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JUVENILE LAW

INTRODUCTION

The juvenile system, only recently established in the United States, has a dark history in its treatment of delinquent youths.¹ Until the mid-1960s, juveniles had no constitutional rights or protections from the system's abuse.² Several major revisions to juvenile law culminated to form a juvenile justice system nearly rivaling in size and complexity that of the adult criminal system.³ In spite of the transformation, the judicial shift from pursuing the "best interests of the child"⁴ to proof of criminal guilt continues to stimulate controversy while steering juvenile law in the direction of greater criminalization.⁵

In light of the debate surrounding adult sentence enhancement and certification issues, this Survey examines two cases that came before the United States Court of Appeals for the Tenth Circuit in 1995. Part I examines the use of juvenile convictions to enhance adult criminal sentences. In *United States v.*

1. JUDGE JERRY L. MERSHON, *JUVENILE JUSTICE: THE ADJUDICATORY AND DISPOSITIONAL PROCESS* 11 (1991). Other than the New York House of Refuge, established in 1824, there were very few early juvenile institutions in the United States. *Id.* While some discussion of the government's *parens patriae* existed as early as 1839, the theory that children under a certain age should be treated differently from adult criminals did not gain acceptance until the first juvenile code in 1989. *Id.*

2. *Id.* at 12.

3. *Id.* Past juvenile law procedures, which did not guarantee the right to remain silent, the right to counsel, and other basic rights, were constitutionally suspect. In recent years, the Supreme Court has corrected most of these deficiencies without destroying the underlying basis of the juvenile justice system. *Id.* As attitudes shift toward making juvenile offenders more accountable for their actions, the adult and juvenile systems will become even less distinguishable.

4. Entrenched in family law, the "best interests" philosophy remains the predominant custody standard in most jurisdictions. Best interests philosophy developed by way of *parens patriae*, on the theory that when a child's natural parents die, a special court would manage the family estate until the child reached age 21. THOMAS J. BERNARD, *THE CYCLE OF JUVENILE JUSTICE* 69 (1992). A fundamental difference, however, exists between the state's role as a parent and the state's interest in the control and discipline of disruptive youths. *Id.* A parent may discipline his/her child by placing limits on the child's behavior. *Id.* The state, on the other hand, punishes the child by imposing sanctions such as arrest, detention, prosecution, stigmatization, probation, and institutionalization. *Id.*

5. The juvenile justice system first evolved as an attempt to deal with the problems of dependent, neglected, and delinquent juveniles. Originally, the court's role did not include culpability determinations or assignments of punishment, but served to protect and help youths in trouble with the law. *Id.*

Through its evolutionary process, the philosophy has split into several directions in an attempt to draw the most serious offenders further into the juvenile system and divert the least serious offenders away from it. The juvenile justice system subscribes to several basic models when dealing with juvenile offenders. DEAN J. CHAMPION, *THE JUVENILE JUSTICE SYSTEM* 179 (1992). These models guide the different types of decision making made on behalf of or against specific juvenile offenders. *Id.* Discussed in context throughout this Survey, these models include: (1) the rehabilitation model, (2) the treatment or medical model, and (3) the "just desserts" or justice model. *Id.* at 179-80. Other models include the noninterventionist, the due process, and the crime control models. *Id.*

Alberty,⁶ the court affirmed the federal district court's legal conclusions regarding the application and interpretation of the United States Sentencing Guidelines.⁷ Part II discusses the Tenth Circuit's treatment of certifying juveniles for adult criminal prosecution. In *Green v. Reynolds*,⁸ the court departed from its traditional interpretation of Rule 9(b),⁹ which requires the dismissal of successive habeas corpus petitions, and concluded that denying counsel at a retroactive adult certification hearing constitutes a deprivation of due process.¹⁰ After these two decisions, the Tenth Circuit's position on juvenile rights is now less clear; it is evident, however, that the court has taken a step backward in awarding the protections of procedural due process to minors.¹¹

I. THE USE OF JUVENILE CONVICTIONS TO ENHANCE ADULT CRIMINAL SENTENCES¹²

A. Background

The juvenile justice system establishes the means by which state courts adjudicate youths charged with violations of state laws or ordinances.¹³ The adult criminal system, however, may only sustain sanctions or penalties against those offenders whom the court officially designates as "adults."¹⁴ In that respect, the state must prove cases against adult defendants, who assume full responsibility for their actions, beyond a reasonable doubt.¹⁵ For non-

6. 40 F.3d 1132 (10th Cir.), *cert. denied*, 115 S. Ct. 1416 (1995).

7. *Alberty*, 40 F.3d at 1135.

8. 57 F.3d 956 (10th Cir. 1995).

9. Rule 9(b) applies to section 2254, or federal habeas corpus petitions. The rule states: A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petition to assert those grounds in a prior petition constituted an abuse of the writ.

Rules Governing Section 2254 Cases in the United States District Courts, rule 9(b), 28 U.S.C. § 2254 (1994).

10. *Green*, 57 F.3d at 958.

11. While the Tenth Circuit's present stance on juvenile rights is evident given the increased punishment for serious or violent juvenile offenders, its opinion as to the future of the juvenile justice system remains unclear. In any event, the current system must respond to complaints that minors, left to the juvenile court's jurisdiction, receive neither the constitutional protections accorded adults nor the rehabilitative treatment postulated for children.

12. 40 F.3d 1132 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1416 (1995).

13. CHAMPION, *supra* note 5, at 1-2. State juvenile laws include, within their definitions of delinquent behavior, all criminal acts, whether violative of local ordinance, state law, or federal law. Robert E. Shepherd Jr., *Trying Juveniles in Federal Court*, 9 CRIM. JUST. 45, 45 (1994). Although most juvenile delinquency proceedings fall within state court jurisdiction, several provisions of the 1994 federal crime bill encourage or even require the federal handling of juveniles charged with gun or gang related crimes. *Id.* As a result, state juvenile courts will likely see a greater number of juvenile cases adjudicated in the federal system. *Id.* Unless otherwise stated, this Survey will focus on state court procedures.

14. CHAMPION, *supra* note 5, at 1-2. Generally, an individual reaches adulthood at age 21. Yet, the upper limit for many state juvenile courts is 18. The juvenile system resolves this problem by certifying certain juvenile cases to adult court for criminal prosecution.

15. Whenever a person's freedom becomes jeopardized, "beyond a reasonable doubt" serves as the appropriate standard of proof in both criminal and juvenile courts. CHAMPION, *supra* note 5, at 28. However, in many instances, juvenile courts continue to use the civil "preponderance of the evidence" standard despite the Supreme Court's ruling in *In re Winship*, 397 U.S. 358 (1970).

adults, a separate adjudication process exists for the purpose of deciding culpability and appropriate treatments.¹⁶ As a result, two separate systems of justice coexist: adult and juvenile.¹⁷

1. Defining Delinquency

Juvenile courts have exclusive jurisdiction over three major categories of juvenile behavior.¹⁸ First, the court may intervene in "delinquent offenses" where the minor allegedly committed an act that the state defines as criminal for an adult.¹⁹ Second, the juvenile court reviews "status offenses"²⁰ involving juvenile behavior that would not be considered criminal if committed by an adult.²¹ Finally, the court has exclusive jurisdiction over juvenile cases involving dependency and neglect.²² In these situations, parent-child conflicts and/or removal decisions merit court intervention simply for the child's protection.²³

Much of the controversy surrounding the juvenile justice system lies in the status offender classification.²⁴ This category's very existence illustrates society's insatiable desire to punish juveniles whenever possible.²⁵ In

CHAMPION, *supra* note 5, at 28. The Court ruled in that case that the U.S. Constitution entitled juveniles to the standard of proof beyond a reasonable doubt. *Id.* The Court, however, used a due process rationale rather than the equal protection analysis which would have destroyed all distinctions between juvenile and criminal proceedings. MERSHON, *supra* note 1, at 27.

16. BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 64 (1993). Since juveniles are not considered fully responsible for their actions, the antiquated view is that juveniles do not deserve the same harsh treatment as their adult counterparts. *Id.* at 65. The logic of this argument served as the basis for many notions adopted by the early juvenile courts. *Id.* Contemporary jurisprudence, however, stresses individual accountability for one's action which departs from the traditional view of the term "treatment." Consistent with the adult criminal system, the juvenile justice system has also responded to the growing trend of "just desserts." CHAMPION, *supra* note 5, at 19.

17. This idea, reflected in court nomenclature, illustrates several outdated principles that merely add to the complexity and confusion surrounding the juvenile system. For example, an officer may not arrest a child, but may place him/her in "Protective Custody." MERSHON, *supra* note 1, at 12. Similarly, the system does not jail children, but "Detains" them upon the adjudication of an "offense" rather than imprisonment following the conviction of a crime. *Id.* The juvenile court procedures refer to a "Hearing," not a trial, where a "Disposition" takes place instead of sentencing. *Id.*

18. KRISBERG & AUSTIN, *supra* note 16, at 64.

19. *Id.*

20. *Id.* at 65. This group of juveniles is also referred to as "Persons (or Children, or Juveniles, or Minors) in Need of Supervision." MARTIN L. FORST, THE NEW JUVENILE JUSTICE 80 (1995).

21. KRISBERG & AUSTIN, *supra* note 16, at 65. This category includes truancy, curfew violations, and running away. *Id.*

22. *Id.* The only behavioral categories that involve the commission of an offense include delinquency and status offenses. The children in the last category, whose contact with the law involves issues of dependency and neglect, fall within the juvenile court's jurisdiction through uncontrollable circumstances. Their only problem is one of "status," in that these children are either dependent (without family or support) or neglected (where the family situation is harmful for the child). CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 30-31 (3d ed. 1991).

23. KRISBERG & AUSTIN, *supra* note 16, at 65.

24. Generally, status offending children have the same legal and constitutional rights as the juvenile delinquent. Judge Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 11 (1992). Under state and federal law, the juvenile court does not have the same power to detain or incarcerate status offenders. *Id.* at 12. In practice, however, most states still permit the detention of status offenders. *Id.*

25. A considerable part of the status offender debate surrounds the issue regarding the han-

response to society's concern for violence by and against youth, the juvenile system tends to "redefine" status offenders as delinquent offenders—directly subjecting the child to juvenile court processing.²⁶ For example, the more a court official believes that a particular youth's "best interests" require institutional placement, the more severe the particular status offense becomes.²⁷ Furthermore, federal policy categorizes probation violations as criminal offenses, providing juvenile judges the authority to institutionalize status offenders directly, even where the original violation constitutes only a mere status offense.²⁸

In addition to the various behavioral categories, juvenile delinquency definitions "differ from time to time and place to place" according to several criteria.²⁹ The term "juvenile offender" may differ depending on the particular jurisdiction, the scope of the offensive behavior, and the ambiguities surrounding age requirements.³⁰ To add to the complexity, the juvenile system breaks down the definition of offender status into categories of serious, violent, and chronic.³¹ The Federal Bureau of Investigation³² defines a "serious juvenile offender" as a youth convicted of a Part I offense³³ who is at least age fourteen at the time of the offense.³⁴ Similarly, a "violent offender" is a

ding of children who commit noncriminal acts. While a law enforcement agency would not arrest an adult for running away from home, receiving an unexcused absence from school, or walking the streets after dark, these behaviors call for juvenile sanctioning. Considered part of the juvenile justice system, status offenders undergo a delinquent labeling process similar to society's more serious juvenile offenders. Without judicial review, juvenile courts may legally institutionalize youths who have not committed any criminal acts until they reach their twenty-first birthday. KRISBERG & AUSTIN, *supra* note 16, at 58. In that respect, society fails to distinguish between juvenile delinquencies such as running away from severe offenses: armed robbery, forcible rape, aggravated assault, or murder.

26. BERNARD, *supra* note 4, at 27.

27. *Id.* Not only does the juvenile receive institutional placement, he now becomes labeled a "criminal," rather than a status offender. *Id.*

28. *Id.* at 28. Under federal policy, a youth charged with a status offense may appear in court and receive court-ordered probation. *Id.* As a condition of this probation, the juvenile court may order the youth not to commit another status offense. *Id.* Repeat offenders who violate the conditions of their probation by committing a status offense may then receive criminal institutionalization. *Id.*

29. STEVEN M. COX & JOHN J. CONRAD, JUVENILE JUSTICE: A GUIDE TO PRACTICE AND THEORY 12 (3d ed. 1991).

30. *Id.* at 12-15. For example, an act might be delinquent in State X, but not State Y or the law may change in State X, such that an act considered delinquent this year is not delinquent the following year. *Id.* at 12. The scope of behaviors is subject to a wide variety of interpretations at all levels of the juvenile justice system. For example, the terms "incorrigible" or "indecent" conduct may appear in delinquency definitions without a standard to guide judges and practitioners. *Id.* at 13. Finally, states differ as to the minimum age below which the juvenile court will not hold a child accountable for illegal acts, or an upper limit where the juvenile court loses jurisdiction. *Id.* at 14.

31. NATIONAL COALITION OF STATE JUVENILE JUSTICE ADVISORY GROUPS, MYTHS AND REALITIES: MEETING THE CHALLENGE OF SERIOUS, VIOLENT, AND CHRONIC JUVENILE OFFENDERS, 1992 ANNUAL REPORT 27 (1993) [hereinafter ANNUAL REPORT]. Note, however, that these definitions do not fall along rigid lines as some youths may share the characteristics of more than one category.

32. The Federal Bureau of Investigation's Uniform Crime Reports borrows the juvenile offender definitions from the United States Department of Justice. *Id.*

33. Included among Part I offenses are murder and non-negligent homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

34. *Id.* at 8.

youth convicted of a violent Part I offense who has a prior adjudication of such an offense.³⁵ The violent offender category also includes youths convicted of murder alone.³⁶ The third classification, "chronic juvenile offender," applies to youths whose records reflect five or more separate charges of delinquency, regardless of the gravity of each offense.³⁷

2. Procedural Rights

Juvenile justice philosophy developed from two distinct legal theories: the doctrine of *parens patriae* and the rationale of due process.³⁸ The most comprehensive landmark juvenile Supreme Court decision to date is *In re Gault*,³⁹ in which the Court held that juvenile proceedings must measure up to the standards of due process and fair treatment.⁴⁰

The revolutionary *Gault* decision at last addressed the constitutionality of the *parens patriae* doctrine. The Court, however, not only failed to overthrow the juvenile court system, but also disregarded many other aspects of the *parens patriae* doctrine. In an attempt to provide only basic procedural rights for juveniles,⁴¹ the Court formally established the process of "selective incorporation" of constitutional guarantees on a case-by-case basis.⁴² Subsequent decisions have broadened the juvenile's due process rights, but the Supreme Court has failed to grant juveniles constitutional protection equivalent to those granted to adults.⁴³

35. *Id.*

36. The Office of Juvenile Justice and Delinquency Prevention considers a youth a violent offender if "found guilty of murder alone or of attempted murder, rape or attempted rape, aggravated assault, armed robbery, arson of an occupied dwelling, voluntary manslaughter, or kidnapping, combined with a prior adjudication." *Id.* at 27.

37. *Id.* at 8.

38. For a discussion of the *parens patriae* philosophy, see *supra* notes 1, 4 and accompanying text.

39. 387 U.S. 1 (1967). The treatment of Gerry Gault, arrested at the age of 15 for making obscene phone calls to a neighbor, illustrates the disparity in treatment between youths and adults. *Gault*, 387 U.S. at 4. Gault was taken into custody and detained overnight without notification of his parents and appeared at a hearing the following day without counsel. *Id.* at 5-6. At the hearing, the complaining witness did not appear, the judge did not take any sworn testimony, and the court made no transcript or formal memorandum of the proceedings. *Id.* at 5. The trial court convicted Gault of the charge and sentenced him to a penal institution for six years. *Id.* at 29. In the same state and year, an adult would receive a prison sentence of 60 days or less with a maximum fine of 50 dollars. *Id.*

40. *Id.* at 30-31.

41. Instead of demanding exact conformity with adult criminal procedural safeguards, the Court required only a standard of "fundamental fairness" combined with four specific procedural protections. These protections include: the right to adequate and timely notice; confrontation of adverse witnesses; counsel; and the recognition of the privilege against self-incrimination. *Id.* at 31-57. Indicating that certain protections become applicable only in confinement cases, the Court did not address the rights of a juvenile in the pre- or post-adjudicatory stages of the proceeding. BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 19 (1993). Instead, the Court chose to narrowly confine the holding to the actual adjudication of guilt or innocence. *Id.* Other matters not decided under *Gault* include: arrest rights, public or jury trials, jeopardy, capacity under the insanity defense, grand jury indictment, and appellate review. MERSHON, *supra* note 1, at 25.

42. MERSHON, *supra* note 1, at 24. In reviewing juvenile cases, the Court "selects" which constitutional rights extend to juveniles and which do not, based upon a seemingly arbitrary decision-making process.

43. Listed in chronological order showing the evolution of the Court's incorporation doctrine

3. Sentence Determinations

Another difference between the adult and juvenile justice system concerns individualized dispositions.⁴⁴ The philosophy underlying juvenile justice includes rehabilitation and individualized justice, thus the juvenile sentence structure grants judges wide latitude in disposing of juvenile cases.⁴⁵ Although juvenile delinquency adjudications carry far less serious consequences today, few sanctions actually reflect the seriousness of the crimes committed.⁴⁶ Tied to sentence determinations are confidentiality concerns.⁴⁷ Generally, states hold juvenile records confidential, forbidding their use in subsequent civil or criminal proceedings.⁴⁸ Note, however, that a judge in a subsequent criminal case may properly have access to juvenile records paraphrased in the presentence report.⁴⁹ In addition, the presentence report itself may be a key component in guiding the sentencing judge's decision.⁵⁰ In that respect, the use of juvenile adjudications to enhance the sentences of adult offenders has a long lineage.⁵¹ Since juveniles do not have the full array of procedural rights afforded to adults, critics argue that the use of juvenile adjudications for

regarding juvenile rights, the major cases include the following: *Haley v. Ohio*, 332 U.S. 596 (1948) (protecting juveniles against coerced confessions); *Kent v. United States*, 383 U.S. 541 (1966) (establishing procedural requirements for certification hearings); *In re Gault*, 387 U.S. 1 (1967) (providing juveniles with rights of notice, counsel, confrontation, cross examination, and protection against self-incrimination); *In re Winship*, 397 U.S. 358 (1970) (establishing the child's right, in a delinquency adjudication, to have charges proven beyond a reasonable doubt); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (refusing to extend the right to a jury trial to juveniles); *Breed v. Jones*, 421 U.S. 519 (1975) (establishing the child's right against double jeopardy); *Schall v. Martin*, 467 U.S. 253 (1984) (rejecting the claim that pre-trial detention of juveniles offended the Due Process Clause); *New Jersey v. T.L.O.*, 460 U.S. 325 (1985) (holding that a diminished Fourth Amendment standard applies to school searches).

44. FORST, *supra* note 20, at 2.

45. *Id.*

46. Considered a necessity to the treatment model, the indeterminate sentence has become the hallmark of the juvenile justice system. *Id.* When disposing of offenders, one cannot determine in advance how long it will take for the treatment to become effective. Leslie T. Wilkins, *Foreword to GERALD R. WHEELER, COUNTER-DETERRENCE: A REPORT ON JUVENILE SENTENCING AND EFFECTS OF PRISONIZATION* xii (1978).

47. In achieving the purpose of rehabilitating troubled juveniles, the juvenile system promises confidentiality to avoid the stigma of an arrest, criminal conviction, or delinquency finding. DONALD B. KING, 100 INJUSTICES TO THE CHILD 14-15 (1971). The juvenile justice system often undermines this promise, however, by the sheer number of people who have access to police records. *Id.* at 15.

48. MERSHON, *supra* note 1, at 13. Most state statutes incorporate this principle, and case law clearly supports this proposition. *Id.* Exploring the traditional idea of juvenile confidentiality, Judge Mershon refers to Eugene H. Czajkoski, author of *Why Confidentiality in Juvenile Justice?*, which called for the abolishment of confidentiality in juvenile proceedings due to its lack of effect on the juvenile offender and the disastrous effect on the court's control over serious crimes. *Id.* at 14.

49. *Id.* at 14-15.

50. *Id.*

51. *See United States v. Chester*, 919 F.2d 896, 898 (4th Cir. 1990); *United States v. Reid*, 911 F.2d 1456, 1466 (10th Cir. 1990), *cert. denied*, 498 U.S. 1097 (1991); *United States v. Brown*, 903 F.2d 540, 543 (8th Cir. 1990); *United States v. Keys*, 899 F.2d 983, 989 (10th Cir.), *cert. denied*, 498 U.S. 858 (1990); *United States v. White*, 888 F.2d 1252, 1254 (8th Cir. 1989).

Other circuits have held that incarceration in a juvenile facility is "imprisonment" for sentencing purposes, and that the use of juvenile adjudications to enhance adult sentences do not violate due process. *See United States v. Davis*, 929 F.2d 930 (3d Cir. 1991). For a review of the context of other circuit court decisions, see also *infra* notes 100-08 and accompanying text.

sentencing purposes amounts to a denial of due process.⁵² Like several other circuits, the Tenth Circuit has accepted the constitutionality of the sentence enhancement provisions without question.⁵³

Another procedural issue in juvenile case law addresses whether the Fourteenth Amendment's Due Process Clause provides juveniles a right to a jury in delinquency proceedings. In *McKeiver v. Pennsylvania*,⁵⁴ the Supreme Court held that the right to a jury does not extend to juveniles.⁵⁵ Emphasizing treatment rather than punishment,⁵⁶ the Court reasoned that the "juvenile proceeding has not yet been held to be a 'criminal prosecution' within the meaning and reach of the Sixth Amendment."⁵⁷ Again, the Court invoked its "selective incorporation" of constitutional principles in reaching this conclusion. Arguably, the use of less stringent procedures to generate an adjudication in juvenile court followed by use of that same conviction to enhance a subsequent criminal sentence defies logic.⁵⁸

Overall, the Supreme Court has sent a mixed message concerning the constitutionality of the use of prior convictions.⁵⁹ If ruled constitutionally invalid,

52. See generally David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769 (1991).

53. Few federal courts have addressed the precise question of whether sentence enhancement provisions violate the Due Process Clause. For example, the Ninth Circuit passed upon this issue in *United States v. Williams*, 891 F.2d 212 (9th Cir. 1989), cert. denied, 494 U.S. 1037 (1990). The court reasoned that since *McKeiver* allowed juvenile courts to deprive liberty without benefit of a jury trial, courts may use the juvenile sentence to later enhance an adult's deprivation of liberty. *Id.* at 215.

54. 403 U.S. 528 (1971). Two juveniles, aged 15 and 16 (one charged with a felony and the other charged with a misdemeanor), did not have the benefit of a jury during a delinquency proceeding. *McKeiver*, 403 U.S. at 534. The state accused the first child, Joseph McKeiver, of robbery, larceny, and receiving stolen goods. *Id.* Three of the felony charges arose from an incident in which McKeiver, along with several other youths, chased three younger children and took 25 cents from them. *Id.* at 536.

In a separate case, the second child, Edward Terry, allegedly hit a police officer with his fists and a stick, after the officer attempted to break up a fight not involving Terry. *Id.* After the Pennsylvania Supreme Court denied each the right to a jury trial, in the consolidated case the question eventually appeared before the U.S. Supreme Court, where it joined two North Carolina cases. *Id.* at 536-38. The North Carolina cases involved two separate incidents where children allegedly obstructed traffic and created a disturbance in a principal's office as a result of a march protesting racial discrimination. *Id.* at 537.

55. *Id.* at 545.

56. *Id.* at 544 n.5. Emphasizing the potential adverse impact that jury trials may have on the informality, flexibility, and confidentiality of juvenile court proceedings, the Court decided not to alter juvenile court practices. FELT, *supra* note 41, at 23.

57. *McKeiver*, 403 U.S. at 541. The Court remained unwilling to "remake the juvenile proceeding into a fully adversary process" and put "an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545.

58. If a juvenile court adjudicates a juvenile offender, the adult criminal court may use that "conviction" in future prosecutions, even if the individual's rights were compromised (denial of mandatory advice of counsel and/or the option of a jury trial) as a juvenile.

59. Enhancement provisions call into question two basic premises underlying Supreme Court decisions. First, if a court uses a juvenile adjudication to enhance an adult sentence, the adjudication itself becomes "criminalized." Dormont, *supra* note 52, at 1797. Thus, the rehabilitative goal of the juvenile justice system is abandoned and the fundamental differences between the adult and juvenile procedural rights no longer hold true. *Id.* Second, the length of the juvenile confinement directly affects the period of adult incarceration. If a minor receives a sentence of confinement for treatment or warning purposes, the system later penalizes that person as an adult.

courts may not use convictions against defendants in subsequent proceedings.⁶⁰ The Court refined this principle in *Burgett v. Texas*,⁶¹ holding that the use of such convictions would essentially deprive a defendant of a constitutional right twice.⁶² Nevertheless, the Court continues to permit the use of prior juvenile adjudications to enhance later sentences.

Despite case law prohibiting the use of prior uncounseled convictions, federal courts must include prior juvenile adjudications in adult sentence calculations.⁶³ Federal courts generate their sentencing determinations with guidelines promulgated by the United States Sentencing Commission.⁶⁴ The heart of the United States Sentencing Guidelines (Guidelines)⁶⁵ is a sentencing table, consisting of forty-three base offense levels and six criminal history categories, identifying the applicable sentencing range for offenders.⁶⁶ According to the Guidelines, assignments to the highest criminal history category, level VI, include those persons classified as career offenders.⁶⁷ Juvenile defendants, aged eighteen years at the time of the offense, who commit crimes of violence or controlled substance offenses, and have at least two similar prior felony convictions, are classified as career offenders.⁶⁸ Furthermore, the various offense levels may also increase depending on the statutory penalty for a particular crime.⁶⁹

60. The Court has held that the denial of constitutional protections will invalidate a conviction in several instances. *Id.* at 1805 n.32. For example, the denial of a speedy trial invalidated the defendant's conviction in *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the denial of a jury trial invalidated the conviction. *Id.* at 162. Similarly, the Court held that the denial of the right both to confront and cross-examine accusers, and the right against self-incrimination invalidated convictions in *Pointer v. Texas*, 380 U.S. 400 (1965) and *Malloy v. Hogan*, 378 U.S. 1 (1964). Finally, the Court invalidated a defendant's conviction where he had been denied of the right to counsel in *Carnley v. Cochran*, 369 U.S. 506, 517 (1962).

61. 389 U.S. 109 (1967).

62. *Burgett*, 389 U.S. at 115. The Court concluded that the admissions of constitutionally infirm convictions result in inherently prejudicial decisions. *Id.*

63. Shepherd, *supra* note 13, at 47. "Despite their 'civil' tag, prior juvenile adjudications are included as part of the 'criminal history' category under the Federal Sentencing Guidelines." *Id.*

64. Paul M. Winters et al., *Project: Twenty-fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994 Sentencing Guidelines*, 83 GEO. L.J. 1229, 1229 (1995).

65. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 4A1.3 (November 1993) [hereinafter U.S.S.G.]. The Guidelines are applicable to all offenses committed on or after November 1, 1987. U.S.S.G. Ch.1, Pt.A(1). When a federal court convicts a defendant, the sentencing judge must impose a sentence based on the Guidelines in effect at defendant's sentencing date. *Id.* § 1B1.1, comment.

66. The base offense level constitutes the vertical axis of the Sentencing Table. *Id.* at Ch.5, Pt.A. This level focuses on the defendant's conduct during the commission of the convicted offense(s). Darren M. Gelber, Note, *The Federal Sentencing Guidelines: Is Discretion Still the Better Part of Valor?*, 9 N.Y.L. SCH. J. HUM. RTS. 355, 357 (1992). The criminal history category constitutes the horizontal axis of the table. U.S.S.G. Ch.5, Pt.A. The judge determines the appropriate category by totaling the number of criminal history points calculated in the pre-sentence report. *Id.* § 4A1.1. The points start at zero and have no upper limit. *Id.* All defendants with 13 or more points have a criminal history category of VI, regardless of whether their point total adds up to 14 or 43. *Id.* at Ch.3, Pt.A.

67. U.S.S.G. § 4B1.1.

68. Winters et al., *supra* note 64, at 1244.

69. *Id.* at 1230. Adjustment factors include the harm to the victim, the defendant's role in the offense, the presence of any obstruction of justice, defendant's conviction of multiple offenses, and whether the defendant accepted personal responsibility for the offense. *Id.* at 1230-36.

The Guidelines treat prior sentences, imposed in "related" cases, as one sentence for purposes of calculating the criminal history category.⁷⁰ Prior sentences relate if the sentence results from one of three criteria. The commission of the crimes must occur either: (1) on the same occasion, (2) as part of a single common scheme or plan, or (3) or as a result of consolidation for trial or sentencing.⁷¹ Prior sentences do not "relate" if an intervening arrest occurs.⁷²

B. United States v. Alberty⁷³

1. Facts

Defendant-appellant Anthony Alberty received indictments for unlawful possession of a firearm as a convicted felon and unlawful possession of ammunition as a convicted felon.⁷⁴ Pursuant to a plea agreement, Alberty pleaded guilty to the firearm charge in exchange for the government's agreement to dismiss the ammunition possession.⁷⁵ Subsequently, the probation officer classified Alberty as a level VI offender based on thirteen criminal history points.⁷⁶ Alberty maintained that his two prior juvenile offenses were "related," and therefore, made him only a level V offender with eleven criminal

70. U.S.S.G. § 4A1.2. The applicable provisions of the Guidelines read:

(a) Prior Sentences Defined. (1) The term "prior sentences" means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense. (2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history. Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment in the case of consecutive sentences.

.....

(d) Offenses Committed Prior to Age Eighteen. (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence. (2) In any other case, (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense; (B) add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

Id.

71. U.S.S.G. § 4A1.2, comment. (n.3).

72. *Id.*

73. 40 F.3d 1132 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1416 (1995).

74. *Alberty*, 40 F.3d at 1132. The felonies were in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2) respectively.

75. *Id.* at 1132-33.

76. *Id.* at 1133. The pre-sentence report assigned Alberty an unadjusted base level of 24. *Id.* After receiving a two-level reduction for acceptance of responsibility, and an additional one-level reduction for entering a timely guilty plea, the base dropped to 21. The issue presented on appeal concerned Alberty's criminal history score of 13. *Id.* Assessed two criminal points for each prior juvenile adjudication, Alberty received a total of 13 criminal history points. *Id.*

The first prior juvenile conviction stemmed from a failure to appear for a hearing relating to a second-degree burglary charge. *Id.* Even though the court eventually dismissed the burglary charge, Alberty received a delinquent adjudication for jumping bail on June 9, 1989. *Id.* at 1134. Adjudicated on the same day, the second offense, robbery by force, occurred on a separate occasion. *Id.* Placed in custody from June 23, 1989 to June 13, 1990, the court ordered the sentences for bail jumping and robbery to run concurrently. *Id.*

history points.⁷⁷ In ruling against Alberty's argument, the district court concluded that the two offenses were separate and unrelated.⁷⁸ The court sentenced Alberty to a ninety month term of imprisonment.⁷⁹

2. Decision

The Tenth Circuit affirmed the lower court's decision, holding that Alberty's two prior juvenile offenses were not "consolidated for sentencing" under the Guidelines.⁸⁰ The sole issue before the court concerned the "relatedness" of Alberty's two prior juvenile convictions. Relying on the prior sentence criteria in the Guidelines' comment section, the court required Alberty to prove the existence of some formal order of transfer or consolidation in support of his claim. However, the Tenth Circuit chose to rely on circuit precedent and ruled that Alberty failed to satisfy his burden of demonstrating the existence of a judicial order.⁸¹

The absence of a "factual nexus" between the prior offenses further persuaded the court's ruling.⁸² In the Tenth Circuit precedents requiring no formal order,⁸³ the court required each of the prior cases to tie together factually.⁸⁴ Since the prior cases at issue lacked any factual connection, other than the fact that the juvenile judge adjudicated both cases on the same day,⁸⁵ the court upheld the district court's assessment of two criminal history points for each prior juvenile offense.⁸⁶

C. Analysis

In *Alberty*, the Tenth Circuit relied on its precedent in *United States v. Chavez-Palacios*,⁸⁷ which adopted as authority the commentary in the Guide-

77. *Id.* The greater the defendant's criminal history score, the more severe his sentence. For example, the sentencing table for a level six offense and a level I criminal history category has a range of imprisonment of zero to six months. Dormont, *supra* note 52, at 1772 n.20. If another defendant commits the same offense, with a criminal history score of VI, he will receive 12 to 18 months imprisonment. *Id.*

78. *Alberty*, 40 F.3d at 1133-34.

79. *Id.*

80. *Id.* at 1135.

81. *Id.* Specifically, the court relied on: *United States v. Gary*, 999 F.2d 474 (10th Cir.), *cert. denied*, 114 S. Ct. 259 (1993) and *United States v. Villarreal*, 960 F.2d 117 (10th Cir.), *cert. denied*, 506 U.S. 856 (1992). These cases, however, "impliedly suggest" the inclusion of a formal judicial order (but do not necessarily require one) to permit a finding of consolidation. *Gary*, 999 F.2d at 479-80; *Villarreal*, 960 F.2d at 119-21.

82. *Alberty*, 40 F.3d at 1135.

83. *See supra* note 81 (discussing the *Gary* and *Villarreal* decisions).

84. *Gary*, 999 F.2d at 479-80.

85. *Alberty*, 40 F.3d at 1134.

86. *Id.* at 1135. In finding the district court's judgment not clearly erroneous, the Tenth Circuit cited other circuits where a formal judicial order serves as a prerequisite to a consolidation finding. *Id.* at 1135 n.4. In *United States v. Russell*, 2 F.3d 200 (7th Cir. 1993), the court required a judicial determination from the sentencing judge to consolidate into a single sentence. *Id.* at 204. "Without something in the record . . . the district court did not err in finding the offenses unrelated." *Id.* The Eighth Circuit, in *United States v. McComber*, 996 F.2d 946 (8th Cir. 1993), held that the section 4A1.2(a)(2) consolidation requirement does not apply where the cases proceeded to sentencing under separate docket numbers and no formal order exists. *Id.* at 947.

87. 30 F.3d 1290 (10th Cir. 1994).

lines, unless it conflicts with federal law.⁸⁸ Regardless of whether the prior sentence counts as one related sentence or two separate sentences, sentence enhancements undermine the important distinction between adult and juvenile defendants. Sentence enhancement provisions directly conflict with the informal, nonadversarial setting of the juvenile courts.⁸⁹ As part of child development,⁹⁰ society expects young people to make mistakes and learn from their indiscretions without exacting the full extent of adult criminal penalties on juveniles.⁹¹ In practice, sentence enhancements illustrate the extreme difficulties faced by the appellate courts in upholding the developmental element of juvenile law.⁹² In *Alberty*, the Tenth Circuit misinterpreted the *McKeiver* Court's treatment of youths who fall between the two worlds—the adult and juvenile courts.⁹³

Unbeknownst to the *McKeiver* Court, section 4A1.2 of the Guidelines opened the floodgates for the enhancement of individual sentences based upon prior juvenile adjudications.⁹⁴ As juveniles, these defendants did not receive the benefit of Sixth Amendment protections;⁹⁵ yet as adults, they may endure

88. *Chavez-Palacios*, 30 F.3d at 1295 (quoting *Stinson v. United States*, 113 S. Ct. 1913 (1993)). Note, however, that the legislative history of the Guidelines fails to mention *Gault*, *McKeiver*, or provide any logical basis for including juvenile adjudications in the criminal history scoring. Dormont, *supra* note 52, at 1785 n.89.

89. SIMONSEN, *supra* note 22, at ix; see also CHAMPION, *supra* note 5, at 21 ("Juvenile courts are civil proceedings designed exclusively for juveniles, whereas criminal courts are proceedings designed for alleged violators of criminal laws."). This civil-criminal distinction becomes apparent in several areas: the absence of a criminal record, limited punishments, and extensive leniency. Formal criminal procedures, relating to the admissibility of evidence or testimony, do not enjoy the same heightened scrutiny in juvenile proceedings. *Id.* In addition, hearsay receives the same consideration as hard information and evidence. *Id.* at 27.

Another remaining legacy of *parens patriae* lies in the right to a jury. In recent years, the Court has consistently rejected attempts to extend the full range of procedural due process guarantees to juveniles. *Id.* at 173.

90. Research on delinquency suggests that most youths mature out of illegal behaviors or misdeeds. KRISBERG & AUSTIN, *supra* note 16, at 4. Generally considered less mature and responsible than adults, minors often lack experience, perspective and judgment. Shelia L. Sanders, Comment, *The Imposition of Capital Punishment on Juvenile Offenders: Drawing the Line*, 19 S.U. L. REV. 141, 153 n.87 (1992).

91. KRISBERG & AUSTIN, *supra* note 16, at 5.

92. *Id.*

93. Similar to other federal courts, the Tenth Circuit's interpretation of § 4A1.2 produces a result inconsistent with U.S. Supreme Court precedent. Dormont, *supra* note 52, at 1788-89. The interpretation problem arises when the underlying premises of the juvenile justice system do not manifest themselves in adult sentencing requirements. *Id.* at 1790. In *McKeiver*, the Court made two key assumptions in justifying a lower standard of due process for juveniles. *Id.* The first view relies on the difference between juvenile punishment and treatment. *Id.* at 1790 n.103. The second view reflects the belief that juvenile proceedings will not detrimentally affect individuals once they reach adulthood. *Id.* at 1790. For a related discussion of the *McKeiver* decision, see *infra* notes 54-62. For a review of the context of other circuit court decisions, see also *infra* notes 100-08 and accompanying text.

94. Dormont, *supra* note 52, at 1805.

95. The Sixth Amendment provides:

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

additional adult punishment.⁹⁶ The collateral use of juvenile adjudications demonstrates the failure of the "fundamental fairness" standard to protect the very persons the Court meant to protect.⁹⁷ By refusing to address the constitutionality of sentence enhancements,⁹⁸ the Tenth Circuit merely postponed another challenge to juvenile rights.⁹⁹

D. Other Circuits

Certain types of prior sentences are generally not included in the defendant's criminal history calculations.¹⁰⁰ Note, however, that the circuit courts do not always agree as to what constitutes an includable prior sentence. The First Circuit ruled, in *United States v. Unger*,¹⁰¹ that uncounseled juvenile proceedings count toward the criminal history scoring.¹⁰² In *United States v. Ashburn*,¹⁰³ the Fifth Circuit held that a juvenile conviction, automatically set aside under a state statute, properly received the prior sentence designation.¹⁰⁴ In comparison, the Seventh Circuit held, in *United States v. Kozinski*,¹⁰⁵ that a sentence of supervision not based on a finding of guilt received improper consideration as a prior sentence.¹⁰⁶ However, in *Nichols v. United States*,¹⁰⁷ the Supreme Court permitted use of a prior uncounseled misdemeanor conviction to enhance the sentence for a subsequent conviction that did not, by itself, justify imprisonment.¹⁰⁸

96. Dormont, *supra* note 52, at 1805.

97. *Id.*

98. The Ninth Circuit was the first appellate court to address the constitutionality of U.S.S.G. § 4A1.2(d). In *United States v. Williams*, 891 F.2d 212 (9th Cir. 1989), *cert. denied*, 494 U.S. 1037 (1990), the trial court committed the defendant to the California Youth Authority following his second juvenile bank robbery. *Id.* at 213. His commitment, however, consisted of an indeterminate sentence according to a treatment mandate. Dormont, *supra* note 52, at 1803. Had the sentencing judge not included Williams's juvenile sentences in his criminal history scoring, his sentence would have ranged from 30 to 37 months, not 46 to 57 months. *Williams*, 891 F.2d at 214. Williams's first bank robbery would have added two points to his criminal history score regardless of whether he had received incarceration in an adult prison, with full constitutional protection, or in juvenile hall with limited protections. Dormont, *supra* note 52, at 1804.

99. Dormont, *supra* note 52, at 1805.

100. U.S.S.G. § 4A1.2(c). According to the Guidelines, sentences for offenses such as hitchhiking, juvenile status offenses and truancy, loitering, minor traffic infractions, public intoxication, and vagrancy do not count towards the criminal history scoring. *Id.* To work around these constraints, "the Guidelines place no cap on the number of points an adult may acquire from his juvenile record." Dormont, *supra* note 52, at 1774.

101. 915 F.2d 759 (1st Cir. 1990), *cert. denied*, 498 U.S. 1104 (1991).

102. *Unger*, 915 F.2d at 761-62. Unger allegedly engaged in a variety of criminal conduct as a juvenile, including breaking and entering, receiving stolen goods, and assault and battery. *Id.* at 763. In failing to prove this conduct, the state could not convict Unger of these offenses, but instead found him "guilty" of being "wayward." Two years later, an adult court judge used this wayward finding to increase his criminal history score, imposing the maximum sentence. *Id.* at 760.

103. 20 F.3d 1336 (5th Cir.), *opinion reinstated in part on reh'g en banc*, 38 F.3d 804 (1994), *cert. denied*, 115 S. Ct. 1969 (1995).

104. *Ashburn*, 20 F.3d at 1343.

105. 16 F.3d 795 (7th Cir. 1994).

106. *Kozinski*, 16 F.3d at 812.

107. 114 S. Ct. 1921 (1994).

108. *Nichols*, 114 S. Ct. at 1928.

II. CERTIFYING JUVENILES FOR ADULT CRIMINAL PROSECUTIONS¹⁰⁹A. *Background*

Another issue in juvenile justice concerns the adequacy of "transfer" proceedings. Transfers, also known as waivers or certifications, refer to the transfer or jurisdictional shift of certain cases from juvenile courts to adult criminal courts¹¹⁰ for purposes of adult prosecution and punishment.¹¹¹ Few jurisdictions provide an intermediate juvenile-adult category for sentencing serious young offenders. As a result, juveniles indicted for certain serious crimes may either be tried in juvenile court with inadequate procedures, or in adult court, with standard adult sentences.¹¹² Juveniles tried in juvenile courts do not have a right to a jury trial and may receive longer sentences than young adult offenders convicted for the same offense in criminal court.¹¹³ On the other hand, juveniles transferred out of the juvenile justice system are subject to the full range of adult punishments, including life imprisonment and the death penalty.¹¹⁴

The landmark case concerning waiver of juvenile court jurisdiction is *Kent v. United States*.¹¹⁵ Regarded as the first major juvenile rights case, *Kent* addressed the issue of whether a juvenile should receive less protection than that awarded to adults suspected of criminal offenses.¹¹⁶ *Kent* established that: (1)

109. 57 F.3d 956 (10th Cir. 1995).

110. Hon. Vida J. Taliaferro, *Waiver of Juvenile Court Jurisdiction*, 38 RES GESTAE 38 (1995).

111. CHAMPION, *supra* note 5, at 212. Intake officers generally refer the more serious cases to juvenile prosecutors with a recommendation that the children receive a jurisdictional transfer, for their safety, as well as the safety of others. *Id.* at 178. Once granted, the jurisdictional waiver redefines and classifies the defendants as adults for prosecution in criminal courts. *Id.* at 212.

112. Juvenile judges have limited options when dealing with those offenders who commit particularly serious violent or capital offenses. *Id.* at 228. Generally, prolonged incarceration in a juvenile facility serves as the most powerful sanction available to these judges. *Id.* As a result, officials consider waiver or certification actions the desired method of obtaining more severe punishments for juvenile offenders. *Id.*

113. Due to their wide discretion in handling juveniles, juvenile courts have the power to administer lengthy sentences of detention. *Id.* Unfortunately, this discretion applies to status offenders as well as to serious or dangerous juvenile offenders. *Id.* Despite the few unfavorable implications of juvenile court adjudications, however, many juveniles prefer not to contest or fight their transfers to criminal courts.

114. Generally, life imprisonment and the death penalty lie beyond the powers of the juvenile court judge. *Id.* Age, however, no longer remains a mitigating factor as the U.S. Supreme Court has upheld death sentences for two offenders who committed criminal offenses at age 16 and 17 in the consolidated cases of *Stanford v. Kentucky* and *Wilkins v. Missouri*. *Stanford v. Kentucky*, 492 U.S. 361 (1989). See generally Sanders, *supra* note 90, at 141 (discussing the death penalty and juvenile defendants).

115. 383 U.S. 541 (1966). The state arrested Morris Kent, then age 16, on charges of housebreaking, robbery, and rape, as he was serving probation for housebreaking and attempted purse snatching. *Kent*, 383 U.S. at 543. After repeated interrogations, the juvenile court detained Kent for one week at the receiving home for children, without the benefit of an arraignment or probable cause hearing. *Id.* at 544-45. During the detention, the police interrogated Kent without the benefit of his counsel or parents. *Id.* at 551. Kent's attorney filed a motion for a hearing on whether to waive jurisdiction. *Id.* at 545. The judge waived jurisdiction without ruling on the motion and without a waiver hearing. *Id.* at 546.

116. *Id.* at 551.

juvenile courts must conduct waiver hearings before transferring juveniles to the jurisdiction of adult criminal court;¹¹⁷ and (2) juveniles have the right to counsel before and during such hearings.¹¹⁸ After summarizing the differences between adult courts and juvenile delinquency proceedings,¹¹⁹ the Court laid out several determinative factors to guide waiver judicial decision-making.¹²⁰

B. *Green v. Reynolds*¹²¹

1. Facts

The Oklahoma district court convicted and sentenced Rickke Green when he was sixteen years old.¹²² After filing the first of three federal habeas petitions, Green pursued a state post-conviction claim asserting that his adult prosecution violated the Equal Protection Clause of the Fourteenth Amendment.¹²³ At the time of the convictions, the applicable Oklahoma statute allowed the adjudication of females, eighteen years old and younger, in juvenile court¹²⁴ while subjecting juvenile males, sixteen to eighteen years old, to adult prosecution without providing a transfer hearing.

Pursuant to the remedy announced by the Tenth Circuit in *Bromley v. Crisp*,¹²⁵ the state granted Green a retroactive adult certification hearing

117. *Id.* at 561.

118. *Id.*

119. These differences include:

[The juvenile] may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the [D.C. juvenile] statute to give preference to retaining the child in the custody of his parents "unless his welfare and the safety and protection of the public cannot be adequately safeguarded. . . ." The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment.

Id. at 556-57 (quoting D.C. CODE ANN. §§ 11-907, -915, -927, -929 (1961)).

120. The *Kent* factors address issues such as the seriousness of the alleged offense, the sophistication and maturity of the juvenile, and the likelihood of rehabilitation. For a complete listing of the *Kent* factors, see *id.* at 566-67.

121. 57 F.3d 956 (1995).

122. *Green*, 57 F.3d at 957. Green faced over 55 years of incarceration for grand larceny, possession of and robbery with a firearm after former conviction of a felony (AFCF), and concealment of stolen property AFCF. *Id.*

123. *Id.*

124. *Id.* at 958.

125. 561 F.2d 1351 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). This case established the proper procedures for determining whether a defendant's conviction survived a challenge under *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972). Under Oklahoma juvenile code provisions, the state could prosecute males under age 16 as adults, while females of the same age remained subject to the juvenile court's jurisdiction, unless certified to stand trial as adults. OKLA. STAT. tit. X, § 1101(a) (Supp. 1969). The *Lamb* court held that the sex-based statute violated the Equal Protection Clause. *Lamb*, 456 F.2d at 20. The court later held that the *Lamb* decision applied retroactively. *Radcliff v. Anderson*, 509 F.2d 1093, 1096 (10th Cir.), *cert. denied*, 421 U.S. 939 (1975).

Citing *Kent*, the *Bromley* court held that it need not set aside convictions if the juvenile court can establish that the adult certification would have taken place had it conducted an adequate hearing. *Bromley*, 561 F.2d at 1356-57 (citing *Kent*, 383 U.S. at 564-65). To make such determinations, the court requires that a state or federal court conduct an evidentiary hearing. *Id.* at 1357 n.6. The burden of proof, however, rests with the state to take into account all doubts and any weakness of proof due to the passage of time. *Id.*

(RAC hearing) to determine whether a transfer would have even taken place had the court followed the proper procedures in 1971.¹²⁶ After denying Green's request for assistance of appointed counsel, Green refused to participate in the hearing claiming insufficient time to prepare.¹²⁷ Upon hearing the state's evidence at the RAC hearing, the court concluded that Green's transfer would have occurred had the district court conducted a proper hearing in 1971.¹²⁸ The district court concluded that each of the seven grounds for relief¹²⁹ referred to in the habeas petition related to the 1971 convictions.¹³⁰ The district court ruled that defendant's grounds "could have been, or were, raised" in an earlier petition,¹³¹ and dismissed all the claims under Rule 9(b).¹³²

2. Decision

The Tenth Circuit affirmed the lower court's decision as to six of the seven grounds—finding relief unavailable due to their omission from the first habeas petition in 1977.¹³³ The last ground for relief survived dismissal as the Tenth Circuit further ruled that the state's denial of Green's request for counsel at the RAC hearing deprived him of due process.¹³⁴ The Tenth Circuit reasoned that the claim contained neither successive nor abusive elements, and, therefore, required a constitutional review on the merits due to the inapplicability of Rule 9(b).¹³⁵ Consequently, the Tenth Circuit remanded in part, reversed in part,¹³⁶ and instructed the lower court to issue a conditional writ vacating the pertinent convictions unless the state conducted an RAC hearing, complete with representation.¹³⁷

C. Analysis

The Tenth Circuit's decision in *Green v. Reynolds* follows a long line of cases protecting the rights of juveniles.¹³⁸ To comply with the Supreme Court's ruling in *Kent*, a transfer hearing "must measure up to the essentials of due process and fair treatment."¹³⁹ Generally, a habeas petition requires

126. *Green*, 57 F.3d at 957.

127. *Id.*

128. *Id.* at 957-58.

129. Defendant's grounds included: (1) ineffective assistance of appellate counsel; and (2) that the Court of Criminal Appeals acted to deprive him of effective assistance of appellate counsel. *Id.* Other grounds included one claim that the court subjected him to an unconstitutional appellate delay and one claim that the convictions were unconstitutional under *Lamb*. *Id.*

130. *Id.* at 957.

131. *Id.* at 958.

132. *Id.*

133. *Id.* at 957.

134. *Id.* at 961.

135. *Id.* at 958.

136. *Id.* at 961.

137. *Id.*

138. For a brief description of the major juvenile rights cases, see *supra* note 43.

139. *Kent*, 383 U.S. at 562. Relevant provisions include representation by counsel; the juvenile's meaningful access to pertinent information considered by the juvenile court; and an adequate statement of reasons for the juvenile court's decision. *Id.* at 561-63.

Rule 9(b) dismissal if the petition "successfully" repeats a claim previously determined on the merits, or the petition "abusively" asserts new grounds unjustifiably omitted from a prior petition.¹⁴⁰ The "unique" factual twist presented in *Green*, however, required a somewhat different analysis of Rule 9(b).¹⁴¹ As the only logical alternative, the Tenth Circuit regarded the *Lamb* violation (gender-discrimination) and the denial of counsel as substantively separate claims. Had the Tenth Circuit deemed the RAC hearing a post-conviction proceeding, the district court could deny counsel, thus repeating the same due process violation.¹⁴²

The principal purpose of a jurisdictional waiver is to decide whether the juvenile should receive criminal prosecution in adult court or be subject to the rehabilitation of the juvenile courts.¹⁴³ Transfer procedures represent a type of community vengeance toward juveniles.¹⁴⁴ Too frequently, however, the use of transfers serves merely as a convenient tool for shifting jurisdiction over certain juveniles to adult courts.¹⁴⁵ The system arbitrarily renders some juveniles "death eligible" simply because a particular judge subjectively deems the juvenile "mature."¹⁴⁶ If the separation of juveniles from hardened adult criminals serves as a crucial component of juvenile rehabilitation, then transfers to adult facilities deprive youths of an opportunity for rehabilitation.¹⁴⁷ This loss also subjects juveniles to cruelty and abuse by other inmates.¹⁴⁸

The current standard of appellate review of waiver decisions¹⁴⁹ and the consequences of reversal should remain separate and independent issues.¹⁵⁰ Every decision to transfer a child to criminal court should automatically create

140. *Green*, 57 F.3d at 958 n.3 (citing *Watkins v. Champion*, 39 F.3d 273, 275 (10th Cir. 1994)).

141. *Id.* at 958.

142. *Id.* at 961. As a post-conviction hearing, the only available remedy would be to institute another uncounseled hearing on adult certification. *Id.* For an explanation of the *Lamb* decision and *Lamb* violations, see *supra* note 125.

143. KING, *supra* note 47, at 70. According to the founders of the juvenile justice system, all children capable of rehabilitation should receive a trial through the juvenile court procedures rather than the criminal law system. *Id.*

144. *Id.* at 68.

145. Twenty years ago, most certification cases occurred as a result of a some type of sensational delinquency or criminal act that attracted public attention. *Id.* As a result, the child was unjustly "thrown to the lions" to satisfy the community's sense of vengeance. Today, many children receive the same fate simply due to society's abhorrence for youth violence. *Id.*

146. Glenn M. Bieler, Note, *Death Be Not Proud: A Note on Juvenile Capital Punishment*, 7 N.Y.L. SCH. J. HUM. RTS. 179, 201 (1990).

147. KING, *supra* note 47, at 85-86.

148. *Id.* It is not uncommon for younger boys to be exposed to various sexual assaults by other inmates. *Id.* Adult facilities may also become an undesirable school yard where juveniles learn even more sophisticated methods of criminal activity from adults. *Id.* One study observed that juveniles held in adult jails have a suicide rate nearly five times that of juveniles housed in juvenile facilities. Sarah Freitas, *Extending the Privilege Against Self-Incrimination to the Juvenile Waiver Hearing*, 62 U. CHI. L. REV. 301, 309 (1995). In addition, it is likely that a juvenile detainee, without a prior record may share a cell with a hardened and dangerous adult offender. *Id.*

149. Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 278 (1991). Generally, a defendant must demonstrate that the trial court abused its "sound discretion." *Id.* In *Green*, the Tenth Circuit reviewed the district court's factual findings for clear error and its legal conclusions de novo. *Green*, 57 F.3d at 957.

150. Zimring, *supra* note 149, at 278.

a right of appeal.¹⁵¹ As demonstrated by *Green*, a number of difficult issues surround the standard of review and the appropriate remedy, especially if the alleged behavior does not warrant the transfer.¹⁵² If the Tenth Circuit had held the district court's waiver decision inappropriate, Green's age, at the time of the appeal, would have pushed him far beyond the reach and setting of the juvenile court.¹⁵³ The consequences of reversal directly influenced the Tenth Circuit's unwillingness to intervene and correct an abusive result. The court did nothing but "pass the buck" back to the lower court, without addressing the prejudicial effects of the entire waiver process. If the court truly recognized the philosophy of "best interests," it would have to remand with instructions to impose juvenile sanctions.¹⁵⁴

D. Other Circuits

Transfer issues represent a complex area of juvenile law with many statutory schemes. As it stands today, appellate courts reviewing the constitutionality of state laws have found variance in their due process provisions. For example, in *Russell v. Parratt*, the Eight Circuit found no denial of due process in proceeding against a juvenile as an adult without an evidentiary hearing.¹⁵⁵ In addition, the Ninth Circuit, in *Guam v. Kinsbury*,¹⁵⁶ held that due process does not require a social investigation as a condition precedent to certification.

CONCLUSION

The juvenile courts in this country have an important mission regarding their place within the criminal justice system. Since juveniles do not have the full range of procedural protection under the law, the systematic violation of juvenile rights becomes inevitable. At one extreme, a great tragedy would result if the judicial system abolished all rehabilitative goals envisioned for

151. *Id.* at 277. Zimring proposes a system that provides "waived" defendants the option to appeal the waiver determination before trial or after the conviction in criminal court. *Id.*

152. *Id.*

153. Prosecuted at the age of 16 as an adult, Green received a sentence of incarceration for over 55 years. *Green*, 57 F.3d at 957. Having served some 24 years in an adult penitentiary, the only available recourse is to reduce Green's sentence. Zimring, *supra* note 149, at 278. Had defendant received a juvenile delinquency proceeding in 1971, state law would have mandated Green's release from detention by his nineteenth birthday. *Green*, 57 F.3d at 961 n.8. Although a reduction in sentence does not restore the defendant to juvenile status, it does prevent the state court from conducting a retroactive adult certification (RAC) hearing in its favor.

154. Contrary to precedent established by *Kelley v. Kaiser*, 992 F.2d 1509 (10th Cir. 1993), the *Green* court remanded the case to state court to conduct a constitutionally adequate RAC hearing. *Green*, 57 F.3d at 960. Similar to *Green*, *Kelley* had also suffered a *Lamb* injustice. However, the *Kelley* court ruled that the state already had the opportunity to address the certification issue and had resolved the question without providing the defendant with a full and fair hearing. *Kelley*, 992 F.2d at 1516. The court then held that proper procedures required the district court to address the issue. *Id.* While no proof exists as to which court, state or federal, provides the better forum, the *Green* decision provides the trial judge an opportunity to search for new reasons to certify the juvenile. If a trial judge denied jurisdiction over the juvenile once, it is highly unlikely that judge would fairly reconsider the issue on remand.

155. 543 F.2d 1214 (8th Cir. 1976).

156. 649 F.2d 740 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981).

youthful offenders and treated all juveniles as adults. At the other extreme, the system will continue to hold delinquents criminally responsible for their misbehavior without the added benefit of certain privileges and immunities intended for juveniles. In sum, the juvenile justice system lacks a coherent and consistent policy on how to deal with juveniles. American society must decide whether it wants to punish, protect, or treat its wayward youth. Only then may the judicial system clear the muddle surrounding juvenile justice. Until that time, the lack of response serves only to help offenders generate future crimes.

Leta R. Holden