

**THE IMPACT OF *STATE IN RE V.A.* ON THE ROAD BACK TO
JUVENILE REHABILITATION AND THE NEED FOR FURTHER
LEGISLATIVE CHANGES IN NEW JERSEY’S WAIVER LAW**

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I. INTRODUCTION	531
II. HISTORY AND BACKGROUND OF TRANSFER LAWS IN THE UNITED STATES	534
A. History of the Juvenile Court System	534
B. History of Waiver Laws in the United States	536
C. History of Waiver Laws in New Jersey	538
III. THE CONSEQUENCES OF LOCKING JUVENILES UP IN ADULT PRISONS	541
IV. THE DIFFERENCE IN BRAIN DEVELOPMENT IN ADOLESCENTS AND ADULTS.....	546
V. THE BENEFITS OF THE JUVENILE JUSTICE SYSTEM ON JUVENILES	548
VI. THE NEW JERSEY SUPREME COURT’S DECISION IN <i>STATE IN RE</i> <i>V.A.</i>	549
VII. TRENDS FOUND IN OTHER STATES AND THE U.S. SUPREME COURT OFFERING JUVENILES MORE PROTECTION.....	553
A. Trends Found in Other States	553
B. Trends Found in Recent U.S. Supreme Court Decisions	555
VIII. PROPOSAL OF A FURTHER NEEDED CHANGE IN NEW JERSEY’S WAIVER LAW	557
VIV. CONCLUSION	561

I. INTRODUCTION

In its recent decision, the New Jersey Supreme Court heightened the standard of review that the court should use when reviewing a prosecutor’s decision to waive juveniles aged sixteen and over charged with an enumerated offense under section 2A:4A-26 of the

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New Jersey Statutes Annotated¹ into adult criminal court.² The court held that the judicial review should be governed by an abuse of discretion standard, rather than the “patent and gross abuse of discretion standard.”³ This landmark decision for the State of New Jersey dictated that while this new standard does not give courts the power to make substitute judgments over those of the prosecutors, it does allow the courts to substantially review “to ensure that the prosecutor’s individualized decision about the juvenile before the court . . . is not arbitrary or abusive of the considerable discretion allowed to the prosecutor by statute.”⁴

The New Jersey Supreme Court’s decision in *State In re V.A.* can be seen as an important step taken by the State towards providing juveniles with more protection from the waiver process—a process which, over the years, has been amended to ease the process of trying more juveniles in adult courts than ever before.⁵ The reason behind the amendments can be traced back to the late 1980s and early 1990s, when the United States experienced a temporary spike in crimes committed by juveniles.⁶ In response to the increase in juvenile crimes as well as the public’s fear that followed it, legislatures all around the country began enacting new waiver laws, which extended the feasibility and possibility of prosecuting juveniles in adult court systems.⁷

Today, “[a]n estimated 250,000 youth[s] are tried, sentenced, or incarcerated as adults every year across the United States, most of whom are charged with non-violent offenses.”⁸ This overwhelmingly high number of juveniles has not decreased, despite the falling rates of juvenile crimes in the past fifteen years.⁹ Additionally, the rising

1. N.J. STAT. ANN. § 2A:4A-26 (West 2008).

2. *State In re V.A.*, 50 A.3d 610, 614 (N.J. 2012).

3. *See id.* at 622.

4. *Id.* at 614.

5. *See* Laura Cohen, *Opinion: N.J., Think Twice Before Trying Young Offenders as Adults*, NJ.COM, (Sept. 16, 2012, 7:46 AM), http://blog.nj.com/njv_guest_blog/2012/09/nj_think_twice_before_trying_y.html.

6. *Id.*; DANIELLE MOLE & DODD WHITE, CHILD WELFARE LEAGUE OF AMERICA, TRANSFER AND WAIVER IN THE JUVENILE JUSTICE SYSTEM 2 (2005), *available at* <http://www.cwla.org/programs/juvenilejustice/jjtransfer.pdf>; Brief of Amici Curiae at 8, *State In re V.A.*, 50 A.3d 610 (N.J. 2012) (No. 068707).

7. *See* PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 8-9 (2011) (discussing the radical changes in States’ waiver laws from 1970 to present day, in response to the “surge in youth violence that peaked in 1994”).

8. GERSTEIN BOCIAN AGNE STRATEGIES, CAMPAIGN FOR YOUTH JUSTICE, YOUTH JUSTICE SYSTEM SURVEY 1 (2011), *available at* http://www.campaignforyouthjustice.org/documents/FR_GBA_Poll_1011.pdf.

9. Cohen, *supra* note 5; UCLA SCHOOL OF LAW JUVENILE JUSTICE PROJECT, THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM 2 (2010) (citing John H. Lemmon et al., *The Effect of Legal and Extralegal Factors on Statutory*

number of youths being prosecuted and incarcerated as adults around our nation today does not reflect an understanding of the negative impact waivers have on youths.¹⁰ Minors who are transferred to adult court systems and eventually incarcerated in adult jails are in substantial need of services for psychiatric disorders and substance abuse.¹¹ Inside of adult prisons, minors also face the difficulty of having facility staff who are not “trained to work with juvenile populations, [and] have less access to rehabilitative programming and educational services than their counterparts confined in juvenile facilities.”¹² Moreover, a juvenile placed in adult prison faces a higher risk of physical and sexual assault, posed by fellow adult inmates.¹³ Despite findings of evidence that having juveniles locked up in adult prisons does not reduce recidivism rates, “[m]ore youths are processed in adult criminal court than ever before.”¹⁴

The New Jersey Supreme Court’s decision in *State In re V.A.* follows a string of recent notable U.S. Supreme Court decisions and legislative enactments, which have attempted to give juveniles more protection and offer them more leniencies.¹⁵ Although the New Jersey Supreme Court has taken a substantial step towards giving juveniles more protection from waiver laws, this step is just the

Exclusion of Juvenile Offenders, 3 YOUTH VIOLENCE AND JUV. JUST. 214, 215 (2005)), available at <http://www.campaignforyouthjustice.org/documents/UCLA-Literature-Review.pdf>.

10. See UCLA SCHOOL OF LAW JUVENILE JUSTICE PROJECT, *supra* note 9, at 11.

11. *Id.* at 12 (citing Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 PSYCHIATRIC SERVICES 965, 969 (2008)).

12. Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1448 (2012) (citing JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, NCJ 182503, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT ix (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>).

13. *Id.* (citing JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, NCJ 182503, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT ix (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>).

14. Brief of Amici Curiae, *supra* note 6, at 11 (citing Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile and Adult Criminal Court*, 59 PSYCHIATRIC SERVICES 965, 972 (2008)).

15. In 2010, the U.S. Supreme Court ruled that life without parole for juveniles who have not committed homicide violated the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 82 (2010). In 2005, the Court held that “[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.” *Roper v. Simmons*, 543 U.S. 551, 578 (2005). In 2012, Governor Jerry Brown of California signed SB9, which would allow inmates to seek permission from “judges to reconsider their sentences after they serve at least 15 years in prison.” Don Thompson, *Gov. Brown Signs Bill Giving Juveniles 2nd Chance*, BIGSTORY, (Sept. 30, 2012, 8:19 PM), <http://bigstory.ap.org/article/gov-brown-signs-bill-giving-juveniles-2nd-chance>.

beginning of more changes that need to take place in order to give juveniles all of their entitled rights throughout the transfer process.

This Note will analyze the decision in *State In re V.A.* and propose a further legislative change that still must be made to New Jersey's waiver law. Part I will discuss the history of juvenile transfer laws in the United States and further discuss how juvenile transfer laws in New Jersey, specifically, have changed over time. Part II will examine the negative impact of having juveniles tried in adult courts and eventually sent to adult prisons. This section includes findings from studies that show that "[a]dult prosecution of youth does little, if anything, to deter crime or rehabilitate teen criminals."¹⁶ Part III will discuss the brain development of adolescents and examine how it differs from that of adults. This section will also include studies showing that "children's judgment and decision-making processes are fundamentally different from adults'."¹⁷ Part IV will emphasize the benefits of keeping juveniles in juvenile facilities.

Part V of the Note will discuss and analyze the findings of the New Jersey Supreme Court in *State In re V.A.* It further presumes what the court's decision could mean for juveniles in New Jersey. Part VI will cover the trends in different states of giving juveniles more protection and discusses a similar trend found in the recent Supreme Court decisions. Part VII will propose a further need for amendments in New Jersey's waiver law, particularly on the need for amenability hearings for juveniles who are over the age of sixteen and have committed enumerated acts under section 2A:4A-26.¹⁸

II. HISTORY AND BACKGROUND OF TRANSFER LAWS IN THE UNITED STATES

A. *History of the Juvenile Court System*

Historically, the criminal court system of the United States treated juveniles the same as adult criminals.¹⁹ This meant that

16. Cohen, *supra* note 5.

17. See Anthony Campisi, *Ruling Will Make it More Difficult to Try Juveniles as Adults*, NORTHJERSEY.COM (Sept. 13, 2012, 10:06 AM), www.northjersey.com/news/169583086_Ruling_will_make_itmore_difficult_to_tryjuveniles_as_adults.html?page=all.

18. N.J. STAT. ANN. § 2A:4A-26 (West 2008).

19. MOLE & WHITE, *supra* note 6, at 1 (internal citations omitted). Up until the late nineteenth century, American criminal court systems followed the precedents of the English common law, which tended to be overly broad. Daniel M. Vannella, Note, *Let the Jury Do the Waive: How Apprendi v. New Jersey Applies to Juvenile Transfer Proceedings*, 48 WM. & MARY L. REV. 723, 727 (2006) (citing Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 779-80 (2002)). Such a court system placed juveniles into three groups: children younger than the age of seven were vindicated from any crime whatsoever; children older than

under one criminal court system, juveniles “were subject to the same harsh realities and penalties as adults in the criminal justice system.”²⁰ It was not until the late nineteenth century that the public’s opinion of the single criminal court system began to change: the public began to recognize that juveniles, due to their infancy, develop differently from adults and consequently, may be more responsive to and affected by rehabilitation than their adult counterparts.²¹ As a response to the public’s shifted view of juveniles, Illinois established the first juvenile court in 1899, “based on the premise that juveniles should receive different treatment than adults.”²² Primarily, “different treatment” for juveniles emphasized their welfare and rehabilitation—facilities such as “[s]pecialized detention centers, training schools, and youth centers were developed to confine and treat delinquent youth apart from adult offenders.”²³ By 1925, separate criminal courts that had jurisdictions over juveniles were established in every state of the United States with the exception of two.²⁴

Following the establishment of juvenile court systems, the U.S. Supreme Court reached a number of landmark decisions pertaining to juveniles. In 1966, the Court held that courts could not deny juveniles their due process rights—namely, the right to a “hearing before being transferred to criminal court, representation by counsel, access to social service records, and a written statement of the reasons for waiver.”²⁵ A year later, the Court decided that the “juvenile defendant be provided with notice of charges, right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.”²⁶ The Court took another step

fourteen were deemed responsible for their committed crimes as an adult would be and thus, were tried as adults; the responsibility and sentencing of children between the ages of seven and fourteen were left to the State’s discretion. *Id.* at n.17 (citing Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 779-80 (2002)).

20. MOLE & WHITE, *supra* note 6, at 1.

21. *Id.* (citing Brian Hansen, *Kids in Prison*, 11 CQ RESEARCHER 347, 356-58 (2001)).

22. *Id.*

23. JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, NCJ 182503, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 1 (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

24. By 1925, Maine and Wyoming had yet to establish separate juvenile courts. MOLE & WHITE, *supra* note 6, at 1.

25. *Id.* at 2; *Kent v. United States*, 383 U.S. 541, 562 (1966) (citing *Pee v. United States*, 274 F.2d 556, 559 (1959)) (the Court explained that although it does not intend its decision to “indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing,” the hearing must at least conform “to the essentials of due process and fair treatment”).

26. *In re State ex rel. A.J.*, 27 So.3d 247, 253 (La. 2009) (citing *In re Gault*, 387 U.S. 1 (1967)).

in ensuring juveniles their constitutional rights in 1970, when it decided that, regardless of whether the offender was in an adult or juvenile criminal court jurisdiction, the guilt “beyond a reasonable doubt” standard applies.²⁷

B. History of Waiver Laws in the United States

Despite the efforts of the Supreme Court to protect juveniles and the constitutional rights they were entitled to, the situation became more adverse for young offenders during the 1980s and early 1990s.²⁸ This was due to a sharp, yet temporary, increase in crimes, specifically violent crimes committed by juveniles.²⁹ The public began to fear the increasing rate of violent crimes committed by juveniles, and the media’s portrayal of young offenders only intensified the public’s negative perception of juveniles and the juvenile court system.³⁰ States all over the country quickly responded to the public’s intensified fear by “pass[ing] legislation expanding transfer of juveniles.”³¹ Such reforms “lowered the minimum age for transfer, increased the number of transfer-eligible offenses, or expanded prosecutorial discretion and reduced judicial discretion in transfer decisionmaking.”³² The juvenile court system’s digression from its

27. *In re Winship*, 397 U.S. 358, 368 (1970).

28. MOLE & WHITE, *supra* note 6, at 2-3.

29. *Id.* at 2 (citing JEFFREY BUTTS & JEREMY TRAVIS, *THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 to 2000* (2002), *available at* <http://www.urban.org/uploadedPDF/410437.pdf>) (noting that the rate of arrests made for young violent offenders between the years 1980 and 1994 increased sixty-four percent, “with the number of arrests for murder jumping ninety-nine percent during this same time period”); Brief of Amici Curiae, *supra* note 6, at 8 (citing PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1, 8* (2011), *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>).

30. *See* Brief of Amici Curiae, *supra* note 6, at 8-9 (discussing the impact of media’s portrayal of juveniles, such as “news reports in the 1980s and 1990s pronouncing an imminent tidal wave of teen ‘super-predators’” (quoting Patricia Soung, *Social and Biological Constructions of Youth: Implications for Juvenile Justice and Racial Equity*, 6 NW J. L. & SOC. POL’Y 428, 431 (2011)); MOLE & WHITE, *supra* note 6, at 2-3 (discussing the intensification of the public’s fear of juvenile-related criminal activity due, in part, to predictions by John DiLulio, a professor at Princeton University, that “these juvenile predators would rob, rape, maim, and murder for trivial reasons” (citing John J. DiLulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23-28)).

31. Brief of Amici Curiae, *supra* note 6, at 9 (internal citation omitted). Between the years “1992 and 1999, all but one state expanded or enacted legislation making it easier for juveniles to be tried as adults.” MOLE & WHITE, *supra* note 6, at 3 (citing Brian Hansen, *Kids in Prison*, 11 CQ RESEARCHER 347, 347 (2001)).

32. RICHARD E. REDDING, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY?* 1 (2010) (internal citations omitted), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

initial goal of rehabilitating juveniles reflected the beliefs and views of many Americans at the time that “juveniles should be treated with the same severity as adults” and that “the rehabilitative efforts of the juvenile system had failed.”³³ Additionally, the Juvenile Justice and Delinquency Prevention Act of 2002³⁴ was passed in hopes of “increas[ing] the accountability of violent juvenile offenders” and “address[ing] violent juvenile offenders in a more punitive manner resembling the adult court system.”³⁵

As of 2005, all states in the country had some kind of legislation that determines the jurisdiction juveniles are placed in.³⁶ While waiver laws vary significantly from state to state, especially in their levels of “flexibility and breadth of coverage,”³⁷ they all fit under one of three broad categories: (1) judicial waiver laws, which “allow juvenile courts to waive jurisdiction on a case-by-case basis”³⁸ and usually involve a case filed initially in juvenile court, which is then transferred into adult court with a judge’s approval; (2) prosecutorial discretion laws, which involve cases that can “be brought in either juvenile or criminal court” at the prosecutor’s discretion without a hearing;³⁹ and (3) statutory exclusion laws, which “grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile-age offenders,”⁴⁰ meaning that if a case falls into a statutory category, it must initially and automatically be filed in criminal court.⁴¹ Out of the three basic categories, the oldest and most common form of waiver law is one which “designat[es] some category of cases in which waiver of jurisdiction may be considered, generally on the prosecutor’s motion, and granted on a discretionary basis.”⁴²

33. Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 180 (2007) (citations omitted).

34. 42 U.S.C. §§ 5601-81 (2012).

35. Pagnanelli, *supra* note 33, at 180-81 (citing KAREEM L. JORDAN, *VIOLENT YOUTH IN ADULT COURT: THE DECERTIFICATION OF TRANSFERRED OFFENDERS* 20 (Marilyn McShane & Frank P. Williams III eds., 2006)).

36. MOLE & WHITE, *supra* note 6, at 5 (including the District of Columbia).

37. GRIFFIN ET AL., *supra* note 7, at 2.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* Additionally, while all states have waiver laws that fall into such basic categories, most of them also have at least one of the following: (1) “once adult/always adult” laws, which require any juvenile who has previously been prosecuted as an adult in the past to be prosecuted as an adult again for the current crime, regardless of the gravity of the current offense; (2) reverse waiver laws, which, as the name implies, allow juveniles who are put into adult court systems to petition for a transfer back to juvenile court; and (3) blended sentencing laws, which either “provide juvenile courts with criminal sentencing options . . . or allow criminal courts to impose juvenile dispositions.” *Id.*

42. *Id.*

Although waiver laws, in the beginning, gave juvenile court judges much authority and discretion when making jurisdictional decisions for juveniles, the judges' role in the process has substantially decreased over the years.⁴³ Over the past two decades, more discretion and authority have been given to the prosecutors, either through "direct file or by simply excluding certain charges from juvenile court jurisdiction at all."⁴⁴ An astonishing percentage—nearly fifty percent—of states made alterations to their waiver laws between 1996 and 1997, taking "away at least some form of judicial authority."⁴⁵

Judicial waiver laws themselves also fall into three subtypes: discretionary, mandatory, and presumptive.⁴⁶ The first category of waiver laws, discretionary waivers, are "the most commonly used [type] of judicial waiver" laws and require that a hearing be held, giving parties an opportunity to "present evidence that bears upon the waiver issue."⁴⁷ Fifteen states have established mandatory waiver laws which "require juvenile courts to waive jurisdiction over cases that meet specified age/offense or prior record criteria," and once all of the criteria are met, "the court has no other role than to confirm that the statutory requirements for mandatory waiver are met."⁴⁸ With the final category, presumptive waiver laws, once juveniles meet a designated category of offenses, "they must be sent to the criminal system unless it can be adequately demonstrated that transfer is not appropriate"—meaning that the burden shifts to the juvenile.⁴⁹

C. History of Waiver Laws in New Jersey

Until 1973, New Jersey's Code of Juvenile Justice provided:

If it shall appear to the satisfaction of the juvenile and domestic relations court that a case of juvenile delinquency as defined in section 2A:4-14 of this title committed by any juvenile of the age of 16 or 17 years, should not be dealt with by the court, either because of the fact that the person is an habitual offender, or has been

43. MOLE & WHITE, *supra* note 6, at 6-7.

44. *Id.* at 7.

45. *Id.* (citing PATRICIA TORBET & LINDA SZYMANSKI, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE LEGISLATIVE RESPONSE TO VIOLENT CRIME: 1996-97 UPDATE (1998), available at <http://www.juvenilenet.org/jjtap/archives/121198/pp2.pdf>).

46. *Id.* at 6.

47. *Id.* at 7 (explaining that usually, the states that use discretionary waivers set standards, such as "a minimum age . . . , specific offenses . . . or a serious record of delinquency," in order "to determine which cases may be waived into the adult criminal system").

48. GRIFFIN, *supra* note 7, at 4.

49. MOLE & WHITE, *supra* note 6, at 7-8 (discussing the three categories that presumptive waivers can fall into: offense-based, age-based, and record-based).

charged with an offense of a heinous nature, under circumstances which may require the imposition of a sentence rather than the disposition permitted by this chapter for the welfare of society, then the court may refer such case to the county prosecutor of the county wherein the court is situate.

Any juvenile of the age of 16 or 17 years may demand a presentment and trial by jury and, in such case, when this fact is made known to the court, such case, together with all documents pertaining thereto, shall be referred to the county prosecutor.

Cases so referred to the county prosecutor shall thereafter be dealt with in exactly the same manner as a criminal case.⁵⁰

During this period, “nonwaiver was to be the rule and not the exception.”⁵¹ The two main issues in transfers were “the protection of the public and rehabilitation of the offender.”⁵²

However, New Jersey’s laws were not immune to the legislators’ response to the public’s fear of increasing juvenile crime rates “during the late 1980s and early 1990s.”⁵³ New Jersey’s legislation mirrored the state’s evolving policy that “expressed concern that the juvenile justice system had dealt inadequately with serious offenders even as it may have dealt too severely with less serious offenders.”⁵⁴

On July 23, 1982, Governor Kean signed into effect Assembly No. 641, which was intended to deal with the serious juvenile offenders in a more serious manner.⁵⁵ Although more juveniles were eligible to

50. N.J. STAT. ANN. § 2A:4-15 (West 1952), *repealed by* L.1973, c. 306, § 27.

51. *State v. R.G.D.*, 527 A.2d 834, 836-37 (N.J. 1987).

52. *Id.* at 837 (referring to the decision in *State in the Interest of C.A.H. and B.A.R.*, in which the court found that the “juvenile court had incorrectly applied the standards under the statute by not properly considering the statutorily required protection of the public,” which “is not limited to ensuring society’s safety or physical security from the offender; rather, deterrence is a relevant factor in its objective of preventing future criminal conduct by both the juvenile and others”) (citing *State in re C.A.H. and B.A.R.*, 446 A.2d 93, 96-97 (N.J. 1982)).

53. Brief of Amici Curiae, *supra* note 6, at 8. See *State v. R.G.D.*, 527 A.2d at 837.

54. *State v. R.G.D.*, 527 A.2d at 837.

55. *Id.* at 838. The Act made a broader group of offenders “eligible for waiver and revised the standards for waiver in certain cases.” *Id.* (citing N.J. STAT. ANN. § 2A:4A-26 (West 2008)). The changes made in the Code of Juvenile Justice were the following:

In order to be eligible for waiver, the juvenile must be fourteen years of age or older at the time of the offense and it must be established that either (a) there is probable cause to believe that the juvenile committed certain serious acts such as criminal homicide, robbery, arson, sexual assault, possession of a firearm, (b) the juvenile had been previously adjudicated delinquent on the basis of a serious offense, or (c) the juvenile committed a delinquent act as a previous offender and had been previously incarcerated or had committed the delinquent act in a violent manner against a person.

State v. R.G.D., 527 A.2d at 838 (citing The Judiciary Comm. Statement to Assemb. No. 641, the New Jersey Code of Juvenile Justice, at § 7 (N.J. 1982)). Under the revised waiver standard, it was more difficult for juveniles to establish the likelihood of rehabilitation—“the juvenile ha[d] the burden of proof on this issue; and must show

face waivers due to the amendments, they still had a greater opportunity to show that they “should not be waived to adult court.”⁵⁶ Until the year 2000, “[i]f the State established probable cause to believe a juvenile fourteen years or older committed a delinquent act or acts, which if committed by an adult would constitute certain enumerated offenses, no additional showing was required by the State for waiver to occur.”⁵⁷ At that point, however, the convicted juvenile was given the opportunity to have a hearing, during which he “could overcome the presumption of waiver by showing”⁵⁸ the court that he could rehabilitate and that the “services and facilities available to the court prior to the juvenile reaching the age of 19 substantially outweighs the reasons for waiver.”⁵⁹

The amendments to section 2A:4A-26⁶⁰ became effective on March 14, 2000, allowing juveniles who were sixteen years old or older and charged with one of the enumerated offenses⁶¹ to be waived into adult court without a rehabilitation hearing, so long as the “State established probable cause that the juvenile committed the offense.”⁶² According to the amended statute, prosecutors now have increased discretion and responsibility to waive juveniles who are of age and have been charged with an enumerated offense, merely by showing probable cause to the court.⁶³ When faced with the question of whether juveniles should be given the opportunity to “present evidence during the probable cause portion of a juvenile waiver hearing,”⁶⁴ the court concluded that since probable cause hearings have a more heightened significance to young offenders than they do to adults, juveniles should be able to present evidence regarding

the probability that he can be rehabilitated as a juvenile prior to reaching the age of nineteen and, further, that the probability of such rehabilitation ‘substantially outweighs the reasons for the waiver.’ R.G.D., 527 A.2d at 839 (quoting N.J. STAT. ANN. § 2A:4A-26a(3) (West 1982)).

56. *State v. J.M.*, 866 A.2d 178, 183 (N.J. 2005).

57. *Id.*

58. *Id.*

59. *Id.* (quoting *State v. Scott*, 661 A.2d 1288, 1291-92 (N.J. 1995)).

60. N.J. STAT. ANN. § 2A:4A-26 (West 2008).

61. Such enumerated acts included crimes such as “[c]riminal homicide other than death by auto, strict liability for drug induced deaths, . . . robbery which would constitute a crime of the first degree, . . . aggravated sexual assault, . . . kidnapping, aggravated arson, [and] . . . [c]omputer criminal activity,” among others. § 2A:4A-26(a)(2)(a), (a)(2)(j).

62. *State v. J.M.*, 866 A.2d 178, 183 (N.J. 2005).

63. *Id.* at 183-84. In other words, for juveniles sixteen years or older who are charged with enumerated offenses, no opportunity is given to participate in the waiver hearing. Additionally, there is no “substantive inquiry into the reasons for the transfer” nor an “effective assistance of counsel” available to the juvenile. Brief of Amici Curiae, *supra* note 6, at 37.

64. *J.M.*, 866 A.2d at 180.

probable cause during their waiver hearings.⁶⁵ As for the juveniles who do not fall into the age group and/or have not been charged with one of the enumerated offenses, the statute maintains that they are only permitted to show, during the hearing, that rehabilitation is likely to occur.⁶⁶ Thus, their testimony shall not be “admissible for any purpose in any hearing to determine delinquency or guilt of any offense.”⁶⁷

III. THE CONSEQUENCES OF LOCKING JUVENILES UP IN ADULT PRISONS

It is estimated that, today, 250,000 young adults are “tried, sentenced, or incarcerated as adults every year across the United States.”⁶⁸ Every day in the United States, an average of 7,500 young adults are locked up in adult jails.⁶⁹ More shockingly, in half of the states, no minimum age limit exists for those who may be prosecuted as adults—young children, possibly as young as ages five or six, may be prosecuted as adults.⁷⁰ The rising number of juveniles who are waived into the adult criminal system seems to be “directly related to a change in waiver criteria.”⁷¹ Once placed in adult prisons, juveniles face a number of adverse consequences.⁷²

Supporters of waiver provisions, which may lead to harsher treatment of young offenders, argue that waivers deter further crimes that could be committed by juvenile offenders.⁷³ A similar argument to that of deterrence is the argument of recidivism.⁷⁴

65. *Id.* at 180, 186.

66. N.J. STAT. ANN. § 2A:4A-29 (West 1995).

67. *Id.*

68. GERSTEIN BOCIAN AGNE STRATEGIES, *supra* note 8, at 1.

69. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4 (2007), *available at* www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf.

70. NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010: REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 7 (2011), *available at* www.campaignforyouthjustice.org/documents/CFYS_State_Trends_Report.pdf.

71. MOLE & WHITE, *supra* note 6, at 13 (citing HOWARD N. SNYDER ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE TRANSFERS TO CRIMINAL COURT IN THE 1990'S: LESSONS LEARNED FROM FOUR STUDIES (2000), *available at* <https://www.ncjrs.gov/pdffiles1/ojdp/181301.pdf>).

72. *See supra* notes 10-13 and accompanying text.

73. MOLE & WHITE, *supra* note 6, at 13. It is important to note, however, that deterrence “is not the established standard for juvenile system intervention, which prescribes treatment and rehabilitation while balancing the safety of the community.” *Id.*

74. Whereas the deterrence effect of transfer laws refers to their “tendency to discourage the commission of offenses subject to transfer and criminal prosecution,” GRIFFIN, *supra* note 7, at 26, recidivism refers to the juvenile’s “tendency to relapse into a habit of criminal activity or behavior.” BLACK’S LAW DICTIONARY 1384 (9th ed.

Contrary to the belief that keeping juveniles in adult court systems will keep charged or convicted juveniles from committing a crime in the future and also keep other potential juveniles from committing crimes, studies have shown that such waiver laws are “misguided and ineffective at curbing juvenile crime.”⁷⁵

The recidivism argument is misguided because young adults who are placed in adult prison systems are actually more likely to commit a crime again after serving their time in prison.⁷⁶ So why are juveniles convicted in adult court systems significantly more prone to recommitting crimes than those convicted in juvenile court systems? Experts have identified several different possible explanations for this trend.⁷⁷ Such explanations or causes are: (1) “[t]he stigmatization and other negative effects of labeling juveniles as convicted felons”⁷⁸; (2) “[t]he sense of resentment and injustice juveniles feel about being tried and punished as adults”⁷⁹; (3) “[t]he learning of criminal mores and behavior while incarcerated with adult offenders”⁸⁰; and (4) “[t]he decreased focus on rehabilitation and family support in the adult system.”⁸¹ Additionally, it is important to note that the fear of young offenders re-committing crimes itself may be exaggerated— “[m]ost of the youth who enter the adult court are charged with non-violent offenses.”⁸²

2009).

75. Brief of Amici Curiae, *supra* note 6, at 10 (citations omitted).

76. CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 14 (2007), *available at* http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf. For example, studies have shown that there is a greater overall recidivism rate among young offenders who were prosecuted as adults than the young offenders who were convicted as juveniles. *Id.* Also, “[c]riminally prosecuted youth were also generally found to have recidivated sooner and more frequently.” GRIFFIN, *supra* note 7, at 26. In one study, it was discovered that young offenders who were detained in New York’s adult prison were “85 percent more likely to be re-arrested for violent offenses, and 44 percent more likely to be arrested for property crimes, than were youth committing similar offenses in the New York metropolitan area” but detained in juvenile systems. Brief of Amici Curiae, *supra* note 6, at 10 (citations omitted); *see also* REDDING, *supra* note 32, at 4-6 (discussing six major published studies that indicated that juveniles tried in adult courts were generally more likely to re-offend and get re-arrested than those who were tried in juvenile systems).

77. REDDING, *supra* note 32, at 4-6.

78. *Id.* at 7.

79. *Id.*

80. *Id.*

81. *Id.* Studies found that many juveniles convicted in adult court systems felt that waiver laws were unfair, “did not understand why the legal system was trying them as adults, and . . . saw themselves as being “treated differently from other similarly situated juveniles.” *Id.*

82. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 76, at 1. While it has been shown that “7 out of 10 [convicted juveniles in adult courts] are convicted of violent offenses,”

Although the waiver laws' inability to deter potential juvenile offenders from committing crimes and keep convicted juveniles from re-committing crimes poses a serious problem, the bigger issue is the negative impact that the laws have on the charged juveniles themselves. Juveniles, historically, were purposely kept in separate court systems because the focus was on rehabilitation, not punishment.⁸³ However, for juveniles who are tried and convicted in adult court, adult prison systems simply fail to provide them with the "age-appropriate rehabilitative treatment that will allow them to lead productive lives post-incarceration."⁸⁴ For example, one juvenile, who was held in adult prison at age fifteen, witnessed an adult inmate attempting to take his own life and shared a cell with "an adult convicted of child molestation."⁸⁵ During this time, he also had no access to any "educational programming or mental health counseling."⁸⁶ Unfortunately, mental health counseling is the type of service that is especially needed for juveniles being processed in adult systems.⁸⁷ Thus, not only are such juveniles held in different facilities than other juveniles who are held in juvenile prisons, but they are also denied the opportunity to rehabilitate themselves. Adult prison systems "emphasi[ze] . . . punishment, . . . [not] treatment and rehabilitation."⁸⁸ This difference makes it difficult and almost impossible for juveniles to receive the adequate training and programming they need in order to be rehabilitated.⁸⁹ It was found,

this proportion is not such an accurate representation either because the term "violent" is used inappropriately in many cases. *Id.* at 6. For example, one juvenile was charged with "strong-armed robbery" and placed in an adult detention facility for stealing two dollars from another young person. MOLE & WHITE, *supra* note 6, at 26.

83. See *supra* notes 19-35 and accompanying text.

84. Brief of Amici Curiae, *supra* note 6, at 11-12.

85. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 76, at 7.

86. *Id.* Researchers have found that many young offenders in adult jails "sleep in excess of 15 hours a day, do not receive adequate nutrition or exercise, and do not have access to educational programming." *Id.*

87. Juveniles who are processed in adult courts are in dire need of psychiatric services because a significant number of juveniles processed in adult court have psychiatric disorders. See UCLA SCHOOL OF LAW JUVENILE JUSTICE PROJECT, *supra* note 9, at 12. A study found that "66% of youth processed in adult criminal court had at least one psychiatric disorder and 43% had two or more types of disorders." *Id.* (citing Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 PSYCHIATRIC SERVICES 965, 969 (2008)).

88. MICHELE DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 54 (2009), available at http://www.campaignforyouthjustice.org/documents/NR_TimeOut.pdf.

89. *Id.* It is estimated that more than "40% of incarcerated youth are in need of special education classes . . . and yet adult facilities do not have the resources to provide this service." *Id.* To make matters worse, budget cuts often lead to the elimination of programs such as higher education programs and specialized therapy. *Id.*

through a survey of adult facilities, “that 40% of jails provided no educational services at all, only 11% provided special education services, and a mere 7% provided vocational training” to juveniles in adult prisons.⁹⁰

A bigger issue juveniles detained in adult prisons must face is being incarcerated with adult inmates. While some states keep their juvenile offenders separate from adult offenders in adult prisons, many do not.⁹¹ By sharing cells with adult inmates, juveniles are fully exposed to the negative influence the older inmates may have on them.⁹² At a young age, they are exposed to a “criminal culture in which inmates commit crimes against each other” and thus face the danger of transforming from mere delinquent juveniles to “true career criminals.”⁹³

Unfortunately, being exposed to their adult inmates’ negative influence is truly the least of the juveniles’ fears and concerns. Being detained with adult inmates makes young offenders extremely vulnerable to becoming victims of serious abuse, such as sexual and physical assault.⁹⁴ Juveniles become easier targets for abuse in adult prisons for various reasons: young children are smaller than their adult inmates; they lack a social network within the prison as a protective measure; and they are easy to intimidate.⁹⁵ The situation is also exacerbated by the fact that adult prisons are simply understaffed and overcrowded with inmates.⁹⁶ Thus, there is a lack of supervision and consequentially for juveniles, a lack of protection from the threats of supervisors.⁹⁷

Although youth in adult prison face a serious problem of physical abuse from their adult inmates,⁹⁸ the more threatening issue for

90. ARYA, *supra* note 70, at 15 (citing CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS (2003), available at <http://www.prisonpolicy.org/scans/bjs/ecp.pdf>).

91. Andrea Wood, *supra* note 12, at 1448 (citing JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, at xi, 45 (2000), available at <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>).

92. REDDING, *supra* note 32, at 7. “Juveniles [detained] in adult prison[s] reported that much of their time [served in prison] was spent learning criminal behavior from the inmates and proving how tough they were.” *Id.*

93. *Id.*

94. See AUSTIN ET AL., *supra* note 23, at 7-8.

95. DEITCH ET AL., *supra* note 88, at 55.

96. *Id.*

97. *Id.*

98. *Id.* A study showed that juveniles in adult prison were “50 percent more likely to be physically attacked by fellow inmates with a weapon of some sort, and twice as likely as adults to be physically assaulted by staff members.” *Id.* (footnotes omitted). Thus, these juveniles face not only the threat of physical abuse from adult inmates but from adult staff members as well.

them is that of sexual assault.⁹⁹ Despite the fact that many sexual assault cases are unreported, studies show that juveniles held in adult prisons are five times more likely to become victims of such abuse than juveniles kept in juvenile systems.¹⁰⁰ Juveniles may become victims of sexual assault almost immediately upon their incarceration—abuse may begin as early as within the first two days of their entry into an adult prison.¹⁰¹

While juvenile offenders made up “less than 1% of the jail population in 2005, . . . they made up 21% of all victims of substantiated incidents of inmate-on-inmate sexual violence in jails.”¹⁰² The harm from sexual assault also affects the juveniles who are not actually sexually assaulted or raped but inevitably live in “constant and legitimate fear of sexual assault, or of witnessing the sexual assault of others.”¹⁰³ The fear of sexual assault that these juveniles feel is so severe that some even resort to strategically partaking in punishable activity within the jail cells, in order to get locked up in solitary and avoid the possibility of getting sexually abused.¹⁰⁴

At quick glance, the solution to the physical and sexual assault that juveniles suffer from may seem quite simple: keep the juveniles separate from their adult inmates. However, simply separating the younger offenders from their potential abusers does not solve the issue completely and may well cause a new set of problems.¹⁰⁵

99. *Id.*

100. *Id.* (citing Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601-15609 (2006))).

101. Wood, *supra* note 12, at 1450-51 (citing Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §15601(4) (2006)); see also VINCENT SCHIRALDI & JASON ZEIDENBERG, THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS 3 (1997), available at http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf).

102. Wood, *supra* note 12, at 1451 (citing NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 155 (2009), available at http://nprec.us/files/pdfs/NPREC_FinalReport.PDF).

103. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 69, at 13. According to a letter written by Sam, in which he recalled his time spent in an adult facility at age 17, he “was called names and laughed at by the guards and inmates[]” and the fear of being attacked by them at night kept him awake. *Id.* at 8. Moreover, he did not receive the medication he needed for his paranoia and panic attacks. *Id.*

104. *Id.* at 13. Juveniles resorted to purposely assaulting staff members to get locked up. *Id.* They would not “mind being locked up 23 hours a day if that meant, as they would often say, not having to watch your back These were not gang-bangers . . . not violent youths, these were youth trying to escape the victimization that was going on in” the prison cells. *Id.* (quoting Testimony of Barry Krisberg, President of the National Council on Crime and Delinquency, before the National Prison Rape Elimination Commission (June 2006), available at http://www.nprec.us/docs/boston_natureofproblem_krisberg.pdf).

105. See LIZ RYAN, CAMPAIGN FOR YOUTH JUSTICE, YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM 4 (2012), available at

Officials in adult prisons are caught “in a Catch 22 when it comes to young people in their custody”¹⁰⁶ because on the one hand, if they fail to separate juveniles from adult inmates, youth are exposed to the possibility of physical and sexual abuse.¹⁰⁷ However, on the other hand, if officials choose to separate juveniles from the adult inmates, the juveniles “are often placed in isolation for long periods of time,”¹⁰⁸ which can eventually “lead to depression, exacerbate already existing mental health issues, and put youth at risk of suicide.”¹⁰⁹

Even when long-term isolation is removed from the picture, suicide rates for juveniles in adult prisons are alarming.¹¹⁰ Statistics show that “jail inmates under 18 had the highest suicide rate of all inmates.”¹¹¹ When compared to other young adults in the general population, juveniles in adult prisons are “19 times more likely to commit suicide.”¹¹² The high risk of suicide also existed for juveniles who were held in adult prisons for only a short period of time, and for juveniles held in both small and large jails.¹¹³ Ultimately, the type of jail and the duration of incarceration do not seem to make a difference—all juveniles who are locked up in adult prisons face a greater risk of suicide than their counterparts placed in juvenile cells.¹¹⁴

IV. THE DIFFERENCE IN BRAIN DEVELOPMENT IN ADOLESCENTS AND ADULTS

The negative impact of adult prison on juveniles is especially detrimental to such young inmates because teen brains generally are not as developed as those of adults.¹¹⁵ At the same time, due to their continuing brain development, juveniles are also more receptive to rehabilitation than are adults.¹¹⁶ “They do not have the same abilities as adults to make sound judgments in complex situations, to control their impulses, or to plan effectively for the long term.”¹¹⁷

http://www.campaignforyouthjustice.org/documents/FR_YACJS_2012.pdf.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 69, at 10.

111. *Id.* at 10 (citing CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS (2005), available at <http://www.bjs.gov/content/pub/pdf/shsplj.pdf>). Specifically, during the years 2000-2002, it was reported that 101 per 100,000 juvenile inmates committed suicide. *Id.* (citing MUMOLA, *supra*).

112. *Id.* at 4 (citing MUMOLA, *supra* note 111).

113. *Id.* at 10.

114. *See id.*

115. *See* ARYA, *supra* note 70, at 9; DEITCH ET AL., *supra* note 88, at 53-56.

116. *See* ARYA, *supra* note 70 at 9.

117. *Id.*

These differences can be explained by scientific findings. Brain development continues into adulthood, and adolescents' "brain[s] undergo[] dramatic changes to the structure and function of the brain,"¹¹⁸ which has an impact on the way young adolescents process and react to certain situations and information.¹¹⁹

There are both downsides and upsides to the still-developing and malleable nature of adolescents' minds. The downside is that a youth's mind is particularly prone to making poor decisions,¹²⁰ which may be the reason the adolescent ends up in the justice system in the first place, and such poor decisions may also be the cause of the high rates of recidivism and suicide among juveniles incarcerated in adult prisons. On the other hand, "[t]he upside . . . is that the rapid growth and development happening in adolescent brains make them highly elastic and malleable to change."¹²¹ This type of malleability can either be used to their benefit, which is likely to occur in juvenile systems that emphasize rehabilitation and training, or to their detriment, which is likely to occur in adult prisons where juveniles are exposed to all of the adverse influence their adult inmates can have on them.

Moreover, adolescents are "more susceptible to peer pressure than mature adults."¹²² This explains why juveniles may engage in certain illicit behavior around their peers due to the "desire for peer approval or the fear of peer rejection."¹²³ This peer pressure also applies to juveniles' behavior around adult inmates in the adult prison system.¹²⁴ Thus, juveniles are likely to give into certain demands and threats that they may not normally give into.¹²⁵ Lastly, adolescents' hormones and emotions fluctuate more dramatically

118. *Id.*

119. *Id.* According to Laurence Steinberg, a psychology professor at Temple University, the following analogy can be made to understand the developing adolescent brain: "The teenage brain is like a car with a good accelerator but a weak brake. With powerful impulses under poor control, the likely result is a crash." DEITCH ET AL., *supra* note 88, at 13 (internal quotation marks omitted) (quoting Malcolm Ritter, *Scientists: Teen Brain Still Maturing*, WASH. POST (Dec. 2, 2007, 7:42 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/02/AR2007120200809.html>). More specifically, images taken during a longitudinal study showed that the human brain is not completely mature until the human reaches age twenty-five. *Id.* (citing Ritter, *supra*). "The parietal lobes typically reach full development around age 16, the temporal lobes are still in development at 16 years of age, and the frontal lobe continues to develop throughout the early 20s." *Id.* at 13-14 (citing Sedra Spano, *Adolescent Brain Development*, 22 YOUTH STUD. AUSTL. 36, 36 (2003)).

120. *See* ARYA, *supra* note 70, at 9.

121. *Id.*

122. DEITCH, ET AL., *supra* note 88, at 15.

123. *Id.*

124. *See id.*

125. *See id.*

than those of adults.¹²⁶ These fluctuations also increase an adolescent's tendency to make rash and irresponsible decisions.¹²⁷

V. THE BENEFITS OF THE JUVENILE JUSTICE SYSTEM ON JUVENILES

The harmful impact that adult prisons can have on juveniles, especially on their developing adolescent brains, further supports the idea that a juvenile justice system is generally a more beneficial and safer facility to incarcerate juveniles in compared to the adult justice system.¹²⁸ Juvenile systems in our country were "originally created to divert young offenders from the dangerous environment of destructive punishments and to provide rehabilitation services in order to transform the youth into a productive member of society."¹²⁹

In contrast to adult prisons, juvenile facilities provide their inmates with counseling, which is "provided by line staff as part of their regular duty."¹³⁰ Another benefit that juvenile facilities offer is a group of trained staff members.¹³¹ These staff members are also more likely to be rewarded for their services, such as helping and counseling inmates.¹³² Moreover, through the training and support system available to them, juveniles who are incarcerated "in juvenile facilities were more likely to regard treatment services as helpful in improving their relationships with family members and deepening their understanding of themselves and their problems, and effective in meeting their medical needs."¹³³ Again, all of the effects that juveniles in juvenile facilities report feeling trace back to the emphasis these facilities place on rehabilitation, not punishment.¹³⁴ On the other hand, juveniles who are incarcerated in adult prisons are stripped of the right to some or all of these resources that would have been available to them in juvenile facilities.¹³⁵ Thus, it is "hard to imagine how the conditions and criminal culture of adult prisons

126. *Id.*

127. *Id.*

128. *See* discussion *infra* Part III.

129. DEITCH, ET AL., *supra* note 88, at 17 (citing NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 154 (Joan McCord et al. eds., 2001)).

130. Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE & JUV. JUST. 128, 141 (2003). "[I]n adult prisons, counseling was provided separately and only for limited time periods." *Id.*

131. *Id.*

132. *Id.* Additionally, juveniles in juvenile prisons "gave higher marks to case management services, which they regarded as helpful in obtaining needed services, providing counseling, encouraging participation in programs, teaching the consequences of breaking rules, and orienting offenders to facility rules and procedures." *Id.*

133. *Id.*

134. *See id.* at 136.

135. *See id.* at 141-42.

could be rehabilitative for juvenile offenders.”¹³⁶

VI. THE NEW JERSEY SUPREME COURT’S DECISION IN *STATE IN RE V.A.*¹³⁷

In *State In re V.A.*, the New Jersey Supreme Court dealt with the issue of which standard of review courts should apply when reviewing the prosecutor’s “decision to seek waiver.”¹³⁸ The facts of the case are as follows: Four individuals, V.A., M.R., C.T., and T.H., were arrested and charged with “acts of juvenile delinquency equivalent to second-degree aggravated assault;¹³⁹ first-degree robbery;¹⁴⁰ and second-degree conspiracy”¹⁴¹ in connection to the attacks that Omar Estrada suffered on November 8, 2009.¹⁴² When they were charged with these acts, all four individuals were under the age nineteen and the State sought to “transfer jurisdiction to the Law Division, Criminal Part.”¹⁴³

Abiding by New Jersey’s statute governing transfers of juveniles to other courts without their consent,¹⁴⁴ “[t]he State submitted a ‘STATEMENT OF REASONS FOR WAIVER MOTION’ for each juvenile,” in which it discussed the different factors specified in the Attorney General’s Guidelines (“Guidelines”).¹⁴⁵ Thereafter, the Family Court held a probable cause hearing and decided to deny the

136. *Id.* at 141. What the juveniles placed in adult prisons face are not rehabilitative opportunities but “[f]orce, intimidation, and threat from prison gangs . . . [and] inadequate living conditions and . . . significant physical and psychological stresses of prison life.” *Id.*

137. 50 A.3d 610 (N.J. 2012).

138. *Id.* at 613-14.

139. *Id.* at 617 (citing N.J. STAT. ANN. § 2C:12-1(b)(West 2005 & Supp. 2013)).

140. *Id.* (citing N.J. STAT. ANN. § 2C:15-1 (West 2005)).

141. *Id.* (citing N.J. STAT. ANN. § 2C:5-2 (West 2005)).

142. *Id.* While walking down an avenue in Woodbridge Township, Estrada was “struck on the back of the head from behind[,] . . . lost consciousness and fell to the ground While on the ground, he was kicked several times in the face.” *Id.* Estrada “felt someone remove his wallet from his pocket and throw it the ground.” *Id.* He lost two teeth from this attack. *Id.*

143. *Id.*

144. N.J. STAT. ANN. § 2A:4A-26 (West 2011).

145. *State In re V.A.*, 50 A.3d at 617. “[T]he Legislature directed the Attorney General to issue guidelines for prosecutors to promote uniformity, thereby preventing arbitrary exercise of that discretionary authority.” *Id.* at 614; *see also* *State v. J.M.*, 866 A.2d 178, 188 (N.J. 2005). Under the Attorney General’s Juvenile Waiver Guidelines, prosecutors must take specified factors into consideration when deciding whether to file a motion for juvenile waiver, including: (1) nature of the defense; (2) deterrence; (3) effect on co-defendants; (4) maximum sentence and length of time served; (5) prior record; (6) trial considerations; and (7) victim’s input. JOHN J. FARMER, JR. & PAUL H. ZOUBEK, OFFICE OF THE ATT’Y GEN., JUVENILE WAIVER GUIDELINES 5-6 (2000) [hereinafter GUIDELINES], available at <http://www.nj.gov/oag/dcj/agguide/pdfs/AG-Juvenile-Waiver-Guidelines.pdf>.

State's waiver applications¹⁴⁶ and "determined that probable cause existed for enumerated offenses that made the juveniles who were over the age of sixteen eligible to be waived to adult court . . . without the right to present rehabilitative evidence."¹⁴⁷ Next, the prosecutor's reasons for seeking the juveniles' transfers were reviewed by the court¹⁴⁸ and the court denied the prosecutor's waiver motion, its reason being "that the prosecutor's decisions to waive these juveniles constituted an abuse of discretion, rising to the level of patent and gross abuse of discretion, which [the court] considered applicable in its review."¹⁴⁹ On appeal, "[t]he Appellate Division remanded for the entry of orders waiving V.A., M.R., and C.T. to Superior Court, Law Division, Criminal Part."¹⁵⁰ V.A. then filed a motion to the New Jersey Supreme Court for leave to appeal and the court granted the motion.¹⁵¹

In convincing the court that the "patent and gross abuse of discretion standard should apply to the review of a prosecutor's waiver decision,"¹⁵² the State argued that waiver is automatic for juveniles older than age sixteen, who have been charged with one or more of the enumerated offenses, so long as the State has demonstrated probable cause and adhered to the Guidelines.¹⁵³ On the other hand, the defendants argued that there was no clear guidance on what standard of review the court should use when reviewing the prosecutor's decision to ask for a waiver.¹⁵⁴ V.A., C.T., and M.R. also "contend[ed] that the patent and gross abuse of discretion standard is too deferential for use in reviewing a waiver decision that results in greater punishment for a juvenile."¹⁵⁵

Before rendering its decision, the court stated that it had applied the gross and patent abuse of discretion standard of review in the past when reviewing a prosecutor's decision to seek a waiver.¹⁵⁶ It went on to surmise that the Guidelines' purpose was probably not to require that prosecutors "seek waiver whenever probable cause is

146. State *In re* V.A., 50 A.3d at 618-19. At the hearing, witnesses for both the State and the defendants testified. *Id.*

147. *Id.* at 619 (citing § 2A:4A-26(a),(e)).

148. *Id.*

149. *Id.* at 619-20.

150. *Id.* at 621 (citing State *ex rel.* V.A., 21 A.3d 619, 631 (N.J. Super. Ct. App. Div. 2011), *rev'd*, 50 A.3d 610 (N.J. 2012)).

151. State *ex rel.* V.A., 27 A.3d 947 (N.J. 2011) (granting V.A.'s motion for leave to appeal).

152. State *In re* V.A., 50 A.3d at 621.

153. *Id.*

154. *Id.*

155. *Id.* The American Civil Liberties Union, as amicus curiae, agreed with the juveniles, arguing that the standard "is too deferential to the significant liberty interests at stake in waiver hearings." *Id.*

156. *Id.* at 623.

present for an enumerated offense committed by a juvenile over the age of sixteen.”¹⁵⁷ Instead, the court inferred that the Legislature intended the Guidelines to be a means of unifying prosecutors’ exercise of discretion.¹⁵⁸ Recognizing both the significant potential for enhanced punishment that would come out of granting the juvenile waiver motions, and the New Jersey State Legislature’s intended direction towards uniformity, the court found that “the abuse of discretion standard . . . for review of another prosecutorial determination that affects the enhancement of punishment” was most appropriate.¹⁵⁹ This standard, the court clarified, does not give the family court the authority to substitute its own judgment for that of the prosecutor when reviewing the specified Guidelines factors.¹⁶⁰ It further expressed that such a standard will best further the Legislature’s intended goal of application uniformity, due to the added level of protection against the potential unpredictability in a “critical decision affecting the quantity and quality of punishment for a juvenile.”¹⁶¹

The court also reviewed the statement the State submitted with its juvenile waiver application, which contained the State’s evaluation of the factors specified by the Guidelines.¹⁶² In discussing the State’s statement, the court opined that it is imperative that prosecutors provide sufficient facts, instead of mere cursory conclusions, to support its decision to seek waiver.¹⁶³ The court found this especially important because it is easy for the prosecutor to become “vulnerable to a claim of arbitrariness due to the failure to assess the juvenile as a distinct individual who deserves an individualized waiver determination.”¹⁶⁴ To succeed under the court’s adopted abuse of discretion standard, the statement must show that the prosecutor “actually considered for each particular juvenile the factors that ‘shall’ be weighed under the . . . Guidelines.”¹⁶⁵ Because the State failed to lay out factual explanations supporting its decision

157. *Id.* at 624.

158. *See id.*

159. *Id.* (citing *State v. Lagares*, 601 A.2d 698, 704-05 (N.J. 1992)). The court expressed its doubts that the Legislature “expected judicial blindness to the prosecutor’s compliance with the Guidelines’ efforts to channel prosecutorial discretion and avoid arbitrariness in implementation that could lead to the undermining of legislative efforts toward uniformity.” *Id.* at 625.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 626.

165. *Id.* at 625 (citing GUIDELINES, *supra* note 149, at 5-6). In sum, the court mandated that the prosecutor’s statement of reasons contain evidence that the prosecutor, when making his assessment, made an “individualized determination” for the juvenile in question. *Id.*

to seek a waiver, the court held that the State's statement needed a "more full explanation of the deterrence assessment of the three juveniles,"¹⁶⁶ thereby reversing the Appellate Division's judgment on the standard of review, and remanded the case "for further proceedings consistent with [its] opinion."¹⁶⁷

The court's holding in *State In re V.A.* significantly impacts New Jersey's juvenile waiver process because it mandates that prosecutors make an individual determination with regard to each juvenile's case before requesting a waiver.¹⁶⁸ The decision places limitations on what had previously been the otherwise limitless discretion prosecutors enjoyed over juvenile waivers.¹⁶⁹ Therefore, instead of simply checking off the Guidelines' factors when convincing a court to grant a juvenile waiver, prosecutors now must present a statement of reasons for each individual application for waiver that contains factual explanations based on the *specific juvenile's case*.

The decision is especially beneficial to juveniles over age sixteen because under the 2000 amendments, so long as the State can show probable cause that these juveniles have committed an enumerated offense, waiver is granted without giving the juvenile an opportunity to present rehabilitation evidence.¹⁷⁰ Therefore, the process by which the State can establish probable cause has much more significance to juveniles over age sixteen than it does for younger juveniles, as it completely determines whether the older juvenile faces waiver into the adult court system.¹⁷¹ Post-*State In re V.A.*, juveniles who are sixteen years old or older are now offered an additional layer of protection against prosecutors' potential arbitrariness when making

166. *Id.* at 627.

167. *Id.* at 628.

168. *Id.* at 624-25; see also *Rutgers Law School Wins Stricter Standards for Juvenile Court Review of Prosecutors' Requests to Try Youth in Adult Court*, RUTGERS SCHOOL OF LAW—NEWARK (Sept. 12, 2012), <http://law.newark.rutgers.edu/rutgers-law-school-wins-stricter-standards-juvenile-court-review-prosecutors-requests-try-youth>.

169. See *State v. J.M.*, 866 A.2d 178, 184 (N.J. 2005). The court stated that through the 2000 statutory amendments, the Legislature "vested the prosecutor's office with the primary responsibility for juvenile waiver decisions when the juvenile is sixteen years or older and charged with a designated offense." *Id.* (citing N.J. STAT. ANN. § 2A:4A-26 (West 2011)).

170. *Id.* at 183-84. According to subpart (e) of New Jersey's statute governing juvenile waivers,

[i]f the juvenile can show that the probability of his rehabilitation by the use of the procedures, services and facilities available to the court prior to the juvenile reaching the age of 19 substantially outweighs the reasons for waiver, waiver shall not be granted. *This subsection shall not apply with respect to a juvenile 16 years of age or older who is charged with committing any of the [enumerated] acts.*

N.J. STAT. ANN. § 2A:4A-26(3)(e) (West 2008) (emphasis added).

171. See § 2A:4A-26(3)(e).

the decision to seek waiver.¹⁷² The ruling not only “reflects growing national alarm over the ease and frequency with which youth are tried in the adult system,”¹⁷³ but also adheres to the trend, found among courts and legislatures in other states, towards providing more protection for juveniles’ constitutional rights.¹⁷⁴

VII. TRENDS FOUND IN OTHER STATES AND THE U.S. SUPREME COURT OFFERING JUVENILES MORE PROTECTION

A. Trends Found in Other States

According to a report published by Campaign for Youth Justice in 2011,¹⁷⁵ “[b]etween 2005 and 2010, nearly half of the states have considered or passed legislation designed to help youth in the adult system.”¹⁷⁶ This trend can be divided into four categories of changes: (1) “State and Local Jurisdictions Remove Youth from Adult Jails and Prisons;”¹⁷⁷ (2) “States Raise the Age of Juvenile Court Jurisdiction;”¹⁷⁸ (3) “States Change Transfer Laws to Keep More Youth in Juvenile Court;”¹⁷⁹ and (4) “States Rethink Sentencing Laws for Youth.”¹⁸⁰

Four states—Colorado, Maine, Virginia, and Pennsylvania—and two local jurisdictions—New York City and Multomah County, Oregon—have recently taken steps to ensure that juveniles placed in adult systems receive more attention and protection.¹⁸¹ Notably, Colorado recently enacted a law requiring that juveniles being held in adult jails receive “educational services during the school year” from local school districts.¹⁸² While Colorado focused on providing educational services to juveniles in adult facilities, the New York City Council took an approach that provides juveniles protection against violent acts and, in 2009, passed a bill mandating that the Department of Corrections collect certain data on juveniles in city jails.¹⁸³ Once the City Council receives the collected data, it is

172. See *State In re V.A.*, 50 A.3d at 625.

173. Cohen, *supra* note 5.

174. See *infra* Part VI.

175. ARYA, *supra* note 70.

176. *Id.* at 21.

177. *Id.* at 21, 24-28.

178. *Id.* at 21, 29-32.

179. *Id.* at 21, 33-40.

180. *Id.* at 21, 41-43.

181. See *id.* at 24-28.

182. *Id.* at 24 (citing S.B. 10-054, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010)).

183. *Id.* at 25 (citing N.Y.C., N.Y., Ordinance 2009/029 (May 11, 2009) (codified at N.Y.C., N.Y., ADMIN. CODE § 9-130 (effective July 1, 2009))). The data that the Department is required to collect includes information such as “the number of stabbings/slashings, fights resulting in serious injury, attempted suicides, and incidents of sexual assault.” *Id.*

anticipated that it will have a better understanding and awareness of the threats that juveniles face in adult prisons and take further action to reduce such harms.¹⁸⁴

Other states are focused on raising the age limit for young offenders who would qualify as juveniles and fall into juvenile court jurisdictions.¹⁸⁵ For example, the Connecticut legislature passed a bill that raised “the age of juvenile court jurisdiction from 16 to 18” in June of 2007.¹⁸⁶ Similarly, in 2010, Mississippi enacted “a new law removing most 17-year-olds from the adult criminal court.”¹⁸⁷ Such legislative changes that these states are attempting to enact represent the growing overall concern for such young adults being held in adult facilities.

The third type of trend found in states involves ten state transfer laws that have been changed in the past five years.¹⁸⁸ Three of these states—Arizona, Colorado, and Nevada—have recently made changes to the age requirements of adolescents who may be tried as adults.¹⁸⁹ Meanwhile, Indiana, Virginia, and Washington made amendments to their “once an adult, always an adult” laws.¹⁹⁰ Lastly, four states—Connecticut, Delaware, Illinois, and Indiana—have recently either placed limitations on the types of offenses that required juveniles to be prosecuted in adult courts or changed the “presumptions for adult court prosecution.”¹⁹¹

In recent years, some states have reexamined the harsh consequences that adult sentences can have on youth offenders and made changes that lessen the harm.¹⁹² For example, in 2006 the

184. *Id.*

185. *Id.* at 29-32. Although most states consider adolescents up to the age of 18 to be juveniles, some states draw the line at a lower age. *Id.* at 29.

186. *Id.* at 29-30 (citing 2007 Conn. Pub. Acts 07-4 (Spec. Sess.)).

187. *Id.* at 30 (citing S.B. 2969, 2010 Leg., Reg. Sess. (Miss. 2010)).

188. *Id.* at 33-40. Namely, these states are Arizona, Utah, Colorado, Nevada, Indiana, Virginia, Washington, Connecticut, Delaware, and Illinois. *Id.* at 33.

189. *Id.* at 33-36. For example, the Colorado legislature enacted a bill which increased the age of juveniles “against whom a prosecutor may directly file charges in adult court” from age fourteen to sixteen. *Id.* at 34.

190. *Id.* at 33, 36-37. Virginia, for instance, passed a bill in 2007 that amended its “once an adult, always an adult” law, making its application fairer. *Id.* at 37 (citing H.B. 3007, 2007 Gen. Assemb., Reg. Sess. (Va. 2007)). Whereas the law previously allowed for unfair applications, such as the prosecution of an adolescent who was “acquitted or . . . [had his] charges . . . dismissed in the first trial” as an adult, the new law requires that the adolescent “be convicted of the offense in adult court in order to be tried in adult court for all subsequent offenses.” *Id.*

191. *Id.* at 33, 35-36. Notably, in 2005, Illinois Governor Blagojevich signed an amendment to what had been deemed “the most racially biased drug transfer law in the Nation,” that repealed the policy of transferring young offenders charged with drug-related offenses into adult courts automatically. *Id.* at 35 (internal citations omitted).

192. *See id.* at 41-42.

Colorado General Assembly issued a decision to terminate the life without parole sentence for its juveniles.¹⁹³ However, even before Colorado made such an amendment, “Washington State became a leader in juvenile justice reform by eliminating the application of mandatory minimum sentences to juveniles tried as adults” in 2005.¹⁹⁴ The bill’s proposal included a statement that found that the required minimum sentences for juveniles were against research findings that showed the differences in the ways adolescents’ brains develop from the way those of adults do.¹⁹⁵

B. Trends Found in Recent U.S. Supreme Court Decisions

The U.S. Supreme Court’s three most recent decisions, regarding the limits on the type of sentencing that juveniles may receive, truly suggest that a shift towards wanting to rehabilitate juveniles exists in our country today. First, in 2005, the Court was faced with the issue of whether the death sentence for juveniles was constitutional under the Eighth and Fourteenth Amendments.¹⁹⁶ In reaching its decision, the Court pointed out “[t]hree general differences between juveniles under 18 and adults . . . [that] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders”:¹⁹⁷ (1) adolescents, when compared to adults, are immature and lack a developed sense of responsibility;¹⁹⁸ (2) adolescents are more prone to give into peer pressure, some of which can be a negative influence;¹⁹⁹ and (3) adolescents have yet to form a definite character with set personality traits, as adults have.²⁰⁰ Having highlighted such vast “differences between juvenile[s] and adult[s],” the Court opined that such differences were “too marked and well understood to risk allowing” an adolescent to receive an execution sentence, “despite insufficient culpability.”²⁰¹ Therefore, the Court held that under the Eighth and Fourteenth Amendments, the death sentence for juveniles was unconstitutional.²⁰²

Now that the question of whether the death sentence for

193. *Id.* at 41 (citing H.B. 06-1315, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006)). It is noted that the General Assembly’s decision came four years prior to the Supreme Court’s *Graham* decision. *Id.*

194. *Id.* at 42 (citing H.B. 1187, 59th Leg., Reg. Sess. (Wash. 2005)).

195. *Id.*; see *supra* Part III.

196. *Roper v. Simmons*, 543 U.S. 551, 555-56 (2005). The Eighth Amendment prohibits “cruel and unusual punishments.” U.S. CONST. amend. VIII. The Fourteenth Amendment prohibits any State from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

197. *Roper*, 543 U.S. at 569.

198. *Id.*

199. *Id.*

200. *Id.* at 570.

201. *Id.* at 572-73.

202. *Id.* at 578-79.

juveniles was constitutional had been answered, the Court was next asked whether sentencing juveniles to life without parole was unconstitutional under the Eighth Amendment.²⁰³ In its decision in *Graham*, the Court emphasized that the “[l]ife without parole is an especially harsh punishment for a juvenile . . . [because] [u]nder this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”²⁰⁴ Moreover, the Court pointed out that the Eighth Amendment does not allow for States, by sentencing a juvenile to life without parole, to deny that juvenile the opportunity “to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law.”²⁰⁵ After adding that our country is the only nation that allows the sentencing of life without parole to juvenile nonhomicide offenders, the Court held that such a sentence for juveniles who have not committed homicide was unconstitutional.²⁰⁶

In its most recent holding regarding juvenile sentencing, the Court was asked to decide whether the mandatory sentence of life without parole of juveniles, regardless of the committed offense, was constitutional under the Eighth Amendment.²⁰⁷ Just two years ago, the Court had been asked to extend protection for juveniles by determining that the life without parole sentence, along with the death sentence,²⁰⁸ was unconstitutional unless the juvenile had committed homicide.²⁰⁹ This time, the Court was asked once again to extend the protection even further for juveniles by determining that the Eighth Amendment prohibited states from mandatorily sentencing any juvenile to life without parole.²¹⁰ Weaving together its decisions from both *Roper* and *Graham*, the Court held that “mandatory life without parole violates the Eighth Amendment”²¹¹

203. *Graham v. Florida*, 560 U.S. 48, 52-53, (2010). Petitioner, *Graham*, “challeng[ed] the sentence under the Eighth Amendment’s Cruel and Unusual Punishments Clause, made applicable to the States by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 53 (citing *Robinson v. California*, 370 U.S. 660 (1962)).

204. *Id.* at 70. In further support of its opinion, the Court demonstrated that the life without parole sentence is the same in name only for a sixteen-year-old offender and a seventy-five-year-old offender. *Id.*

205. *Id.* at 79. When a juvenile is sentenced to life without parole, in the Court’s words, he will “die in prison without any meaningful opportunity to obtain release, no matter what he” does to show that the offenses he committed as an adolescent do not represent who he is. *Id.*

206. *Id.* at 82.

207. *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012).

208. *Roper v. Simmons*, 543 U.S. 551 (2005).

209. *Graham*, 560 U.S. at 82.

210. *Miller*, 132 S. Ct. at 2460.

211. Tejinder Singh, *Eighth Amendment Prohibits Mandatory Life Without Parole for Juveniles*, SCOTUS BLOG (June 25, 2012, 10:45 AM),

because such a sentence would be ignoring factors such as the juvenile's age, the nature of their committed offenses, and age-related characteristics.²¹²

VIII. PROPOSAL OF A FURTHER NEEDED CHANGE IN NEW JERSEY'S WAIVER LAW

The New Jersey Supreme Court's decision in *State In re V.A.* is considered to be "both welcome and important,"²¹³ and surely mirrors the nationwide trend of providing more protection for the rights and well-being of juveniles. Because of this landmark decision, juveniles in New Jersey are now afforded the opportunity to avoid falling victim to prosecutors' arbitrariness.²¹⁴ The heightened level of review that courts will now use when reviewing a prosecutor's decision to seek waiver has the potential to make a significant difference for hundreds of juveniles every year—between 2008 and 2009, "more than 500 requests to move juveniles to adult courts were made."²¹⁵

Accordingly, this ruling undoubtedly represents the court's significant attempt to protect juveniles who, on too many occasions, are tried as adults and eventually sent to adult facilities.²¹⁶ However, even after *State In re V.A.*, many juveniles in New Jersey still remain vulnerable to harsh consequences of the waiver law and will continue to be so until other significant changes are made. While *State In re V.A.* surely affects the process during which the prosecutor can establish that waiver is appropriate for the juvenile in question, it still leaves one major issue unresolved: once probable cause is established by the prosecutor, juveniles who are (1) over the age of sixteen and (2) charged with any of the enumerated offenses are completely barred from an amenability hearing.²¹⁷ In other words, so long as these three factors are checked off affirmatively, a juvenile who is sixteen years old or older automatically has jurisdiction waived into adult criminal court without having been offered the opportunity to convince the court "that the probability of his rehabilitation by the use of the procedures, services and facilities available to the [juvenile] court prior to [him] reaching the age of 19 substantially outweighs the reasons for waiver."²¹⁸ The concern for

<http://www.scotusblog.com/2012/06/eighth-amendment-prohibits-mandatory-life-without-parole-for-juveniles>; see *Miller*, 132 S. Ct. at 2475.

212. *Miller*, 132 S. Ct. at 2475.

213. Cohen, *supra* note 5.

214. See *supra* Part V.

215. Campisi, *supra* note 17.

216. See GERSTEIN BOCIAN AGNE STRATEGIES, *supra* note 8, at 1.

217. See N.J. STAT. ANN. § 2A:4A-26(e) (West ?).

218. *Id.* "The statute requires a balancing of 'the need for deterrence against the prospects of rehabilitation.'" *State v. Scott*, 661 A.2d 1288, 1292 (N.J. 1995) (quoting *State ex rel. of C.A.H. & B.A.R.*, 446 A.2d 93, 96 (N.J. 1982)).

the harsh consequences of denying juveniles an opportunity to an amenability hearing is even suggested by Former Governor Whitman in the Governor's Conditional Veto Message following the 2000 amendments to the waiver statute.²¹⁹

For these reasons, the next step towards protecting the rights and interests of juveniles in New Jersey should be a legislative one—specifically, an amendment to section 2A:4A-26(e) so that all juveniles, regardless of their age, are offered amenability hearings.

Typically, in order “[t]o establish the probability of rehabilitation, the juvenile” brings in one or more expert witnesses to testify.²²⁰ The expert’s “testimony should relate the gravity of the crimes and the background of the juvenile offender to the prospects of rehabilitation,” while addressing different factors that will determine the juvenile’s responsiveness to rehabilitation.²²¹ Such various factors include the young offender’s age, the proposed rehabilitation program’s rate of success, and the time period necessary for the juvenile to complete such a program.²²²

The juvenile’s opportunity to call in an expert witness to present such factors to the court is vital to the juvenile for a couple of reasons. Foremost, the portion of the expert witness’ testimony, during which the expert establishes how the seriousness of the crimes and the juvenile’s personal background relates to the chances of his rehabilitation, gives family courts the rare opportunity to view the juvenile in a different light.²²³ The juvenile is presented in front of the court as an individual whose background is illustrated not by his prior records, but by his personal history of life events.²²⁴ Thus, the presentation of an expert witness whose testimony could potentially paint a much more personal picture of the juvenile for the courts can make a significant difference in the juvenile’s chance of avoiding waiver.²²⁵ Ultimately, a single testimony from an expert

219. N.J. STAT. ANN. § 2A:4A-26 (West 2008) (Conditional Veto Message of Christine Todd Whitman, Former Governor of New Jersey) (“I am concerned . . . about removing the authority of the family court—a court particularly skilled in dealing with juveniles—to hear evidence regarding a juvenile’s potential for rehabilitation and to have input into the decision to transfer a case to adult court.”).

220. *Scott*, 661 A.2d at 1292.

221. *Id.*

222. *Id.* (citing *State ex rel. B.G.*, 589 A.2d 637, 647 (N.J. Super. Ct. App. Div. 1991)). The court noted that the testifying witness should offer a “specific rehabilitation plan,” since the probability of rehabilitation “must be determined in light of the services available” to the juvenile court. *Id.* (citing *State ex rel. A.L.*, 638 A.2d 814, 825 (N.J. Super. Ct. App. Div. 1994)).

223. *See id.*

224. *See id.*

225. For example, if a juvenile, who is sixteen years old or older, is charged with criminal homicide and is either denied or given the opportunity to present evidence regarding his personal background, such as the fact that he was a child of a rape

witness could determine whether the juvenile enters a rehabilitation program along with peers in his age group, in which he has access to “mandatory elements like education, vocational classes . . . recreation time, and group and individualized therapy,”²²⁶ or on the other hand, an adult prison where the juvenile is susceptible to harsh consequences, such as sexual and physical assault and suicide, and is denied access to educational, mental, and health treatment.²²⁷

Secondly, the expert witness’ testimony is crucial to the determination of the older juvenile’s waiver in that it considers the probability of the rehabilitation program’s success as well as the duration in which the juvenile can complete the program.²²⁸ Thus, it can be argued that one of the dangerous consequences of denying the opportunity of an amenability hearing to a juvenile is the failure of the courts to recognize—or even find out about—the juvenile’s actual receptiveness to a specific rehabilitation program. This can hypothetically lead to a devastating situation where an older juvenile, who in the eyes of an expert witness has the potential to successfully complete a rehabilitation program in merely week’s worth of time, is waived into adult criminal court and potentially sentenced as an adult to years in an adult facility. The amount of chilling consequential scenarios that one can postulate is endless.

When the Legislature amended section 2A:4A-26 in 2000, “[t]he intent was to increase prosecutorial discretion and to make waiver more likely in the case of [sixteen years old or older] juveniles.”²²⁹ Perhaps in the eyes of the legislators, juveniles who are sixteen years old or older were viewed as somewhat more culpable, mature, and likely to have been aware of their actions when committing offenses, when compared to juveniles under the age of sixteen. However, research studies that have been conducted on the development of adolescents’ brains do not characterize adolescents who are sixteen years old or older to be of a different or separate class from younger

victim and her rapist, a victim of sexual assault at a young age, a victim of domestic violence, and a witness to his own stepfather’s suicide, the decision on his waiver may vary significantly. See Tamara Lush, *Police: Florida Teen Killed 2-Year-Old Brother*, ASSOCIATED PRESS (Sept. 16, 2012, 11:19 PM), available at <http://usatoday30.usatoday.com/news/nation/story/2012/09/16/police-florida-teen-killed-2-year-old-brother/57791414/1> (hypothetical scenario involves facts identical to those in the case of Fernandez, with the exception of Fernandez being thirteen years old, not sixteen years old or older). It is important to note that if the hypothetical scenario took place in New Jersey, the juvenile could end up in the same situation if he is charged with non-violent offenses, such as computer criminal activity, instead of criminal homicide. N.J. STAT. ANN. § 2A:4A-26(j), (e) (West 2008).

226. DEITCH ET AL., *supra* note 88, at 63.

227. See *supra* Part II; see also Cohen, *supra* note 5.

228. Scott, 661 A.2d at 1292 (internal citation omitted).

229. J.M., 866 A.2d at 184.

adolescents.²³⁰ Additionally, studies that show the negative impact of juveniles who are incarcerated in adult prisons do not make such a differentiation either.²³¹

Moreover, such differentiation is not found in other New Jersey statutes and regulations that address minimum age limits. Frequently, in New Jersey, such age limits are set at eighteen, such as:²³² (1) individuals under the age of eighteen cannot get body piercings or tattoos unless they are accompanied by a parent or guardian;²³³ (2) individuals under the age of eighteen do not have the “basic civil and contractual rights”;²³⁴ (3) individuals under the age of eighteen cannot attend nor participate at casinos.²³⁵ In all of these minimum age limitation statutes and regulations, separate classification for those who are of a certain age or older is not found.²³⁶

An obvious instance of New Jersey statutorily differentiating adolescents who are sixteen years old or older from younger adolescents is found in New Jersey’s sexual assault statute.²³⁷ In New Jersey, if an individual is guilty of engaging in sexual penetration with a victim who is between sixteen and eighteen years of age, that individual is convicted of sexual assault as opposed to aggravated sexual assault.²³⁸ This type of close-in-age exemption is “also known as a ‘Romeo and Juliet Law’” and allows partners “who are close in age . . . to engage in consensual sex without fear of prosecution under New Jersey age of consent regulations.”²³⁹ Such an exemption involving different treatment for older adolescents can be distinguished from the juvenile age subdivision found in New Jersey’s waiver statute because the close-in-age exemption’s purpose is strictly to show more leniency for two partners who are *close enough* in age that the State need not worry about potential acts of coercion. In other words, this exemption assumes that individuals who engage in sexual relations with partners who are *close enough in age with them* have a different mindset from those who engage in the same relations with partners who are significantly older than them-

230. See *supra* Part III and accompanying notes.

231. See *supra* Part II and accompanying notes.

232. An exception is the minimum age to purchase tobacco, which is nineteen years old. See N.J. STAT. ANN. § 2C:33-13.1(a) (West 2010).

233. See N.J. ADMIN. CODE § 8:27-2.6(a) (2001).

234. See N.J. STAT. ANN. § 9:17B-1(a) (West 1973).

235. See N.J. STAT. ANN. § 9:17B-1(c) (West 1983).

236. See *supra* notes 220-22.

237. N.J. STAT. ANN. § 2C:14-2(c)(3) (West 2012).

238. *Id.*

239. *New Jersey Legal Age of Consent (Legal Age for Consensual Sex)*, AGE OF CONSENT BY STATE, http://www.age-of-consent.info/states/New_Jersey (last visited Mar. 18, 2014).

—it does not assume that individuals who are sixteen years old or older necessarily have a different mindset from those who are younger, based on their older age.

Therefore, the subdivision of juveniles that is found in section 2A:4A-26(e) serves no purpose other than that of taking away vital opportunities for amenability hearings from older juveniles, based on the meritless assumption that they are somehow different from juveniles younger than sixteen years of age. Unless section 2A:4A-26(e) is amended to treat all juveniles equally, older juveniles will continuously be forced to face the life-changing and at times capricious consequences of the arbitrary classification, which seeks to place them in a less protected group of juveniles.

VIV. CONCLUSION

The statistics found in studies and actual testimonies of juveniles found in reports clearly echo our country's juveniles' cries for help that are being ignored. Fortunately, over the years, some of these cries have been and are being heard and answered.²⁴⁰ Through its judicial decision in *State In re V.A.*, New Jersey has taken an important and substantial step in bringing the focus back to *rehabilitating* juveniles, as opposed to further criminalizing and punishing them. As its next step in the road back to rehabilitation, New Jersey should look to its waiver statute and make the necessary amendments to further ensure the protection of juveniles' rights, well-being, and ultimately, their future.

240. See *supra* Parts V-VI.