

# Technical Assistance

## Case Law Analysis of Transfer Criteria

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The cases below highlight some of the published appellate court analyses of the criteria used to determine whether a person should be transferred to adult court pursuant to Welf. & Inst. Code § 707. There are many published cases that are relevant to this determination, but those selected here discuss the criteria in detail. Courts rely heavily on probation departments for the information contained in their social studies, and in particular, transfer hearing reports. A recommendation from probation carries great weight. This collection of case summaries is provided to assist probation in understanding the issues the court must consider when ruling on a transfer motion, and how appellate courts review the trial court's decision-making process and in some cases the information provided in the probation reports themselves.

## WEIGHING THE FIVE CRITERIA

In 2018, after the passage of Proposition 57, the Fourth District Court of Appeals published an opinion “to provide guidance to the courts in deciding” some of the issues around transfer [J.N. v. Superior Court (2018) 23 Cal. App. 5th 706, 710 fn.2]. The juvenile court had found J.N. was suitable to remain in juvenile court under criteria (1) the lack of sophistication exhibited in the crime, (3) his minimal previous delinquent history, and (4) the limited number of previous attempts to rehabilitate, but found that J.N., who was by then age 20, should be transferred to criminal court based upon the remaining two criteria: (2) the limited amount of jurisdiction time the juvenile court had left to rehabilitate him, and (5) the gravity of the offense. [*Id.* at p. 714].

The juvenile court referred to information provided in the probation officer's report, which identified the various programs offered by DJJ, but "without any analysis" the court simply concluded the minor was unsuitable for juvenile court and implicitly, for treatment at DJJ [*Id.* at p. 721]. Because the prosecution must prove transfer is appropriate, the prosecution bears the burden of producing evidence of insufficient time to rehabilitate [*Id.* at p. 721]. "[W]here the court might decide treatment as a juvenile would be in the minor's best interest, the court could still find the minor 'unfit *if* [the] experts testified that rehabilitation might require treatment beyond the date of his mandatory discharge [Citations.]' " [*Id.* at p. 721–722]. Here, the prosecutor provided no evidence or expert testimony about the DJJ programs, their duration, or whether J.N. could be rehabilitated by DJJ prior to the termination of the court's jurisdiction. Further, the probation officer provided no information or materials to support his conclusion that the minor was unsuitable for juvenile treatment through the programs at DJJ [*Id.* at p. 722].

Regarding the circumstances and gravity of the offense, the juvenile court record made clear that the court believed this was not a sophisticated murder, and that to some extent the aggressive nature of the victim contributed to the struggle over the gun and the ultimate shooting. However, the court then concluded that because a crime "doesn't get much more serious than [murder] ..." J.N. was not appropriate for treatment in juvenile court [*Id.* at p. 724]. Clearly, murder is the gravest of offenses, but those juveniles who are accused of it are not automatically excluded from consideration for juvenile court treatment, and thus, simply relying on the seriousness of the offense itself was not substantial evidence of J.N.'s unsuitability for juvenile court under this criterion [*ibid.*].

## DEALING WITH "CIRCUMSTANCES AND GRAVITY"

Since most, if not all, of the offenses for which the prosecutor makes a motion to transfer to adult court are extremely serious, a question frequently arises as to how the fifth criterion, "circumstances and gravity of the offense," may be overcome. To answer this question, in addition to the case referenced above, *Rene C. v. Superior Court* (2006) 138 Cal. App. 4th 1, while a pre-Proposition 57 case, may still be instructive. In this case, a 14-year-old charged with murder, attempted murder, and assault with a firearm was determined to be a fit and proper subject for juvenile court, even though the charges arose from a gang-related altercation. To reach this conclusion, the court examined evidence which demonstrated that the minor's participation was less grave or less serious than the crime would lead a court to believe. Such evidence may come from the fact that the individual's culpability arises from his role as an aider and abettor. It may also come from the existence of a developmental or cognitive disability, organic brain dysfunction (or, in light of some more recent court cases,

even a lack of maturity). The language added to the fifth criterion by Senate Bill 382 in 2015 codified the approach taken by the court in *Rene C.*

## ADDRESSING “REHABILITATION PRIOR TO THE EXPIRATION OF JUVENILE COURT JURISDICTION”

When evaluating the rehabilitation criterion in Welf. & Inst. Code § 707(a)(3)(B), the trial court may not determine the juvenile’s rehabilitative needs based on the gravity of the offense alone [Kevin P. v. Superior Court (2020) 57 Cal. App. 5th 173, 179, 270 Cal. Rptr. 3d 877]. In granting the prosecution’s motion to transfer minor’s case to adult court, the juvenile court based its decision on the gravity of the offense, criminal sophistication, and the lack of time for rehabilitation criteria. The court, however, erroneously believed that DJJ’s parole consideration date of seven years for first degree murder was the “baseline” period necessary for rehabilitation, and because the minor would turn 25 years old and have to be released before he received seven years of DJJ treatment, he could not be rehabilitated prior to the expiration of the court’s jurisdiction and therefore this criterion favored transfer to adult court [*Id.* at p. 199–200]. No evidence about the minor’s rehabilitative prospects was presented by the prosecution to rebut the defense expert’s opinion that the minor had a good chance to be rehabilitated at DJJ based on his positive characteristics, lack of serious psychological issues, and positive adjustment while in juvenile hall, and though the murder was heinous, that alone is not substantial evidence the minor could not be rehabilitated at DJJ [*Id.* at p. 200].

## THINKING ABOUT “CRIMINAL SOPHISTICATION”

In evaluating this factor, the court is required “to consider the whole picture, that is, all the evidence that might bear on the minor’s criminal sophistication, including any criminal sophistication manifested in the present crime” [People v. Superior Court (Jones) (1998) 18 Cal. 4<sup>th</sup> 667, 683-684]. In one case, the court found the person’s “age, maturity, cognitive functioning, and positive upbringing and social history, as well as his attempts to cover up his involvement in the crime, weighed in favor of transfer to criminal court because they demonstrated his ‘ability to appreciate the risks and consequences of his criminal behavior’ and his awareness ‘of the wrongfulness ... of [his] conduct.’” [Kevin P., *supra*, 57 Cal. App. 5<sup>th</sup> at

193]. This was despite his “hopelessly unsuccessful” attempt to cover up the crime [*Id.* at p. 195]. Activities such as trying to avoid detection by destroying the crime scene or disposing of evidence like the tools used in committing the crime can point to criminal sophistication—even if not done well. However, many youths will not be as high functioning or have the positive upbringing and social history that the youth in this case did. Further, Kevin P. was 17.5 years of age at the time of his crime, thus he was older and more mature than many youths will be.

## EVALUATING “PREVIOUS DELINQUENT HISTORY”

In considering a person’s prior delinquent history under § 707(a)(3)(C), the court is not limited to considering conduct that resulted in delinquency petitions or conduct that precedes the offense(s) alleged in the transfer proceeding [D.C. v. Superior Court (2021) 71 Cal. App. 5th 441, 456–458]. In this case, the minor was suspected in a murder but never charged, and a year later was sent to DJJ for a later in time, unrelated burglary, and assault with a deadly weapon. Prior to his DJJ commitment and throughout his confinement minor produced writings describing murder, stabbings, satanic worship, and mentioning the murder victim. Prior to discharge from DJJ, the prosecutor filed a petition for the old murder, robbery, and other offenses, and filed a motion for transfer. The juvenile court granted the motion for transfer based upon the minor’s criminal sophistication—the offense was preplanned, and a cover-up attempted; the likelihood of rehabilitation—prior DJJ commitment had mixed success and on-going mental health issues; previous delinquent history—prior battery, negative school history, prior burglary and assault; and gravity of the offense—a preplanned vicious stabbing attack. The court ultimately found that upon the totality of the circumstances D.C. would not be amenable to juvenile court treatment [*Id.* at p. 450–451]. In his writ D.C. argued the previous delinquent history criterion is limited to conduct that results in a delinquency petition and conduct that precedes the alleged transfer offense [*Id.* at p. 451]. The appellate court held that the legislative history of § 707 indicates a desire to give judges broad discretion to consider all relevant evidence when making a transfer decision, including evidence of offenses and overall behavior that may come *after* the alleged transfer offense, as well as evidence that relates to the youth’s mental and emotional state and associated characteristics [*Id.* at p. 457]. Importantly here, D.C.’s writings were not admitted in the hearing for their truth, but the court considered them as evidence that he had “an ongoing interest in and attraction to violence” [*Id.* at p. 458].

# WHAT COUNTS AS “SUCCESS OF PREVIOUS ATTEMPTS TO REHABILITATE”?

There is limited discussion of the Welf. & Inst. Code § 707(a)(3)(D) criterion in published cases. Participating in diversion or informal probation for four months or sanctions imposed for nine months following a truancy case, where there were no “programs or counseling” provided, do not count as significant previous attempts at rehabilitation [J.N., *supra*, 23 Cal. App. 5th at 720]. In another case where the court did not sufficiently address whether this criterion weighed in favor of or against transfer, the court did mention the youth had not taken advantage of services that had been provided by the Department of Family and Children’s Services and highlighted that not many probation services had been provided due to the lack of prior juvenile offenses. This seems to indicate rehabilitative attempts other than probation programming can be considered [C.S. v Superior Court (2018) 29 Cal. App. 5th 1009, 1024].

## THE COURT’S PROCESS

As a probation department, it may be useful in preparing transfer hearing reports to understand what evaluative process a court goes through during transfer proceedings. The Sixth District Court of Appeals has held that due process principles require the juvenile court “clearly and explicitly ‘articulate its evaluative process’ by detailing ‘how it weighed the evidence’.” [T]his requirement will be met where the court performs a factual analysis of the relevant factors as to each criterion ... and then specifies the criteria that weighed in favor of transfer ... and which criteria weighed against transfer” [C.S., *supra*, 29 Cal. App. 5th at 1029]. Here, the juvenile court considered the five criteria of § 707 and ordered the case transferred based upon a “totality of the circumstances” analysis, but did not explicitly state which criteria weighed in favor of, against, or were neutral as to transfer—in contrast to the juvenile court in J.N. v. Superior Court (2018) 23 Cal. App. 5th 706, 714, where the court specifically identified which three criteria weighed against and which two weighed in favor of transfer. The appellate court in C.S. highlighted that nothing in § 707 requires the court to give equal weight to each criterion. Nor would it even be an abuse of discretion to find one criterion alone outweighed the other four. In considering other statutes involving the weighing of factors, “the law generally does not require that the same weight be accorded to each factor,” but here, the juvenile court must make “clear and explicit” findings as to which criteria weighed in favor of, against, or were neutral as to transfer, to permit “meaningful appellate review” [C.S., *supra*, 29 Cal. App. 5th at 1034–35].