



NEW JERSEY'S FULL DISCOVERY MANDATE: A LESSON FOR OTHER JURISDICTIONS AND THE NEED FOR FURTHER JUVENILE LAW REFORM

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I. INTRODUCTION

In most areas of the law, at both the state and federal level, children are often afforded special protections when they are involved in legal action.¹ In fact, children are often categorized as one of the most vulnerable populations in the United States² because of their inability to protect themselves from inherent dangers of life and make cognizant choices.³ Due to these vulnerabilities, a separate court system was established for children charged with crimes.⁴ The juvenile court system was founded as a way to separate children from adults, and focus on rehabilitation, rather than punishment for juveniles that have been adjudicated delinquent or declared dependent.⁵ Despite the protections the juvenile court system offers to children, all states have transfer laws that permit or compel the criminal prosecution of juveniles in the state's respective criminal courts under certain circumstances.⁶

¹ *Child Welfare Laws and Policies*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <https://www.childwelfare.gov/topics/systemwide/laws-policies/> (last visited Mar. 18, 2017). See Brittany Logino Smith & Glen A. Kercher, *Adolescent Sexual Behavior and the Law*, http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf ("Statutory rape laws have been enacted to protect minors from sexual abuse").

² Leiyu Shi & Gregory D. Stevens, *Vulnerable Populations in the United States* 163 (David Vlahov et. al. eds., 2nd ed. 2011).

³ Preethi Shivayogi, *Vulnerable Population and Methods for Their Safeguard*, PERSP. IN CLINICAL RES., 2013, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3601707/>.

⁴ Danielle Mole & Dodd White, *Child Welfare League of America, Transfer and Waiver in the Juvenile Justice System* (2005), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.528.7538&rep=rep1&type=pdf>

⁵ *Dialogue on Youth and Justice*, ABA DIV. FOR PUB. EDUC., Part I <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>.

⁶ Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, Office of Juvenile Justice and Delinquency Prevention (2011) (Juvenile transfer laws fall into three general categories which are judicial waiver laws, prosecutorial discretion laws, and statutory exclusion laws).

In a landmark decision, the New Jersey Supreme Court unanimously held in *In re N.H.* that prosecutors must provide full discovery to juveniles prior to a waiver hearing.⁷ N.H., a seventeen-year-old at the time, went to a fight to support a friend, D.W.⁸ At the fight, N.H. allegedly took a handgun from an individual and “shot C.W. four times, including once in the back of the head.”⁹ Parts of the incident were video recorded and numerous witnesses made statements to law enforcement incriminating N.H.¹⁰

On June 11, 2014, the juvenile was charged with acts of delinquency, and the following week the State filed a motion to remove jurisdiction from juvenile court to criminal court.¹¹ A month later, the State provided discovery to N.H.’s counsel, which included incident reports, recorded statements, video surveillance of the location of the fight, an autopsy, and the defendant’s birth certificate.¹² However, additional witness statements, police reports, and video recordings of the incident were not disclosed by the State.¹³ These materials were not disclosed by the State for two reasons: (1) the State claimed it did not intend to rely on this evidence at the waiver hearing¹⁴ and (2) neither the New Jersey Juvenile Code or New Jersey Court Rules required the State to do so.¹⁵ Both the New Jersey Juvenile Code of Justice and the New Jersey Court Rules did not clearly speak to discovery in juvenile cases.¹⁶

The Supreme Court of New Jersey relied on case law as well as the discovery practices of the State when there was not a waiver

⁷ *In re N.H.*, 226 N.J. 242, 245 (2016).

⁸ *Id.* at 246.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *In re N.H.*, 226 N.J. at 246.

¹⁴ *Id.*

¹⁵ *Id.* at 247.

¹⁶ *Id.*

motion.¹⁷ The Court opined that the current case law “highlights how important the juvenile waiver decision is . . . [because] once waiver occurs, the child loses the protections and opportunities for rehabilitation for which the Family Part [of the state judiciary] affords.”¹⁸ Additionally, the Court noted that if no waiver motion is made by the State, and the Family Part retains jurisdiction, full discovery is to be provided to the juvenile prior to a hearing on the merits.¹⁹ The Court reasoned that it had difficulty “justify[ing] disclosure of less than full discovery in the State’s possession when juvenile proceedings turn more serious.”²⁰

New Jersey’s newly adopted mandate for full discovery prior to a juvenile’s waiver hearing ensures that the juvenile court system is operating in the best interests of the juvenile.²¹ This note will address the importance of New Jersey’s decision to provide juveniles with full discovery prior to a waiver hearing in two key ways: (1) the racial and geographical impacts of not providing full discovery, and (2) potential ethical implications. Part I will address this topic broadly; providing a brief history of the juvenile court system, a look at the United States Supreme Court jurisprudence in favor of protections for juveniles, a historical overview of juvenile waiver law in the United States, and prominent New Jersey case law that supports the protection of juveniles in the state. Part II will discuss the New Jersey Supreme Court’s decision in *In re N.H.* and its significance for juveniles in New Jersey. Part III will discuss the additional safeguards that full discovery ensures juveniles, the ethical implications that arise when full discovery is not afforded, the current waiver reporting practices at both the state and federal level, and the need for further reform in favor of juvenile justice.

II. BACKGROUND

A. THE BEGINNING OF RECOGNIZING THE SIGNIFICANCE OF SPECIAL PROTECTIONS FOR JUVENILES UNDER THE LAW

¹⁷ *Id.* at 254.

¹⁸ *Id.* at 252.

¹⁹ *In re N.H.*, 226 N.J. at 254.

²⁰ *Id.* at 255.

²¹ *Id.* at 252.

1. A BRIEF HISTORY OF THE JUVENILE COURT SYSTEM

Traditionally, the United States criminal court system did not separate juveniles and adults because of the heavy influence English common law courts had on the American court system.²² During the nineteenth century, juvenile advocates created facilities for distressed juveniles, usually located in larger cities such as New York and Chicago.²³ Advocates who supported these facilities wanted to “protect juvenile offenders by separating them from adult offenders.”²⁴ Another initiative of these social reformers was to shift society’s focus to rehabilitation instead of punishment for juvenile offenders.²⁵ The first juvenile court was established in Illinois during 1899, and by 1925 almost all jurisdictions had moved toward a system which separated juveniles from adults under the law.²⁶ The juvenile court system was meant to serve a parental role for the juvenile by focusing on the “best interests of the child.”²⁷

2. THE HISTORY OF JUVENILE WAIVER LAW IN THE UNITED STATES

Juvenile waiver laws are not new to the juvenile justice system.²⁸ Despite the protections the juvenile court system and United States Supreme Court required for juveniles, states began enacting statutes that were tough on crime.²⁹ These statutes resulted

²² *Dialogue on Youth and Justice*, *supra* note 5. See, e.g., Esther Pak, Note, *The Impact of In re V.A. on the Road Back to Juvenile Rehabilitation and the Need for Further Legislative Changes in New Jersey’s Waiver Law*, 66 RUTGERS L. REV. 531, 536 (2014).

²³ *Dialogue on Youth and Justice*, *supra* note 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Danielle Mole & White, *supra* note 4.

²⁷ *Dialogue on Youth and Justice*, *supra* note 5.

²⁸ Griffin et al., *supra* note 6, at 2.

²⁹ Cathy S. Widom, *Juvenile Crime, Juvenile Justice*, 161, 1-62, (Joan McCord et. al. eds., 1st ed. 2001).

from the public's concern with violent crime, particularly those committed by children and adolescents in the early 1990s.³⁰ Though transfer laws among states vary in their scope of coverage, there are three general categories that have emerged: (1) judicial waiver laws, (2) prosecutorial discretion laws,³¹ and (3) statutory exclusion laws.³² The most common form of waiver is judicial waiver, where a prosecutor files a motion to waive, and the judge decides to grant the waiver on a discretionary basis.³³

In addition to judicial waivers, prosecutorial discretion, and statutory exclusion laws, many states have supplementary transfer laws such as “once adult/always adult laws,”³⁴ “reverse waiver laws,”³⁵ and “blended sentencing laws.”³⁶ Once an adult/always an adult transfer laws exclude juveniles from the juvenile court system if the juvenile has already been tried criminally.³⁷ Reverse waiver laws give juveniles the opportunity to appeal their case to juvenile court if it was originally filed in adult court.³⁸ Finally, some states have blended sentencing that allows courts to have either criminal or juvenile sentencing options.³⁹

3. ENSURING JUVENILES GREATER PROTECTIONS UNDER THE LAW: *UNITED STATES v. KENT*

³⁰ *Id.*

³¹ Griffin et al., *supra* note 6, at 2. Prosecutorial discretion laws describe sets of cases that can be tried in juvenile or adult court at the preference of the prosecutor.

³² *Id.* (“Statutory exclusion laws grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile-age offenders”).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Griffin, *supra* note 6, at 2.

³⁸ *Id.*

³⁹ *Id.*

Over the last four decades, juvenile law has transformed, offering more protections to juveniles under the law than adults. In a 1966 decision, the Supreme Court of the United States determined that courts cannot violate a juvenile's Due Process rights; deciding that a juvenile is entitled to a waiver hearing prior to being transferred to adult court.⁴⁰ The Court relied on both the inherent protections that the juvenile court system affords to juveniles, and the role of the juvenile court system in determining whether to constitutionally require a waiver hearing prior to transferring a juvenile to adult court.⁴¹ Specifically, the Court noted that the role of the juvenile court system is "determining the needs of the child and of society rather than adjudicating criminal conduct."⁴² Further, the Court recognized "that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of juveniles."⁴³ A juvenile's right to counsel, the Court reasoned, could not operate unless it is given the chance to function at a waiver hearing.⁴⁴ Thus, the parental role of the juvenile justice system, coupled with the inherent significance of the determination to transfer jurisdiction, granted juveniles the constitutional right to a waiver hearing.⁴⁵

B. RECENT UNITED STATES SUPREME COURT JURISPRUDENCE IN FAVOR OF GREATER JUVENILE PROTECTIONS

Recently, the Supreme Court of the United States had a number of cases on their docket concerning the regulation of juvenile

⁴⁰ *Kent v. United States*, 383 U.S. 541, 551-52 (1966).

⁴¹ *Id.* at 555-56.

⁴² *Id.* at 554. ("The [Juvenile Court's] objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt, and punishment").

⁴³ *Id.* at 555-56.

⁴⁴ *Id.* at 561.

⁴⁵ *Id.* at 563.

crime.⁴⁶ Specifically, the Supreme Court addressed several cases involving the Eighth Amendment rights of juvenile offenders.⁴⁷ In 2005, the Supreme Court prohibited the use of the death penalty for a crime committed by a juvenile.⁴⁸ In his majority opinion, Justice Kennedy stated that “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”⁴⁹ Additionally, the Court outlined three general differences between juveniles under the age of eighteen and adults: (1) “[a] lack of maturity and an undeveloped sense of responsibility” in youths,⁵⁰ (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,”⁵¹ and (3) “the character of a juvenile is not as well formed as that of an adult.”⁵² The existence of these inherent differences between juveniles and adults, the Court reasoned, “render suspect any conclusion that a juvenile falls among the worst offenders.”⁵³

Five years later, the Supreme Court of the United States was faced with another issue involving juvenile sentencing, the question presented was whether a juvenile could be sentenced to life without parole for a non-homicide crime.⁵⁴ Answering the issue in the negative, the Court in *Graham v. Florida* emphasized that

⁴⁶ Elizabeth Scott et al., *The Supreme Court and the Transformation of Juvenile Sentencing*, Models for Change: Systems Reform in Juvenile Justice (2015).

⁴⁷ *Id.* Under the Eighth Amendment, “cruel and unusual punishments” are unconstitutional. U.S. CONST. amend. VII. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 59 (2010) (“Embodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))).

⁴⁸ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁴⁹ *Id.* at 568 (citing *Atkins v. Virginia*, 538 U.S. 304, 319 (2002)).

⁵⁰ *Id.* (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1994)).

⁵¹ *Roper*, 543 U.S. at 568.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Graham v. Florida*, 560 U.S. 48, 52-53 (2010).

sentencing a juvenile to life without parole “is an especially harsh punishment for a juvenile,” as compared to their adult counterparts.⁵⁵ If a juvenile offender is sentenced to life without parole, the juvenile will spend a larger portion of his or her life in prison than an adult offender.⁵⁶ Moreover, sentencing a juvenile to life without parole for a non-homicide crime cannot be justified by either of the stated goals of punishment, deterrence, or retribution.⁵⁷ The Court already determined in *Roper* that juveniles lack maturity, which in turn makes juveniles less prone to deterrence.⁵⁸ At the heart of the retributive argument, the Court emphasized that a “criminal sentence must be directly related to the personal culpability of the criminal offender.”⁵⁹ Relying on the Court’s findings in *Roper* that the retributive argument is weaker for minors than for adults,⁶⁰ the Court in *Graham* concluded that retributivism does not substantiate the imposition of “the second most severe penalty on the less culpable juvenile nonhomicide offender.”⁶¹

More recently, the United States Supreme Court faced another juvenile sentencing issue; whether mandatory sentencing of life without the possibility of parole for juvenile offenders, notwithstanding the underlying offense, violated the Eighth Amendment.⁶² The Court determined that the mandatory sentencing scheme did violate the Eighth Amendment because “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”⁶³

⁵⁵ *Id.* at 70.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 72.

⁵⁹ *Id.* at 71 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

⁶⁰ *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

⁶¹ *Graham*, 560 U.S. at 72.

⁶² *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012).

⁶³ *Id.* at 2475. See Scott et al., *supra* note 46, at 11

(Miller did not require states to abolish the sentence of LWOP for juveniles convicted of homicide. But

C. RECOGNIZING THE RIGHTS OF JUVENILES IN NEW JERSEY

Steps have been taken in New Jersey through the evolution of common law and through legislation to ensure greater protections of juveniles. In *In re K.A.W.*, the New Jersey Supreme Court held that a complaint filed against a juvenile must contain the date and time of the conduct alleged.⁶⁴ Although full disclosure was not at issue in this case, the Court did address the Juvenile Code's silence on its discovery requirement to juveniles prior to the waiver hearing.⁶⁵ The Court stated:

[t]he custom—almost invariable in matter such as this—is for the state to open its file to the juvenile, and hence at no time has there been a recommendation from the appropriate Supreme Court Committee for us to amend our Rules to structure discovery procedures in juvenile delinquency actions similar to those embodied in our Rules governing criminal practice, Rule 3:13-1 to 4, nor does it appear that any question as ever arisen in that regard. The process has become, commendably, self-regulating.⁶⁶

The Court offered little guidance in dealing with the Juvenile Code's silence other than that the Code appears to be “self-regulated.”⁶⁷ Over the years, the legislature has enacted and revised multiple juvenile statutes regarding waiver law.⁶⁸ Beginning in

the Court makes clear that this sentence is seldom acceptable—and only after full consideration of the juvenile's age, immaturity . . . family and home environment, circumstances of the offense including the role of the juvenile and the extent to which peer pressure was involved, [and] [t]he youth's potential for rehabilitation).

⁶⁴ *In re K.A.W.* 104 N.J. 112, 121 (1986).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See L. 1982, c. 77, § 7; L. 1987, c. 106, § 23; L. 1991, c. 30, § 1; L. 1991, c. 83, § 3; L. 1991, c. 91, § 6; L. 1999, c. 373, § 1; L. 2003, c. 39, § 8; L. 2007, c. 341, § 3; L. 2015, c. 89, § 1. Under the current and prior versions of the law, the prosecutor has discretion to decide whether to seek waiver.

2000, the Legislature lessened the circumstances of waiver for juveniles who were at least fifteen-years-old, when they were charged with specific serious offenses.⁶⁹ Additionally, the legislature called on the Attorney General to develop guidelines for the factors prosecutors will assess in determining whether to waive a juvenile's case to adult court.⁷⁰ However, the guidelines intended to make it

69 In re V.A., 212 N.J. 1, 8 (2012). See N.J.S.A. 2A:4A-26.1(c)

([e]xcept as provided in paragraph (3) of this subsection, the court shall waive jurisdiction of a juvenile delinquency case without the juvenile's consent and shall refer the case to the appropriate court and prosecuting authority having jurisdiction if: (1) The juvenile was 15 years of age or older at the time of the alleged delinquent act; and (2) There is probable cause to believe that the juvenile committed a delinquent act which if committed by an adult would constitute: (a) criminal homicide, other than death by auto; (b) strict liability for drug-induced deaths; (c) first degree robbery; (d) carjacking; (e) aggravated sexual assault; (f) sexual assault; (g) second degree aggravated assault; (h) kidnapping; (i) aggravated arson; (j) possession of a firearm with a purpose to use it unlawfully against the person of another under subsection a. of N.J.S.2C:39-4, or possession of a firearm while committing or attempting to commit, including the immediate flight therefrom, aggravated assault, aggravated criminal sexual contact, burglary, or escape; (k) a violation of N.J.S.2C:35-3 (Leader of a Narcotics Trafficking Network); (l) a violation of N.J.S.2C:35-4 (Maintaining and Operating a CDS Production Facility); (m) a violation of section 1 of P.L.1998, c.26 (C.2C:39-4.1) (Weapons Possession while Committing certain CDS Offenses);

(n) an attempt or conspiracy to commit any of the crimes enumerated in subparagraphs (a) through (m) of this paragraph; or (o) a crime committed at a time when the juvenile previously had been sentenced and confined in an adult correctional facility).

⁷⁰ *Attorney General's Juvenile Waiver Guidelines* 5-6 (Mar. 14, 2000)

((1) the nature of the offense; (2) the need for deterrence; (3) the effect of waiver on the prosecution of any co-defendants; (4) the maximum sentence and length of time served; (5) the juvenile's prior record; (6) the likelihood of conviction and

easier for prosecutors to waive juveniles to criminal court so long as the juvenile was fifteen or older, committed an enumerated offense, and the prosecutor established probable cause.⁷¹ Under current law, a prosecutor has the discretion to make the determination to seek a waiver; however, a judge makes the ultimate decision whether waiver is appropriate.⁷²

In *State v. J.M.*, the New Jersey Supreme Court held that juveniles can present evidence and testify during a probable cause hearing.⁷³ The State argued that probable cause was established because the juvenile was sixteen years or older, the juvenile had participated in an enumerated offense, and the State had met its evidentiary burden of establishing probable cause; therefore, the Court must waive the juvenile to adult court.⁷⁴ Additionally, the State relied on *State v. R.G.D.*, arguing that this decision suggested that a juvenile's right to testify in a waiver hearing should not extend to the determination of probable cause.⁷⁵ The State further argued that the probable cause hearing is not intended to determine guilt, so there is no reason to permit the juvenile to present evidence concerning his intent at the time of the alleged offense.⁷⁶ The State suggested that if the court decided to allow the juvenile to testify at the probable cause portion of the hearing, the state may be compelled to produce witnesses which would result in a trial-like presentation that would be unfitting for a waiver hearing.⁷⁷ In response, the juvenile argued that it was important for him to testify and present evidence to aid the court in determining whether there was probable cause present to find that his participation rose to the level of first or second degree robbery.⁷⁸

the potential need for a grand jury investigation; and (7) the victim's input).

⁷¹ *State v. J.M.*, 182 N.J. 402, 414 (2005).

⁷² *In re N.H.*, 226 N.J. at 249.

⁷³ *State v. J.M.*, 182 N.J. at 418.

⁷⁴ *Id.* at 408-09.

⁷⁵ *Id.* at 409.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 409.

The New Jersey Court Rules were silent on whether to allow a juvenile to testify and present evidence at the probable cause hearing; therefore, the Court could not look to the Rules for guidance.⁷⁹ Under R. 5:22-2 at the time of this case, “there [was] neither a provision in the rule giving the juvenile the right to present evidence at the probable cause hearing nor a provision prohibiting such a right.”⁸⁰ The Court determined that it was illogical to equate a juvenile’s probable cause hearing with that of an adult’s because the stakes are much higher for the juvenile.⁸¹ Additionally, the Court relied on *State v. R.G.D.*, which the Court recognized that once a waiver occurs, the juvenile loses all protective and rehabilitative

⁷⁹ *State v. J.M.*, 182 N.J. at 414.

⁸⁰ *Id.* The trial court attempted to equate a juvenile’s probable cause hearing to that of an adult’s and used R. 3:4-3 to make a determination as to whether the juvenile should testify. R. 3:4-3(a) governs adult probable cause hearings and does not allow adults to testify at the probable cause hearing. The Rule states:

((a) If the defendant does not waive indictment and trial by jury but does waive a hearing as to probable cause, the court shall forthwith bind the defendant over to await final determination of the cause. If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, after notice to the county prosecutor a judge of the Superior Court shall hear the evidence offered by the State within a reasonable time and the defendant may cross-examine witnesses offered by the State. If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind the defendant over to await final determination of the cause; otherwise, the court shall discharge the defendant from custody if the defendant is detained. Notice to the county prosecutor may be oral or in writing. An entry shall be made on the docket as to when and how such notice was given).

Thus, the trial court used this rule for the juvenile proceeding and incorrectly determined that the juvenile was not allowed to testify or present evidence to the court during the probable cause hearing. *State v. J.M.*, 182 N.J. at 414.

⁸¹ *State v. J.M.*, 182 N.J. at 415.

possibilities available to the Family Part.⁸² The Court determined it was necessary to modify R. 5:22-2 to permit a juvenile to testify and present evidence at a probable cause hearing.⁸³ However, the modification to R. 5:22-2 only applied to those juveniles who fit into

⁸² *Id.*

⁸³ *Id.* See R. 5:22-2 which states,

((a) Motion for Waiver of Jurisdiction and Referral. A motion seeking waiver of jurisdiction by the Family Part shall be filed by the prosecutor within 60 days after the receipt of the complaint, which time may be extended for good cause shown. The motion shall be accompanied by a written statement of reasons clearly setting forth the facts used in assessing all factors contained in N.J.S. 2A:4A-26.1 et seq., together with an explanation as to how evaluation of those facts support waiver for each particular juvenile. (b) Waiver Hearing. At the waiver hearing, the court shall receive the evidence offered by the State and by the juvenile. No testimony of a juvenile at a hearing to determine referral by this rule shall be admissible for any purpose in any subsequent hearing to determine delinquency or guilt of any offense. The court also shall permit cross[-]examination of any witnesses. The State shall provide proof to satisfy the requirements of N.J.S. 2A:4A-26.1(c)(1) with respect to the age of the juvenile and N.J.S. 2A-26.1(c)(2) with respect to probable cause to believe that the juvenile committed one of the enumerated delinquent acts. The court also shall review whether the State considered the factors set forth in N.J.S. 2A:4A-26.1(c)(3). (c) Factors to be Considered. The court may deny a motion by the prosecutor to waive jurisdiction of a juvenile delinquency case if it is clearly convinced that the prosecutor abused his or her discretion in considering the factors set forth within N.J.S.A. 2A:4A-26.1(c)(3). (d) Standards for Referral. The court shall waive jurisdiction of a juvenile delinquency action without the juvenile's consent and shall refer the action to the appropriate court and prosecuting authority having jurisdiction pursuant to N.J.S. 2A:4A-26.1(c). (e) Order to Waive Jurisdiction and for Referral. An order waiving jurisdiction of the case and referring the case to the appropriate court and prosecuting authority shall specify therein the alleged act or acts upon which the referral is based, and all other delinquent acts charged against the juvenile arising out of or related to the same transaction). The Court's main focus in *State v. J.M.* was subsection (b) which originally did not include the juvenile, only evidence offered by the state.

the particular age group and were charged with one of the enumerated offenses contained therein. Under the statute, juveniles who were fifteen and younger and not charged with an enumerated offense were only permitted to show at the proceeding that rehabilitation is possible.⁸⁴ Therefore, the juveniles' testimony shall not be "admissible for any purpose in any hearing to determine delinquency or guilt of any offense."⁸⁵

Recently, the New Jersey Supreme Court in *In re V.A.* held the abuse and discretion standard applies when a court grants a waiver motion under the former procedures when the waiver hearing "carr[ies] such serious consequences for the juvenile."⁸⁶ The case involved four juveniles "charged with acts of juvenile delinquency equivalent to second-degree aggravated assault, first-degree robbery, and second-degree conspiracy."⁸⁷ Subsequently, the State filed motions to waive all four juveniles to criminal court and presented a "Statement of Reasons for Waiver Motion for each juvenile."⁸⁸ Nevertheless, each statement for the juveniles "was virtually identical to one another with the exception of the section detailing each juvenile's prior record."⁸⁹

Prior to the New Jersey Supreme Court's decision in *In re V.A.*, the Court applied the gross and patent abuse of discretion standard when reviewing a prosecutor's decision to seek a waiver of a

⁸⁴ N.J. STAT. ANN. § 2A:4A-29 (West 1995).

⁸⁵ Pak, *supra* note 22, at 541.

⁸⁶ *In re V.A.*, 212 N.J. 1, 8 (2014). See Pak, *supra* note 22, at 531

(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") (quoting *In re V.A.*, 212 N.J. 1, 8 (2012)).

⁸⁷ *In re V.A.*, 212 N.J. at 13.

⁸⁸ *Id.*

⁸⁹ *Id.*

juvenile to adult court.⁹⁰ Under this standard, a prosecutor could essentially get a waiver every time the prosecutor establishes probable cause for an enumerated offense and the offender is sixteen or older.⁹¹ The Court recognized the ease with which prosecutors were waiving juveniles and inferred that the Guidelines put forth by the Attorney General did not intend for that kind of result where prosecutors could make arbitrary decisions about whether to waive a juvenile to adult court.⁹² The Court determined that the Attorney General's Guidelines were intended to create uniformity in the exercise of prosecutorial discretion when seeking waiver motions.⁹³ In recognizing the great dangers of allowing a discretion standard that could likely result in heightened punishments, the Court determined that "the abuse of discretion standard . . . for review of another prosecutorial determination that affects the enhancement of the punishment" would be well suited for a check on the prosecution's discretion to waive, accompanied with the Guidelines.⁹⁴

In addition to providing a new standard for reviewing prosecutors' decisions to waive a juvenile to adult court, the Court also analyzed the prosecution's statements regarding the reasoning behind its application for waiver.⁹⁵ In reviewing the State's application for waiver, the Court noted it is especially important for prosecutors to provide sufficient facts for each individual juvenile instead of conclusions of fact about the crimes alleged.⁹⁶ After *In re V.A.* was decided, it was considered an advancement of greater protections for juveniles under the law; however, many scholars believed that more needed to be done in order to afford the best protection possible for juveniles.⁹⁷ One scholar noted that juveniles

⁹⁰ Pak, *supra* note 22, at 550.

⁹¹ *Id.* at 550-51.

⁹² *Id.* at 551.

⁹³ *Id.*

⁹⁴ *Id.* (quoting *In re V.A.*, 212 N.J. at 25).

⁹⁵ *In re V.A.*, 212 N.J. at 26.

⁹⁶ *Id.* at 26-27.

⁹⁷ Pak, *supra* note 22, at 558.

above the age of sixteen and charged with an enumerated offense do not have the opportunity to present evidence regarding the possibility of rehabilitation.⁹⁸ However, the Court's adoption of the abuse of discretion standard serves as a judicial check on the State's power.⁹⁹

III. *IN RE N.H.*

On August 10, 2016, the New Jersey Supreme Court held the State must provide full discovery to juveniles prior to a waiver hearing.¹⁰⁰ The factual background for this case involves a juvenile N.H., , went to a fight to for the purpose of helping his friend.¹⁰¹ While at the fight, N.H. allegedly took a handgun from one

([E]ven after *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 *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. 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." The concern for 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) (quoting *State v. Scott* 141 N.J. 457, 464 (1995)).

⁹⁸ *Id.*

⁹⁹ *In re V.A.*, 212 N.J. at 25.

¹⁰⁰ *In re N.H.*, 226 N.J. at 256.

¹⁰¹ *Id.* at 246.

individual and shot another individual four times.¹⁰² Portions of the incident were recorded and multiple witnesses gave accounts to law enforcement supporting the allegations against N.H.¹⁰³ N.H. spoke with police and claimed he “shot only at the ground.”¹⁰⁴

As a result, “N.H. was charged with acts of delinquency which, if committed by an adult, would constitute murder, unlawful possession of a weapon, and possession of a firearm for an unlawful purpose.”¹⁰⁵ A week later, the State filed a waiver motion to transfer the case to criminal court.¹⁰⁶ Before the waiver hearing, the State provided the following discovery:

an incident report dated June 10, 2014; a DVD of N.H.’s recorded statement; DVDs of recorded statements by D.W. and another juvenile present at the fight; a detective’s “continuation report” dated June 11, 2014; video surveillance footage from the high school where the fight took place; an autopsy report, and N.H.’s birth certificate.¹⁰⁷

Consequently, the State failed to disclose “additional witness statements, other police reports, and other videos of the event taken from different angles.”¹⁰⁸ The State contended that it was not required to provide full discovery because it did not anticipate using the undisclosed evidence, because they did not believe they would use the evidence to establish probable cause at the waiver hearing.¹⁰⁹ Additionally, no court rule or Juvenile Code provision addressed discovery in juvenile proceedings.¹¹⁰ The State additionally argued that they should not be required to provide the juvenile with full discovery because it would “cause substantial delay in holding waiver

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *In re N.H.*, 226 N.J at 246.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 247.

hearings and risk jeopardizing the State's ongoing investigation while at the same time, provide the juvenile with no tangible benefits."¹¹¹

However, N.H. claimed that to not provide juveniles full discovery would significantly belittle the "critical importance" of the hearing.¹¹² Furthermore, any discovery less than complete disclosure allows for the State to control the information the juvenile and his defense counsel receives prior to the hearing.¹¹³ Amici Curiae in favor of N.H. additionally noted there is an "essential relationship between access to information and the right to counsel in Juvenile Court."¹¹⁴ A fundamental unfairness results when a juvenile is not afforded access to all information relating to the juvenile's case.¹¹⁵

The Court recognized that New Jersey's case law repeatedly emphasized the importance of a juvenile waiver proceeding.¹¹⁶ Juvenile waiver requires both notice and effective assistance of counsel.¹¹⁷ Additionally, "if there is no waiver motion and a delinquency matter remains in the Family Part, the juvenile is entitled to full discovery prior to a hearing on the merits."¹¹⁸ In reaching its decision, the Court found it difficult to rationalize affording a juvenile full discovery in a juvenile proceeding in the Family Part; while providing less than full discovery in a more serious, potentially life altering proceeding.¹¹⁹ Briefly, the Court

¹¹¹ Brief of Petitioner-Appellant at 15, *In re N.H.*, 226 N.J. 242 (2016) (No. A-0433-14T2).

¹¹² *In re N.H.*, 226 N.J. at 248.

¹¹³ *Id.*

¹¹⁴ Brief for Amici Curiae at 42, supporting Respondents, *In re N.H.*, 226, N.J. 242 (2016) (No. A-0433-14T2).

¹¹⁵ *Id.*

¹¹⁶ *In re N.H.*, 226 N.J. at 252.

¹¹⁷ *Id.* at 253.

¹¹⁸ *Id.* at 254.

¹¹⁹ *Id.* at 255. ("As a juvenile with no prior record, N.H. faces up to twenty years' incarceration if he is adjudicated delinquent on the charge that constitutes murder. If convicted as an adult, N.H. will be sentenced to a minimum term of thirty years' imprisonment without being eligible for parole") (citations omitted).

noted the benefits that full discovery will provide a juvenile's counsel by stating "Full discovery [] enables the juvenile and counsel to prepare for all facets of the hearing and decide how best to cross-examine the State's witnesses, whether the juvenile or others should testify, and how to assess and challenge the prosecutor's exercise of discretion."¹²⁰ Thus, due to the inherently critical nature of waiver hearings, the Court determined the State must be required to provide full discovery to juveniles.

IV. THE IMPACT OF FULL DISCLOSURE AND THE NEED FOR REFORM

A. TAKING *IN RE V.A.* A STEP FURTHER: THE CONCERN WITH ARBITRARINESS

The decision to provide full discovery to juveniles prior to a waiver hearing took the New Jersey Supreme Court's previous decision, *In re V.A.*, a step further by eliminating subjective discovery disclosures by prosecutors. *In re V.A.* was primarily concerned with prosecutors arbitrarily seeking waivers of juveniles to adult court.¹²¹ The *In re N.H.* opinion largely focuses on the life-altering impact that a juvenile waiver hearing poses for the juvenile,¹²² and mentions briefly that entitling full discovery would help to safeguard fairness in the process.¹²³ Juvenile waiver hearings are recognized as being "critically important"¹²⁴ enough to warrant full discovery, but without mandated full discovery the risk arises that prosecutors across the

¹²⁰ *Id.* at 256.

¹²¹ *In re V.A.*, 212 N.J. 1, 8 (2012). *See also*, Pak, *supra* note 22, at 552

(The court's holding in *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. The decision places limitations on what had previously been otherwise limitless discretion prosecutors enjoyed over juvenile waivers).

¹²² *In re N.H.*, 226 N.J. at 252. ("[T]he waiver of a juvenile to adult court 'is the single most serious act that the juvenile court can perform'") (quoting *State v. R.G.D.*, 108 N.J. 1, 4-5 (1987)).

¹²³ *Id.* at 256.

¹²⁴ *Kent v. United States*, 383 U.S. 541, 556 (1966).

state may have too much discretion in the discovery they can provide juveniles. Without mandated full discovery, the outcomes of waiver hearings would vary from county to county based on the discovery the prosecutor decided to provide the juvenile.¹²⁵ Amici Curiae in favor of the juvenile in *In re N.H.* were also concerned with discovery being determined by the prosecutor, stating, “[T]he rule does not fit the structure of the juvenile justice system and makes juveniles charged with delinquency vulnerable to the disclosure whims of prosecutors.”¹²⁶

Data has shown the disparate impact on juveniles in the application of waiver law.¹²⁷ For example, prior to both the *In re N.H.* and the *In re V.A.* decisions, New Jersey’s waiver rates varied significantly by county.¹²⁸ A comprehensive report revealed “[c]ounties with the same crime rates have wildly varying rates of exposure to waiver, and counties with relatively low rates of violent crime have very high rates of waiver requests.”¹²⁹ The purpose of waiver law was intended to address violent crimes, however in practice there is little correlation between violent crime rates and waiver requests.¹³⁰

1. Comparison of Waiver Requests versus Juvenile Violent Crime Arrests¹³¹

¹²⁵ See Brief for Amici Curiae, *supra* note 114, at 2.

¹²⁶ *Id.*

¹²⁷ Public Catalyst Group, *Recommendations for the Reform of New Jersey’s Juvenile Waiver Law*, (Nov. 2011), <https://d3n8a8pro7vhmx.cloudfront.net/njisj/pages/164/attachments/original/1458585106/RecommendationsfortheReformofNewJerseyJuvenileWaiverLaws.pdf?1458585106>.

¹²⁸ Brief for Amici Curiae, *supra* note 114, at 11; See Public Catalyst Group, *supra* note 127, at 18.

¹²⁹ Public Catalyst Group, *supra* note 127, at 18.

¹³⁰ *Id.*

¹³¹ *Id.* This information is not publicly reported and was provided to the Juvenile Justice Reform Task Force of the Yale Alumni Association of Metropolitan New York by the Administrative Office of the Courts.

County	Waiver Requests to Adult Court (AOC data; adjusted to annual)	Juvenile Arrests for Violent Crime (2008)	Rate¹³²
Atlantic	6	140	4%
Bergen	5	138	3%
Burlington	4	118	3%
Camden	94	277	34%
Cape May	29	43	68%
Cumberland	36	134	27%
Essex	17	518	3%
Gloucester	2	79	3%
Hudson	57	394	14%
Hunterdon	1	5	15%
Mercer	32	140	23%
Middlesex	32	158	20%
Monmouth	7	188	4%
Morris	0	42	NA
Ocean	5	70	8%
Passaic	4	273	1%
Salem	14	20	68%

¹³² *Id.*

(AOC data for waiver requests were reported for a 16-month period, so were multiplied by .75 to calculate annual data, which were used in conjunction with the 12-month UCR data to determine these rates. The annualized AOC numbers were not always whole numbers. The precise annualized numbers were used to calculate the rates, but the annualized AOC numbers in the second column of this chart were rounded to the nearest whole number to avoid confusion, as it is not possible to request a waiver for a fraction of a child. This rounding makes it appear that some of the rates were calculate inaccurately, but this is not so).

Somerset	5	31	15%
Sussex	0	11	NA
Union	1	215	0.3%
Warren	2	8	28%
Statewide	353	3002	12%

The random application of waiver practices across the state of New Jersey not only have a geological impact, but a disparate impact on racial minorities, predominantly black male youth.¹³³ Prosecutors had interpreted waiver laws in some counties to mean that some juveniles have the opportunity to be waived to municipal court, which in return would result in a decreased sentence.¹³⁴ However, though prosecutors have used the option to waive juveniles to municipal court, black male youths make up the majority of juveniles waived to adult criminal court.¹³⁵ Waiver requests to adult criminal court are “disproportionately high for black male youth.”¹³⁶ It is important to note that this data exhibiting unequal treatment for black male youths does not necessarily mean intentional discrimination exists in waiver practice, however it is illustrative of the inadvertent consequences of the law.¹³⁷

2. Cases Waived to Municipal Court Between July 2008 – October 2009¹³⁸

White	Black	Other	Total	Female	Male
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¹³³ *Id.* at 15.

¹³⁴ *Id.*

¹³⁵ Public Catalyst Group, *supra* note 127, at 15.

¹³⁶ *Id.* (“While black youth constitute 18% of New Jersey’s overall youth population, they constitute 36% of juveniles arrested, 61% of those arrested for violent crime, while fully 72% of waive requests and 77% of waivers granted are for black youth”).

¹³⁷ *Id.* at 16.

¹³⁸ *Id.* at 15.

31	2	2	35	11	24
89%	6%	6%	X	31%	69%

Though this data was collected before the *In re V.A.* decision imposing a stricter standard of review on prosecutors seeking waivers,¹³⁹ commentators note that at the time “there [was] a very different understanding of the purpose and application of waiver law from place to place in New Jersey.”¹⁴⁰ Additionally, commentators suggested that publicizing such startling data can act as a stepping-stone for change in statutes governing juvenile waiver hearings.¹⁴¹

It is unclear whether New Jersey’s waiver practices are still arbitrarily applied after the *In re V.A.* and *In re N.H.* decisions. It remains unclear not only because of the recency in which *In re N.H.* was decided,¹⁴² but also because New Jersey does not publicly report information regarding the criminal prosecution of juveniles.¹⁴³ New Jersey only contributes to the National Juvenile Court Data Archive but does not otherwise report any data regarding juvenile transfers to adult court.¹⁴⁴ Part D will further address the consequences of not providing public data on juvenile criminal prosecutions. Despite the lack of publicly available data for juvenile transfers to adult court, the decision of *In re N.H.* to mandate full discovery prior to a waiver hearing advances the protection of juveniles. A stricter standard of review coupled with a requirement for complete discovery creates a check on the prosecutor’s discretion by preventing random applications for waiver and also preventing unilaterally determined discovery.

B. ARBITRARY DISCOVERY PRACTICES IN TENNESSEE

¹³⁹ *In re V.A.*, 212 N.J. at 7.

¹⁴⁰ Public Catalyst Group, *supra* note 127, at 19.

¹⁴¹ *Id.* at 16.

¹⁴² *In re N.H.*, 226 N.J. at 242.

¹⁴³ Griffin, *supra* note 6.

¹⁴⁴ *Id.* at 15.

Unlike New Jersey, the current discovery practices in Tennessee allow for random and inconsistent treatment of juveniles subjected to waiver hearings throughout the state. The 2016 Tennessee Rules of Juvenile Practice and Procedure do not mandate discovery be provided at all, let alone a mandate of full discovery.¹⁴⁵ There are many instances in Tennessee where a juvenile facing a waiver hearing is denied discovery in its entirety.¹⁴⁶ Despite the current discovery practices in Tennessee, the Advisory Commission Comments to the Rule note the significance of discovery prior to a juvenile waiver hearing, though it is not explicitly mandated by the Rule.¹⁴⁷ Without an explicit mandate of full discovery, the

¹⁴⁵ E-Mail from Sandra Simkins, Director of Children's Justice Clinic, to Hon. Dan H. Michael, Juvenile Court Memphis Shelby County (Nov. 6, 2016) (on file with author). See TENN. R. JUV. PRO. 206.

((a) Each juvenile court shall ensure that the parties in delinquent and unruly proceedings have access to any discovery materials consistent with Rule 16 of the Rules of Criminal Procedure. (b) An informal request for discovery is encouraged, but if the parties cannot agree as to discovery, then a formal request shall be made).

¹⁴⁶ *Id.* at 1.

¹⁴⁷ *Id.* See also TENN. R. JUV. PRO. 206 advisory commission on discovery:

In drafting this rule, the Commission was concerned with potential burdens and delays that might be caused if existing criminal discovery methods were applied without modification to juvenile court proceedings. This does not preclude adoption by each court of local rules of procedure to implement the discovery mechanisms found in the Tennessee Rule of Criminal Procedure. The Commission emphasizes the mandate of Supreme Court Rule 18, which limits local rules to those 'not inconsistent with . . . the Rules of Juvenile Procedure[.]' *State v. Willoughby*, 594 S.W.2d 388 (Tenn. 1980) holds that discovery rules do not apply to preliminary examinations and hearings. Therefore, this rule would not apply to any probable cause hearing in juvenile court with the caveat that this rule is not the exclusive procedure for obtaining discovery. Please note **that some discovery may be critical in a transfer hearing**. The Court should use its discretion in granting access to

prosecutors have the authority to determine what discovery will be provided to the juvenile and their attorney prior to a waiver hearing, if they decide to provide discovery at all. The chart below demonstrates the discovery practices of four different counties in Tennessee.

**1. Tennessee's Transfer Hearing Discovery Practice
County Comparison, October 2016¹⁴⁸**

Davidson County/Nashville	District Attorney provides everything that exists to defense counsel, all statements, police files, and reports
Hamilton County/Chattanooga	District Attorney instructs the police department to give the juvenile defense attorney every detail from the entire case file.
Knox County/Knoxville	Family court judge orders the District Attorney to turn over all statements (including a co-defendant statement), a witness list, any/all Brady material, and any evaluations or reports that planned to be used to defense counsel
Shelby County/Memphis	No discovery provided

Currently, Shelby County Tennessee does not provide any discovery to juveniles and their counsel prior to a waiver hearing.¹⁴⁹ The implications of Shelby County not being required to provide discovery to juvenile defendants before potentially being waived to adult criminal court are significant. As shown in the chart above, juveniles are not afforded the same protections in all counties of the

information necessary to defend or prosecute a transfer case. The state must disclose any exculpatory evidence to the child's attorney (alteration in original) (emphasis added).

¹⁴⁸ *Id.* at 2.

¹⁴⁹ *Id.*

state.¹⁵⁰ Based on these discovery practices, the county in which the juvenile is arrested becomes a substantial factor in determining whether a juvenile is waived to adult court, an alarming inconsistency. Without a mandate of full discovery, the focus is not on the substantive offense or whether the juvenile can be rehabilitated,¹⁵¹ but rather on the county the juvenile was arrested in and the discovery practices that the juvenile is afforded based on that county.

C. THE ETHICAL IMPLICATIONS WITHOUT A FULL DISCOVERY MANDATE

1. Ethical Implications on Behalf of the Judiciary

When full discovery is not provided to a juvenile and defense counsel prior to a waiver hearing, ethical issues may arise.¹⁵² A juvenile could admit to charges in juvenile court to avoid being tried in adult criminal court, even when the quantum of evidence is lacking.¹⁵³ Due to a lack of mandated discovery, defense attorneys often do not have essential pieces of information such as, “statements made by the juvenile defendant, statements made by witnesses, statements made from co-defendant(s), and location of the alleged incident.”¹⁵⁴ Without this critical information, defense attorneys are unable to fully advise their juvenile clients of the best possible option, and therefore advise them to admit to the charges alleged or run the risk of waiver to adult criminal court.¹⁵⁵ As a result, serious ethical issues are present when a juvenile admits to a charge in juvenile court to avoid transfer without first examining discovery.¹⁵⁶

¹⁵⁰ *Id.*

¹⁵¹ Simkins, *supra* note 145, at 2.

¹⁵² *Id.*

¹⁵³ *Id.* (“Juveniles, with the aid of their attorney, admit to charges even though they are operating in an informational vacuum and cannot possibly know the strength of the prosecutor’s case.”).

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.*

¹⁵⁶ Simkins, *supra* note 145; see also Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafter v. Cooper*, 46 LOYOLA L.A. L. REV. 457, 480-89 (2013) (“Judges, defense attorneys, and

For example, under the Federal Rules of Criminal Procedure, it is the duty of the court to ensure a plea is made knowingly and voluntarily.¹⁵⁷ It becomes difficult for a court to really assess whether a juvenile's guilty plea was really given "knowingly and voluntarily" when neither the juvenile or the defense attorney fully comprehend the state's case against the juvenile.¹⁵⁸ There is also a possibility that a prosecutor can imply that a waiver application will be filed absent an admission of guilt in juvenile court, which can be observed as a threat.¹⁵⁹ If a threat is present on the part of the prosecutor, there is a strong argument that the guilty plea was not given "knowingly and voluntarily," subjecting a judge to a violation of his ethical duty to the juvenile defendant.¹⁶⁰

2. Ethical Implications on Behalf of the Defense Attorney

In addition to judicial ethical violations, there are ethical implications that arise for defense attorneys when they do not receive full discovery prior to a waiver hearing. The American Model Rules of Professional Conduct require attorneys to "provide competent

prosecutors all play a critical role in ensuring the fair administration of justice in the delinquency system.").

¹⁵⁷ See Simkins, *supra* note 145, at 3. (Many of the state Rules of Criminal Procedure reflect the basic premise outline in Rule 11 of the Federal Rules of Criminal Procedure that the court knows the plea is voluntary and that there is a factual basis for the plea.); see also FED. R. CRIM. P. 11(b)(2), (b)(3).

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement). **(3) Determining the Factual Basis for a Plea.** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

¹⁵⁸ Simkins, *supra* note 145, at 3.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

representation,”¹⁶¹ communicate and explain matters to a client,¹⁶² and to guarantee “candor to the tribunal.”¹⁶³ A juvenile’s lawyer could

¹⁶¹ MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR. ASS’N 1983) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

¹⁶² MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR. ASS’N) no date in original

((a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

¹⁶³ Simkins, *supra* note 145, at 3. See MODEL RULES OF PROF’L CONDUCT, r. 3.3 (AM. BAR. ASS’N 2002)

((a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly

be in violation of the Model Rules of Professional Conduct because without full discovery, a defense attorney does not know the strength of the State's case against their client.¹⁶⁴ If a defense attorney is unaware of the strength of the State's case against their client, this could subject the juvenile to enter into plea bargains, even if they are innocent so that juvenile does not run the risk of waiver into adult court.¹⁶⁵ For example, in New Orleans, Louisiana, statistics show that eighty-seven percent of juveniles transferred to adult court are convicted.¹⁶⁶ However, what is most alarming is that of these

adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse).

¹⁶⁴ Simkins, *supra* note 145, at 3.

¹⁶⁵ *Id.* at 2.

¹⁶⁶ *More Harm Than Good: How Children Are Unjustly Tried as Adults in New Orleans*, SOUTHERN POVERTY LAW CENTER (Feb. 17, 2016) <https://www.splcenter.org/20160217/more-harm-good-how-children-are-unjustly-tried-adults-new-orleans>.

convictions, ninety-six percent of them result from guilty pleas.¹⁶⁷ Juveniles “have been shown overwhelmingly to accept plea deals, even when they are innocent, to avoid the risk of trial and longer adult sentences.”¹⁶⁸ Additionally, seventy-five percent of juveniles transferred who enter into guilty pleas plead to lesser offenses.¹⁶⁹ These lesser offenses are usually nonviolent offenses or sometimes even misdemeanors, which are not transferrable offenses.¹⁷⁰ It can be argued that in some instances, “the charges pled to may be more accurate descriptions of conduct of which the young defendant was actually guilty – and where these charges were not eligible for transfer[.]”¹⁷¹ A logical explanation for plea deals involving nonviolent offenses and misdemeanors could be that the strength of the prosecutor’s case against the juvenile is actually very weak.¹⁷² Given these statistics, juveniles are more likely to be convicted because their defense attorneys advise them to plead guilty because they are unaware of the strength of the state’s case against their client.

3. Ethical Implications on Behalf of the Prosecution

Prosecutors seeking waiver are also subject to ethical implications when they choose to deny a juvenile full discovery prior to a waiver hearing. The Model Rules of Professional Conduct recognize the unique obligations of prosecutors in choosing to prosecute cases.¹⁷³ Specifically, the Model Rules of Professional Conduct refer to prosecutors as having the obligation of not playing

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *More Harm Than Good: How Children Are Unjustly Tried as Adults in New Orleans*, *supra* note 167.

¹⁷² *Id.*

¹⁷³ *See* MODEL RULES OF PROF’L CONDUCT, r. 3.8 (AM. BAR. ASS’N).

the role as an advocate, but rather serving as a “minister of justice” in prosecuting criminal cases.¹⁷⁴

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.¹⁷⁵

Rule 3.8(d) recognizes that absent a protective order of a tribunal sought on the basis of significant harm to an individual or the public, prosecutors are required to hand over all evidence that may disprove guilt or diminish the offense the defendant is charged with.¹⁷⁶ The argument that requiring full discovery prior to a juvenile’s waiver hearing would impede the prosecutorial process falls short.¹⁷⁷ In the event that a substantial risk is posed to either an individual or the public, prosecutors have the ability to seek a

¹⁷⁴ MODEL RULES OF PROF’L CONDUCT, r. 3.8 cmt. (AM. BAR. ASS’N).

(A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.).

¹⁷⁵ MODEL RULES OF PROF’L CONDUCT, r. 3.8(d) (Am. Bar. Ass’n).

¹⁷⁶ See MODEL RULES OF PROF’L CONDUCT, r. 3.8 (AM. BAR. ASS’N).

¹⁷⁷ Brief of Petitioner-Appellant, *supra* note 111, at 15.

protective order via a tribunal of the court.¹⁷⁸ Additionally, requiring full discovery absent significant harm to an individual or the public does not force the prosecutor to make the determination of whether the evidence is exculpatory or not. Therefore, full discovery seems to be the rule, while limiting that discovery due to a substantial risk is the exception to the rule.¹⁷⁹

D. A LACK OF STATEWIDE AND FEDERAL REPORTING FOR JUVENILE WAIVERS

Many states do not record all of their juvenile transfer cases and their outcomes.¹⁸⁰ Additionally, there is no national data system that records instances of juvenile transfer and no record of the factors that determine whether a case gets waived.¹⁸¹ Currently, only *thirteen* states publicly report information involving criminal actions against juveniles.¹⁸² Most of these thirteen states report “age, race, or gender information on transferred youth, how they reached criminal court, what their offenses were, or how their cases were resolved.”¹⁸³ However, a number of public reporting states only report an annual total of juveniles criminally prosecuted and the total number of criminal cases with juvenile defendants.¹⁸⁴ Of the fifteen states that have prosecutorial discretion laws, only one state publicly reports the total number of cases filed in criminal court using the prosecutor’s discretion.¹⁸⁵

¹⁷⁸ MODEL RULES OF PROF’L CONDUCT, r. 3.8(d) (Am. Bar. ASS’n).

¹⁷⁹ *Id.*

¹⁸⁰ Griffin, *supra* note 6.

¹⁸¹ *Id.* at 14.

¹⁸² *Id.* States that report comprehensive information about criminal prosecutions of juveniles include: Arizona, California, Florida, Kansas, Michigan, Missouri, Montana, North Carolina, Ohio, Oregon, Tennessee, Texas, and Washington. *Id.* at 15.

¹⁸³ *Id.* at 14.

¹⁸⁴ *Id.*

¹⁸⁵ Griffin, *supra* note 6, at 15.

Documentation of juvenile waiver is considered complete when the state records information regarding total volume, pathways, demographics, offenses, and processing outcomes.¹⁸⁶ Total volume speaks to the number of juveniles that are prosecuted in adult criminal court.¹⁸⁷ States that provide records of pathways show “how transfer cases reached the criminal system—whether by way of judicial waiver, prosecutors’ discretionary decisions, or as a result of statutory exclusions.”¹⁸⁸ Of the thirteen states that provide the total number of juvenile cases prosecuted in adult criminal court, only five record pathway information, however the other six states only have the option of judicial waiver.¹⁸⁹ Eight of the thirteen states provide information about “age, race/ethnicity, gender, or other demographic information on criminally prosecuted youth,”¹⁹⁰ and only three of those states keep record of information regarding the offense.¹⁹¹ California is the only state that reports the processing outcomes of juvenile cases waived to adult court.¹⁹² The lack of public reporting of juvenile waivers and other characteristics involved in the waiver process create serious issues in determining the effectiveness of a state’s waiver procedures.¹⁹³ Without state-wide or national schemes that report demographics such as race, gender, age, offense, and sentencing, it becomes unclear whether juvenile waiver laws are targeting the types of offenders lawmakers intended.¹⁹⁴

¹⁸⁶ *Id.* at 17.

¹⁸⁷ *Id.* Only thirteen states currently provide the total number of cases in which juvenile offenders are prosecuted in adult criminal court to the public.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Arizona, California, Florida, Michigan, and Washington are the only states to provide pathway information.

¹⁹⁰ Griffin, *supra* note 6, at 17.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 15.

¹⁹⁴ *Id.*

What little data is provided of the national scheme of juvenile waiver statistics show dramatic differences in states' transfer rates.¹⁹⁵ Of the thirteen states that record the total volume of juvenile cases successfully waived to adult court, "there are striking variations in individual states' propensity to try juveniles as adults, even when differences in juvenile population sizes are taken into account."¹⁹⁶ This can be explained by the differences in jurisdictional age requirements.¹⁹⁷ For example, the lowest transfer rates are among states that have lower statutory age restrictions and allow younger adolescents to be within the jurisdiction of the criminal court automatically.¹⁹⁸ The correlation between lower transfer rates and lower statutory age requirements is that the population eligible for transfer is younger and "statistically less likely to be involved in serious offending."¹⁹⁹ Another reason for the differences in state transfer rates could be explained by the variety of ways transfer mechanisms are applied.²⁰⁰ Specifically, the six states that report information and only have judicial waiver mechanisms have, on average, lower transfer rates than the seven states with statutory exclusion laws, prosecutorial discretion, or both.²⁰¹ However, the mechanism of juvenile waiver may not be as sound of a reason as statutory age restrictions. For example, both Tennessee and Kansas are "waiver-only" states, however, Tennessee transfers juveniles far more than Kansas.²⁰²

¹⁹⁵ *Id.*

¹⁹⁶ Griffin, *supra* note 6, at 15.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 17.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 17-18.

²⁰¹ *Id.* at 18.

²⁰² Griffin, *supra* note 6, at 18. In a study of annual transfer rates between 2003 and 2008, Tennessee waived 42.6 juveniles for every 100,000 juveniles ages 10 to upper age of the juvenile court jurisdiction, while Kansas only waived a little more than half that of Tennessee at 25.3 juveniles.

Arizona, California, and Florida, the three states that most thoroughly document their data on juvenile transfers, show a more nuanced snapshot of transfer law in practice.²⁰³ Recently, the Southern Poverty Law Center recommended New Orleans to collect data regarding the outcomes of juvenile transfer cases and make them publicly accessible due to the waiver practices of the city's District Attorney.²⁰⁴ If national data was recorded more thoroughly, juvenile advocates, scholars, and legislators could more easily monitor the waiver practices among prosecutors and judges and ensure a consistent outcome.

E. A CALL TO ACTION FOR FURTHER REFORM IN FAVOR OF JUVENILE JUSTICE

States, such as Tennessee, should be more willing to protect juveniles under the law due to the inherent differences between adolescents and adults.²⁰⁵ Tennessee and states with similar discovery practices should require full discovery for juveniles prior to waiver hearings to guarantee juveniles the same treatment in every area of the state. The outcome of a waiver hearing should not be determined solely on the county the juvenile is arrested in, but should be evaluated on an individual basis.²⁰⁶ Additionally, full disclosure on behalf of the State empowers the juvenile and defense counsel to best prepare for the hearing and fully assess the strength of the State's case against the juvenile.²⁰⁷ Furthermore, as the New

²⁰³ *Id.*

²⁰⁴ *More Harm Than Good: How Children Are Unjustly Tried as Adults in New Orleans*, *supra* note 167.

²⁰⁵ Scott, *supra* note 46.

(The [Supreme] Court point[s] to three characteristics of adolescence that distinguish youths from those of adults—immature and impetuous decision-making with little regard for consequences, vulnerability to external coercion (particularly by peers), and unformed character, which ma[kes] it difficult to judge an adolescent's crime as "irretrievably depraved"). *Id.* at 6.

²⁰⁶ *More Harm Than Good: How Children Are Unjustly Tried as Adults in New Orleans*, *supra* note 167.

²⁰⁷ *In re N.H.*, 226 N.J. 242, 256 (2016).

Jersey Supreme Court noted, there is no burden or threat of disrupting the prosecutorial process by providing full discovery.²⁰⁸ Thus, because there is essentially no burden on the State to provide full discovery for a waiver hearing and the benefits to the juvenile are profound, there is no justifiable reason for not mandating full discovery at the waiver hearing.

In addition to a mandated full discovery requirement, states should be required to publicly report all juvenile transfers to adult court to further ensure the fairness and effectiveness of state juvenile waiver practices. It is extremely challenging to assess the impact of waiver laws and youth incarceration when “[t]here is no one single, credible, national data source that tracks all the youth prosecuted in adult courts.”²⁰⁹ Without this data, legislators lack the necessary information to make educated decisions about juvenile waiver laws.²¹⁰

V. CONCLUSION

Juvenile laws should reflect both the scientific and societal understanding that children and adolescents are a vulnerable population.²¹¹ The New Jersey Supreme Court’s decision in *In re N.H.*,²¹² to require full discovery before a juvenile waiver hearing, can serve as a model for other states who are working to further protect juveniles under the law. Both the Supreme Court and New Jersey state courts have recognized the significance of juvenile waiver hearings²¹³ because once a juvenile is waived, they face increased

²⁰⁸ *Id.*

²⁰⁹ *Campaign for Youth Justice, The Consequences Aren’t Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 16 (Liz Ryan & Jason Ziedenberg eds., 2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf

²¹⁰ *Id.*

²¹¹ Scott et. al., *supra* note 46.

²¹² *In re N.H.*, 226 N.J. 242 (2016).

²¹³ *Id.* at 253. *See, e.g., Kent*, 383 U.S. at 557.

sentences and no longer have the protection of the juvenile court system.²¹⁴

A statewide mandate for full discovery prior to a waiver hearing ensures fundamental fairness for juveniles.²¹⁵ A mandate for full discovery will guarantee that the decision to waive is based on the substantive offense and the probability that a juvenile can be rehabilitated. This would reduce the chance that a waiver decision would be made on unknown grounds and would result in more consistent and predictable outcomes.²¹⁶ Tennessee's customary juvenile practices serve as an example that providing discovery at the waiver hearing can vary tremendously between counties because a complete discovery mandate is not in place.²¹⁷ As a result, the waiver determination becomes arbitrarily based on the county the juvenile is arrested in.

Discovery that is less than full disclosure can lead to serious ethical violations for judges, defense counsel, and prosecutors.²¹⁸ Judges cannot know if plea deals are given "freely and voluntarily"²¹⁹ if the juvenile is unaware of the strength of the State's case against him. Additionally, defense counsel cannot adequately represent their clients without the proper preparation that full discovery could provide.²²⁰ When defense attorneys are aware of the strength of the State's case, they can make more informed and strategic decisions for their juvenile clients.²²¹ Prosecutors are also not immune from these potentially serious ethical violations because they must serve as a "minister of justice" when prosecuting cases.²²² Not providing

²¹⁴*In re N.H.*, 226 N.J. at 252-53.

²¹⁵ *Id.* at 256.

²¹⁶ *More Harm Than Good: How Children Are Unjustly Tried as Adults in New Orleans*, *supra* note 167.

²¹⁷ Simkins, *supra* note 145, at 2.

²¹⁸ *Id.*

²¹⁹ FED. R. CRIM. P. 11(b)(2), (b)(3).

²²⁰ *More Harm Than Good: How Children Are Unjustly Tried as Adults in New Orleans*, *supra* note 167.

²²¹ *Id.*

²²² MODEL RULES OF PROF'L CONDUCT, r. 3.8(d) (Am. Bar. Ass'n).

complete discovery could give the appearance that the State is *advocating* against the juvenile rather than *administering* justice.

In addition to requiring full discovery, the State should collect and publicly report demographics and the outcomes of juvenile waivers to ensure the effectiveness of waiver laws. Only thirteen states publically report *some* information regarding juvenile waivers.²²³ California remains the only state that publishes any information regarding the processing outcomes of juveniles tried in criminal court.²²⁴ Without this data, juvenile justice advocates and legislators have a hard time determining the effectiveness of the current waiver laws.²²⁵

The law has historically recognized the intrinsic differences between juveniles and their adult counterparts. The New Jersey Supreme Court's decision, *In re N.H.*,²²⁶ acknowledged the importance of providing complete discovery before a juvenile's waiver hearing. However, inconsistent discovery practices used by states like Tennessee run the risk of arbitrarily determining the outcome of waiver hearings before the juvenile has the opportunity to appear in court. Furthermore, the lack of state and national data regarding the demographics and outcomes of juvenile waiver hearings is troubling. Once states begin to provide full discovery and information regarding the outcomes of juvenile waiver hearings can it be determined that the law is working fairly and effectively for juveniles.

²²³ Griffin, *supra* note 6, at 15.

²²⁴ *Id.*

²²⁵ *Campaign for Youth Justice*, *supra* note 210.

²²⁶ 226 N.J. 242 (2016).