

CRITICAL CHALLENGES: TRANSFER

by

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JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

TRANSFER LAW



1939 - no minimum age,
“incorrigibility”

1961 - felony, minimum age 16,
“not amenable to treatment”

1977 - 5 transfer criteria,
presumption of unfitness if 707(b)

TRANSFER LAW



2000 - direct filing for homicides
and forcible sex offenses,
minimum age lowered to 14
(Prop 21)

2015 - mitigating factors added for
transfer criteria

TRANSFER LAW



2016 - direct filing & presumption of unfitness eliminated (Prop 57)
2018 - minimum age raised back to 16 (SB 1391)

COURT WANTS TO KNOW



1. WHY did this happen?

2. Why WON'T this happen again?

TRANSFER: BURDEN OF PROOF



DA must show that transfer is warranted by a preponderance of evidence.

CRC Rule 5.770(a)

TRANSFER: CRITERIA



1. Degree of criminal sophistication
 2. Possibility of rehabilitation before jurisdiction expires
 3. Previous delinquent history
 4. Success of previous attempts to rehabilitate
 5. Circumstances & gravity of offense
- WIC 707(a)

TRANSFER: ANALYSIS



The trial court must weigh the five criteria together under a totality of circumstances.

CRC Rule 5.770(b), Advisory Committee Comment

TRANSFER: ANALYSIS



“The question of a minor’s amenability to treatment within the juvenile court system is concerned with the child’s prospects for rehabilitation, not the degree of his or her criminal culpability.”

People v. Cardona (2009) 177
Cal.App.4th 516, 532.

TRANSFER: ANALYSIS

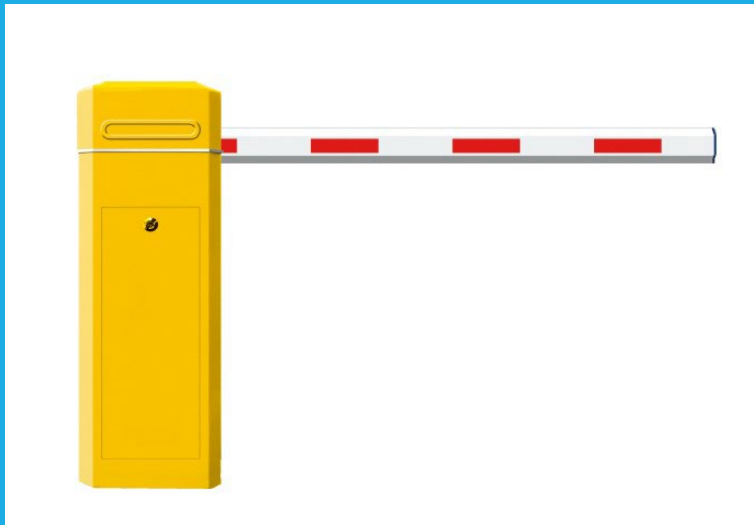


AB-2361

Would require court to find by “clear and convincing evidence” that youth is not amenable to rehabilitation in juvenile court.

Passed Assembly 5-25-22.
Currently before Senate
Appropriations Committee.

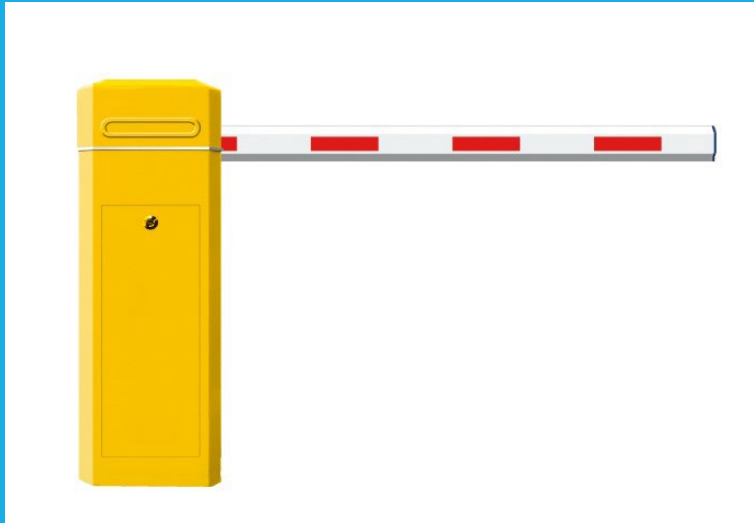
TRANSFER: PRIMA FACIE CASE



Before proceeding with the transfer hearing, upon defense request, the People must make a prima facie showing that the offense alleged makes the child subject to transfer.

CRC Rule 5.766(c)

TRANSFER: PRIMA FACIE CASE



The Court may consider reports containing hearsay. Defense has a right to cross-examine preparers of any reports considered by the court.

CRC Rule 5.674(b)&(c); *P. v. Superior Court (Ronald H.)* (1990)
219 Cal.App.3d 1475

DA THEME: THIS CHILD IS A MONSTER



Criterion 1: Criminal sophistication.

Criterion 5: Circumstances & gravity of offense.

WIC 707(a)(3)(A)&(E)

DA THEME: REHABILITATION IS UNLIKELY



Criterion 2: Possibility of rehabilitation.

Criterion 3: Previous delinquent history.

Criterion 4: Success of previous attempts to rehabilitate.

WIC 707(a)(3)(B)-(D)



DA WITNESSES

- Investigating Officer
- Probation Officer



DA EXHIBITS

- Arrest Report
- Trial Transcripts
- Probation Reports

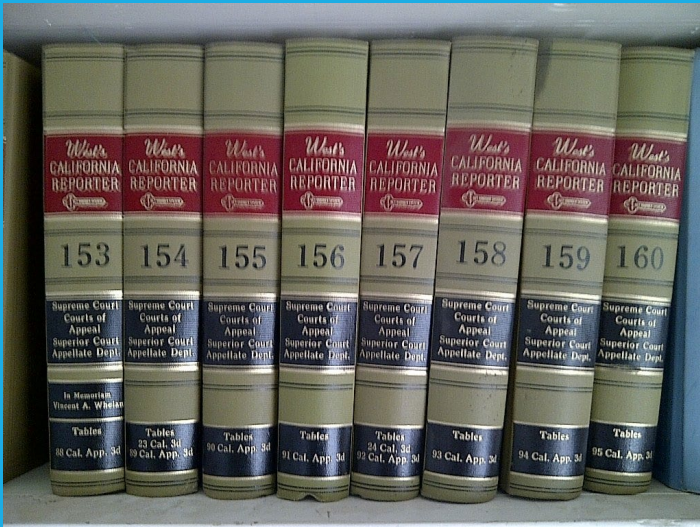


HEARSAY

Hearsay evidence may be received in transfer hearings if it is material and relevant, and founded on accurate and reliable information.

People v. Chi Ko Wong (1976)
18 Cal.3d 868, 719

CASE EXAMPLE: *KEVIN P.*

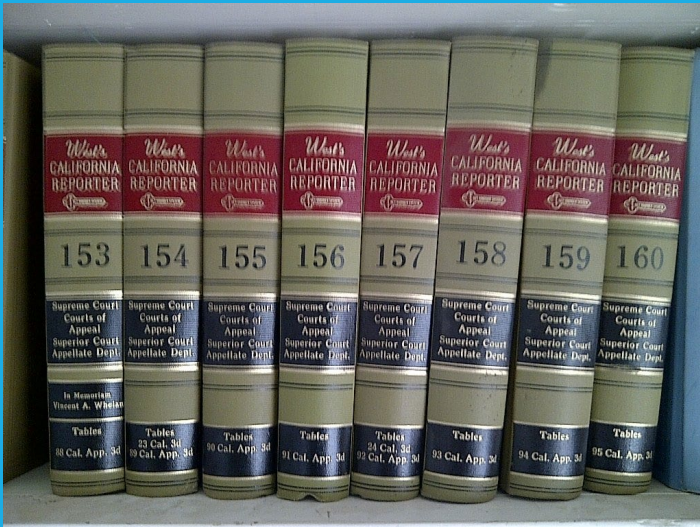


Kevin P. v. Superior Court (2020)
57 Cal.App.5th 173

FACTS OF OFFENSE

- 38 y.o. decedent was stabbed 38 times in neck, shoulder, upper back. Bloody steak knife found on floor nearby, bloody butcher knife found in the kitchen sink.

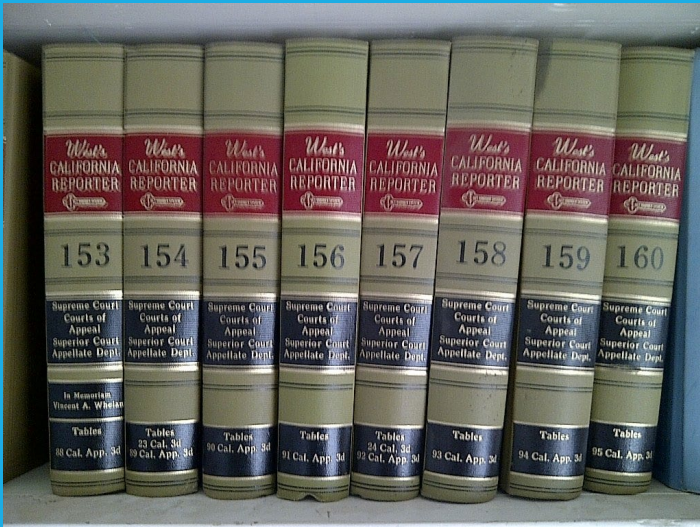
CASE EXAMPLE: *KEVIN P.*



FACTS OF OFFENSE

- Gas burners on stove were left on, and charred substance was found around decedent's head.
- Youth initially denied knowing decedent, then admitted killing her, but claimed he stabbed her in self-defense when she attacked him with a knife.

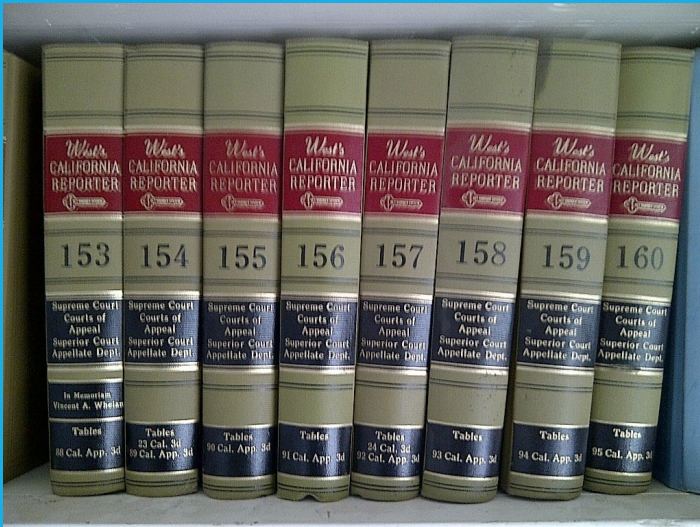
CASE EXAMPLE: *KEVIN P.*



YOUTH'S BACKGROUND

- No evidence of trauma, other than parents' separation. Father was still involved with youth's life.
- Youth had good work record at Boys & Girls Club.
- No criminal history.

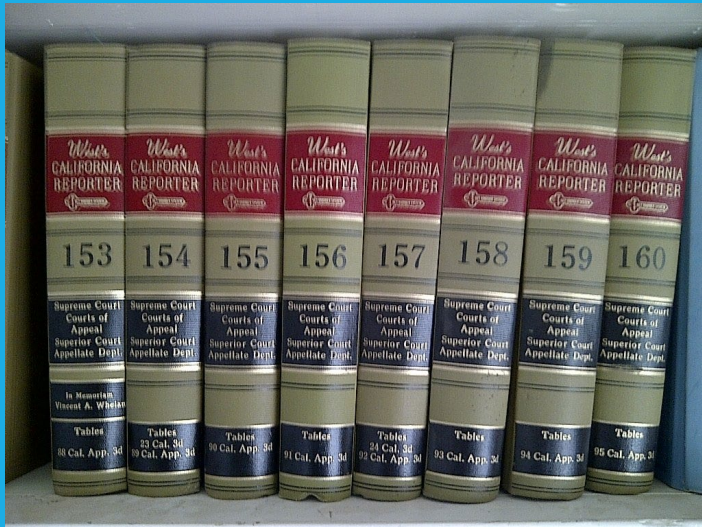
CASE EXAMPLE: *KEVIN P.*



POST-ARREST BEHAVIOR

- Grades improved in juvenile hall, won performance certificates, graduated high school.
- Received rewards for good citizenship in juvenile hall.

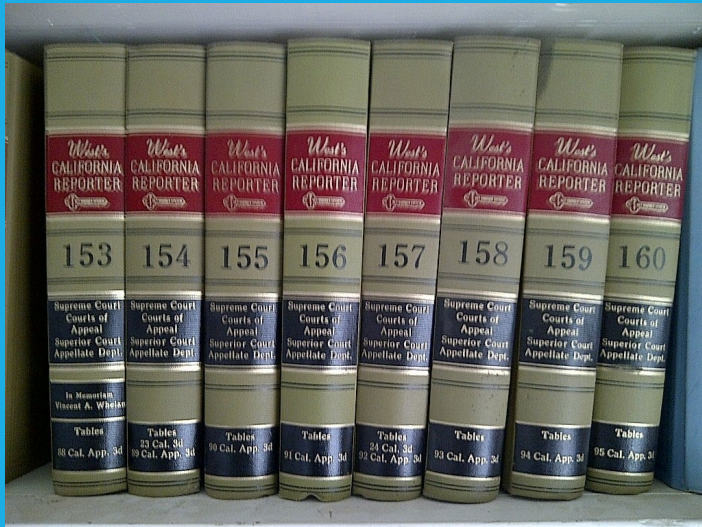
CASE EXAMPLE: *KEVIN P.*



TRIAL COURT ANALYSIS

- Court found high level of criminal sophistication, because youth acted alone and tried to cover up crime, and extreme gravity, because of grisly violence and attempted arson.

CASE EXAMPLE: *KEVIN P.*

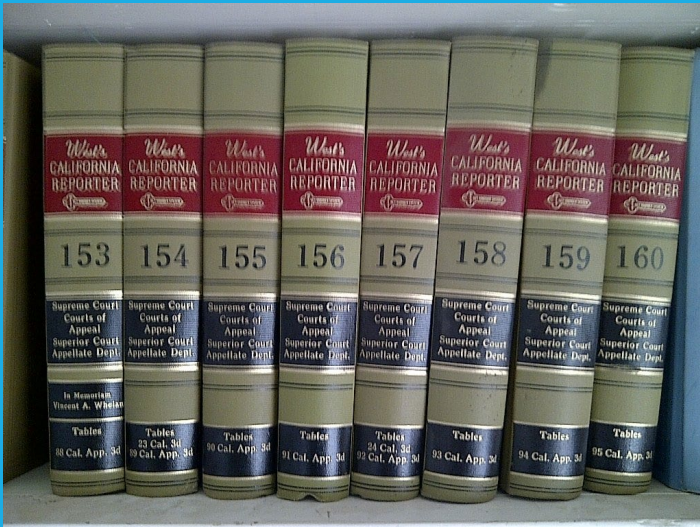


TRIAL COURT ANALYSIS

- Court found rehabilitation unlikely, because less than 7 years of supervision remaining for Category 1 offense, and no evidence of family trauma.

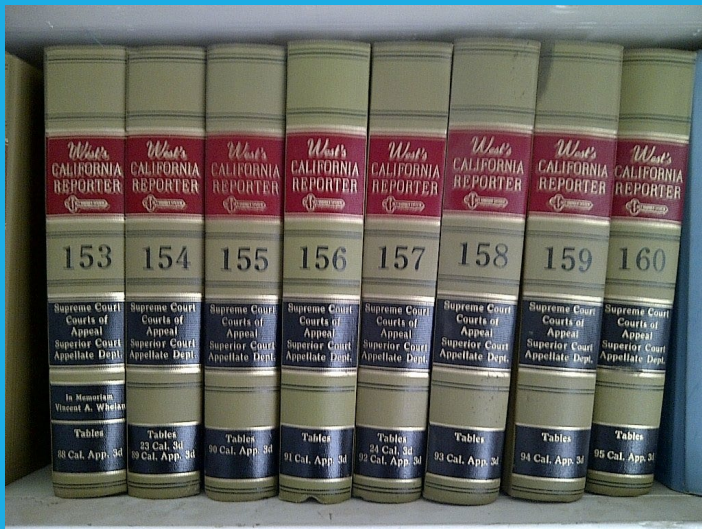
CASE EXAMPLE: *KEVIN P.*

COURT OF APPEAL ANALYSIS



- Improper for trial court to find insufficient time to rehabilitate, simply because less than 7 years remaining.
- Improper for trial court to conclude that youth was extremely dangerous based on supportive family and lack of record.

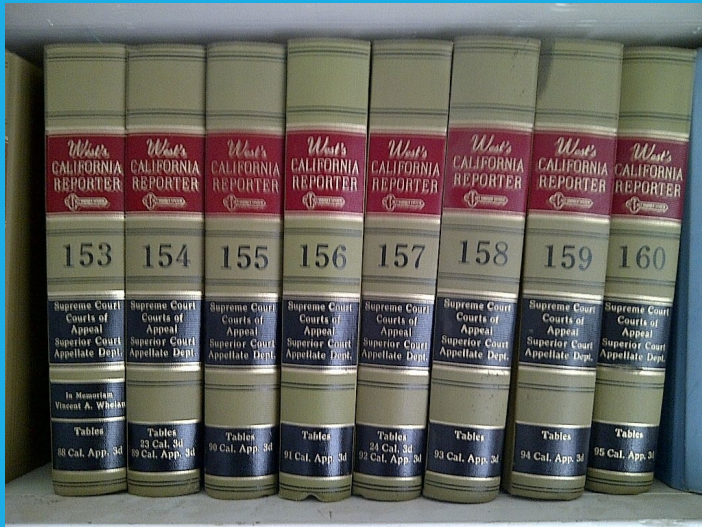
CASE EXAMPLE: *KEVIN P.*



COURT OF APPEAL ANALYSIS

A crime's circumstances may “evince personal characteristics, such as a psychological disorder, that make a minor less amenable to rehabilitation.” *Id.* at 201.

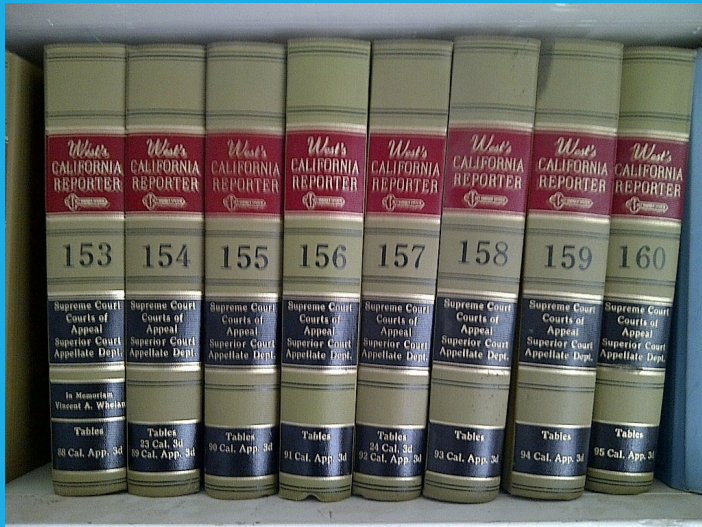
CASE EXAMPLE: *KEVIN P.*



COURT OF APPEAL ANALYSIS

“But without expert testimony to that effect, a court cannot reasonably infer that a minor has an amorphous ‘dark side’ hindering rehabilitation.” *Id.* at 201.

CASE EXAMPLE: *KEVIN P.*



COURT OF APPEAL ANALYSIS

“Otherwise, the rehabilitation criterion would be meaningless in every case in which a juvenile committed a grave crime, a result for which we discern no legislative support.” *Id.* at 201.

DEFENSE THEME: CLIENT IS IMMATURE/DISABLED



The crime was an impulsive act, strongly influenced by client's immaturity and/or disability.

DEFENSE THEME: CLIENT IS IMMATURE/DISABLED



Criteria 1: Criminal sophistication - mitigating factors. WIC 707(a)(3)(A)(ii)

- age & maturity
- intellectual capacity
- impetuosity & failure to appreciate risks and consequences of conduct
- effect of familial/adult/peer pressure

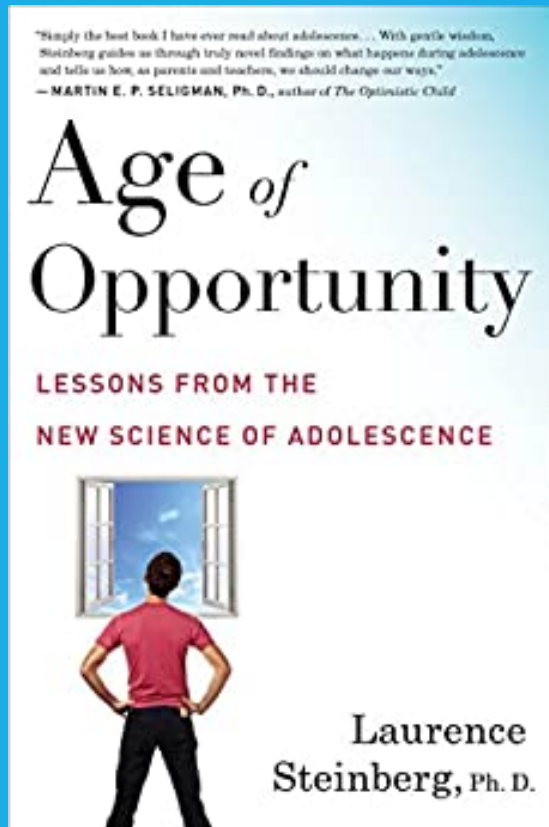
DEFENSE THEME: CLIENT IS IMMATURE/DISABLED



Criteria 5: Circumstances & gravity of the offense. WIC 707(a)(3)(E)(ii)

- actual behavior
- mental state
- degree of involvement
- level of harm caused
- mental and emotional development

DEFENSE THEME: CLIENT IS IMMATURE/DISABLED



Recommended Reading:

Age of Opportunity: Lessons From the New Science of Adolescence by Laurence Steinberg, Ph.D.

DEFENSE THEME: CLIENT IS IMMATURE/DISABLED



During adolescence, the prefrontal cortex, which governs impulse control, is still not fully developed, while the limbic system, which generates feelings of pleasure, spikes.

DEFENSE THEME: CLIENT IS IMMATURE/DISABLED



“This isn’t just true regarding physical rewards, like food, drugs, or money. It’s also true for social rewards, like praise and attention from other people.” p. 73.

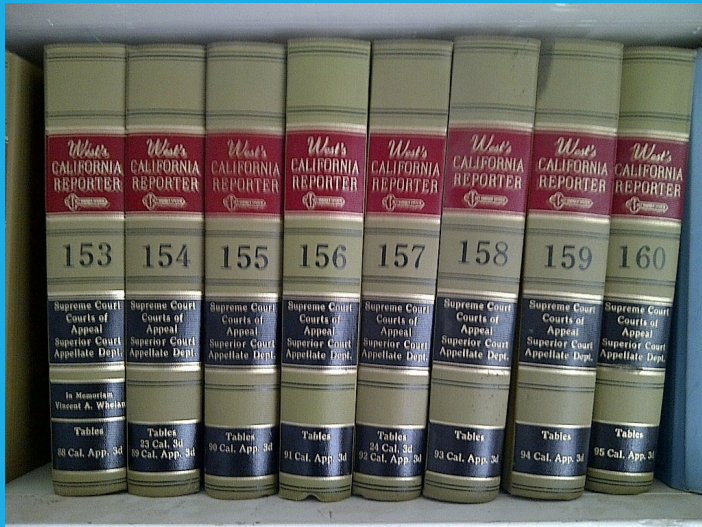
DEFENSE THEME: CLIENT IS IMMATURE/DISABLED



The incidence of learning disabilities among youth in the juvenile justice system is 35.6% to 46%, a rate 3 to 5 times higher than the general population.

Kvarfordt et al. "Youth with Learning Disabilities in the Juvenile Justice System"
[Child & Youth Care Forum \(February 2005\).](#)

CASE EXAMPLE: *RENE C.*



Trial court abused its discretion by ordering 14-y.o. transferred, where there was evidence that victim struck minor before minor shot him, minor had no previous criminal history, and minor was developmentally disabled.

Rene C. v. Superior Court (2006)
138 Cal.App.4th 1

DEFENSE THEME: CLIENT CARRIES TRAUMA



Childhood trauma made client more susceptible to violence.

DEFENSE THEME: CLIENT CARRIES TRAUMA



Criteria 1: Criminal sophistication
- mitigating factors.
WIC 707(a)(3)(A)(ii)

- physical/mental/emotional health
- family & community environment
- childhood trauma

DEFENSE THEME: CLIENT CARRIES TRAUMA



Criteria 5: Circumstances & gravity of the offense.
WIC 707(a)(3)(E)(ii)

- mental state
- mental and emotional development

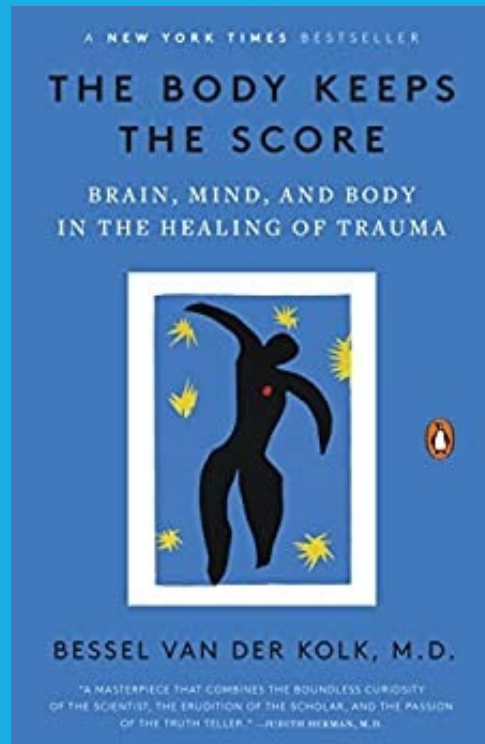
DEFENSE THEME: CLIENT CARRIES TRAUMA



- Repeated exposure to childhood stress impairs the connection of the prefrontal cortex to the amygdala, reducing impulse control.
- The amygdala becomes hypersensitive to threats and negative emotions.

Van Tieghem, "Neurobiological programming of early life stress," *Curr. Top. Behav. Neurosci.* 2018; 38: 117-136; <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5940575/>

DEFENSE THEME: CLIENT CARRIES TRAUMA

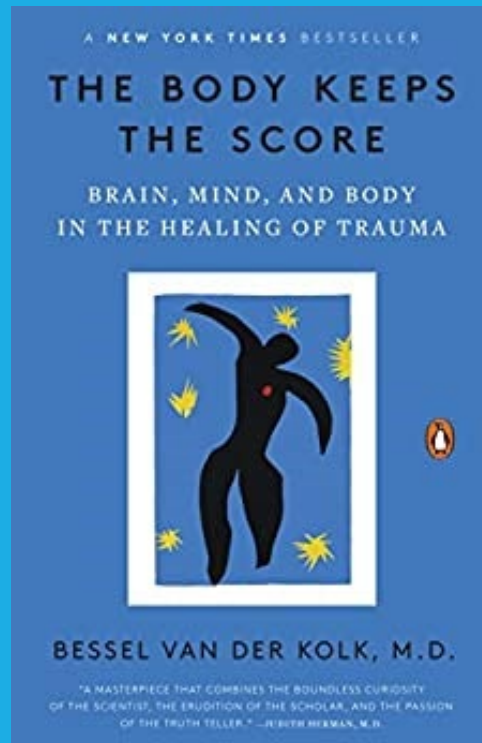


Recommended Reading:

The Body Keeps the Score by
Bessel van der Kolk, M.D.

“Being able to feel safe with other people is probably the single most important aspect of mental health.”
p. 81.

DEFENSE THEME: CLIENT CARRIES TRAUMA



When caregivers are a source of distress or terror, children suffer from disorganized attachment, becoming young adults with “an unstable sense of self, self-damaging impulsivity, . . . inappropriate and intense anger, and recurrent suicidal behavior.” p. 122.

HYPO 1



Your transfer client discloses to you that they were sexually abused by an uncle in the past, but they do not want this information reported to the court.

Is it a breach of your ethical duty to disclose this information to a defense psychologist?

HYPO 1: ANSWER



NO.

Defense experts are exempt from mandated reporting requirements, so the disclosure is protected by work product privilege.

Elijah W. v. Superior Court
(2013) 216 Cal.App.4th 140

DEFENSE THEME: REHABILITATION IS LIKELY



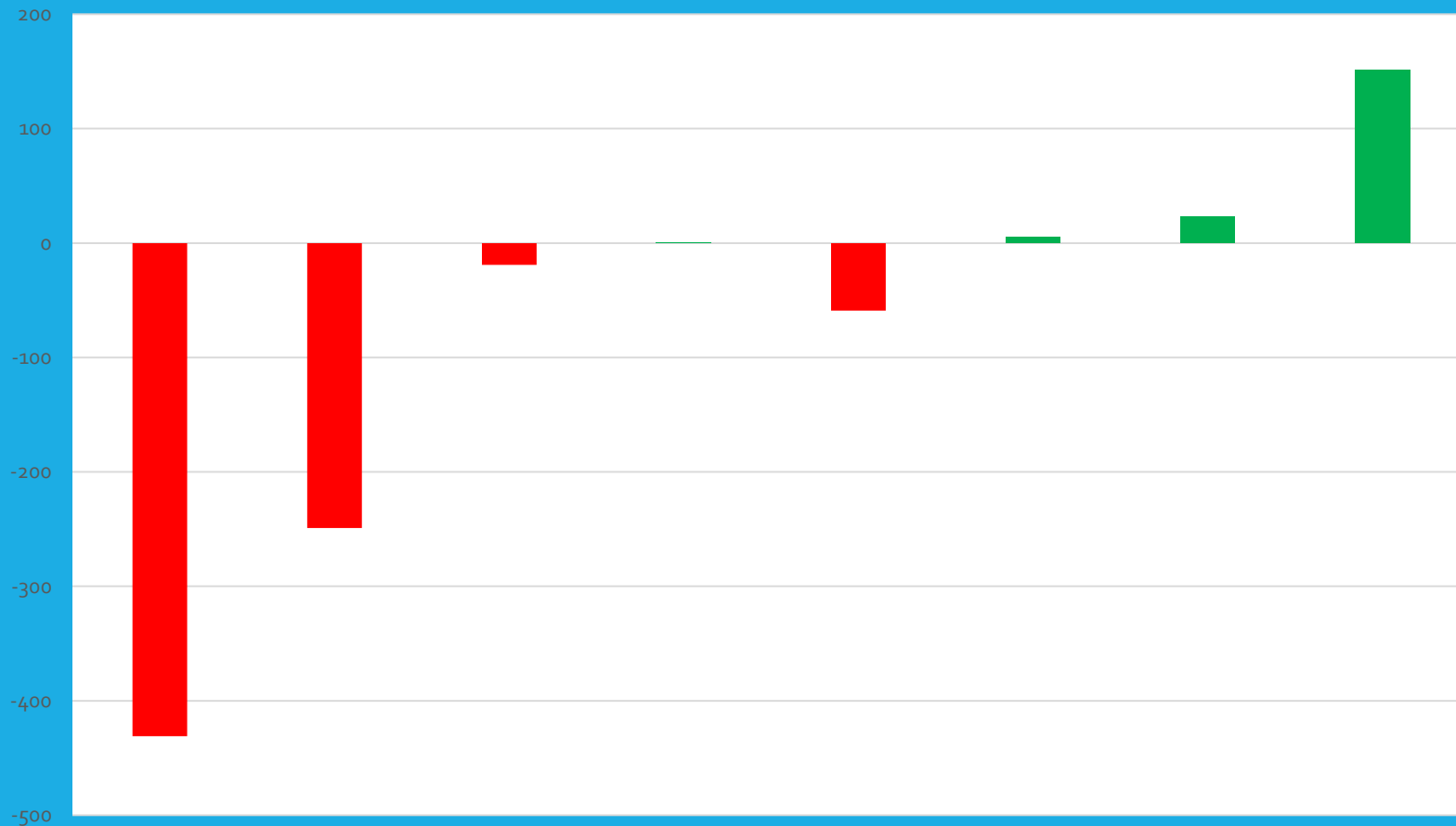
Client did not have proper diagnosis and/or treatment previously, and has improved now with appropriate services.

DEFENSE THEME: REHABILITATION IS LIKELY



Most recent behavior in juvenile hall is a more reliable predictor of future behavior than behavior at the time of the offense.

DEFENSE THEME: REHABILITATION IS LIKELY



DEFENSE THEME: REHABILITATION IS LIKELY



1996 Marvel Comics: - \$431 million

1997 Marvel Comics: -\$249 million

1998 Marvel Comics: -\$19 million

1999 Marvel Comics: +\$256,000

2000 Marvel Comics: -\$59 million

2001 Marvel Comics: +\$5.26 million

2002 Marvel Comics: +\$22.6 million

2003 Marvel Comics: +\$151 million

DEFENSE THEME: REHABILITATION IS LIKELY



Criteria 2: Likelihood of rehabilitation before jurisdiction expires - mitigating factors. WIC 707(a)(3)(B)(ii)

- capacity to grow and mature

DEFENSE THEME: REHABILITATION IS LIKELY



Criteria 4: Success of previous attempts to rehabilitate - mitigating factors. WIC 707(a)(3)(D)(ii)

- adequacy of services provided

CASE EXAMPLE: *J.N.*

J.N. v. Superior Court (2018) 23 Cal. App. 5th 706

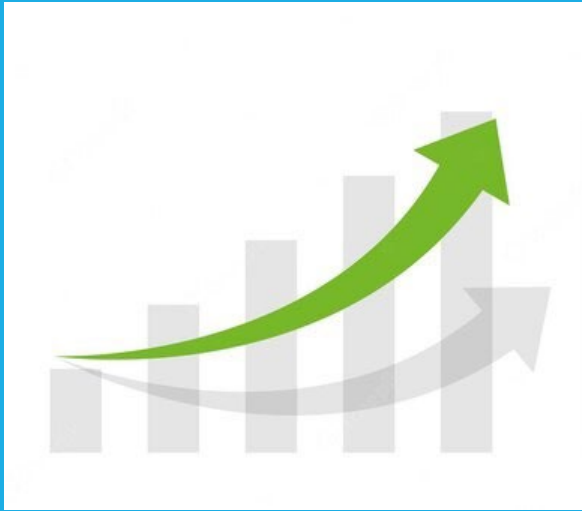


FACTS OF OFFENSE

- Youth tagging with others when adult rival gang member approached.
- Co-minor pulled out gun, victim grabbed for it, gun discharged during struggle, while youth stood frozen.

CASE EXAMPLE: J.N.

YOUTH'S BACKGROUND



- Father was abusive toward mother and children, angered very easily
- When children visited father, he continued to be abusive
- Mother was abusive and neglectful when she had boyfriends, eldest sister took on parenting role

CASE EXAMPLE: J.N.

YOUTH'S BACKGROUND



- Family moved frequently because mother unable to pay rent
- Sometimes mother did not have enough money for food or shoes
- Family moved to neighborhood with extreme violence and gang activity

CASE EXAMPLE: J.N.

POST-ARREST BEHAVIOR



- Youth asked to be placed in protective custody to separate himself from other gang members
- After visitor told youth about things going on in the street, youth told mother he did not want to know about it. Mother asked visitor not to visit

CASE EXAMPLE: *J.N.*

TRIAL COURT ANALYSIS



- Court found that the crime was unsophisticated, and the youth's history of trauma was mitigating.
- However, the youth was already 20 at the time of transfer hearing, and the court found 3 years to be insufficient time for rehabilitation.

CASE EXAMPLE: *J.N.*

COURT OF APPEAL ANALYSIS



- Prosecution did not present any evidence to suggest juvenile programming was unlikely to result in rehabilitation.
- Probation officer's opinion that rehabilitation was unlikely was not supported by any evidence.



DEFENSE WITNESSES

Why did this happen?

- Psychologist
- Neuropsychologist
- Social Worker



DEFENSE WITNESSES

Why won't this happen again?

- Psychologist
- Social Worker
- Teacher
- Probation Officers
- Program Workers
- Therapist



DEFENSE WITNESSES

For counsel privately retained by the client's family who do not have resources to pay expert fees, a motion can be made to appoint them at public expense.

Tran v. Superior Court (2001)
92 Cal.App.4th 1149.



DEFENSE EXHIBITS

- Psychological Evaluations
- Psychosocial Assessments
- Regional Center Records
- IEP's/Report Cards
- Medical Records
- DCFS Records
- Probation Records

PROBLEM: POOR RECORD IN JH



If client has had spotty behavioral history in juvenile hall, you must emphasize any improvements, and the natural maturation of adolescents.

PROBLEM: POOR RECORD IN JH



Research suggests that youth who are transferred re-offend at higher rates than youth who are retained in juvenile court.

Fagan, "Juvenile Crime and Criminal Justice: Resolving Border Disputes", *Future of Children* (Fall 2008) 18:2, pp. 81-118; <https://core.ac.uk/download/pdf/161454263.pdf>

PROBLEM: POOR RECORD IN JH



However, the court still has to make an individual finding that your client is likely to be rehabilitated if they remain in juvenile court.

HYPO 2



Two co-minors are arrested for murder based on drive-by shooting of a rival gang member.

HYPO 2

A



- shooter
- abusive father
- no previous record
- good behavior in juvenile hall

B

- driver
- absent father
- 2 previous gang-related assaults
- poor behavior in juvenile hall

Is A or B more likely to be transferred?

HYPO 2: ANSWER



B is more likely to be transferred, because there is less evidence to support a likelihood of rehabilitation.

PROBLEM: OLDER CLIENT



Court may retain jurisdiction for two years if it orders DJJ commitment. WIC 607(h)

However, you will likely have to argue that client is already rehabilitated, so Court should deny transfer and terminate jurisdiction.

APPELLATE REVIEW



Transfer order is directly appealable. Notice must be filed within 30 days.

WIC 801(a)

Criminal proceedings must be stayed upon defense request. WIC 801(b)

APPELLATE REVIEW



DA has to seek review by filing a writ petition within 20 days, because it is not directly appealable.

CRC Rule 5.770(g)

APPELLATE REVIEW



Under abuse of discretion standard, transfer order must be supported by substantial evidence.

Rene C. v. Superior Court
(2006) 138 Cal.App.4th 1

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