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JUVENILE LAW

INTRODUCTION

Juvenile law has always been a complicated subject to untangle. Courts historically have had difficulties deciding how to label and treat juveniles because the crimes they commit are difficult to categorize and society is reluctant to view children as mature individuals. Simply stated, children are immature, lacking the faculties and responsibilities of adults. Juveniles learn and react through their unique experiences which creates a severe tension when courts attempt to treat individuals in a common juvenile system. Society tends to protect a child offender's innocence, but this tendency is difficult to sustain when children commit increasingly atrocious crimes.

Juveniles were subjected to the same justice system as adults until the late nineteenth century.[1] The juvenile justice system today is an entirely different entity from the justice system for adults.[2] "These systems are governed by different laws, follow different procedures, use different terminology, and operate under different philosophies as to their purpose and the nature of the suspects who come before them."[3]

Be it the commission of crimes or the capacity to stand trial or testify, the struggle to define the contours of juvenile justice within an adult focused system is a persistent reality. This survey[4] attempts to unravel some of the mysteries behind the juvenile justice system, why it exists as it does, and where it is going through an analysis of the Tenth Circuit's treatment of juvenile law. Part I explores the transfer of juveniles to adult status through *United States v. Leon, D.M.*[5] Part II discusses children as witnesses through *United States v. Allen J.*[6] Although competency requirements are the same for both children and adults,[7] courts treat child witnesses with more discretion. Questions arise regarding the veracity of children's statements and their ability to withstand the severe psychological impact of trial type proceedings.[8] Issues of child abuse further

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1. *See* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 179 (1997).
2. *See* PETER W. GREENWOOD ET AL., AGE, CRIME, AND SANCTIONS: THE TRANSITION FROM JUVENILE TO ADULT COURT at v (1980).
3. *Id.*
4. This survey addresses cases decided by the Tenth Circuit Court of Appeals between September 1, 1997, and August 31, 1998.
5. 132 F.3d 583 (10th Cir. 1997).
6. 127 F.3d 1292 (10th Cir. 1997).
7. The Federal Rules of Evidence state: "Every person is competent to be a witness except as otherwise provided in these rules." FED. R. EVID. 601. The rules set out no further exceptions for children. *See id.*
8. *Cf.* Lucy Berliner, *The Child Witness: The Progress and Emerging Limitations*, 40 U. MIAMI L. REV. 167, 169 (1985).

complicate these proceedings.[9] This survey examines the advantages and disadvantages of allowing children to testify and discusses the emergence of juvenile witnesses and their place in the juvenile justice system.

I. TRANSFERRING JUVENILES TO ADULT STATUS

A. *Background*

In recent decades, an onslaught of juvenile offenders committing heinous crimes flooded the justice system.[10] Appalled citizens recognized that sentences for many felonies, including murder, allowed a juvenile to go to jail only until he or she attained the age of majority after which time he or she was returned to the streets.[11] The courts may impose more lenient sanctions and penalties on young criminal offenders until the juvenile system labels them as "adults."[12]

The trend is for society to respond to juvenile offenders with rehabilitation, not severe punishment.[13] Underlying this trend is the theory that children are of a tender age, and the system has an obligation to try to "fix" them so that they can become a functional part of society.[14] Furthermore, the different capacities of adults and children require different treatment under the law.[15] The state acts as the *parens patriae* of the

9. *See generally* Elizabeth Vaughan Baker, *Psychological Expert Testimony on a Child's Veracity in Child Sexual Abuse Prosecutions*, 50 LA. L. REV. 1039 (1990) (arguing that the justice system needs to revamp itself in order to serve the needs of increasing child sex abuse cases); Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439 (1994) (discussing the different theories as to how children react to testifying and whether it is contrary to the defendant's due process rights); Julie A. Dale, Comment, *Ensuring Reliable Testimony from Child Witnesses in Sexual Abuse Cases: Applying Social Science Evidence to a New Fact-Finding Method*, 57 ALB. L. REV. 187 (1993) (analyzing whether children's testimony in sexual abuse cases is reliable enough to utilize, and suggesting ways to improve the process).

10. *See generally* JUDGE JERRY L. MERSHON, JUVENILE JUSTICE: THE ADJUDICATORY AND DISPOSITIONAL PROCESS 11–12 (1991) (analyzing the juvenile justice system from its inception through the present adjudicatory process); Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, 22 CHAMPION 10, 10–11 (1998) (discussing the expansion of younger juvenile offenders and how they should be handled in the justice system, and encouraging the maintenance of the juvenile court system as a means of protecting our children); Edward L. Thompson, *Juvenile Delinquency: A Judge's View of Our Past, Present, and Future*, 46 OKLA. L. REV. 655, 655 (1993) (addressing the increase in serious juvenile crimes, particularly with respect to the Oklahoma Juvenile Code); Holly Beatty, Comment, *Is the Trend to Expand Juvenile Transfer Statutes Just an Easy Answer to a Complex Problem?*, 26 U. TOL. L. REV. 979, 980 (1995) (questioning the motives behind transferring juveniles to adult status in criminal court).

11. *Cf.* Thompson, *supra* note 10, at 655–56.

12. *See* DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM, DELINQUENCY, PROCESSING, AND THE LAW 1–2 (1992).

13. *Cf.* Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1038–39 (1995); Thompson, *supra* note 10, at 656–57; Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 373 (1998).

14. *See* Aron & Hurley, *supra* note 10, at 11–12.

15. *See* Ross, *supra* note 13, at 1038.

child, striving to protect the child's integrity.[16] Difficulties arise, however, when juveniles commit particularly violent crimes, and society favors punishment over protection in the belief that doing so serves the best interests of justice.[17] Ongoing tension results between the desire to protect and rehabilitate juvenile offenders, and society's appetite for retribution in cases where especially violent crimes are committed.[18]

Historically, judges looked to the nature of the offender, not the offense.[19] Considering the increasingly violent nature of juvenile crimes, the particular circumstances of juvenile offenders are eliciting less sympathy from the public and, looking forward, the life circumstances of juvenile offenders likely will carry less weight with the courts. Judges may be hesitant to send a juvenile to jail for fear of the consequences of exposure of the juvenile to prison life,[20] yet more and more juveniles are being prosecuted in adult criminal courts.[21]

1. Emergence of Procedural Rights

Two Supreme Court decisions primarily shape juvenile rights within the judicial system. *Kent v. United States*[22] paved the way for emerging juvenile rights, holding that juveniles are entitled to a hearing before transfer to adult criminal court and the right to confer with counsel throughout the hearing process.[23] The ideals expressed in the *Kent* case stemmed from "social welfare policy rather than in the corpus juris."[24] The *parens patriae* role of the state dictated a supervisory role of the government:

> The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal

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16. *See id.* at 1039. *Parens patriae* is the theory that the government acts as an "ultimate parent and guardian of all children, car[ing] for all children who need [] protection." *Id.*
17. *See id.* at 1039–41.
18. *Cf. id.* at 1044; Beatty, *supra* note 10, at 979.
19. *See* Klein, *supra* note 13, at 377.
20. *See id.* at 402.
21. *See* Aron & Hurley, *supra* note 10, at 10–12. Aron and Hurley raise the point that the offenders are still children:

> As society becomes more punitive in response to rising crime rates, it fails to recognize and acknowledge that juvenile offenders are children. They are children often confronted by family and socioeconomic problems and personal trauma which negatively influence their behavior, often resulting in heinous acts. Many juvenile offenders live lives more problematic and horrific than most adults can imagine. Such backgrounds call for rehabilitation, not punishment; opportunity, not ostracism. They are, after all, children.

Id. at 11.

22. 383 U.S. 541 (1966). Kent, age 14, was convicted of housebreaking and robbery and placed on probation. *See Kent*, 383 U.S. at 543. Two years later, police officers took Kent into custody for robbing and raping a D.C. woman. *See id.* They interrogated him at the police headquarters without the benefit of counsel or his parents. *See id.* at 534–44. Kent was then detained in a Receiving Home for a week, with no hearing or arraignment. *See id.* at 544–45. The juvenile court waived jurisdiction without a hearing and without ruling on any of the motions filed by Kent's counsel. *See id.* at 546.
23. *See id.* at 561.
24. *Id.* at 554.

> conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.[25]

The Court's decision in In re *Gault*[26] expanded the definition of juvenile rights by granting the right to notice of charges, to counsel, to confrontation, to cross-examination of witnesses, and to the privilege against self-incrimination.[27] Both *Kent* and *Gault* underscored the fact that "[j]uvenile courts had failed to deliver on their promise of treatment, and instead were merely providing punishment in the form of training schools or other types of incarceration."[28]

2. Transfer Process

Removal of juvenile offenders from the juvenile to adult judicial system occurs by way of a "transfer" of jurisdiction.[29] Since the juvenile courts were developed to address juvenile crimes, a compelling reason to prosecute under adult law must exist. Juvenile defendants will typically argue against the transfer process because the sentencing alternatives under the adult system may be much more severe.[30]

Only three avenues exist for a juvenile to be transferred to adult criminal court, all of which are governed by statute.[31] First, the juvenile court may waive jurisdiction.[32] Second, statutes may mandate immediate transfer, depending on the type of crime.[33] Finally, the legislature may give the prosecutor discretion to file charges either in juvenile or adult criminal court.[34]

Few jurisdictions provide for an intermediary court where juvenile sentencing may be more appropriate.[35] Although transfer methods exist, juveniles tried in juvenile court may be awarded longer sentences and harsher punishments than offenders tried for similar crimes in adult

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25. *Id.* The Court continues to explain that the parental role of the state encourages a civil, not a criminal dimension to juvenile proceedings. *See id.* at 555. "[T]he child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment." *Id.* (footnote omitted).

26. 387 U.S. 1 (1967). Gault was fifteen years old when he was convicted of making obscene phone calls. *See* In re *Gault*, 387 U.S. at 4–7. Gault was sent to the State Industrial School for a maximum of six years by the juvenile court for being a "delinquent." *Id.* at 4.

27. *See id.* at 28–31.

28. THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS, LEGAL AND PSYCHOLOGICAL COMPETENCE 4–5 (1981).

29. *See* Leta R. Holden, Tenth Circuit Survey, *Juvenile Law*, 73 DENV. U. L. REV. 843, 855 (1996).

30. *See* Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1261 (1996).

31. *See* Klein, *supra* note 13, at 374.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See* Holden, *supra* note 29, at 855.

criminal court.[36] Alternatively, juveniles tried in adult criminal court will be subject "to the full range of adult punishments, including life imprisonment and the death penalty."[37]

Title 18, section 5032 of the United States Code governs delinquency[38] proceedings in federal district courts and the transfer of children for criminal prosecution.[39] The statute deters the transfer of juveniles to adult status in order to encourage individual rehabilitation and discourage the stigma attached to adult status and criminal trials.[40]

On the other hand, the statute indicates that juvenile offenders may be transferred to adult status if it serves the best interests of justice.[41] The statute sets out six factors to weigh when considering a transfer:

> [1] the age and social background of the juvenile; [2] the nature of the alleged offense; [3] the extent and nature of the juvenile's prior delinquency record; [4] the juvenile's present intellectual development and psychological maturity; [5] the nature of past treatment efforts and the juvenile's response to such efforts; [and 6] the availability of programs designed to treat the juvenile's behavioral problems.[42]

The statute also provides for an analysis of the nature of the offense, taking into consideration

> the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.[43]

3. Transfer in the Tenth Circuit

In addressing whether a court should transfer juveniles transferred to adult status, the Court of Appeals for the Tenth Circuit concentrates pri-

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36. *See id.*

37. *Id.*

38. It is important to distinguish between "delinquency" and "status offenses." Delinquency exists when children commit offenses that would also be offenses if committed by an adult. *See* GARDNER, *supra* note 1, at 199. Status offenses are those that are unique to children (such as truancy). *See id.* Juvenile courts tend to have original jurisdiction over both. *See id.*

39. *See* 18 U.S.C. § 5032 (1994 & Supp. II 1996).

40. *See In re* Sealed Case (Juvenile Transfer), 893 F.2d 363, 367–68 (D.C. Cir. 1990) (stating that the purpose of the Juvenile Delinquency Act lies in the recognition that "it is in the best interest of both the juvenile and society that juveniles be insulated from the stigma associated with criminal trials, the publicity, the retributive atmosphere and threat of criminal incarceration attendant to criminal proceedings"); *see also* U.S. v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980) (stating that the purpose of the Juvenile Delinquency Act is to remove juveniles from the regular criminal justice system and to treat them separately from adults).

41. *See* 18 U.S.C. § 5032.

42. *Id.*

43. *Id.*

marily on jurisdictional issues, as opposed to the section 5032 statutory factors. The Tenth Circuit has established that the court does not have jurisdiction over transfer orders because they are not final orders.[44] In 1996, the Tenth Circuit was in accord with other circuits in claiming that "an order transferring a juvenile to be tried as an adult is immediately appealable."[45] This is the doctrine of collateral order,[46] which provides certain exceptions to the general rule requiring a final judgment for an interlocutory appeal. The three situations that warrant an immediate appeal are when the order has conclusively determined the question in debate, resolved a separate important issue other than the merits of the case, or will be "effectively unreviewable on appeal from a final judgment."[47]

The Tenth Circuit's 1996 decision, *United States v. Angelo D.*,[48] allowed an immediate appeal of a transfer order because any delay would threaten the benefits afforded by the juvenile justice system.[49] These threatened benefits included serving time at a foster home or a community-based facility closer to the juvenile's home, instead of an adult prison that may be far away and more dangerous;[50] keeping records and photographs sealed from the public and the media; and concealing the juvenile's identity.[51] If the defendant had to wait until there was a final judgment at the close of the trial before bringing an appeal, these benefits could not accrue, defeating the purpose of having a separate juvenile justice system.[52] The Tenth Circuit also ruled that "[t]he purpose of the federal juvenile delinquency proceeding is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[53] In 1997, the Tenth Circuit decided the following case in an effort to further this proposition.

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44. *See* United States v. Angelo D., 88 F.3d 856, 857–58 (10th Cir. 1996).

45. *Id.* Other circuits have followed this rule as well. *Cf.* United States v. J.J.K., 76 F.3d 870, 871–72 (7th Cir. 1996); United States v. Doe, 49 F.3d 859, 865 (2d Cir. 1995); United States v. One Juvenile Male, 40 F.3d 841, 844 (6th Cir. 1994); United States v. A.R., 38 F.3d 699, 701–02 (3d Cir. 1994); United States v. Bilbo, 19 F.3d 912, 914–15 (5th Cir. 1994); United States v. Gerald N., 900 F.2d 189, 190 (9th Cir. 1990); In re *Sealed Case*, 893 F.2d at 368; United States v. Smith, 851 F.2d 706, 708 (4th Cir. 1988); United States v. A.W.J., 804 F.2d 492, 492 (8th Cir. 1986); United States v. C.G., 736 F.2d 1474, 1477 (11th Cir. 1984).

46. The doctrine of collateral order arose out of the 1949 Supreme Court decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545–47 (1949).

47. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

48. 88 F.3d 856 (10th Cir. 1996).

49. *See Angelo D.*, 88 F.3d at 858 (citing United States v. Doe, 49 F.3d 859, 865 (7th Cir. 1996)).

50. *See* 18 U.S.C. § 5035 (1994); *see also Angelo D.*, 88 F.3d at 858.

51. *See* 18 U.S.C. § 5038 (1994 & Supp. II 1996); *see also Angelo D.*, 88 F.3d at 858.

52. *See Angelo D.*, 88 F.3d at 858.

53. United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990) (citing United States v. Mechem, 509 F.2d 1193, 1195–96 (10th Cir. 1975)); Cotton v. United States, 355 F.2d 480, 481 (10th Cir. 1966); United States v. Webb, 112 F. Supp. 950, 950–51 (W.D. Okla. 1953)).

B. *Tenth Circuit Decision*—United States v. Leon, D.M.[54]

1. Facts

Leon D.M., seventeen years old, was charged with murdering a two-year-old boy on a San Juan Indian reservation in New Mexico.[55] Before the murder, Leon moved in with a twenty-five-year-old woman, Ms. Chavez, had a child with her, and helped take care of three children from her previous marriage.[56] On November 16, 1995, Leon called Ms. Chavez at work because one of her children had allegedly fallen off of a bicycle and needed medical attention.[57] Leon attempted to administer cardio-pulmonary resuscitation, but upon arrival at the hospital the victim died.[58] An autopsy revealed that the injuries and death could not have resulted from a bicycle injury, but only from multiple blows inflicted at the same time.[59] The government submitted evidence of some child abuse, and the court asked both parties to submit information regarding facilities that accepted juvenile offenders.[60] The trial court judge considered the factors set forth in section 5032 of the Federal Juvenile Delinquency Act[61] and denied a motion to transfer to adult status.[62] On appeal, the government contended that the district court erred in denying the motion to transfer.[63] Leon argued that the court lacked jurisdiction over the appeal and, on the merits, the record supported keeping him in juvenile status.[64]

2. Decision

a. *Jurisdiction*

The Tenth Circuit Court of Appeals claimed jurisdiction over this appeal through the *Cohen* collateral order doctrine.[65] Although a final decision had not been issued, the court agreed that the required elements for an immediate appeal had been satisfied.[66] The first two elements were readily apparent: "[t]he transfer order conclusively determine[d] whether the defendant [was] to be tried as an adult or a juvenile and resolve[d] an important issue separate from whether the juvenile [was] innocent or

54. 132 F.3d 583 (10th Cir. 1997).
55. *See Leon, D.M.*, 132 F.3d at 584–85.
56. *See id.* at 585.
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.* at 585–86.
61. 18 U.S.C. § 5032 (1994 & Supp. II 1996).
62. *See id.* at 586.
63. *See id.* at 587.
64. *See id.*
65. *See id.* at 589 (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)); *see also supra* note 46 and accompanying text.
66. *See id.* at 588 (quoting United States v. Angelo D., 88 F.3d 856, 858 (10th Cir. 1996)).

guilty of the current charges."[67] The third requirement, "[w]hether the transfer order would be effectively unreviewable from a final judgment," warranted a deeper analysis[68] and required the court to consider the purpose behind the Federal Juvenile Delinquency Act.[69] As previously discussed, the Act intends to grant further protection to children by removing them from ordinary criminal proceedings and attempting to rehabilitate them, thereby enhancing their chances of becoming functional adults in society.[70]

Leon argued that no right was irretrievably lost if the appellate court required the government to wait until the district court rendered a final decision. Leon distinguished his case from a prior Tenth Circuit case, *Angelo D.*,[71] asserting that when the government rather than the defendant requests an appeal on a denial of transfer, the third *Cohen* element is not satisfied.[72] The reason for this is that the government loses no right if the court requires a final judgment before appeal.[73]

Leon was a case of first impression for the Tenth Circuit and the court followed the approach adopted in both the Second and Ninth Circuits in allowing the government to request such an appeal.[74] These circuits weighed the interests of the state in promoting rehabilitation and protecting juveniles against the opposing interest of protecting citizens by keeping dangerous juveniles off the streets, especially if they met the adult status requirements under the Federal Delinquency Act.[75] Furthermore, because of the "double jeopardy" clause articulated in *United States v. Hawley*,[76] the government would be unable to retry the juvenile for the same offense.[77] The government is permitted only one opportunity to prosecute and should be afforded the same benefit as the defendant by an immediate appeal.[78] Accordingly, the court claimed jurisdiction over the appeal.[79]

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67. *Id.*
68. *Id.*
69. *See id*; *see also* Federal Juvenile Deliquency Act, 18 U.S.C. § 5032 (1994 & Supp. II 1996).
70. *See id.* (citing *Angelo D.*, 88 F.3d at 858; United States v. Brian N., 900 F.2d 218, 220 (10th Cir. 1990)).
71. 88 F.3d 856 (10th Cir. 1996).
72. *See Leon, D.M.*, 132 F.3d at 588.
73. *See id.*
74. *See id.* (citing United States v. Doe, 94 F.3d 532, 535 (9th Cir. 1996); United States v. Juvenile Male No. 1, 47 F.3d 68, 70–71 (2d Cir. 1995)).
75. *See id.* at 588–89.
76. 93 F.3d 682 (10th Cir. 1996).
77. *See Leon, D.M.*, 132 F.3d at 589 (citing United States v. Hawley, 93 F.3d 682, 687 (10th Cir. 1996)). The Fifth Amendment guarantee against double jeopardy protects against a second prosecution or multiple punishments for the same offense. *See* U.S. CONST. amend. V; *see also Hawley*, 93 F.3d at 687.
78. *See Leon, D.M.*, 132 F.3d at 589.
79. *See id.*

b. *Motion to Transfer*

In analyzing the district court's determination on the motion to transfer, the Tenth Circuit balanced the six factors listed in section 5032 of the Federal Delinquency Act.[80] The court concluded that despite strong arguments by the government in favor of transferring Leon to adult status, the district court had broad discretion in weighing these factors.[81] The trial court did not abuse its discretion in deciding that more pertinent factors, other than Leon's proximity to the age of majority and the severity of the crime, outweighed the transfer to adult status.[82]

The court reiterated that under section 5032, juvenile adjudication is presumed suitable and the government has the burden to convince otherwise.[83] Moreover, appellate review of section 5032 cases is highly deferential, and the appellate court will only review when there is an abuse of discretion.[84] A district court's ruling should only be overturned if the court's factual findings were clearly erroneous, and not if another court could merely weigh the factors differently and arrive at a different conclusion.[85]

Despite Leon's proximity to the age of majority and the seriousness of his crime, the court concluded that his slower intellectual development and psychological immaturity, as well as the existence of several treatment programs available to offenders of his type, required the Leon to be tried as a juvenile.[86]

3. Analysis

The Tenth Circuit's reasoning in *Leon* supports the argument that courts aspire to protect the integrity of children. Since the appellate court gave deference to the district court in weighing the statutory factors, an analysis of the district court's findings is proper. On the merits, the district court conducted a weighing of the various factors to determine the appropriateness of either a juvenile or adult course of judicial action.[87] The court found that the two most influential factors favoring a transfer

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80. *See* 18 U.S.C. § 5032 (1994 & Supp. II 1996) (establishing statutory factors such as age and social background of the child, the nature of the alleged offense, the extent and nature of the juvenile's prior offense record, the child's present intellectual development and psychological maturity, the nature of past treatment efforts and the juvenile's response to them, and the availability of programs developed to treat the child's behavioral problems).

81. *See Leon, D.M.*, 132 F.3d at 590.

82. *See id.* at 590–91.

83. *See id.* at 589; *see also* United States v. Nelson, 68 F.3d 583, 588 (2nd Cir. 1995); *see also* United States v. Juvenile Male No. 1, 47 F.3d 68, 71 (5th Cir. 1995).

84. *See Leon, D.M.*, 132 F.3d at 590; *see also Juvenile Male No. 1*, 47 F.3d at 71.

85. *See Leon, D.M.*, 132 F.3d at 590; *see also Juvenile Male No. 1*, 47 F.3d at 71.

86. *See Leon, D.M.*, 132 F.3d at 590.

87. *See id.* at 589–90.

were that D.M. was almost of majority age, eighteen, at the time of the offense and the crime's violent nature.[88]

a. *Factors Warranting a Transfer to Adult Status*

The court pointed out the fact that Leon was three days away from his eighteenth birthday, indicating just how close he was to being tried as an adult without any further consideration of his disposition.[89] But Leon's age was not the only factor examined.[90] The court also analyzed Leon's social background, which included dropping out of high school and beginning a relationship with a much older woman.[91] Leon placed himself in a father figure role by both fathering a child at the age of sixteen and also by taking care of his mate's children from a previous relationship.[92] Leon assumed these roles without any indication that he was capable of doing so.[93]

The court also weighed the seriousness of the crime as a factor favoring adult adjudication.[94] Leon was accused of murder, the most grave of all criminal offenses.[95] He sought to mitigate the impact of the charge by arguing that he was under an incredible amount of pressure and was burdened by the responsibility of caring for four children.[96] Of course, the fact that the Leon was himself a minor placed him at an even higher risk.[97] Leon argued that these factors led to a loss of temper which, while not excusable, should be considered.[98]

b. *Factors Warranting Retention of Juvenile Status*

The factors warranting juvenile adjudication were more persuasive to the court. The first was Leon's immature nature—the court agreed that his relationship with Ms. Chavez put him in an adult situation that he was not mentally prepared to handle.[99] Moreover, school records indicated that he was a slow learner and a below-average student.[100] Leon was occasionally employed, and his unsettled lifestyle weighed heavily in the court's decision.[101]

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88. *See id.* at 586.
89. *See* United States v. Leon, D.M., 953 F. Supp. 346, 348 (D.N.M. 1996), *aff'd*, 132 F.3d 583 (10th Cir. 1997).
90. *See Leon, D.M.*, 953 F. Supp. at 348.
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.* at 349.
100. *See id.*
101. *See id.*

Leon's delinquency record was substantial quantitatively, but not qualitatively, and did not support a transfer particularly since he previously demonstrated no violent behavior.[102] His record showed three minor infractions: malicious mischief, a minor drug violation, and disorderly conduct, for each of which he was fined only $100.[103] He failed to pay the fines and also testified to smoking marijuana on occasion, but the court viewed this as insignificant as compared to the behavior of juveniles in other jurisdictions.[104]

Additionally, Leon never had the benefit of prior treatment, a factor which encouraged the court to retain him as a juvenile.[105] The court acknowledged the availability of many programs that had the potential to successfully educate and rehabilitate Leon in a manner useful to society.[106]

c. *Standard of Review*

The government carries the burden of persuading the court of the necessity of a transfer to adult status,[107] and the court found in this situation that the statutory factors weighed heavily in favor of retaining Leon as a juvenile.[108] The court is not required to give equal weight to each factor, but it can balance the factors in a manner that appears appropriate under the specific circumstances.[109] The trial court is afforded broad discretion in applying the balancing test, and no court of appeals has ever reversed a trial court's decision on this matter.[110] Even if a higher court could have reached a different conclusion, this would not suffice to reverse the lower court's decision, so long as the court made the requisite factual findings.[111] Furthermore, the court is not required to state specifically whether each factor alone warrants a transfer.[112] Therefore, the district court's findings set a foundation upon which the appellate court could expand.

d. *Impact of Decision*

In deciding *Leon*, the Tenth Circuit followed the traditional path of protecting the innocence of our children. The Tenth Circuit must be pre-

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102. *See* United States v. Leon, D.M., 132 F.3d 583, 586–87 (10th Cir. 1997).

103. *See Leon, D.M.*, 953 F. Supp. at 348.

104. *See id.*

105. *See Leon, D.M.*, 132 F.3d at 586–87.

106. *See Leon, D.M.*, 953 F. Supp. at 349.

107. *See Leon, D.M.*, 132 F.3d at 589.

108. *See id.* at 590.

109. *Cf.* United States v. Juvenile Male No. 1, 47 F.3d 68, 71 (2d Cir. 1995). A seventeen-year-old male was convicted on a charge of conspiracy to distribute cocaine. *See id.* at 69.

110. *See Juvenile Male No. 1*, 47 F.3d at 71; *see also* United States v. One Juvenile Male, 40 F.3d 841 (6th Cir. 1994); United States v. Bilbo, 19 F.3d 912 (5th Cir. 1994); United States v. Parker, 956 F.2d 169 (8th Cir. 1992).

111. *Cf. Juvenile Male No. 1*, 47 F.3d at 71.

112. *See* United States v. Three Male Juveniles, 49 F.3d 1058, 1061 (5th Cir. 1995).

pared for the steady increase in the number of violent juvenile crimes that will be reflected in the juvenile justice system. Other circuits have been forced to address juvenile crimes that shock the conscience—schoolyard shootings, for example. These types of crimes will eventually exert a formidable influence on the Tenth Circuit's direction in juvenile law, and will force the courts to question the practicality of the current trend protecting children. Society may shift away from rehabilitation, as emphasized in the juvenile delinquency statutes, and toward harsher punishments that serve as a deterrent to the commission of further crimes and satisfy society's appetite for retribution.[113] Proponents of the punishment theory may be anticipating the rising tide of public outrage against violent juvenile crime, and the Tenth Circuit may adopt the punishment theory perspective if they continue to address violent crime cases.

C. *Other Circuits*

Several circuits use the balancing test when deciding to transfer juveniles to adult status.[114] The Fifth Circuit has rejected the argument that each statutory factor needs to be argued and has said that the factors as a whole must be balanced.[115] In *United States v. Three Juvenile Males*, the court held that some factors might indicate a stronger preference for transfer, while others may mandate a retention of juvenile status.[116] Unlike the Tenth Circuit's decision in *Leon*, the seriousness of defendants' crimes and unsuccessful past rehabilitative treatments warranted a transfer to adult status.[117] This illustrates the discretion of trial courts in weighing each statutory provision.

The Second Circuit also followed an "in the interest of justice" scheme for transferring juveniles to adult criminal status.[118] In *United States v. Juvenile Male No.1*,[119] the court justified the transfer primarily on the severity of the crime, which was drug distribution.[120] "In the interests of justice, one last effort to stave off the downward course of life [the defendant] has followed is the more appropriate choice."[121] The Second Circuit also noted that the trial court's choice to focus more on a defendant's background and lack of past treatment efforts, rather than the seriousness of the crime and the defendant's past record, does not suffice

113. *See* Beatty, *supra* note 10, at 992–93. Retribution stands for the proposition of revenge, while deterrence discourages offenders from repeating criminal acts. *See id.*

114. *See* United States v. Three Male Juveniles, 49 F.3d 1058, 1060–61 (5th Cir. 1995).

115. *See Three Male Juveniles*, 49 F.3d at 1061.

116. *See id.* at 1060–61 (citing United States v. Doe, 871 F.2d 1248, 1255–56 (5th Cir. 1989)). In this case, a thirteen-year-old juvenile was convicted of armed robbery. *See id.* at 1249.

117. *See Three Male Juveniles*, 49 F.3d at 1062.

118. *See* United States v. Juvenile Male No. 1, 47 F.3d 68, 69 (2d Cir. 1995).

119. 47 F.3d 68 (2d Cir. 1995).

120. *See Juvenile Male No. 1*, 47 F.3d at 69–70.

121. *Id.* at 70.

for a finding of abuse of discretion.[122] Here, another circuit diverged from *Leon* in concluding that the seriousness of the crime was enough to justify adult adjudication.

Another Second Circuit opinion, *United States v. Nelson*,[123] focused on whether age should be considered at the time of the offense or at the time of the possible transfer.[124] Since the judicial process is so time consuming, a defendant may not be best suited for juvenile-type rehabilitation by the time of adjudication.[125] This appellate court disagreed with the trial court's decision to exclude the defendant's current age from its analysis and remanded the case for further findings.[126] This notion was not addressed in the Tenth Circuit's analysis of the *Leon* case.

The Seventh Circuit also emphasized the importance of discretion in the trial court:

> [W]e join those circuits today and hold that the district court had discretion to give more weight to some factors than to others. Determining whether the transfer of a juvenile to adult status is in the interest of justice is not a simple arithmetical exercise, where the court adds up all the factors to see if the sum is a positive or negative number.[127]

As a result, most circuits use the balancing test, but each circuit gives weight to different statutory factors.

II. JUVENILES AS WITNESSES

A. *Background*

Another prevalent issue in the juvenile justice system focuses on when children may be called as witnesses. The history of juveniles as witnesses illustrates the special protection that courts offer only to children.[128] Deeply rooted in our justice system is the desire to maintain a person's innocence until proven guilty.[129] The United States Constitution provides that a defendant is entitled to confront any witnesses presented;[130] however, the inclination to protect children offsets this

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122. *See id.* at 71.

123. 68 F.3d 583 (2d Cir. 1995).

124. *See Nelson*, 68 F.3d at 589.

125. *See id.*

126. *See id.* at 589, 591 (stating that "[b]y completely eliminating current age from its assessment, the district court misinterpreted the full significance of the age factor").

127. United States v. Wilson, 149 F.3d 610, 614 (7th Cir. 1998).

128. *Cf.* Hon. Barbara Gilleran-Johnson & Timothy R. Evans, *The Criminal Courtroom: Is It Child Proof?*, 26 LOY. U. CHI. L.J. 681, 682 (1995).

129. *Cf.* Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy*, 42 ME. L. REV. 283, 286–87 (1990).

130. The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

ideal.[131] Courts envision children as very delicate and hesitate to put them through the trauma of testifying live in court.

Moreover, courts may be reluctant to place children on the stand since they fear that their testimony is likely to be both inconsistent and inaccurate. These concerns make it difficult for any court to find a reliable formula to use when exercising its dual role as protector of the interests of juvenile witnesses and the constitutional ideal.

The Child Victims' and Child Witnesses' Rights[132] (CVCWR) statute governs juvenile witnesses. Congress enacted the statute as an answer to the public policy concerns of protecting and nurturing our children.[133] The CVCWR allows two alternatives to live testimony: taped deposition or live, two-way, closed-circuit television.[134] Furthermore, the statute expands on the Federal Rules of Evidence by presuming all children competent to testify.[135]

1. Procedure

The first question to address is the competency of the juvenile to testify. Second, if a court finds a child to be competent, it must assess his or her credibility, and determine if allowing the child to testify is in the child's best interest.[136] Particularly in sexual abuse cases, the child may

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> to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI; *see also* LUCY S. MCGOUGH, CHILD WITNESSES 159–61 (1994) (discussing judicial interpretation of the Confrontation Clause and, in particular, the definition of "confrontation").

131. *See* Gilleran-Johnson & Evans, *supra* note 128, at 682.

132. 18 U.S.C. § 3509 (1994 & Supp. II 1996). This statute defines words under "Child victims' and child witnesses' rights." *Id.* A "child" is defined as "a person who is under the age of 18, who is or is alleged to be—(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or (B) a witness to a crime committed against another person." *Id.* The statute also sets out alternatives to live in-court testimony, including competency examinations, privacy protection, closing the courtroom, victim impact statements, use of multidisciplinary child abuse teams, guardians ad litem, adult attendants, speedy trials, stay of civil actions, and testimonial aids. *See id.*

133. *Cf.* Gilleran-Johnson & Evans, *supra* note 128, at 692.

134. *See* 18 U.S.C. § 3509(b)(1), (2). The statute allows for these alternatives "in a proceeding involving an alleged offense against a child." *Id.* § 3509(b)(1)(A), (b)(2)(A).

135. *See id.* § 3509(c)(1), (2).

136. *See id.* § 3509(b)(2)(B)(i). This section states that a child may be unable to testify live in court for any of the following reasons:

> (I) The child will be unable to testify because of fear.
> (II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.
> (III) The child suffers a mental or other infirmity.
> (IV) Conduct by the defendant or defense counsel causes the child to be unable to continue testifying.

Id.

be too afraid to face his or her alleged assailant,[137] and the child's fear may affect the quality of his or her testimony.[138]

a. *Competency*

A court must find children as well as adults "competent" before granting them the opportunity to testify.[139] The Federal Rules of Evidence provide that "[e]very person is competent to be a witness except as otherwise provided in these rules,"[140] which the CVCWR expanded upon. While most children are found competent to testify, it is the absence of credibility that ultimately bars their testimony.[141] Courts have the opportunity to manipulate the system. A judge may prohibit a child's testimony by discrediting him or her on account of lack of personal knowledge[142] or due to unfair prejudice.[143] Higher courts also prefer to honor lower courts' discretion on the issue of competency and will rarely overturn a trial court's holding.[144]

Witness competency is usually the overriding issue in child sex abuse cases because the child victim is often the only eyewitness to the alleged event besides the purported abuser.[145] Courts are concerned that children, either because of emotional trauma, lack of sophistication, or fear of consequences, may not be the most reliable witnesses.[146] Yet, sometimes these children are the only direct link between the child and the offender.[147] Although federal rules[148] are in place regarding these fac-

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137. *See* Brannon, *supra* note 9, at 459.

138. *See id.*

139. *Cf.* Gilleran-Johnson & Evans, *supra* note 128, at 685.

140. FED. R. EVID. 601.

141. *Cf.* Gilleran-Johnson & Evans, *supra* note 128, at 686; Robin W. Morey, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 272 (1985).

142. *See* FED. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

143. *See* FED. R. EVID. 403 (stating that any piece of evidence may be inadmissible if the risk of unfair prejudice outweighs its probative value). Here, if the children relay a frightening story, or one that is incredibly offensive, a jury might convict out of sympathy for the child instead of a belief that the evidence proved the defendant's guilt.

144. *See id.* ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."); *see also* United States v. Gomez, 807 F.2d 1523, 1527 (10th Cir. 1986) (citing Bickford v. John E. Mitchell Co. 595 F.2d 540 (10th Cir. 1979); United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973)).

145. *Cf.* MCGOUGH, *supra* note 130, at 2; Morey, *supra* note 141, at 245.

146. *See* Gilleran-Johnson & Evans, *supra* note 128, at 685, 687 (stating that before the court may allow a child to testify as a witness, it must determine that the child is capable of "observing the events of the particular matter in question," recalling the events, and truthfully relating those events to the court).

147. *See id. See generally* MEMORY AND TESTIMONY IN THE CHILD WITNESS at ix (Maria S. Zaragoza et al. eds., 1995) (observing that "[m]ounting pressures to prosecute cases of child sexual and physical abuse have increased the courtroom appearances of child witnesses and raised questions about the accuracy and reliability of their reports").

148. *See* 18 U.S.C. § 3509 (1994 & Supp. II 1996).

tors, different jurisdictions implement them in different ways.[149] Judges ask children different questions in order to ascertain their competency as witnesses.[150] This lack of a single standard fosters inconsistency throughout the judicial system.

b. *Credibility*

A widely held theory regarding child testimony is that children have a tendency to get confused and do not comprehend concepts of truth and falsehood, right and wrong, and memory.[151] Some argue that children do not have many experiences from which to draw and compare, they have a smaller vocabulary,[152] and they are not sophisticated enough to make certain rational connections. Adults also assume that even if children are capable of understanding what it means to tell the truth, they do not understand the ramifications if they fail to do so, especially in the courtroom.[153] Although many adults believe that children succumb to coaching and suggestions,[154] they forget to acknowledge the susceptibility of adults to these practices as well.[155]

But evidence of weak child testimony is not indisputable. Another theory claims that while a child witness's recollection of events may be less complete than an adult's, it is qualitatively richer.[156] Many psychological experts express their desire to describe techniques to those who interview children that will "maximize the informativeness of children's testimony while minimizing the risks of impeaching their credibility."[157]

c. *Constitutional Issues*

Another concern governing child witnesses involves speculation of emotional trauma on the child after testifying. According to the United States Constitution, a criminal defendant has the right to confront his or her witnesses.[158] But, this right "must be balanced against the potential

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149. *Cf.* Morey, *supra* note 141, at 257.

150. *See id.* at 268.

151. *See* Gilleran-Johnson & Evans, *supra* note 128, at 686–87 (noting that children most often become confused when testifying as the victim, that this confusion is really a mask for the emotional trauma they feel, and that testifying can be devastating to the child).

152. *See* Michael E. Lamb et al., *Making Children into Competent Witnesses: Reactions to the Amicus Brief in In re* Michaels, 1 PSYCHOL. PUB. POL'Y & L. 438, 440 (1995).

153. *See* Belle Kinnan Deaver, *The Competency of Children*, 4 Cooley L. Rev. 522, 523 (1987).

154. *See id.*; *see also* JON'A F. MEYER, INACCURACIES IN CHILDREN'S TESTIMONY: MEMORY, SUGGESTIBILITY, OR OBEDIENCE TO AUTHORITY? 34–35 (1997).

155. *See* Deaver, *supra* note 153, at 526, 531; *see also* MEYER, *supra* note 154, at 31, 48; Lamb, *supra* note 152, at 445 (asserting that "[a]dults, like children, respond to coercion, peer pressure, and manipulation, and children are not well served by the implicit assumption that they hold within their minds more information than they are able to provide").

156. *See* MEYER, *supra* note 154, at 15; *see also* Lamb, *supra* note 152, at 439.

157. Lamb, *supra* note 152, at 439.

158. *See supra* note 130 and accompanying text.

psychological injury the victim may suffer from such encounters."[159] The state's interest is not always met since preventing a juvenile from testifying who may have "the most accurate information"[160] can lower the probability of conviction resulting in less punishment to offenders.

2. Case Law and the Child Witness in the Tenth Circuit

The first case to address the issue of child competency arose in 1895. In *Wheeler v. United States*,[161] the Supreme Court introduced the theory that "there is no precise age which determines the question of competency."[162] The Court began to consider the different rates at which people mature[163] and held that competency depended on "the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former."[164] In 1973, the Tenth Circuit used the *Wheeler* test to decide if a five-year-old child was intelligent, could tell the difference between truth and falsehood, could understand the repercussions of lying at trial, and knew what it meant to take an oath.[165] The *Wheeler* test remains active with some variation depending on the circuit.[166] In 1975, Rule 601 of the Federal Rules of Evidence[167] was enacted which, along with the 1990 statute addressing child witnesses,[168] attempted to streamline competency requirements. Through the promulgation of these rules, the Tenth Circuit now presumes children competent witnesses and "the party seeking to prevent a child from testifying has the burden of providing a compelling reason for questioning the child's competence."[169]

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159. Julie Oseid, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1380 (1985); *see also infra* note 224 and accompanying text.

160. Oseid, *supra* note 159, at 1380.

161. Wheeler v. United States, 159 U.S. 523, 524 (1895). This was a murder trial in which the son of the deceased was going to testify. *See id.*

162. *Wheeler*, 159 U.S. at 524.

163. *See id.*

164. *Id.* The trial court judge essentially was given sole discretion to determine the capacity of the child. *See id.* at 524–25 (stating that the decision of the trial judge will only be overturned upon a showing that the decision was clearly erroneous).

165. *See* United States v. Spoonhunter, 476 F.2d 1050, 1054 (10th Cir. 1973) (citing *Wheeler*, 159 U.S. at 523). The court does not explain whether "intelligence" means average intelligence for a five year old or more intelligent than the average five-year-old.

166. A number of courts have followed the *Wheeler* test. *Cf., e.g.*, Turner v. American Sec. & Trust Co. 213 U.S. 257, 261–62 (1909) (citing *Wheeler*, 159 U.S. at 524); United States v. Schoefield, 465 F.2d 560, 561–62 (D.C. Cir. 1972) (citing *Wheeler*, 159 U.S. at 523); Pocatello v. United States, 394 F.2d 115, 116–17 (9th Cir. 1968) (citing *Wheeler*, 159 U.S. at 523); State v. Oliver, 49 N.W.2d 564, 573 (N.D. 1951) (citing *Wheeler*, 159 U.S. at 523).

167. FED. R. EVID. 601 (deeming "every person" competent).

168. 18 U.S.C. § 3509 (1994 & Supp. II 1996).

169. United States v. Allen J., 127 F.3d 1292, 1295 (10th Cir. 1997).

B. *Tenth Circuit Case*—United States v. Allen J.[170]

1. Facts

Allen J. was fifteen years old when a federal court convicted him of violating the Federal Juvenile Delinquency Act[171] for knowingly using force to engage in a sexual act with a thirteen-year-old juvenile.[172] The court obtained jurisdiction because both Allen J. and the victim were Native American and the crime took place within the Navajo Nation Indian Reservation.[173] Although the case involved rape and sexual abuse, the sole issue on appeal was whether the trial court erred in finding that the thirteen-year-old victim was competent to testify.[174]

Allen J. filed a motion challenging the victim's capability to testify and requested an official competency examination by the court.[175] In support of the motion, Allen J. introduced evidence that the victim suffered from Fetal Alcohol Syndrome,[176] and argued that the Syndrome rendered the victim mildly retarded and learning disabled.[177] Allen J. also contended that due to the victim's poor verbal skills, she would be unable to correctly relate the events of the evening in question.[178] Allen J. argued that this showed the victim was incompetent to testify.[179]

The trial court rejected Allen J.'s argument on the grounds that despite the victim's slower learning capabilities, she was generally older than most, and at least as capable as many children who previously testified.[180] The victim answered preliminary questions about her name and age, and questions regarding truth and falsehood in general.[181] Although the victim answered most of these questions accurately, Allen J. rested the incompetency claim on the silences and inconsistencies that riddled the victim's testimony concerning the rape.[182]

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170. 127 F.3d 1292 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 1204 (1998).

171. 18 U.S.C. §§ 5031–5042 (1994 & Supp. II 1996).

172. *See Allen J.*, 127 F.3d at 1293.

173. *See id.*

174. *See id.*

175. *See id.* at 1294.

176. *See id.* The two pieces of evidence introduced consisted of (1) a "6–9 Year EPSDT Tracking form" which was completed four years prior to the trial (December 30, 1992) and (2) a report from a pediatrician dated October 9, 1993. *Id.* This document stated that the child suffered from "developmental delay and mild mental retardation," but that it was inconclusive as to whether this was a result of Fetal Alcohol Syndrome. *Id.*

177. *See id.*

178. *See id.*

179. *See id.* The defendant stated that a competency examination was needed due to the victim's poor verbal skills which prevented her from accurately relating what took place during the rape. *See id.*

180. *See id.*

181. *See id.* at 1295.

182. *See id.* at 1296.

2. Decision

The Tenth Circuit Court of Appeals affirmed the district court's determination that the victim was competent to testify.[183] The court reasoned that any inconsistencies in the victim's story or problems with her testimony raised questions of credibility, not competency.[184] Rule 601 of the Federal Rules of Evidence presumes competency of a witness,[185] and the trial court had broad discretion in declaring the victim competent to testify.[186]

In addition to the discretion granted to the trial judge, the court recognized the statutory presumption that children are competent witnesses.[187] The statutory scheme places the burden of proof on the party seeking to discredit the child's competency.[188] Pursuant to 18 U.S.C. § 3509, Allen J. needed to produce evidence that would show a "compelling reason" to mandate a competency examination.[189] The court rejected Allen J.'s evidence as unpersuasive, and allowed the victim to testify, leaving her inconsistent answers for the trier of fact to assess.[190]

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183. *See id.* The questioning proceeded as follows:

> When the victim was called to testify, the court asked her a series of questions seeking to confirm she understood the importance of the oath. These questions included: "Do you understand what it is to tell the truth?" and "Do you know the difference between the truth and a lie?" The victim did not respond to the judge's questioning. (The court then asked the prosecutor to try questioning the witness. The prosecutor began with simple questions ("[W]hat is your last name?", "How old are you?", and "Where do you live?"), which the victim answered. After about thirty questions along these lines, almost all of which the victim was able to answer correctly, the prosecutor shifted the questions relating to the difference between the truth and lies. Among other questions, the prosecutor asked the victim if she understood she had promised to tell the truth in court, to which the victim responded affirmatively. After this series of questions, which established the victim knew the difference between a truth and a lie, knew she was to tell the truth in court, and knew she would be punished if she told a lie, the court directed the prosecutor to proceed to the heart of her case.).

Id. at 1295 (alteration in original).

184. *See id.* at 1296.

185. FED. R. EVID. 601.

186. *See Allen J.*, 127 F.3d at 1295, 1296 (citing Wheeler v. United States, 159 U.S. 523, 524–25 (1895) (stating that the standard of review is abuse of discretion)).

187. *See id.* at 1294; *see also* 18 U.S.C. § 3509(c)(2) (1994).

188. *See* 18 U.S.C. § 3509(c)(1)–(4). This section states:

> (1) . . . Nothing in this subsection shall be construed to abrogate rule 601 of the Federal Rules of Evidence. (2) . . . A child is presumed to be competent. (3) . . . A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party. (4) . . . A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

Id.

189. *Allen J.*, 127 F.3d at 1295.

190. *See id.* at 1296. The court continued by pointing out:

> Over one hundred years ago, the Supreme Court held it was proper for a five-year-old to give critical testimony in a capital case . . . . Since that time, the trend in the law has been to grant trial courts even greater leeway in deciding if a witness is competent to testify.

Id. (citing Wheeler v. United States, 159 U.S. 523, 524 (1895); United States v. Cook, 949 F.2d 289, 293 (10th Cir. 1991)); *cf., e.g., supra* note 186.

3. Analysis

a. *Competency*

The Tenth Circuit expanded upon basic principles of evidence law in rendering its decision. Courts approach the competency of witnesses, whether children or adults, in a similar manner.[191] Competency is such an essential issue because the presence or absence of a witness's testimony may decisively affect the outcome of a case. By passing the threshold requirement of competency, the doors open as to the amount of information attainable through a witness, thereby bolstering his or her believability.

The court in *Allen J.* rejected the *Wheeler* test for competency of children, a test that "depends on the capacity and intelligence of the child, [the child's] appreciation of the difference between truth and falsehood, as well as of [the child's] duty to tell the former."[192] *Wheeler* was decided before the enactment of the Federal Rules of Evidence which state that "[e]very person is competent to be a witness except as otherwise provided in these rules."[193] The court interpreted this narrowly and rejected Allen J.'s claims that a child victim's hesitation and inaccurate answers should cause the court to deem that child incompetent.[194]

Attorneys must realize the importance of deeming a child a competent witness. Although it appears that recent statutory provisions make it easy to deem a child competent,[195] judges still retain broad discretion to reject claims of competency.[196] The judge can discredit a child witness due to a finding of lack of personal knowledge[197] or unfair prejudice,[198] but he or she may also find other compelling evidence rendering that child

191. *See Allen J.*, 127 F.3d at 1294 (stating that Federal Rule of Evidence 601 and 18 U.S.C. § 3509 serve as guidelines to determine when children are competent to be witnesses).

192. *Id.* at 1294–95 (quoting *Wheeler*, 159 U.S. at 524).

193. FED. R. EVID. 601. The federal rules on witnesses do not specifically mention children. *See id.*

194. *Allen J.*, 127 F.3d at 1296 (stating that "[a]ny inconsistencies in the victim's story or problems with her testimony, however, raise questions of credibility, not competence," and, "[t]his court has rejected similar arguments before").

195. *See* FED. R. EVID. 601 (deeming every person competent to be a witness).

196. *See* FED. R. EVID. 403 (stating that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

197. *See* FED. R. EVID. 602.

198. *See* FED. R. EVID. 403.

incompetent.[199] Advocates for child witnesses must be prepared to show that the child witnesses meet the threshold standard for competency.[200]

Furthermore, comparison between a juvenile's and an adult's abilities to recall information, to relay that information accurately, and to be susceptible to suggestion and leading questions are factors in determining competency.[201] The court will focus on specific attributes unique to children,[202] such as the child's capacity to tell the truth.[203] The child must be aware of the difference between truth and falsehood, and comprehend the taking of an oath.[204] Next, the court tests the child's mental capacity.[205] To help assure accurate recall of the event, the court will require that the child have sufficient mental capacity and memory at the time of the event.[206] Finally, the child must be able to effectively translate his or her experiences to others and be able to understand and answer simple questions.[207] Each of these elements will play a role in determining the competency of juveniles to testify,[208] making it harder for juveniles than for adults to freely testify and tell their stories.

The myth that adults tell the truth and children lie[209] is not only apparent in our judicial system, but also in our everyday lives. "[T]he relationship between age and memory is complex, with a variety of factors influencing the quality of information provided."[210] Since this research is inconclusive, it is often difficult to create ways to improve the quality of children's testimony.[211]

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199. *See* Gilleran-Johnson & Evans, *supra* note 128, at 685 (stating that the court will also examine the child's intelligence, ability to receive correct impressions, and the child's age when determining whether a child is competent to testify).

200. *See id.* at 685 (explaining that to show competency, the advocate of the child witness must show that the witness has "a minimum capacity to observe, recollect, and recount the incident to which the witness will testify").

201. *See* Baker, *supra* note 9, at 1044–45.

202. *See* DEBRA WHITCOMB, WHEN THE VICTIM IS A CHILD 56 (2d ed. 1992).

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.*

209. *See* Deaver, *supra* note 153, at 522.

210. Lamb et al., *supra* note 152, at 440. Some factors mentioned are the difference between script memories (representations of typical events, not a particular one as remembered) and episodic memories, recall memory ("tell me everything you remember . . . ") and recognition memory ("Was his shirt red?"), and memory performance and memory capacity (children are less capable of retaining large amounts of information, particularly due to their age). *Id.* at 439–40.

211. *See* MEYER, *supra* note 154, at 115. Despite the varying opinions of others, Meyer suggests ways to improve children's testimonies, including: learn from others' mistakes, avoid leading questions, use indirect and nonverbal techniques, rehearsals, reduce perceived authority of interviewer, teach children about their role in the courts, train children to answer questions, and teach children to watch for misleading items. *See id.* at 116–23.

b. *Effects on Juveniles Who Testify*

Finding a juvenile competent to testify represents only the first hurdle in considering the issue of children as witnesses.[212] As previously mentioned, a child-victim may suffer profound detrimental effects by confronting his or her alleged perpetrator.[213] A child's advocate must consider whether the benefits of allowing the child an opportunity to be heard outweigh the potential trauma of giving testimony.[214] Factors to consider include, but are not limited to, the age of the child, the circumstances surrounding the trial (e.g., the type of offense), the ability of the child to speak effectively in front of groups, and the level of maturity.[215]

The state has a particularly strong interest in protecting victims of sexual assault.[216] Accordingly, the government enacted federal statutes to enlarge the opportunity of juveniles to testify while at the same time diminishing their trauma.[217] As an alternative to live testimony, attorneys may request the testimony to be taken outside of the courtroom and be televised by a two-way closed-circuit television.[218] The number of peripheral people permitted in the room is limited,[219] and this may serve as a more efficient and less shocking way to gather information.[220]

Another alternative to live, in-court testimony is to obtain a videotaped deposition from the child.[221] This method provides the child with a completely private interview session, possibly serving as an incentive to testify.[222]

The most controversial aspect of juvenile witnesses is balancing the rights of the accused against those of the victim.[223] "The state's interest in protecting child witnesses from the distress of testifying conflicts with the accused's right to confront all witnesses against him."[224] There is no concrete answer to this inquiry, and one must be sensitive to the different

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212. *See generally* Berliner, *supra* note 8, at 169 (discussing two issues surrounding the use of juveniles as witnesses: emotional trauma afforded to the child by testifying and whether or a not a child is competent to testify).

213. *See* Gilleran-Johnson & Evans, *supra* note 128, at 687.

214. *See id.* at 682 (explaining that before a minor testifies, judges and attorneys must weigh the interests of justice against the best interests of the child).

215. *See id.* at 685–87.

216. *See* Brannon, *supra* note 9, at 459.

217. *See* 18 U.S.C. § 3509 (1994 & Supp. II 1996) (providing alternatives to live testimony).

218. *See id.* § 3509(b)(1).

219. *See id.* § 3509(b)(1)(D).

220. *Cf.* Brannon, *supra* note 9, at 459.

221. *See* 18 U.S.C. § 3509(b)(2).

222. *See* Brannon, *supra* note 9, at 459 (arguing that alternative procedures by which a child can testify may lessen the trauma to the child).

223. *See* Baker, *supra* note 9, at 1055.

224. Brannon, *supra* note 9, at 459.

arguments on each side. Each situation should be determined on a case-by-case basis, utilizing a test which weighs the interests of the parties.[225]

Considering the dramatic increase in sex abuse cases over the last few years, there likely will be a dramatic increase in the number of child witnesses.[226] Communities and children's advocates have begun to develop ways to make the testimonial process easier for juveniles.[227] In order to reduce emotional trauma, entities involved in protecting child abuse cases agree to follow certain procedures and "create[] an atmosphere of cooperation and coordination in order to facilitate child participation."[228] Some approaches include using of specially trained personnel who understand the importance of their work, decreasing the number of interviews with juveniles and the number of people who interview them, and assigning the same individual to work with them throughout each case to promote consistency.[229] In addition, advocates encourage the use of certain devices, such as special interviewing rooms and anatomically correct dolls.[230] Specialists in juvenile law believe that if legal entities follow these operations, children's performance as witnesses will improve, thereby increasing their credibility.[231]

C. *Other Circuits*

Treatment of child witnesses is not uniform throughout the judicial system.[232] Statutes and rules of evidence serve as guidelines for both federally enacted and state enacted law[233] under which the competency of juvenile witnesses is construed liberally.[234] Before these rules were en-

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225. *See id.* at 449 (stating the test denoting when an exception should exist to the confrontation clause: "First, the exception must further an important public policy. Second, an individualized determination that the particular child witness would be traumatized by testifying in the presence of the accused must be made.").

226. *See* Berliner, *supra* note 8, at 169.

227. *See id.* at 170.

228. *Id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *See* Morey, *supra* note 141, at 257. Morey offers the following example:

> In one jurisdiction, the courts treat the child's ability to receive accurate impressions of fact as merely indicating the credibility of the witness. In another jurisdiction, the same ability determines the child's competency to be a witness. Thus, the inconsistency is more significant than having the same child found competent by one judge and incompetent by another.

Id.

233. *Cf. id.* at 251 (stating that the Federal Rules of Evidence and the 1974 Uniform Rules of Evidence reflect the modern view of competency in children witnesses).

234. *See id.* at 247–48.

acted, some courts grappled with the issue of child testimony,[235] and different state laws reflect the different policies among jurisdictions.[236]

For example, a 1953 D.C. Circuit case, *Doran v. United States*,[237] emphasized that competency determinations should rest within the discretionary authority of the trial court.[238] The court reasoned that the judge

> is in a much better position than any appellate tribunal to consider and to weigh all of the impalpable factors which should be taken into account, such as the attitude and demeanor of the witness, the extent of her intelligence and the degree of moral responsibility of which she might be capable.[239]

Furthermore, this early decision mentioned that specific answers to questions are not the deciding factors; rather, the child's responses inform the weight, not the admissibility, of the testimony.[240]

Recently promulgated rules reflect the century-long trend toward allowing children to testify.[241] In particular, the Ninth Circuit, using reasoning similar to the Tenth Circuit's analysis in *Allen J.*, allowed the inconsistent testimony of a four-year-old child.[242] "A finder of fact might well look with scepticism on [the child's] testimony, but that is a question of weight, not admissibility."[243] Another issue in earlier Ninth Circuit cases was the controversy about testifying via two-way closed-circuit television.[244] As designated in the United States Code, this is an acceptable way for children to testify if the child exhibits a fear of confronting the alleged perpetrator.[245] A 1993 Ninth Circuit decision, *United States v. Garcia*,[246] used a Supreme Court decision, *Maryland v. Craig*,[247] to analyze whether the use of a video violated the Confrontation Clause as specified in the Constitution's Sixth Amendment.[248] The court held that since Congress enacted section 3509 after the decision in *Craig*, it in-

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235. *See id.* at 250 (recalling that, for example, two early commentators argued that even if courts admitted child testimony, the testimony would be of "dubious value" because all children are limited by immaturity and imagination).

236. *See id.* at 257.

237. 205 F.2d 717 (D.C. Cir. 1953).

238. *Doran*, 205 F.2d at 718 (citing Wheeler v. United States, 159 U.S. 523 (1895)).

239. *Id.* at 718–19 (citing Williams v. United States, 3 App. D.C. 335 (1894)).

240. *See id.* at 719.

241. *Cf.* Morey, *supra* note 141, at 247, 250–51.

242. *See* Walters v. McCormick, 122 F.3d 1172, 1174–75 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1389 (1998). This case also examines the testimony of a child who allegedly was sexually assaulted and raped by an older man. *Walters*, 122 F.3d at 1175

243. *Id.*

244. *See* United States v. Garcia, 7 F.3d 885, 887–88 (9th Cir. 1993) (including an analysis of the Sixth Amendment right to confrontation).

245. *See* 18 U.S.C. § 3509 (b)(1)(B) (1994).

246. 7 F.3d 885 (9th Cir. 1993).

247. 497 U.S. 836 (1990).

248. U.S. CONST. amend. VI.

tended for a child's concerns to outweigh a defendant's ability to confront the witness face-to-face, thereby codifying this rule.[249]

The Eighth Circuit also ruled on the use of two-way, closed-circuit televisions.[250] This court held that the statute does not require a "because of fear" finding to let the child testify through video.[251] The court merely needs to use its own discretion in deciding whether the child shows any signs of needing to testify this way, either through judicial questioning or analysis of the child's appearance.[252] By making such an inquiry, the court again protects the rights of children. Although most jurisdictions seek to protect children, it is apparent through different state laws that jurisdictions implement this desire in differing degrees.

CONCLUSION

The Tenth Circuit has acknowledged the intricacies of the current juvenile justice system through decisions involving both transfer proceedings and child witnesses during the survey period.

Although the balancing test set forth in the Federal Juvenile Delinquency Act is used in prosecuting transfer cases, the underlying issue is not the consideration of each factor. The courts are concerned with the broader ramifications of trying juveniles as adults. Some research indicates that adult criminal courts treat juveniles more sympathetically than in juvenile courts.[253] Unfortunately, it is impossible to accurately predict who will benefit from rehabilitative efforts and who is bound for a life of crime. Courts must analyze each situation on a case-by-case basis; because society strives to promote individual growth and stimulation in its children, inflexible standards governing transfer might serve as inadequate.

The trend to treat juveniles as adults is not only recognized in transfer proceedings, but also when considering children as witnesses.[254] Courts must analyze three conditions: competency, credibility, and the psychological effect of live testimony.[255] Although it seems that child

249. *See Garcia*, 7 F.3d at 888.

250. *See* United States v. Rouse, 111 F.3d 561 (8th Cir. 1997).

251. *See Rouse*, 111 F.3d at 569.

252. *See id.*

253. *See* Klein, *supra* note 13, at 402. Klein states:

> In addition to sentencing disparities between the juvenile and criminal systems, there are four main areas where the concrete negative consequences of transfer can be seen as they relate to the individual child. These are (1) the swiftness of sanctions imposed; (2) recidivism rates for transferred juveniles versus those for non-transferred juveniles; (3) the loss of rehabilitative opportunities for transferred juveniles; and (4) the effects of incarcerating children in adult prisons.

Id.

254. *Cf.* Gilleran-Johnson & Evans, *supra* note 128, at 685 (stating that in all cases, after analyzing three separate criteria, a court must find all witnesses competent, whether they are adults or children, before allowing either to testify).

255. *See id.* at 682, 685.

witnesses often are given the opportunity to be heard, judges can still exclude testimony when there is a lack of personal knowledge[256] or unfair prejudice.[257] More commonly, courts also consider the child's maturity level, memory, communication skills, and mental capacity.[258] As illustrated, the trend of protecting children begins and ends with each individual juvenile defendant. In order to keep some form of standardization, however, Congress should develop a consistent framework by which the courts can analyze each case.

The area of juvenile law is forever changing. Although historically the justice system has protected children's innocence, the future is uncertain. With increasing juvenile crime rates and new technological developments, the prospects for the promulgation of a uniform standard by which to treat juveniles, particularly in the Tenth Circuit, seem bleak, but attainable.

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256. *See* FED. R. EVID. 602. For text of the rule, see *supra* note 142.

257. *See* FED. R. EVID. 403. For text of the rule, see *supra* note 196.

258. *See* Gilleran-Johnson & Evans, *supra* note 128, at 685.

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