Fulfilling the Promise of *Kent*: Fixing the Texas Juvenile Waiver Statute

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I. Introduction ........................................................................................................................................... 110

II. History of Juvenile Justice System ..................................................................................................... 111
   A. Early Development ......................................................................................................................... 111
   B. Development of Waiver Law ......................................................................................................... 112

III. Texas Waiver Law .............................................................................................................................. 114
   A. History ........................................................................................................................................ 114
   B. Statutory Scheme ......................................................................................................................... 115
   C. Texas Case Law ............................................................................................................................ 117
      1. No Requirement of Specific Factual Findings .......................................................................... 117
      2. No Objective Standards for a Full Investigation ...................................................................... 119
      3. Rehabilitation and Lack of Resources .................................................................................... 120

IV. Criticisms of Waiver Scheme .......................................................................................................... 121

V. Recommendations for Change .......................................................................................................... 123

VI. Conclusion ....................................................................................................................................... 126

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I. Introduction

Historically, the goal of the juvenile justice system has been the rehabilitation of youthful offenders. Thus, youth who could not be reformed or rehabilitated within the juvenile system were to be transferred to the adult system. Juvenile courts have always had provisions allowing for the removal of the most serious juvenile offenders from the juvenile justice system to adult court.1 But what was once an exception has developed into a general policy.2 All states now allow juveniles to be transferred for adult criminal proceedings, with the criteria for waiver varying from state to state.3 Because waiver to adult court is a decision with serious consequences, it should be limited to cases where it is truly warranted—given that the likelihood of rehabilitation is then slim. Research indicates that transfer does nothing to reduce recidivism.4 In fact, transferring juveniles for adult criminal proceedings may actually increase recidivism rates: a study focused on the aftereffects of transfer to the adult court system found that youths who were transferred were three times more likely to re-offend than those who remained in the juvenile court system.5 Often, juveniles who are incarcerated with adults leave prison hardened and embittered, possibly due to the psychological and physical trauma they may endure.6 Juveniles in adult institutions are five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than minors in juvenile facilities.7 The benefits of waiving juvenile court jurisdiction over youth must be considered in light of the tremendous harm that may be done by placing young offenders in the adult criminal system.

The juvenile justice system in the United States has traditionally emphasized individualized treatment and rehabilitation. This focus has

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2 Jarod K. Hofacket, Comment, Justice or Vengeance: How Young is Too Young for a Child to be Tried and Punished as an Adult?, 34 TEX. TECH. L. REV. 159, 161 (2002).

3 OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, supra note 1.


6 See Lisa S. Bereford, Comment, Is Lowering the Age at Which Juveniles Can be Transferred to Adult Criminal Court the Answer to Juvenile Crime?: A State-by-State Assessment, 37 SAN DIEGO L. REV. 783, 821 n. 263 (2000).

shifted over the years, however, and while juvenile courts are still directed at reform of young offenders, juvenile proceedings have become more punitive in nature. Recognizing the need to accord juveniles due process protection in waiver proceedings, the Supreme Court set constitutional standards for valid waiver orders in *Kent v. U.S.* These standards were largely designed to protect due process rights by providing for meaningful appellate review. Although the Texas waiver statute follows the requirements of *Kent* in form, its application in practice leaves much to be desired.

This article analyzes the Texas statutory scheme governing waiver of juveniles to be tried as adults. Part II details a brief history of the juvenile justice system, with a focus on the *Kent* decision. Part III discusses the Texas juvenile waiver scheme as it is defined by statute and has been applied in case law. Finally, Parts IV and V highlight the problems inherent in the application of the Texas waiver statute and recommend courses of action to ensure that the intent of the *Kent* decision is honored.

II. History of Juvenile Justice System

A. Early Development

Prior to the 1800’s, juveniles in the United States who committed offenses were tried and sentenced as adults. From the early 1820s to the late 1890s, various social welfare groups investigated the welfare of children and advocated for better treatment and rehabilitation of delinquent youth. Many organizations established homes for children and training schools focused on rehabilitation and education. The reform movement called public attention to the corruptive influence of confining juveniles with hardened adult criminals and reasoned that separate correctional systems could alleviate these results. The influence of these individuals and organizations inspired the juvenile court system we know today and prompted the formation of the first juvenile court in Cook County, Illinois in 1899. By 1925, an overwhelming majority of states had created a juvenile court system.

The early juvenile courts adopted an approach derived from English

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11 Bereford, *supra* note 6, at 788.
13 Bereford, *supra* note 6, at 789.
common law known as *parens patriae*. This term literally means “parent of the country” and reflects the idea that the state is regarded as a sovereign that provides protection for those unable to care for themselves. As applied to the juvenile justice system, *parens patriae* meant that the state acted “as guardian of children lacking proper supervision and guidance” in order to ensure their well-being. The focus was placed on reform and rehabilitation of the juvenile offender, rather than punishment. This approach did not prevent courts from punishing children, but asked instead whether a particular punishment was both in the child’s and society’s best interests. Quite simply, juvenile courts were “designed to be more therapeutic than the adult criminal justice system.”

B. Development of Waiver Law

The intention behind waiver law was to prosecute as adults those juveniles who had committed violent crimes. The concept of *parens patriae* requires that the decision to transfer involve a balancing of state interest in protecting its citizens and possible rehabilitation of the accused juvenile. Two major justifications are typically offered for the waiver of juveniles to adult court. First, keeping serious offenders in the juvenile justice system might allow for them to serve as a negative influence on less sophisticated youthful offenders. Second, the continued presence of serious offenders in the juvenile system may be viewed as resulting in the misallocation of treatment resources. Through a series of decision in the 1960s and early 1970s, the Supreme Court indicated that juvenile status does not deny a youth fundamental constitutional rights. The first of these cases was *Kent v. U.S.*

This decision set out the procedures by which a juvenile court may waive its jurisdiction and transfer juveniles to adult criminal court. *Kent* was the first in a series of major Supreme Court decisions that established the minimum constitutional safeguards for the juvenile justice system.
Morris A. Kent, Jr. was a repeat juvenile offender who had previously been placed on probation as a result of his involvement in housebreakings and other thefts. In September of 1961, his fingerprints were determined to match those found at the scene of a rape and burglary. At the time he was 16 years old and subject to the exclusive jurisdiction of the Juvenile Court of the District of Columbia. Kent was apprehended and taken to police headquarters, where he admitted his involvement in the offense and volunteered information regarding his involvement in other similar offenses involving housebreaking, robbery, and rape. After his interrogation, Kent was placed at a home for children where he remained for approximately one week. The day after Kent’s apprehension, his mother obtained counsel. Kent’s attorney “promptly” conferred with the Social Service Director of the Juvenile Court and indicated Kent’s intention to oppose waiver to adult court. Kent’s counsel filed a motion with the Juvenile Court for a hearing on waiver of Juvenile Court jurisdiction. No arraignment was held and no determination of probable cause for detention was made by a judicial officer during Kent’s detention. Without a hearing, the Juvenile Court judge entered an order waiving Juvenile Court jurisdiction over Kent and ordering that Kent be held for trial in adult court. No findings were made, no reference was made to the motions filed by Kent’s counsel, and no rationale was stated for the waiver.

In an opinion written by Justice Fortas, the Supreme Court found the order of the Juvenile Court transferring jurisdiction to be invalid. The Court recognized that although the statute in question gave the Juvenile Court a “substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given to them and the conclusion to be reached,” this discretion “does not confer upon the Juvenile Court a license for arbitrary procedure.” In a footnote, the Court emphasized that a full investigation must be conducted before waiver is decided. Waiver “requires a judgment in each cause based on an inquiry not only into the facts of the alleged offense, but also into the question whether the parens patriae...
plan of procedure is desirable and proper in the particular case.” The opinion recognized that the failure of the juvenile justice system to serve a pure parens patriae role necessitated broader constitutional protections for juveniles, fearing that “the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”

The Kent opinion concluded that a juvenile facing waiver to adult criminal court is entitled to a hearing, which includes access by counsel to records to be considered by the court and a statement of the rationale upon which the juvenile court’s waiver decision is based. The requirements were based upon the constitutional rights to due process and assistance of counsel. Additionally, the Court acknowledged the critical nature of waiver proceedings and the importance of appellate review. As a result, the holding included a requirement that a waiver order be accompanied by “a statement of the reasons or considerations therefor [sic].” This requirement was intended to permit thorough appellate review and prevent appellate courts from assuming that adequate reasons for transfer existed and that a full investigation had been conducted. Accordingly, the opinion stated that waiver order statements “must set forth the basis for the order with sufficient specificity to permit meaningful review.” In 1975, the Supreme Court reaffirmed Kent with its decision in Breed v. Jones. All states have incorporated the standards set by the Kent decision into their waiver law, either judicially or by statute.

III. Texas Waiver Law

A. History

Texas adopted the Common Law of England in 1840, and with it, acquired a harsh criminal law system applicable to children. Under the common law, children over seven could be punished as adults. But Texas juvenile law began to focus on the rehabilitation of youthful offenders with the establishment of delinquency courts in 1907 as part of the nationwide movement for juvenile justice reform. Continuing this trend, Texas en-

38 Id. at 553 n.15.
39 Id. at 556.
40 Id. at 557.
41 Id. at 561.
42 Id.
43 421 U.S. 519 (1975) (holding that the double jeopardy clause prevented criminal prosecution of a youth in adult courts following conviction for the same offense in a juvenile forum).
44 Hofacket, supra note 2, at 168.
45 George C. Butte, Early Development of Law and Equity in Texas, 26 YALE L.J. 699, 700 (1917).
47 Id.
acted its first juvenile code in 1943, which included a provision allowing for the prosecution of juvenile offenders in adult courts.\(^{48}\)

Texas uses a judicial waiver system to determine which juveniles will be prosecuted in adult courts. Judicial waiver is the original and most common method of transferring juveniles to the adult criminal court system.\(^{49}\) Judges are given the discretion to determine which juvenile offenders will be waived, reflecting “the individualized, offender-oriented, protective philosophy upon which the juvenile [justice] system is founded.”\(^{50}\) But judicial waiver has also faced some criticism. The judicial waiver system is based on the assumption that reliable diagnostic tools exist and will allow judges to predict which juveniles are amenable to rehabilitation.\(^{51}\) However, there is evidence that the accuracy of such tools is questionable.\(^{52}\) Additionally, many waiver statutes are couched in terms of a juvenile’s amenability to rehabilitative treatment, but are too vague to provide any objective guidance to a judge’s broad discretion.\(^{53}\) The result is the inconsistent application of judicial waiver statutes.

**B. Statutory Scheme**

The Texas judicial waiver scheme is too equivocal to place any real limits upon judicial discretion. Originally enacted in 1967, the Texas statutory scheme gives judges discretion to waive juvenile court jurisdiction and transfer a child under the age of majority to district court for criminal proceedings.\(^{54}\) This framework was most recently amended in 1999.\(^{55}\) In recognition of the unique challenges presented in trying mentally ill or mentally retarded juveniles, the revisions provide that when waiver is granted, the results of diagnostic studies are to be transferred to the district if waiver was granted. The 1999 amendments also allowed for the transfer of juveniles as young as 10 years of age to be waived to district court if they face allegations of homicide or a capital offense.\(^{56}\)

Under the current statutory framework, discretionary waiver hear-

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48 Act of 1943, ch. 544, Art. 2338-1, (1973) (current version at TEX. FAM. CODE ANN. § 54.02 (Vernon 2007)).
49 Bereford, supra note 6, at 793.
50 Hager, supra note 17, at 832.
52 Norval Morris & Marc Miller, Predictions of Dangerousness, 6 CRIME & JUST. 1, 44 (1985), available at http://www.heinonline.org. The authors acknowledge that predictions of dangerousness have been criticized as unreliable, but support the use of such mechanisms due to their helpfulness at the sentencing stage. It is difficult to say if the author would take the same approach nearly twenty years later, when the use of such predictive tools is much more widespread.
53 Feld, supra note 51, at 491.
54 Juvenile Court-Jurisdiction-Waiver Act, ch. 475, §§ 5, 6, 1967 Tex. Gen. Laws 1083, 1084 (current version at TEX. FAM. CODE ANN. § 54.02 (Vernon 2007)).
56 Id. Provisions were also inserted governing the detention of juveniles facing a waiver hearing.
ings are held without a jury and a judge serves as the final arbitrator of factual determinations. Only a few requirements limit the judge's discretion: the juvenile must be alleged to have committed a felony; after investigation, the judge must find probable cause to believe the juvenile committed the offense; and the judge must find that the seriousness of the alleged offense or the background of the juvenile requires criminal proceedings in adult court in order to provide for the welfare of the community. If a juvenile is being charged with an eligible offense and meets the age requirements, the judge need only find probable cause and seriousness of the offense in order to support a valid waiver order. In order for a waiver of juvenile court jurisdiction to be valid, it must state specifically the reasons relied upon by the court for waiver.

The statutory scheme does require that the court obtain a complete diagnostic study, a social evaluation, and full investigation of the juvenile and the alleged offense. The court "may" consider written reports from professionals such as the juvenile's probation officer and other professional court employees or consultants. Counsel for the juvenile must be given access to all written materials to be considered by the court at least one day prior to the transfer hearing. Finally, the statutory scheme sets out particular considerations to guide judicial decision making, including:

1. whether the alleged offense was against person or property, with greater weight in favor of transfer given to offense against person;
2. the sophistication and maturity of the child;
3. the record and previous history of the child; and
4. the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court.

It is important to note that although an investigation is mandatory, the judge's consideration of such reports and weight accorded to them is purely discretionary. In addition, although the judge may consider the six factors named by statute, a determination on each consideration is not necessary—only a mere recitation that the factors have been considered.
C. Texas Case Law

1. No Requirement of Specific Factual Findings

Ten years after the enactment of the juvenile waiver statutory scheme, a trio of Texas Appellate Court decisions made clear that there was no need for specific factual findings in waiver orders. In re J.R.C. held that the juvenile court’s order must incorporate and specifically state its reasons for waiver in the order. The court based its decision on the assumption that because the statutory scheme required the waiver order to “state specifically” the reasons for waiver, this indicated that the Legislature “contemplated more than merely an adherence to printed forms and, indeed, contemplated a true revelation [sic] of reasons for making this discretionary decision.” But on rehearing, the court found a mere recitation of the considerations provided by the Family Code to be adequate. This interpretation of the waiver statute was supported by the decision in In re D.L.C., which held that a mere recitation of the Texas Family Code § 54.02(a) and (f) factors was sufficient to support a valid waiver order. This decision was affirmed by the holding of the Dallas Court of Appeals in In re Hon-saker, stating that “no separate findings of fact . . . are required by the [statute].”

The J.R.C. decision is now distinguished on the grounds that the original order was inadequate merely because it failed to echo the statutory language. But this ignores the court’s earlier analysis regarding the statute’s intention and issuance of findings in support of the reasons for waiver. The effect of the holding in these cases is to allow the satisfaction of Texas statutory requirements and Kent’s mandate of adequate specificity for appellate review through a brief statement that the § 54.02(a) requirements have been met and a mere recitation of the considerations provided by subsection (f).

More recent Texas appellate court decisions indicate that little is

66 522 S.W.2d 579, 584 (Tex. Civ. App.—Texarkana 1975, writ ref’d n.r.e.).
67 Id. at 582 (quoting Dawson, Delinquent Children and Children in Need of Supervision: Draftman’s Comments to Title 3 of the Texas Family Code, 5 TEX. TECH. L. REV. 509, 564-65 (1974)).
68 In re J.R.C., 551 S.W.2d 748, 753 (Tex. Civ. App.—Texarkana 1977, writ ref’d n.r.e.).
69 533 S.W.2d 157, 158 (Tex. Civ. App.—Austin 1976, no writ.). In D.L.C., the juvenile court’s waiver order indicated that the seriousness of the offense and the child’s background warranted transfer. The order cited five of the six factors listed in TEX. FAM. CODE § 54.02(f), but did not make any specific findings of fact.
70 539 S.W.2d 198, 202 (Tex. Civ. App.—Dallas 1976, writ ref’d n.r.e.).
71 Hager, supra note 17, at 840.
72 TEX. FAM. CODE § 54.02 (a) requires that: the juvenile be facing felony charges be under the age of 18 but over the age of 14 or fifteen (depending upon the offense), there is probable cause to believe the juvenile committed the offense, and the seriousness of the offense or the background of the juvenile indicate that the welfare of the community would be better served by proceedings in adult criminal court.
73 Hager, supra note 17, at 842.
still required in the way of "specificity" in waiver orders. Decisions by appellate courts in San Antonio, Fort Worth, and Dallas support the conclusion that no specific factual findings need to be established in regard to the considerations provided by § 54.02(f), as long as there is evidence from the trial court record to support the conclusion that the requirements set by § 54.02(a) are met. The individual circumstances of the case are irrelevant.

The defendant in C.M. v. State sought appellate review of the waiver order transferring him for adult criminal proceedings. The juvenile stood accused of shooting and killing another teen during an altercation. The victim had assaulted C.M. approximately one week before the shooting and weighed almost twice as much as the accused. A clinical psychologist and juvenile probation officer testified at the waiver hearing that they believed C.M. would have a better chance of rehabilitation in the juvenile system. Despite the testimony and the facts surrounding the offense, the trial court entered an order waiving juvenile court jurisdiction over C.M., reciting affirmative answers to all of the considerations posed by section 54.02(f), save two. The trial court's order recognized that the juvenile had no prior offenses and that "it was unclear whether the public would be adequately protected if Appellant were not transferred to criminal district court."

The appellate court found that the trial court did not abuse its discretion in transferring the case to criminal court. It emphasized that the trial court found "that because of the seriousness of the offense the welfare of the community required transfer" and stated that the "[t]he trial judge is free to decide to transfer the case due to the seriousness of the crime, even if the background of the child suggests the opposite." The opinion stated that the record justified the trial court's findings and that § 54.02(f) did not require an affirmative finding on each factor listed for consideration. This decision was affirmed by the Fort Worth appellate court's decision In re D.D.

In re D.D. dealt with a juvenile challenging waiver to adult criminal court, who claimed that there was insufficient evidence to support the waiver order. The findings of fact contained in the waiver order consisted of a mere recitation that the factors set forth in § 54.02 subsections (a) and

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74 In re C.M. v. Texas, 884 S.W.2d 562 (Tex. App.—San Antonio 1994, no writ).
75 Id. at 563.
76 Id.
77 Id.
78 Id. at 564.
79 Id.
80 Id.
81 Id., citing In re C.C.G., 805 S.W.2d 10, 15-16 (Tex. App.—Tyler 1991, writ denied); In re A.T.S., 694 S.W.2d 252, 254 (Tex. App.—Fort Worth 1985, writ dism'd); In re E.D.N., 635 S.W.2d 798, 800 (Tex. App.—Corpus Christi 1982, no writ).
82 In re D.D., 938 S.W.2d 172, 173 (Tex. App.—Fort Worth 1996, no writ).
83 Id.
(f) had been met. But the Fort Worth appellate court found this to be adequate, stating that once the juvenile court makes the findings required by subsection 54.02(a) regarding classification of the alleged offense as a felony, the specified age of the child at the time the offense was allegedly committed, and probable cause, "it is not required to make any other findings." Citing the holding of C.M. v. State, the opinion also noted that "while the trial court is required to consider each factor listed in subsection 54.02(f) before transferring the case to district court, it is not required to find that each factor is established by the evidence." This interpretation of § 54.02(f) continues to guide appellate review of judicial waiver orders, as indicated by the decision of the Dallas appellate court in Price v. State.

2. No Objective Standards for a Full Investigation

Just as there is no requirement that the factors listed in § 54.02(f) be supported by the evidence, Texas case law indicates that there are no objective standards as to what comprises a "full investigation" as required by § 54.02(a). In Price, the juvenile challenged the sufficiency of the waiver hearing, contending that there was not a "full investigation" because the probation officer who prepared the social evaluation and investigative report did not speak to the victim and the report did not include the juvenile's version of the offense. The decision of the appellate court did not indicate that there were any set criteria for determining the sufficiency of the investigation, but did point to the fact that the court was provided with information regarding: "(1) appellant's prior referrals, (2) the circumstances of the instant offenses, (3) the appellant’s school, and (4) his academic performance." The appellate court upheld the validity of the waiver order, rejecting the juvenile's contention that the probation officer must have spoken with the victim directly or included the accused's version of events in the investigative report.

Another appellate court decision demonstrates the lack of standards for what constitutes a "full investigation." The Corpus Christi appellate court heard the contention of a juvenile that a waiver order was insufficient

84 Id. at 175.
85 Id. at 176, citing Moore v. State, 713 S.W.2d 766, 768 (Tex. App.—Houston [14th Dist.] 1986, no writ).
86 Id.
87 2002 Tex. App. LEXIS 2852 (Tex. App.—Dallas Apr. 24, 2002, no pet.). Price presented the appeal of a juvenile waived to adult criminal court for the offense of aggravated robbery. After a waiver hearing, the juvenile court concluded that "(1) a full investigation was performed, (2) probable cause existed to believe that the appellant committed the offenses, and (3) because of the seriousness of the offenses alleged and the background of the child, the welfare of the community required criminal proceedings." Id. at *3. The trial court record indicated that two males robbed the victim at gunpoint and then raped his wife, who subsequently identified the defendant. The appellate court held that this alone was sufficient to support a transfer order with no explicit consideration of § 54.02(f) factors.
88 Id. at *3.
89 Id. at *5.
90 Id.
because the professionals submitting diagnostic studies, a psychiatrist and psychologist, had never met with the juvenile because he refused to answer their questions.\textsuperscript{91} The appellate court wisely limited its holding to these particular circumstances, stating that where the juvenile refuses to cooperate with authorities, "a report is sufficient to satisfy the statutory requirements provided a bona fide effort is made to obtain the full study."\textsuperscript{92} But the opinion also recognized that what constitutes a full investigation is not defined in the statutory scheme.\textsuperscript{93} The court stated that "it is a matter of common knowledge that the course and scope of an investigation will vary according to the circumstances surrounding the events"\textsuperscript{94} and left the determination of what constitutes a "full investigation" up to the trial court.\textsuperscript{95} This leaves the trial court with broad discretionary powers as to what evidence is utilized in the consideration of waiver.

3. Availability of Resources Impacts Rehabilitation Received

Finally, Texas case law indicates that the lack of resources provided by the juvenile system may serve as a serious consideration in favor of waiver. This essentially punishes juveniles for the failings of the system because the juvenile court's waiver decision can be based on the possibility of rehabilitation given the resources available.\textsuperscript{96} But this does not require the trial court to evaluate the quality of services offered to the child in deciding whether to waive jurisdiction.\textsuperscript{97}

The juvenile against whom waiver was sought in \textit{In re T.D.} had previously been committed to the Texas Youth Authority, where he remained in custody for a year. The juvenile's probation officer testified that while at the Texas Youth Authority, "he had not really received any structure or care for the last six months."\textsuperscript{98} Despite a recommendation that the juvenile be placed in a structured medium risk facility for an indeterminate period and be provided substance abuse counseling and specialized academic training,\textsuperscript{99} the juvenile was placed in a low risk facility\textsuperscript{100} and re-
leased after a mere two months. In addition, the juvenile was never provided with an educational plan and was medicated with an anti-psychotic drug for control purposes in violation of Texas Youth Commission regulations. The appellate court opinion glossed over these serious failures of the juvenile justice system and merely stated that “[t]he availability of services to rehabilitate a juvenile is only one of the issues to be considered by the court in determining if juvenile court jurisdiction should be waived.”

A later appellate decision demonstrates that Texas juveniles are still being punished for the lack of rehabilitative programs in the juvenile justice system. In *Faisst v. State*, the trial court partially based its decision to order waiver on the grounds that rehabilitation of the juvenile was unlikely given the resources available for the juvenile court. The juvenile sought to invalidate the waiver order on appeal, contending that the facts presented at the hearing did not show that the welfare of the community demanded she be subject to adult criminal proceedings. Despite testimony from numerous witnesses indicating that the appellant posed a minimal risk of recidivism, the appellate court found that the trial court’s finding was not “so against the great weight and preponderance of the evidence so as to be manifestly unjust” because the seriousness of the offense required a longer period of supervision and probation than the juvenile justice system was equipped to provide.

As the decisions from *T.D.* and *Faisst v. State* illustrate, juveniles facing waiver who are amenable to rehabilitation may face waiver simply because the juvenile court does not have adequate resources to provide for their rehabilitation. Both juveniles and the public lose in these situations: youth are denied the opportunity for rehabilitation and the public is faced with the prospect of yet another adult offender released from jail who has received few to no rehabilitative services. Without serious consideration of the rehabilitative services available to the juvenile court and the youth in question, the waiver decision punishes the youth for the lack of resources available to the juvenile court—not for his own failure to seize an opportunity for rehabilitation.

IV. Criticisms of Waiver Scheme

*Kent’s* requirements may be procedurally fulfilled by the current

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101 Id. at 779 (O’Connor, M., dissenting). The juvenile himself objected to being sent home and asked to remain at the state school where he had been placed.

102 Id. at 780 (O’Connor, M., dissenting).

103 Id. at 779.

104 105 S.W.3d 8, 12 (Tex. App.—Tyler 2003, no pet.). The incident giving rise to delinquency charges occurred when Lindsay Faisst attempted to flee police who sought to pull her vehicle over for speeding. Rounding a curve at a high rate of speed, Ms. Faisst’s vehicle hit a tree, killing her passenger. She was waived to adult court and charged with involuntary manslaughter, convicted and sentenced to ten years of confinement.

105 Id.

106 Id. at 15.
Texas waiver scheme, but its substantive requirements are not. A lack of specificity in waiver orders makes appellate review difficult and gives judges unbridled discretion in a system that no longer prioritizes rehabilitation. This lack of factual specificity in waiver orders leads to the exact result that the holding in *Kent* sought to prevent. Appellate review is "remit-ted to assumptions"\(^{107}\) because courts must assume a full investigation was conducted and then scour the trial court record for factual support for the relevant considerations. Appellate review essentially consists of guess-work in order to determine the facts that motivated the decision of the trial court judge.\(^{108}\) As the dissenting justice noted in *T.D.*, "To reproduce the statutory requirements as the findings, makes a mockery of the entire proceeding.\(^{109}\)

The lack of guidance as to what constitutes a "full investigation," as required by 54.02(a), allows juvenile courts to make waiver decisions without a complete picture of the juvenile before them and the conditions influencing his alleged actions. As indicated by the decision in *Price*, the investigative report need not even include the juvenile's own version of events.\(^{110}\) Without such information, the judge cannot attempt to understand the juvenile's motivation for his actions or make a considered decision in regards to the juvenile's background, or his level of sophistication and maturity. Although information regarding how a juvenile views his offense would certainly help a judge understand the juvenile's motivation and resulting amenability to rehabilitation, probation officers may legally omit this from their reports.

Additionally, the fact that there are no real requirements on the diagnostic study conducted of the juvenile encourages minimal consideration of the juvenile's well-being. This is of great concern because many youth in the juvenile justice system have psychiatric disorders.\(^{111}\) If judges are not made aware of such conditions and other comparable considerations, they cannot make a true determination of the juvenile's sophistication, maturity, and amenability to rehabilitation. Likewise, juveniles are unlikely to receive the mental health treatment and rehabilitative programming they need in the adult criminal system.\(^{112}\) Without treatment, psychiatric disor-

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\(^{108}\) *Hager*, supra note 17, at 851.

Texas appeals courts have found it sufficient that the "relevant" facts are contained somehow, somewhere, within the trial court's record. However, because the appeals courts are forced to search the record, they are forced to make assumptions as to which facts from the record motivated the trial court's decision to waive jurisdiction.

\(^{109}\) *In re T.D.*, 817 S.W.2d at 783 (O'Connor, M., dissenting).


\(^{112}\) *Building Blocks for Youth, Transfer to Adult Court/Trying Kids as Adults*,.
orders are likely to worsen, contributing to negative social outcomes and continued recidivism. 113 Juvenile courts must consider inquiry into a youth’s psychiatric conditions and treatment in order to adequately provide for the youth’s rehabilitation. A lack of standards for what constitutes a “full investigation” gives the trial court judge virtually unbridled discretion to pick and choose which materials to admit in a waiver hearing, possibly ignoring important evidence relating to mental health issues and leading to improper waiver and negative outcomes for juveniles and society.

Finally, the fact that § 54.02(f)(4) contemplates the likelihood of rehabilitation of the child through the use of the resources currently available to the juvenile court essentially punishes the juvenile for the inadequacies of the Texas juvenile justice system. Texas judges, attorneys, and probation officers acknowledge that there are insufficient programs and services in place for juveniles after disposition. 114 Large numbers of juveniles are committed to the Texas Youth Commission because of probation violations, highlighting the need for additional services. 115 As illustrated by the mismanagement of services provided to the juvenile in T.D., juveniles who wish to receive services and are willing to explore rehabilitative programs may be denied access simply because of a lack of resources. The rehabilitative goals of the juvenile justice system cannot be met without sufficient programs and services in place. To hold juveniles liable for the system’s failure is a grave injustice.

V. Recommendations for Change

The Kent decision was founded on the principle that waiver to adult criminal proceedings involved the due process rights of juveniles and the idea that the waiver procedure should respect the constitutional rights of juveniles. An important part of ensuring that the due process rights of juveniles are protected is allowing for substantial appellate review. Yet the vagueness of the current Texas waiver standard requires appellate courts to search the record to find facts in support of the trial court’s decision. In addition, the lack of standards for what constitutes a full investigation leaves trial court judges with broad discretion as to what evidence they will consider. Finally, the waiver statute’s consideration of the resources available for rehabilitation essentially forces youth to bear the burden of the failures of the juvenile justice system. When there are not enough available resources, the juvenile is left to be tried as an adult. These results were not the contemplated goal of Kent and are highly inconsistent with the premise that rehabilitation, not punishment, is the primary goal of the juvenile justice system.


113 Abram et al., supra note 111, at 1098.


115 Id. at 30.
The statutory scheme governing waivers in Texas should be amended to require a statement of factual findings utilized by the judge in the waiver determination. This would include a specific statement about which of the factors found in subsection (f) were considered and what evidence the judge found in support of those considerations. Another possibility is a requirement that a specific number of the considerations listed in §54.02(f) are necessary to support the waiver of the juvenile to adult criminal court. As stated by Hager:

While it seems appropriate that the six factors are considerations to guide the exercise of juvenile courts’ discretion and need not all be proven, it is not clear that a child should be stripped of the juvenile system’s promise of treatment, confidentiality, and anonymity, and suffer the loss of rights that accompanies a transfer to the comparatively brutal realities of the adult criminal system absent a finding that some specific number of those factors weigh in favor of transfer. Explicit factual findings would allow for more thorough and directed appellate review. This would better capture the intent behind the Supreme Court’s decision in Kent.

This recommendation raises several questions that would require further consideration, the primary concern being the number of factors required for support of a waiver. Although three factors seems like an obvious number as a majority, there remains the consideration that three factors may not be present in a case where the heinousness of the crime argues in favor of transfer. But despite the attention and shock often generated by violent juvenile crimes, there may still remain the possibility of rehabilitation—the original goal at the heart of the juvenile justice system. Thus, a finding of support for a majority of the factors set forth by §54.02(f) would serve the best interests of the child and society.

The statutory scheme should also be amended to follow the holding of J.C.S. and specifically require that professionals partaking in the diagnostic study of the juvenile meet with him if at all possible. Although it is entirely possible that some alleged offenders will decline a meeting with any evaluator, this requirement, at a minimum, puts the impetus on the court and the professional to ensure an in-person meeting is attempted. Where this is not possible, the report should explicitly state that the professional was unable to meet with the juvenile and the basis of the professional’s opinion. This will provide judges with additional information regarding the basis of the professional’s opinion and allow it to be weighed accordingly.

Finally, a major reassessment of the resources available to the Texas juvenile justice system is in order. If the transfer of juveniles is to be partially determined by the resources available for rehabilitation, the state should ensure that it has a wide range of relevant programs in place in order

116 Hager, supra note 17, at 855.
to reduce recidivism. In 2001, the Texas Juvenile Probation Commission reported that over one-third of the juveniles they screened scored at the caution cutoff on multiple mental health screening instruments. This statistic is even more troubling given the fact that less than half of the referrals received by the Texas Juvenile Probation Commission were part of the screening process. With this mental health prevalence rate in the Texas juvenile justice system, programs should be developed to address the needs of juveniles. A failure to treat juveniles affected by mental illness leads to higher rates of recidivism, and punishes those juveniles eligible for transfer for the system's own failings. The Texas Youth Commission offers only two placements with specialized services for mentally ill or retarded juveniles, Corsicana Residential Treatment Center or Crockett State School, despite the fact that research has demonstrated specialized treatment may reduce the rate of recidivism for felony offenses by 13 percent. More specialized services should be made available for juveniles with mental impairments.

In order to provide for the rehabilitation of serious juvenile offenders, Texas should make efforts to replicate successful programs, such as those found at the Giddings State School (hereinafter "Giddings"). This juvenile correctional facility houses serious young offenders, including juveniles adjudicated on charges of rape, murder, and robbery. But the staff at Giddings have a rehabilitative focus, insisting that "they can 'turn bad kids around with a kinder, gentler approach' instead of the usual 'lock them up and throw away the key mentality.'" The services offered at Giddings include the use of group therapy and provision of mental health services. The ultimate goal is for juveniles to admit to their crimes and take personal responsibility for what they have done. This is accomplished through a reenactment of the juvenile's crime, both from the perspective of the victim and the offender. This innovative rehabilitative approach has lead to positive results: "only twelve percent of the juveniles who complete this program at Giddings commit another crime." The Texas juvenile justice system should replicate models that work, such as the programming offered at the Giddings State School. Only when a full range of rehabilitative options are available can § 54.02(f)(4) be fairly applied.

118 Abram et al., supra note 111, at 1098 ("Early onset of disorders predicts worse outcomes, early intervention is critical. Psychiatric care has a chance to succeed where criminalization never can."); id. at 1103; see also Deborah Shelton, Experiences of Detained Young Offenders in Need of Mental Health Care, 36 J. NURSING SCHOLARSHIP 129, 129 (2004).
120 See JOHN HUBNER, LAST CHANCE IN TEXAS: THE REDEMPTION OF CRIMINAL YOUTH, xvii (2005).
121 Bereford, supra note 6, at 825.
122 See HUBNER, supra note 120, at xviii-xx.
123 Bereford, supra note 6, at 826.
VI. Conclusion

The juvenile justice system was intended to operate in the best interests of the child and by providing for rehabilitation of the child, for the best interests of society. Although the juvenile justice system no longer operates in with a purely rehabilitative goal, this should still be the priority. The \textit{Kent} decision indicates that where juvenile court decides that rehabilitation is no longer a possibility, this decision must be made according to due process standards and allow for thorough appellate review.

The Texas statutory scheme as developed through case law does not honor the intention of \textit{Kent}. The lack of specificity required in waiver orders does not allow for substantial appellate review, but instead results in a sort of guessing game from the trial court record. Because a full investigation is not defined objectively, judges may pick and choose which information they wish to consider, possibly ignoring the fact that the system has failed the child. Changes to the waiver statute would remedy the misapplication of the \textit{Kent} standards and honor its true intent—to protect the due process rights of juveniles. Perhaps more importantly, a full evaluation of the rehabilitative resources available in the Texas juvenile justice system may demonstrate solutions that may reduce the need for waiver and allow waiver decisions to serve the purpose for which they were initially intended—a last resort.