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Juvenile Law Developments—"One Last Chance": Applying Adult Standards to Extended Jurisdiction Juvenile Proceedings—State v. B.Y.

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JUVENILE LAW DEVELOPMENTS— "ONE LAST CHANCE": APPLYING ADULT STANDARDS TO EXTENDED JURISDICTION JUVENILE PROCEEDINGS —*STATE V. B.Y.*

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I. INTRODUCTION

In 1995, Minnesota created a blended sentencing option for serious, violent juvenile offenders. Under this new option, Extended Juvenile Jurisdiction ("EJJ"),[1] the juvenile court retains jurisdiction over the offender until age 21.[2] In EJJ cases the court also imposes an adult sentence, which is stayed on the condition that the offender complies with the conditions of probation.[3]

Since the passage of the EJJ statute, the Minnesota Supreme Court has issued a limited number of opinions reviewing EJJ cases.[4] *State v. B.Y.*,[5] issued April 24, 2003, involves an issue of first impression. The *B.Y.* opinion addresses standards to be applied in EJJ probation revocation proceedings, holding that adult revocation standards apply to EJJ proceedings.[6]

This case note provides a historical background of the EJJ statute[7] and probation revocation process[8] in order to provide context for analysis of the *B.Y.* decision. A brief description of the facts and the court's analysis presents further background information for the court's decision.[9] The note goes on to discuss and explain the court's decision in light of applicable statutes and case law.[10]

This case note seeks to address the two central questions that arise from the *B.Y.* decision: first, whether the application of adult revocation

1. Juveniles falling under EJJ are referred to as Extended Jurisdiction Juveniles.
2. MINN. R. JUV. P. 19.01, subd. 1.
3. MINN. STAT. § 260B.130, subd. 4 (2002).
4. *See In re* Welfare of M.P.Y., 630 N.W.2d 411, 417-19 (Minn. 2001) (ruling that an EJJ criminal defendant cannot be precluded from testifying on his own behalf); *In re* Welfare of D.M.D., 607 N.W.2d 432, 436 (Minn. 2000) (confirming to the role of the public safety factors when the prosecution designates a juvenile EJJ); *In re* Welfare of G.M., 560 N.W.2d 687, 690-96 (Minn. 1997) (addressing the validity of criminal procedure measures used in an EJJ case).
5. 659 N.W.2d 763 (Minn. 2003).
6. *Id.* at 768-69.
7. *See infra* Part II.A.
8. *See infra* Part II.B.
9. *See infra* Part III.A-B.
10. *See infra* Part IV.

standards to EJJ revocation proceedings is justified under the EJJ statute and other principles of law; and second, whether the Minnesota Supreme Court applied the analysis used in adult proceedings to the *B.Y.* case in a way that provides future guidance to lower courts.

II. HISTORICAL BACKGROUND

A. The Beginning of EJJ

From 1992 to 1996, forty-seven states and the District of Columbia made substantive revisions to laws concerning juvenile crime.[11] These revisions reflected a shift in the focus of juvenile courts from the rehabilitation of juvenile offenders to public safety and accountability.[12] This shift was, in part, due to an increase in serious, violent offenses committed by juveniles.[13]

In Minnesota, the catalyst for change to the juvenile system came in 1991 when juveniles represented 43% of the total number of arrests made for serious crimes.[14] The 1992 Legislature addressed this problem by creating the Minnesota Task Force on the Juvenile Justice System ("Task Force").[15] The Task Force examined the process of transferring

11. *See* PATRICIA TORBET ET AL., U.S. DEPARTMENT OF JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 59 (1996).

12. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1071 (1995) (identifying trend toward public safety, punishment, and individual accountability within juvenile code legislative purpose clauses); *see also* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 523-24 (1984) (naming accountability and punishment as emerging purposes of juvenile justice statues and recognizing a heavier consideration of culpability and accountability in waiver and dispositional decisions); *see also* TORBET, *supra* note 11, at 59 (providing a brief discussion of the changing purpose of the juvenile justice system); Kathryn A. Santelmann & Kari L. Lillesand, *Extended Jurisdiction Juveniles in Minnesota: A Prosecutor's Perspective*, 25 WM. MITCHELL L. REV. 1303, 1304 (explaining that Minnesota's juvenile statute reforms shifted the focus of the juvenile courts from rehabilitation to public safety).

13. *See* TORBET, *supra* note 11, at 59 (suggesting that changes made in juvenile justice systems came about as a legal response to juvenile crime).

14. *See* DANIEL STORKAMP**,** MINNESOTA CRIMINAL JUSTICE STATISTICAL ANALYSIS CENTER, MINNESOTA PLANNING: OVERVIEW OF JUVENILE CRIME IN MINNESOTA 5 (Feb. 26, 1993); Santelmann & Lillesand, *supra* note 12, at 1305 (highlighting this statistic as one that caused the Legislature to act on juvenile matters).

15. *See* Act of Apr. 29, 1992, ch. 571, art. 7, § 13, 1992 Minn. Laws 1983, 2048. The Task Force was assigned to study the juvenile justice system and make recommendations regarding:

(1) the juvenile certification process;

(2) the retention of juvenile delinquency adjudication records and their use in

juveniles to adult court for prosecution and the disposition options available in juvenile court.[16] In their report, the Task Force recommended to the Legislature significant revisions to the transfer process and the establishment of a juvenile blended-sentencing option, consisting of a juvenile court disposition and imposition of a stayed adult sentence.[17] The Legislature adopted the Task Force's recommendation, codified this blended sentencing option as "Extended Juvenile Jurisdiction," and codified it at Minnesota Statutes section 260B.130.[18] The creation of EJJ gives juvenile courts the ability to impose upon a juvenile offender one or more juvenile dispositions and an adult criminal sentence, which is stayed on the condition that the juvenile does not violate the disposition order or commit a new offense.[19]

In addition to creating the blended sentencing option of EJJ, this new legislation significantly altered the way in which juvenile cases could be transferred, or "certified," to adult court.[20] Before the Task Force recommendations were enacted in 1995, the transfer of juvenile cases to adult court was a possibility for any juvenile ages 14 to 17 who had committed any crime.[21] Following the Task Force's suggestions,[22]

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subsequent adult proceedings;

(3) the feasibility of a system of statewide juvenile guidelines;

(4) the effectiveness of various juvenile justice system approaches, including behavior modification and treatment; and

(5) the extension to juveniles of a nonwaivable right to counsel and a right to a jury trial.

Id. at subd. 4(1)-(5).

16. *See* ADVISORY TASK FORCE ON THE JUVENILE JUSTICE SYSTEM, MINNESOTA SUPREME COURT, FINAL REPORT 31-37 (Jan. 1994) [hereinafter TASK FORCE, FINAL REPORT]. The Task Force's recommendations contemplated the needs of the juvenile offender and the need to control the juvenile for the benefit of the juvenile and protection of society. *Id.* at 3.

17. *See id.* (providing a thorough discussion of how these recommendations were reached).

18. *See also* Santelmann & Lillesand, *supra* note 12, at 1306, 1306 n.21 (explaining blended sentencing as involving a juvenile and adult sentence); TORBET, *supra* note 11, at 11-14 (providing a detailed explanation of the five models of blended sentencing that have emerged).

19. MINN. STAT. § 260B.130, subd. 4(a).

20. MINN. STAT. § 260.125 (1992) (current version at § 260B.125 (2002)) (reflecting the certification process before the implementation of the EJJ designation).

21. MINN. STAT. § 260.125. Before 1995, the transfer process, called "reference," was not limited to the severity of the offense. § 260.125. The 1992 statute authorized the reference of a juvenile to adult court upon the finding of probable cause to believe the juvenile committed the offense and a showing, by clear and convincing evidence, that the child was not suitable for treatment in the juvenile system or that public safety was not served by retaining the case in juvenile court. § 260.125, subd. 2(d)(1),(2). The statute further included specifications for establishing a prima facie case for transferring to adult

the legislature revised the transfer statute by limiting certification to felony offenses and designating public safety as the primary concern.[23] A significant aspect of this revision was the creation of presumptive and non-presumptive certification processes.[24] Under the statute, certification is presumed for juveniles ages 16 or 17 who commit a felony offense for which the Sentencing Guidelines presume a commitment to prison[25] or that involve a firearm.[26] In presumptive certification cases, the juvenile bears the burden of proving, by clear and convincing evidence, that retaining the proceedings in juvenile court as an EJJ case serves public safety.[27]

Non-presumptive certification cases include all felonies committed by 14- and 15-year-olds, and offenses committed by 16- or 17-year-olds that do not call for a presumptive prison sentence under the Guidelines or do not involve the use of a firearm.[28] In non-presumptive cases, the state bears the burden of proving, by clear and convincing evidence, that retaining the proceeding in juvenile court does not serve public safety.[29]

While seeking to ensure a more consistent approach for certifying the most serious juvenile offenders to be prosecuted as adults,[30] the Task Force also sought to give juveniles "one last chance at success in the

court 16-year-olds and 17-year-olds who had committed serious offenses. § 260.125, subd. 3. Within the prima facie case, the burden of proof was on the prosecution. *See* Santelmann & Lillesand, *supra* note 12, at 1306. Prior to 1994, the Juvenile Court Rules set forth eleven factors for courts to consider in making the transfer decision. *See* MINN. R. JUV. P. 32.05, subd. 2 (repealed 1996); *see also* TASK FORCE, FINAL REPORT, *supra* note 16, at 22-23 (detailing the criteria for certification in 1983).

22. *See* TASK FORCE, FINAL REPORT, *supra* note 16, at 27.

23. *See* Act of May 5, 1994, ch. 576, § 13, 1994 Minn. Laws 934, 940-945 (showing a record of the amendments made to MINN. STAT. § 260.125); Act of May 5, 1994, ch. 576, § 68, 1994 Minn. Laws 934, 985 (referencing the effective date of ch. 576, § 13, 1994 Minn. Laws 934, 940-945 as January 1, 1995).

24. *See* Santelmann & Lillesand, *supra* note 12, at 1308 (explaining this distinction as a significant amendment to the transfer procedure).

25. MINN. STAT. § 260B.125, subd. 3(2) (2002) (specifying that a presumptive commitment to prison can result from the sentencing guidelines or an applicable statute).

26. MINN. STAT. § 260B.125, subd. 3 (articulating the criteria for the presumption of certification).

27. *Id.*

28. MINN. STAT. § 260B.125, subd. 1 (allowing but not requiring certification of felony offenders older than 14); § 260B.125, subd. 3 (failing to include 16- and 17-year-olds as requiring presumptive certification when their committed offense does not presume a prison sentence or involve the use of a firearm).

29. MINN. STAT. § 260B.125, subd. 2(6)(ii).

30. *See* TASK FORCE, FINAL REPORT, *supra* note 16, at 27 (recommending implementation of a system that would make it easier to certify the most serious juvenile offenders).

juvenile system, with the threat of adult sanctions as an incentive not to reoffend."[31] The Task Force established this "one last chance" as EJJ, to give deserving juveniles an opportunity to change through treatment in the juvenile system[32] while still providing public safety protections by imposing a stayed adult sentence.[33] The legislature responded to the Task Force's recommendations by statutorily creating EJJ.[34]

EJJ designations are reserved for juvenile felony offenders ages 14 to 17.[35] There are three ways in which an offender may be designated an EJJ: automatic, presumptive, and designated.[36] Automatic EJJ prosecution applies to juveniles 16 or older who commit a felony offense using a firearm or for which the Sentencing Guidelines presume a commitment to prison.[37] In these cases, a prosecutor has the authority to designate the case as an EJJ prosecution.[38] Presumptive EJJ designation occurs when, following a presumptive certification hearing, the trial court denies the prosecutor's motion for certification. In such cases, the trial court is required to designate the case as an EJJ prosecution.[39] The final path to EJJ designation is through a successful motion to designate the case an EJJ prosecution.[40] Prior to designating the proceedings as EJJ under either of the last two paths, the court must weigh six public safety factors.[41] These six factors focus on the juvenile's prior history,

31. TASK FORCE, FINAL REPORT, *supra* note 16, at 33; *see* Santelmann & Lillesand, *supra* note 12, at 1309.

32. TASK FORCE, FINAL REPORT, *supra* note 16, at 31 (providing the rationale for the creation of blended sentencing).

33. TASK FORCE, FINAL REPORT, *supra* note 16, at 33.

34. *See* MINN. STAT. § 260.126 (1994 and Supp. 1995) (current version at MINN. STAT. § 260B.130 (2002)) (codifying the EJJ designation as an option for juvenile offenders).

35. MINN. STAT. § 260B.130, subd. 1 (listing the various routes for juvenile offenders to be designated as an EJJ).

36. See *In re* Welfare of D.M.D., Jr., 607 N.W.2d 432, 434 (Minn. 2000) (citing relevant statutory sections).

37. MINN. STAT. § 260B.130, subd. 1(2).

38. *Id.*; MINN. R. JUV. P. 19.01, subd. 3(B).

39. MINN. STAT. § 260B.125, subd. 8.

40. *Id.*; MINN. R. JUV. P. 18.06, subd. 1(B)(1).

41. MINN. R. JUV. P. 19.05. The six factors determining if public safety would be served through an EJJ designation are:

> (A) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Minnesota Sentencing Guidelines, the use of a firearm, or the impact on the victim;
>
> (B) 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

current offense, and amenability to treatment in the juvenile system.[42]

B. Minnesota's Approach to Revoking Probation

An essential element to the EJJ designation is the imposition of a stayed adult prison sentence as a deterrent to reoffending.[43] If a juvenile designated EJJ violates the conditions of his or her stayed sentence or commits a new offense, probation revocation proceedings may be commenced.[44] The juvenile is entitled to notice and a hearing of any revocation proceeding.[45] If, following the hearing, the court finds reasons exist to revoke the stay of execution of sentence, the court may then treat the juvenile offender as an adult and order any of the adult sanctions authorized.[46] However, if the EJJ offender was convicted of an offense that presumed a commitment to prison or was convicted of any offense that involved a firearm, and if the court finds that reasons exist to revoke the stay, Minnesota's statute provides that the court must execute the formerly imposed sentence unless the court also finds mitigating factors.[47]

The Minnesota Rules of Juvenile Procedure provide further guidance in the process of EJJ revocation.[48] These rules equip the court

> and the existence of any mitigating factors recognized by the Minnesota Sentencing Guidelines;
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> (C) the child's prior record of delinquency;
>
> (D) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
>
> (E) the adequacy of the punishment or programming available in the juvenile justice system;
>
> (F) the dispositional options available for the child.

MINN. R. JUV. P. 19.05.

42. *See* TASK FORCE, FINAL REPORT, *supra* note 16, at 31 (citing Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 417 (1991)).

43. *See* TASK FORCE, FINAL REPORT, *supra* note 16, at 33 (recognizing the Task Force's intent to adopt the blended sentencing option as an incentive for the juvenile to be rehabilitated).

44. MINN. STAT. § 260B.130, subd. 5.

45. *Id.* (allowing the juvenile a chance to challenge the claimed violation(s)).

46. *Id.*

47. *Id.* Without the presence of mitigating factors that could justify continuing the stay, the court has no discretion in implementing the stayed adult sentence when the offense presumed a commitment to prison or involved a firearm. *Id.*

48. MINN. R. JUV. P. 19.09 (articulating the procedural rules for EJJ proceedings and prosecution).

with discretionary authority to execute the stayed sentence of an EJJ offender if the court finds upon clear and convincing evidence that the probationer violated any provision of the disposition order or if the probationer admitted to a violation of the disposition order.[49] The discretionary authority of the court becomes compulsory when the court finds the probationer violated a provision of the disposition order or admitted to a violation of the disposition order when the initial EJJ conviction involved an offense holding a presumptive prison sentence or an offense involving a firearm.[50] The only exception to this compulsory execution is if the court makes written findings noting the mitigating factors that validate continuing the stay.[51] Both the EJJ statute and juvenile procedural rule governing EJJ are silent as to what constitutes "mitigating factors."

The United States Supreme Court established standards governing the process of revocation for parolees in *Morrissey v. Brewer*.[52] The Supreme Court recognized that the effectiveness of parole stems from the court's ability to return the parolee to prison for failing to adhere to the conditions of parole.[53] A parole officer holds broad discretion in seeking to have parole revoked.[54] One year later, in *Gagnon v. Scarpelli,*[55] the Supreme Court extended the *Morrissey* decision to apply equally to probationers.[56] The *Scarpelli* Court reinforced the broad discretion of a probation officer in holding the authority to recommend or even declare revocation of probation.[57]

State v. Austin established the criteria that Minnesota trial courts must use in adult probation violation proceedings.[58] In determining

49. *Id.* at subd. 3(C)(1).

50. *Id.* at subd. 3(C)(2).

51. *Id.*

52. 408 U.S. 471, 482 (1972) (holding that parolees are entitled to due process when facing revocation of their parole and a return to prison). Parole is supervision that follows an offender's release from prison. *See id.* at 474-75.

53. *See id*. at 478-79.

54. *See id.* at 479 (noting that broad discretion is also inherent in the role of a parole officer simply by the vague conditions of parole). "[A] parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity." *Id.*

55. 411 U.S. 778, 782 (1973) (affirming *Morrissey* in allowing due process for probationers).

56. *Id*.

57. *Id.* at 784 (citing the responsibility to supervise the probationer's progress in rehabilitation as the reason for a parole officer's broad discretion).

58. 295 N.W.2d 246, 250 (Minn. 1980) (establishing these criteria for the further

whether an adult probationer's previously stayed sentence should be executed, *Austin* requires the court to:

> (1) designate the specific condition or conditions that were violated;
>
> (2) find that the violation was intentional or inexcusable; and
>
> (3) find that need for confinement outweighs the policies favoring probation.[59]

Since the court's decision in *Austin* in 1980, the three factors articulated in the decision have become the cornerstone of any trial court's decision to revoke adult probation.[60] However, until *B.Y.* the *Austin* factors had not been applied to EJJ probation revocation proceedings.

With the creation of EJJ in 1995, Minnesota appellate courts developed the standard to be used in EJJ probation revocation proceedings.[61] Distinguishing EJJ from adult probation violation proceedings, the Minnesota Court of Appeals held in *State v. Bradley* that only the first two *Austin* factors applied to EJJ revocation proceedings; the *Bradley* court noted that the third factor, weighing the need for confinement against policies favoring probation, is not consistent with the EJJ statute.[62] The *J.K.* court followed precedent and evaluated EJJ revocation based upon only the first two *Austin* factors.[63] In addition to these two key appellate decisions, a number of unpublished appellate decisions have reviewed lower-court decisions revoking EJJ status.[64] A number of these unpublished decisions follow the standard

guidance of lower courts in determining probation revocation).

59. *Id.* (listing these factors as a mandatory evaluation by the court before adult probation may be revoked).

60. *See* State v. Hamilton, 646 N.W.2d 915, 917 (Minn. Ct. App. 2002) (applying the *Austin* factors in revoking adult probation); State v. Theel, 532 N.W.2d 265, 267 (Minn. Ct. App. 1995) (recognizing the requirement of a court to engage in the *Austin* analysis while considering the revocation of adult probation).

61. *See In re* J.K., 641 N.W.2d 617 (Minn. Ct. App. 2002); State v. Bradley, 592 N.W.2d 886 (Minn. Ct. App. 1999).

62. *See Bradley*, 592 N.W.2d at 887 (declining to evaluate the facts in light of the third *Austin* factor and recognizing more discretion in revoking EJJ probation relative to revoking adult probation).

63. *See In re* J.K., 641 N.W.2d at 621 (citing *Bradley* as authority in applying two of the three *Austin* factors).

64. *See* State v. Henson, No. C2-02-297, 2002 WL 1424430 at *5 (Minn. Ct. App. July 2, 2002) (holding that probationer gave up his "one last chance" to be successful in the juvenile system by failing to obey his probation officer); State v. Washington, No. C0-02-914, 2002 WL 31553980 at *1 (Minn. Ct. App. Nov. 19, 2002) (revoking EJJ probation for probationer's failure to maintain contact with his probation officer over a four-month period of time); State v. Yang, C9-02-605, 2002 WL 1614065 at *2 (Minn.

developed in *Bradley* and *J.K.*[65]

III. *STATE V. B.Y.*

A. The Facts

On February 9, 1998, B.Y., based upon a plea agreement, pled guilty to kidnapping and committing a crime for the benefit of a gang.[66] B.Y.'s plea resulted from his participation in the kidnapping and gang rape of a 12 year-old girl.[67] At the time of the offense, B.Y. was 15 years old and the prosecution had moved to certify him to stand trial as an adult.[68] Because of B.Y.'s age at the time of the offense, certification to adult court was not presumptive.[69]

In addition to his guilty plea to charges of kidnapping and committing a crime for the benefit of a gang, B.Y. agreed to designation

Ct. App. July 23, 2002) (listing numerous probation violations as reason to revoke EJJ probation); *In re* Welfare of J.C.B., No. C2-00-649, 2000 WL 1778910 at *2 (Minn. Ct. App. Nov. 21, 2000) (finding EJJ revocation proper under the EJJ statute and the applicable Rule of Juvenile Procedure for a "technical" probation violation); State v. McArthur, No. C4-99-502, 1999 WL 759985 at *1 (Minn. Ct. App. Sept. 28, 1999) (executing a stayed sentence because probationer possessed a firearm in violation of his terms of probation); Welfare of C.A.S., No. C8-98-217, 1998 WL 345514 at *1 (Minn. Ct. App. June 30, 1998) (upholding probationer's EJJ status due to probationer's decision to reoffend).

65. *See Henson*, 2002 WL 1424430 at *3 (citing *Austin* as authority to revoke probation if a probation officer's instructions are disobeyed); *Yang*, 2002 WL 1614065 at *1 (upholding the application of the first two *Austin* factors in revoking probation under the EJJ statute); *In re* Welfare of J.C.B., 2000 WL 1778910 at *2 (stating that the text of the EJJ statute does not require the district court to consider the third *Austin* factor); Welfare of C.A.S., 1998 WL 345514 at *2 (defining *Austin* as applying solely to adults violating probation). *But see Washington*, 2002 WL 31553980 at *1 (failing to discuss *Austin* in its brief opinion); *McArthur*, 1999 WL 759985 at *1 (mentioning *Austin* only to provide the applicable standard of review).

66. State v. B.Y., 659 N.W.2d 763, 765 (Minn. 2003) (explaining that B.Y.'s agreement to plead guilty to kidnapping and committing a crime to benefit a criminal gang was only one of the conditions of the plea bargain). B.Y. was initially charged with first-degree criminal sexual conduct, conspiracy to commit criminal sexual conduct, kidnapping, and crime committed for the benefit of a gang. Appellant's Brief and App. at 5, *B.Y.* (No. C7-01-897); Respondent's Brief at 2, *B.Y.* (No. C7-01-897) (citing Plea Tr., Feb. 9, 1998, page 3). The original Plea Transcript from February 9, 1998 is not accessible to the public because of B.Y.'s juvenile status at the time of the offense.

67. *B.Y.*, 659 N.W.2d at 765 (identifying the offense of the crime for the benefit of a criminal gang as gang rape).

68. *Id.*; s*ee also* Respondent's Brief, *supra* note 66, at 2 (citing Plea Tr., Feb. 9, 1998, p. 3).

69. MINN. STAT. § 260B.125, subd. 3 (2002).

as an EJJ until the age of 21,[70] and imposition of a 108-month adult prison sentence.[71] Based on the EJJ designation, the adult sentence was stayed. Further terms of B.Y.'s plea included his agreement to testify truthfully at the trials of other individuals involved in the offense, completion of a juvenile rehabilitation program, discontinued association with known gang members, and no contact with the victim.[72]

The district court informed B.Y. at the sentencing hearing on February 9, 1998 that violations of the terms and conditions of probation would trigger the execution of the 108-month prison sentence.[73] More than a year later, the court allowed B.Y. to return home after successfully completing the juvenile rehabilitation program at Woodland Hills.[74] At a hearing in June of 1999, the court again reminded B.Y. that a probation violation before he turned 21 would result in the execution of the 108-month prison sentence.[75]

On February 9, 2001, B.Y. appeared before a juvenile court judge on allegations that he had violated the terms of his EJJ probation by failing to abide by the curfew set by his probation officer.[76] The probable cause statement, attached to the probation violation warrant, also set forth other alleged violations of probation.[77] At that hearing,

70. *B.Y.*, 659 N.W.2d at 765. The court has authority over an EJJ who enters a guilty plea to impose one or more juvenile dispositions and an adult criminal sentence stayed upon the proposition that the juvenile does not violate the provisions in the disposition order or commit a new offense. MINN. STAT. § 260B.130, subd. 4(a) (2002).

71. *B.Y.*, 659 N.W.2d at 765. This sentence was set forth in the plea agreement. *Id.* The agreement calculated the applicable sentences for kidnapping and crime for the benefit of a criminal gang. *Id.* The kidnapping charge held a presumptive prison sentence of forty-eight months. *Id.* This sentence was determined by assigning the severity level of 7 to the offense of Kidnapping-Victim Under 16 and examining the severity level under the Sentencing Guidelines Grid. U.S. SENTENCING GUIDELINES MANUAL, NUMERICAL REFERENCE OF FELONY STATUTES, SENTENCING GUIDELINES GRID § IV (1997). The plea included a double durational departure from the sentencing guidelines recommendation for kidnapping, equaling a ninety-six-month prison term. *B.Y.*, 659 N.W.2d at 765. The crime for the benefit of a criminal gang charge added a presumptive sentence of twelve months consecutive to the ninety-six months already determined by the kidnapping offense, resulting in a total stayed sentence of 108 months. *Id.*

72. *B.Y.*, 659 N.W.2d at 765.

73. *Id.* Aside from the plea agreement, no additional conditions were discussed at the hearing or placed in the disposition order. *Id.*

74. *Id.*

75. *Id.* (quoting the court as saying "don't commit any new crimes and keep in touch").

76. *Id.* at 766.

77. Appellant's Brief and App., *supra* note 67, Motion for Rehearing and Motion to Reconsider, at Appellant's App. 1-1. The "Probable Cause Statement attached to the

B.Y. admitted he violated his 9:00 p.m. curfew.[78] The district court judge and court of appeals determined this admission constituted a probation violation.[79] The trial court ordered a study to determine whether B.Y.'s EJJ designation should be revoked and the stayed adult sentence executed.[80] At a subsequent disposition hearing, the state presented evidence of other violations.[81] A probation officer testified that B.Y. had previously been placed on "enhanced probation" with a stricter level of supervision because of B.Y.'s inability to check in weekly with his probation officer.[82] The State contended that B.Y. previously was placed at the Juvenile Detention Center for a curfew violation,[83] failed to show up for eight hours of work crew for a separate curfew violation, refused to make up for the eight hours of missed work crew,[84] and was placed at the Adult Detention Center for curfew and school attendance violations.[85]

Following the report of the probation officer, and arguments of counsel, the court revoked B.Y.'s EJJ status and executed his 108-month sentence.[86] The district court found that there were no mitigating factors to justify continuing the stay of execution of the adult sentence.[87] Based

[Probation Violation Warrant] listed numerous curfew violations from 11-30-00 to 2-6-01." *Id.* The original Probable Cause Statement and Probation Violation Warrant are not accessible to the public due to B.Y.'s juvenile status at the time of the offense.

78. *B.Y.*, 659 N.W.2d at 766.

79. *Id.*; *see also* State v. Yang, No. C7-01-897, 2002 WL 523433 at *3 (Minn. Ct. App. Apr. 9, 2002) (concluding that even a "technical" violation is still a violation). The court of appeals opinion also discusses the district court's findings of B.Y.'s probationary history as involving repeated failures to comply with conditions laid out by his probation officer and numerous warnings that violating these conditions would result in probation revocation. *Id.*

80. *See* Respondent's Brief, *supra* note 66, at 4 (citing Tr. of Hearing Feb. 9, 2001, p. 6). The original Transcript of Hearing from February 9, 2001 is not accessible to the public because of B.Y.'s juvenile status at the time of the offense.

81. *B.Y.*, 659 N.W.2d at 766. The State argued that it would not seek revocation of probation "for a mere curfew violation had there not been multiple violations and had [B.Y.] not shown that he was unamenable to supervision." *Id.*

82. *Id.* The transfer to "enhanced probation" resulted from a one- to two-month period where B.Y. did not properly report to his probation officer and concerns were raised that B.Y. was not attending school or residing at his parents' house full time. *Id.*

83. *Id.* (asserting that B.Y. was placed on twenty-four-hour hold at the Juvenile Detention Center).

84. *Id.* B.Y. was given two eight-hour days on a work crew for a violation; B.Y. failed to show up on the second day.

85. *Id.* (asserting that B.Y. was placed on forty-eight-hour hold at the Adult Detention Center).

86. *Id.*

87. State v. Yang, No. C7-01-897, 2002 WL 523433 at *2 (Minn. Ct. App. Apr. 9, 2002) (referencing the district court's failure to find any mitigating factors).

upon this finding, the court was compelled to execute B.Y.'s stayed sentence.[88] After hearing B.Y.'s appeal, the court of appeals affirmed the district court's decision.[89]

B. The Minnesota Supreme Court's Analysis

In reviewing the district court and court of appeals opinions, the Minnesota Supreme Court examined the provisions of the EJJ statute governing probation violations. The court concluded that the statutory provision requiring execution of the stayed adult sentence when the original offense assumes a presumptive prison sentence applies to all EJJ offenders, regardless of age.[90] This portion of the opinion holds that presumptive execution of an adult sentence is not limited to 16- and 17-year-olds.[91] In so holding, the court found that the Rules of Juvenile Procedure and the statute do not conflict as they relate to the standards for execution of an adult sentence.[92]

Next, the court examined whether the *Austin* factors are applicable to EJJ probation revocation proceedings.[93] The court concluded that all three of the *Austin* factors must be considered to determine if "reasons exist to revoke the stayed sentence."[94] The court reasoned that the need to balance a probationer's interest in freedom with the State's interest in ensuring rehabilitation and public safety, as required under *Austin*, is also

88. *Id.*

89. *Id.* (concluding that execution of B.Y.'s stayed sentence is required under MINN. STAT. § 260B.130, subd. 5 absent any mitigating factors). The court of appeals noted that B.Y's probation history included repeated failures to abide by conditions of his probation and repeated warnings by the court and probation officer that violations would trigger revocation of his probation. *Id.* at *3.

90. *See B.Y.*, 659 N.W.2d at 768 (determining this to be true once the violation has been established); MINN. STAT. § 260B.130, subd. 5 (differentiating between the circumstances when adult sentences shall or must be executed).

91. *See B.Y.*, 659 N.W.2d at 768 (agreeing with the prosecution that B.Y.'s age at the time of the offense was not a factor in the revocation proceedings).

92. *See id.* (identifying the consistency between the statute and rule to recognize the offense rather than age as the key factor in determining the mandatory or discretionary execution of adult sentence). *Compare* MINN. STAT. § 260B.130, subd. 5 (recognizing the EJJ conviction due to an offense with a presumptive prison sentence as a crucial component in the court's requirement to order execution of an adult sentence) *with* MINN. R. JUV. P. 19.09, subd. 3(C)(2) (failing to address age while stating requirements for the court to order execution of an adult sentence).

93. *B.Y.*, 659 N.W.2d at 768 (noting that the Minnesota Supreme Court had not yet addressed *Austin* in light of EJJ probation revocation).

94. *Id.* (distinguishing this requirement as an addition to the requirement that the EJJ conviction be based upon an offense that presumed a prison sentence or involved a firearm).

present in EJJ revocation proceedings because "revocation of EJJ probation may result in the execution of an adult sentence."[95] The court went on to note that Rule 19.09, subdivision 3(C)(2) of the Minnesota Rules of Juvenile Procedure contains neither the statute's "reasons to reduce the stay" language, nor the *Austin* analysis.[96] Based upon these deficits, the court directed the Supreme Court Advisory Committee on the Rules of Juvenile Procedure to review Rule 19.09, subdivision 3(C) for appropriate amendments incorporating the *Austin* factors.[97]

IV. ANALYSIS OF THE *B.Y.* DECISION

Since the passage of Minnesota's EJJ statute, the Minnesota Supreme Court has issued a limited number of opinions addressing substantive issues related to EJJ.[98] Prior to *B.Y.,* none of these decisions had addressed the issue of revocation of EJJ status. In *B.Y.*, the court addressed revocation for the first time and held that the standards of probation revocation established in *Austin* apply to EJJ revocation proceedings.[99] As discussed above, in so holding, the court overruled the court of appeals decisions in *J.K.* and *Bradley*.[100]

Prior to *B.Y.,* an EJJ offender was in a unique category—neither juvenile nor adult offender but a blend of both. Previously, the adult standards for probation revocation were not applied based upon a literal reading of the governing statutory provisions.[101] *B.Y.* has changed this. Now, in terms of probation violation proceedings, the analysis used in

95. *Id.* at 769.

96. *Id*.

97. *Id.* at 769 n.3.

98. *See, e.g., In re* Welfare of D.M.D., Jr., 607 N.W.2d 432 (Minn. 2000) (holding that nonoffense related evidence of a juvenile's dangerousness is not a requirement for the prosecution to designate a juvenile offender as an EJJ under the public safety requirements). The Minnesota Supreme Court has issued other decisions addressing EJJ procedural concerns. *See supra* note 4.

99. *See B.Y.*, 659 N.W.2d at 768-69 (stating that all three *Austin* factors must be met to revoke probation).

100. *Id.*; *see also In re* Welfare of J.K., 641 N.W.2d 617, 621 (Minn. Ct. App. 2002) (recognizing that the EJJ text does not require consideration of the third *Austin* factor); State v. Bradley, 592 N.W.2d 886, 887-88 (Minn. Ct. App. 1999) (concluding that the third *Austin* factor is not easily reconciled with the EJJ statute).

101. The *Bradley* court held that the third *Austin* factor, weighing confinement against probation policy, conflicted with the EJJ statute requirement of revoking probation for a violation absent any mitigating factors. 592 N.W.2d at 887. The *J.K.* court reinforced *Bradley's* holding that it is not necessary under the EJJ statute to consider the third *Austin* factor. 641 N.W.2d at 621.

adult cases must be applied to EJJ offenders.[102]

A. The Age of the Offender in EJJ Probation Violation Proceedings

The first issue addressed by the *B.Y.* court clarified the distinction between violations of probation that require the trial court to execute the stayed adult sentence and those that do not.[103] The provision governing probation violation proceedings, section 260B.130, subdivision 5 of the Minnesota Statutes, provides in pertinent part that:

> If the offender was convicted of an offense described in subdivision 1, clause (2), and the court finds that reasons exist to revoke the stay, the court must order execution of the previously imposed sentence unless the court makes written findings regarding the mitigating factors that justify continuing the stay.[104]

Subdivision 1, clause (2) of the same statute describes both the offender and the offense for which EJJ designation is mandatory upon designation by the prosecutor.[105] This provision applies to any 16- or 17-year-old offender alleged to have committed a felony if the offense is one for which the Sentencing Guidelines and applicable statutes presume a commitment to prison or in which the offender allegedly used a firearm.[106]

The sole issue raised by the appellant involved the application of the language of section 260B.130, subdivision 5, to offenders younger than 16.[107] The appellant argued that, because the language of subdivision 1, clause (2) refers to both the age of the offender and the offense, the language of subdivision 5, requiring the execution of the adult sentence absent mitigating circumstances, does not apply to any EJJ offender younger than 16 at the time of the offense.[108] Appellant further argued that, based upon this interpretation, subdivision 3(C)(2) of Minnesota Rule of Juvenile Procedure 19.09 is inconsistent with the statute.[109]

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102. By ruling that the third *Austin* factor applies to EJJ revocation proceedings, *B.Y.* changed the standards for EJJ probation violators to equal the standards of adult probation violators. *See B.Y.*, 659 N.W.2d at 768.

103. *See id.* at 767.

104. MINN. STAT. § 260B.130, subd. 5 (2002).

105. *Id.* at subd. 1(2) (2002).

106. *Id.*

107. *B.Y.*, 659 N.W.2d at 767.

108. *See id.*

109. *B.Y.,* 659 N.W.2d at 767. The Minnesota Rules of Juvenile Procedure do not refer to an offender's age, only the offense, when articulating under what circumstances a

The State argued that the appellant's position required an implied amendment to the revocation statute, changing the pertinent language of section 260B.130, subdivision 5 from "if the offender was *convicted of an offense described in* subdivision 1, clause (2)" to "if the offender was *designated EJJ pursuant to* subdivision 1, clause (2)."[110]

The court summarily rejected the appellant's argument.[111] In a well-reasoned analysis, the court interpreted the statute according to its plain meaning.[112] The court noted that subdivision 5 of section 260B.130 refers to "an offense described in subdivision 1, clause (2)" and does not "mention the age of the offender."[113] Based upon this plain language, the court held that subdivision 5, section 260B.130 "is properly read to require the execution of the adult sentence, absent written mitigating factors, regardless of the age of the defendant at the time of the original offense."[114] Thus, the court reasonably concluded that the statute and rule do not conflict. The court's reasoning is also consistent with the Sentencing Guidelines, which do not distinguish between a presumptive stay or executed sentence based upon the age of the offender.[115]

B. Application of Austin *to EJJ Probation Revocation Proceedings*

The central issue addressed by the court in *B.Y.* was not one specifically raised by the appellant.[116] After clarifying that the age of the offender is immaterial to the revocation decision, the court went on to discuss the application of *Austin* to EJJ probation violation proceedings.[117] It is this application of the *Austin* analysis to EJJ proceedings that is the focus of this case note.

As set forth above, *Austin* established a three-step analysis for courts to use in determining whether reasons exist to revoke an adult

trial court is required to order execution of the adult sentence. MINN. R. JUV. P. 19.09, subd. 3(C)(2).

110. Respondent's Brief and App., *supra* note 66, at 30.

111. *B.Y.*, 659 N.W.2d at 767-68.

112. *Id.*

113. *Id.*

114. *Id*. at 768.

115. MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 49 (2003) [hereinafter SENTENCING GUIDELINES]. The two determinative factors in the Sentencing Guidelines Grid are the severity of the offense committed and the offender's criminal history score. *Id*.

116. *B.Y.*, 659 N.W.2d at 768.

117. *See id*. at 768-69.

offender's probation.[118] In *B.Y.*, the court held that all three of the *Austin* factors apply to EJJ probation revocation proceedings.[119] This decision raises two fundamental concerns. The first concern is whether applying the three *Austin* factors to EJJ revocation proceedings is consistent with the EJJ statute and other principles of law.[120] The second concern is whether the Minnesota Supreme Court applied the *Austin* factors in a manner that lower courts can understand and implement.[121]

C. *Application of the* Austin *Analysis to EJJ Probation Revocation Proceedings*

A fundamental difficulty in understanding the *B.Y.* decision can be traced to the governing statute's failure to distinguish between the two decisions a trial court must make in EJJ revocation proceedings.[122] In EJJ probation violation proceedings, unlike adult violation proceedings, the trial court must first decide whether to revoke an offender's EJJ *designation*.[123] If the trial court determines revocation of the EJJ designation is warranted, then the trial court must decide whether grounds exist to execute the stayed adult sentence.[124] Thus, the decision to revoke EJJ designation is a decision to transfer the case to adult court and nothing more.

It is unclear from the holding in *B.Y.* whether the court intended the *Austin* analysis to apply to the decision to revoke EJJ designation, or simply to the decision to execute the adult sentence once EJJ status has been revoked. If the decision is read to require the *Austin* analysis applies to the decision to revoke an offender's EJJ designation, then application of the third *Austin* factor does not seem to fit within the analytical structure of the statute.

118. *See supra* Part II.B.
119. *B.Y.*, 659 N.W.2d at 769.
120. *See infra* Part IV.C.
121. *See infra* Part IV.D.
122. *See* MINN. STAT. § 260B.130, subd. 5 (2002). The imprecise language of MINN. STAT. § 260B.130, subdivision 5 simply requires the trial court to determine whether "reasons exist to revoke the stay of execution of sentence . . . ." *Id.* However, execution of the stayed adult sentence does not automatically flow from the decision to revoke the EJJ designation. Under the statute, the trial court's decision to execute the adult sentence does not arise unless the court first finds that the offender has violated his or her EJJ probation. *See id.* The court must then determine, based on whether the Sentencing Guidelines provide for a presumptive or non-presumptive prison sentence, whether execution of the stayed sentence is warranted. *Id.*
123. *Id.*
124. *Id.*

It appears that by the terms of the statute, the juvenile court judge must find an intentional or inexcusable violation of a term of probation before transfer of the case to adult court.[125] Due process requires such proof.[126] Thus, application of the first two *Austin* factors to the decision to revoke an offender's EJJ designation is justified under both the statute and governing principles of law. However, application of the third *Austin* factor to the decision to revoke an offender's EJJ designation is premature.

Revocation of an offender's EJJ designation does not automatically result in execution of a prison sentence in either presumptive or non-presumptive cases.[127] In non-presumptive cases, once the trial court has ordered revocation of the offender's EJJ status and transferred the case to adult court, the court can then order any of the sanctions available to an adult sentencing court.[128] It is unnecessary to determine that the "need for confinement outweighs the policies favoring probation," the third factor under *Austin*, if the trial court can simply continue the offender on adult probation. In presumptive cases, the statute requires the court to execute the stayed adult sentence unless it finds mitigating factors to justify continuing the stay.[129] Thus, in both non-presumptive and presumptive cases, application of the third *Austin* factor is unnecessary to the decision to transfer the case to adult court through revocation of the EJJ designation.

The practical result is that the third *Austin* factor must be modified slightly in order to logically apply it to the decision to revoke an EJJ

125. *Id.* The statute requires a finding that the offender violated a condition of the stayed sentence and that reasons exist to revoke the stay of execution of sentence. *Id.*

126. The United States Supreme Court established the principle that parolees are entitled to due process when facing revocation of their parole and a return to prison. *See* Morrissey v. Brewer, 408 U.S. 471, 499-500 (1972). One year later, this principle was extended to probationers facing revocation. *See* Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973). The minimum due process to which offenders are entitled includes:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders [sic] as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489.

127. MINN. STAT. § 260B.130, subd. 5 (2002).

128. *Id.*

129. *Id.*

designation. At the stage where a court considers revoking an offender's EJJ status, the issue is whether the need to transfer the case to adult court outweighs the desire to retain the offender in the juvenile system. With this caveat, application of the *Austin* analysis can be made to fit the decision to revoke EJJ designation.

The holding in *B.Y.* can also be read as applicable only to the decision to revoke the stay of execution of sentence following revocation of EJJ designation. This interpretation is reasonable because the court refers to the decision to revoke the stay of execution of sentence when applying the *Austin* analysis. If the opinion is interpreted in this way, the decision is consistent with the philosophy adopted by the court in *Austin* and its progeny. However, it raises serious questions about whether the intent of the statute can be enforced. The *Bradley* court articulated the intent of the statute.[130]

In *Bradley*, the court of appeals noted that the balance between the need for confinement and the policies favoring probation is difficult to reconcile with the policies articulated in the EJJ statute.[131] The *Bradley* court held that, in light of the "one last chance" nature of EJJ proceedings, the trial court was not required to consider whether the need for confinement outweighed the policy in favor of probation.[132] However, the Task Force report did not characterize EJJ as the one last chance to avoid adult prison. The "one last chance" contemplated by the Task Force was "success in the juvenile system, with the threat of adult sanctions as an incentive not to reoffend."[133]

Furthermore, the statute gives trial courts the option, upon revocation of the EJJ designation, to continue or execute the stayed adult sentence.[134] Based upon both the Task Force report and the provisions of the statute, it is perhaps more accurate to characterize EJJ as the "one last chance at juvenile programming." Thus, application of the *Austin* analysis may not be as inconsistent with the intent of the statute as it first appears. Yet, it can also be argued that to require the trial court to consider whether the need for confinement outweighs the policies favoring probation when deciding whether to revoke the stay of execution of sentence ignores the second stated intent of the EJJ statute: certainty of punishment.

130. State v. Bradley, 592 N.W.2d 886 (Minn. Ct. App. 1999).
131. *Id.* at 887.
132. *Id.* at 888.
133. *See* TASK FORCE, FINAL REPORT, *supra* note 16, at 33.
134. MINN. STAT. § 260B.130, subd. 5.

Certainty of punishment upon violation of EJJ probation was a critical component of the statute when drafted and passed.[135] This is particularly clear in cases where the Sentencing Guidelines presume a commitment to prison. In these cases, the trial court must execute the stayed adult sentence unless it finds mitigating factors.[136] Application of the third *Austin* factor diminishes this certainty of punishment. Moreover, its application to an EJJ case where the statute presumes certification to adult court appears to discount the opportunity the offender was given to prove that the policies favoring probation outweigh the need for confinement.

In its application of the third *Austin* factor, the *B.Y.* court does not address the opportunity the offender has already been given to avoid adult prison. A trial court, when it honors a plea agreement or makes an independent determination to designate an offender as EJJ, has already considered the question of whether the policies favoring probation outweigh the need for confinement in an adult institution. When the court designates the offender EJJ, it has already found that the offender should be given the opportunity to avoid adult prison through programming in the juvenile system. The *B.Y.* court does not explain why the trial court should again be required to examine whether the need for confinement outweighs the policies favoring probation at the time of revocation of EJJ designation. Furthermore, requiring the court to conduct this examination when addressing the second decision, whether to execute the adult sentence, is consistent with the terms of the statute, but only in non-presumptive cases. Once the decision has been made to revoke an offender's EJJ designation, in non-presumptive cases, the statute gives the court all the sentencing options available in adult proceedings. To apply the third *Austin* factor in non-presumptive cases to the decision to execute the stayed sentence gives the EJJ offender the same protections adults enjoy. This result seems fair and just. However, in presumptive cases, the equities are not as clear.

In presumptive prison cases, unless the probation-versus-confinement analysis is interpreted to be the examination of mitigating factors required by the EJJ statute, application of the third *Austin* factor

135. *See* TASK FORCE, FINAL REPORT, *supra* note 16, at 34. Furthermore, upon designation of EJJ, the trial court must impose a stayed adult sentence. The statute does not allow for a stay of imposition of sentence. Thus, the adult sentence that the offender may face upon revocation of the designation is established with certainty at the time of EJJ designation.

136. MINN. STAT. § 260B.130, subd. 5.

provides the EJJ offender more protections than afforded an adult offender. Furthermore, unless the statute's reference to mitigating factors requires an analysis consistent with the Sentencing Guidelines, EJJ offenders who commit an offense for which the Guidelines presume a commitment to prison will be treated differently than adults who commit the same type of offense. Because the *B.Y.* court did not address application of the sentencing guidelines to EJJ revocation proceedings, these issues remain unresolved.

D. Application of the Austin *Analysis*

Perhaps the most helpful aspect of the *B.Y.* decision for practitioners is its articulation of the mitigating factors that justify continuing the stay of execution of sentence.[137] However, the difficulties with the decision include an unclear standard of review, an unclear amount of authority probation officers should be given to monitor EJJ offenders, and an unclear role of the reviewing court.

Minnesota has historically afforded the trial court broad discretion to determine whether there are sufficient grounds to revoke probation.[138] Furthermore, as articulated in *Austin* and its progeny, a trial court's decision is to be reversed only when the reviewing court finds a clear abuse of this discretion.[139] The Minnesota Court of Appeals used this standard of review as it reviewed the trial court's decision to revoke

137. State v. B.Y., 659 N.W.2d 763, 770-72 (Minn. 2003) (providing discussion as to the mitigating factors in B.Y.'s situation).

138. Minnesota appellate courts have long recognized the broad discretion of a trial court in determining whether there is sufficient evidence to revoke probation, reversing only if the trial court clearly abused its discretion. *See, e.g.*, State v. Hamilton, 646 N.W.2d 915, 917 (Minn. Ct. App. 2002); State v. Schwartz, 615 N.W.2d 85, 90 (Minn. Ct. App. 2000); State v. Balma, 549 N.W.2d 102, 104 (Minn. Ct. App. 1996); State v. Hlavac, 540 N.W.2d 551, 552 (Minn. Ct. App. 1995); State v. Theel, 532 N.W.2d 265, 266-67 (Minn. Ct. App. 1995); State v. Morrow, 492 N.W.2d 539, 543 (Minn. Ct. App. 1992); State v. Wittenberg, 441 N.W.2d 519, 521 (Minn. Ct. App. 1989); State v. Fritsche, 402 N.W.2d 197, 201 (Minn. Ct. App. 1987); State v. Moot, 398 N.W.2d 21, 23 (Minn. Ct. App. 1987); State v. Scholberg, 393 N.W.2d 247, 248 (Minn. Ct. App. 1986).

139. *See* State v. Austin, 295 N.W.2d 246, 249-50 (Minn. 1980) (determining the standard of review for reviewing adult probation revocation); *see, e.g.*, State v. Hamilton, 646 N.W.2d 915, 917 (Minn. Ct. App. 2002); State v. Schwartz, 615 N.W.2d 85, 90 (Minn. Ct. App. 2000); State v. Balma, 549 N.W.2d 102, 104 (Minn. Ct. App. 1996); State v. Hlavac, 540 N.W.2d 551, 552 (Minn. Ct. App. 1995); State v. Theel, 532 N.W.2d 265, 266-67 (Minn. Ct. App. 1995); State v. Morrow, 492 N.W.2d 539, 543 (Minn. Ct. App. 1992); State v. Wittenberg, 441 N.W.2d 519, 521 (Minn. Ct. App. 1989) (quoting State v. Ehmke, 400 N.W.2d 839, 840 (Minn. Ct. App. 1987)); State v. Fritsche, 402 N.W.2d 197, 201 (Minn. Ct. App. 1987); State v. Moot, 398 N.W.2d 21, 23 (Minn. Ct. App. 1987); State v. Scholberg, 393 N.W.2d 247, 248 (Minn. Ct. App. 1986).

B.Y.'s probation.[140] However, this was not the standard of review used by the Minnesota Supreme Court.

The opinion states that the applicability of the *Austin* factors directly related to the interpretation of the EJJ statute, implying a de novo standard of review. The de novo standard is traditionally used when reviewing statutory interpretations.[141] Thus, it is the appropriate standard of review for the court to use when interpreting the revocation provisions of the EJJ statute to include the *Austin* analysis. However, the court did not then examine the trial court's decision to revoke B.Y.'s EJJ status and execute the adult sentence using an abuse of discretion standard of review. Rather, the court found that the trial court "erred" in revoking B.Y.'s EJJ probation.[142]

The *B.Y.* opinion makes no mention of the broad discretion to be afforded the trial court. Nor does it state that reversal can only be based upon a finding that the trial court clearly abused this discretion. Thus, while applying the same analysis used in adult revocation proceedings to EJJ revocation proceedings, the court does not apply the same standard of review. Consequently, the opinion calls into question the previously well-established standard of review to be used in probation violation proceedings.

The *B.Y.* decision also calls into question the authority of a probation officer to set conditions of probation. The decision appears to hold that the court may not find a violation of probation if the specific condition violated has not been established by the court either in the disposition order or by announcing it from the bench.[143]

Citing to Rule 19.09, subdivision 3(C)(2) of the Minnesota Rules of Juvenile Procedure, the court found that B.Y.'s admitted violation of curfew could not be the basis for executing his sentence because the curfew condition was not part of the disposition order.[144] This finding disregards the general term of probation set by the trial court to abide by the terms of probation.[145] The finding is also inconsistent with the long-

140. *See* State v. Yang, No. C7-01-897, 2002 WL 523433, at *3 (Minn. Ct. App. Apr. 9, 2002).

141. *See, e.g.,* State v. Iverson, 664 N.W.2d 346, 350 (Minn. 2003); Jorgensen v. Knutson, 662 N.W.2d 893, 897 (Minn. 2003); BCBSM, Inc. v. Comm'r of Revenue, 663 N.W.2d 531, 532 (Minn. 2003); State v. Murphy, 545 N.W.2d 909, 914 (Minn. 1996).

142. *B.Y.*, 659 N.W.2d at 769.

143. Using the language of Rule 19 of the Minnesota Rules of Juvenile Procedure, the *B.Y.* court requires the conditions of probation to be in the disposition order. *Id*.

144. *B.Y.*, 659 N.W.2d at 769.

145. *See* State v. Bee Yang, No. C7-01-897, 2002 WL 523433 (Minn. Ct. App. Apr. 9, 2002) (recognizing that the district court stayed B.Y.'s sentence "on the condition that

established authority given to probation officers to set some terms of probation.

Courts have long recognized that an order to abide by the conditions of probation conveys to the probation officer significant discretion.[146] Ironically, the *Austin* decision upon which the court bases its ruling in *B.Y.* involved the violation of a condition set by the probation officer. The *Austin* court, in affirming the trial court's revocation of probation, held that there was "sufficient evidence to warrant finding that the appellant intentionally disobeyed his probation officer's instructions."[147] Therefore, they found "no abuse of discretion in the decision to revoke probation."[148]

In *B.Y.,* the court does not appear to recognize the authority of a probation officer to set conditions for a probationer and have those conditions enforced by the court through violation proceedings. This lack of recognition was apparent in the court's refusal to consider the curfew violation because it was not part of the disposition order, and its discussion of mitigating factors.

Determination of mitigating factors under the EJJ probation violation statute is an issue of first impression.[149] Therefore, the court's articulation of the mitigating factors presented in *B.Y.* is helpful.

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he not violate the terms of his probation"). The court also finds that B.Y.'s admission to the curfew violation was not an admission to the probation violation. All parties understood that B.Y. admitted that, by violating curfew, he violated his EJJ probation. *See id*. at *1; Appellant's Brief and Appendix, *supra* note 66, at 6; Respondent's Brief, *supra* note 66, at 9. Thus, the Supreme Court created a factual distinction that is not supported by the record.

146. Morrissey v. Brewer*,* 408 U.S. 471, 478-79 (1972). In *Morrissey*, the Supreme Court recognized the necessity of vague conditions of probation as consistent with the broad discretion of a probation officer, holding that

> The enforcement leverage that supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity. The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid "undesirable" associations or correspondence.

Id.; *see also* State v. Austin, 295 N.W.2d 246 (Minn. 1980).

147. *Austin,* 295 N.W.2d at 250.

148. *Id.*

149. *B.Y.*, 659 N.W.2d at 769.

However, the way in which the opinion is written results in less guidance and, perhaps, more confusion for trial courts in EJJ revocation cases.

Without citing supporting authority, the court concludes that: "The relevant mitigating factors are not those circumstances surrounding the original offense, but rather the mitigating factors relating to the probation violation."[150] No explanation is given for this conclusion. It may be that the court is interpreting the requirement to examine "mitigating factors" as consideration of "mitigating circumstances," required by the Criminal Rules of Procedure.[151] However, even if this is assumed, it is unclear why the court focuses only on the factors relating to the probation violation and excludes any consideration of the facts surrounding the underlying offense.

It is arguable that the court's holding is justified because the underlying offense has already been considered in the decision to designate an offender as EJJ.[152] However, the same is true in adult cases. The underlying offense is an integral part of the original sentence.[153] If the sentence is stayed, the underlying offense is again considered in adult revocation proceedings under the provisions of Minnesota's Sentencing Guidelines.[154]

Because revocation of the EJJ designation results in a transfer of the case to adult court, it is logical to apply the adult standards to the decision to revoke the stayed adult sentence. Furthermore, the standards set forth in the Sentencing Guidelines are consistent with the intent of the EJJ statute. The Guidelines caution that the decision to revoke is a serious one and "should not be a reflexive action to technical violations of the condition of the stay."[155] The Guidelines also urge trial courts to use "great restraint" in execution of a prison sentence for offenders originally convicted of "low severity offenses" or offenders who have "short prior criminal histories."[156] The court's reasoning in *B.Y.* is consistent with this portion of the Sentencing Guidelines. However, the

150. *Id.* at 769-70.

151. *See* MINN. R. CRIM. P. 27.04, subd. 2(1)(d).

152. The severity of the offense is one of the six public safety factors the court is required to consider under MINN. STAT. § 260B.130, subd. 2 (2002).

153. SENTENCING GUIDELINES, *supra* note 116 (showing the severity of the offense as one of the two factors considered in sentencing).

154. *Id.* § III.B. (2003) (urging less judicial forbearance for violations by those "convicted of a more severe offense"); *see, e.g.*, State v. Hamilton, 646 N.W.2d 915, 918 (Minn. Ct. App. 2002) (considering the severity of the offense during a revocation hearing for probation violations).

155. SENTENCING GUIDELINES § III.B, *supra* note 116.

156. *Id.*

reasoning in *B.Y.* ignores the next statement within the Guidelines: "Less judicial forbearance is urged for persons violating conditions of a stayed sentence who were convicted of a more severe offense or who had a longer criminal history."[157] The effect these provisions of the Sentencing Guidelines have on EJJ revocation proceedings is a question that remains unanswered by this opinion.

After confining consideration of mitigating factors to circumstances relating to the probation violation, the *B.Y.* court explains the mitigating factors it found in the record. These factors include: B.Y.'s amenability to treatment in a probationary setting as demonstrated by his successful completion of a juvenile residential program, the term of probation violated not being a condition set by the court or perhaps not clearly understood by B.Y., and, in light of all the circumstances, the failure to show that B.Y. could not be counted on to avoid antisocial activity.[158]

While giving guidance on what factors should be considered as part of the EJJ revocation decision, the court's analysis is troubling in a number of ways. First, the court appears to put itself in the position of fact finder rather than a reviewing court. Second, the opinion disregards the lower court's consideration of interim sanctions imposed by the probation officer prior to commencement of the violation proceedings.

The opinion states of B.Y.'s violation of the curfew established by the probation officer that "[a]lthough appellant was warned by the probation officer of the curfew, it is probable that appellant did not fully comprehend the harsh sanction he would face for violating curfew. Similarly, it is more probable that such a violation is not evidence that appellant is likely to return to criminality."[159] The court makes no reference to the record to support these conclusions. Furthermore, the lower-court record does not appear to support these conclusions. Thus, this portion of the opinion indicates a willingness of the *B.Y.* court to step outside its role as a reviewing court and to sit as a fact finder.[160]

Equally troubling is the court's apparent disregard of the trial

157. *Id*.

158. *B.Y.*, 659 N.W.2d at 769-72.

159. *Id.* at 770.

160. *See In re* M.D.O., 462 N.W.2d 370, 374-75 (Minn. 1990) (discussing the purpose of appellate review to determine whether a trial court made an error and not to try the case de novo). Standards of review exist to ensure "uniformity and consistency by prohibiting the retrial of a case on appeal." *Id.* at 374. "Trial courts stand in a superior position to appellate courts in assessing the credibility of witnesses." *Id.* at 374-75. *See also* State v. Kates, 616 N.W.2d 296, 300 (Minn. Ct. App. 2000) (remanding a case after noting that a certain factual determination would exceed the role and ability of an appellate court).

court's consideration of intermediate sanctions imposed by the probation officer prior to commencement of the violation proceedings. Although the probation violation listed B.Y.'s failure to abide by his curfew as the sole grounds for revocation, the attached probable cause statement chronicled other behaviors.[161] The probable cause statement alleged that B.Y. had failed to maintain regular contact with his probation officer, attend school, reside at home, abide by the curfew set by his probation officer, and had been found in a home where gang members were present.[162] At the violation hearing, the probation officer informed the court that, as a result of these behaviors, B.Y. had been placed on a more intense level of supervision, told to perform community work service hours (which, according to the probation officer, he had failed to complete), and placed in detention for forty-eight hours.[163] The probation officer also informed the court that the same evening B.Y. was released from detention following his forty-eight-hour placement, he violated his curfew.[164]

The trial court's Memorandum of Law accompanying the revocation order reflects consideration of these intermediate sanctions.[165] Absent the acknowledgement that B.Y. "apparently did not comply" with the requirement that he keep in touch with his probation officer,[166] the *B.Y.* court does mention the other factors considered by the trial court when it concluded that the adult sentence was executed "as a result of a curfew violation."[167] Thus, it appears the *B.Y.* court failed to consider the record used by the trial court in deciding to revoke B.Y.'s EJJ designation and execute his adult sentence.

Disregard of the factors considered by the trial court appears inconsistent with the standard of review previously applied to both juvenile and adult revocation proceedings. In applying the *Austin* analysis to the record of the proceedings, the *B.Y.* court does not afford the trial court broad discretion. Nor does the court articulate the trial court's abuse of its broad discretion. Perhaps one of the most important messages lower courts can take from *B.Y.* is the importance of making a

161. *See* Appellant's Brief and App., *supra* note 67, at App. 2-3 (citing Order and Memorandum). The original Order and Memorandum is not accessible to the public due to B.Y.'s juvenile status at the time of the offense.
162. *See id.*
163. *Id.*
164. *Id.* at 2-4.
165. *See id.*
166. *B.Y.*, 659 N.W.2d at 771.
167. *Id.*

complete record of all reasons justifying the trial court's decision.

V. CONCLUSION

Because it is a case of first impression, the *B.Y.* decision makes an important contribution to the growing body of law governing EJJ proceedings. By holding that the three-step *Austin* analysis used in adult cases also applies to EJJ revocation proceedings, the court provides an analytical structure for lower courts to use in EJJ revocation proceedings. More guidance is needed as to whether the analysis applies to the decision to revoke EJJ designation or only to the decision to revoke the stay of execution of sentence upon transfer to adult court. Application of the first two *Austin* factors is consistent with both the spirit and intent of the EJJ statute. Application of the third *Austin* factor to the decision to revoke the stay of execution of sentence appears consistent with the policies applied in adult proceedings; however, it appears inconsistent with the intent of the statute to provide certainty of punishment. In addition, the way in which the *B.Y.* court applies the *Austin* analysis to the facts of the case calls into question previously well-established principles of law. It is now unclear what standard of review will be used, and to what extent a probation officer's authority can be enforced, in EJJ revocation cases. The decision leaves as many questions unanswered as it answers, and thus ensures further litigation and debate on how best to implement Minnesota's Extended Jurisdiction Juvenile statute.