *Id.*

140. See *Blevins v. State*, 308 Ark. 613, 826 S.W.2d 265 (1992) (seriousness of the offense can be considered separate from violence). Although the dissent in this case argues that the majority was holding that violence had to be employed for circuit court to retain jurisdiction,

inquiry into the particulars of the offense. Almost all the enumerated offenses that can be charged against fourteen and fifteen-year olds in circuit court are serious and violent. There would be no need for the judge to review the nature of the offense if the charging document were legally sufficient to keep a child in adult court. But the courts have found that the act of a prosecutor charging a child with a serious violent offense is sufficient by itself to keep a child in adult court.¹⁴¹ However, a serious offense without a finding of violence is not a factor sufficient by itself to keep a child in adult court.¹⁴²

Another surprising ruling by the Arkansas Supreme Court is that violence committed during an offense can count against the child even if he or she didn't commit the violence.¹⁴³ Given that almost all the offenses serious

subsequent decisions make it clear that the seriousness of the offense can be considered even in the absence of violence. *See id.* at 619-620, 826 S.W.2d at 268 (Brown, J., dissenting); *McClure v. State*, 328 Ark. 35, 942 S.W.2d 243 (1997); *Bright v. State*, 307 Ark. 250, 819 S.W.2d 7 (1991) (denial of a request to transfer a case to juvenile court affirmed even though there were no acts of violence committed).

141. Following the writing of this article but shortly before it was printed, the Arkansas Supreme Court reversed its holding on this issue. The court concluded that "there must be some evidence to substantiate the serious and violent nature of the charges contained in the information." *Thompson v. State*, No. 97-339, slip op. at 6 (Dec. 11, 1997). *See Carroll v. State*, 326 Ark. 882, 934 S.W.2d 523 (1996) (murder); *Sanders v. State*, 326 Ark. 415, 932 S.W.2d 315 (1996) (terroristic threatening and aggravated assault); *Butler*, 324 Ark. 476, 922 S.W.2d 685 (aggravated robbery); *Cole v. State*, 323 Ark. 136, 913 S.W.2d 779 (1996) (ruling that a charge of aggravated assault is enough to permit the trial of a child in adult court.). However, the court is not clear whether the second count of possession of a handgun on school property does not also qualify as a sufficiently violent offense to keep a child in adult court). *See id.* at 142, 913 S.W.2d at 782; *Holmes*, 322 Ark. 574, 911 S.W.2d 256 (aggravated robbery); *Ring v. State*, 320 Ark. 128, 894 S.W.2d 944 (1995) (rape); *Davis v. State*, 319 Ark. 613, 893 S.W.2d 768 (1995) (rape); *Vickers v. State*, 307 Ark. 298, 819 S.W.2d 13 (1991) (murder); *Walker v. State*, 304 Ark. 393, 803 S.W.2d 502 (1991) (murder). *See also Brooks v. State*, 326 Ark. 201, 929 S.W.2d 160 (1996) (the court does not address the state's argument that statutory rape is inherently violent because the allegations in this case involved violence). *See id.* at 204, 929 S.W.2d at 161. *But see Green v. State*, 323 Ark. 635, 916 S.W.2d 756 (1996) (information charging manslaughter but not alleging the use of violence is not sufficient to keep a child in adult court).

It is interesting to note that the courts have moved from allowing a charge of murder to be in and of itself enough to keep a child in adult court to allowing a charge of terroristic threatening to be in and of itself enough to keep a child in adult court. This move to allow lesser offenses to qualify children for adult court corresponds with the legislatures move in this same direction. *See supra* part V.A.1.

142. *See Sebastian v. State*, 318 Ark. 494, 498, 885 S.W.2d 882, 885 (1994). *See also Maddox v. State*, 326 Ark. 515, 519-20, 931 S.W.2d 438, 441 (1996) (throwing of a soda bottle at a moving vehicle is a sufficiently violent act to keep a child in adult court even if they are merely charged with criminal mischief); *Green*, 323 Ark. at 635, 916 S.W.2d at 756; *Cole*, 323 Ark. at 142, 913 S.W.2d at 782. The court makes it clear that violence is not necessary. A serious offense when combined with evidence on the other two factors can make a child eligible for adult court. *See McClure*, 328 Ark. at 40, 942 S.W.2d at 246.

143. *See Carroll*, 326 Ark. at 885, 934 S.W.2d at 524-25; *Butler*, 324 Ark. at 484, 922 S.W.2d at 690; *Lammers v. State*, 324 Ark. 222, 225, 920 S.W.2d 7, 9 (1996); *Guy v. State*,

enough to allow a prosecutor to file an adult charge against a child fourteen or fifteen years old are violent offenses, the court's ruling seems to ignore the clear wording of the statute requiring courts to consider both the seriousness of the offense and whether the juvenile used violence. The statute's specific consideration of whether the child used violence is intended to prevent the transfer of a child who was involved in a violent offense but who did not actually participate in the violence.

In *Johnson v. State*,¹⁴⁴ the court misinterprets this factor to be "the seriousness of the offense and whether it involved violence."¹⁴⁵ Although this language has not been followed in any subsequent opinions, the court's rulings permitting the mere charging of a violent offense to be a sufficient basis upon which to keep a child in adult court have the same effect.¹⁴⁶

ii. Prior Adjudications

In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors: . . . (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidence by past efforts to treat and rehabilitate the juvenile and the response to such efforts¹⁴⁷

This second factor permits the court to consider a history of prior juvenile adjudications. However, this factor appears to be misconstrued by trial and appellate judges on a regular basis. It appears that the judges believe that a regular pattern of criminal conduct suffices,¹⁴⁸ but the language of the Code is clear that it is a "repetitive pattern of *adjudicated* offenses" that triggers this factor.¹⁴⁹ Criminal conduct that has not lead to an adjudication can be

323 Ark. 649, 654, 916 S.W.2d 760, 763 (1996); *Bell v. State*, 317 Ark. 289, 292, 877 S.W.2d 579, 581 (1994) ("An accomplice is responsible for the activities of his cohort."); *Walter v. State*, 317 Ark. 274, 277, 878 S.W.2d 374, 375 (1994) ("The circuit court correctly concluded that his association with the gunman in committing the alleged robberies and thefts were [sic] enough to satisfy the criterion.").

144. 317 Ark. 521, 878 S.W.2d 758 (1994).

145. *Id.* at 523, 878 S.W.2d at 759.

146. *See infra* parts V.B.1-2.

147. ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995).

148. *See, e.g., Collins*, 322 Ark. at 163, 908 S.W.2d at 81. The offense that brings the child into adult court may also have occurred prior to the rehabilitative efforts. *See Estes v. State*, 1994 WL 245504 (Ark. App. 1994) (aggravated robbery occurred prior to juvenile court efforts beginning).

149. ARK. CODE ANN. §9-27-318(e)(2) (Michie Supp. 1995) (emphasis added). The trial judge in *Hansen v. State* seemed to understand that a series of pending offenses does not make a "pattern of adjudicated offenses." 323 Ark. 407, 914 S.W.2d 737 (1996). *See also Macon v. State*, 323 Ark. 498, 499-500, 915 S.W.2d 273, 274 (1996). *But see Butler*, 324 Ark. 476, 922

considered under the third factor of the transfer statute, but does not appropriately fall under this section.

If there are no prior adjudications, this factor obviously favors the child seeking to be transferred to juvenile court. If there are any prior adjudications, the courts generally assume that the child's involvement in a subsequent offense bringing him or her to court again proves that the efforts have not been successful.¹⁵⁰ Thus, even if a child has responded well to rehabilitation efforts, the mere fact that he is a repeat offender is generally sufficient to satisfy this factor.

iii. The Character of the Child

In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors: . . . (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.¹⁵¹

This third factor is the catch-all category that allows the admission of any testimony relevant to the character of the child and his likelihood of rehabilitation, including school records,¹⁵² prior social interventions,¹⁵³ intelligence,¹⁵⁴

S.W.2d 685 (pending juvenile charges for burglary and theft are entered into the transfer hearing, but it does not seem to have been influential to the court's decision).

150. Prior efforts may not be a complete predictor of future success. One has to expect some level of failure from a child who has lacked structure and support in his or her life. The better gauge should be progress not success. *See, e.g., Estes*, 1994 WL 245504 (probation officer reports that the child has about thirty juvenile offenses but predicts the child's prospects for rehabilitation are good).

151. ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995).

152. *See, e.g., Ring*, 320 Ark. at 128, 894 S.W.2d at 944; *Slay v. State*, 309 Ark. 507, 832 S.W.2d 217 (1992).

153. *See, e.g., Butler*, 324 Ark. at 476, 479-80, 922 S.W.2d at 685, 688-89 (both parents and a program director present evidence of past treatment efforts); *Holmes*, 322 Ark. at 574, 911 S.W.2d at 256 (mother testified that efforts, including hospitalization for drug or alcohol addiction, to address problems had not been successful); *Walter*, 317 Ark. at 274, 878 S.W.2d at 374 (witness testified about the child's involvement in an anti-violence program).

154. *See, e.g., Carroll*, 326 Ark. at 885, 934 S.W.2d at 524; *Ring*, 320 Ark. at 128, 894 S.W.2d at 944; *Allen v. State*, 253 Ark. 732, 488 S.W.2d 712 (1973). The children charged with offenses in both of these cases were mildly mentally retarded. *See also Sims v. State*, 320 Ark. 528, 900 S.W.2d 508 (1995) (the child was described as "a strongly dependent character whose borderline intelligence and developmental lags [cause him to] look to outsiders for guidance in complex situations.") *Id.* at 535-36, 900 S.W.2d at 512.

age,¹⁵⁵ criminal conduct that may not have led to a prior adjudication¹⁵⁶ or courtroom demeanor.¹⁵⁷

Often there is favorable testimony about the child, but it does not appear to be given great weight.¹⁵⁸ The quality of testimony provided under this category also seems weak. Often the only testimony offered involves the child, parents, or friends.¹⁵⁹ Without expert testimony about the child¹⁶⁰ and the

155. Although age is a permissible consideration, it should not be the overriding consideration suggested by the Arkansas Supreme Court. See *Jensen*, 328 Ark. 349, 944 S.W.2d 820; *McClure*, 328 Ark. at 35, 942 S.W.2d at 243; *Carroll*, 326 Ark. at 885, 934 S.W.2d at 525; *Jones v. State*, 326 Ark. 681, 684, 933 S.W.2d 387, 389 (1996); *Maddox*, 326 Ark. at 520, 931 S.W.2d at 441; *Sanders*, 326 Ark. at 422, 932 S.W.2d at 319; *Brooks*, 326 Ark. at 204-05, 929 S.W.2d at 162; *Macon*, 323 Ark. at 498, 915 S.W.2d at 273; *Hansen*, 323 Ark. at 410-11, 914 S.W.2d at 739; *McGaughy v. State*, 321 Ark. 537, 539, 906 S.W.2d 671, 673 (1995); *Myers v. State*, 317 Ark. 70, 71-72, 876 S.W.2d 246, 247-48 (1994); *Wicker v. State*, 310 Ark. 580, 839 S.W.2d 186 (1992); *Bright*, 307 Ark. at 252, 819 S.W.2d at 8.

156. See, e.g., *Macon*, 323 Ark. at 499, 915 S.W.2d at 274; *Hansen*, 323 Ark. at 407, 914 S.W.2d at 738. This can also include criminal activity subsequent to the adult charge. See *Booker v. State*, 324 Ark. 468, 475, 922 S.W.2d 337, 340-341 (1996).

157. See *McGaughy*, 321 Ark. at 540, 906 S.W.2d at 674.

158. See *Green*, 323 Ark. at 638, 916 S.W.2d at 758 (although several witnesses testified about the child, the court only mentions the "type of person" the child is but doesn't elaborate on what that means). See also *Maddox*, 326 Ark. at 515, 931 S.W.2d at 438; *Walter*, 317 Ark. at 277, 878 S.W.2d at 375; *Banks v. State*, 306 Ark. 273, 813 S.W.2d 256 (1991).

159. See *Smith v. State*, 328 Ark. 736, 946 S.W.2d 667 (1997) (two aunts testify for the defense); *McClure*, 328 Ark. at 35, 942 S.W.2d at 243 (the child, his mother and the church youth director testified); *Maddox*, 326 Ark. at 520, 931 S.W.2d at 441 (the child's mother testified); *Sanders*, 326 Ark. at 415, 932 S.W.2d at 315 (the mother testified); *Booker*, 324 Ark. at 468, 922 S.W.2d at 337 (child and both parents testified); *Hansen*, 323 Ark. at 407, 914 S.W.2d at 737 (mother testified); *Cole*, 323 Ark. at 136, 913 S.W.2d at 779 (stepfather testified); *Collins*, 322 Ark. at 161, 908 S.W.2d at 80 (mother testified); *Davis*, 319 Ark. at 613, 893 S.W.2d at 768 (child testified); *Sebastian*, 318 Ark. at 494, 885 S.W.2d at 882 (child testified); *Johnson*, 317 Ark. at 521, 878 S.W.2d at 758 (grandmother and father testified about planned family interventions if the child were sent to juvenile court.); *Walter*, 317 Ark. at 274, 878 S.W.2d at 374 (mother and friend of family testify about his potential for rehabilitation; another witness testifies about his participation in a program, but it is not clear whether they provided any additional information for the court).

160. There have been cases with expert testimony about the child, but the testimony tends to be focused on traditional culpability evaluations such as those used for an insanity defense or intelligence tests. See *Kindle v. State*, 326 Ark. 282, 931 S.W.2d 117 (1996) (psychiatrist and three school officials testified); *Carroll*, 326 Ark. at 882, 934 S.W.2d at 524 (psychologist testifies about the child's I.Q.); *Butler*, 324 Ark. at 476, 922 S.W.2d at 685 (program administrator testified); *Green*, 323 Ark. at 635, 916 S.W.2d at 756 (psychologist testified); *Hamilton v. State*, 320 Ark. 346, 896 S.W.2d 877 (1995) (psychologist testified.); *Bell*, 317 Ark. at 289, 877 S.W.2d at 579 (psychologist testified). Better testimony may be provided by a qualified social worker who could do a complete psycho-social assessment of a child to explain potential environmental factors affecting the child's conduct and not merely his mental state.

system,¹⁶¹ the trial courts do not have much evidence upon which to give this factor great weight.

B. Arkansas Courts - Disturbing the Balance¹⁶²

Although the Arkansas legislature has maintained its commitment to the purposes of the Juvenile Code regarding the desire to rehabilitate as many children as possible,¹⁶³ the Arkansas Courts have tended to rule in favor of transferring children to adult court without adequate consideration of the

161. The expert testimony about the juvenile justice system tends to be from probation officers or intake officers and is not complimentary of the system's ability to handle difficult children. This testimony often supports a finding that the system cannot meet the needs of the child seeking return to juvenile court. *See, e.g., Guy*, 323 Ark. at 652, 916 S.W.2d at 762; *Collins*, 322 Ark. at 165, 908 S.W.2d at 82.

162. It is difficult to conclude what happens in the trial courts of Arkansas without a study of the practice. The only information available about the practice are the opinions of the appellate courts. There have been studies of the court practices in other states. *See, e.g., Robert O. Dawson, An Empirical Study of Kent Style Juvenile Transfers to Criminal Court*, 23 ST. MARY'S L. J. 975 (1992).

163. ARK. CODE ANN. § 9-27-302 (Michie 1993) states:

This subchapter shall be liberally construed to the end that its purposes may be carried out:

(1) To assure that all juveniles brought to the attention of the courts receive the guidance, care, and control, preferably in each juvenile's own home, which will best serve the emotional, mental, and physical welfare of the juvenile and the best interests of the state;

(2) To preserve and strengthen the juveniles' family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot adequately be safeguarded without such removal; and, when the juvenile is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents; and to assure, in all cases in which a juvenile must be permanently removed from the custody of his parents, that the juvenile be placed in an approved family home and be made a member of the family by adoption;

(3) To protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases;

(4) To provide means through which the provisions of this subchapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

(Emphasis added).

statutorily mandated factors, thereby rejecting the prospect of rehabilitation.¹⁶⁴

1. *The Courts Abdicate Their Judicial Role*

While the United States Supreme Court emphasized the importance of the judicial role in the critically important decision regarding the transfer of a child to adult court,¹⁶⁵ Arkansas courts have been willing to abdicate this responsibility to others, including police officers. As early as 1974, the Arkansas Supreme Court was permitting police and prosecutors to file charges against children in adult court.¹⁶⁶ Although the statute permitted prosecutors to bring children directly into circuit court if there had been a warrant issued for the child's arrest,¹⁶⁷ the statute made it clear that when a child was arrested without a warrant he or she must be brought before a juvenile court.¹⁶⁸ However, in *Cantrell v. Goldberger*,¹⁶⁹ the Arkansas Supreme Court concluded that a police officer could decide within which court children should be processed: "[i]t appears from this statute that the [police] officers may elect as to the manner in which they are to proceed; i.e. whether the child should be taken before the juvenile court as a delinquent or charged in criminal court under a separate crime or misdemeanor."¹⁷⁰

164. As Justice Roaf explains, the present practice of sending children to adult court does not serve the children or the state.

Children between the ages of 14 and 17 years are paying the price for our failures. We cannot even take comfort in the notion that the best interests of the state are being served, for many of these juveniles will return to our midst as adults, and the opportunity to use our best efforts to rehabilitate, guide and care for them will have been lost.

Butler, 324 Ark. at 487, 922 S.W.2d at 692 (Roaf, J., dissenting).

165. In *Kent v. United States*, the United States Supreme Court emphasized that a juvenile transfer hearing is a "critically important" proceeding. 383 U.S. at 556-57. It means the difference between treatment and potentially a long period of incarceration or even the death penalty. *See id.*

166. *See Cantrell*, 256 Ark. 784, 510 S.W.2d 546.

167. *See* 1911 Ark. Acts 215, § 10.

168. *See id.*

169. 256 Ark. 784, 510 S.W.2d 546 (1974).

170. *Id.* at 786, 510 S.W.2d at 548 (citing with approval *Pritchard v. Downie*, 216 F. Supp. 621 (E.D. Ark. 1963) *aff'd*, 326 F.2d 323 (8th Cir. 1964)). The majority opinion was criticized by Justices Fogelman and Brown in their dissent. The dissent concludes:

The language of the act as to the minor who may be arrested without a warrant is clearly mandatory. . . . A reading of this section (and other statutes) evinces a clear legislative intention that a court acting through a judicial officer, not an arresting officer, make the determination, in the exercise of judicial discretion, whether a youthful law violator should be prosecuted in the criminal courts as an adult would be. . . .

Id. at 792, 510 S.W.2d at 551.

Despite changes to the Code, the Arkansas Supreme Court continued to grant prosecutors the authority to decide which children should be tried as adults with little court review.¹⁷¹ The Arkansas Supreme Court has concluded that the charging document alone is enough to justify keeping a child in adult court,¹⁷² even though the statutory language clearly contemplates independent judicial review.¹⁷³ The Court's deference to the prosecutor in these cases ignores the statutory obligation for a hearing.¹⁷⁴

2. *The Arkansas Supreme Court Minimizes the Trial Judges' Responsibilities*

Although the Code clearly mandates that the trial judges review all three factors,¹⁷⁵ the Arkansas Supreme Court has continually permitted the trial judges to consider the charge alone as a legally sufficient basis to keep a child in adult court.¹⁷⁶ Recognizing the need for discretion in these difficult

171. See *Boyce*, *supra* note 55, at 1001-02. See also *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997); *Davis*, 319 Ark. at 613, 893 S.W.2d at 768; *Walker*, 304 Ark. at 393, 803 S.W.2d at 502; *Hallman v. State*, 288 Ark. 448, 452, 706 S.W.2d 381, 383 (1986). Even though prosecutors are technically given this authority, it appeared as late as 1989 that police officers continued to make the decision regarding in which court to charge a child. See ARKANSAS COMM'N ON JUV. JUST., JUVENILE COURTS IN ARKANSAS at 30 (1989).

172. Following the writing of this article but shortly before it was printed, the Arkansas Supreme Court reversed its holding on this issue. The court concluded that "there must be some evidence to substantiate the serious and violent nature of the charges contained in the information." *Thompson v. State*, No. 97-339, slip op. at 6 (Dec. 11, 1997). See *Miller*, 328 Ark. at 130-31, 942 S.W.2d at 830-31; *Sanders*, 326 Ark. at 415, 932 S.W.2d at 315; *Walker*, 304 Ark. at 399, 803 S.W.2d at 506. Although the court in *Walker* states that not all criminal informations will qualify as sufficient evidence, see *Walker*, 304 Ark. at 402-D, 805 S.W. 2d at 82, the court has never overturned a finding based on an information. See, e.g., *Butler*, 324 Ark. at 476, 922 S.W.2d at 685; *Davis*, 319 Ark. at 613, 893 S.W.2d at 768; *Bell*, 317 Ark. at 289, 877 S.W.2d at 579; *Bradley v. State*, 306 Ark. 621, 816 S.W.2d 605 (1991).

173. See *Walker*, 304 Ark. at 402, 803 S.W.2d at 508 (Newbern, Dudley & Corbin, JJ., dissenting) ("If the Arkansas General Assembly had intended that the court have the power to try a juvenile as an adult any time a serious offense involving violence was alleged, it would have said so."). But see *Pennington v. State*, 305 Ark. 312, 807 S.W.2d 660 (1991); *Banks*, 306 Ark. at 273, 813 S.W.2d at 256. See, e.g., *Hallman*, 288 Ark. at 452, 706 S.W.2d at 383 ("The trial court stated that the Prosecuting Attorney had used sound judgment and denied the motion based on the factors discussed by the Prosecutor." From the opinion, it does not appear there was any testimony. There was only a justification for the charge stated by the prosecutor.).

174. The court seemed to suggest that there was no need for an evidentiary hearing in *Ring* when it stated "the challenged testimony was wholly unnecessary given the sufficiency of the felony information." *Ring*, 320 Ark. 128, 133, 894 S.W.2d 944, 947 (1995).

175. See ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995). See also *Booker*, 324 Ark. at 474, 922 S.W.2d at 340; *Walker*, 304 Ark. at 393, 803 S.W.2d at 502.

176. See, e.g., *Carroll*, 326 Ark. at 882, 934 S.W.2d at 524-25; *Sanders*, 326 Ark. at 415, 932 S.W.2d at 315; *Butler*, 324 Ark. at 484, 922 S.W.2d at 690; *Cole*, 323 Ark. at 136, 913

decisions, the court has reasonably concluded that equal weight need not be given to each factor.¹⁷⁷ However, this balancing does not obviate the need to consider all the factors as mandated by the legislature.¹⁷⁸

Furthermore, the court's decision can be made without the presentation of any evidence.¹⁷⁹ The court can base its ruling on the prosecutor's statements

S.W.2d at 779; *Ring*, 320 Ark. at 128, 894 S.W.2d at 944; *Davis*, 319 Ark. at 613, 893 S.W.2d at 768.

The court relies on its findings in *Ashing v. State* as its precedent for this conclusion. See *Ashing*, 288 Ark. 75, 702 S.W.2d 20 (1986). In *Ashing*, the Arkansas Supreme Court concluded that "[t]he seriousness and violence of this crime might alone be sufficient to sustain the refusal to transfer to juvenile court . . ." *Id.* at 79, 702 S.W.2d at 21. *Ashing*, however, is based on the previous code. Under the 1981 version of the Code used in *Ashing*, there was not the operative word "and" between the factors as there is today. See ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995). Furthermore, the 1981 Code limited the trial court's authority to review factors. ARK. CODE ANN. § 45-420 (Michie Supp. 1983) states that "the court shall consider only the following factors." Whereas, the modern code states "the court shall consider the following factors." ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995). These distinctions make the application of *Ashing* to the modern code inappropriate. However, the court continues to apply *Ashing*.

177. See, e.g., *Ring*, 320 Ark. at 128, 894 S.W.2d at 944; *Ashing*, 288 Ark. at 77, 702 S.W.2d at 21; *Walker*, 304 Ark. at 400, 803 S.W.2d at 506.

178. See *Smith v. State*, 307 Ark. 223, 228, 818 S.W.2d 945, 947 (1991) (the court appears to rely exclusively on the prior adjudications factor. There is no evidence that the other two factors were considered.). See *Bright*, 307 Ark. 250, 819 S.W.2d 7 (the court appears to rely exclusively on the second factor.). See *Wicker*, 310 Ark. 580, 839 S.W.2d 186 (the court appears to rely exclusively on the serious and violent nature of the offense). See *Holland v. State*, 311 Ark. 494, 844 S.W.2d 943 (1993) (although the only evidence apparently presented was on the child's likelihood for rehabilitation, the Arkansas Supreme Court upheld the trial court's denial of request for a transfer to juvenile court even though the trial court provided no reasons for its ruling).

In *Ashing*, the trial judge did not appear to consider the potential for rehabilitation or the character of the children involved. See *Ashing*, 288 Ark. 75, 702 S.W.2d 20. "[A] charge of first degree murder as indicated by the facts in this case is not one that should be dealt with by the Juvenile court." *Id.* at 79, 702 S.W.2d at 22. This was under the old statute under which it could be argued that the judge was not obligated to consider all three factors. See *supra* note 174.

Although there may not be evidence to be presented on each factor, that does not mean the court should not consider each factor. See *Walker*, 304 Ark. at 400, 803 S.W.2d at 506.

179. In *Walker*, the Court takes a novel view that the criminal information is "evidence." *Walker*, 304 Ark. at 399, 803 S.W.2d at 506. See also *Bell*, 317 Ark. at 292, 877 S.W.2d at 581.

However, there are cases in which it appears from the facts presented in the appellate decision that a full evidentiary hearing was presented. See *Jones*, 326 Ark. at 684, 933 S.W.2d at 389 (two police officers, the aunt of the defendant, a teacher and counselor testified); *Kindle*, 326 Ark. 282, 931 S.W.2d 117 (psychiatrist, three school officials, the grandparents of the defendant and the victim testified); *McClure*, 328 Ark. 35, 942 S.W.2d 243 (a probation officer, criminal investigator, the defendant, his mother and a church youth program director testified); *Humphrey v. State*, 327 Ark. 753, 940 S.W.2d 860 (1997) (The surviving victim testified); *Carroll*, 326 Ark. 882, 934 S.W.2d 523 (two police officers, a psychologist and the child's guardian testified); *Booker*, 324 Ark. 468, 922 S.W.2d 337 (two police officers, the child and

alone¹⁸⁰ or merely on the charging document.¹⁸¹ This practice is shocking because the burden of proof in transfer cases is "clear and convincing evidence that a juvenile should be tried as an adult."¹⁸² Although the rules of evidence apply to these proceedings, the judges regularly allow inadmissible evidence.¹⁸³

both parents testified); *Butler*, 324 Ark. 476, 922 S.W.2d 685 (a police officer and both parents testified); *McGaughy*, 321 Ark. 537, 906 S.W.2d 671 (numerous witnesses testified); *Johnson*, 317 Ark. 521, 878 S.W.2d 758 (two family members, the child, a juvenile probation officer, and the investigating detective testified); *Beck v. State*, 317 Ark. 154, 876 S.W.2d 561 (1994); *Cobbins v. State*, 306 Ark. 447, 816 S.W.2d 161 (1991) (victim testified about the acts committed by the defendant, a juvenile officer testified about prior failed attempts at rehabilitation, and a University of Arkansas for Medical Sciences report provided information about the child's character).

180. See *Sanders*, 326 Ark. 415, 932 S.W.2d 315; *Hallman*, 288 Ark. at 452, 706 S.W.2d at 383; *Walker*, 304 Ark. 393, 803 S.W.2d 502.

The only recognition that statements by counsel are not evidence involved the exclusion of a defense counsel's statement regarding the lack of prior offenses. See *Johnson v. State*, 307 Ark. 525, 535, 823 S.W.2d 440, 445 (1992).

181. Following the writing of this article but shortly before it was printed, the Arkansas Supreme Court reversed its holding on this issue. The court concluded that "there must be some evidence to substantiate the serious and violent nature of the charges contained in the information." *Thompson v. State*, No. 97-339, slip op. at 6 (Dec. 11, 1997). See *Walker*, 304 Ark. at 399, 803 S.W.2d at 506. Although this opinion allowed the judge to consider the criminal information as evidence, subsequent opinions have given trial judges authority to give the information "substantial weight." See *Williams v. State*, 313 Ark. 451, 455, 856 S.W.2d 4, 6 (1993). See also *Humphrey*, 327 Ark. at 768, 940 S.W.2d at 868; *Hamilton*, 320 Ark. 346, 896 S.W.2d 877 (seeming to exclude consideration of police testimony to avoid addressing an evidentiary objection); *Davis*, 319 Ark. 613, 893 S.W.2d 768; *Bell*, 317 Ark. at 292, 877 S.W.2d at 581.

There is one case in which the Arkansas Supreme Court reversed a trial court for relying solely on the prosecutor's statements. In *Pennington*, three children were charged with criminal mischief for damaging tombstones. 305 Ark. 312, 807 S.W.2d 660. In its ruling, the trial judge admitted, "I'm not going to substitute my judgment in this case for that of the prosecutor. If he wants to proceed with felony charges against these three, well, he certainly may do so." *Id.* at 315, 807 S.W.2d at 662.

182. ARK. CODE ANN. § 9-27-318(f) (Michie Supp. 1995). See also *Walker*, 304 Ark. at 401-02, 803 S.W.2d at 507 (Newbern, Dudley, & Corbin, J.J., dissenting).

"Clear and convincing evidence is evidence of a degree that produces in the trier of fact a firm conviction as to the allegation sought to be established." *Guy v. State*, 323 Ark. 649, 653, 916 S.W.2d 760, 762 (1996).

183. ARK. CODE ANN. § 9-27-325(e) (Michie Supp. 1995) states that the Rules of Evidence shall apply to proceedings under the Arkansas Juvenile Code. However, this issue has not been resolved by the Arkansas Supreme Court. In a concurrence, Justices Brown and Imber express their clear belief that the Rules of Evidence do apply. See *McClure*, 328 Ark. at 45-46, 942 S.W.2d at 248-49 (1997) (Brown & Imber, J.J., concurring). The majority has avoided addressing the issue directly. In *McClure*, the court found that there was no prejudice caused by the admission of inadmissible documentary evidence when the contents of the evidence was properly presented through another witness in addition to the questionable documents. See *McClure*, 328 Ark. at 42-43, 942 S.W.2d at 247. In *Hamilton* and *Davis*, the court avoided addressing the issue because it found the court's transfer reasonable based on the criminal information of rape alone. See *Hamilton*, 320 Ark. 346, 896 S.W.2d 877 (1995); *Davis*, 319

It does not seem justifiable to permit such a critical stage of the case to proceed in such a lax manner.¹⁸⁴

In *Pennington v. State*,¹⁸⁵ one of the few cases in which the Arkansas Supreme Court reversed a circuit court's decision to retain jurisdiction over a juvenile, the Arkansas Supreme Court provides the proper rule for the trial judges:

[T]he purpose of the Arkansas Juvenile Code . . . recognizes the need for careful, case-by-case evaluation when juveniles are charged with criminal offenses. Section 9-27-318 clearly delegates the responsibility for determining which court is most appropriate to the court in which the charges were brought, and the abdication of this responsibility to the prosecutor, in this case, was an abuse of the court's discretion.¹⁸⁶

Although this "careful, case-by-case evaluation" is the standard by which trial courts should abide, this standard has been applied only once by the Arkansas Supreme Court when evaluating trial judges' conduct in juvenile transfer hearings.¹⁸⁷

3. *The Courts Minimize Appellate Review*

Arkansas law allows for an interlocutory appeal of a trial court's transfer decision.¹⁸⁸ Any appeal of this decision must be done interlocutorily.¹⁸⁹ This

Ark. 613, 893 S.W.2d 768 (1995); see also *Sanders*, 326 Ark. at 421, 932 S.W.2d at 318-19.

Although the trial judges appear to permit a great deal of inadmissible evidence into the record, few objections by defense counsel are referenced in the case law. Without objections, the Arkansas Supreme Court cannot review the error. See *Sanders*, 326 Ark. at 421, 932 S.W.2d at 318-19.

184. See, e.g., *Smith*, 307 Ark. 223, 818 S.W.2d 945 (finding no prejudice from giving the defense only a three-day notice on a transfer hearing). It was precisely this type of lax manner that was condemned by the Supreme Court in *Kent*. See *Kent*, 383 U.S. 541, 554 (1966). As the Court in *Kent* explained, "[i]t is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner." *Id.* In *Kent*, they were dealing with proceedings much worse than many of the proceedings described in the Arkansas appellate decision, but *Kent* makes it clear that these are "critically important" proceedings that need to be taken seriously. See *id.* at 556-57.

185. 305 Ark. 312, 807 S.W.2d 660 (1991). This case involved two seventeen year-old children charged with criminal mischief for damaging tombstones in a cemetery. See *id.*

186. *Pennington*, 305 Ark. at 315, 807 S.W.2d 662.

187. See *Banks*, 306 Ark. at 282, 813 S.W.2d at 261. In *Holland*, the trial court denied the motion without stating any reasons, and the Arkansas Supreme Court upheld the denial of a transfer. See *Holland*, 311 Ark. 494, 844 S.W.2d 943.

188. Rule 1-2(a)(11) of the Rules of the Supreme Court allows "interlocutory appeals permitted by statute," and ARK. CODE ANN. § 9-27-318(h) (Michie Supp. 1995) states that "[a]ny party may appeal from an order granting or denying the transfer of a case from one court to another court having jurisdiction over the matter." See also *McClure*, 328 Ark. at 37, 942 S.W.2d at 244; *Booker*, 324 Ark. at 470, 922 S.W.2d at 338; *Guy*, 323 Ark. at 651, 916 S.W.2d

procedure is not uncommon.¹⁹⁰ It allows for the resolution of this issue before there has been an expensive jury trial and can spare the child the burden and public scrutiny of a criminal trial.¹⁹¹ However, this procedure causes tremendous delay in the proceedings especially when appeals in these matters are not generally expedited.¹⁹² The delay hurts the child as much as the system.¹⁹³

Whereas *Kent v. United States*¹⁹⁴ calls for meaningful appellate review of this important judicial proceeding,¹⁹⁵ Arkansas appellate courts have deferred to trial court conclusions even without any findings.¹⁹⁶ Under an older version of the statute, the court applied an abuse of discretion standard when reviewing trial courts' decisions regarding transfers of children to adult courts.¹⁹⁷ After

at 761; *McGaughy*, 321 Ark. at 538, 906 S.W.2d at 672; *Ring*, 320 Ark. at 130, 894 S.W.2d at 945; *Sebastian*, 318 Ark. at 495, 885 S.W.2d at 883; *Beck*, 317 Ark. at 158, 876 S.W.2d at 563.

189. See *Hamilton*, 320 Ark. at 346, 896 S.W.2d at 877.

190. See, e.g., *United States v. A.D.J.*, 108 F.3d 851 (8th Cir. 1997). See also 2 KRAMER, *supra* note 1, § 22.20.

191. See *Hamilton*, 320 Ark. at 348-49, 896 S.W.2d at 879 (adopting the latter rationale from *State v. Harwood*, 572 P.2d 1228 (Idaho 1977)).

192. There was an effort to expedite the trial court review of this procedure. In 1989, the legislature mandated a hearing to resolve the transfer issue within ninety days of a charge being filed in circuit court against fourteen or fifteen year-old child in circuit court. See 1989 Ark. Acts 273, § 17(b)(2). However, this time line was not enforced by the appellate courts, which were not willing to mandate the loss of circuit court jurisdiction due to the expiration of the ninety day deadline. See *Cobbins v. State*, 306 Ark. 447, 816 S.W.2d 161 (1991) (ruling that the failure to meet the ninety day hearing deadline is not jurisdictional). So, this time line was deleted from the code in 1994. See 1994 Ark. Acts 40.

193. The delays in appeals seem to strengthen the case against the child who is disadvantaged because the Arkansas Supreme Court has concluded that a child over eighteen at the time of appeal should remain in adult court regardless of his age at the time of the incident. See *McClure*, 328 Ark. at 35, 942 S.W.2d at 243; *Carroll*, 326 Ark. at 886, 943 S.W.2d at 525; *Sims*, 320 Ark. at 536-37, 900 S.W.2d at 513; *Wicker*, 310 Ark. at 580, 839 S.W.2d at 186. These decisions also seem to be in conflict with *Kent*. See *Kent*, 383 U.S. 541. In *Kent*, the Supreme Court reversed the case even though the child had reached twenty-one and was thus beyond the jurisdiction of juvenile court. See *id.* at 564-65.

194. 383 U.S. 541 (1996).

195. In *Kent*, the court explains:

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor

Id. at 561.

196. See, e.g., *Smith*, 328 Ark. at 737-39, 946 S.W.2d at 668-69 (1997) (affirming a one sentence order denying the request to transfer the case to juvenile court); *Bell*, 317 Ark. at 292-93, 877 S.W.2d at 581. One Justice made it clear that he believed transfer decisions are "best left to the trial judges." *Blevins*, 308 Ark. at 619, 826 S.W.2d at 268 (Brown, J., dissenting).

197. See *Little v. State*, 261 Ark. 859, 884, 554 S.W.2d 312, 324 (1977); *Franklin v. State*,

changes were made to the statute in 1989, the court modified its standard of review to a clearly erroneous standard.¹⁹⁸ However, the seriousness with which the court takes this review is questionable. As the dissent in one case explains:

While our job is not to determine on appeal whether there was clear and convincing evidence or whether the trial court abused its discretion we must decide whether the trial court clearly erred in making the determination. If the determination was not clearly erroneous when all the evidence but for the charge was on the side of trying the juvenile as a juvenile, then how could we ever hold a decision that a juvenile, charged in Circuit Court, should be tried as such is clearly erroneous? If we can never make such a decision, then why did the General Assembly not simply require that any juvenile charged with a serious offense be tried as an adult?¹⁹⁹

Often the trial court provides only general statements explaining its decision²⁰⁰ or provides no explanation at all.²⁰¹ This leaves the appellate courts

7 Ark. App. 75, 76, 644 S.W.2d 318 (1983).

198. Clearly erroneous is defined as "whether the trial judge's finding is clearly against the preponderance of the evidence." *Smith*, 307 Ark. at 227, 818 S.W.2d at 948; *Cobbins*, 306 Ark. at 447, 816 S.W.2d at 161; *Walker*, 304 Ark. at 402-D, 805 S.W.2d at 81. Although this is the standard adopted in the *Walker* case based on changes made to the Juvenile Code in 1989, the court erred in two cases and applied the old abuse of discretion standard in *Pennington*, 305 Ark. 312, 807 S.W.2d 660 and *Banks*, 306 Ark. at 282, 813 S.W.2d at 261. This error was admitted and corrected in *Bradley*, 306 Ark. at 624, 816 S.W.2d at 607.

199. *Walker*, 304 Ark. at 402-03, 805 S.W.2d at 83-84 (Newbern, Dudley, & Corbin, JJ., dissenting). The court can give deference to the trial courts, but this does not mean that trial courts should be given "a license for arbitrary procedure." *Kent*, 383 U.S. at 553.

200. In the court's most recent ruling on transfer it makes a shocking conclusion. Although the court's order denying the request to transfer a case to juvenile court consists of one sentence and the oral pronouncement discusses none of mandated statutory criteria required under ARK. CODE ANN. § 9-27-318(e), the court concluded that the trial court considered all the criteria mandated. See *Smith*, 328 Ark. at 738, 946 S.W.2d at 669. See also *Butler*, 324 Ark. at 484, 922 S.W.2d at 689; *Lammers*, 324 Ark. at 225-26, 920 S.W.2d at 10; *Green*, 323 Ark. at 638, 916 S.W.2d at 758; *Cole*, 323 Ark. at 140-41, 913 S.W.2d at 781; *Sims*, 320 Ark. at 536, 900 S.W.2d at 512; *Davis*, 319 Ark. at 613, 893 S.W.2d at 768; *Bell*, 317 Ark. at 292, 877 S.W.2d at 581; *Vickers*, 307 Ark. at 300, 819 S.W.2d at 14 (Although the court heard testimony on the offense and the child's background, "the circuit court alluded to the seriousness and severity of the offense charged and to the manner in which it was carried out . . . He then denied the motion."); *Hallman*, 288 Ark. at 452, 706 S.W.2d at 383 ("The trial court stated that the Prosecuting Attorney had used sound judgment and denied the motion."); *Ashing*, 288 Ark. at 79, 702 S.W.2d at 21-22; *Evans v. State*, 287 Ark. 136, 143, 697 S.W.2d 879, 883 (1985) ("The primary complaint of appellant is that the trial court failed to state the rationale for its decision . . ."); *Little*, 261 Ark. at 884, 554 S.W.2d at 324 (no statement supporting the trial court's conclusion to retain jurisdiction over the child, however, the court concludes that the trial court must have had a basis because it had conducted a lengthy hearing on the voluntariness of the child's confession).

However, some judges have provided detailed explanations for their findings. See *Holmes*, 322 Ark. at 580, 911 S.W.2d at 259; *Sebastian*, 318 Ark. at 497, 885 S.W.2d at 884; *Beck*, 317 Ark. at 165, 876 S.W.2d at 567; *Williams*, 313 Ark. at 451, 856 S.W.2d at 4;

with the task of guessing the basis for the ruling.²⁰² If the Arkansas Supreme Court wanted to have meaningful review of these decisions, it could mandate specific findings by the trial judges.²⁰³ The Court has recommended such procedures but has failed to enforce its recommendations with a mandate.²⁰⁴ Such a mandate may already exist under the Constitutional obligation of due

Franklin, 7 Ark. App. at 75, 644 S.W.2d at 318.

201. See *Booker*, 324 Ark. at 473, 922 S.W.2d at 339; *Holland*, 311 Ark. at 494, 844 S.W.2d at 943.

202. The guessing of the court is highlighted by the following statement in *Guy*: "It is not apparent that the trial court failed to consider the remaining statutory factors." *Guy*, 323 Ark. at 654, 916 S.W.2d at 763. See also *Butler*, 324 Ark. at 483, 922 S.W.2d at 689-90 ("[I]t appears that the circuit court took into consideration all the testimony and evidence presented") (emphasis added). This type of guessing was precisely what the Supreme Court condemned in *Kent*. See *Kent*, 383 U.S. at 561. There is a statutory presumption that a child should be in juvenile court, and the burden of proof is clear and convincing evidence. Without specific findings, it does not seem that the appellate court should give the trial courts as much deference as the appellate courts have been inclined to give in these cases.

203. Findings of fact seem especially necessary in these transfer cases because the standard of review for the appellate court is clearly erroneous findings of fact. See *Smith*, 307 Ark. at 227, 818 S.W.2d at 947.

204. See *Evans*, 287 Ark. at 143, 697 S.W.2d at 883 ("Although it would be preferable for a trial judge to state the reasons for his decision, there is no statutory requirement that he do so."). See also *Lammers*, 324 Ark. at 225-26, 920 S.W.2d at 10; *Bell*, 317 Ark. at 293, 877 S.W.2d at 581; *Williams*, 313 Ark. at 454, 856 S.W.2d at 6; *Walker*, 304 Ark. at 400, 803 S.W.2d at 507.

The Arkansas Supreme Court is correct that the Arkansas statute does not mandate a specific statement of facts. Some state legislatures have chosen to require courts to make factual findings. Even without this statutory requirement, the Court could mandate such findings as the Supreme Court did in *Kent*. See *Kent*, 383 U.S. at 561.

process as interpreted in *Kent*.²⁰⁵ However, this holding has not been applied to Arkansas cases.²⁰⁶

The Arkansas Supreme Court has further limited its review by creating a standard that views the evidence in a light most favorable to the state.²⁰⁷ In transfer hearings, there is a statutory presumption that a child should be in juvenile court, and the burden is clear and convincing evidence.²⁰⁸ Therefore, it would appear more appropriate for the courts to view the evidence in a light most favorable to the child.

4. *The Court Interprets Statutory Language to Keep Children in Adult Court*

Although the Juvenile Code mandates liberal construction so its purposes of rehabilitation rather than retributive punishment may be carried out,²⁰⁹ the

205. See KRAMER, *supra* note 1, § 22.20. Although there was some confusion about whether the *Kent* decision involved statutory construction or constitutional interpretation, the Supreme Court made it clear that *Kent* involved a constitutional interpretation of transfer proceedings in *Breed v. Jones*, 421 U.S. 519, 537 (1975) (The Court ruled that a transfer hearing after an adjudication would violate the constitutional protection against double jeopardy). See also *T.J.H. v. Bills*, 504 S.W.2d 76, 80 (Mo. 1974); *Lujan v. District Court*, 505 P.2d 896, 900 (Mont. 1973); *Edwards v. State*, 591 P.2d 313, 319-320 (Okla. Crim. App. 1979); *Pollard v. Riddle*, 482 F. Supp. 260, 262 (E.D. Va. 1979); In the matter of Three Minors, 684 P.2d 1121, 1123 (Nev. 1984); *Commonwealth v. Deppella*, 460 A.2d 1184, 1186-1187 (Pa. Super. Ct. 1983); *Crick v. Smith*, 650 F.2d 860, 863-864 (6th Cir. 1981); *Hubbs v. Commonwealth*, 511 S.W.2d 664 (Ky. 1974); Michael Vitiello, *Constitutional Safeguards For Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 DEPAUL L. REV. 23 (1976). However, some courts have held that all the mandates of *Kent* are not necessarily constitutional mandates. See *People v. Taylor*, 391 N.E.2d 366 (Ill. 1979).

The Arkansas Courts have not directly addressed the question of whether *Kent's* mandates are constitutional. In *Ashing*, the court references an Illinois case, *People v. Taylor*. See *Ashing*, 288 Ark. at 78, 702 S.W.2d at 21. The Illinois case holds that *Kent* is a case involving constitutional mandates. Thus, one could argue that the court has accepted the principle that *Kent* is a constitutional case. See also *Banks*, 217 Ark. at 333, 609 S.W.2d at 12. (concluding that *Kent* did not interpret the constitution to require a judicial hearing prior to a prosecutor filing adult charges).

206. The Arkansas courts have not directly addressed the applicability of any of *Kent's* mandates. See *supra* note 203. The specific issue of *Kent's* mandate for specific factual findings was raised in *Butler*, 324 Ark. 476, 922 S.W.2d 685. However, the court did not rule on the issue because it had not been raised in the trial court and thus could not be reviewed on appeal. See *Butler*, 324 Ark. at 485, 922 S.W.2d at 691.

207. See *McClure*, 328 Ark. at 35, 942 S.W.2d at 245; *Kindle*, 326 Ark. at 284, 931 S.W.2d at 118; *Wicker*, 310 Ark. at 580, 839 S.W.2d at 186.

208. See ARK. CODE ANN. §9-27-318(f) (Michie Supp. 1995). Other states' courts have recognized this presumption in favor of the child based on legislative purposes clauses very similar to Arkansas's. See, e.g., *Atkins v. State*, 290 N.E.2d 441, 443 (Ind. 1972), *superseded by statute*, *Gregory v. State*, 386 N.E.2d 675 (Ind. 1979).

209. The Arkansas Juvenile Code states:

This subchapter shall be liberally construed to the end that its purposes may be

Arkansas Supreme Court has historically gone to great lengths to interpret statutory language in a manner which keeps children under the jurisdiction of adult courts.²¹⁰ This rewriting of legislation is extraordinary although not unprecedented.²¹¹ It is a basic tenet of statutory construction that the court is obligated to give terms their ordinary meaning.²¹² Properly applied, the Code requires the trial court to show evidence of balancing the factors, requires the State to prove actual violence committed by the child if violence was the factor

carried out:

(1) To assure that all juveniles brought to the attention of the courts receive the guidance, care, and control, preferably in each juvenile's own home, which will best serve the emotional, mental, and physical welfare of the juvenile and the best interests of the state;

(2) To preserve and strengthen the juveniles' family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot adequately be safeguarded without such removal; and, when the juvenile is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents; and to assure, in all cases in which a juvenile must be permanently removed from the custody of his parents, that the juvenile be placed in an approved family home and be made a member of the family by adoption;

(3) To protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases;

(4) To provide means through which the provisions of this subchapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

ARK. CODE ANN. § 9-27-302 (Michie 1993) (emphasis added).

210. Under the former Juvenile Code, the court ignored operative phrases in an effort to permit direct filing of children arrested without a warrant. See *Cantrell*, 256 Ark. at 788-89, 510 S.W.2d at 549 (Fogleman, J., dissenting). The court later concluded that the legislature's use of the phrase "over the age of fifteen" must have been inadvertent and concluded that the legislature really meant to say "fifteen or over." See *Banks*, 271 Ark. at 331, 609 S.W.2d at 11. The court also concluded that the legislature didn't mean to say that a fourteen-year-old child must have "committed" the offense of murder or rape to qualify for adult court. According to the court, the legislature meant that child merely needed to be accused of murder or rape to qualify for adult court. See *Ashing*, 288 Ark. at 79-80, 702 S.W.2d at 22, *superseded by statute*, *Walker v. State*, 304 Ark. 393, 805 S.W.2d 80 (1991). The court permits the charge alone to be sufficient to keep a child in adult court. See *Walker*, 304 Ark. at 402, 803 S.W.2d at 508 (Newbern, Dudley & Corbin, JJ., dissenting) ("If the Arkansas General Assembly had intended that the court have the power to try a juvenile as an adult anytime a serious offense involving violence was alleged, it would have said so.").

211. See, e.g., *Rosario v. State*, 319 Ark. 764, 894 S.W.2d 888 (1995) (adding the offense of possession of handgun by a juvenile to juvenile court jurisdiction while admitting it is redefining the Code.).

212. See *Mountain Home Sch. Dist. V. T.M.J. Builders, Inc.*, 313 Ark. 661, 664, 858 S.W.2d 74, 76 (1993).

relied upon,²¹³ and requires prior criminal activity to involve adjudicated offenses rather than just charges.²¹⁴

One of the more egregious additions created by the court has been the additional grounds that a child is too close to or over his eighteenth birthday to allow juvenile court jurisdiction.²¹⁵ Although the factors to be used by the trial courts in reviewing transfer request have remained identical since 1981²¹⁶ and

213. In *Johnson*, the court changed the Juvenile Code's violence factor, which requires consideration of "[t]he seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense," ARK. CODE ANN. § 9-27-318(e)(1) (Michie Supp. 1995), to require consideration of only "[t]he seriousness of the offense and whether it [i.e. the offense] involved violence." See *Johnson*, 317 Ark. at 523, 878 S.W.2d at 759. See also *Bell*, 317 Ark. 289, 877 S.W.2d 579 (even though the child didn't commit the violence, violence counted against the child because it was a violent offense.)

This loose interpretation permits the mere accusation of a violent offense to be enough to keep a child in adult court and thereby leads to a convoluted reading of precedent. See *Green*, 323 Ark. at 641-42, 916 S.W.2d at 759-60 (Glaze, Jesson, & Corbin, JJ., dissenting). In *Green*, a fourteen year-old boy with no priors but some history of brandishing firearms killed a thirteen year-old friend. See *Green*, 323 Ark. at 637-38, 916 S.W.2d at 757-58. The friend died from a gunshot wound. There was some discrepancy about whether the shooting was an accident, but the defendant testified that it was an accident. See *id.* at 637, 916 S.W.2d at 757. To avoid overturning precedent, the court concluded that to kill someone recklessly with a firearm does not necessarily mean that violence was employed. See *id.* at 639-41, 916 S.W.2d at 758-59.

214. But see *Bright*, 307 Ark. 250, 819 S.W.2d 7. The child's record in *Bright* was not clear. He "previously had been charged in juvenile court, and previously had been placed on probation by the juvenile court." *Id.* at 251, 819 S.W.2d at 8.

215. See *Jensen*, 328 Ark. 349, 944 S.W.2d 820; *McClure*, 328 Ark. 35, 942 S.W.2d 243; *Carroll*, 326 Ark. at 886, 934 S.W.2d at 525; *Jones*, 326 Ark. at 684, 933 S.W.2d at 389; *Maddox*, 326 Ark. at 520, 931 S.W.2d at 441; *Sanders*, 326 Ark. at 422, 932 S.W.2d at 319; *Brooks*, 326 Ark. at 204-05, 929 S.W.2d at 162; *Macon*, 323 Ark. at 500, 915 S.W.2d at 274; *Hansen*, 323 Ark. at 407, 914 S.W.2d at 739; *McGaughy*, 321 Ark. at 539, 906 S.W.2d at 673; *Myers*, 317 Ark. at 71-72, 876 S.W.2d at 247-48; *Wicker*, 310 Ark. at 581, 839 S.W.2d at 187; *Bright*, 307 Ark. at 252, 819 S.W.2d at 8. Even if the child wasn't near his eighteenth birthday at the time of the offense but the delay of the appeal has caused him to be close to or over his eighteenth birthday by the time the supreme court hears the matter, it counts against the child. See *McClure*, 328 Ark. 35, 942 S.W.2d 243; *Sims*, 320 Ark. at 537, 900 S.W.2d at 513.

In *Guy v. State*, the fact that the child was only sixteen at the time of the hearing would count in his favor according to three concurring justices. See *Guy*, 323 Ark. at 655, 916 S.W.2d at 763.

216. ARK. STAT. ANN. § 45-420 (1981) is almost identical to ARK. CODE ANN. 9-27-318(e) (Michie Supp. 1995). Both state the factors a trial judge must consider when reviewing a transfer motion:

- (a) The seriousness of the offense and whether violence was employed by the juvenile in the commission of the offense.
- (b) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts.
- (c) The prior history, character traits and mental maturity, and any other factors which reflect on the juvenile's prospects for rehabilitation.

none of them permit the court to consider the age of the child, the court has added a clause permitting courts to deny a transfer because the child is too close to or over his eighteenth birthday.²¹⁷ In a recent decision, the Arkansas Supreme Court concluded that this "can be a critical factor" even though it is not mentioned in the statute.²¹⁸

5. *The Child's Burden of Proof*

Although the Code presumes the child should be processed in juvenile court,²¹⁹ the courts have required the child to prove that he or she should be

ARK. STAT. ANN. § 45-420 (1981)

The only additions in the 1995 version are semicolons after sections a and b, an "and" after section b, deleting the "s" in the word factor in subsection c, and renumbering the subsections with numbers rather than letters. See ARK. CODE ANN. § 9-27-318(e) (Michie Supp. 1995). Although these changes are significant, they do not change the factors to be considered.

217. In *Evans v. State*, the court concluded the fact that the child could only be given a disposition of probation by a juvenile court because he had turned eighteen is a legitimate consideration in concluding that rehabilitation would not work. See *Evans*, 287 Ark. at 143, 697 S.W.2d at 883. See also *Smith v. State*, No. 96-1180, 1997 WL 316720 (Ark. June 2, 1997); *Hansen*, 323 Ark. at 410-11, 914 S.W.2d at 739; *Myers*, 317 Ark. at 71-72, 876 S.W.2d at 247-48; *Wicker*, 310 Ark. 580, 839 S.W.2d 186.

It appears the court has a misunderstanding of the powers of juvenile court. In *Bright*, the court concludes that because the child can't be committed to a youth services center there are no rehabilitative options available to the juvenile court. See *Bright*, 307 Ark. 250, 819 S.W.2d 7; See also *Smith*, 1997 WL 316720; *Myers*, 317 Ark. at 71-72, 876 S.W.2d at 247-48; *Wicker*, 310 Ark. 580, 839 S.W.2d 186. However, juvenile probation, with its many options for services, is often more rehabilitative than commitment to the Division of Youth Services. See ARK. CODE ANN. § 9-27-330(a) (Michie Supp. 1995). Probation can include attendance of a rehabilitation program as a condition of probation. See ARK. CODE ANN. § 9-27-331(c) (Michie Supp. 1995). These programs can be inpatient or outpatient. Furthermore, probation can be maintained until a child reaches the age of twenty-one. See ARK. CODE ANN. § 9-27-303(1)(B) (Michie Supp. 1995). Juvenile court also has authority to commit a child to the Division of Youth Services for a period of time beyond the child's eighteenth birthday if "the Department of Human Services' State Institutional System Board determines that an adequate facility or facilities are available for youths eighteen (18) years of age or older." ARK. CODE ANN. 9-28-208(c)-(d) (Michie Supp. 1995). However, the commitment must occur before the child's eighteenth birthday. See ARK. CODE ANN. § 9-28-206 (Michie Supp. 1995); *Hansen*, 323 Ark. at 411, 914 S.W.2d at 739. The Department of Human Services has not had to make a determination of its facilities or provide adequate facilities for children close to their eighteenth birthday because the courts have concluded that seventeen and eighteen-year-olds are not rehabilitatable.

Other states have recognized the fallacy of the statement that there are no options to juvenile courts other than commitment. See, e.g., *Atkins*, 290 N.E.2d at 444.

218. See *Smith*, 1997 WL 316720.

219. The Arkansas Code states: "Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect." ARK. CODE ANN. § 9-27-318(f) (Michie Supp. 1995). This requires proof that a child should be tried as an adult. It does not require proof that a child should be sent to juvenile court. The presumption is that the child should be in juvenile court. Clear and convincing evidence is required to keep

transferred if he or she is the movant.²²⁰ Because prosecutors are granted broad discretion to file charges in adult court, most transfer decisions in Arkansas occur in circuit court.²²¹ Thus, the child, as defendant, is often moving for transfer to juvenile court. Because the child is the movant, the Supreme Court requires the child to prove his or her motion.²²² By virtue of their broad discretion in where to file the charges, the prosecutor can effectively decide who should have the burden of proof, thereby negating any incentive for the prosecutor to file in juvenile court.

In light of the statutory preference for juvenile court, a more logical approach would be for a shifting burden similar to that required in Fourth Amendment search or seizure hearings.²²³ Once the child establishes that he

a child in adult court. "Clear and convincing evidence" is "that degree of proof which will produce in the trier of fact a firm conviction as to the allegation sought to be established." *Kelly v. Kelly*, 264 Ark. 865, 870, 575 S.W.2d 672, 676 (1979). This would suggest that the state has the burden if it wishes to keep a child in adult court. As the dissent in *Walker* makes clear: "If the juvenile has moved to transfer the case to juvenile court, only one party will be offering evidence 'that a juvenile should be tried as an adult,' and that is the state." *Walker*, 304 Ark. at 402, 803 S.W.2d at 507 (Newbern, Dudley & Corbin, JJ., dissenting). See also *Atkins*, 290 N.E.2d at 443 (interpreting the Indiana Juvenile Code, which is similar to the Arkansas Code, as imposing a clear presumption in favor of juvenile court jurisdiction).

220. See *Walker*, 304 Ark. at 398, 803 S.W.2d at 505, *reh'g denied*, 304 Ark. 393, 805 S.W. 2d 80 (1991). See also *Davis*, 319 Ark. 613, 893 S.W.2d 768; *Williams*, 313 Ark. at 454, 856 S.W.2d at 6; *Johnson v. State*, 307 Ark. 525, 823 S.W.2d 440 (1992); *Bradley*, 306 Ark. 621, 816 S.W.2d 605.

To support this proposition in *Walker*, the court relied erroneously on the analysis in Pennsylvania and Oklahoma cases. See *Commonwealth v. Leatherbury*, 568 A.2d 1313 (Pa. Super. Ct. 1990) and *H.W. v. State*, 759 P.2d 214 (Okla. Crim. App. 1988). As the dissent in *Walker* points out, the Pennsylvania and Oklahoma statutes are dramatically different than the Arkansas statute. See *Walker*, 304 Ark. at 402, 803 S.W.2d at 507 (Newbern, Dudley, & Corbin, JJ., dissenting). In Pennsylvania, the statute specifically puts the burden on the child. See *Leatherbury*, 568 A.2d at 1315. In Oklahoma, the statute required proof that the person should be tried as a child which is the "mirror image" of the Code in Arkansas. See *Walker*, 304 Ark. at 402, 803 S.W.2d at 508 (Newbern, Dudley, & Corbin, JJ., dissenting).

221. Although there is no data on the actual number of transfer motions filed in juvenile versus circuit courts, the appellate cases in this area provide some insight into the process. Out of the sixty-eight appellate court opinions on transfers, only two have involved a motion to transfer from juvenile to adult court. See *Collins*, 322 Ark. 161, 908 S.W.2d 80; *Smith*, 307 Ark. 223, 818 S.W.2d 945.

222. It is not clear who would have the burden of proof if the motion to transfer were made by the Court. The Arkansas Juvenile Code clearly permits motions of the court. See ARK. CODE ANN. § 9-27-318(d) (Michie Supp. 1995). Due to the statutory preference for juvenile court, the court should conclude the burden rests with the State. See *Walker*, 304 Ark. at 402-E, 805 S.W.2d at 82 (Newbern, Dudley, & Corbin, JJ., dissenting).

223. In a warrantless search, the defense only needs to establish that there was a warrantless search. Then the state has the burden of proof because the state seeks to use the evidence and thus ought to bear the burden of establishing that it was lawfully come by in light of the desire to protect the potentially infringed Constitutional rights of privacy. See 1 LAFAYE & ISRAEL, CRIMINAL PROCEDURE, § 10.3(b) (1984). Likewise, the state desires to try a child as an adult and should have to justify this in light of the statutory preference against this.

or she is under eighteen, the burden should shift to the prosecution to establish by clear and convincing evidence that the child should be tried as an adult.²²⁴ Then, the child should be given an opportunity to rebut the prosecution's evidence.

6. *The Court's Message - Bad Kids Should Be in Adult Court*

The logical conclusion from these decisions is that the Arkansas Supreme Court wants children to be tried in adult court if they are charged with serious offenses, and it will go to extraordinary means to prevent children from avoiding adult punishment. As Justice Roaf so aptly stated in a dissent, "In light of this court's previous holdings . . . it seems to be open season on juveniles, at least in the context of juvenile transfer hearings."²²⁵

However, the court's obligation is to apply the law unless it violates the constitution. There are problems in the juvenile justice system, but the Court should be highlighting these problems by applying the law as written, not circumventing the clear language of the statute to avoid the difficult questions.

VI. SUGGESTIONS FOR CHANGE

A. Supreme Court Action

In *Sanders v. State*,²²⁶ the Arkansas Supreme Court provides an invitation to review its holdings in transfer cases. The court stated:

This appears to be the logic of the court in *Walker*:

Appellant still has the burden of going forward with proof to show he meets the criteria of the statute to warrant transfer. If he meets that burden, the transfer is made. Under Act 273 he only fails if there is clear and convincing countervailing evidence to support a finding that the juvenile should remain in circuit court.

Walker, 304 Ark. at 399, 803 S.W.2d at 506. This burden shifting seems to have been lost in subsequent decisions.

224. The court would appear to require more than evidence of age. See *Bradley*, 306 Ark. 621, 816 S.W.2d 605 (holding that although the trial court was told the defendants' ages, it did not shift the burden to the state to prove anything more than that they were charged with aggravated assault); *Johnson*, 307 Ark. 525, 823 S.W.2d 440; *Walker*, 304 Ark. 393, 803 S.W.2d 502. However, requiring more than age would seem to defeat the clear intent of the statute that the state has the burden. See *id.* at 401-02, 803 S.W.2d at 507 (Newbern, Dudley, & Corbin, JJ., dissenting).

225. *Hamilton*, 320 Ark. at 352, 896 S.W.2d at 881 (Roaf, J., dissenting). In this same case, Justice Newbern raises his objection to the tenor of these cases. These cases have "allowed us to permit the trial courts, time and again, to sanction adult trials for children solely on the basis of a charge of a violent crime." *Id.* at 351, 896 S.W.2d at 880.

226. 326 Ark. 415, 932 S.W.2d 315 (1996).

For the above reasons we affirm the trial court's ruling denying the motion to transfer. Even so, in our decisional conference, this case was a catalyst for discussion on the need to review our past interpretation of parts of the juvenile code. This case exemplifies the fact that, under our current interpretations of the code, prosecuting attorneys can file a serious charge against a juvenile in circuit court and do nothing more. It may be that there is no substantial evidence to support the charge, and a transfer may be denied. . . . This type of proceeding was not envisioned by the drafters of the juvenile code, and we did not intend for our interpretations to do away with the need for a meaningful hearing. As a result, we issue a caveat that in juvenile transfer cases tried after this date, we will consider anew our interpretation of the juvenile code when the issues are fully developed and briefed.²²⁷

The attorneys and the court should take this opportunity to scrutinize the wisdom and logic of the court's precedent and reverse some of its precedent that neither meets the purposes of the code nor the language of the statute.

1. *Fulfill the Purposes of the Arkansas Juvenile Code*

The Arkansas Supreme Court should review its precedent and reverse those opinions that conflict with the stated purposes of juvenile court "by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution."²²⁸ Justice Roaf in a dissent criticized the Arkansas Supreme Court for woefully failing to consider a significant portion of the stated purposes of the Juvenile Code.²²⁹ She explained:

We have neither liberally construed the statute to the benefit of the emotional mental, and physical welfare of the juveniles, nor even for the best interests of the state. We have failed to insure that methods of rehabilitation and restitution are substituted wherever possible, for retributive punishment, and we have surely failed to provide that juveniles are assured fair hearings and that their constitutional and other rights provided by this statute are uniformly recognized and enforced. We share responsibility equally with our elected state representatives.²³⁰

227. *Id.* at 422-23, 932 S.W.2d at 319.

228. *See* ARK. CODE ANN. § 9-27-302(3) (Michie 1993).

229. *See Butler*, 324 Ark. at 486, 922 S.W.2d at 691 (Roaf, J., dissenting).

230. *Id.* at 487, 922 S.W.2d at 691-92 (Roaf, J., dissenting).

2. *Place the Burden on the State to Establish that A Child Should Be Tried As An Adult*

The dissent in *Walker v. State*²³¹ should be adopted by the majority. The dissent was correct in its assertion that the intent of the legislature was for the burden to be on the State to prove that a child should be prosecuted as an adult and that there needs to be more than a charging document presented.²³² These rules are mandated by a clear reading of the statute as well as the purposes mandate of the Arkansas Juvenile Code.

3. *Recognize That Violence Committed By A Codefendant Should Not Always Weigh Against the Child*

Children who don't commit violence should be able to be sent to juvenile court even if their accomplice commits violence. There will be cases in which a child's participation in a violent crime will weigh against him or her even if he or she didn't commit violence.²³³ Yet the statutory language is clear that the court is supposed to consider whether "violence was employed by the juvenile."²³⁴ The statute does not say "whether it was a crime of violence."

4. *Mandate Meaningful Hearings*

The court should reverse its holdings that interpret a charging document as evidence sufficient to support a finding that a child should be tried as an adult. The state should have to provide testimonial evidence that proves the child before the court deserves to be tried as an adult because of his conduct in the present case or his or her individual history.²³⁵

231. 304 Ark. 393, 401-02A, 803 S.W.2d 502, 503-08.

232. *See id.* at 401-02A, 803 S.W.2d at 507-08.

233. *See, e.g., Carroll*, 326 Ark. 882, 934 S.W.2d 523 (defendant carried a gun into a home; while his codefendant killed three children, the defendant wrestled with the mother of the children). *But see Butler*, 324 Ark. 476, 922 S.W.2d 685 (no evidence that the defendant used violence); *Guy*, 323 Ark. 649, 916 S.W.2d 760 (defendant did not use violence but his codefendant did); *Bell*, 317 Ark. 289, 877 S.W.2d 579; *Walter*, 317 Ark. 274, 878 S.W.2d 374.

234. ARK. CODE ANN. § 9-27-318(e)(1) (Michie 1995).

235. Following the writing of this article but shortly before it was printed, the Arkansas Supreme Court concluded that "there must be some evidence to substantiate the serious and violent nature of the charges contained in the information." *Thompson v. State*, No. 97-339, slip op. at 6 (Dec. 11, 1997). Justice Newbern states well the rule that should be adopted in *Hamilton v. State*:

No doubt some people below the age of 18 are tough, hardened, and incorrigible. In my view, the transfer provisions should be interpreted so that such persons wind up being treated as adults. The State, however, in a case such as this one, should be

5. *Provide Meaningful Review*

The court should mandate that trial judges make specific findings of facts in these cases.²³⁶ Without such findings, the appellate court should reverse the case for specific findings.²³⁷

Furthermore, the court should recognize its role in providing meaningful review and not grant deference to the trial judges in such a critically important stage of the proceeding.²³⁸ The presumption should be as stated in the statute that children should be tried as children. The trial judges should provide specific and significant justifications for their clear and convincing findings that children should be tried as adults.²³⁹

B. Use Other Parts of the Code to Strengthen The System

1. *Require Predisposition Studies Before the Hearings*

Without any major changes in the code or the court's precedent, the attorneys and trial judges could improve the quality of these decisions by requesting predisposition reports on all children facing potential adult charges.²⁴⁰ These reports are akin to psycho-social reports provided by licensed

required to show more than that a youngster who was aged 14 has been charged with committing one act of violence.

320 Ark. 346, 896 S.W.2d 877 (1995).

236. Other states have mandated such findings without clear statutory mandates. See T.J.H. v. Bills, 504 S.W.2d 76 (Mo. 1974); Hubbs v. Commonwealth, 511 S.W.2d 664 (Ky. 1974); Commonwealth v. Deppeller, 460 A.2d 1184, 1186-1187 (Pa. Super. Ct. 1983); In re Stevenson, 538 P.2d 5, 10 (Mont. 1975).

237. If the Arkansas Supreme Court is unwilling to mandate such findings, the legislature should mandate it. Such findings are mandated in several other states' transfer statutes. See, e.g., ALA. CODE § 12-15-34(f) (Michie Supp. 1996); TEX. FAM. CODE ANN. § 54.02(d) (West 1996); VT. STAT. ANN. TIT. 33, § 5506(f) (1991); MINN. STAT. ANN. § 260.125(5) (West Supp. 1997); MISS. CODE ANN. § 43-21-157(6)(d) (Supp. 1997); MO. ANN. STAT. § 211.071(7)(4) (West 1996).

238. This deference was raised to an unbelievable level in a recent opinion. In *Smith*, the trial court's oral basis for its decision was that the numbers of burglaries charged, the amount stolen, the failure to help officers retrieve the stolen material, and the lack of parental guidance. See *Smith*, 1997 WL 316720. The number of burglaries could make the offense serious under ARK. CODE ANN. § 9-27-318(e)(1), but it is difficult to see how the other items satisfy a clear and convincing standard that the child should be tried as an adult. However, the Arkansas Supreme Court concluded that the trial court considered all the statutory factors.

239. The supreme court should review trial court decisions on transfer by the standard articulated in *Pennington*, which is whether or not there was a careful, case-by-case evaluation of the request to transfer a child. See *Pennington*, 305 Ark. at 315, 807 S.W.2d 662.

240. Such reports are mandated in other jurisdictions. See, e.g., ALA. CODE § 12-15-34(e) (Michie Supp. 1996); CAL. WELF. & INST. CODE § 707(a) (West Supp. 1997); FLA. STAT. ANN. § 39.059(7)(a) (West Supp. 1997); MO. STAT. ANN. § 211.071(6) (West 1996).

social-workers.²⁴¹ Such reports would go beyond the psychological testing that has been traditionally presented in transfer cases.²⁴² These reports would provide valuable information for the issues at these proceedings such as what environmental or family related factors may have led this child to this conduct and which if any of these factors could help in rehabilitation.

2. *Use Blended Sentencing*

For those children who are tried in adult court, the circuit judges should use the code provision that allows for suspended imposition adult incarceration and use of the delinquency rehabilitation system.²⁴³ Other states have used these systems well.

The Arkansas Code states:

(a) All youthful male offenders under the age of eighteen (18) years convicted of a felony in the State of Arkansas may, in the discretion of the sentencing authority, be sentenced to the appropriate division of the Department of Human Services or to the Tucker Unit of the Department of Correction.

(b)(1) If the sentencing authority determines that a youthful male offender would be more amenable to the rehabilitation programs of the appropriate division of the Department of Human Services, the sentencing authority may sentence the youthful offender to the Department of Correction for a term of years, suspend the sentence, and commit the youth to the custody of the appropriate division of the Department of Human Services.

(2) In such case, if the youth completes the training school program satisfactorily, the appropriate division of the Department of Human

241. A predisposition report is defined as:

a report concerning the juvenile, the family of the juvenile, all possible disposition alternatives, the location of the school in which the juvenile is or was last enrolled, whether the juvenile has been tested for or has been found to have any handicap, the name of the juvenile's attorney, and if appointed by the court, the date of the appointment, any participation by the juvenile or his family in counseling services previously or currently being provided in conjunction with adjudication of the juvenile and any other matters relevant to the efforts to provide treatment to the juvenile or the need for treatment of the juvenile or the family. The predisposition report shall include a home study of any out-of-home placement which may be part of a disposition.

ARK. CODE ANN. § 9-27-303(28) (Michie Supp. 1995).

242. See *supra* part V.A.2.iii.

243. Although Arkansas has this system, Ruth Whitney, Director of the Division of Youth Services is unaware of any child being sent to the Division of Youth Services by a circuit court judge. Telephone Interview with Ruth Whitney, Director of the Division of Youth Services in Little Rock, Ark. (June 11, 1997).

Services shall return him to the sentencing court and provide the court with a written report of the youth's progress and a recommendation that he be placed on probation.

(3) In the event that the youth becomes unruly, incorrigible, or is not amenable to the training program of the appropriate division of the Department of Human Services, the board may return him to the sentencing court with a written report of the youth's conduct and a recommendation that he be transferred to the Department of Correction. The court shall then revoke the suspension of the sentence originally imposed and commit the youth to the Tucker Unit of the Department of Correction.²⁴⁴

This statute allows the juvenile justice system to try to rehabilitate all children yet provides long term incarceration as a deterrent. The trial judges are not bound to abide by any recommendations of the Department of Human Services. If the rehabilitation appears to have been unsuccessful to the judge, the judge can order the child to the Department of Corrections. Arkansas is missing an opportunity by its failure to use this statute.

C. Improve the Division of Youth Services' Ability to Handle These Kids

The Division of Youth Services does not have adequate resources to handle the most difficult children charged with the more serious offenses. The state should choose to spend money for intensive rehabilitation for a few years rather than the option of warehousing these children for many years at the Department of Corrections. In particular, the Division of Youth Services should develop sufficient facilities to work with persons aged eighteen to twenty-one years old.²⁴⁵

244. ARK. CODE ANN. § 12-28-403 (Michie 1995). There are some changes that could improve this code provision such as expansion of this authority to female offenders and offenders over eighteen but under twenty-one. However, this provision is still valid and is strengthened by ARK. CODE ANN. § 9-28-206 (Michie Supp. 1995).

245. In order for a judge to commit a person over the age of eighteen, the Department of Human Services must determine that there are adequate facilities for such youths. See ARK. CODE ANN. § 9-28-208(d) (Michie Supp. 1995).

D. Statutory Response: Mandate that All Cases Involving Children Begin in Juvenile Court²⁴⁶

The Juvenile Code should be modified to require that all offenses involving children under the age of eighteen begin in juvenile court.²⁴⁷ This process has been adopted by the majority of the states.

After the initial charging decision, the prosecutor would retain his or her discretion to move to transfer the child to adult court. Prosecutors would not be losing their discretion,²⁴⁸ but they would clearly have the burden to prove the need to try the child as an adult. This would also protect the child from public scrutiny if he or she was not going to be tried as an adult. This change would also assure that the judges best able to make the decision on transfer would be given that responsibility. Juvenile judges know the children regularly brought before juvenile court and are able to compare with other children when deciding which of the children charged with delinquency should be in adult

246. I am not the first Arkansan to recommend this. See ARKANSAS COMM'N ON JUV. JUST., JUVENILE COURTS IN ARKANSAS 30 (1989); Boyce, *supra* note 55, at 1008-09. The Supreme Court also recognized that juvenile courts have "the facilities, personnel and expertise for a proper determination of the waiver issue." *Kent*, 383 U.S. at 564 (quoting *Black v. United States*, 355 F.2d 104, 107 (D.C. Cir. 1965)).

247. This could be accomplished with the following revisions to ARK. CODE ANN. § 9-27-318:

(a) Juvenile court has exclusive jurisdiction when a delinquency case involves a juvenile. Upon a motion of the court or of any party, the juvenile judge shall conduct a hearing to determine whether to retain jurisdiction over the matter or to transfer the case to a circuit court for the case to proceed as a criminal prosecution. The juvenile court may consider such a motion only when a case involves a juvenile:

(1) At least sixteen (16) years old when he engages in conduct that, if committed by an adult, would be any felony;

(2) Fourteen (14) or fifteen (15) years old when he engages in conduct that, if committed by an adult, would be: [insert the list of enumerated offenses presently listed in ARK. CODE ANN. § 9-27-318(b)(2)-(4) (Michie Supp. 1995)].

(b) In making the decision to retain jurisdiction or to transfer the case, the court shall consider the following factors: [insert the list of factors presently mandated under ARK. CODE ANN. § 9-27-318(e)(1)-(3) (Michie Supp. 1995)].

(c) Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect.

(d) If the case is transferred to another court, any bail or appearance bond given for the appearance of the juvenile shall continue in effect in the court to which the case is transferred.

(e) Any party may appeal from an order granting or denying the transfer of a case from one court to another court having jurisdiction over the matter.

248. Filing all charges in juvenile court would also avoid the problem of splitting nine enumerated offenses in juvenile court and adult court.

court.²⁴⁹ The juvenile judges also know what delinquency services are available for children closest to their eighteenth birthday.²⁵⁰

VII. CONCLUDING THOUGHTS

Arkansas should make it clear through statutes and case law that it wants to try to save every child brought to the attention of the juvenile courts. The presumption should be that all children will benefit from going through the juvenile court system. Only upon a clear showing that the child cannot benefit from juvenile court should he or she be sent to the adult corrections system. This system makes sense from a criminal justice, corrections and monetary basis. Our juvenile court system has succeeded with some children and could succeed with even more if given the chance. The response to juvenile violent crimes and the failure of the system in some cases should be to re-evaluate our system. We should not give up on the children. If our response does not meet the needs of the children, we should try some other responses.²⁵¹

There are commonly accepted causes to delinquency.²⁵² These causes lead to logical responses such as a continuum of care that strengthens children's families, communities, and schools giving individual children support and hope.²⁵³ If the state would spend more resources in these areas and less on the

249. See Boyce, *supra* note 55, at 1008-09.

250. This would eliminate the confusion some judges appear to have over the available services to children, see *supra* note 214, and it would minimize the need for expert testimony on this issue because these judges already have this knowledge of the system. See *supra* note 148.

251. See D'Ambra, *supra* note 3, at 5.

We are not sufficiently sophisticated in our diagnostic tools to predict which intervention will work with which child or family. Thus, we may fail in some initial efforts. Limited failure should be assumed and accepted.

252. A report published in 1995 from the U.S. Department of Justice's Office of Juvenile Justice summarized thirty years of research by categorizing the following risk factors broken into four major categories as follows: (1) community-related risk factors including availability of drugs; availability of firearms; community laws and norms favorable toward drug use, firearms, and crime; media portrayals of violence; transitions and mobility; low neighborhood attachment and community disorganization; extreme economic deprivation; (2) family-related risk factors of family history of problem behavior, family management problems, family conflict, and favorable parental attitudes concerning crime and involvement in crime; (3) school-related risk factors of early and persistent antisocial behavior, academic failure in elementary school, and lack of commitment to school; and, (4) individual and peer-related risk factors of alienation and rebelliousness, friends who engage in problem behavior, favorable attitudes toward problem behavior, early initiation of problem behavior, and constitutional factors. See OFFICE OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., DELINQUENCY PREVENTION WORKS at 6-7 (1995).

253. See OFFICE OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., DELINQUENCY PREVENTION WORKS (1995).

prosecution of children as adults and incarceration of children in adult facilities, we may succeed in helping some children.

The popular quick-fix response of locking up the kids has long term affects.²⁵⁴ With this response, we are missing the opportunity to help our children.

254. Opponents to the juvenile justice system argue that rehabilitation does not work and deterrence is a better response. They suggest that there are greater costs to society with the crimes committed by these "predators" left in the juvenile justice system. Although I disagree with these statements and have not been shown data to support them, I believe we should try to save the children even if the finances do not work out evenly. The value of a child's future is more than his or her costs to society. If we save one child, his or her productivity in creative contributions to society may be greater than our wildest imagination. I accept the proposition that many children charged with delinquent acts may be a continual drain on our criminal justice system for years to come. The problem is that we don't know which child will be a drain and which will be a contributor. I encourage us to foster a hope of contribution and reject the presumption of drainage.

