

1999

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Santelmann, Kathryn A. and Lillesand, Kari L. (1999) "Extended Jurisdiction Juveniles in Minnesota: a Prosecutor'S Perspective," *William Mitchell Law Review*: Vol. 25: Iss. 4, Article 4.

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EXTENDED JURISDICTION JUVENILES IN MINNESOTA: A PROSECUTOR'S PERSPECTIVE

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*There is always a moment in a child's life when a door opens and
lets the future in.*

- Graham Green

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The authors wish to acknowledge the contributions made to this article by a number of people: Jim Hayes, Juvenile Division Director of the Ramsey County Community Corrections Department; Fred Karasov, Managing Attorney of the Hennepin County Juvenile Prosecution Division; and Heidi Green of the Minnesota Supreme Court Research and Technology Office. The authors express their gratitude to these individuals and all those who provided assistance in the creation of this article.

I. INTRODUCTION

The creation of Minnesota's Extended Jurisdiction Juvenile statute was part of a national trend to redefine the purpose of the juvenile court by shifting the focus from rehabilitation to public safety.¹ From 1988 to 1992, in a span of just four years, the number of serious crimes, such as murder and assault, committed by juveniles increased by sixty-eight percent.² By 1991, forty-three percent of persons apprehended for serious crimes were under the age of eighteen.³ The rise in serious, violent juvenile crime rates occurring nationally also occurred in Minnesota.⁴

Since 1992, more than ninety percent of the states have revised their laws relating to juvenile crime.⁵ Minnesota's revision of its statute governing the transfer of juveniles to adult court and the creation of a new category of juvenile offender—the Extended Jurisdiction Juvenile (“EJJ”)—was part of this trend.⁶ Minnesota's EJJ statute represents not only a shift in focus from rehabilitation to the protection of public safety;⁷ it also represents an expansion of the juvenile court's dispositional options.⁸ Furthermore, it is evidence of the increased role prosecutors and legislatures are playing in cases involving the serious and violent juvenile offender.⁹

In Minnesota, from 1980 to 1991 the overall crime rate had decreased four percent.¹⁰ However, this same period saw a four-

1. See PATRICIA TORBET ET AL., U.S. DEP'T OF JUSTICE, STATE RESPONSES TO SERIOUS AND JUVENILE CRIME, 11 (July 1996); see also Barry Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 967 (1995) (discussing legislative initiatives and judicial reforms in response to serious youth crime).

2. See U.S. DEP'T OF JUSTICE, PROGRAM REPORT—JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994-1996, 42 (citing U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURTS AND DISPOSITIONS I (Aug. 1995)).

3. See ADVISORY TASK FORCE ON THE JUVENILE JUSTICE SYSTEM, MINNESOTA SUPREME COURT, FINAL REPORT 31 (Jan. 1994).

4. See DANIEL STORKAMP, MINNESOTA CRIMINAL JUSTICE STATISTICAL ANALYSIS CENTER, MINNESOTA PLANNING: OVERVIEW OF JUVENILE CRIME IN MINNESOTA 5 (Feb. 26, 1993).

5. See TORBET ET AL., *supra* note 1, at 59.

6. See generally Feld, *supra* note 1.

7. See ADVISORY TASK FORCE, *supra* note 3, at 32.

8. See *id.* at 32-33.

9. See TORBET ET AL., *supra* note 1, at 60.

10. See STORKAMP, *supra* note 4, at 5.

percent increase in serious crime.¹¹ Furthermore, the number of juveniles arrested for serious crimes increased ten percent from 1980 to 1991.¹² In 1991 alone, juveniles accounted for forty-three percent of the total number of arrests for serious crimes.¹³ In response to this rise in violent juvenile crime, the 1992 Legislature created the Minnesota Task Force on the Juvenile Justice System ("Task Force").¹⁴

The Task Force was charged with the responsibility of examining the current juvenile system and making recommendations concerning, among other things, the process of transferring juveniles to adult court.¹⁵ In fulfilling this charge, the Task Force examined the policies and procedures used by the juvenile courts to deal with serious and repeat offenders.¹⁶ The Task Force also examined the question of how the juvenile justice system should balance the needs of the juvenile offender with the need to control the offender for the benefit of the juvenile and the protection of society.¹⁷ This examination led to the following identified needs:

1. A stronger response to serious and repeat juvenile crime;
2. A continuum of juvenile justice system responses to juvenile crime based on the seriousness of the offense, the age of the offender, and the threat posed to public safety, with an increase in sentencing alternatives for juvenile offenders; and
3. Strong leadership by the Department of Corrections in developing statewide juvenile justice policy, and in taking fiscal and program responsibility for serious juvenile offenders.¹⁸

11. *See id.*

12. *See id.* at 6.

13. *See id.* For 1991, there were 17,688 juveniles arrested for serious offenses out of a total population of 41,547. *See id.*

14. *See* 1992 Minn. Laws ch. 571, art. 7, sec. 13.

15. *See id.* The Task Force, chaired by Minnesota Supreme Court Justice Sandra Gardebring, was comprised of 22 members and three ex officio members. *See* ADVISORY TASK FORCE, *supra* note 3, at 3-4. The membership included private citizens, community leaders, judges, legislators, law professors, law enforcement personnel, corrections officers, and staff of state agencies. *See id.*

16. *See id.* at 22-26.

17. *See id.* at 3.

18. *See id.* at 3-4.

Having identified these needs, the Task Force issued a report recommending significant changes to the statute governing the transfer of juveniles to adult court.¹⁹ The Task Force also recommended the creation of a blended sentencing option, named by the Task Force as the Serious Youthful Offender²⁰ and renamed by the legislature the Extended Jurisdiction Juvenile ("EJJ").²¹ The substantive recommendations submitted to the 1994 Legislature by the Task Force were adopted almost in their entirety.²² This article examines: (1) the relevant changes to the transfer process; (2) the creation of the EJJ classification; and (3) the impact of these changes on the juvenile system from the perspective of a prosecutor.

II. THE 1994 STATUTORY CHANGES: CERTIFICATION AND EJJ

A. Overview

The changes in the provisions to transfer juveniles to adult court ("certification") and the creation of the blended jurisdiction category of juvenile offender are entwined. Both grew from a desire to give the juvenile court tools to address the serious juvenile offender while retaining the court's ability to rehabilitate those juveniles amenable to treatment.²³

Prior to the 1994 changes to the certification statute, juveniles between the ages of fourteen and seventeen could be certified to adult court for any crime.²⁴ The prosecutor, however, was required to prove by clear and convincing evidence that the child was not suitable for treatment or that public safety would not be served by retention in the juvenile system.²⁵ Although the statute set forth various *prima facie* criteria for certification of sixteen and seventeen year olds accused of specific offenses, the burden of proof remained with the prosecution.²⁶ The Juvenile Court Rules set forth eleven factors for the court to consider when examining the issue

19. See *id.* In Minnesota, this process is now referred to as certification to stand trial as an adult, or simply "certification." See MINN. STAT. § 260.125 (1998).

20. See ADVISORY TASK FORCE, *supra* note 3, at 31-37.

21. See MINN. STAT. § 260.126 (1998).

22. See *id.* §§ 260.125 & .126; see also Feld, *supra* note 1, at 967.

23. See ADVISORY TASK FORCE, *supra* note 3, at 3-4.

24. See MINN. STAT. § 260.125, subd. 1 (1992).

25. See *id.* § 260.125, subd. 2 (1992).

26. See *id.* § 260.125, subd. 3 (1992).

of certification.²⁷

The subjectivity of these factors was of concern to the Task Force.²⁸ Even with the rise in juvenile crime, the 1992 statistics showed that the majority of juveniles certified to adult court were accused of committing property offenses.²⁹ Specifically, the Task Force report notes that in 1992, fifty-two percent of juveniles sentenced in adult court were property offenders, thirty-five percent were person offenders and thirteen percent had committed other crimes.³⁰ The Task Force recommended that this dispositional option be reserved for those few offenders who have shown that they pose a risk to public safety.³¹

For these offenders, the Task Force recommended simplifying the certification process, as well as clearly making public safety the

27. See MINN. R. JUV. P. 32.05, subd. 2 (1992). The eleven factors set forth in Rule 32 of the Minnesota Rules of Juvenile Procedure were:

- (1) the seriousness of the offense in terms of community prosecution;
- (2) the circumstances surrounding the offense;
- (3) whether the offense was committed in an aggressive, violent, premeditated or willful manner;
- (4) whether the offense was directed against persons or property, the greater weight being given to an offense against persons, especially if personal injury resulted;
- (5) the reasonably foreseeable consequences of the act;
- (6) the absence of adequate protective and security facilities available to the juvenile treatment system;
- (7) the sophistication and maturity of the child as determined by consideration of the child's home, environmental situation, emotional attitude and pattern of living;
- (8) the record and previous history of the child;
- (9) whether the child acted with particular cruelty or disregard for the life or safety of another;
- (10) whether the offense involved a high degree of sophistication or planning by the child; and
- (11) whether there is sufficient time available before the child reaches age nineteen to provide appropriate treatment and control.

Id.

28. See ADVISORY TASK FORCE, *supra* note 3, at 27; see also Feld, *supra* note 1, at 8-9.

29. See ADVISORY TASK FORCE, *supra* note 3, at 25.

30. See *id.* These figures are consistent with national statistics, which show that in 1992 nonviolent offenders comprised 66 percent of all juveniles waived to adult court. See U.S. DEP'T OF JUSTICE, *supra* note 2, at 42.

31. See ADVISORY TASK FORCE, *supra* note 3, at 27.

central issue in any certification proceeding.³² Both of these recommendations were adopted by the 1994 Legislature.³³ The certification statute was amended to limit certification to felony offenses, to create presumptive and non-presumptive certification procedures, and to articulate clearly that public safety is the focus of any certification proceeding.³⁴

Under the statute as amended, certification is presumed for juveniles sixteen or seventeen years old (at the time of the offense) who are charged with committing an offense for which the sentencing guidelines presume an executed prison sentence or an offense involving the use of a firearm.³⁵ In these presumptive cases, the burden of proof rests with the child to establish by clear and convincing evidence that public safety is served by retention in the juvenile system.³⁶ In all other cases the burden of proof remains with the state to prove that transfer of the child to adult court serves public safety.³⁷ The public safety factors set forth in the certification statute are:

- (1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm, and the impact on any victim;
- (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the sentencing guidelines;
- (3) the child's prior record of delinquency;
- (4) the child's prior programming history, including the child's past willingness to participate meaningfully in available programming;
- (5) the adequacy of the punishment or programming available in the juvenile justice system; and

32. *See id.* at 26-30.

33. *See* 1994 Minn. Laws 576 (amending MINN. STAT. § 260.125).

34. *See* 1994 Minn. Laws 576.

35. *See* MINN. STAT. § 260.125, subd. 2a (1998).

36. *See id.*

37. *See id.*

(6) the dispositional options available for the child.³⁸

In considering each of these factors, the court is required to give greater weight to the seriousness of the alleged offense and to the child's prior programming history than to the other four factors.³⁹ While creating changes intended to make certification of serious offenders more certain, the Task Force and legislature also created a mechanism by which serious juvenile offenders could be given "one last chance at success in the juvenile system, with the threat of adult sanctions as an incentive not to reoffend."⁴⁰ This "one last chance" category was dubbed Extended Juvenile Jurisdiction by the legislature. Those falling within the category have become known as Extended Jurisdiction Juveniles.

The same public safety factors set forth in the certification provisions are to be used by courts in making decisions regarding EJJ designation.⁴¹ The intention of the Task Force, and presumably the legislature, in requiring evidence on each of the public safety factors was to make the proceedings as objective as possible.⁴² Whether this goal has been accomplished with respect to EJJ proceedings will be discussed below.

B. *EJJ: Expansion of the Juvenile Court's Sentencing Authority*

A growing trend in the area of juvenile justice is the expansion of the juvenile court's disposition and sentencing options.⁴³ As part of the trend to focus on public safety concerns as well as rehabilitation of the juvenile, courts nationally are experimenting with new

38. MINN. STAT. § 260.125, subd. 2b (1998). The Task Force recommendations listed five of these six factors. See ADVISORY TASK FORCE, *supra* note 3, at 27. The legislature added the fifth factor, adequacy of punishment or programming available in the juvenile system. See 1994 Minn. Laws 576.

39. See MINN. STAT. § 260.125, subd. 2b.

40. See ADVISORY TASK FORCE, *supra* note 3, at 5.

41. See *id.* The Task Force recommended only two paths to designation as a Serious Youthful Offender: from a failed certification hearing or by prosecutor designation. See *id.* The designation resulting from a failed certification hearing requires consideration of the public safety factors because the certification process requires the weighing of these factors. See MINN. STAT. § 260.125, subd. 2. The legislature, in adopting the Extended Jurisdiction Statute, specifically required the consideration of the six public safety factors set forth in the certification statute. See *id.* § 260.126, subd. 2.

42. See ADVISORY TASK FORCE, *supra* note 3, at 27.

43. See TORBET ET AL., *supra* note 1, at 11.

sentencing and disposition options.⁴⁴ Shifts in these sentencing practices include:

(1) the imposition of 'blended sentences' that mix both adult and juvenile sanctions; (2) the imposition of mandatory minimum sentences for certain types of offenders or offense categories; and (3) the extension of juvenile court jurisdiction for dispositional purposes beyond the age of majority, lengthening the time that a juvenile is held accountable in juvenile court.⁴⁵

Minnesota's EJJ statute includes two of these three practices by extending the expiration of the juvenile court's jurisdiction to the child's twenty-first birthday.⁴⁶ The statute further provides for the imposition of both a juvenile disposition and a stayed adult sentence.⁴⁷ Enacted in 1994, and effective January 1, 1995, the statute

44. *See id.*

45. *Id.* The authors identify five basic models of blended sentencing options. *See id.* These models are described as:

- (1) the "juvenile exclusive blend" in which the juvenile court imposes either a juvenile or adult sanction;
- (2) the "juvenile inclusive blend" in which the juvenile court simultaneously imposes both a juvenile and an adult sentence, with the adult sentence being suspended pending violation and revocation;
- (3) the "juvenile contiguous" blend in which the juvenile court imposes a juvenile sanction that may remain in force beyond the age of its extended jurisdiction;
- (4) the "criminal exclusive blend" in which the criminal court imposes either a juvenile or an adult sanction; and
- (5) the "criminal inclusive blend" in which the criminal court imposes both a juvenile and adult sanction and suspends the adult sentence pending a violation or reoffense.

See id. at 11-14. Minnesota's EJJ statute is an example of the "juvenile inclusive blend" model. *See id.* at 12.

46. *See* MINN. STAT. § 260.181, subd. 4(b) (1998). The majority of Task Force members recommended extension of the juvenile court's jurisdiction to age 23. *See* ADVISORY TASK FORCE, *supra* note 3, at 33. A minority of the members felt jurisdiction should extend only to age 21. *See id.* The report identifies a number of concerns expressed if jurisdiction was extended to age 23. *See id.* These concerns included: too long an exposure for juveniles to reoffend; overwhelming the adult criminal justice system if the juveniles were to reoffend and have their adult sentences executed; and making certification to adult court more difficult. *See id.* Ultimately, the legislature chose to extend juvenile court jurisdiction to age 21 rather than 23. *See* MINN. STAT. § 260.181, subd. 4(b).

47. *See* MINN. STAT. § 260.126 (1998).

expanded the dispositional options for the serious, violent or repeat juvenile offender.⁴⁸

The Task Force designed the EJJ designation to provide "a more graduated juvenile justice system based on age and offense with a new transitional component between the juvenile and adult systems."⁴⁹ The purpose of the designation was to give the public the best of both systems.⁵⁰ The juvenile court would retain access to juvenile programming and would have the availability of adult sanctions if the programming was not successful.⁵¹ Because adult sanctions can be imposed if the juvenile is found to have violated the terms of the juvenile probation, the statute gives the child the right to trial by jury.⁵² In Minnesota, all juveniles charged with a criminal offense are also entitled to court-appointed counsel.⁵³ Thus, in EJJ proceedings: the child is granted the adult rights of representation and jury trial, the dispositional options of the juvenile system are retained, and the sentencing authority of the juvenile court is expanded.

The statute provides that the EJJ designation is limited to juveniles fourteen to seventeen years old who have committed a felony-level offense.⁵⁴ There are four paths to an EJJ designation:

- (1) Prosecution Designation: prosecutors may designate as EJJ any 16- or 17-year-old charged with committing an offense with a firearm or an offense for which the sentencing guidelines presume an executed prison term.⁵⁵
- (2) Mandatory Court Designation: the juvenile court must designate as EJJ any 16- or 17-year-old charged with committing an offense with a firearm or an offense for which the sentencing guidelines presume an executed prison term if the state's motion for certification is denied.⁵⁶
- (3) Discretionary Court Designation Following Certifica-

48. *See id.* § 260.126, subd. 4.

49. ADVISORY TASK FORCE, *supra* note 3, at 32.

50. *See id.* at 33.

51. *See id.* at 33-34.

52. *See* MINN. STAT. § 260.126, subd. 3 (1998).

53. *See* MINN. R. JUV. P. 3.02.

54. *See* MINN. STAT. § 260.126, subd. 1 (1998).

55. *Id.* § 260.126, subd. 1(2); MINN. R. JUV. P. 19.01, subd. 3(b).

56. MINN. STAT. § 260.126, subd. 1(2) (1998); MINN. R. JUV. P. 19.01, subd. 3(a).

tion Motion: a juvenile 14 to 17 charged with a felony when, following a certification hearing, the court determines the designation to be appropriate.⁵⁷

(4) Discretionary Court Designation Following EJJ Motion: a juvenile 14 to 17 charged with a felony when, following an EJJ motion and hearing, the court determines the designation to be appropriate.⁵⁸

In reaching its decision regarding EJJ designation, the juvenile court must weigh the same six public safety factors set forth in the certification statute.⁵⁹ Because the statute does not specify if or how these factors are to be weighed differently in EJJ proceedings, in many cases juvenile courts must subjectively determine whether a child should be certified as an adult or designated EJJ. This result appears to be at cross-purposes with the Task Force's goal of limiting the subjectivity of the juvenile court through the creation of the public safety factors. Nevertheless, the creation of the EJJ designation has provided more options in treating the serious juvenile offender and from this standpoint it has been beneficial.

The probation violation provisions of the EJJ statute also warrant comment. The statute sets forth procedures for the revocation of juvenile probation and imposition of the adult sentence. The juvenile is entitled to notice and a hearing on the alleged violations.⁶⁰ As in adult court, a violation must be proven by clear and convincing evidence.⁶¹ If the court finds reasons exist to revoke the stay of execution of the adult sentence, the court is required to treat the offender as an adult.⁶² The court retains the option of executing the stayed adult sentence or again staying execution of the sentence on specified conditions.⁶³ However, in presumptive EJJ cases, cases where the juvenile has committed an offense using a firearm or for which the sentencing guidelines presume an executed prison term, if the judge does not execute the stayed sentence he or she must make written findings.⁶⁴ The findings must

57. MINN. STAT. § 260.126, subd. 1(1) (1998); MINN. R. JUV. P. 19.01, subd. 4.

58. MINN. STAT. § 260.126, subd. 1(3) (1998); MINN. R. JUV. P. 19.01, subd. 4.

59. See MINN. STAT. § 260.126, subd. 2 (1998).

60. See *id.* § 260.126, subd. 5 (1998).

61. See *id.* § 260.126, subd. 2.

62. See *id.* § 260.126, subd. 5.

63. See *id.*

64. See *id.*

set forth the mitigating factors that justify continuing the stay.⁶⁵

Because the statute took effect on January 1, 1995,⁶⁶ there have not yet been large numbers of juveniles designated EJJ. In 1995, 195 juveniles were designated as EJJ.⁶⁷ This number rose to 240 juveniles in 1996, and fell to 220 juveniles in 1997.⁶⁸ As many of these offenders were sent to placements for a year to eighteen months, data on probation violations are limited. For example, whether the path to EJJ designation effects the frequency or outcome of probation violations remains to be seen.

The Task Force recommended that the court treat probation violations of EJJ offenders in the same manner as adults who had committed a new offense or violated the terms of probation, including execution of the stayed adult sentence.⁶⁹ The intent is clear: "Juveniles will know there is certainty of punishment, combined with an opportunity to be successful in the juvenile system."⁷⁰ Although the intent of the Task Force is clear; whether certainty of punishment occurs will depend upon the decisions of our juvenile judges.

III. THE IMPACT OF THE 1994 STATUTORY CHANGES

As a result of the 1994 statutory changes, certification of juveniles for anything less than a felony offense is no longer allowed in Minnesota.⁷¹ EJJ designation is also limited to felony cases.⁷² Thus, by its own terms, the effect of the statutory changes has been to retain all nonfelony cases within juvenile court. A review of the statistical data available on EJJ offenders, as well as an examination of the probation revocation proceedings, reveals that the impact of the statutory changes has been significant.

65. *See id.*

66. *See* 1994 Minn. Laws 576.

67. *See* Letter from Sharon Krmpotich, Research and Planning, Supreme Court of Minn., to Jim Hayes, Juvenile Division Director of the Ramsey County Community Corrections Department (undated) (on file with the *William Mitchell Law Review*).

68. *See id.*

69. *See* ADVISORY TASK FORCE, *supra* note 3, at 34.

70. *Id.*

71. *See* MINN. STAT. § 260.125, subd. 1 (1998).

72. *See id.* § 260.126, subd. 1 (1998).

A. *EJJ*: Statistical Data

Although the law provides four ways in which a juvenile may be designated *EJJ*,⁷³ most cases fall within clause two of the *EJJ* statute.⁷⁴ Court designation under clause two of the statute accounts for 69.7% of all *EJJ* cases.⁷⁵ Of the remaining cases, 14.4% followed a failed certification motion,⁷⁶ and only 15.9% of juveniles were designated *EJJ* through a prosecutor's filing a motion to designate an offender *EJJ*.⁷⁷

There does not appear to be statewide data available that shows how many of the court designated *EJJ* cases were the result of plea agreements. However, it is important to note that a child who fits the criteria of clause two of the *EJJ* statute also meets the criteria for presumptive certification.⁷⁸ It is, therefore, reasonable to assume that the majority of these "clause two" *EJJ* cases are the result of a negotiated plea. Internal data from the Ramsey County Attorney's Office show that certification motions were brought in twenty-six of the thirty-four cases designated as *EJJ* in 1997.⁷⁹ In 1998, certification motions were brought in eighteen out of the twenty cases eventually designated as *EJJ*.⁸⁰ In the author's experience, in the majority of these cases, the *EJJ* designation was the result of a negotiated settlement.

73. See *id.* §§ 260.125, subd. 5 & .126, subd. 1(2) & 5.

74. See MINNESOTA SUPREME COURT, 1996 EXTENDED JURISDICTION JUVENILE (*EJJ*) CASES DISPOSITION STATUS-TO-DATE 12 (Feb. 13, 1998) [hereinafter EXTENDED JURISDICTION]. According to data provided by the Minnesota Supreme Court, Research and Technology Office, 195 cases were disposed of as *EJJ* in Minnesota in 1996. See *id.* Of these 195 cases, 28 cases were designated *EJJ* as a result of a denied certification motion, 136 met the presumptive criteria for *EJJ* designation under clause two of the statute, and 31 cases were designated *EJJ* following a hearing on prosecutors motions. See *id.* Minnesota Statutes section 260.126, subd. 1(2), provides for designation when the child is 16 or 17 years old at the time of the alleged offense; the child is alleged to have committed an offense for which the sentencing guidelines and applicable statutes presume a commitment to prison or to have committed any felony in which the child allegedly used a firearm; and the prosecutor designated in the delinquency petition that the proceeding is an extended jurisdiction juvenile prosecution. See MINN. STAT. § 260.126, subd. 1(2).

75. See EXTENDED JURISDICTION, *supra* note 74, at 9-10.

76. See *id.* at 8.

77. See *id.* at 11.

78. See MINN. STAT. §§ 260.125, subd. 2a & .126, subd. 1(2).

79. See Ramsey County Attorney's Office Certification/*EJJ* statistics for 1998 (on file with the *William Mitchell Law Review*).

80. See *id.*

It is also not surprising that very few cases were designated EJJ as a result of a motion for designation brought by the prosecutor. From a prosecutor's perspective, it is often preferable to bring a motion for certification, even in those cases where the statute would allow for automatic EJJ designation. The certification motion provides an opportunity to investigate the child's delinquency history and psychological profile. In Ramsey County it is the policy that for every motion for certification a probation officer's report and a psychological evaluation will be done. The information contained in these reports is critical when making a decision to litigate the issue of certification or to agree to another disposition. In addition, the Minnesota Juvenile Rules of Procedure provide a disincentive for a prosecutor to designate a juvenile as EJJ.⁸¹ The Rules require a jury trial to be commenced within thirty days of the EJJ designation if the child is in custody.⁸² In non-custody cases the time for trial is extended to sixty days.⁸³ Bringing a certification motion means that the case is set for a certification hearing within thirty to sixty days. This additional time gives prosecutors, defense counsel and the court an opportunity to evaluate the juvenile to determine whether an EJJ designation would be appropriate. It also gives the parties time to prepare for trial, which is advantageous to all concerned.

As intended by the Task Force, the statutory changes also appear to have limited certification and EJJ designation to the more serious, person-related offenses.⁸⁴ All ten judicial districts within the state use four categories in classifying EJJ offenders: person-related offenses, property-related offenses, drug-related offenses, and "other" offenses.⁸⁵

Data show that in 1996, 50.9% of certified juveniles⁸⁶ and sixty-four percent of EJJ offenders⁸⁷ were charged with committing a person-related offense. In 1997, over fifty-nine percent of EJJ of-

81. See MINN. R. JUV. P. 19.07.

82. See MINN. R. JUV. P. 13.02, subd. 1.

83. See MINN. R. JUV. P. 13.02, subd. 2.

84. See Letter from Sharon Krmptich, *supra* note 67.

85. See *id.* All offenses that can not be labeled person-related, property-related, or drug-related are considered "other" offenses. See *id.*

86. See Letter from Sharon Krmptich, The Supreme Court of Minnesota, Research and Planning, to Kari Lillesand, Juvenile Law Clerk, Ramsey County Attorney's Office (undated) (on file with the *William Mitchell Law Review*).

87. See MINNESOTA SUPREME COURT, STATISTICAL OVERVIEW OF EJJ AND CERTIFICATION DATA, THE 3RD ANNUAL CONFERENCE ON YOUTH AND CRIME 8 (Mar. 19, 1997) [hereinafter STATISTICAL OVERVIEW].

fenders were charged with committing a person-related offense.⁸⁸ When viewing all ten judicial districts collectively, seventy percent of all juveniles designated as EJJ in 1996 were charged with assault, robbery, or burglary.⁸⁹ Forty-six percent of those adjudicated had no prior criminal history; while forty-three percent had one to three prior felonies; and eleven percent had four or more prior felonies.⁹⁰

Although the cumulative statewide figures show a majority of EJJ offenders have been accused of person-related offenses, there is significant disparity amongst the counties.⁹¹ The Ninth Judicial District consists of seventeen counties comprising the northwest quarter of the state.⁹² In the Ninth District, property offenders represented seventy-three percent of all juveniles designated EJJ in 1997.⁹³ For this same year, in the Fourth Judicial District (Hennepin County) property offenders represented only 10.6% of the EJJ cases, while sixty-nine percent involved crimes against persons.⁹⁴ In the Second Judicial District (Ramsey County) property offenders accounted for 3.4% of the EJJ cases and person-related offenses accounted for 86.2% of the cases.⁹⁵ A comparison of the figures in the Ninth Judicial District to those for the Second District becomes even more interesting in light of the number of EJJ cases in each District.

In 1997, the Ninth District designated thirty-seven juveniles as EJJ.⁹⁶ For this same year, the Second District designated twenty-nine juveniles as EJJ.⁹⁷ Thus, the Ninth District had more EJJ offenders than the Second District, and the majority of these offenders were accused of committing property crimes.⁹⁸ It would be un-

88. See Letter from Sharon Krmpotich, *supra* note 86.

89. See STATISTICAL OVERVIEW, *supra* note 87, at 9.

90. See *id.* at 10. In addition, the figures show that 42.0% were White, 35% African American, 8.0% Hispanic, 8% American Indian, and 7.0% were Asian. See *id.*

91. See MINNESOTA PLANNING, JUDGING BY THE DATA: OFFENDERS IN MINNESOTA'S JUVENILE COURTS 6 (June 1998).

92. See *id.* The seventeen counties are: Aitkin, Beltrami, Cass, Clearwater, Crow Wing, Hubbard, Itasca, Kittson, Koochiching, Lake of the Woods, Mahnomon, Marshall, Norman, Pennington, Polk, Red Lake, and Roseau. See *id.*

93. See Letter from Sharon Krmpotich, *supra* note 67.

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

98. See *id.*

fair to draw any conclusions about these figures without knowing the types of cases that resulted in certification as compared to EJJ, the facts of each case, and the histories of the juveniles involved. Nevertheless, it is apparent that in the Ninth District a significant number of property offenders are being designated as EJJ, while in the Second District, a much more urban district, almost all of the EJJ cases involve person-related offenses. The variance amongst the judicial districts in EJJ designations by offense category is depicted in the chart appearing in Appendix I.

The demographics of EJJ offenders are also interesting. EJJ offenders are primarily males over the age of fifteen.⁹⁹ Data provided by the Minnesota Supreme Court and Minnesota Department of Corrections show that in 1996, 94.5% of Extended Jurisdiction Juveniles were male, and 5.5% were female.¹⁰⁰ Furthermore, although the minimum age for EJJ designation is fourteen, the majority of offenders are sixteen or seventeen years old at the time they commit the offense for which they are designated an EJJ.¹⁰¹ In fact, only two percent of the offenders were fourteen and 12.9% fifteen years old at the time they committed the offense for which they were designated EJJ.¹⁰² Over twenty-five percent of the EJJ offenders were sixteen years old at the time of the offense and 46.5% were seventeen years old.¹⁰³

The age data is interesting in light of a recent legislative proposal made to the Minnesota County Attorneys Association ("MCAA") to lower to twelve the age at which a juvenile could be designated EJJ.¹⁰⁴ The need for this amendment to the statute is unclear. Furthermore, it is sobering to contemplate imposing a stayed adult prison sentence on a twelve-year-old child. While the likelihood of passage of such legislation is uncertain, it is further evidence of the trend described at the outset of this article—to shift the focus in juvenile court from rehabilitation to public safety.

99. *See id.*

100. *See* STATISTICAL OVERVIEW, *supra* note 87, at 2.

101. *See id.* at 2.

102. *See id.*

103. *See id.*

104. *See id.* The legislation as discussed would have allowed prosecutors to designate as EJJ juveniles 12 to 15 years of age alleged to have used a firearm in the commission of any of the offenses set forth in Minnesota Statutes section 609.11, subd. 9. *See id.* It also would have allowed prosecutors to move to designate as EJJ any juvenile 12 to 13 years old alleged to have committed any of the offenses listed in Minnesota Statutes section 609.11, subd. 9. *See id.*

A more specific examination of the data from Hennepin and Ramsey counties is also instructive. Minnesota remains one of the fastest-growing states in the Northeast and Midwest, and ranks twentieth nationally in total population size.¹⁰⁵ Hennepin and Ramsey Counties¹⁰⁶ constitute 33.22% of the state's population, and contain the state's two largest cities, Minneapolis and St. Paul.¹⁰⁷ An examination of EJJ data in Hennepin and Ramsey Counties shows that particularly in these two counties an overwhelming number of juveniles are designated EJJ for serious, person-related offenses.¹⁰⁸

105. See Minnesota Planning, *Minnesota Population Growth Continues to Slow* (Dec. 31, 1998) (visited Sept. 27, 1999) <<http://www.mnplan.state.mn.us/press/migrate98.html>>. The state of Minnesota is comprised of 87 counties. See MINNESOTA PLANNING, *supra* note 91, at 6. Over one million individuals ages 10 to 24 reside in Minnesota. See U.S. Census Bureau, *State Population Projections* (visited Sept. 30, 1999) <<http://www.census.gov/population/www/projections/stproj.html>>. The U.S. Bureau of the Census projects that by the year 2000 the number of individuals between 10 and 24 will continue to slowly rise along with the rest of the state's population. See *id.* The Bureau's projections for Hennepin County and Ramsey County reflect that approximately 325,000 individuals ages 10 to 24 will reside within one of these counties by the year 2000. See *id.*

The focus of the demographic information cited in this article will be tailored around discussion of the Second and Fourth Judicial Districts, Ramsey County and Hennepin County respectively, because many of those designated EJJ are dispositioned in one of these counties. See EXTENDED JURISDICTION, *supra* note 74, at 12. A greater representative sample can be ascertained by using these two counties in part due to the fact in 1996, 46 counties did not even have one juvenile designated as EJJ, and 33 counties had five or less juveniles designated as EJJ. See *id.* According to the Minnesota Planning Department, Minnesota's population on July 1, 1998 was 4,725,419, an increase of 38,000 people in one year. See Minnesota Planning, *Minnesota Population Growth Continues to Slow*, *supra*.

106. Ramsey County is the only county in the Second Judicial District. See MINNESOTA PLANNING, *JUDGING BY THE DATA: OFFENDERS IN MINNESOTA'S JUVENILE COURTS* 6 (June 1998), available at <<http://www.mnplan.state.mn.us/press/juvenile.html>>. Together, Hennepin County and Ramsey County account for over 1.5 million of the state's total population. See Minnesota Planning, *County Estimates* (visited Sept. 27, 1999) <http://www.mnplan.state.mn.us/demography/demog_3b.html>. Ramsey County's population constitutes slightly over 10% of the state's total population. See *id.* Ramsey County has designated 123 juveniles as EJJ since the evolution of the EJJ statute. See generally RAMSEY COUNTY JUVENILE PROBATION AND PAROLE: EXTENDED JURISDICTION JUVENILE SUMMARY (Jan. 1, 1995 to Nov. 2, 1998) [hereinafter RAMSEY COUNTY JUVENILE PROBATION SUMMARY] (on file with authors).

107. See Minnesota Planning, *County Estimates*, *supra* note 106.

108. See Letter from Sharon Krmpotich, *supra* note 67. Together, Hennepin and Ramsey counties comprise 33.22% of the state's population and contain the two largest cities (Minneapolis and St. Paul) within the state. See Minnesota Planning, *County Estimates*, *supra* note 106. In Hennepin County 69.4% of EJJ offend-

Hennepin County is the most populous county in the state of Minnesota.¹⁰⁹ More than thirty percent of the state's EJJ dispositions take place in Hennepin County.¹¹⁰ As in the statewide data, male offenders dramatically outnumber female offenders.¹¹¹ Ninety-six percent of all offenders are male.¹¹² Over thirty percent of offenders had no prior record of past adjudications, 17.7% had been convicted of misdemeanor level offenses, and 27.8% had been convicted of one felony in the past.¹¹³ The deviation in these figures from the statewide figures is marginal; however, all Hennepin County offenders were designated EJJ prior to being convicted of more than three felonies.¹¹⁴ In Hennepin County more than 50.5% of all EJJ offenders never had a prior delinquency out-of-home placement, and 81.7% had been placed out of the home two or fewer times as a result of delinquency proceedings.¹¹⁵

Ramsey County mirrors the statewide data with respect to gender and closely resembles the statewide average with respect to the age of offender at the time of filing the petition. The vast majority, ninety-six percent, of offenders are male and eighty percent are over the age of sixteen.¹¹⁶ Only four percent of Ramsey County's designated EJJ offenders were accused of property or drug-related offenses.¹¹⁷ An overwhelming ninety-six percent are designated EJJ for person-related offenses.¹¹⁸ This value is significantly higher than the statewide figure (59.1%) for individuals designated EJJ as a result of person-related offenses.¹¹⁹ This data indicates that, especially in Hennepin and Ramsey Counties, the EJJ designation is being used to give the serious and violent juvenile offender one last chance.

ers and 86.2% in Ramsey County were charged with person offenses based on data available for 1997. See Letter from Sharon Krmpotich, *supra* note 67.

109. See Minnesota Planning, *County Estimates*, *supra* note 106.

110. See Letter from Marcy Podkopacz, Director of Research, State of Minnesota, to Kathryn Santelmann, Assistant Director, Prosecution Division-Juvenile Section, Ramsey County Attorney's Office (Jan. 1, 1999) (on file with the *William Mitchell Law Review*).

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See RAMSEY COUNTY JUVENILE PROBATION SUMMARY, *supra* note 106.

117. See *id.*

118. See *id.*

119. See *id.*

Based upon all of the above data, it also appears that the majority of EJJ offenders are juveniles who meet the criteria for presumptive certification to adult court. The vast majority of EJJ offenders are at least sixteen years old and relatively few have previously committed four or more felonies.¹²⁰ The designation appears equally divided between those juveniles who have no felony history and those who have previously committed one to three felonies.¹²¹ That these offenders are being given the opportunity for treatment within the juvenile system appears consistent with the goals of the statute as designed by the Task Force.

B. Probation Violation Data

Another measure of the effectiveness of the EJJ statute is the frequency and outcome of probation violation proceedings. When a juvenile offender is designated as EJJ, both a juvenile disposition and an adult criminal sentence are imposed.¹²² Execution of the adult sentence is stayed pending satisfactory completion of the juvenile disposition.¹²³ If the child violates the terms of his or her juvenile sentence, the statute provides for the revocation of the offender's juvenile status.¹²⁴ If a court determines revocation is warranted, the judge must determine whether to execute the stayed adult sentence.¹²⁵

Upon revocation, the juvenile judge may order any of the adult sanctions authorized by Minnesota Statutes section 609.14, subd. 3.¹²⁶ However, if the juvenile was convicted of an offense for which the Sentencing Guidelines presume an executed prison sentence, the court is required to execute the previously imposed sentence unless the judge makes written finding regarding the mitigating factors that justify continuing the stay.¹²⁷ One issue that has arisen a number of times in Ramsey County is whether or not the "mitigating factors" must be ones that are recognized by the Sentencing Guidelines. We are unaware of any appellate decisions on this issue and the statute does not explain what is meant by this

120. See *id.*; see also Letter from Marcy Podkopacz, *supra* note 110.

121. See Letter from Marcy Podkopacz, *supra* note 110.

122. See MINN. STAT. § 260.126, subd. 4 (1998).

123. See *id.*

124. See MINN. STAT. § 260.126, subd. 5 (1998); see also MINN. R. JUV. P. 19.

125. See MINN. STAT. § 260.126, subd. 5.

126. See *id.*

127. See *id.*

term.

The Research and Technology Office of the Minnesota Supreme Court has tracked the dispositions and status of all offenders designated as EJJ in 1996.¹²⁸ According to this data, 195 juveniles were designated EJJ in that year.¹²⁹ Of those designated EJJ, twenty-eight were the result of failed certification motions under clause one of the statute,¹³⁰ 136 were court designated under clause two of the statute,¹³¹ and thirty-one were the result of a prosecutor's motion for EJJ designation under clause three of the statute.¹³²

Statewide probation violation data on these 1996 offenders was tabulated through December 31, 1998. These data show that there have been forty-three juveniles (22.1%) whose EJJ probation has been revoked.¹³³ Of these, seventeen (39.5%) have had their prison sentences executed.¹³⁴ An almost equal number, twenty-one (48.8%), have been sentenced to local jails or workhouses.¹³⁵ The specific data for Hennepin and Ramsey Counties show a similar division of revoked offenders whose prison sentences have been executed versus those who have been sent to county jail.¹³⁶

In Hennepin County, sixty-seven of the 170 designated EJJ from January 1, 1995 to December 31, 1996 have had their juvenile dispositions revoked, and their adult sentence executed due to noncompliance with the conditions of juvenile probation.¹³⁷ Eleven offenders had their adult sentences executed based on a failure to comply with the conditions of sexual offender or chemical dependency treatment.¹³⁸ Of these, five offenders were sent to prison, and the remaining six offenders were sent to the workhouse.¹³⁹ Thirty-nine offenders violated the conditions of juvenile probation,¹⁴⁰ resulting in twenty-two individuals ordered to prison, and

128. See generally EXTENDED JURISDICTION, *supra* note 74.

129. See *id.* at 7.

130. See *id.*

131. See *id.*

132. See *id.*

133. See *id.* at 12.

134. See *id.*

135. See *id.*

136. See Letter from Marcy Podkopacz, *supra* note 110; see also RAMSEY COUNTY JUVENILE PROBATION SUMMARY, *supra* note 106.

137. See Letter from Marcy Podkopacz, *supra* note 110.

138. See *id.*

139. See *id.*

140. See *id.*

seventeen ordered to the workhouse.¹⁴¹ Sixteen offenders had their juvenile probation revoked due to the commission and subsequent conviction of a new offense.¹⁴² Exactly half of these offenders were sentenced to prison, and half were ordered to the workhouse.¹⁴³ In addition, no matter what the bases of the revocation, there is virtually an equal number of offenders who have been sentenced to prison, and who have been sentenced to the workhouse.¹⁴⁴

In Ramsey County, of the thirty-three offenders who have had their juvenile disposition revoked, ten offenders had non-presumptive adult stayed sentences, and the remaining twenty-three offenders had presumptive adult stayed sentences.¹⁴⁵ Of the non-presumptive group, eight were sentenced to jail and probation, one was sentenced to prison, and one was placed under a civil commitment as a sex offender upon completion of his adult prison sentence.¹⁴⁶ Of the presumptive group, eleven of the offenders were ordered to prison whereas the other twelve offenders were sent to jail and placed on probation.¹⁴⁷

The most frequent bases for the revocation proceedings in Ramsey County was an inability of the offenders to successfully abide by the conditions of juvenile probation or the commission of a new criminal offense. A closer look at these offenders reveals that fifty-eight percent failed the conditions of probation, and forty-two percent had committed a new offense.¹⁴⁸

The statewide probation violation data has also been calculated based on which clause the juvenile was designated EJJ.¹⁴⁹ There is some variance in the outcomes using this distinguishing characteristic. For example, for those juveniles designated EJJ un-

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.*

145. *See* Memorandum from Jim Hayes, Juvenile Division Director of the Ramsey County Community Corrections Department, to Harley Nelson (Feb. 18, 1999) (on file with the *William Mitchell Law Review*). The data provided for Ramsey County includes all offenders designated EJJ from January 1, 1995 through December 31, 1998. During this period, 121 juveniles were designated EJJ.

146. *See* Electronic Mail Message from Jim Hayes, Juvenile Division Director of the Ramsey County Community Corrections Department, to Kari Lillesand, Juvenile Law Clerk, Ramsey County Attorney's Office (Mar. 17, 1999) (on file with the *William Mitchell Law Review*).

147. *See id.*

148. *See* Electronic Mail Message from Hayes, *supra* note 146.

149. *See* EXTENDED JURISDICTION, *supra* note 74, at 8.

der clause one of the statute, five were found to have violated their EJJ probation. However, only one of these five juveniles was sent to prison.¹⁵⁰ Yet half of the juveniles designated EJJ under clauses two and three of the statute were sent to prison upon a finding that they had violated the terms of their EJJ probation.¹⁵¹

This outcome is somewhat surprising given that the “clause one” offenders were designated EJJ as a result of a failed certification motion. One would assume that juveniles in this category would be older and have committed more serious offenses. This outcome may be able to be explained by virtue of the small sample size (only five cases).¹⁵² However, this result points to the need for future studies to track such variables as offense type, age, prior offense history and the basis for revocation to determine the fairness of probation violation proceedings.

Overall, the data show that lower courts are exercising significant discretion when deciding whether to execute the stayed adult sentence. This appears consistent with the Task Force’s recommendation to treat EJJ probation violations in the same manner as adult violation proceedings.¹⁵³ However, these results are arguably inconsistent with the Task Force’s intention to ensure “certainty of punishment” after an offender fails to take advantage of the one last chance of juvenile treatment.

IV. CASELAW

An examination of Minnesota’s EJJ statute would not be complete without a discussion of the cases that have emerged since its passage in 1994. However, as of the writing of this article, the number of either published or unpublished appellate decisions is limited. Only two opinions address the constitutionality of the EJJ statute.¹⁵⁴ Other decisions seem to focus primarily on sufficiency of the evidence issues.¹⁵⁵

With regard to the two constitutional cases, in neither has the

150. *See id.* at 7-11. Supreme Court data show that of the 28 “clause one” EJJ cases, five juveniles (17.9%) have had their probation revoked. *See id.* Of the 136 “clause two” cases, 27 juveniles (19.9%) have had their probation revoked, and of the 31 “clause three” cases, 11 juveniles (35.5%) have had their probation revoked, as of December 31, 1998. *See id.*

151. *See id.*

152. *See id.* at 8.

153. *See* ADVISORY TASK FORCE, *supra* note 3, at 34.

154. *See infra* notes 157-170 and accompanying text.

155. *See infra* notes 172-195 and accompanying text.

Minnesota Court of Appeals sustained the challenge. The first case, *In re Welfare of L.J.S & J.T.K.*,¹⁵⁶ the court of appeals addressed the issues of separation of powers, vagueness, equal protection and due process.¹⁵⁷ The State charged J.T.K by petition with making terroristic threats and committing first and second degree assault.¹⁵⁸ He was sixteen years old when he allegedly committed these offenses.¹⁵⁹ The prosecutor's designation of J.T.K. was automatic because the sentencing guidelines presumed an executed prison sentence.¹⁶⁰ J.T.K. argued that the language of the statute allowing prosecutors to designate an offender an EJJ was unconstitutionally vague and violated due process.¹⁶¹ The court of appeals summarily rejected both of these arguments, holding that the statutory criteria for EJJ designation are very specific and not conducive to arbitrary or discriminatory enforcement.¹⁶²

J.T.K. also challenged, on the basis of the separation of powers doctrine, the provision of the statute allowing prosecutors to designate a juvenile EJJ without a hearing on the matter.¹⁶³ The juvenile asserted that the EJJ designation is essentially a sentencing determination.¹⁶⁴ Thus, J.T.K. argued, the court should retain the exclusive authority to designate any juvenile as an EJJ offender.¹⁶⁵ The State argued that the designation should be characterized as a charging decision rather than a sentencing determination.¹⁶⁶

In rejecting J.T.K.'s argument, the Minnesota Court of Appeals noted the unique nature of juvenile proceedings.¹⁶⁷ The court also cited to various jurisdictions in which, based on age and offense, legislators have given prosecutors the authority to charge juveniles as adults.¹⁶⁸ Based on this reasoning, the court found that the automatic designation provisions of the EJJ statute do not violate

156. 539 N.W.2d 408 (Minn. Ct. App. 1995), *review denied*, (Minn. Jan. 25, 1996).

157. *See id.* at 411.

158. *See id.* at 410.

159. *See id.*

160. *See* MINN. STAT. § 260.126, subd. 1(2) (1998).

161. *See L.J.S. & J.T.K.*, 539 N.W.2d at 410.

162. *See id.* at 411.

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.* at 412.

168. *See id.*

the separation of powers doctrine.¹⁶⁹

The second constitutional case involves a Sixth Amendment challenge. In this case, *In re Welfare of J.K.B.*,¹⁷⁰ the juvenile asserted he had been denied his constitutional right to be tried by a jury of his peers because the jury pool did not contain anyone aged sixteen or seventeen.¹⁷¹ The Minnesota Court of Appeals summarily rejected this argument noting that age requirements for jury service have long been accepted as constitutional.¹⁷²

The majority of cases since 1994, both certification and EJJ, have involved sufficiency of the evidence challenges. As these cases relate to the EJJ statute, the challenges take two forms: certified juveniles who assert the trial court erred by not designating them EJJ;¹⁷³ and juveniles designated EJJ who assert they should not have been.¹⁷⁴ In all of these cases the courts have applied the "clearly erroneous" standard of review, the standard long used to review transfer decisions.¹⁷⁵ This standard recognizes the broad discretion of the trial court. Thus, it is to be expected that reversal of trial court decisions will be rare. As of the date of writing this article, there are only two EJJ decisions, unpublished at that, where the trial court's determination has been reversed.¹⁷⁶

169. See *id.* at 411-12. In this consolidated appellate decision, the second juvenile, L.J.S., challenged the certification statute on the basis that the presumptive certification provisions violate the principals of equal protection. See *id.* at 412. The juvenile argued that there was no rational basis for distinguishing between the presumptive and non-presumptive certification classifications. See *id.* The court of appeals rejected this argument, finding that the age and offense criteria used were relevant to the legitimate purpose of the statute. See *id.* L.J.S. also challenged the presumptive certification provisions on due process grounds. See *id.* at 413. In rejecting this argument, the court of appeals noted that the presumption of certification is rebuttable and that the statute does not affect the state's burden of proof as it relates to the underlying offense or offenses. See *id.*

170. 552 N.W.2d 732 (Minn. Ct. App. 1996).

171. See *id.* at 733.

172. See *id.* at 733-34.

173. See, e.g., *In re Welfare of D.T.H.*, 572 N.W.2d 742, 745 (Minn. Ct. App. 1997), *review denied*, (Minn. Feb. 19, 1998); *In re Welfare of J.S.J.*, 550 N.W.2d 290, 291 (Minn. Ct. App. 1996); *In re Welfare of S.J.G.*, 547 N.W.2d 456, 458 (Minn. Ct. App. 1996); *In re Welfare of K.M.*, 544 N.W.2d 781, 783 (Minn. Ct. App. 1996).

174. See *In re Welfare of C.L.S.*, 558 N.W.2d 12, 14 (Minn. Ct. App. 1997); *In re Welfare of S.W.N.*, 541 N.W.2d 14, 17 (Minn. Ct. App. 1995).

175. See *D.T.H.*, 572 N.W.2d at 745; *J.S.J.*, 550 N.W.2d at 291; *S.J.G.*, 547 N.W.2d at 458; *K.M.*, 544 N.W.2d at 783; *C.L.S.*, 558 N.W.2d at 14; *S.W.N.*, 541 N.W.2d at 17.

176. See *In re Welfare of D.M.D.*, No. C4-98-1185, 1999 WL 107800 (Minn. Ct. App. Mar. 2, 1999), *review granted*, (Minn. May 18, 1999); *In re Welfare of R.P.P.*,

Primarily, the focus of the appellate decisions has been on analyzing the trial court's application of the six public safety factors set forth in the statute. The difficulty with this analysis is that the six public safety factors that are to be used to support the EJJ designation are the same ones used in certification decisions. There has been no indication by either the courts or the legislature as to whether there is, or should be, any distinction between the two types of proceedings.

As discussed earlier, the articulation in statute of the six public safety factors to be used in both certification and EJJ cases was, in part, designed to limit the subjectivity of the proceedings. Although there are few cases from which to evaluate the success of this endeavor, it appears that the trial courts have retained a significant amount of discretion. The cases indicate that the public safety factors serve to frame the analysis.¹⁷⁷ However, the application of these factors to the unique facts of each case necessarily involves a judge's subjective weighing of the evidence. The discretion of the trial court is also affirmed by the standard used to review EJJ designations.

The courts have given us some guidance on the meaning of each of the six public safety factors. The first factor, the seriousness of the offense, does not seem to generate much controversy. It appears generally accepted that allegations of murder, sexual assault, or the use of a firearm are serious offenses.¹⁷⁸

With respect to the second public safety factor, culpability, the statute requires consideration of the child's involvement in the of-

No. C8-97-2135, 1998 WL 281911, at *3 (Minn. Ct. App. June 2, 1998). *See also infra* notes 202-207 and accompanying text (discussing need for nonoffense related evidence of dangerousness).

177. *See D.T.H.*, 572 N.W.2d at 743 (upholding the certification of a juvenile on charges of first and second degree murder using an analysis that individually addresses each of the public safety factors); *J.S.J.*, 550 N.W.2d at 291 (upholding certification of juvenile on charges of numerous offenses, including assault, kidnapping, robbery and theft by evaluating the evidence in terms of each of the six public safety factors); *In re Welfare of D.E.F.*, No. C6-97-2344, 1998 WL 531757, at *2 (Minn. Ct. App. Aug. 25, 1998) (upholding designation as EJJ on charges of criminal sexual conduct in the first degree by evaluating the evidence using each of the six public safety factors); *In re Welfare of G.L.D.*, No. C8-97-644, 1997 WL 680614, at *4 (Minn. Ct. App. Nov. 4, 1997) (upholding designation as EJJ on charge of aggravated robbery by individually addressing each of the public safety factors).

178. *See* MINN. STAT. § 260.125, subd. 2b(1) (1998); *see also In re Welfare of M.S.H.*, No. C1-95-1369, 1996 WL 5815, at *1 (Minn. Ct. App. Jan. 9, 1996).

fense, as well as the level of planning required.¹⁷⁹ Whether the offense is an intentional or unintentional crime has also been held to be a factor in evaluating the child's culpability.¹⁸⁰ In the unpublished decision of *In re Welfare of M.S.H.*,¹⁸¹ the juvenile was charged with negligently causing an explosion and fire that destroyed or damaged over forty buildings.¹⁸² Because the crime was one of negligence, the child's culpability was held to be less than it would have been had he been charged with an intentional crime.¹⁸³

A child's mental condition is also relevant to the issue of culpability. The statute specifically provides that evaluating culpability requires an examination of whether there is evidence of any mitigating factors recognized by the sentencing guidelines.¹⁸⁴ One of these recognized factors is whether the juvenile "because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed."¹⁸⁵ In the case of a juvenile, this can often be a challenging determination. Parties are dependent upon psychological evaluations and testing to give guidance. As of the writing of this article, there have been no appellate decisions addressing the issue of competency as it relates to the EJJ offender. However, given this second public safety factor, this appears to be an area that is ripe for litigation.

As to the third public safety factor, courts have broadly defined what is meant by the term "prior delinquency history." In certification cases, Minnesota appellate courts have upheld the trial courts' consideration of pending delinquency matters and unadjudicated offenses when determining delinquency history.¹⁸⁶ The reasoning of certification cases has been followed in EJJ cases.¹⁸⁷ Essentially, the courts have held that this evidence is relevant to the ultimate determination of dangerousness.¹⁸⁸ In so holding, they have not limited trial courts to a simple examination of the juvenile's history of adjudicated offenses. Similarly, the fourth factor, prior pro-

179. See MINN. STAT. § 260.125, subd. 2b(2) (1998).

180. See *M.S.H.*, 1996 WL 5815, at *1.

181. No. C1-95-1369, 1996 WL 5815, at *1 (Minn. Ct. App. Jan. 9, 1996)

182. See *id.*

183. See *id.*

184. See MINN. STAT. § 260.125, subd. 2b(2) (1998).

185. MINN. SENTENCING GUIDELINES AND COMMENTARY § I.I.D.2. (a)(3) (1998).

186. See *In re Welfare of K.A.P.*, 550 N.W.2d 9, 12 (Minn. Ct. App. 1996).

187. See *In re Welfare of D.E.F.*, No. C6-97-2344, 1998 WL 531757, at *3 (Minn. Ct. App. Aug. 25, 1998); *In re Welfare of T.H.W.*, No. CX-98-1045, 1998 WL 827908, at *2 (Minn. Ct. App. Jan. 4, 1998).

188. See *K.A.P.*, 550 N.W.2d at 12.

gramming history, has been broadly defined. Family counseling, informal counseling, school interventions, foster home placements and parental attempts to modify behavior have all been included in the definition of "programming."¹⁸⁹

Decisions examining the fifth factor, the adequacy of punishment and programming within the juvenile system, often focus on whether there is sufficient time to treat the child within the juvenile system. With respect to certification, the cases focus on the lack of time remaining for the juvenile to receive treatment.¹⁹⁰ As expected, an EJJ designation appears to be the result when sufficient time remains in the juvenile system for treatment.¹⁹¹

It is often difficult to differentiate the sixth factor, dispositional options, from the adequacy of punishment and programming analyses of the fifth public safety factor. Both factors focus on time remaining in the juvenile system. In Ramsey County, we have interpreted the sixth public safety factor as requiring an examination of the length of time the offender would be in placement and on probation for each of the dispositional options. Whether this interpretation is correct will be left up to the courts.

Another issue that appears especially ripe for review by the Minnesota Supreme Court is whether, in light of the statutory factors, prosecutors must still introduce independent evidence of dangerousness. Prior to the 1994 changes to the certification statute and the creation of the EJJ designation, Minnesota law required prosecutors to establish evidence of the juvenile's dangerousness

189. See *In re Welfare of C.L.S.*, 558 N.W.2d 12, 16 (Minn. Ct. App. 1997) (finding family counseling a factor in programming); *In re Welfare of M.S.H.*, No. C1-95-1369, 1996 WL 5815, at *2 (Minn. Ct. App. Jan. 9, 1996) (finding intervention a factor in programming); *D.E.F.*, 1998 WL 531757, at *3 (finding defendant's history in foster homes and shelters as a factor in programming).

190. See *In re Welfare of D.N.G.*, No. C1-98-110, 1998 WL 665044, at *2 (Minn. Ct. App. Sept. 29, 1998), *review denied*, (Minn. Nov. 24, 1998). The trial court noted that if D.N.G. remained in the juvenile system he would spend 18 months in placement and would return to probation status until he turned 21. See *id.* at *3. Alternatively, if D.N.G. would be certified he would therefore receive a sentence of approximately 300 months. See *id.* The trial court decided that the juvenile could not be treated within the period of time remaining in juvenile jurisdiction, and that certification was proper. See *id.* The court of appeals affirmed. See *id.* at *5. See also *In re Welfare of N.B.*, No. C6-96-1040, 1996 WL 722112, at *3 (Minn. Ct. App. Dec. 17, 1996), *review denied*, (Minn. Mar. 18, 1997); *In re Welfare of A.W.S.*, No. C9-97-2273, 1998 WL 436907, at *2 (Minn. Ct. App. Aug. 4, 1998), *review denied*, (Minn. Sept. 22, 1998).

191. See *In re Welfare of G.L.D.*, No. C8-97-644, 1997 WL 680614, at *3 (Minn. Ct. App. Nov. 4, 1997).

independent of the pending offense.¹⁹² The reasoning behind this requirement was simple: if the legislature had intended for the seriousness of the offense alone to be sufficient to transfer the case to adult court, then it would have made the transfer mandatory for certain offenses.¹⁹³

Despite the 1994 statutory changes, and the creation of the six public safety factors, the Minnesota Court of Appeals has continued to require this nonoffense-related evidence of dangerousness in both certification and EJJ cases. *In re Welfare of S.W.N.*¹⁹⁴ is the first EJJ case to address this issue. In *S.W.N.*, the court of appeals ignored the fact that, except in prosecutor designated cases, the EJJ designation requires the weighing of six public safety factors.¹⁹⁵ *S.W.N.* did not address the fact that two of these six factors, prior delinquency and prior programming history, focus on the child. These factors, arguably, include consideration of nonoffense-related evidence of dangerousness. The court also did not address the legislative intent to make public safety the primary focus of the proceedings. Rather, without significant analysis, the court simply concluded that nonoffense-related evidence of dangerousness is required to support an EJJ designation.¹⁹⁶

In a recent certification case, the Minnesota Court of Appeals called into question whether nonoffense-related evidence of dangerousness must still be proved. This case, *In re Welfare of D.T.H.*,¹⁹⁷ correctly points out that the current statute does not specifically list nonoffense-related evidence of dangerousness as a required factor.¹⁹⁸ However, the court fell short of reversing *S.W.N.* and went on to find in the record sufficient evidence of dangerousness to sustain the trial court's certification decision.¹⁹⁹

Six months later, in an unpublished opinion, a different three-judge court of appeals panel reversed a lower court's EJJ designation. In this case, *In re Welfare of R.P.P.*,²⁰⁰ the juvenile was charged

192. See *In re Welfare of K.P.H.*, 289 N.W.2d 722, 725 (Minn. 1980); *In re Welfare of Dahl*, 278 N.W.2d 316, 318 (Minn. 1979).

193. See *Dahl*, 278 N.W.2d at 320.

194. 541 N.W.2d 14 (Minn. Ct. App. 1995).

195. See *id.* at 17.

196. See *id.* at 16.

197. 572 N.W.2d 742 (Minn. Ct. App. 1997), *review denied*, (Minn. Feb. 19, 1998). See also *In re Welfare of S.R.*, No. C5-98-1776, 1999 WL 289257 (Minn. Ct. App. May 11, 1999).

198. See *D.T.H.*, 572 N.W.2d at 745.

199. See *id.*

200. No. C8-97-2135, 1998 WL 281911 (Minn. Ct. App. June 2, 1998).

with assault in the first and second degree and reckless discharge of a firearm.²⁰¹ The court held that the lower court had properly weighed the six public safety factors but had failed to make any findings on the nonoffense-related evidence of dangerousness.²⁰² This failure, the court of appeals concluded, constituted an abuse of discretion.²⁰³

The court, in *R.P.P.*, reversed the EJJ determination and remanded the matter back to the trial court for further proceedings consistent with the holding.²⁰⁴ In a footnote, the court stated that both parties questioned, during oral argument, the continued need for evidence of dangerousness in light of the *D.T.H.* decision.²⁰⁵ Without explaining its reasoning, the court summarily concluded that *D.T.H.* was not relevant because it concerned certification to adult court rather than an EJJ designation.²⁰⁶ There was no recognition of the fact that the six public safety factors are identical in certification and EJJ proceedings. Further, the court did not articulate why there should be a distinction between EJJ and certification cases when it comes to nonoffense-related evidence of dangerousness.

To further confuse the issue, one month after issuing the *R.P.P.* decision, the court of appeals decided the case of *In re Welfare of D.E.F.*²⁰⁷ In this unpublished decision, the court of appeals upheld the trial court's EJJ designation despite the failure to make specific findings as to nonoffense-related evidence of dangerousness.²⁰⁸ While the opinion notes the trial court's failure to make the requisite findings, it goes on to cite evidence from the record which established sufficient evidence of dangerousness. There is no apparent distinction between the *R.P.P.* and *D.E.F.* cases. Both cases involve serious offenses. In *R.P.P.*, the juvenile was charged with committing an assault with a shotgun.²⁰⁹ In *D.E.F.*, the juvenile was accused of committing a brutal sexual assault.²¹⁰

201. See *id.* at *1.

202. See *id.* at *2.

203. See *id.*

204. See *id.* at *3.

205. See *id.* at *2.

206. See *id.*

207. No. C6-97-2344, 1998 WL 531757 (Minn. Ct. App. Aug. 25, 1998), *review denied*, (Minn. Oct. 29, 1998).

208. See *id.* at *1.

209. See *R.P.P.*, 1998 WL 281911, at *2.

210. See *D.E.F.*, 1998 WL 531757, at *1.

Both appear to involve juveniles under the age of sixteen, although the *R.P.P.* opinion does not specifically state the juvenile's age but only notes that it is a non-presumptive case. The only clear distinction is the make-up of the panels issuing the opinions. Recently, the court of appeals has once again addressed the need for nonoffense-related evidence of dangerousness. In *In re Welfare of D.M.D.*,²¹¹ the court reversed and remanded the case for further findings of fact because the trial court had failed to find nonoffense-related evidence of dangerousness.²¹² Charged with two counts of criminal sexual conduct in the first degree, the prosecution moved to designate D.M.D. as an EJJ offender.²¹³ The trial court weighed the six public safety factors set forth in the statute and granted the motion for EJJ designation.²¹⁴ On appeal, the juvenile argued that the failure to find nonoffense-related evidence of dangerousness constituted reversible error.²¹⁵ The court of appeals agreed, noting that with the public safety factors split so evenly, nonoffense-related evidence of dangerousness was required.²¹⁶ Although this is an unpublished decision, the Minnesota Supreme Court has granted review.

With public safety now defined by the six statutory factors in both certification and EJJ proceedings, the separate requirement of nonoffense-related evidence of dangerousness appears inconsistent with the 1994 statutory changes. The legislature did not see fit to list it as a specific factor. In the author's experience, nonoffense-related evidence of dangerousness, or the lack of such evidence, is considered as part of a child's prior delinquency and programming history. However, it should no longer be considered a prerequisite to either certification or EJJ designation. Furthermore, given the lack of consistency in recent court of appeals decisions, *D.M.D.* provides the Minnesota Supreme Court with an opportunity to clarify this issue.

To date, only one reported appellate opinion has addressed the issue of probation violations in EJJ cases: *State v. Bradley*,²¹⁷

211. No. C4-98-1185, 1999 WL 107800 (Minn. Ct. App. Mar. 2, 1999), *review granted*, (Minn. May 18, 1999).

212. *See id.* at *3.

213. *See id.* at *1.

214. *See id.* at *2.

215. *See id.* at *1.

216. *See id.* at *3.

217. 592 N.W.2d 886 (Minn. Ct. App. 1999).

which established an abuse of discretion standard of review.²¹⁸ In *Bradley*, the court upheld the revocation and execution of the adult sentence, finding that no mitigating factors existed to justify continuing the stay.²¹⁹ The decision draws a distinction between EJJ and adult probation violation proceedings. Citing *State v. Austin*,²²⁰ the juvenile argued that his probation should not be revoked unless the need for incarceration “outweighed the policy favoring probation.”²²¹ The appellate court rejected this standard, used in adult proceedings, noting that the EJJ statute presumes that, absent mitigating factors, the court will impose an executed prison sentence.²²² The court held that, because of the unique characteristics of the EJJ designation, trial courts are not required to consider whether confinement outweighs the policy favoring probation.²²³ In recognizing this fact, both the lower and appellate courts are ultimately responsible for determining whether the designation will, in actuality, provide the juvenile with “one last chance” or more than one last chance.

As a final note, there are a number of additional issues ripe for appellate review. One such issue is how out-of-county EJJ cases should be handled. The Juvenile Code provides that delinquents may be prosecuted in the county in which the offense occurred or in their county of residence.²²⁴ The code further allows for venue to be transferred to the juvenile’s county of residence when the transfer is in the “best interests of the child, society or the convenience of the proceedings.”²²⁵ It is usually most convenient for the child to receive services in his or her own county of residence. Furthermore, the county of residence is financially responsible for the juvenile’s treatment and/or placement costs.²²⁶ Therefore, in the author’s experience virtually all juvenile dispositions are transferred to the child’s county of residence. However, it is usually preferable to prosecute the offense in the county where the offense occurred. This is because most, if not all, of the witnesses will be located in the county of offense.

218. *See id.* at 887.

219. *See id.*

220. 295 N.W.2d 246 (Minn. 1980).

221. *Bradley*, 592 N.W.2d at 888 (citing *Austin*, 295 N.W.2d at 250).

222. *See id.*

223. *See id.*

224. *See* MINN. STAT. § 260.121, subd. 1 (1998).

225. *Id.* § 260.121, subd. 2 (1998).

226. *See id.* § 256G.02, subd. 4 (1998).

In light of this bifurcation of prosecution and disposition between counties, prosecutors struggle with how to handle the disposition and sentencing of EJJ offenders. The Juvenile Rules now specifically allow for courts to transfer venue of both the juvenile disposition and the adult sentence.²²⁷ However, as a practical matter, most plea negotiations require agreement on the adult sentence as well as on the juvenile disposition.

Prosecutors are reluctant to leave open the issue of the stayed adult sentence. We want to be assured, as do victims, of an appropriate stayed sentence. Defense attorneys are equally reluctant to expose their clients to an undetermined, albeit stayed, adult sentence. Consequently, in Ramsey County, we have negotiated the stayed adult sentences in each of the out-of-county cases we have prosecuted. The plea is taken and the stayed adult sentence imposed. Venue of the case is then transferred to the offender's county of residence for juvenile disposition.

This situation poses a problem if the juvenile does not follow the terms of probation or commits a new offense. The issue then arises as to in which county the probation revocation proceedings should be held. The staff within the juvenile's county of residence has the most current information about the offender. However, the juvenile may wish to have the violation proceedings heard by the judge who imposed the original sentence. It has been the practice in Ramsey County to allow adult offenders to appear before the same judge for sentencing if they so choose. However, in light of the aforementioned Rule changes and the unique characteristics of EJJ proceedings, it is questionable that EJJ offenders should be afforded this same privilege.

Another important issue recently addressed by the Minnesota Court of Appeals is whether EJJ offenders are entitled to credit against their adult sentences for time they have spent in juvenile placement.²²⁸ Under the Minnesota Rules of Juvenile Procedure Rule 18.06, subd. 1(D), an EJJ offender is entitled to credit against their adult sentence for "time spent in custody."²²⁹ What Rule 18.06 means by "in custody" within this context is not defined in either the certification or EJJ statutes.²³⁰ Under the general provisions of

227. See MINN. R. JUV. P. 19.06, subd. 3.

228. See *State v. Bowman*, No. C7-98-1892, 1999 WL 153788 (Minn. Ct. App. Mar. 23, 1999).

229. MINN. R. JUV. P. 18.06, subd. 1(D).

230. See MINN. STAT. §§ 260.125 & .126 (1998).

the Juvenile Code, however, the term "custody" is used in the context of arrest and detention procedures for delinquent children.²³¹ The Task Force report states that it was their intention for credit to be given only for the time a juvenile spends in a physically secure juvenile facility.²³² This interpretation, however, differs somewhat from the laws governing adults. The Minnesota Sentencing Guidelines specifically disallow credit for time spent in residential treatment facilities as a condition of a stay of imposition or execution of a prison sentence.²³³ Minnesota courts have specifically held that placement in a secure treatment facility does not alter the rule disallowing credit.²³⁴

The Minnesota Court of Appeals addressed this issue in its unpublished decision in *State v. Bowman*.²³⁵ However, it did not base its ruling on this distinction between secure and nonsecure facilities. Rather, the court found determinative the fact that the juvenile had been committed to the Commissioner of Corrections as part of his juvenile disposition.²³⁶ Following his commitment to the Commissioner of Corrections, Bowman was placed at Red Wing, a correctional facility for juveniles.²³⁷ He later asked to have his stayed adult sentence executed.²³⁸ The trial court declined to give him credit against his adult sentence for the time spent at Red Wing, but the court of appeals reversed this ruling, holding that commitment to the Commissioner of Corrections and placement at a correctional facility entitled Bowman to credit for time spent at

231. See MINN. STAT. § 260.165 (1998). The statute and the juvenile rules set forth the requirements of taking a child into custody by a peace officer or probation officer. See MINN. R. JUV. P. 5.04.

232. See ADVISORY TASK FORCE, *supra* note 7, at 8. In its report, the Task Force specifically recommended that the statute provide that "[a]ny juvenile placed in a physically secure juvenile program as a Serious Youthful Offender will receive credit for that time if there is ever a commitment to prison for a probation violation." *Id.*

233. See MINNESOTA SENTENCING GUIDELINES AND COMMENTARY § IIC.04 (1998); see also MINN. STAT. § 609.145, subd. 2 (1998); MINN. R. CRIM. P. 27.03, subd. 4(b).

234. See *State v. Peterson*, 359 N.W.2d 708, 710 (Minn. Ct. App. 1984), *review denied*, (Minn. Mar. 13, 1985) (holding that a defendant was not entitled to credit for time spent at St. Peter Security Hospital receiving sex-offender treatment following conviction); see also *State v. Marti*, 372 N.W.2d 755, 759 (Minn. Ct. App. 1985).

235. No. 37-98-1892, 1999 WL 153788 (Minn. Ct. App. Mar. 23, 1999).

236. See *id.* at *1.

237. See *id.*

238. See *id.*

Red Wing.²³⁹ Without explanation, the opinion distinguishes *State v. Peterson*,²⁴⁰ which held that a defendant was not entitled to credit for time at the State's Security Hospital in St. Peter.²⁴¹ In drawing the distinction based on commitment to either a correctional or residential treatment facility, the court in *Bowman* appears to give EJJ offenders the same protections afforded adults. Furthermore, in the authors' opinion, it is critical to preserving the purpose of the EJJ statute. If EJJ offenders are placed in facilities that do not have treatment as their primary focus, we will not be affording them the "one last chance" promised.

Equally important, allowing credit for time spent in a treatment facility, whether secure or not, would undermine the efficacy of the EJJ designation. Clearly one of the intentions of the stayed adult sentence is to give juveniles the incentive to succeed on EJJ probation. If the EJJ offender is given credit for the time spent in a juvenile treatment facility, that incentive dwindles the longer he or she is in placement. Furthermore, this would provide a disincentive for prosecutors to afford juveniles the "one last chance" of EJJ status.

V. CONCLUSION

It appears from the data that the legislative intent to give juvenile courts an additional sentencing option for the serious, violent offender has been successful. To the extent that EJJ gives the court and prosecutors an option short of prison for juveniles who are amenable to treatment within the juvenile system, it is beneficial. It allows prosecutors and judges, who often desire to give a child an opportunity for rehabilitation, the ability to do so while fulfilling their obligation to protect public safety. Carefully selecting those juveniles to be designated EJJ is also critical. For the integrity of the designation to be maintained, courts must be willing to follow through and impose adult sentences if a juvenile violates his or her EJJ probation.

Overall, EJJ appears to be a successful sentencing option. Subjectivity is still present in deciding whether a juvenile should be designated EJJ; however, the statutory factors provide a framework of analysis that can be objectively evaluated. How each factor is

239. *See id.*

240. 359 N.W.2d 708 (Minn. Ct. App. 1984).

241. *See id.*

weighed can never be reduced to a formula. The Extended Jurisdiction Juvenile statute was designed, to borrow from the words of Graham Green, to open a door to the future for juveniles who have committed serious offenses but for whom rehabilitation in a juvenile setting meets the interests of public safety. Ultimately, the success of the Extended Jurisdiction Juvenile designation depends upon prosecutors and courts using it wisely, and juveniles appreciating that this is a door that has been opened for them to let in a better future.

APPENDIX I



