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Kids Can Change: Reforming South Dakota's Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety

Wendy Hess, *University of South Dakota*



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KIDS CAN CHANGE: REFORMING SOUTH DAKOTA'S JUVENILE TRANSFER LAW TO REHABILITATE CHILDREN AND PROTECT PUBLIC SAFETY

WENDY N. HESS†

“[N]o child is a finished product, every child has the potential to be redeemed, and if given the opportunity many will accomplish great things.”

– Amicus Brief of Former Juvenile Offenders in *Graham v. Florida*¹

“[C]hildren cannot be viewed simply as miniature adults.”

– Justice Kagan, United States Supreme Court Justice, in *Miller v. Alabama*²

I. INTRODUCTION

In many ways, the law recognizes that juveniles are less mature than adults and therefore need protection from the consequences that would result if they were able to make adult decisions on their own. For example, both federal and South Dakota laws restrict minors' abilities to enlist in the military,³ vote,⁴ marry,⁵ get a driver's license,⁶ enter into a contract,⁷ obtain an abortion,⁸ or get a tattoo.⁹ Yet, South Dakota, like many other states, permits adult criminal prosecution, sentencing, and imprisonment of certain minors who commit a crime.¹⁰

† Assistant Professor, University of South Dakota School of Law. B.A., 1995, University of Maryland; J.D., 1998, University of Denver. The research for this article was supported by a grant from the University of South Dakota School of Law. I am particularly indebted to Melissa Knight for her invaluable research assistance. I am also grateful to the following individuals for their support: Senior Secretary Teresa Carlisle; Kristin Schiller (J.D., 2014); law librarian Marsha Stacey; attorneys Jeff Larson and Angel Runnels; and Professors Chris Hutton, Allen Madison, and Michael McKey.

1. Brief of Former Juvenile Offenders Charles S. Dutton, et al. as Amici Curiae in Support of Petitioners, *Graham v. Florida*, (Nos. 08-7412, 08-7621), 2009 WL 2219302, at *31.

2. *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012) (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011)) (citations omitted).

3. 10 U.S.C. § 505(a) (2004) (setting minimum age for enlistment in military at eighteen; allowing enlistment at age seventeen with parent/guardian consent).

4. U.S. CONST. amend. XXVI (setting voting eligibility age at eighteen).

5. S.D.C.L. § 25-1-9 (2004) (permitting individuals eighteen and older right to marry; allowing children between sixteen and eighteen to marry with consent of parent/guardian).

6. S.D.C.L. § 32-12-6 (2004) (requiring parent/guardian authorization for children younger than eighteen to obtain a driver's license or non-driver identification card).

7. S.D.C.L. § 26-2-1 (2004) (prohibiting children under age eighteen from entering into certain types of contracts).

8. S.D.C.L. § 34-23A-7 (2004) (prohibiting children under age eighteen from obtaining an abortion until forty-eight hours after parent/guardian notification; describing certain limited exceptions to the requirement).

9. S.D.C.L. § 26-10-19 (2004) (prohibiting tattooing a child under age eighteen without parent/guardian consent).

10. See *infra* Part II.B.

The following story is an example of just one of the estimated 250,000 children under age eighteen who are sent to the U.S. adult criminal system every year.¹¹ Andrew, a slightly built, Native American youth from Western South Dakota, was a well-adjusted child; he was a good student with long-established friendships.¹² At the age of fourteen, however, Andrew's support system started to fall apart when his parents divorced, his grandparents divorced, his aunt and uncle divorced, and his cousin and his favorite uncle died.¹³ His family was too preoccupied to meet his needs at the time he most needed their help.¹⁴ Andrew turned to an inappropriate support group by joining a gang and also began abusing alcohol and marijuana.¹⁵ He had a few relatively minor run-ins with the juvenile system which included: an unidentified "disturbance at a school" at age sixteen; running away from home twice (while on probation for the school incident); and two occasions where he was in possession of alcohol.¹⁶ He eventually dropped out of school at age sixteen.¹⁷

At age seventeen, after a night of drinking, Andrew and his friends, Sloane (age seventeen) and Anthony (age twenty), held up the Loaf 'N Jug convenience store with a B.B. gun and stole two cases of beer, cash, and cigarettes.¹⁸ Sloane pulled the B.B. gun, which resembled a real handgun, on the store clerk.¹⁹ As Andrew and his friends left the store, the clerk followed them out and Andrew's friends beat the clerk up, breaking his nose and causing massive bruising and lacerations, as well as memory loss.²⁰

A psychologist who evaluated Andrew after the incident concluded that Andrew had poor judgment and was somewhat immature, very needy, and impressionable—a follower rather than a leader.²¹ Andrew was charged in adult court with first degree robbery and simple assault.²² He asked the court to send his case to the juvenile court but, after holding a hearing, the lower court denied

11. Jason Zidenberg, *You're an Adult Now: Youth in Adult Criminal Justice Systems*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRECTIONS, 2 (Dec. 2011), available at <http://static.nicic.gov/Library/025555.pdf> (citation omitted).

12. Appellant's Brief, State v. A.B., No. 24753 (S.D. 2008), 2008 WL 5519959, at *7.

13. State v. A.B., 2008 SD 117, ¶ 6, 758 N.W.2d 910, 912.

14. Appellee's Brief, State v. A.B., No. 24753 (S.D. 2008), 2008 WL 5519959, at *5.

15. A.B., 2008 SD 117, ¶ 4, 758 N.W.2d at 912.

16. *Id.*; Appellant's Brief, State v. A.B., No. 24753 (S.D. 2008), 2008 WL 5519959, at *8.

17. Appellant's Brief, State v. A.B., No. 24753 (S.D. 2008), 2008 WL 5519959, at *9.

18. A.B., 2008 SD 117, ¶ 2, 758 N.W.2d at 911; Appellee's Brief, State v. A.B., No. 24753 (S.D. 2008), 2008 WL 5519959, at *6.

19. Appellee's Brief, State v. A.B., No. 24753 (S.D. 2008), 2008 WL 5519959, at *7.

20. A.B., 2008 SD 117, ¶ 2, 758 N.W.2d at 912. Information about lasting injury is not available in the Court's opinion although it likely was not extensive because the clerk's medical expenses amounted to \$1,263.67. *Id.* ¶ 11, 758 N.W.2d at 918.

21. Appellant's Brief, State v. A.B., No. 24753 (S.D. 2008), 2008 WL 5519959, at *10; *see also* A.B., 2008 SD 117, ¶ 7, 758 N.W.2d at 912.

22. A.B., 2008 SD 117, ¶ 1, 758 N.W.2d at 911. More specifically, he was charged with the following offenses: first degree robbery, or, in the alternative, second degree robbery; conspiracy to commit first degree robbery and simple assault. *Id.*

his request.²³ The lower court reasoned that it was in Andrew's and the public's best interests to keep Andrew in the adult system because long-term recovery was highly unlikely within his remaining time in the juvenile system—until he turned twenty-one.²⁴ Andrew pleaded guilty to first degree robbery and was sentenced to ten years in adult prison, with six years suspended.²⁵

Andrew's case exemplifies several of the issues addressed in this article. For example, his behavior and the results of his psychological evaluation illustrate young people's susceptibility to peer pressure and tendency toward recklessness and impulsivity. His Native American heritage is a reminder of the overrepresentation of minorities in the criminal justice system.

In addition to his personal characteristics and behavior, the outcome of Andrew's case also typifies certain juvenile transfer issues. The lower court's conclusion that the public interest is best served by sending Andrew to the adult system is a concern that has been raised in other cases; judges worry that young people may not be rehabilitated by the time they age out of the juvenile system. Finally, Andrew's adult prison sentence raises the issue of what may happen to juveniles who are sent to adult prison. A juvenile who is sentenced to the adult prison system: can be housed with adult prisoners, is not entitled to rehabilitative services, is subjected to more violence than in the juvenile system, leaves prison with a criminal record, and is more likely to return to prison than if he had been kept in the juvenile system.

Part II of this article will describe how the juvenile transfer mechanism developed—both generally and in South Dakota—as well as how it operates today. The mechanism which allows prosecution of a child as an adult is referred to as “juvenile transfer,” because the juvenile court's jurisdiction over the child is transferred to the adult criminal court.²⁶ A juvenile who is transferred to adult court is treated just like an adult—she is prosecuted in an adult criminal court and sentenced in the adult corrections system. She has no right to the rehabilitative services offered to a child in the juvenile justice system.

Part III of this article will explore the research findings about the efficacy and fairness of juvenile transfer. Harsh criminal consequences for juveniles are increasingly disfavored as we learn more about youth development. For example, in 2012, the U.S. Supreme Court decided *Miller v. Alabama*,²⁷ where it held that the Eighth Amendment prohibits sentencing juveniles to life imprisonment without parole.²⁸ The Court's decision was based, in part, on

23. *Id.* ¶ 3, 758 N.W.2d at 912.

24. *Id.* ¶ 16, 758 N.W.2d at 915 (quoting lower court opinion).

25. *Id.* ¶ 1, 758 N.W.2d at 911.

26. Some jurisdictions refer to this process as “waiver” or “certification.” See, e.g., Monica Franklin Hill, Annotation, *Applicability of Rules of Evidence to Juvenile Transfer, Waiver, or Certification Hearings*, 37 A.L.R.5TH 703.

27. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

28. *Id.*

emerging scientific evidence about juvenile brain development and the fact that youth have greater capacity for change than adults. In addition to the research about youth development, Part III will discuss research about the relative inefficacy of juvenile transfer as a response to crime as well as the disproportionate impact juvenile transfer has on youth of color.

Part IV of this article makes four recommended changes to South Dakota's juvenile transfer laws. First, the decision to transfer a juvenile to the adult system should be returned to the discretion of the juvenile court and made on a case-by-case basis. Second, greater emphasis must be placed on the best interests of the child in transfer proceedings because it is more likely to accomplish the State's public safety goals. Third, children's development and capacity for change need to be taken into account as courts make transfer determinations. Fourth, additional procedural protections should be put in place for a juvenile facing transfer to the adult system.

II. THE EVOLUTION OF JUVENILE TRANSFER IN SOUTH DAKOTA

Like many other states, South Dakota created a separate juvenile court system in the early 1900s to better meet the unique needs of children who have committed crimes. And, also like many other states, South Dakota passed laws in the 1990s which made it significantly easier to charge children as adult criminals. This Part explains the genesis of the juvenile delinquency court and then explains the evolution of juvenile transfer in South Dakota and its present day application.

A. CREATION AND PURPOSE OF THE JUVENILE COURT

The nation's first juvenile court—a court designed specifically to address children's needs—was established in Illinois in 1899.²⁹ Other states soon followed, and by 1925, all but two had courts designed to address the unique needs of children.³⁰ The key focus of the juvenile court system was to rehabilitate rather than punish the child.³¹ The mission of the juvenile court, as articulated by early proponents, was to understand the child “physically, mentally, morally” and “not so much to punish as to reform . . . not to make [the child] a criminal but a worthy citizen.”³²

South Dakota passed its first juvenile delinquency law in 1909, which, consistent with the national trend, sought to treat an offending child “not as a

29. ELLEN MARRUS & IRENE MERKER ROSENBERG, *CHILDREN AND JUVENILE JUSTICE* 5 (2d ed. 2012).

30. *Id.*

31. *See, e.g.,* Kent v. United States, 383 U.S. 541, 554-55 (1966) (explaining that the theory of the juvenile court system “is rooted in social welfare philosophy rather than in the corpus juris. . . . 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. The State is *parens patriae* rather than prosecuting attorney and judge.”)

32. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

criminal, but as misdirected and misguided and needing aid, encouragement and assistance[.]”³³ If a child could not be properly cared for at home or with the assistance of a probation officer, the law provided that the child “may be placed in a suitable institution where [the child] may be helped and educated and equipped for industrial efficiency and useful citizenship.”³⁴

Even now, more than one hundred years after its creation, South Dakota’s juvenile court remains oriented toward the rehabilitation of a child. For example, South Dakota law provides that juvenile delinquency proceedings “shall be in the best interests of the child,”³⁵ and that juvenile delinquency statutes “shall be liberally construed in favor of the child, the child’s parents, and the state for the purposes of . . . affording guidance, control, and rehabilitation of any . . . delinquent child.”³⁶

B. JUVENILE TRANSFER TO ADULT CRIMINAL COURT: DISCRETIONARY JUDICIAL & AUTOMATIC STATUTORY TRANSFER MECHANISMS

Under current general South Dakota law, the juvenile court has original jurisdiction over all juvenile delinquency proceedings.³⁷ A delinquent child is defined as a minor who is at least ten years of age and has violated a law for which there is an adult criminal penalty.³⁸ If the juvenile court adjudicates a child as delinquent, the juvenile court and corrections systems have jurisdiction over the child until she reaches the age of twenty-one.³⁹

A significant exception to the juvenile delinquency laws is the juvenile transfer mechanism, which permits a child to be prosecuted as an adult in the adult criminal system. There are currently two different methods in South Dakota by which a juvenile can answer for an offense in adult criminal court: discretionary judicial transfer and statutory automatic transfer. The following describes how those methods have developed in South Dakota as well as their current status.

1. *Discretionary Judicial Transfer*

Even in the early twentieth century, juvenile courts, including South Dakota, had the ability to transfer a child to adult court to face criminal charges.⁴⁰ Early South Dakota law provided that “[t]he court may, in its

33. 1909 S.D. Sess. Laws 490.

34. 1909 S.D. Sess. Laws 490.

35. S.D.C.L. § 26-7A-5 (2004).

36. S.D.C.L. § 26-7A-6 (2004).

37. S.D.C.L. § 26-7A-2 (2004).

38. S.D.C.L. § 26-8C-2 (2004); *see also* S.D.C.L. § 26-1-1 (2004) (defining minor as a person under the age of eighteen).

39. *See* S.D.C.L. § 26-11A-5 (2004); S.D.C.L. § 26-11A-20 (2004); S.D.C.L. § 26-7A-117 (2004).

40. Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report* 94, U.S. DEPARTMENT OF JUSTICE, <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

discretion, in any case of a delinquent child permit such child to be proceeded against in accordance with the laws that may be in force in this state governing the commission of crimes or violation of city or town ordinances.”⁴¹ At that time, judicial transfer decisions were made on a case-by-case basis without any specific procedural or substantive requirements for courts to follow.⁴²

In 1966, the United States Supreme Court decided *Kent v. United States*,⁴³ which established procedural protections for children before they could be transferred to adult court.⁴⁴ The Court recognized that the question of whether to transfer a child to adult court is “critically important” because it involves “tremendous consequences,” including that the “child will be deprived of the special protections and provisions” of the juvenile court.⁴⁵ Specifically, the Court identified that the juvenile system has restrictions on jailing children with adults and it only has jurisdiction over the child until the child reaches a certain age.⁴⁶ Furthermore, the Court observed that a child in the juvenile system “is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings,” and employment consequences.⁴⁷

The *Kent* decision established for the first time that, prior to transferring a child to juvenile court, the child is entitled to due process protections including: a hearing, examination and refutation of evidence presented to the judge, and a statement of the reasons and facts underlying the juvenile court’s decision.⁴⁸ The *Kent* Court also appended to its opinion a policy memorandum, written in 1959 by a District of Columbia juvenile court judge, which listed factors to be used by the D.C. Juvenile Court to decide whether a child should be transferred to the adult criminal court.⁴⁹ Those factors related to considerations of the nature of the offense and various aspects of the child’s history and potential for rehabilitation.⁵⁰ The U.S. Supreme Court did not endorse or otherwise rely on

41. S.D. Code 1939 § 43.0313.

42. See Snyder & Sickmund, *supra* note 40, at 94.

43. 383 U.S. 541 (1966).

44. See *id.* at 553-54.

45. *Id.* at 553-54.

46. *Id.* at 556.

47. *Id.* at 557.

48. *Id.* at 561-63.

49. *Id.* at 565-68.

50. The factors listed in the appendix are: (1) “The seriousness of the alleged offense to the community and whether the protection of the community requires waiver”; (2) “Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner”; (3) “Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted”; (4) The prosecutive merit of the complaint . . .; (5) “The desirability of trial and disposition of the entire offense in one court when the juvenile’s associates in the alleged offense are adults who will be charged with a crime” in the adult criminal court; (6) “The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living”; (7) “The record and previous history of the juvenile, including previous contacts with the [juvenile system]”; and (8) “The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court.” *Id.* at 566-67.

the policy memorandum in its opinion. Nevertheless, after the *Kent* decision, many states incorporated some version of the “*Kent* factors” into their juvenile transfer laws in an effort to comply with the Court’s holding.⁵¹

After *Kent*, South Dakota amended its transfer statute to add factors for juvenile court judges to consider before making a transfer decision which are similar in many respects to the *Kent* factors.⁵² Those factors cover the following subject areas: (1) the nature of the alleged offense and its implications for community safety;⁵³ (2) judicial efficiency;⁵⁴ and (3) information about the child, including previous history and likelihood of rehabilitation.⁵⁵

South Dakota’s current judicial discretionary transfer statute provides that a child is eligible for a transfer to adult court if the child is ten years old or older and commits what would be a felony if committed by an adult.⁵⁶ The general requirement that juvenile proceedings must be conducted in the best interests of the child does not apply to transfer hearings.⁵⁷ Instead, the discretionary transfer statute requires the juvenile court to consider “whether it is contrary to the best interest of the child and of the public to retain jurisdiction over the child.”⁵⁸ The South Dakota Supreme Court interprets this language to mean that a juvenile court may transfer the child to the adult court if it would be contrary to either the public’s or the child’s interest for the child to remain in juvenile court.⁵⁹

2. Automatic Statutory Transfer

In the 1990s, in response to an increase in violent youth crime during the previous decade,⁶⁰ states began passing tougher laws that made it much easier to charge children as adults.⁶¹ The public and legislatures were motivated by

51. Barry C. Feld, *Juvenile and Criminal Justice Systems’ Responses to Youth Violence*, 24 CRIME & JUST. 189, 198 (1998).

52. 1977 S.D. Sess. Laws 409-10.

53. S.D.C.L. § 26-11-4(1)–(4) (2004) (seriousness of the alleged offense and whether transfer is necessary to protect the community; whether it was “committed in an aggressive, violent, premeditated, or willful manner”; whether it was “against persons or property with greater weight being given to offenses against persons”; and the complaint’s “prosecutive merit”).

54. S.D.C.L. § 26-11-4(5) (2004) (whether it is desirable to have one proceeding if the child’s associates in the alleged crime are adults).

55. S.D.C.L. § 26-11-4(6)–(7) (2004) (the child’s record and previous history; “[t]he prospect for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services, and facilities currently available to the juvenile court”). Unlike the *Kent* factors, South Dakota does not consider the child’s level of sophistication and maturity. *Kent v. United States*, 383 U.S. 541, 567 (1966).

56. S.D.C.L. § 26-8C-2 (2004); S.D.C.L. § 26-11-4 (2004).

57. *State v. Harris*, 494 N.W.2d 619, 623 (S.D. 1993).

58. S.D.C.L. § 26-11-4 (2004) (emphasis added).

59. *See, e.g., In re Interest of Y.C.*, 1998 SD 76, ¶ 7, 581 N.W.2d 483, 485.

60. Franklin E. Zimring, *American Youth Violence: A Cautionary Tale*, 42 CRIME & JUSTICE 265, 265 (2013) (“[T]he late 1980s produced an epidemic of gun homicides by juveniles and young adults, which led in the mid-1990s to . . . fabulously inaccurate predictions of ‘a coming storm of juvenile violence.’ Just as the rhetoric was reaching its crescendo, youth homicide rates began their largest drop in modern history.”)

61. Snyder & Sickmund, *supra* note 40, at 96-97.

unfounded rhetoric of “superpredator” youth who “without moral sensibilities . . . would roam the streets in gangs, terrorizing the public with their violent and senseless rampages.”⁶²

South Dakota was no exception to this tough-on-crime movement. In 1994, South Dakota amended its discretionary transfer law to include a “once an adult, always an adult” measure.⁶³ Essentially, if a child is transferred to the adult system and found guilty of an offense, she will automatically be considered an adult if she subsequently commits any crime, petty offense, or municipal ordinance violation.⁶⁴ Because the discretionary judicial transfer law only applies to transfers to adult criminal court for felony offenses, the “once an adult, always an adult” measure opens a much broader array of offenses for which a child, under certain circumstances, can be prosecuted as an adult.

In 1997, the South Dakota Legislature passed a law requiring an *automatic* adult criminal charge against juveniles, sixteen or over, who are charged with certain felony offenses.⁶⁵ Rather than a juvenile court judge making an individualized determination of whether to transfer the child to adult court, the law requires that a child charged with an eligible offense be automatically prosecuted in adult criminal court.⁶⁶ The statute creates a rebuttable presumption that it is in the best interest of the public to charge the child as an adult.⁶⁷ Once a child is automatically charged as an adult, she may request that the adult criminal court transfer her to juvenile court; i.e., a “reverse transfer.”⁶⁸ Upon a reverse transfer request, the statute provides that the adult court should conduct a transfer hearing using the same factors in the discretionary transfer law.⁶⁹ In 2006, the automatic transfer provision was amended to increase the number of eligible offenses.⁷⁰ At present count, there are forty-one crimes for which a child in South Dakota, who is sixteen or older, will be automatically charged as an adult.⁷¹

62. Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 49 (2010). The term “superpredator” was coined by criminologist John DiIulio, who predicted that the new century would bring an unprecedented juvenile crime wave. *Id.* at 36 n.6. He later expressed regret and acknowledged that the crime wave prediction did not come true. *Id.*

63. 1994 S.D. Sess. Laws 266.

64. S.D.C.L. § 26-11-4 (2004).

65. 1997 S.D. Sess. Laws 239. Before creating the automatic transfer to adult court, the South Dakota Legislature took an interim step. In 1995, the South Dakota Legislature passed a bill that created “a rebuttable presumption that it is *not* in the best interest of the public [for the juvenile court] to retain jurisdiction over any child, sixteen years of age or older who is charged with” a certain type of felony. 1995 S.D. Sess. Laws 266 (emphasis added). Rather, the presumption was that those children should be tried in adult court. *Id.* (codified in S.D.C.L. § 26-11-10, which was repealed in 1997).

66. S.D.C.L. § 26-11-3.1 (2004 & Supp. 2008).

67. *Id.*

68. This adult court hearing process, although called a “transfer” in the South Dakota statute, will be referred to in this article as a “reverse transfer” for greater clarity.

69. S.D.C.L. § 26-11-3.1 (2004 & Supp. 2008).

70. 2006 S.D. Sess. Laws 170 (adding Class C felonies to S.D.C.L. § 26-11-3.1).

71. South Dakota Class A, B, C, 1, and 2 felonies include the following offenses:

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1. Murder in the first degree (S.D.C.L. § 22-16-12 (2006));
 2. Attempted murder in the first degree (*Compare* S.D.C.L. § 22-16-12 (2006), *with* S.D.C.L. § 22-4-1 (2006));
 3. Criminal solicitation of murder in the first degree (*Compare* S.D.C.L. § 22-16-12 (2006), *with* S.D.C.L. § 22-4A-1 (2006));
 4. Murder in the second degree (S.D.C.L. § 22-16-12 (2006));
 5. Criminal solicitation of murder in the second degree (*Compare* S.D.C.L. § 22-16-12 (2006), *with* S.D.C.L. § 22-4A-1 (2006));
 6. Attempted murder in the second degree (*Compare* S.D.C.L. § 22-16-12 (2006), *with* S.D.C.L. § 22-4-1 (2006));
 7. Manslaughter in the first degree (S.D.C.L. § 22-16-15 (2006));
 8. Attempted manslaughter in the first degree (*Compare* S.D.C.L. § 22-16-15 (2006), *with* S.D.C.L. § 22-4-1 (2006));
 9. Criminal solicitation of manslaughter in the first degree (*Compare* S.D.C.L. § 22-16-15 (2006), *with* S.D.C.L. § 22-4A-1 (2006));
 10. Fetal homicide (S.D.C.L. § 22-16-1.1 (2006));
 11. Attempted fetal homicide (*Compare* S.D.C.L. § 22-16-1.1 (2006), *with* S.D.C.L. § 22-4-1 (2006));
 12. Criminal solicitation of fetal homicide (*Compare* S.D.C.L. § 22-16-1.1 (2006), *with* S.D.C.L. § 22-4A-1 (2006));
 13. Aggravated kidnapping in the first degree (S.D.C.L. § 22-19-1 (2006));
 14. Attempted aggravated kidnapping in the first degree (*Compare* S.D.C.L. § 22-19-1 (2006), *with* S.D.C.L. § 22-4-1 (2006));
 15. Criminal solicitation of aggravated kidnapping in the first degree (*Compare* S.D.C.L. § 22-19-1 (2006), *with* S.D.C.L. § 22-4A-1 (2006));
 16. Kidnapping in the first degree (S.D.C.L. § 22-19-1 (2006));
 17. Attempted kidnapping in the first degree (*Compare* S.D.C.L. § 22-19-1 (2006), *with* S.D.C.L. § 22-4-1 (2006));
 18. Criminal solicitation of kidnapping in the first degree (*Compare* S.D.C.L. § 22-19-1 (2006), *with* S.D.C.L. § 22-4A-1 (2006));
 19. Aggravated kidnapping in the second degree (S.D.C.L. § 22-19-1.1 (2006));
 20. Criminal solicitation of aggravated kidnapping in the second degree (*Compare* S.D.C.L. § 22-19-1.1 (2006), *with* S.D.C.L. § 22-4A-1 (2006));
 21. Act of terrorism (S.D.C.L. § 22-8-12 (2006));
 22. Attempted act of terrorism (*Compare* S.D.C.L. § 22-8-12 (2006), *with* S.D.C.L. § 22-4-1 (2006));
 23. Rape in the first degree (S.D.C.L. § 22-22-1 (Supp. 2013));
 24. Attempted rape in the first degree (*Compare* S.D.C.L. § 22-22-1 (Supp. 2013), *with* S.D.C.L. § 22-4-1 (2006));
 25. Criminal solicitation of rape in the first degree (*Compare* S.D.C.L. § 22-22-1 (Supp. 2013), *with* S.D.C.L. § 22-4A-1 (2006));
 26. Rape in the second degree (S.D.C.L. § 22-22-1 (Supp. 2013));
 27. Criminal solicitation of rape in the second degree (*Compare* S.D.C.L. § 22-22-1 (Supp. 2013), *with* S.D.C.L. § 22-4A-1 (2006));
 28. Rape in the third degree (S.D.C.L. § 22-22-1 (Supp. 2013));
 29. Encouraging or soliciting violence in a riot (S.D.C.L. § 22-10-6 (2006));
 30. Commission of a felony while armed with a firearm (S.D.C.L. § 22-14-12 (2006));
 31. Carrying or placing explosive device on vehicle or in baggage (S.D.C.L. § 22-14A-5 (2006));
 32. Intentional use of device or explosive to cause serious bodily injury (S.D.C.L. § 22-14A-11 (2006));
 33. Aggravated assault against law enforcement officer, Department of Corrections employee, or person under contract, or other public officer (S.D.C.L. § 22-18-1.05 (2006));
 34. Aggravated battery of an infant (S.D.C.L. § 22-18-1.4 (Supp. 2013));
 35. Robbery in the first degree (S.D.C.L. § 22-30-7 (2006));
 36. Aggravated grand theft (S.D.C.L. § 22-30A-17.1 (Supp. 2013));
 37. First degree burglary (S.D.C.L. § 22-32-1 (2006));
 38. Distribution of certain illegal substances to a minor (S.D.C.L. § 22-42-2 (2006 & Supp. 2013));

3. Judicial Interpretation of South Dakota Juvenile Transfer Laws: A Brief Overview

A survey of significant South Dakota Supreme Court transfer decisions over the last thirty years reveals that the Court has issued a decision in favor of a youth remaining in the juvenile system once—in *L.V.A.*, a 1976 decision.⁷² Since 1976, the Court has affirmed all lower court decisions to prosecute the child in the adult system⁷³ and reversed the two cases where the lower court exercised its discretion to keep the child in the juvenile system.⁷⁴

As mentioned previously, South Dakota transfer hearings, whether conducted in juvenile or adult court, are exempt from the requirement that juvenile proceedings be conducted only in the best interests of the child. Courts making a transfer decision may still consider the child's best interests but the law instructs that they should also consider the public's interests.⁷⁵ The South Dakota Supreme Court has held that neither interest is more important than the

39. Distribution or possession with intent to distribute one pound or more of marijuana to a minor (S.D.C.L. § 22-42-7 (2006 & Supp. 2013));

40. Human trafficking in the first degree (S.D.C.L. § 22-49-2 (Supp. 2013)); and

41. Subsequent convictions for what is known as "statutory rape" and/or sexual contact with a minor (Compare S.D.C.L. § 22-22-1(5) (2006), and S.D.C.L. § 22-22-7 (2006), with S.D.C.L. § 22-22-7.7 (Supp. 2013)).

72. *In re Interest of L.V.A.*, 248 N.W.2d 864, 872 (S.D. 1976). The South Dakota Supreme Court has overturned transfer decisions on other procedural/evidentiary grounds, however. For example, in *State v. Horse*, the Court remanded the case to the lower court for a new transfer hearing because a confession had improperly been admitted in the first transfer hearing. 2002 SD 47, ¶ 29, 644 N.W.2d 211, 225-26. On remand, the youth, Robert Horse (who was fifteen years old at the time of the offense) was convicted as an adult. See Robert Angelo Horse, *Letter to the Editor*, LAKOTA COUNTRY TIMES, Sept. 15, 2009, http://www.lakotacountrytimes.com/news/2009-09-15/PDF/Page_06.pdf.

The Court also overturned a youth's adult conviction in *State v. Caffrey* based on an involuntary confession (the court did not disturb the lower court's transfer decision). 332 N.W.2d 269, 275 (S.D. 1983). On remand, Sean Caffrey, an Oglala Sioux teen (who was seventeen years old at the time of the offense), was convicted of manslaughter and sentenced to life without parole. Nearly thirty years later, the Governor of South Dakota commuted Caffrey's sentence to 237 years. He was released on parole in 2012, thirty years after the crime. Josh Verges, *Man Who Killed Dad as Teen Receives Long-Sought Break*, ARGUS LEADER, Jan. 4, 2011, at 1A; Peter Harriman, *A Man Reborn*, ARGUS LEADER, Mar. 18, 2012, at 1A.

Most recently, the South Dakota Supreme Court held, in an unreported order that a seventeen year old, in an ongoing case, should be given a new transfer hearing because of problems with the psychologist's testimony in the first transfer hearing. *High Court Overturns Ruling in Pierre Teen Homicide*, RAPID CITY JOURNAL, Dec. 4, 2013, http://rapidcityjournal.com/news/local/high-court-overturns-ruling-in-pierre-teen-homicide/article_1ebe73be-930d-5fdb-b462-5a2d4b07f82d.html.

73. See *State v. A.B.*, 2008 SD 117, ¶ 21, 758 N.W.2d 910, 916; *State v. Krebs*, 2006 SD 43, ¶ 14, 714 N.W.2d 91, 97; *State v. Jensen*, 1998 SD 52, ¶ 55, 579 N.W.2d 613, 623; *State v. Jones*, 521 N.W.2d 662, 674 (S.D. 1994); *State v. Milk*, 519 N.W.2d 313, 318 (S.D. 1994); *State v. Rios*, 499 N.W.2d 906, 910 (S.D. 1993); *State v. Harris*, 494 N.W.2d 619, 627 (S.D. 1993); *State v. Flying Horse*, 455 N.W.2d 605, 608 (S.D. 1990); *State v. Rurup*, 272 N.W.2d 821, 823 (S.D. 1978); *In re Interest of D.M.L.*, 254 N.W.2d 457, 459 (S.D. 1977).

74. *In re Interest of S.K.*, 1999 SD 7, ¶ 40, 587 N.W.2d 740, 746; *In re Interest of Y.C.*, 1998 SD 76, ¶ 44, 581 N.W.2d 483, 490.

75. S.D.C.L. § 26-11-4 (2004).

other.⁷⁶ Indeed, lower courts are not required to consider *both* interests when making a transfer decision.⁷⁷

The Court's transfer decisions reveal a particularly strong emphasis on the public's interest. For example, the Court has stated that "[s]ociety must be protected from violent crime and the agony of its effects. It is of little or no comfort to a victim of violent crime and the victim's family that the victim's life was damaged or destroyed by a youth rather than an adult."⁷⁸ Although the Court recognizes society could be protected through the rehabilitation of the child, it does not believe that it is possible in all cases.⁷⁹

A common thread in many of the South Dakota Supreme Court's juvenile transfer decisions is its concern about the availability of suitable juvenile services and the length of time a child can remain in the juvenile system—only until turning twenty-one. In many of its decisions in favor of adult prosecution, the Court has expressed concern that the length of stay in the juvenile system is too short and may not be sufficient for the needs of a young person who has committed a serious crime.⁸⁰ Without a guarantee that the juvenile will be rehabilitated before the juvenile system's jurisdiction ends, the Court has been loath to keep her in the juvenile system.

III. EFFICACY AND FAIRNESS OF JUVENILE TRANSFER

In recent years, experts have increasingly called into doubt the wisdom of juvenile transfer and have concluded that it is not an effective response to serious youth offenses. For example, a 2012 Report of the United States Attorney General's National Task Force on Children Exposed to Violence recommends, "[w]e should stop treating juvenile offenders as if they were adults, prosecuting them as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore their capacity to grow."⁸¹ Similarly, a 2007 Centers for Disease Control affiliated Task Force recommends against the

76. *Harris*, 494 N.W.2d at 624.

77. *Id.*

78. *In re Y.C.*, 1998 SD 76, ¶ 43, 581 N.W.2d at 490.

79. *Id.*; see also *In re S.K.*, 1999 SD 7, ¶ 11, 587 N.W.2d at 742 (quoting *In re Y.C.*, 1998 SD 76, ¶ 43, 581 N.W.2d at 490).

80. See, e.g., *State v. A.B.*, 2008 SD 117, ¶ 18, 758 N.W.2d 910, 916 (noting that lower court determined it was unlikely the juvenile system would make "significant progress" treating seventeen year old's alcohol and drug addiction during the time he would be in the system); *State v. Krebs*, 2006 SD 43, ¶ 13, 714 N.W.2d 91, 96-97 (noting lower court's concern that the juvenile system's jurisdiction would end at age twenty-one and that the youth's needs might not be dealt with during the time he was in the juvenile system); *State v. Rios*, 499 N.W.2d 906, 909 (S.D. 1993) (observing that lower court was concerned that available rehabilitative services had average lengths of stay less than one year and also that the jurisdiction over the child would end at age twenty-one); *Harris*, 494 N.W.2d at 626 (noting that average length of stay in particular treatment program was up to one year but that expert's estimate for successful treatment was four years and, even then, a best case scenario).

81. UNITED STATES ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, U.S. DEP'T OF JUSTICE, 190 (Dec. 12, 2012) available at <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf> [hereinafter CHILDREN EXPOSED TO VIOLENCE].

transfer of juveniles to the adult criminal justice system because the practice increases violence rates.⁸² The federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) has made similar recommendations.⁸³

When legislatures passed juvenile transfer laws, they did not have the benefit of reliable scientific research findings. Indeed, the “get tough” amendments in the 1990s were based on inaccurate predictions of an unprecedented rise in violent youth crime.⁸⁴ We now have access to reliable research to better guide our responses to youth crime.

This Part discusses what we have learned in the intervening years about juvenile transfer, including the following issues: (1) juveniles, even those who have committed heinous acts, have a greater capacity for change than do adult criminals; (2) juveniles transferred to the adult system reoffend more often than their counterparts in the juvenile system; (3) juvenile transfer drains limited financial resources and does not further the State’s goal of reducing the adult prison population; and (4) minorities are disproportionately impacted by juvenile transfer.

A. JUVENILES HAVE GREATER CAPACITY FOR REFORM THAN ADULT OFFENDERS

Recent U.S. Supreme Court decisions indicate a shift in the way the judicial system views youth crime and capacity for rehabilitation. In the past ten years, the U.S. Supreme Court has decided three cases involving cruel and unusual punishment challenges to sentences given to juveniles convicted as adults. In all three cases, the Court has struck down the sentences as unconstitutionally harsh. First, in *Roper v. Simmons*, the Court invalidated the death penalty for all juvenile offenders.⁸⁵ Next, in *Graham v. Florida*, the Court abolished life without parole sentences for juveniles in non-homicide cases.⁸⁶ Finally, in *Miller v. Alabama*, the Court struck down mandatory life without parole sentences for juveniles, even in homicide cases.⁸⁷ The trio of juvenile sentencing decisions were all based, in part, on emerging scientific evidence about juvenile brain development.

The Court was influenced by the research showing that “juveniles have diminished culpability and greater prospects for reform” and concluded that

82. Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, 56 Morbidity and Mortality Weekly Report 1 (No. RR-9) (Nov. 30, 2007), available at <http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf> [hereinafter CDC, *Effects on Violence*].

83. Richard E. Redding, Office of Juvenile Justice and Delinquency Prevention (OJJDP), *Juvenile Justice Bulletin, Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* 8 (June 2010), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf> [hereinafter Redding, *Juvenile Transfer Laws*].

84. See *supra* Part I.

85. 543 U.S. 551, 568 (2005).

86. 560 U.S. 48, 82 (2010).

87. 132 S. Ct. 2455, 2460 (2012).

juveniles are therefore “less deserving of the most severe punishments.”⁸⁸ The Court recognized “three significant gaps between juveniles and adults.”⁸⁹ First, children lack maturity and have “an underdeveloped sense of responsibility” which leads to “recklessness, impulsivity, and heedless risk-taking.”⁹⁰ Second, “children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers[.]”⁹¹ Children “have limited ‘control[] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.”⁹² Third, children’s “character is not as ‘well-formed’” and their traits are “less-fixed,” and their actions are “less likely to be ‘evidence of [irretrievably depraved character]’” than are the actions of adults.⁹³

These differences influenced the Court’s decisions in the juvenile sentencing cases because “the case for retribution is not as strong with a minor as with an adult.”⁹⁴ Adolescents’ “brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance[.]”⁹⁵ and adolescents’ “transient rashness, proclivity for risk, and inability to assess consequences—both lessen[] a child’s ‘moral culpability’ and enhance[] the prospect that, as the years go by and neurological development occurs, [the child’s] ‘deficiencies will be reformed.’”⁹⁶ Adolescents’ distinctive attributes “diminish the penological justifications for imposing the harshest sentences on juvenile offenders, *even when they commit terrible crimes.*”⁹⁷

The information emerging about the nature of youth development and its relation to crime calls into question the once popular notion that if a juvenile “does the adult crime” she should “do the adult time.”⁹⁸ Some might find the concept of treating perpetrators of violent crime with equal severity sensible. But the effectiveness of this approach does not stand up to scrutiny. Not only does scientific evidence about youth development call into question the wisdom of harsh consequences for juveniles, other statistical data finds that adult prosecution is not an effective response to youth crime.

88. *Id.* at 2464 (quoting *Graham*, 560 U.S. at 68).

89. *Id.*

90. *Id.* (quoting *Roper*, 543 U.S. at 569).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 2465 (quoting *Graham v. Florida*, 560 U.S. 48, 71 (2010)).

95. *Id.* at 2464 n.5 (quoting Brief for Am. Psychological Ass’n et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) at 4).

96. *Id.* at 2465 (quoting *Graham*, 560 U.S. at 68).

97. *Id.* (emphasis added).

98. The origins of this sound bite are unknown but evidence of its use can be traced to the 1990s, as states passed laws making it easier to charge minors as adults. David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 665 n.94 (2002).

B. JUVENILE TRANSFER DOES NOT IMPROVE PUBLIC SAFETY

Several studies have found that transferring juveniles from the juvenile system to the adult criminal system does not reduce crime. Rather, it substantially increases crime, particularly in violent offenders. According to a Centers for Disease Control Task Force analysis, children transferred to the adult criminal system are 34% more likely to be re-arrested than comparable children retained in the juvenile system.⁹⁹ Similarly, the federal Office of Juvenile Justice and Delinquency Prevention determined that “[t]he practice of transferring juveniles for trial and sentencing in adult criminal court has . . . produced the unintended effect of increasing recidivism, particularly in violent offenders, and thereby of promoting life-course criminality.”¹⁰⁰

Among the possible explanations for the higher rates of recidivism of juveniles charged in the adult system include the following: a decreased focus on rehabilitation in the adult system, greater exposure to violence while in adult prisons, and the collateral consequences of an adult conviction.¹⁰¹

1. *The Juvenile System Places More Emphasis on Rehabilitation*

In general, the juvenile system places greater emphasis on treatment and is more likely to use therapeutic rehabilitation models than the adult system.¹⁰² Children in the juvenile system tend to report more positive, mentoring-style interactions with staff than children in adult prisons.¹⁰³ South Dakota law places more emphasis on rehabilitation in the juvenile system than it does in the adult criminal justice system. For example, as mentioned previously, the State requires that juvenile delinquency laws be “construed in favor of . . . guidance, control, and rehabilitation” of the delinquent child.¹⁰⁴ There is no such requirement in the State’s adult criminal justice system.

99. CDC, *Effects on Violence*, *supra* note 82. Because there is no available data on how many juveniles are charged as adults in South Dakota, it is not possible to compare South Dakota’s transferred youth recidivism rate to that found in these other studies. See U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 15 (Sept. 2011), *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (including South Dakota among the states that do not publicly report at least some information regarding criminal prosecutions of juveniles). In general, the recidivism rates for South Dakota adults and juveniles, one year out of prison or juvenile corrections, was roughly the same in FY2011 (about 29%). SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, ANNUAL REPORT FY 2011, <http://doc.sd.gov/about/publications/documents/DOCFY2011AnnualReport1-27-12.pdf>. Recidivism rates are often higher after more than one year out. For example, 45% of adults released from prison in South Dakota were reincarcerated within three years. PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 11 (Apr. 2011), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf.

100. Redding, *Juvenile Transfer Laws*, *supra* note 83, at 8.

101. *Id.* at 7.

102. *Id.* (citation omitted).

103. *Id.*

104. S.D.C.L. § 26-7A-6 (2004).

In South Dakota, the different goals of the juvenile and adult systems are also reflected in the State's emphasis on including the child's family in juvenile court proceedings. For example, the law requires that both the child and her parents be informed of the child's rights,¹⁰⁵ that parents have notice of and attend certain juvenile proceedings,¹⁰⁶ and that parents have access to the child's juvenile delinquency records.¹⁰⁷ The adult system does not have any similar requirements for the involvement of family in a child's adult criminal court proceedings.

2. *Children in Adult Prisons are Subjected to More Violence*

Both federal and state laws require that a child cannot be housed with adult prisoners.¹⁰⁸ However, this requirement does not apply to a child convicted in the adult system, placing children in the adult prison system at greater risk of harm.¹⁰⁹ Juveniles are more likely to be targeted by sexual predators.¹¹⁰ A recent report found that juveniles in adult facilities are "five times as likely to be sexually abused or raped as they would be in a juvenile facility."¹¹¹ Juveniles in adult prison are also twice as likely to be attacked with a weapon by inmates or beaten by staff.¹¹²

Juveniles also report spending much of their time in adult prison "learning criminal behavior from the inmates and proving how tough they [are]."¹¹³ Due

105. See, e.g., S.D.C.L. § 26-7A-11 (2004 & Supp. 2008) (informing child and parents of constitutional and legal rights required before referral for informal action); S.D.C.L. § 26-7A-30 (2004) (requiring court advise child and parents of constitutional and statutory rights at first court appearance).

106. See, e.g., S.D.C.L. § 26-11A-15 (2004) (notice to child and parents of aftercare supervision revocation hearing); S.D.C.L. § 26-7A-118 (2004) (requiring parent appearance at hearings with certain exceptions).

107. See, e.g., S.D.C.L. § 26-7A-37 (2004) (parents entitled to records of court proceedings); S.D.C.L. § 26-7A-115 (2004) (child or parents may petition court to seal delinquency records).

108. S.D.C.L. § 26-7A-26 (2004 & Supp. 2008) (preventing children from being held in adult jails and prisons with limited exceptions, such as for short durations while separated from adults by sight and sound; allowing placement of children charged as an adult to be held in an adult facility if physically separated from adults; permitting children under eighteen convicted as an adult to be held in adult jail or lock-up); see also 42 U.S.C. § 5633(a)(12)-(13) (2006).

109. South Dakota law does, however, permit the Department of Corrections to house a juvenile convicted as an adult who is under the age of eighteen to be placed in a juvenile facility. This is an option available to the Secretary of Corrections but is not a statutory requirement. See S.D.C.L. § 26-11A-6 (2004).

110. See HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) (observing that characteristics of people most likely to be targeted by sexual predators include: youth, small size, and physical weakness, among others), available at <http://www.hrw.org/reports/2001/prison/report4.html>.

111. CHILDREN EXPOSED TO VIOLENCE, *supra* note 81, at 190. Cf. ALLEN J. BECK ET AL., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, U.S. DEP'T OF JUSTICE (May 2013), available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (compiling statistics of victimization of children, and finding somewhat higher rates of sexual victimization for juveniles ages sixteen to seventeen in prisons and jails but not enough to be statistically significant).

112. Redding, *Juvenile Transfer Laws*, *supra* note 83, at 7.

113. *Id.*

to juvenile exposure to adult prison criminal culture, certain “institutions may socialize delinquent juveniles into true career criminals.”¹¹⁴

Researchers posit that the adult system is also responsible for higher rates of mental health problems of children in adult facilities as compared to children in juvenile facilities.¹¹⁵ For example, children in adult facilities have higher rates of paranoid ideation, depression, psychoticism, and post-traumatic stress disorder.¹¹⁶ Children in adult prisons are also eight times more likely to commit suicide.¹¹⁷

Juveniles in South Dakota juvenile facilities are afforded an additional protection from any abuses that might occur. South Dakota law provides for an independent juvenile corrections system monitor whose primary responsibility is protecting children in the care and custody of juvenile corrections facilities.¹¹⁸ South Dakota law authorizes the monitor to investigate incidents of abuse or neglect, access records, provide training to juvenile corrections employees, review corrections policies to ensure compliance with federal and state laws, and to update the Governor, Legislature, and other high-ranking officials.¹¹⁹ There is no equivalent of the independent monitor in the adult system or even for children held in adult facilities.

3. *Collateral Consequences of an Adult Conviction Pose Greater Challenges to Reentry*

The collateral consequences of an adult conviction make successful reintegration into the community more difficult and, therefore, are also part of the likely explanation for increased recidivism by juveniles committed to the adult system. For example, an adult criminal conviction may negatively impact a person's right to vote,¹²⁰ eligibility for military service,¹²¹ government benefit

114. *Id.*

115. MACARTHUR FOUNDATION RESEARCH NETWORK, ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 3 (Issue Brief 5), available at http://www.adjj.org/downloads/3582issue_brief_5.pdf.

116. *Id.* The rate of mental health disorders in juveniles in the juvenile justice system is already quite high. For example, approximately “65% to 70% of these youths have a diagnosable mental health disorder . . .” JOSEPH J. COCOZZA & JENNIE L. SHUFELT, JUVENILE MENTAL HEALTH COURTS: AN EMERGING STRATEGY, NAT’L CTR FOR MENTAL HEALTH & JUVENILE JUSTICE 1 (June 2006), available at http://www.ncmhjj.com/wp-content/uploads/2013/07/2006_Juvenile-Mental-Health-Courts1.pdf (citations omitted).

117. Redding, *Juvenile Transfer Laws*, *supra* note 83, at 7.

118. S.D.C.L. § 26-11A-25 (2004).

119. S.D.C.L. § 26-11A-27 (2004 & Supp. 2008).

120. See S.D.C.L. § 12-4-18 (2004 & Supp. 2013) (providing for removal of voter from registration records if she is serving a sentence for a felony conviction); see also S.D.C.L. § 23A-27-35.

121. See 10 U.S.C. § 504(a) (2012) (providing that persons with felony convictions may be ineligible for military service).

eligibility,¹²² and employment opportunities. In addition to statutory limits on certain employment opportunities,¹²³ many employers are reluctant to hire someone with a criminal record.¹²⁴ The juvenile system offers greater confidentiality protections than does the adult system, which helps to limit the public's access—including potential employers—to a person's criminal record.¹²⁵

C. TRANSFERRING YOUTH TO THE ADULT SYSTEM SQUANDERS LIMITED FINANCIAL RESOURCES

Youth transfer to the adult system adds to South Dakota's burgeoning adult prison population, spending taxpayer money on a costly and ultimately ineffective response to youth crime. As South Dakota is confronting an explosion in its prison growth, policymakers recognize that the State has come to the proverbial "fork in the road."¹²⁶ Indeed, South Dakota Supreme Court Chief Justice Gilbertson recently said South Dakotans must "decide whether we will continue to be 'tough on crime' in the same manner as we have in the past with ever-increasing rates of incarceration or be fiscal conservatives. As other states have found, we cannot be both."¹²⁷

South Dakota's prison population has increased by more than 500% since 1977 and the State's spending on adult corrections has tripled in the last twenty years.¹²⁸ Without intervention, the prison population is projected to grow another 25% through 2022, requiring construction of two new prisons which would cost taxpayers up to \$224 million.¹²⁹ The increased spending has not

122. 21 U.S.C. § 862a (2012) (making persons convicted of felony drug offenses ineligible for food stamps); 24 C.F.R. § 982.553 (2013) (limiting public housing benefits for drug-related and other criminal convictions).

123. For example, the following South Dakota statutes include limits on certain employment opportunities for people with a criminal conviction: S.D.C.L. § 36-14-32 (2004 & Supp. 2013) (barber licensing); S.D.C.L. § 36-29-18 (2004 & Supp. 2013) (athletic trainer licensing); S.D.C.L. § 36-31-14 (2004) (occupational therapist licensing).

124. See, e.g., CHRISTY VISHER ET AL., EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES, URBAN INST. (Oct. 2008), available at http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf.

125. See, e.g., S.D.C.L. § 26-7A-27 (2004 & Supp. 2008) (providing for privacy of police records of children taken into temporary custody); S.D.C.L. § 26-7A-28 (2004) (limiting release of identity of child); S.D.C.L. § 26-7A-29 (2004) (limiting release of information concerning children to persons with legitimate interest and pursuant to an order of court); S.D.C.L. § 26-7A-36 (2004) (providing that juvenile hearings are ordinarily closed to the public and outlining the exceptions to the general rule which include a child sixteen or older who is charged with certain serious offenses); S.D.C.L. § 26-7A-38 (2004) (protection of identity of witnesses in delinquency proceedings); S.D.C.L. § 26-7A-115 (2004) (sealing records in action involving delinquent child).

126. SOUTH DAKOTA'S 2013 CRIMINAL JUSTICE INITIATIVE, PUBLIC SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS 7 (2013), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/PSPP_SD_2013_Criminal_Justice_Initiative_.pdf.

127. *Id.*

128. FINAL REPORT, SOUTH DAKOTA CRIMINAL JUSTICE INITIATIVE 1-2 (Nov. 2012) available at <http://doc.sd.gov/documents/CJIRReportDraftNov2012FINAL112712pdf.pdf>.

129. PEW CHARITABLE TRUSTS, *supra* note 126, at 1-2.

resulted in an increase in public safety. Rather, most prisoners “get out of prison eventually and a very high proportion go[] back, because the main change that took place in prison is that they became better criminals.”¹³⁰

In 2013, South Dakota responded to the growth in its adult prison system when it passed comprehensive legislation designed to reduce the prison population, improve probation and parole systems, and reduce recidivism, with particular emphasis on offenders with substance-abuse problems.¹³¹ At the same time, the State is also working, with positive results, to reduce its reliance on detention in the juvenile system through the Juvenile Detention Alternatives Initiative (JDAI).¹³²

The State is making smart choices about how to allocate its scarce resources and reduce crime. This is the ideal time to consider the relative value of prison sentences for children convicted as adults, which only increase recidivism, versus more intensive and effective interventions in the juvenile system.

To the extent evidence-based services for high-risk youth might be more immediately costly than incarceration in adult prison,¹³³ those services advance the State's goals to reduce the adult prison population and increase public safety and therefore will ultimately result in cost savings.¹³⁴ In addition, the public supports paying for rehabilitation opportunities for youth.¹³⁵ For example, one

130. *Id.* at 2 (quoting floor testimony of Sen. Craig Tieszen, Jan. 24, 2013). “From 2001 to 2011, [sixteen] states reduced both their imprisonment rates and crime rates. South Dakota was not one of them. Nationally, the imprisonment rate rose just 2 percent . . . while crime declined by 21 percent. In South Dakota, however, the imprisonment rate rose 15 percent and crime dropped just 11 percent.” *Id.* (citation omitted).

131. *Id.* at 1 (describing the goals of Senate Bill 70). One of the main goals of the initiative is to focus prison space on violent and career criminals rather than non-violent offenders. *Id.* at 4.

132. Chief Justice David Gilbertson, South Dakota State of the Judiciary Message 6-7 (Jan. 2014) (transcript available at <http://ujs.sd.gov/uploads/annual/fy2013/2014StateofJudiciary.pdf>). One example of the success of this effort comes from Minnehaha County where the use of a risk assessment instrument resulted in reduction of the average daily population in secured juvenile detention from 41 in 2009 to 11 in 2012. *Id.*

133. See, e.g., SD DOC ANNUAL REPORT FISCAL YEAR 2012, S.D. DEP'T OF CORRS. 7 (2012), available at <http://doc.sd.gov/documents/about/publications/FY2012AnnualReport.pdf> (providing average per diem rates for juvenile and adult facilities for FY12).

134. Economists have estimated significant cost savings of targeting high-risk youth. See, e.g., Mark Cohen & Alex R. Piquero, *New Evidence on the Monetary Value of Saving a High Risk Youth*, 25 J. OF QUANTITATIVE CRIMINOLOGY 46-47 (2009) (estimating the present value of saving a high-risk youth to be \$2.6—\$5.3 million at age 18).

135. See SUSAN M. RANDALL ET AL., KIDS, CRIMES, CHOICES: WHAT CAN WE DO? (2000), available at <http://cdm16442.contentdm.oclc.org/cdm/singleitem/collection/p15403coll2/id/883/rec/1> (describing findings from a series of public forums in South Dakota; e.g., 90% of forum participants said South Dakota should focus on rehabilitating rather than punishing youthful offenders); see also Alex Piquero & Laurence Steinberg, *Rehabilitation Versus Incarceration of Juvenile Offenders: Public Preferences in Four Models for Change States*, MODELS FOR CHANGE: SYSTEMS REFORM IN JUVENILE JUSTICE, 4, available at http://www.macfound.org/media/article_pdfs/WILLINGNESSTOPAYFINAL.PDF (finding that “the public clearly favors rehabilitation over punishment as a response to serious juvenile offending”).

national poll found that more than 80% of Americans think spending on youth rehabilitative services and treatment will save money in the long run.¹³⁶

D. JUVENILE TRANSFER DISPROPORTIONATELY AFFECTS YOUTH OF COLOR

Not only is the efficacy of juvenile transfer in question, it is also problematic because it is unequally applied to youth of color. Nationally, youth of color are overrepresented in transfers to adult court.¹³⁷ Although demographics are not available for South Dakota youth transferred to the adult system, the more general data about South Dakota's juvenile and adult systems reveal that minorities are overrepresented in both systems. For example, although only 8.8% of the state's population is Native American, this group comprised 38% of all juvenile offenders and 29% of all adult offenders committed to the Department of Corrections.¹³⁸

Given these disproportionate numbers in South Dakota's juvenile and adult systems, it is plausible that Native American youth transfers to adult court may also be disproportionate. This would be consistent with a national study that found that, all other things being equal, Native American youth are more likely than white youth to be waived to the adult criminal system and even more likely to be committed to an adult prison.¹³⁹

IV. REFORMING SOUTH DAKOTA'S APPROACH TO YOUTH CRIME

In light of recent U.S. Supreme Court juvenile decisions and South Dakota's recent efforts to reduce its juvenile and adult prison populations, this is the opportune time to re-examine the State's juvenile transfer provisions.¹⁴⁰

136. BARRY KRISBERG & SUSAN MARCHIONNA, ATTITUDES OF US VOTERS TOWARD YOUTH CRIME AND THE JUSTICE SYSTEM, NATIONAL COUNCIL ON CRIME AND DELINQUENCY 1 (Feb. 2007), available at http://www.nccdglobal.org/sites/default/files/publication_pdf/focus-voters-and-youth.pdf.

137. AMANDA BURGESS-PROCTOR ET AL., YOUTH TRANSFERRED TO ADULT COURT: RACIAL DISPARITIES, 2 CAMPAIGN FOR YOUTH JUSTICE 7, available at <http://www.campaignforyouthjustice.org/documents/YouthTransferred.pdf> (finding that youth of color are disproportionately transferred to adult court); see also CHRISTOPHER HARTNEY & LINH VUONG, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM, NATIONAL COUNCIL ON CRIME AND DELINQUENCY 30 (Mar. 2009), available at http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

138. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 19, available at <http://www.census.gov/compendia/statab/2012/tables/12s0019.pdf>; S.D. DEP'T OF CORRS, *supra* note 133, at 7.

139. NEELUM ARYA & ADDIE ROLNICK, A TANGLED WEB OF JUSTICE: AMERICAN INDIAN AND ALASKA NATIVE YOUTH IN FEDERAL, STATE, AND TRIBAL JUSTICE SYSTEMS, 1 CAMPAIGN FOR YOUTH JUSTICE 8 (May 2008) (citing NATIVE AMERICAN YOUTH AND THE JUVENILE JUSTICE SYSTEM, NATIONAL COUNCIL ON CRIME AND DELINQUENCY (Mar. 2008) (finding that Native American youth are 1.5 times more likely than white youth to be waived to the adult criminal system and 1.84 times more likely to be committed to an adult prison)) available at http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf; see also Hartney & Vuong, *supra* note 137, at 36-37 (finding that Native American youth were admitted to adult prison at 2.5 times the rate of Caucasian youth in 2003; also noting that South Dakota reported no juveniles in adult prisons that year).

140. South Dakota has already taken one proactive step in response to the U.S. Supreme Court's decision in *Miller v. Alabama*. In 2013, South Dakota passed a law that requires a presentence hearing

This Part makes recommendations intended to help the State achieve its goals of effectively responding to youth crime and also protecting children's best interests.

A. SOUTH DAKOTA SHOULD RETURN TO A SYSTEM WHERE TRANSFER
DECISIONS ARE MADE ON AN INDIVIDUALIZED BASIS BY A JUVENILE COURT
JUDGE

For so long as South Dakota continues to transfer juveniles to the adult system,¹⁴¹ the state should return the transfer decision-making authority to the juvenile court judge who can make an individualized decision about whether it would be in the child's best interest to be tried as an adult.¹⁴² The State adopted automatic transfer laws during a time when the country erroneously believed youth crime was on a meteoric rise and that such harsh consequences were necessary to prevent it.¹⁴³ What the last twenty-five years have shown is that transfer laws have not reduced crime. Indeed, they have had the opposite effect because they increase recidivism of serious youthful offenders.¹⁴⁴

The return to discretionary judicial decision-making by a juvenile court has support from juvenile court judges. A national study found that 72% of juvenile court judges prefer judicial discretionary decision-making as the best way to handle juvenile transfer.¹⁴⁵ In addition, the National Council of Juvenile and Family Court Judges recommend that transfer decisions be made by a juvenile judge on a case-by-case basis.¹⁴⁶ Finally, studies of voters have found that they favor transfer decisions made by judges on a case-by-case basis rather than a blanket policy.¹⁴⁷

The reverse transfer mechanism currently in place in South Dakota, in which a child requests the adult court send her to the juvenile system, is not an adequate substitute for a discretionary judicial transfer determination. Judges presiding over reverse transfer hearings are bound by a statutory presumption

before a juvenile can be given a life sentence. See S.D.C.L. § 23A-27-1 (2013) (amended by S. 39, 88th Leg., (2013)).

141. Some experts have argued that transfer to adult court should be abolished. See Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 104 (2013).

142. This recommendation to return to judicial discretionary decision-making also means that the juvenile court must be permitted to make its decision without a statutory presumption in favor of the adult system.

143. See *supra* Part I.

144. See *supra* Part II.

145. Dia N. Brannen, et al., *Transfer to Adult Court: A National Study of How Juvenile Court Judges Weigh Pertinent Kent Criteria*, 12 PSYCHOL. PUB. POL'Y & L. 332, 340 (2006).

146. JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES 102 (2005), available at <http://www.ncjfcj.org/sites/default/files/juveniledelinquencyguidelinescompressed%5B1%5D.pdf> [hereinafter NCJFCJ].

147. KRISBERG & MARCHIONNA, *supra* note 136, at 1 (noting that 92% of the U.S. voting public supports case-by-case transfer decisions rather than automatic transfer).

that the child should be prosecuted as an adult and the burden is on the child to rebut that presumption.¹⁴⁸ In the juvenile court, however, there is no mandatory presumption in favor of adult prosecution.

B. SOUTH DAKOTA SHOULD CONDUCT JUVENILE TRANSFER PROCEEDINGS
LIKE ALL OTHER JUVENILE PROCEEDINGS—IN THE BEST INTERESTS OF THE
CHILD

South Dakota should amend its laws so that the requirement that the court make decisions in the best interests of the child in juvenile proceedings be extended to also include transfer proceedings. At present, a judge presiding over a transfer hearing may consider the child's best interests and the public's best interests but is not required to consider both.¹⁴⁹ A judge can even transfer a child to the adult system based solely on the public's interests.¹⁵⁰

South Dakota law providing for a separate consideration of the public's interest in transfer decisions is cumulative and therefore unnecessary. The public's best interest is already well-represented because it is implicit in the very existence of the juvenile and adult court systems.¹⁵¹ The overarching function of delinquency and criminal justice systems is to respond to conduct that society has determined should be illegal because it poses a threat to safety and/or other overall well-being.

The ABA Juvenile Transfer Standards purposely do not include a separate consideration of the public's interest. The ABA explains that the public interest should not be a justification for juvenile transfer because transfer must be "justified on the basis of the juvenile and his or her actions and personal history. A 'public interest' basis for [transfer] looks to something external to the juvenile."¹⁵² Furthermore, the ABA explains concerns about community safety are already implicit in other transfer factors such as: the examination of the seriousness of the present charge, past violent acts, and past efforts at rehabilitation.¹⁵³ These factors are "designed to identify juveniles who are genuine threats to community safety[.]"¹⁵⁴

Similarly, South Dakota's existing transfer factors already address the public's interest. For example, the court considers the "seriousness of the alleged felony offense *to the community* and *whether protection of the*

148. S.D.C.L. § 26-11-3.1 (2006).

149. S.D.C.L. § 26-11-4; *State v. Harris*, 494 N.W.2d 619, 624 (S.D. 1993).

150. *See Harris*, 494 N.W.2d at 624.

151. The South Dakota Supreme Court has acknowledged that the public's interest has always played a part in ordinary non-transfer-related juvenile proceedings. *Harris*, 494 N.W.2d at 623 ("[J]uvenile proceedings have never been conducted in a vacuum, free from the interests of the state.").

152. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO TRANSFER BETWEEN COURTS 40 (1980) [hereinafter INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION].

153. *Id.* at 41.

154. *Id.*

community requires” transfer.¹⁵⁵ The court also examines whether the alleged crime was committed against persons or property and gives greater weight to offenses against persons.¹⁵⁶ The level of violence and aggression alleged in the offense is also a factor in the court’s transfer determination.¹⁵⁷ The law also provides for examination of the juvenile’s previous history of delinquent behavior, if any.¹⁵⁸ Finally, even the factor most closely associated with the child’s best interest—likelihood of reasonable rehabilitation—also explicitly identifies the public’s interest as a consideration. The court may consider the “prospect for *adequate protection of the public* and the likelihood of reasonable rehabilitation of the juvenile, if the juvenile is found to have committed the alleged felony offense, by the use of procedures, services, and facilities currently available to the juvenile court.”¹⁵⁹

If the public has any interests beyond community safety and youth rehabilitation, those interests may not be appropriate considerations for a court’s transfer decision.¹⁶⁰ For example, the ABA cautions that the term “public interest” may be used to refer to political considerations which are more appropriately considered if, at all, by the prosecuting attorney.¹⁶¹ Similarly, the ABA cautions against using administrative convenience as a factor in favor of transferring a child to adult court.¹⁶²

Finally, the more we understand the negative consequences that juvenile transfer has on public safety, the more apparent it is that providing rehabilitative opportunities to young people in the juvenile system is also in the public’s interest. The South Dakota Supreme Court has previously rejected the view that a juvenile’s likelihood of rehabilitation is in the public’s interest.¹⁶³ The Court

155. S.D.C.L. § 26-11-4(1) (2004) (emphasis added).

156. S.D.C.L. § 26-11-4(3) (2004).

157. S.D.C.L. § 26-11-4(2) (2004) (“[w]hether the alleged felony offense was committed in an aggressive, violent, premeditated, or willful manner”).

158. S.D.C.L. § 26-11-4(6) (2004).

159. S.D.C.L. § 26-11-4(7) (2004) (emphasis added).

160. In some of the South Dakota Supreme Court decisions, the Court uses the term “state” in place of the statutory “public” interest language. See, e.g., *State v. Harris*, 494 N.W.2d 619, 623 (S.D. 1993). It is unclear if the Court is merely using the term “state” synonymously with the term “public” or if something more is intended. See *id.*

161. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, *supra* note 152, 40-41.

162. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, *supra* note 152, 42. Currently, one of South Dakota’s juvenile transfer factors allows a court to consider matters of administrative convenience. See S.D.C.L. § 26-11-4(5) (2004) (identifying one of the transfer factors as “desirability of trial and disposition of the entire felony offense in one proceeding if the child’s associates in the alleged felony offense are adults”). Although one of the *Kent* factors permits a court to consider whether it is desirable to dispose of the crime in one proceeding if the juvenile’s co-defendants are being prosecuted in adult court, the ABA Juvenile Justice Standards do not include an equivalent provision. See *Kent*, 383 U.S. at 567; see also S.D.C.L. § 26-11-4(5) (2004). Administrative convenience (or judicial economy, to the extent those concepts differ), while an unobjectionable goal in the abstract, should not be permitted to influence the outcome of the “critically important” transfer decision.

163. *State v. Krebs*, 2006 SD 43, ¶ 13, 714 N.W.2d 91, 96.

has concluded that a child's interest is in not only rehabilitation itself but also the *possibility* of rehabilitation. In contrast, the Court has reasoned that the public's interest is in the juvenile's *actual* rehabilitation; if the youthful offender is not rehabilitated by the time of release, the public is not made safe.¹⁶⁴ The research on youth recidivism calls this reasoning into question, however. The public's interest in actual rehabilitation is better served by placing the child in the system that is more likely to accomplish that goal. Sending a child to the adult system increases the chances that the child will reoffend.

C. SOUTH DAKOTA NEEDS TO INCORPORATE YOUTH'S CAPACITY FOR CHANGE INTO ITS CONSIDERATION OF THE LIKELIHOOD OF REHABILITATION FACTOR

A particularly knotty factor for courts has been the child's "likelihood of reasonable rehabilitation" in the juvenile system "by the use of procedures, services, and facilities currently available to the juvenile court."¹⁶⁵ Courts are concerned about public safety and therefore are reluctant to take a chance on keeping the child in the juvenile system. Courts also are particularly concerned about the juvenile system's ability to deal with children who have committed more serious offenses and whether the system truly has services "available" to these children.

The case of Jessie Krebs exemplifies some of the concerns courts have had with the likelihood factor. At the age of sixteen, Jessie Krebs stabbed nineteen-year old Chance Darrow to death during a fight at a keg party.¹⁶⁶ Jessie was automatically charged as an adult and requested a reverse transfer to the juvenile system.¹⁶⁷ His request for a reverse transfer was denied and he was ultimately convicted as an adult of first-degree manslaughter and sentenced to twenty years in prison.¹⁶⁸

Prior to this incident, Jessie had no juvenile or criminal history and, during the reverse transfer hearing, the trial court commented that, aside from the commission of this crime, Jessie's character, personality, and abilities were upstanding.¹⁶⁹ The trial court was "convinced" that Jessie could be rehabilitated but nevertheless ordered that he remain in the adult system because the juvenile

164. *Id.*

165. S.D.C.L. § 26-11-4(7) (2004).

166. State v. Krebs, 2006 SD 43, ¶¶ 1-2, 714 N.W.2d 91, 93-94; Heidi Bell Gease, *Fatal Stabbing Versions Vary*, RAPID CITY JOURNAL, Mar. 3, 2004, http://rapidcityjournal.com/news/fatal-stabbing-versions-vary/article_70f31087-4dd3-5645-8d5e-c585e0e43824.html (supplying information about victim's age). Jessie and several of his friends accompanied their female friend who wanted to fight another girl who was hosting a keg party. Krebs, 2006 SD 43, ¶ 2, 714 N.W.2d at 94. Jessie and his friends went to the party for this purpose. *Id.* Once they arrived, the girls started to fight and then further fighting erupted between the partygoers and Jessie's group. *Id.* ¶¶ 2-3, 714 N.W.2d at 93-94.

167. See *id.* ¶¶ 6-8, 714 N.W.2d 91, 94-95.

168. *Id.* ¶ 5, 714 N.W.2d at 94.

169. See *id.* ¶ 13, 714 N.W.2d at 97. There is no indication in the court's opinion that any expert testimony was presented to the lower court which suggested that Jessie could not be rehabilitated or that he could not get the services he needed in the juvenile system. See *id.*

system would only have jurisdiction until Jessie turned twenty-one.¹⁷⁰ The trial court was concerned that Jessie might age out of the system before the juvenile system addressed his problems.¹⁷¹

The South Dakota Supreme Court upheld the lower court's transfer decision because, while Jessie was a "young man with a lot of potential who would probably do very well in the juvenile system," the incident with Chance Darrow showed that Jessie was capable of violence and he needed rehabilitative services beyond the age of twenty-one.¹⁷²

1. Assurance of Rehabilitation Should Not be Required to Satisfy the Likelihood of Rehabilitation Factor

Jessie Krebs' case demonstrates the significant challenge – if not impossibility – of demonstrating to a South Dakota court's satisfaction that a child, who is charged with a serious crime, is likely to be rehabilitated in the juvenile system.¹⁷³ As already discussed, the U.S. Supreme Court has recognized that harsh sentences for juveniles are inappropriate – in fact, unconstitutional – because juveniles have such great capacity for change.¹⁷⁴ Yet, this capacity for change makes it especially difficult to predict the likelihood of successful treatment. It is not possible to reliably determine if a particular child will reoffend.¹⁷⁵ For example, only 16% of children assessed as psychopathic at the age of thirteen will receive such a diagnosis as adults.¹⁷⁶ This very capacity for change that makes predictions difficult suggests that, if anything, courts should be more willing to keep a child in the juvenile system because the child's criminal behavior is not indicative of an inability to change.

Another example of the disconnect between the reality of youth behavior and how courts assess the likelihood of rehabilitation is the emphasis courts sometimes place on whether or not the child shows remorse for the alleged

170. *Id.* ¶ 13, 714 N.W.2d at 96.

171. *Id.* ¶ 13, 714 N.W.2d at 96-97.

172. *Id.* ¶ 13, 714 N.W.2d at 97. The South Dakota Supreme Court overturned Jessie's conviction on evidentiary grounds and remanded the case. *Id.* ¶ 29, 714 N.W.2d at 101. On remand, Jessie pleaded guilty and was sentenced as an adult to ten years. See *Jessie Krebs Makes Plea Bargain*, KOTA NEWS, <http://www.kotatv.com/story/5507817/jesse-krebs-makes-plea-bargain>.

173. Jessie's case also exemplifies what studies have shown about courts' assessment of a juvenile's likelihood of reasonable rehabilitation; it can be easily muddled with other factors. The analysis "often ends up being an inquiry about something else. Rather than focus on treatability, the courts appear to be driven by a mix of incapacitative, retributive[,] and rehabilitative concerns, with the latter focus routinely taking a back seat to the first two objectives." Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 300 (1999). In actual judicial decision-making, the perception of the child's dangerousness tends to trump whether the court believes the child is likely to respond well to rehabilitative treatment. Brannen, *supra* note 144 at 347.

174. See *supra* Part II.

175. Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), at 22.

176. *Id.* at 21.

offense.¹⁷⁷ This is an unreliable measure for two reasons: protections against self-incrimination and the nature of youth behavior. First, from a practical perspective, the child has not yet been adjudicated delinquent (or found guilty in adult court), so it would be imprudent to admit any guilt by expressing remorse for commission of a crime.¹⁷⁸

Second, adolescents may find it more difficult to articulate the need for treatment. “Many youth in the justice system appear angry, defiant, or indifferent, but actually they are fearful, depressed, and lonely. . . . These children are often viewed by the system as beyond hope and uncontrollable, labeled as ‘oppositional,’ ‘wilfully irresponsible,’ or ‘unreachable.’”¹⁷⁹ A juvenile who tries to present himself as “street-wise” may be protecting himself rather than demonstrating a true absence of remorse. Furthermore, even where a child has expressed remorse, the South Dakota Supreme Court dismissed it as an “eleventh hour” statement that should be viewed with some skepticism.¹⁸⁰

2. *South Dakota Needs to Address Courts’ Concerns about the Unavailability of Services in the Juvenile System*

Past juvenile transfer opinions suggest that South Dakota courts are worried about the juvenile system’s ability to handle the treatment needs of children who have committed serious offenses. This concern needs to be addressed because a child should not be transferred to the adult system if a service *should* be available in the juvenile system but is not provided.¹⁸¹ Availability of rehabilitative services can refer to the actual existence of particular programs as well as to duration of services (in particular programs and in the juvenile system as a whole).

a. Actual Existence of Suitable Programs in the Juvenile System

Courts would benefit from guidance about when an existing program can be considered available. The South Dakota Supreme Court’s decisions provide conflicting guidance on this issue. In *Jensen*,¹⁸² for example, the South Dakota

177. See, e.g., *In re Interest of Y.C.*, 1998 SD 76, ¶ 42, 581 N.W.2d 483, 489-90 (Court opined that “neither a juvenile nor adult, can be rehabilitated when they show no remorse nor evidence a desire to change their improper ways.”)

178. Slobogin, *Treating Kids Right*, *supra* note 172, at 322. In addition, there is no protection in South Dakota that makes a child’s admission during a transfer proceeding inadmissible in any future proceedings against the child. Lourdes M. Rosado, *Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court*, 38 WASH. U. J.L. & POL’Y 177, 189-190 (2012).

179. CHILDREN EXPOSED TO VIOLENCE, *supra* note 81, at 172-73.

180. *In re Interest of S.K.*, 1999 SD 7, ¶ 31, 587 N.W.2d 740, 744 (reasoning that juvenile’s expression of remorse lacked truthfulness because his prior record and actions showed that his behavior had deteriorated in the past after release from a secure juvenile facility).

181. NCJFCJ, *supra* note 145, at 112; see also Slobogin, *Treating Juveniles Like Juveniles*, *supra* note 141, at 125 (observing that courts and legislatures must address the problems caused by paucity of treatment programs in the juvenile system rather than continuing to transfer children to the adult system).

182. 1998 SD 52, 579 N.W.2d 613.

Supreme Court noted that the defense was unable to identify a *specific* in-state or out-of-state juvenile program that would be appropriate for the youth.¹⁸³ In the *S.K.* case, decided one year after *Jensen*, the Court again articulated the need for a “specific program.”¹⁸⁴ However, when the lower court held that S.K. should be retained in the juvenile system and that a soon-to-be opened juvenile prison would be appropriate for S.K.’s needs, the South Dakota Supreme Court disapproved of the lower court’s reliance on the specific program.¹⁸⁵ The court reasoned that, pursuant to South Dakota statute, the Department of Corrections decides a juvenile’s placement, not the juvenile court.¹⁸⁶ These opinions, when viewed together, suggest that a juvenile cannot successfully assert that a program is available; either she will fail because she cannot identify a specific program or, if she does, the court will nevertheless conclude that it has no authority to order placement in that program.

Another issue that has come up is consideration of an existing program’s cost. As part of the availability of services inquiry, South Dakota judges are permitted to consider the cost to the State of placing a child in an appropriate treatment program.¹⁸⁷ But cost should not result in a finding that the service is not available.¹⁸⁸ Rather, if it is the case that the services are available in the juvenile system but are expensive because, for example, they are out-of-state, those services should still be viewed as “available” options. Deciding that a child should be sent to the adult system rather than given a costly, yet appropriate, evidence-based treatment that would help rehabilitate the child is a “penny wise, pound foolish” approach as it is unlikely to result in cost savings and enhanced public safety in the long run.¹⁸⁹

183. *State v. Jensen*, 1998 SD 52, ¶¶ 48-49, 579 N.W.2d 613, 620. The Court noted that the lower court found that the defense could not point to a program in South Dakota that would be appropriate; rather, the defense admitted that some new program would need to be developed. *Id.* In addition, the Court observed that the defense indicated that the “State ‘could’ access more secure out-of-state facilities, but [the defense expert] did not identify any specific facility or program that would be appropriate for” the youth. *Id.* ¶ 48.

184. *In re Interest of S.K.*, 1999 SD 7, ¶ 12, 587 N.W.2d at 743.

185. *Id.* ¶ 35.

186. *Id.* (citing S.D.C.L. § 24-2-27 (2004)).

187. *State v. Rios*, 499 N.W.2d 906, 910 (S.D. 1993) (noting that out-of-state treatment may be optimal but court can consider the cost of treatment in determining whether that treatment is currently available); *State v. Harris*, 494 N.W.2d 619, 626 (S.D. 1993) (noting that statute and case law do not “prohibit consideration of the cost of out-of-state treatment of a juvenile” and cautioning that considerations of cost should not be given “more than passing notice”).

188. To the extent cost factors in, the larger costs of continued recidivism and crime should be considered as well.

189. *See supra* Part II.C.

b. Duration of Services

Courts' most significant concern appears to be the fact that the juvenile system loses jurisdiction over a child once she reaches age twenty-one. Courts worry that this may not leave enough time to address the child's problems.¹⁹⁰ In that sense, then, the rehabilitative services are not viewed as "available" in the juvenile system. Jessie Krebs' case, mentioned at the beginning of this Part, exemplifies this concern. Although he was, by all counts, amenable to rehabilitative treatment, the Court worried that his violent act may suggest a need that requires help beyond the age of twenty-one.

If a child is likely to benefit from a service but the court is concerned about losing jurisdiction too soon, the best option is not to send the child to the adult system where rehabilitation is much less likely. Instead, South Dakota should explore other options that will achieve goals of rehabilitation and public safety. For example, the State's current juvenile jurisdictional limit of twenty-one is created by statute and could be extended. Juvenile systems in some states, for example, have jurisdiction over juveniles until they turn twenty-five.¹⁹¹

D. PROVIDE ADEQUATE PROCEDURAL SAFEGUARDS TO THE CHILD DURING THE TRANSFER DECISION-MAKING PROCESS¹⁹²

A transfer hearing's procedural nature is unique. It is defined, in part, by what it is not. For example, the South Dakota Supreme Court acknowledges that it is neither an adjudicatory nor a dispositional proceeding.¹⁹³ It is not an

190. See, e.g., *State v. Krebs*, 2006 SD 43, ¶ 13, 714 N.W.2d 91, 97; *In re Interest of Y.C.*, 1998 SD 76, ¶ 39, 581 N.W.2d 483, 489. Courts have also expressed concerns about the average length of stay in a particular facility being relatively brief. See, e.g., *State v. Rios*, 499 N.W.2d 906, 909 (S.D. 1993) (lower court noted that average length of stay in the State's detention facilities was less than 300 days and, in any event, the programs were not sufficiently secure for the juvenile). The average length of stay is not a particularly reliable number in and of itself. It does not indicate the propriety of the individual services for the juveniles who have received services in that program before; it may or may not have been appropriate to their individual needs. An average length of stay is also different than a maximum possible length of stay. A unique need may require a longer duration of treatment and, it seems, a more relevant inquiry is whether the program (or another program) can accommodate the juvenile for a longer than average stay.

Finally, duration of *detention* should not be the only consideration. Research shows that community-based programs are more effective at reducing recidivism than juvenile detention because they address "key risk factors" and because they "avoid the criminological effects of incarceration[.]" which can occur even in juvenile facilities. Slobogin, *Treating Juveniles Like Juveniles*, *supra* note 141, at 113, 129.

191. *OJJDP Statistical Briefing Book*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (April 29, 2013), available at http://ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2012&text= (California, Montana, Oregon, and Wisconsin juvenile court jurisdiction over juveniles extends to age twenty-four). See also Slobogin, *Treating Juveniles Like Juveniles*, *supra* note 141, at 129-131 (proposing that juvenile jurisdiction over youth who commit offenses when under age eighteen should extend to age twenty-five).

192. One important procedural protection which South Dakota already has in place is the inadmissibility of hearsay evidence in a juvenile transfer proceeding. *State v. Milk*, 519 N.W.2d 313, 317 (S.D. 1994).

193. *Id.* at 315.

arraignment or pre-trial hearing. The U.S. Supreme Court in *Kent* and the South Dakota Supreme Court both have described a transfer hearing as “critically important.”¹⁹⁴ But the courts have interpreted “critical importance” quite differently. In *Kent*, the U.S. Supreme Court reasoned that the proceeding is “critically important” because it involves “tremendous consequences” as to whether the “child will be deprived of the special protections and provisions” of the juvenile court.¹⁹⁵ In contrast, South Dakota precedent refers to “critical importance” as a justification for why there must be substantial evidence to support the lower court’s decision to *retain* the juvenile in the juvenile court.¹⁹⁶ In other words, the U.S. Supreme Court focused on the importance of keeping the child protected in the juvenile system while the South Dakota Supreme Court focused on the evidentiary hurdle a child must clear in order to maintain access to those protections.

South Dakota opinions also tend to deemphasize the proceeding’s importance to the juvenile. In *State v. Flying Horse*,¹⁹⁷ for example, the Court concluded that a transfer hearing is not an adversarial hearing and that “[r]egardless of the importance of such a hearing to the juvenile, it does not determine guilt or innocence. Rather, the only question to be resolved is that of the appropriate forum to hold a trial on its merits.”¹⁹⁸

This characterization of the proceeding as a mere resolution of the appropriate forum fails to recognize the significant differences between the juvenile and adult systems and the consequences associated with each one. In addition to the differences in the adult and juvenile systems mentioned throughout this article, the difference in the length of potential incarceration alone is a significant difference. For example, in 1996, fourteen-year-old Paul Jensen was convicted of first-degree murder and sentenced to life.¹⁹⁹ He remains incarcerated today—almost twenty years later.²⁰⁰ Had he not been transferred to adult court, he would have been within the juvenile court’s jurisdiction for seven years—until he turned twenty-one years old.

The serious consequences that result from a transfer to the adult system require South Dakota to recognize the critical importance of these proceedings to

194. *Kent v. United States*, 383 U.S. 541, 556 (1966); *State v. Rios*, 499 N.W.2d 906, 907 (S.D. 1993).

195. *Kent*, 383 U.S. at 553-54.

196. See, e.g., *State v. Harris*, 494 N.W.2d 619, 623-24 (S.D. 1993) (quoting *In re L.V.A.*, 248 N.W.2d 864, 867 (1977)). The transfer hearing is a “critically important proceeding” that determines “vitally important statutory rights of the juvenile” and, therefore, “there must be substantial evidence in the record to support the juvenile court’s [decision] . . . to retain jurisdiction over the child.” *Id.* (quoting *In re L.V.A.*, 248 N.W.2d at 867).

197. 455 N.W.2d 605 (S.D. 1990).

198. *Id.* at 608.

199. *State v. Jensen*, 1998 SD 52, 579 N.W.2d 613.

200. Paul received permission for a resentencing hearing after he challenged his original sentence under the U.S. Supreme Court’s *Miller v. Alabama* ban on mandatory life sentences without parole. *SD Man Serving Life to Get Resentencing Hearing*, KEOLAND.COM, Dec. 13, 2013, available at <http://www.keoland.com/newsdetail.cfm/sd-man-serving-life-to-get-resentencing-hearing/?id=157389>.

the juvenile and provide adequate procedural protections. This Part makes some specific suggestions for changes to South Dakota law that would be a step toward placing appropriate weight on the “critical importance” of transfer proceedings to a child.

1. Permit Interlocutory Appeal of All Transfer Decisions

Juveniles should have the right to file an interlocutory appeal immediately after a transfer decision. Currently, there is no such right in South Dakota.²⁰¹ Both the American Bar Association and the National Council of Juvenile and Family Court Judges recommend an immediate appeal right.²⁰² “[B]ecause of the potentially serious consequences of a juvenile’s charges being transferred to criminal court, counsel for the youth should have the opportunity to request expedited interlocutory appellate review of the juvenile delinquency court’s decision if counsel believes that the juvenile delinquency court judge has made an error in process or judgment.”²⁰³

Indeed, the longer it takes to appeal the decision, the less time the juvenile system will have to work with the child if the transfer decision is reversed. Morris Kent, the youth in the *Kent v. United States* case, exemplifies the importance of immediate appeal of a lower court’s transfer determination.²⁰⁴ At the time of the transfer hearing, Morris was sixteen years old. But by the time the transfer decision was ultimately reversed by the U.S. Supreme Court, Morris was twenty-one years old and no longer within the juvenile court’s jurisdiction or eligible for its services.²⁰⁵

2. There Should be a Probable Cause Determination Before a Juvenile Can Be Transferred to the Adult System

Due to the critical importance of transfer proceedings, the American Bar Association and National Council of Juvenile and Family Court Judges both recommend that there must be a finding of probable cause on the alleged charges

201. *In re L.V.A.*, 248 N.W.2d 864, 872 (1976). The South Dakota Supreme Court can, and sometimes has, permitted discretionary intermediate review of transfer decisions. *See, e.g., In re S.K.*, 1999 SD 7, ¶ 1-3, 587 N.W.2d 740, 741 (granting State’s request for discretionary appeal of lower court’s denial of transfer to adult court). *But see State v. Charles*, 2001 SD 67, ¶ 9, 628 N.W.2d 734, 736 (referring to the Court’s previous denial of child’s request for intermediate appeal of transfer to adult court).

202. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, *supra* note 152, at 52-53; NCJFCJ, *supra* note 146, at 107.

203. NCJFCJ, *supra* note 146, at 107.

204. 383 U.S. 541 (1966).

205. *Id.* at 543, 565.

before a juvenile can be eligible for transfer to the adult system.²⁰⁶ South Dakota currently does not require such a finding.²⁰⁷

3. *The State Should Be Required to Meet a Clearly Articulated Evidentiary Burden in all Transfer Cases*

Both the American Bar Association and National Council of Juvenile and Family Court Judges recommend that prosecutors must show that a child should not be in juvenile court by “clear and convincing evidence.”²⁰⁸ It is unclear from South Dakota’s statutes and juvenile transfer decisions what, if any, standard of proof is required of the prosecution in order to justify transfer to the adult system. Adding this procedural safeguard would provide guidance to lower courts and also require the State to meet a minimal evidentiary burden to justify the significant outcome it is seeking—to remove the child from the juvenile system and its focus on rehabilitation—and send the child to the adult system where there is no right to rehabilitative services.

V. CONCLUSION

Juvenile transfer should be used rarely—if ever. It is based on an incorrect assumption about a child’s unlikeliness to change if she has committed a serious offense and/or has a history in the juvenile justice system. Transfer has not been shown to be effective. Children who are prosecuted as adults are not likely to be rehabilitated; transfer may actually make them more hardened criminals. Transfer is not applied fairly amongst different racial and ethnic groups, and therefore perpetuates already gross disparities in our juvenile and adult criminal justice systems. All things considered, transfer is not a wise expenditure of limited public resources.

The solutions to the problem of how to best address youth crime are not easy. This article makes several recommendations for refocusing on the best interests of the child, returning decision-making authority to the juvenile court, and adding certain procedural safeguards to the juvenile transfer process. Perhaps the most difficult issue is figuring out how to address courts’ concerns that juveniles will age out of the juvenile justice system, whether they are rehabilitated or not.

South Dakota is already taking on the tough questions about how to strategically address crime in order to reduce incarceration and crime rates. This is an opportune time to also explore ways to ensure rehabilitative treatment is available to children in the juvenile system. For example, the author

206. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, *supra* note 152, at 37 (also noting that probable cause, by itself, is insufficient basis for a transfer decision); NCJFCJ, *supra* note 146, at 112.

207. *State v. Jones*, 521 N.W.2d 662, 673 (S.D. 1994).

208. INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, *supra* note 152, at 37; NCJFCJ, *supra* note 146, at 112.

recommends convening stakeholders and experts to explore whether to extend juvenile jurisdiction beyond the current limit of twenty-one. In the words of Chief Sitting Bull, “let us put our minds together to see what life we can make for our children.”²⁰⁹

209. B.J. JONES ET AL., *THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN* 1 (2nd ed. 2008); Danelle J. Daugherty, *Children are Sacred: Looking Beyond Best Interests of the Child to Establish Effective Tribal-State Cooperative Child Support Advocacy Agreements in South Dakota*, 47 S.D. L. REV. 282, 282 (2002).