STATE OF MINNESOTA

IN SUPREME COURT

A20-0954

Court of Appeals

Hudson, J.
Concurring, McKeig, Chutich, Moore, JJ.
Concurring, Chutich, J.
Dissenting, Thissen, J.

In the Matter of the Welfare of: H.B., Child.

Filed: November 16, 2022
Office of Appellate Courts

Cathryn Middlebrook, Chief Appellate Public Defender, Saint Paul, Minnesota; and

Mark D. Nyvold, Special Assistant State Public Defender, Fridley, Minnesota, for appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Joshua Esmay, Bridget Sabo, Legal Rights Center, Minneapolis, Minnesota; and

Perry Moriearty, Associate Professor, University of Minnesota Law School, Minneapolis, Minnesota, for amicus curiae Legal Rights Center and Perry Moriearty.

S Y L L A B U S

1. A district court's consideration of the existence of any mitigating factors when determining the culpability of a child under Minn. Stat. § 260B.125, subd. 4(2) (2020), for purposes of certification, is limited to the level of the child's participation in

planning and carrying out the offense and the mitigating factors recognized by the Sentencing Guidelines, which are set forth in Minn. Sent. Guidelines 2.D.3.a.

2. The court of appeals properly concluded that the district court abused its discretion when the district court determined that the State had not met its burden of proving by clear and convincing evidence that retaining H.B. in the juvenile system would not serve public safety, where the weight of the evidence did not support the district court's findings on the second and fourth public safety factors set forth in Minn. Stat. § 260B.125, subd. 4(2), (4) (2020), concerning culpability and programming history.

Affirmed.

O P I N I O N

HUDSON, Justice.

Appellant H.B. was 15 years old when he was charged in juvenile court with aiding and abetting second-degree murder and first-degree aggravated robbery. The State of Minnesota filed a motion to certify H.B. for adult prosecution. After a 9-day hearing, the district court denied the State's motion, finding that only two of the six public safety factors set forth in Minn. Stat. § 260B.125, subd. 4 (2020), weighed in favor of adult certification, and therefore the State failed to prove by clear and convincing evidence that retaining H.B. in the juvenile system would not protect public safety. The State filed an interlocutory appeal, and the court of appeals reversed, determining that the district court correctly held that the first public safety factor (seriousness of offense) and third public safety factor (history of delinquency) favor adult certification, but that the district court incorrectly concluded that the second (culpability), fourth (programming history), and fifth (adequacy

of the punishment or programming available in the juvenile justice system) public safety factors do not favor certification. Thus, the court of appeals concluded that adult certification is proper, meaning H.B. will be prosecuted as an adult for the charged crimes. With the exception of the fifth public safety factor, the court of appeals correctly determined that the district court clearly erred in its findings and determinations as to the second and fourth factors. And the court of appeals' error as to the fifth public safety factor does not change the appropriateness of its conclusion that the district court abused its discretion when determining that the State had not met its burden of proving that retaining H.B. in the juvenile system would not serve public safety, and thus that certification was required. Accordingly, we affirm.

FACTS

In 2019, the first juvenile delinquency petition was filed charging H.B., a 15-year-old male,[1] with two counts of aiding and abetting second-degree murder in violation of Minn. Stat. § 609.19, subds. 1(1), 2(1) (2020). The petition alleged that on June 11, 2019, H.B. and another male approached an adult male seated in his parked car near an intersection in Minneapolis and planned to rob the victim and steal his car. H.B. and the other male wore bandanas to hide their faces and carried handguns. During the

[1] The dissent reads the court of appeals' and the State's factual characterizations that H.B. was 1 month shy of his 16th birthday at the time of the alleged murder as "implying that proximity to his 16th birthday is relevant," *see infra* at D-8 n.2, and asserts that the bright-line rule for certification "cannot be . . . impermeable when it increases punishment or decreases individual rights but more fluid when it decreases punishment or increases individual rights," and the court "cannot have it both ways." *See infra* at D-9 n.2. We do not reference, let alone rely on, the proposition that H.B.'s proximity to his 16th birthday is germane because it is immaterial to our analysis.

robbery, both H.B. and the other male fired their guns at the adult male, who was shot multiple times and later died. The subsequent law enforcement investigation suggested that H.B. and the other male fled through alleyways behind buildings, changed their clothing, and hid a backpack containing the firearms, their clothing, and other personal items under a set of stairs. In post-*Miranda* statements, both H.B. and the other male admitted to committing the crimes.

The second and third juvenile delinquency petitions were filed charging H.B. with aiding and abetting first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2020). The petitions alleged that on June 9, 2019, H.B. and another juvenile male committed two additional armed robberies, robbing the victims of their vehicles and phones at gunpoint. In a post-*Miranda* statement, the other juvenile admitted to committing both robberies with H.B.

The State filed motions to prosecute H.B. as an adult for the charges set forth in the petitions. The hearing on the State's certification motions took place over 9 days, and the district court heard testimony from law enforcement investigators, a probation officer, a clinical social worker, a psychologist, a doctor qualified as an expert witness on childhood trauma and treatment, correctional officers from the juvenile and adult prison systems, H.B.'s mother, and the mother of the murdered victim. The district court also received into evidence more than 50 exhibits.

A probation officer completed a certification study analyzing the six public safety factors set forth in Minn. Stat. § 260B.125, subd. 4, which the court is required to consider

in making its certification determination.[2] The certification study highlighted H.B.'s lengthy juvenile detention history, his experience with probation and programming—which included many instances of H.B. fleeing from placements—and several of his prior arrest warrants. The certification study noted that H.B. is fully culpable, has a prior record of multiple felony and misdemeanor charges, and has not successfully completed any treatment programs. The probation officer stated that the adequacy of punishment or programming in the juvenile justice system is immensely disproportionate to the gravity of the offense in this case and testified that in her opinion, all six public safety factors under Minn. Stat. § 260B.125, subd. 4, weigh in favor of adult certification for H.B.

Two psychologists jointly prepared a certification report, which noted H.B.'s significant exposure to childhood trauma and history of extensive contact with child

---

[2] Minn. Stat. § 260B.125, subd. 4, reads as follows:

> In determining whether the public safety is served by certifying the matter, the court shall consider the following factors:
>
> (1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;
>
> (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;
>
> (3) the child's prior record of delinquency;
>
> (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
>
> (5) the adequacy of the punishment or programming available in the juvenile justice system; and
>
> (6) the dispositional options available for the child.
>
> In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency than to the other factors listed in this subdivision.

protective services. The report also highlighted H.B.'s many instances of running away from placements and his mental health history, which includes diagnoses of a conduct disorder, post-traumatic stress disorder (PTSD), and an adjustment disorder. The report cited H.B.'s placement in a treatment program in 2018 as "showing a . . . willingness to commit to positive changes," his placement on an FBI watchlist in 2018, and his juvenile delinquency record, and observed that H.B. "is at high risk for future violence, including serious violence." The report ultimately concluded that H.B. is "an appropriate candidate for long-term residential treatment in a structured setting with programming that can address both his history of trauma as well as his delinquency needs." One of the psychologists testified, however, that public safety was not considered when making H.B.'s programming recommendation. Rather, the report was focused on H.B.'s treatment needs and amenability. Thus, the report from the two psychologists did not make a recommendation concerning adult certification.

Another doctor qualified as an expert witness on childhood trauma and trauma-informed treatment testified during the certification hearing. She reviewed the psychological report, placement records, and court filings, but did not interview H.B. She explained that there are 10 adverse childhood experiences recognized by childhood trauma experts and that H.B. has experienced nine of them, which is considered a significant amount. The doctor's memorandum concluded that H.B., "because of his extensive and profound traumas of childhood, has failed to develop adequate cognitive or emotional capacities necessary to make sound decisions" and opined that providing H.B. with trauma-informed treatment is in his best interest and the best interest of the community.

The district court denied the State's motions to certify H.B. for adult prosecution under Minn. Stat. § 260B.125, subd. 4. The district court found that the seriousness of the alleged offense (the first public safety factor) and H.B.'s prior record of delinquency (the third public safety factor) weigh in favor of adult certification, but that the remaining four factors do not. In its analysis, the district court acknowledged that "greater weight is given" to these two factors.

As to the culpability of the child in committing the alleged offense (the second public safety factor), the district court found that H.B. is fully culpable and he participated in the planning and carrying out of each offense, and no mitigating factors recognized by the sentencing guidelines were present. However, the district court reasoned that precedent from the U.S. Supreme Court weighed against assigning full culpability to H.B.[3] Specifically, the district court opined that the consideration of scientific and academic research provided via expert testimony is a proper part of the culpability determination. The district court found that H.B.'s culpability is reduced given his diagnosis of PTSD, his cognitive abilities being less advanced than a typical child his age, and his very reactive nature. Thus, the district court concluded that the second public safety factor does not weigh in favor of adult certification.

---

[3] The district court cited *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005), *Graham v. Florida*, 560 U.S. 48, 68 (2010), and *Miller v. Alabama*, 567 U.S. 460, 471 (2012), to posit that the U.S. Supreme Court has recognized scientific and academic research concluding that children's behavior and culpability are categorically different from those of adults. These juvenile delinquency cases address the imposition of the death penalty (*Roper*), life without parole for crimes not involving homicide (*Graham*), and mandatory life sentences without parole for homicide crimes (*Miller*).

In considering the child's programming history (the fourth public safety factor), the district court found that this factor does not weigh in favor of certification primarily because, even though H.B.'s "instinct is to run away if he can," he has demonstrated progress with treatment in the Bar None program, showing a willingness to participate meaningfully. The district court credited the expert witness doctor's recommendation that H.B. receive long-term trauma-informed treatment because it would be in H.B.'s and the larger community's best interest.

As to the adequacy of punishment or programming available in the juvenile justice system (the fifth public safety factor), the district court compared the length of the applicable extended juvenile jurisdiction—approximately 48 months with the option to revoke a stayed adult sentence—to the presumptive prison commitment of 306 months for the second-degree murder charge and 48 months for the first-degree burglary charges, and concluded that 48 months in the juvenile justice system seemed "woefully inadequate" to punish H.B. Nevertheless, the district court concluded that extended juvenile jurisdiction offers "the best chance of protecting public safety" with "[t]he combination of trauma-informed treatment in a secure facility, transitional programming, intense probationary supervision, and the threat of a stayed adult sentence."

Lastly, as to the dispositional options available, the district court found that if H.B. were designated for extended juvenile jurisdiction, the facility at Red Wing was available as a dispositional option and would offer the type of treatment recommended by the psychologist and other expert, and for a sufficient period of time. The district court also recognized that if H.B. were certified as an adult, the dispositional options available would

include the youthful offenders program until he turned 19 and then a lengthy term in an adult prison. The district court concluded that these dispositional options available to H.B. did not weigh in favor of certification, but instead "weigh in favor of extended juvenile jurisdiction."

The State appealed the district court's denial of adult certification for H.B., and the court of appeals reversed. *In re Welfare of H.B.*, 956 N.W.2d 7, 16 (Minn. App. 2021), *rev. granted* (Minn. May 26, 2021). In reviewing the record from the certification hearing, the court of appeals agreed with the district court that the two factors to be given "greater weight"—public safety factors one and three (seriousness of offense and history of delinquency, respectively)—weigh in favor of adult certification. *Id* at 12–14. The court of appeals also agreed with the district court that the sixth public safety factor (the dispositional options available) does not weigh in favor of adult certification. *Id.* at 15. However, the court of appeals disagreed with the district court that the second, fourth, and fifth public safety factors under Minn. Stat. § 260B.125, subd. 4, weigh against adult certification for H.B. *In re Welfare of H.B.*, 956 N.W.2d at 13–15.

As to the second public safety factor (culpability), the court of appeals agreed with the district court's findings that H.B. is fully culpable and that no mitigating factors recognized by the sentencing guidelines apply. *Id.* at 13–14. However, the court of appeals determined that the district court committed a clear error by extending the culpability analysis to improperly consider the experts' testimony about childhood trauma that was not specific to H.B.'s own culpability in committing the crimes or the sentencing

guidelines' mitigating factors, as well as by improperly considering precedent from the U.S. Supreme Court related to H.B.'s status as a juvenile. *Id.* at 14.

With respect to the fourth public safety factor (programming history), the court of appeals determined that the record does not support the district court's finding that H.B.'s programming history weighs against adult certification. *Id.* at 14–15. The court of appeals highlighted H.B.'s long history of unsuccessful programming and reasoned that H.B.'s positive treatment experience showed only an occasional willingness to participate and does not necessarily support a conclusion that continued commitment to juvenile programming is appropriate. *Id.* at 14. The court of appeals concluded that "[t]he record reflects that H.B. has a long history of unsuccessful programming, including absconding from programming, and there was no evidence presented that participation in this programming would serve the interests of public safety." *Id.*

Lastly, as to the fifth public safety factor (adequacy of the punishment or programming available in the juvenile system), the court of appeals determined that "the record is devoid of evidence to demonstrate that punishment and programming in the juvenile system" would serve public safety in this instance. *Id.* at 15. The court of appeals focused on the district court's finding that 48 months of confinement in juvenile facilities and/or placements is "woefully inadequate" punishment for second-degree murder and noted that none of the experts who testified during the certification hearing considered public safety as part of their analysis, as opposed to the probation officer who testified that adult certification would serve public safety. *Id.*

Ultimately, the court of appeals concluded that the State had demonstrated by clear and convincing evidence that five of the six public safety factors under Minn. Stat. § 260B.125, subd. 4, weigh in favor of adult certification and that retaining this matter in juvenile court does not serve public safety. *Id.* at 15–16. Accordingly, the court of appeals reversed the district court's order denying the State's motions for adult certification and remanded with instructions for the district court to certify H.B. for adult prosecution. *Id.* at 16.

We granted H.B.'s petition for further review.

ANALYSIS

District courts have original and exclusive jurisdiction in juvenile delinquency proceedings concerning any child who is alleged to have committed a crime before reaching 18 years of age, except as provided in Minn. Stat. § 260B.125 (2020), (governing certification) and Minn. Stat. § 260B.225 (2020) (concerning juvenile traffic offenders). *See* Minn. Stat. § 260B.101, subd. 1 (2020). A district court may enter an order certifying a juvenile for adult prosecution if the child is more than 14 years old and is alleged to have committed a felony offense. Minn. Stat. § 260B.125, subd. 1. Adult certification is presumed for children over the age of 16 at the time of the offense who committed either a felony offense while using a firearm or an offense that would result in presumptive prison commitment under the sentencing guidelines. *Id.*, subd. 3. These are known as presumptive certification cases. Non-presumptive certification cases involve children under the age of 16. In these cases, certification may only occur if the State "has

demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety." *Id.*, subd. 2(6)(ii).

In determining whether serving public safety requires certifying a juvenile for adult prosecution, a district court must consider the following six public safety factors:

> (1) the seriousness of the alleged offense[s] in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;
>
> (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;
>
> (3) the child's prior record of delinquency;
>
> (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming;
>
> (5) the adequacy of the punishment or programming available in the juvenile justice system; and
>
> (6) the dispositional options available for the child.

Id., subd. 4.[4] The district court must give greater weight to the seriousness of the alleged offense (the first public safety factor) and the child's prior record of delinquency (the third public safety factor). *Id.*

We review an order denying adult certification for an abuse of discretion. *In re Welfare of D.F.B.*, 433 N.W.2d 79, 82 (Minn. 1988). In this case, reviewing the denial of adult certification for H.B. requires us to consider questions of both law and fact. We

[4] Minnesota Rule of Juvenile Delinquency Procedure 18.06, subd. 3, mirrors the statute.

review questions of law de novo, *see In re Welfare of R.J.E.*, 642 N.W.2d 708, 710–11 (Minn. 2002), and findings of fact under the clearly erroneous standard, *see State v. Buckingham*, 772 N.W.2d 64, 69 (Minn. 2009); *see also* Minn. R. Civ. P. 52.01. Specifically, we will not disturb the district court's findings of fact regarding public safety unless they are clearly erroneous. *See In re Welfare of N.J.S.*, 753 N.W.2d 704, 710 (Minn. 2008). A finding is clearly erroneous only if "there is no reasonable evidence to support the finding or when an appellate court is left with the definite and firm conviction that a mistake occurred." *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012).

H.B. argues that the district court did not abuse its discretion when it denied the State's motions for adult certification, and the court of appeals erroneously reversed the district court's decision. H.B. does not dispute the court of appeals' conclusions that the district court correctly found that the seriousness of the offense (first factor) and the prior record of delinquency (third factor) weighed in favor of certification. And H.B. supports the court of appeals' conclusion that the district court correctly found that the dispositional options available (sixth factor) did not favor certification. But according to H.B., the court of appeals committed a legal error by concluding that only those mitigating factors recognized by the Minnesota Sentencing Guidelines may be considered when analyzing the second public safety factor (culpability). H.B. also disagrees with the court of appeals' conclusion that the weight of the evidence does not support the district court's findings on the second (culpability), fourth (programming history), and fifth (adequacy of the punishment or programming available in the juvenile justice system) public safety factors,

arguing in part that the court of appeals created an improper legal standard for what is required for expert testimony to be considered.

Thus, our analysis focuses on the public safety factors at issue—the second, fourth, and fifth factors.[5] We begin by considering the proper legal analysis of the second public safety factor (culpability) in Minn. Stat. § 260B.125, subd. 4(2). We then turn to the facts of this case—and the expert testimony heard by the district court—to determine whether the weight of the evidence supports the district court's findings on the second, fourth, and fifth public safety factors, when those factors are properly framed.

I.

We first address the proper legal application of the second public safety factor (culpability). The second factor requires a district court to consider "the culpability of the child in committing the alleged offense, including the level of the child's participation

[5] Rather than focusing on the issues raised and arguments asserted by the parties in this appeal, the dissent believes that "[c]onsidering the broad and complexly structured statutory framework is . . . appropriate because . . . the adult certification process and the provisions for extended-jurisdiction-juvenile prosecution were enacted at the same time and address the same subject of how best to address juvenile offenders." *Infra* at D-8 n.1. But our task is to consider and decide the questions raised in the petition for review for which review was granted. In this case, H.B. asked us for discretionary review of two questions: (1) whether the court of appeals properly interpreted the second (culpability) factor in Minn. Stat. § 260B.125, subd. 4, and (2) whether the court of appeals properly evaluated the evidentiary record related to "the public safety factors at issue – punishment and programming adequacy, programming history, and culpability." *See* Pet. for Rev. at 1 (filed Apr. 5, 2021). Rather than addressing the questions posed by H.B., the dissent uses this case as a platform to critique the broader juvenile-justice statutory framework and frame the facts of this particular case in a way that aligns with the dissent's view of justice. We disagree with the dissent's approach.

in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines." Minn. Stat. § 260B.125, subd. 4(2).

In this case, the district court considered external mitigating factors when considering the second public safety factor, including scientific and social-scientific research on child brain development and culpability, H.B.'s PTSD diagnosis, and U.S. Supreme Court precedent discussing child brain development and the status of a juvenile. On appeal, the court of appeals determined that the district court should have limited its inquiry to the level of H.B.'s participation in planning and carrying out the crimes and the mitigating factors recognized by the sentencing guidelines. *See In re Welfare of H.B.*, 956 N.W.2d at 13–14. Therefore, the court of appeals held that the district court's conclusion on the second public safety factor was erroneous. *Id.* at 14.

On appeal to this court, H.B. argues that Minn. Stat. § 260B.125, subd. 4(2), is unambiguous and that under the plain meaning of the statute the mitigating factors listed in the Minnesota Sentencing Guidelines are *relevant* considerations, but they are not the exclusive considerations when deciding whether culpability weighs in favor of adult certification.[6] Specifically, H.B. asserts that the word "including" has been interpreted by

---

[6] Minn. Sent. Guidelines 2.D.3.a prescribes, in relevant part, a nonexclusive list of "Mitigating Factors" that may be used as reasons for departure:

> (1) The victim was an aggressor in the incident.
> (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
> (3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The

this court and the larger legal community to be a term of enlargement, and thus the Legislature's use of the word in subdivision 4(2) is merely a suggestion of what a district court can consider. Therefore, H.B. contends that the court of appeals erred by reversing the district court's consideration of the expert testimony presented during the certification hearing regarding his childhood trauma, mental health diagnoses, and brain development and consideration of scientific research on juvenile brain development discussed in U.S. Supreme Court cases.

For its part, the State argues that the plain language of subdivision 4(2) includes only three factors: (1) culpability in committing the alleged offense, (2) the juvenile's participation in planning and carrying out the offense, and (3) mitigating factors recognized by the sentencing guidelines. The State argues that the statute requires an offense-specific

---

voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.

(4) The offender's presumptive sentence is a commitment but not a mandatory minimum sentence, and either of the following exist:

(a) The current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or

(b) The current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance.

(5) Other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

(6) The court is ordering an alternative placement under Minn. Stat. § 609.1055 for an offender with a serious and persistent mental illness.

(7) The offender is particularly amenable to probation. This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.

analysis and is not focused on general child behavior, thus precluding consideration of scientific and academic studies and case law on the status of juveniles generally.

Statutory interpretation is a question of law that we review de novo. *In re Welfare of J.J.P.*, 831 N.W.2d 260, 264 (Minn. 2013). The goal of all statutory interpretation "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2020). "We interpret the words of a statute according to their plain and ordinary meaning." *State v. Spence*, 768 N.W.2d 104, 107 (Minn. 2009); *see also* Minn. Stat. § 645.08(1) (2020). Additionally, "we read a statute as a whole and give effect to all of its provisions." *In re Welfare of J.J.P.*, 831 N.W.2d at 264. To determine the meaning of words in a statute—including as to whether the term has a technical meaning—we look at the context in which a word appears. *See Hous. & Redev. Auth. of Duluth v. Lee*, 852 N.W.2d 683, 691 (Minn. 2014); *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016).

The first step of the statutory interpretation analysis is to determine whether a statute is ambiguous. *State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019). Since the word "including" in the statute is undefined, we first turn to its common and approved definition. According to various dictionaries, "including" means to contain as part of a whole. *See Including*, *New Oxford American Dictionary* (3d ed. 2010) ("containing as part of the whole being considered"); *Include*, *Black's Law Dictionary* (10th ed. 2010) ("[t]o contain as a part of something"). Consequently, the word is used to suggest that what follows is a partial and not exhaustive list of the content to which the subject refers.

Though the ordinary meaning of "including" signifies enlargement and not limitation, our precedent is split on its legal or technical meaning. On the one hand, the

word "including" has been interpreted by this court to mean an enlargement, such that the words following it are not an exhaustive or exclusive list. *See LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 19 (Minn. 2012); *see also G&I IX OIC LLC v. County of Hennepin*, 979 N.W.2d 52, 58 (Minn. 2022) (citing Bryan A. Garner, *Garner's Dictionary of Legal Usage* 439 (3d ed. 2011) (observing that "including" "should not be used to introduce an exhaustive list, for it implies that the list is only partial"). But the word "including" has also been interpreted as a limitation. *See Becker v. State Farm Auto Ins. Co.*, 611 N.W.2d 7, 11–12 (Minn. 2000) (definition of "insured" was limited to the specific individuals enumerated after "including"). This split is reflective of what we have previously held: that the definition of "including" depends on the circumstances of its use. *See Lowry v. City of Mankato*, 42 N.W.2d 553, 559 (Minn. 1950) ("The word 'including' has a variable meaning" and is sometimes "a word of enlargement and at others one of restriction."). Depending on context, the plain meaning of the term "including" can be an enlargement or a limitation.

Here, the context strongly suggests that the word "including" is a limitation, particularly because the word is used to specify *precisely* what the court *must* consider in ascertaining culpability—"the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines." *See* Minn. Stat. § 260B.125, subd. 4(2); *see also Cocchiarella v. Driggs*, 884 N.W.2d 621, 625 (Minn. 2016) (finding that the word "occupying" had a variety of meanings depending on context in determining whether "occupying" was ambiguous).

This context means that, at a minimum, interpretating "including" as a limitation is a reasonable interpretation of Minn. Stat. § 260B.125, subd. 4(2).

To the extent it is also reasonable to interpret "including" as a term of enlargement, then the term's meaning in Minn. Stat. § 260B.125, subd. 4(2), is subject to more than one reasonable interpretation, and the statute is therefore ambiguous. *See Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 72–73 (Minn. 2012) (stating that a statute is ambiguous "if, as applied to the facts of the particular case, [the words] are susceptible to more than one reasonable interpretation"). If a statute is ambiguous, the next step is to look beyond the statute's text to ascertain the intent of the Legislature. *See* Minn. Stat. § 645.16. Legislative intent can be gleaned from the occasion and necessity for the law. *Id.*

Here, the purpose of the juvenile delinquency rules is "to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law . . . . " Minn. Stat. § 260B.001, subd. 2 (2020). The legislative history reveals that the 1992 Minnesota Supreme Court Advisory Task Force on the Juvenile Justice System and the legislators who adopted the task force's recommendations through legislation sought to achieve this purpose by providing more direction to courts in adult certification proceedings through an objective, streamlined process. *See Minn. Sup. Ct. Advisory Task Force on the Juv. Just. Sys: Final Report*, 20 Wm. Mitchell L. Rev. 595, 600–602, 628 (1994). The task force determined that providing a single criterion directed solely to public safety, and using specific, objective factors in certification determinations, was preferable to the subjective analysis previously used. Hearing on Juvenile Justice System Advisory Task Force Report, S. Comm. Crime Prevention, 78th Minn. Leg., January 19, 1994 (audio

tape). Thus, the task force proposed five factors for district courts to consider when determining whether adult certification furthers public safety, including culpability.[7] 20 Wm. Mitchell L. Rev. at 628.

Additionally, in the 1994 statutory amendments, language was added regarding "aggravating factors" that specifically referenced the factors recognized by the sentencing guidelines, establishing a general theme that the legislators intended to be more detailed and specific in the statute's language. *See* H.F. 2074, § 13, 78th Minn. Leg. 1994. These circumstances illustrate that a primary legislative concern was to provide an objective list of factors to give district courts more specific direction. To interpret "including" as a term of enlargement and allow a district court to consider mitigating factors beyond what is listed is antithetical to the legislative history.

A narrow reading of the second public safety factor in Minn. Stat. § 260B.125, subd. 4(2), also aligns with our previous interpretation of the culpability factor and the other public safety factors. For example, in *In re Welfare of J.H.*, we interpreted programming history (the fourth public safety factor) narrowly, holding that it did not include behavior at home or school, despite the word "including" in Minn. Stat. § 260B.125, subd. 4(4) (requiring courts to consider "the child's programming history,

---

[7] The dissent goes on an extensive, winding odyssey through the legislative history of the statute to arrive at two main principles. One of those principles is that if a juvenile is 16 years old or older, and the alleged offense would result in a presumptive prison commitment or if the juvenile used a firearm, there is a presumption in favor of adult certification. *See infra* at D-9–10. We agree with this conclusion but do not understand its applicability to the specific issues raised in this case. Therefore, the dissent is correct that we do not apply it. *See infra* at D-10.

including the child's past willingness to participate meaningfully in available programming" (emphasis added)). 844 N.W.2d 28, 38–39 (Minn. 2014). Additionally, we have already concluded that the public safety factors enumerated in the statute are "the exclusive list of factors" a district court may consider in determining whether public safety is served by adult certification. *In re Welfare of N.J.S.*, 753 N.W.2d at 710 n.3. Under H.B.'s expansive reading of "including," district courts could consider an endless array of information, which would dilute and undermine an objective assessment of the culpability factor. Lastly, as the State correctly argues, in *In re Welfare of J.H.* we explained that culpability determinations are limited to "examin[ing] the alleged *offenses*." 844 N.W.2d at 38 (emphasis added); Minn. Stat. § 260B.125, subd. 4(2). Thus, the culpability factor is offense specific to the extent that it requires a district court to assess how culpable a *particular* juvenile is in relation to the *specific* offense alleged and whether there are any mitigating factors recognized by the sentencing guidelines that affect the *juvenile's culpability at the time he or she committed the alleged offense*.[8]

Legislative intent and history as well as our precedent demonstrate that the more reasonable interpretation of "including" is a narrow one. We therefore conclude that Minn. Stat. § 260B.125, subd. 4(2), limits a district court's consideration of the existence of any mitigating factors under the second public safety factor to those factors enumerated after the word "including," which includes the level of the child's participation in planning and

[8] The plain language of the statute further aligns with this offense-specific reading because the culpability factor considers "the culpability of the child *in committing the alleged offense*." Minn. Stat. § 260B.125, subd. 4(2) (emphasis added).

carrying out the offense and the existence of any of the mitigating factors set forth in the sentencing guidelines, which are listed at Minn. Sent. Guidelines 2.D.3.a.

In response, the dissent contends that the culpability inquiry is "whether the State has proven by clear and convincing evidence that the child was more culpable for the crimes committed than a typical defendant who commits those same crimes" and that "[t]he child has no burden to prove that they were somehow *less* culpable than a typical defendant who commits the same crimes." *See infra* at D-25. The dissent's test mischaracterizes the nature of the relevant inquiry by improperly importing the departure sentencing jurisprudence from cases involving adult prosecution, which allows departures from a presumptive sentence so long as the court can show that "[s]ubstantial and compelling" circumstances exist that demonstrate that the defendant's conduct "was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (citations omitted) (internal quotation marks omitted). Here, however, subdivision 4(2) directs the court to consider "the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines." Minn. Stat. § 260B.125, subd. 4(2).

In other words, the statute does not direct the juvenile court to consider whether "H.B.'s actions make him *more* culpable than a typical defendant who commits those same crimes," *infra* at D-27, but instead the juvenile court must consider the extent of H.B.'s culpability given his level of participation in planning and carrying out the offense and whether any recognized mitigating factors lessen his culpability such that the factor

ultimately weighs in favor of or against certification. Because the dissent's seamless weaving of the departure jurisprudence with the certification statute is inconsistent with the statute, we reject it.

II.

We next address whether the weight of the evidence supports the district court's findings on culpability (the second public safety factor), programming history (the fourth public safety factor), and adequacy of the punishment or programming available in the juvenile justice system (the fifth public safety factor), when those factors are properly framed.

A.

For the second public safety factor, the district court found that the record shows H.B. was fully culpable for the offenses, but nonetheless declined to weigh the culpability factor in favor of adult certification based on H.B.'s traumatic childhood, his resulting diagnosis of PTSD, and U.S. Supreme Court precedent discussing child brain development and the status of juveniles. The court of appeals reversed the district court's finding on the second public safety factor because the district court considered mitigating factors outside of the sentencing guidelines and found no evidence in the record that H.B.'s mental health diagnoses reduced his culpability in committing the crimes or satisfied a mitigating factor of the sentencing guidelines, such as mental impairment. *In re Welfare of H.B.*, 956 N.W.2d at 13.

For the reasons just explained, the court of appeals was correct to reverse the district court on this factor, to the extent the district court's conclusion rested upon its consideration

of any mitigating factors outside of the level of H.B.'s participation in planning and carrying out the crimes and the existence of any of the mitigating factors set forth in the sentencing guidelines. *See supra* Section I; *see also* Minn. Stat. § 260B.125, subd. 4(2). Here, however, H.B. largely focuses upon the expert testimony offered, and contends that the court of appeals created an improper legal standard that an expert must opine on the ultimate question of public safety, otherwise no evidence can ever exist to support weighing the culpability factor against adult certification. H.B. argues that the rules of evidence and controlling case law prohibit experts from answering the ultimate legal question presented during a certification hearing—whether public safety is served—because doing so invades the province of the district court. According to H.B., the court of appeals' decision improperly shifts the burden to the child, which in a non-presumptive case as here, rests with the State to prove by clear and convincing evidence that retaining the child in the juvenile court does not serve public safety. H.B. further argues that the court of appeals' decision incorrectly prevents a district court from considering scientific child brain culpability research unless an expert applies the research to the specific child. H.B. suggests that the district court properly inferred from expert testimony and reports that he has reduced culpability.

In response, the State argues that the court of appeals did not create a new standard for expert testimony. In addition, the State asserts that the district court improperly considered mitigating factors outside of the sentencing guidelines and conflated the second public safety factor (culpability) with the fourth, fifth, and sixth public safety factors that address programming history and available programming. Moreover, the State argues that

even if this court had instead permitted district courts to consider mitigating factors beyond the sentencing guidelines (which we do not, as outlined in section I of this opinion), case law and any "scientific and academic research" must be specific to the juvenile in light of the statutorily required offense-specific analysis. The State maintains that the court of appeals correctly found that the district court's factual findings on what it was legally permitted to consider were supported by the record and conclusively weigh in favor of certification.

The State's arguments are more persuasive. First, on the issue of an expert opining on the ultimate question of public safety, the Minnesota Rules of Juvenile Delinquency Procedure suggest that experts *may* opine on the ultimate issue, stating that the expert's report "shall address each of the public safety considerations of Rule 18.06, subdivision 3." Minn. R. Juv. Delinq. P. 18.04, subd. 2; *see* Minn. R. Juv. Delinq. P. 18.06, subd. 3 (mirroring the public safety factors in Minn. Stat. § 260B.125, subd. 4). Further, we have held that since a certification hearing is dispositional in nature, the rules of evidence are inapplicable during the hearings, and the appropriate test is whether evidence is relevant and material. *See In re Welfare of S.R.J.*, 293 N.W.2d 32, 35 (Minn. 1980). Thus, while experts are not required to do so, they may opine on the ultimate question during a certification hearing—whether adult certification would further public safety.

Moreover, in our view, the court of appeals did not create a new legal standard suggesting that experts *must* opine on the ultimate question. Instead, the court of appeals used the lack of expert testimony on the ultimate question to support its conclusion that the district court's findings were clearly erroneous.

Nor did the court of appeals improperly shift the burden as between the parties. While the presumptive and non-presumptive distinctions for adult certification place the burden of production on one party or the other, the district court ultimately decides whether the record is sufficient to support the certification decision by weighing the six public safety factors. The court of appeals here did not shift the burden to H.B. Instead, the court of appeals engaged in a sufficiency analysis to review the record and determine whether the evidence supported the district court's ultimate decision not to certify H.B. for adult prosecution.

Second, having affirmed that the court of appeals was correct in holding that the language of § 260B.125, subd. 4(2), limits what a district court may consider for purposes of the culpability factor, the court of appeals was likewise correct that under this legal framework, the district court's factual findings fully resolved the second public safety factor in favor of adult certification. The district court observed that H.B. "was fully culpable and participated in the planning and carrying out of the offense[s]" and that no mitigating factors recognized by the sentencing guidelines were applicable to H.B.'s commission of the alleged offenses. That should have ended the district court's analysis.

Instead, the district court relied upon U.S. Supreme Court precedent regarding child brain development to support a finding of mitigating factors outside of the sentencing guidelines. This was improper. For reasons already discussed, the culpability factor does not permit the consideration of mitigating factors outside the sentencing guidelines. *See supra* Section I. Moreover, the second public safety factor specifically directs the court to consider "the culpability of *the child* in *committing* the alleged *offense*." *See* Minn. Stat.

§ 260B.125, subd. 4(2) (emphasis added). In other words, the culpability consideration must be focused upon the specific child—here H.B.—rather than juveniles generally, and the consideration must be specific to H.B.'s culpability when he committed the crime for which he was charged. This is further reinforced by the statutory directive in the culpability factor that what the court is to consider—other than the mitigating factors in the sentencing guidelines—is "the level of the child's participation in planning and carrying out the offense." *Id.* The district court, however, in using this U.S. Supreme Court precedent, relied on H.B.'s *status* as a juvenile rather than looking at whether mitigating factors impacted his culpability at the time he committed the specific offenses. A district court can make inferences about a juvenile's reduced culpability so long as the record demonstrates that the mitigating factors affected the juvenile at the time he or she committed the alleged offense. However, the U.S. Supreme Court's discussion of the reduced culpability of juveniles when compared to adults if applied generally, rather than specifically to a particular child, would eviscerate the second public safety factor in subdivision 4 because, under its broad language, all juveniles would lack culpability. The Legislature's precise language about the child's participation and planning in the alleged offense shows that it did not expect that all juveniles, by their status as such alone, would not be deemed culpable.[9]

[9] The dissent claims that the district court did evaluate evidence specific to H.B., and that it only used the U.S. Supreme Court precedent discussing scientific research on juvenile brain development "to supplement its understanding of the record . . . . as additional context." *See infra* at D-29 n.11. But the dissent elides the district court's actual use of such precedent. The district court had already found that H.B. was "fully culpable,"

Here, the district court could properly make inferences about H.B.'s reduced culpability *if* the record demonstrated that H.B.'s traumatic childhood and PTSD diagnosis explicitly affected his culpability or ability to plan and carry out the alleged offenses. And the experts were free to opine on public safety, though not required to, but they failed to provide any specific evidence of H.B.'s reduced culpability—that H.B.'s conditions informed his commission of the alleged offenses *at that time*. The district court recognized this failure in finding that "[t]he facts underlying [H.B.'s] charges tend to indicate that [H.B.] was fully culpable and participated in the carrying out [of] each offense." Therefore, given the record and absence of expert testimony on H.B.'s reduced culpability at the time

---

that he "participated in the planning and carrying out of the offense," and that "[t]here are no mitigating factors recognized by the Minnesota Sentencing Guidelines." Moreover, the record is clear that H.B.'s key expert, Dr. Gearity, neither interviewed nor conducted an evaluation of H.B., and thus provided no specific evidence of H.B.'s culpability at the time he committed these specific offenses. In the district court's "struggl[e] to assign full culpability to [H.B.]," it tellingly pivoted to a lengthy discussion of the Supreme Court precedent and held that "[s]cientific and academic research described through expert testimony also weighs against assigning full culpability to [H.B.]." That research contends that children's behavior and culpability is *categorically* different from adults. *See Roper v. Simmons*, 543 U.S. 551, 569–71 (2005); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

The district court concluded that it was "persuaded by the . . . opinions of [the experts], and the scientific and academic research upon which they rely, that [H.B.] suffers from posttraumatic stress disorder, that his ability to think and make executive decisions is not as advanced as a neuro-typical child of the same age." Although the district court notes H.B.'s specific diagnoses, it is clear that the district court used the Supreme Court's precedent as more than "context." To the contrary, that precedent—which focuses on the categorical *status* of children concerning their behavior and culpability—was the lens through which the district court ultimately assessed H.B.'s culpability. Unquestionably, the district court was faced with a difficult task, but for purposes of determining culpability under Minn. Stat. § 260B.125, subd. 4(2), its reliance on *Roper* and its progeny for general principles of juvenile behavior, as opposed to an expert's actual analysis of H.B.'s behavior and culpability at the time of the offense, was clear error.

he committed the offenses, the district court's finding that H.B. had reduced culpability is unreasonable and clearly erroneous.

B.

The next issue is whether the district court committed clear error by finding that the fourth public safety factor (programming history) does not support adult certification. We agree with the court of appeals that the record does not support this finding.

The fourth public safety factor requires the district court to consider "the child's programming history, including the child's past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4). This factor, like all the factors, is to be considered as part of the court's determination as to whether public safety is served by certification. *See id.* And here, it is the State that has the burden to prove by clear and convincing evidence that retaining H.B.'s case in juvenile court would not serve public safety. Minn. Stat. § 260B.125, subd. 2(6)(ii). This central focus on public safety, as dictated by the statute, in turn shapes the inquiry under the fourth factor. The court of appeals correctly stated that the issue is whether extended jurisdiction juvenile (EJJ) programming for H.B., based on his programming history, serves public safety interests. *In re Welfare of H.B.*, 956 N.W.2d 14–15. Properly framed with this public safety focus, the fourth factor plainly analyzes a juvenile's programming history and whether the juvenile demonstrated a willingness to participate, such that EJJ programming would serve public safety interests. The focus is *not* on whether H.B. would benefit from programming were he to participate in and complete it, nor does the factor analyze the reasons why a juvenile may have failed in programming.

The district court found that while H.B.'s programming history is marked by his unwillingness to engage in treatment and absconding from treatment facilities, he had made progress during a recent 45-day placement at Bar None. Focusing on H.B.'s participation in treatment at Bar None, rather than what was "clear from [H.B.'s] placement and programming history that his instinct is to run away if he can," the district court concluded that the programming history factor does not support adult certification because H.B. is "amenable to programming and has recently demonstrated a willingness to participate meaningfully in available programming." But as the State points out, the district court's conclusion emphasized one arguably positive experience over a long history of H.B.'s unwillingness to meaningfully participate in programming and his behavior worsening after each program. The record reflects that H.B. has a long history of programming which can be fairly characterized as unsuccessful. Several reports document that H.B. absconded from various programming while displaying increasingly escalating dangerous delinquent behavior. Despite H.B.'s one positive treatment experience at Bar None, when he was ordered to return to Bar None and continue programming, he fled and reoffended by committing another felony. Here, the record demonstrates H.B.'s noncompliance at several placements and fails to demonstrate any experience when H.B. showed a good performance *following* the programming.

H.B. nonetheless asserts that there is adequate evidentiary support for the district court to weigh the factor against certification because it could, in its discretion, credit expert testimony and reports explaining that H.B. running away from programming was

due to his PTSD.[10] But H.B.'s expert testimony explaining *why* he ran from programming provided no evidentiary support for weighing this factor against adult certification. Again, the focus of the fourth factor is not on the reasons why H.B. may have failed in programming, nor is it on whether H.B. would benefit from programming were he to participate in and complete it. The focus is on whether, based on H.B.'s programming history, EJJ programming would serve public safety interests. While the district court ultimately found that H.B. recently demonstrated a willingness to participate meaningfully in available programming, the complete record of H.B.'s programming history shows that it has largely been unsuccessful. As such, the record on H.B.'s programming history did not reflect that EJJ programming would serve public safety interests. Accordingly, the court of appeals properly held, under the circumstances present here, that it was clear error

[10] H.B. argues that this case is distinguishable from *P.C.T.*, which the court of appeals relied on to characterize H.B.'s positive experience at Bar None as "an occasional willingness to participate in juvenile programming." *In re Welfare of P.C.T.*, 823 N.W.2d 676, 683 (Minn. App. 2012). Specifically, H.B. asserts that in *P.C.T.*, the child's occasional willingness to participate in treatment did not similarly stem from PTSD and a traumatic childhood. *P.C.T.* was a presumptive certification case where the burden rested on the juvenile to rebut the presumption of certification with clear and convincing evidence showing that retaining the case in juvenile court would serve public safety. *See In re Welfare of P.C.T.*, 823 N.W.2d at 681. Based on the underlying factual record, the court of appeals concluded that public safety would not be served by retaining the case in juvenile court. *See id.* at 683, 686 (reviewing the record to find that the juvenile's programming history showed noncompliance, failures at numerous juvenile treatment and dispositional programs, and reoffending following programming). *P.C.T.* is factually distinguishable from this case.

for the district court to conclude that the fourth public safety factor did not favor adult certification.[11] *In re Welfare of H.B.*, 956 N.W.2d at 15.

C.

Lastly, we address whether the court of appeals properly held that it was clear error for the district court to conclude that the fifth public safety factor, punishment and programming available in the juvenile system, weighed against adult certification. This factor requires the court to consider, in determining whether public safety is served by certification, "the adequacy of the punishment or programming available in the juvenile system." Minn. Stat. § 260B.125, subd. 4(5). The district court found that the approximate 48 months H.B. would serve under juvenile jurisdiction (with the option to revoke a stayed adult sentence if H.B. failed to complete the EJJ probation conditions) was "woefully inadequate" to punish him for the seriousness of the offense of second-degree murder; the presumptive sentence if H.B. was certified was 306 months. However, the district court concluded that sending H.B. to a juvenile detention facility offered the best chance of protecting public safety given "[t]he combination of trauma-informed treatment in a secure facility, transitional programming, intense probationary supervision, and the threat of a stayed adult sentence." Moreover, the district court noted that H.B. would be under juvenile court jurisdiction for more than 60 months. In sum, the district court concluded that "[p]ublic safety is better served in both the short and long-term if [H.B.] received

[11] Despite the dissent's assertions to the contrary, we fully considered the district court's findings and used the appropriate standard of review to arrive at our conclusion. We are sympathetic to H.B.'s long traumatic history, but our task is to interpret and apply the law.

appropriate treatment and programming that is available only in the juvenile system." The court of appeals held that the district court's conclusion was clearly erroneous because the adequacy of punishment or programming available favored adult certification given that none of the experts considered public safety in their analysis, and one of the psychologists admitted that H.B. was at high risk of reoffending. *Id.* at 15.

H.B. argues that the district court appropriately decided that trauma-informed therapy, conducted in a secure setting under EJJ designation, was proper given the supporting expert testimony. We agree. As an initial matter, this is not a factor—unlike the second and fourth factors—that the district court analyzed through the wrong legal lens. The district court recognized that the consideration of the adequacy of the punishment or programming available in the juvenile system was to be focused upon how public safety is best served. And it did just that, concluding that "[p]ublic safety is better served in both the short and long-term if [H.B.] received appropriate treatment and programming that is available only in the juvenile system."

The State argues that the district court failed to consider the adequacy of punishment for the two aggravated robberies and focused almost entirely on the programming portion of the fifth public safety factor. The State highlights that H.B.'s experts did not offer promising assessments of the public safety benefits of juvenile-system programming for H.B. and argues that the district court abused its discretion by placing H.B.'s potential for rehabilitation over public safety.

There was more than sufficient evidence, however, to support the district court's conclusions; it is the court of appeals that overstepped in finding the district court's

determination on this factor clearly erroneous. The court of appeals, for support, cited its own decision in *P.C.T.* for the proposition that "designating EJJ despite no expert testimony that doing so was in the interests of public safety was error." *In re Welfare of H.B.*, 956 N.W.2d at 15 (citing *In re Welfare of P.C.T.*, 823 N.W.2d 676, 684 (Minn. App. 2012)). But the district court did hear expert testimony about H.B.'s need for trauma-informed treatment and how lack of treatment could add to H.B.'s adversity and likely perpetuate antisocial functioning. H.B. presented testimony about the type of programming available in a secure juvenile facility, and the district court inferred that the combination of a secure juvenile facility that provides trauma-informed treatment, transitional programming, and probationary supervision, all with the threat of a stayed adult sentence, would be more likely to protect the public in the long term. As we explained in *In re Welfare of D.M.D.*, the district court has "the discretion to weigh the factors in the context they are presented." 607 N.W.2d 432, 438 (Minn. 2000). And here, as in *D.M.D.*, based on our review of the record, the district court did not clearly err in crediting the testimony of H.B.'s experts. *Id.* The district court could properly consider the testimony, in addition to the fact that while the probation officer's certification study recommended adult certification, the State proffered no evidence regarding the programming available to H.B. in the adult prison system. The district court took note of expert testimony about H.B.'s need for juvenile-specific programming and the amount of time H.B. would be under the juvenile court's jurisdiction of between 48 to more than 60 months and compared the evidence with the recommendation for adult certification and the presumptive 306-month prison sentence. The district court balanced these competing considerations

and ultimately concluded that public safety would be served by an EJJ designation. On this record, the district court's conclusion was not clearly erroneous. Instead, it was the court of appeals that erred in concluding that there was no evidence to demonstrate that the punishment and programming in the juvenile system served public safety and that the district court abused its discretion by weighing the fifth public safety factor against certification.

* * *

In sum, we conclude that the court of appeals correctly determined that the district court committed clear error in concluding that the second (culpability) and fourth (programming history) public safety factors do not weigh in favor of adult certification. And although we also conclude that the court of appeals improperly determined that the district court committed clear error in finding that the fifth public safety factor does not weigh in favor of adult certification, that does not change our ultimate affirmance of the court of appeals that the district court abused its discretion and that the matter should be remanded for adult certification. The district court's findings that the first and third public safety factors favored certification was uncontested on appeal. Thus, the first four public safety factors all favor certification, including the first and third factors—the two factors that the Legislature has expressly directed are to be given "greater weight." *See* Minn. Stat. § 260B.125, subd. 4. To not certify here would instead give greater weight to the fifth and sixth factors—the only two factors weighing against certification—in direct contravention of the Legislature's mandate. Our decision applies the correct burden of proof—whether the State has proven that retaining H.B. in juvenile court does not serve public safety—

against the backdrop of the extensive evidence in this case. Accordingly, the court of appeals properly concluded that the district court abused its discretion when it determined that the State had not met its burden of proving by clear and convincing evidence that retaining H.B. in the juvenile system would not serve public safety.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

C O N C U R R E N C E

McKEIG, Justice (concurring).

I agree with the majority's determination that a district court is limited to considering the level of the child's participation in planning and carrying out the offense and the mitigating factors set out in Minn. Sent. Guidelines 2.D.3.a when determining the culpability of a child under Minn. Stat. § 260B.125, subd. 4(2) (2020). I also agree that the court of appeals properly concluded that the district court abused its discretion when the district court found that the State failed to meet its burden in proving that public safety would not be served by retaining the matter in juvenile court. I write separately to address the larger policy issues raised by this case.

As chronicled by the dissent, statutory presumptions against adult certification shifted in the 1990s in response to concerns about increases in serious juvenile crime. *See generally Minn. Sup. Ct. Advisory Task Force on the Juv. Just. Sys: Final Report*, 20 Wm. Mitchell L. Rev. 595 (1994); *see also* Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 Minn. L. Rev. 473, 480 (2017) ("By the 1990s, punitive policies supplanted juvenile courts' earlier emphases on offenders' rehabilitation and had a disproportionate impact on children of color."). Subsequent scientific discoveries regarding juvenile brain development have prompted shifts from the "moral-panic" period of the 1990s to approaches focused more on rehabilitation. Anabel Cassady, Note, *The Juvenile Ultimatum: Reframing Blended Sentencing Laws to Ensure Juveniles Receive a Genuine "One Last Chance at Success"*, 102 Minn. L. Rev. 391, 394 (2017) (internal quotation marks omitted) (quoting Owen D.

Jones, Jeffrey D. Schall & Francis X. Shen, *Law and Neuroscience* 554 (2014)). This shift can be seen in U.S. Supreme Court jurisprudence as well; beginning with *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court has repeatedly recognized a categorical difference in the culpability of adults versus the culpability of children. *See*, *e.g.*, *Montgomery v. Louisiana*, 577 U.S. 190, 209–10 (2016); *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

Compounded with neuroscientific discoveries is the recognition of a "foster-care-to-prison pipeline." Alarmingly, 90 percent of foster children will come into contact with the juvenile justice system. Ashly Marie Yamat, *The Foster-Care-to-Prison Pipeline*, Just. Pol'y J., Fall 2020, at 3. Perhaps the child-protection system is not operating as designed. Budgetary constraints and employee shortages undoubtedly impact the ability of a system to function as intended. Or perhaps the very design of the system is flawed. Regardless of the reason, the unsettling fact is that H.B. is merely one of a troublingly large number of juveniles in the child-protection system who will end up facing criminal charges.

While I agree with the majority's legal determinations, the developing scientific understanding of the juvenile brain and the statistically demonstrable "foster-care-to-prison pipeline" seem to me to suggest that we are at a crossroads for how we deal with some of the most vulnerable individuals in our society. But I also believe the resolution of these deeply complex policy issues is a question for the Legislature, not this court. *See State v. McReynolds*, 973 N.W.2d 314, 320 (Minn. 2022). Accordingly, I concur.

CHUTICH, Justice (concurring).

I join in the concurrence of Justice McKeig. I agree with the court about the weight to be given to the Legislature's public safety factors under the circumstances present here. I also believe that the developing scientific understanding of the juvenile brain warrants legislative attention concerning criminal consequences for youthful offenders. I further share Justice McKeig's concerns about the efficacy of our system to protect abused and vulnerable children.

MOORE, III, Justice (concurring).

I join in the concurrence of Justice McKeig.

D I S S E N T

THISSEN, Justice (dissenting).

This is a tragic case. Steve Markey was murdered when he was shot three times in his car in broad daylight. He lived with his mother, stepfather, sister, and brother-in-law; his family was very close. He was beloved by his community. He was described as "kind and joyous." Over 500 people attended his memorial service. He worked as a paralegal for his mother. They had just started a business helping people expunge old criminal records. He was also growing out his hair for Locks of Love. His family is devastated by ongoing and irreparable grief at his loss. Because of the murder, a hole will exist in Steve Markey's family and in our community forever.

Appellant H.B. was 15 years old when he participated in the events that led to Steve Markey's murder. H.B. and another juvenile carjacked Markey in downtown Minneapolis. Both the other juvenile and H.B. fired their weapons during the incident. In post-*Miranda* statements, the other juvenile stated that he shot the victim in the shoulder and he was responsible for killing the victim. H.B. told police that he fired at the car as it was driving away. The medical examiner determined that the victim died of multiple gunshot wounds.

H.B. grew up on the Pine Ridge Reservation in South Dakota. His mother had—and continues to have—serious alcohol and drug addiction issues since before H.B.'s birth. His father has been incarcerated for most of H.B.'s life, and his parental rights were terminated. H.B. had little stable housing growing up, often moving from relative to relative or living in cars. He and his sisters experienced and witnessed sexual and physical abuse. Since he was a young child, he had a history of hiding and running away.

H.B. has been involved with child protective services since he was 4 years old. Starting at age 6, H.B. moved through a series of group homes and foster homes and was often on the run and homeless. In his first 15 years, H.B. experienced nine of the 10 adverse childhood experiences recognized by mental-health experts and he has been diagnosed with post-traumatic stress disorder (PTSD). The child protection system and our community bear some responsibility for H.B.'s circumstances. He has never been provided the type of individualized trauma-informed treatment—treatment that is available—that could provide him with the tools he needs to address his complex trauma. And he most certainly will not receive that type of treatment if he is incarcerated in adult prison for a presumptive sentence of 12½ years or more.

As a court, we cannot repair the damage that has been done to Steve Markey, his family, and our community. Nor can we turn back the clock and fix the damage that has been done to H.B. over the course of his childhood. What we can and must do is follow the directive of the Minnesota Legislature, which decided several decades ago that our state would not give up on children under the age of 16 who commit serious crimes except in very rare circumstances. I dissent because the court is disregarding the statute and giving up on H.B.

After an extensive and thorough consideration of the complex issues of youth violence, public safety, and the potential for rehabilitating children who are still developing, the Legislature directed that children under the age of 16 who commit crimes—even very serious, violent crimes—*must* remain under the jurisdiction of the juvenile court unless the State proves by clear and convincing evidence that public safety

can be served *only* when the child is tried in adult court and incarcerated in adult prison. *See* Minn. Stat. § 260B.125, subd. 2(6)(ii) (2020).

The juvenile court in this case carefully reviewed the record, including several expert reports. It also heard extensive testimony from those experts, from representatives of Minnesota's juvenile system and adult corrections system, and from Steve Markey's family, as well as H.B.'s family. The juvenile court issued a thorough and balanced 30-page order setting forth its reasons for concluding that public safety would not be served by certifying H.B. for adult criminal prosecution, its reasons for retaining juvenile jurisdiction over his case, and designating H.B. as an extended jurisdiction juvenile. The juvenile court summation of its analysis bears repeating:

> At this moment in time, there are two ways to protect public safety. One is to lock [H.B.] up for a long time in an adult prison. The public would be safe from [H.B.] while he is in confinement, but there is no evidence that the public would be safe upon his release. The other is to focus on rehabilitation. Rehabilitation is the focus of the juvenile system, and the evidence has proven that effective treatment for [H.B.] aimed at rehabilitation is only available in the juvenile system, and only if [H.B.] is designated for extended juvenile jurisdiction.

Here, the court chooses to ignore our deferential standard for reviewing the findings and decision of the juvenile court and instead imposes its own preference for the outcome. The court chooses to overlook that the burden of proof is on the State to prove by clear and convincing evidence that public safety cannot be served by retaining H.B. as an extended jurisdiction juvenile. And, to reach that outcome, the court offers a strained interpretation of certain statutory factors that the Legislature directed courts to consider in assessing public safety. For those reasons, I dissent.

A.

The State filed petitions alleging that H.B. committed two first-degree aggravated robberies and second-degree murder (with intent without premeditation and without intent while committing a felony). For purposes of adult certification proceedings, we accept those allegations as true. *In re Welfare of W.J.R.*, 264 N.W.2d 391, 393 (Minn. 1978).

H.B. was 15 years old when he committed these crimes, and he committed all three crimes with a 16-year-old child. During the two aggravated robberies, H.B. held a gun to each victim's head when they robbed each of their cars. The second-degree murder occurred during an attempted carjacking: the other child shot the victim while the victim was still in his car and H.B. then fired his gun at the car as it was driving away. H.B. stated that he was homeless and had not eaten for a couple of days, that he was "nervous and scared," and that he only shot at the rear tires of the car to make it stop. The victim later died of three gunshot wounds.

All three of these crimes had a significant impact on the victims. It is undoubtedly traumatic to experience armed robbery and gun violence. And as the juvenile court rightly noted about Steve Markey, "[t]he impact on this victim is death, and the impact on the victim's family is a horrible, unending grief."

Expert evaluations of H.B. reveal that lifelong instability, trauma, and neglect have led to several vulnerabilities: diagnoses of PTSD, conduct disorder, unspecified trauma and stressor-related disorder, adjustment disorder, and attention deficit hyperactivity disorder; decreased ability to think and make executive decisions; a high vulnerability to negative peer influence; and lack of impulse control. H.B. was persistently traumatized

and physically abused as a very young child in his home. Reports signal "a pattern of sexual abuse, threatened sexual abuse, substance abuse, and neglect." He reported seeing "a lot of stuff I wasn't supposed to—people doing drugs and stuff, people dying." Although child protective services was involved with his family "constantly" and removed all children, including H.B., from the home when he was only 4 years old, the systems meant to protect him provided no stability.

H.B. was in and out of shelters, foster placements, group homes, and residential treatment centers for the entirety of his childhood. Because H.B. alleged that he was being harmed at his second foster placement, he was removed from that foster home and placed at St. Joseph's Home for Children. He repeatedly ran away from placements and as he got older, he alternated living with friends, in shelters, and on the streets.

As one expert noted, "Every system that might have mediated his primary experiences failed [H.B.]." A lack of coordinated care from child protective services failed to protect him. The school system failed to identify his need for an individualized education plan until he was in the eighth grade, and he was consistently "passed from one school to another." Providers assessing his mental health beginning at age 11 identified significant needs. They noted that "continued therapeutic services are needed due to the severity of [H.B.'s] emotions and how he expresses them outwardly onto others. To not continue services may lead to future issues with mental health, difficulties with interpersonal relationships, as well as issues with pro social engagement with others." No treatment was provided, however, for another year and half.

H.B.'s father was in prison during his childhood. After he was released, H.B.'s father promoted radical ideologies to H.B. and led him into some internet activity that caught the attention of the Federal Bureau of Investigation. It appears that H.B. was offered some "individual and group therapy, educational support, and a structured and safe living environment" at the Port Boys Home for about a year when he was 12. Although there is no evidence that any of the therapy offered at Port Boys Home was trauma informed or individualized to H.B.'s diagnosed needs, he made progress while he was there.

Intertwined with, and as a result of, H.B.'s "highly unstable family and social environment," H.B. exhibited "acting-out behaviors," including repeatedly running away from placements, stealing cars (sometimes to sleep in), committing property crimes, violating curfew, and committing the aggravated burglaries and murder alleged in the present petitions. Experts opined that his "extensive history of running away" stems from the avoidance behaviors that H.B. adopted to cope with his "unmediated traumas" and untreated PTSD symptoms.

The record indicates that until now H.B. has *never* had access to the long-term, trauma-informed care in a secure facility that experts agree he has needed. The closest thing to individualized, appropriate care was during a 45-day assessment at Bar None—a secure facility. H.B.'s record at Bar None was not unblemished. On one occasion, he fled while he was being transported from a court hearing back to Bar None. But overall, H.B. responded so positively there that it was recommended he be placed in their long-term residential treatment program. Unfortunately, one month after H.B. moved into the residential program, Bar None lost its license. The Certification Study prepared by a

Hennepin County probation officer quotes H.B. as stating, "I wouldn't be in this mess if Bar None didn't close." While awaiting a disposition review hearing to "determine next steps," H.B. again ran away and 3 months later committed the serious crimes alleged in the petitions in this case. *See* Minn. R. Juv. Prot. Proc. 51.03 (mandating court review of a disposition of protective supervision at least every 6 months).

B.

My objections to the court's opinion in this case fall into three categories. First, the court fails to afford sufficient deference to the juvenile court's factual findings and balancing of the statutorily required public safety factors set forth in Minn. Stat. § 260B.125, subd. 4 (2020). Second, the court overlooks the State's heavy burden to establish that public safety cannot be served by retaining juvenile jurisdiction over H.B. In other words, the court fails to apply the statutory presumption against certification for children under 16 years old. Third, the court interprets and applies the public safety factors in a cramped fashion that requires mental gymnastics to get around the plain language of section 260B.125, subdivision 4, and the rules of statutory interpretation that we routinely employ. I will address each of these objections below in my analysis of the six public safety factors and wholistic assessment of the risk to public safety. But first, it is important to provide a brief overview of the statutory process for certifying children under the age of 16 as adults.[1]

[1] Understanding the context of the provisions governing the process of adult certification for children under age 16 within the broader juvenile justice statutory framework—rather than limiting our focus to isolated provisions in section 260B.125,

1.

The process and standards for adult certification are set forth in Minn. Stat. § 260B.125 (2020). The essential legal fact in this case is that H.B. was 15 years old when he committed the alleged offenses. The certification statute draws a sharp line at age 16. The standard for certifying a child younger than 16 as an adult is very different from the standard for certifying a child that is 16 years old or older. And because the Legislature drew that clear line, we must carefully adhere to it.[2]

---

subdivision 4—is important and legitimate. The comparison between how the Legislature intended courts to deal with certification petitions involving children under 16 and certification petitions involving children 16 and older and understanding how those provisions intersect with the extended jurisdiction juvenile law provides textual and structural insight into what the Legislature meant by the words it enacted. Considering the broad and complexly structured statutory framework is also appropriate because, as discussed below, the adult certification process and the provisions for extended-jurisdiction-juvenile prosecution were enacted at the same time and address the same subject of how best to address juvenile offenders. *See State v. Fugalli*, 967 N.W.2d 74, 80 (Minn. 2021) (stating that the pre-ambiguity whole statute canon "applies when two statutes were enacted at the same time and address the same subject").

[2] The court of appeals noted that, at the time of the offenses, H.B. was "approximately one month before his 16th birthday, after which he would be subject to presumptive adult certification." *In re Welfare of H.B.*, 956 N.W.2d 7, 10 (Minn. App. 2021). The State's brief also notes H.B.'s age in detail to the day, implying that proximity to his 16th birthday is relevant. Juvenile age categories are bright-line rules. *See Nelson v. State*, 947 N.W.2d 31, 40 (Minn. 2020) (citing *Miller v. Alabama*, 567 U.S. 460 (2012); *Montgomery v. Louisiana*, 577 U.S. 190 (2016)) (denying a petition for postconviction relief based on an argument that the *Miller*/*Montgomery* rule, which renders life without parole unconstitutional for juvenile offenders, should still apply to him because he was only 7 days past his 18th birthday). We stated in *Nelson* that "[t]he nature of a bright-line rule is that in some instances it will be under-inclusive," especially in cases with difficult facts, but that "ethical, moral, and public policy-based concerns . . . are better left to the Minnesota Legislature." *Id.* at 39–40.

In *Nelson*, we were applying a judicially developed standard under the Cruel or Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

Subdivision 2(6)(ii) provides:

> [T]he juvenile court may order [adult] certification *only* if . . .
> . . . .
> (6) the court finds . . .
> . . . .
> (ii) that [the child is less than 16 years old] and the prosecuting authority has demonstrated by clear and convincing evidence that retaining the proceeding in the juvenile court *does not* serve public safety. If the court finds that the prosecutor has not demonstrated by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety, the court shall retain the proceeding in juvenile court.

Minn. Stat. § 260B.125, subd. 2(6)(ii) (emphasis added).

The statutory text makes two things crystal clear. First, the statute imposes a presumption *against* certifying children ages 14 and 15 years to adult court, even when they have committed the most serious crimes. A 14- or 15-year-old child *must* remain in the juvenile system except when public safety *cannot* be served unless the child stands trial in adult court, is sentenced as an adult, and is incarcerated in an adult prison. When there is a potential that public safety can be served by retaining the child in the juvenile system, adult certification is prohibited.[3] In contrast, if a child was 16 or 17 years old at the time

---

In stark contrast, the bright line drawn here at 16 years old was enacted by the Legislature. Finally, it certainly cannot be that the bright-line rule is impermeable when it increases punishment or decreases individual rights but more fluid when it decreases punishment or increases individual rights. Courts and the State cannot have it both ways.

[3] The court seems to suggest that the presumption against certification is only about which party has the burden of production and has nothing to do with the decision the juvenile court must make. I do not think the statutory language supports that position. Section 260B.125, subdivision 2(6)(ii), places limitations on the decision of the *juvenile court*: it may order adult certification of a 14- or 15-year-old child only when it finds that retaining the proceeding in the juvenile court *does not* serve public safety. In other words, the presumption is that a child less than 16 years old should stay in juvenile court, and the district court must determine that the presumption should not apply.

of the offense and (1) the alleged offense would result in a presumptive commitment to prison under the sentencing guidelines, or (2) the child used a firearm during commission of a felony, the certification statute presumes that adult certification is appropriate. Minn. Stat. § 260B.125, subd. 3.

Second, if a child was less than 16 years old when he committed the offense, the State has a burden to prove by clear and convincing evidence that public safety cannot be served if the juvenile court retains jurisdiction over the child. Minn. Stat. § 260B.125, subd. 2(6)(ii). The statute imposes *no burden* on a 15-year-old child to demonstrate why he should stay in juvenile court because courts must presume that keeping him in juvenile court serves public safety. In contrast, if the child was 16 or 17 years old when the offense occurred, and the alleged offense would result in a presumptive commitment to prison under the sentencing guidelines or the child used a firearm during the crime, the *child* bears the burden of proving by clear and convincing evidence that retaining the proceeding in juvenile court affirmatively serves public safety. *Id.*, subd. 6(i).

The court tells us that it agrees with both of these principles, but it does not apply them. That is problematic because the fundamental distinctions that the Legislature drew between 14- and 15-year-old offenders and 16- and 17-year-old offenders are not an accident and must not be glossed over. The Legislature spent many months systematically weighing the difficult and competing interests involved in addressing the problem of serious crimes committed by children, culminating in the enactment of section 260B.125. *See State v. Khalil*, 956 N.W.2d 627, 641 (Minn. 2021) (observing that where the Legislature has enacted a complex statutory structure balancing several important interests,

"it is not our place to question those choices," but rather it is our obligation to "carr[y] out those legislative commands" even when we disagree with the Legislature's policy choices).

Prior to 1994, the statutory presumption against certification to adult court applied to all children (defined as less than 18 years old). *See* Minn. Stat. § 260.125, subd. 2(d)(2) (1992) (requiring the prosecuting authority in all adult certification cases to demonstrate by "clear and convincing evidence that the child is not suitable to treatment or that the public safety is not served under the provisions of laws relating to juvenile courts").[4]

In 1994, the Legislature responded to growing concerns about the increase in serious juvenile crime by significantly reforming the delinquency statutes. *See generally* Symposium, *Minn. Sup. Ct. Advisory Task Force on Juv. Just. Sys.: Final Report*, 20 Wm. Mitchell L. Rev. 595, 598 (1994), [hereinafter Task Force Report] ("year-long study, requested [by the Legislature] in response to the concern about juvenile crime . . . ."). The

---

[4] The prior statute provided that the fact that a child was 16 years old or older at the time of the offense was prima facie evidence in favor of certification. Minn. Stat. § 260.125, subd. 3 (1992) ("A prima facie case that the public safety is not served or that the child is not suitable for treatment shall have been established if the child was at least 16 years of age at the time of the alleged offense . . . ."). Notably, a prima facie case and a presumption are not the same thing. "A person can establish a *prima facie* case by introducing enough evidence to create a [fact] question, without shifting the burden of producing evidence to the other party." 11 Peter N. Thompson, *Minnesota Practice Series—Evidence*, § 301.01 (4th ed. 2012). A presumption, however, creates a burden of proof that includes both the burden of production and the burden of persuasion. *Id.* The burden of production obligates a party "to come forward with sufficient evidence to support its claim." *Braylock v. Jesson*, 819 N.W.2d 585, 590 (Minn. 2012). And the burden of persuasion obligates a party "to persuade the [fact-finder] of the truth of a proposition." *Id.* Prior to 1994, then, it was presumed that retaining all children 14 years old and older in juvenile court served public safety, and a 16-year-old child did not have any burden to prove otherwise when facing a petition for certification—the burden to prove, by clear and convincing evidence, the need to certify any child for adult prosecution remained at all times with the State.

1994 statutory reforms crystallized and sharpened the statutory divide between offenders who were 16 and older at the time of the offense and offenders who were 14 and 15 years old. Children ages 16 and older who had committed serious crimes were removed from the general presumption against certification, explicitly shifting the burden of proof from the prosecutor to the child and making it easier to certify those older children for adult proceedings. *See* Minn. Stat. § 260.125, subd. 2a (1994); *see also* Task Force Report at 629 (clarifying that "[u]nlike the *prima facie* case . . . . [u]nder the presumptive certification system, the defense will always have the burden of proving the juvenile should be retained in the juvenile system"). In short, these reforms manifested the Legislature's intent to get tougher on juvenile crime committed by children ages 16 and older; it did not change the burden of proof at all for children under 16 years old.

Importantly, the Legislature also enacted a provision allowing for an extended jurisdiction juvenile (EJJ) as part of the 1994 reforms. Act of May 5, 1994, ch. 576, § 14, 1994 Minn. Laws 934, 945–47 (codified as amended at Minn. Stat. § 260.126 (1994)). Designating a proceeding as EJJ allows the juvenile court to retain jurisdiction over a 14- to 17-year-old child who is "alleged to have committed a felony," Minn. Stat. § 260B.130, subd. 1 (2020), until they turn 21 years old, with the option to terminate its jurisdiction "at any time," Minn. Stat. § 260B.193, subd. 5 (2020).[5] Under an EJJ prosecution, when a child is found guilty of a felony, courts must impose an adult sentence simultaneous to the juvenile disposition. *See* Minn. Stat. § 260B.130, subd. 4 (2020). The execution of the

[5] In the absence of an EJJ designation, juvenile courts may retain jurisdiction only until the child turns 18 years old. *See* Minn. Stat. § 260B.101, subd. 1 (2020).

adult sentence "shall be stayed on the condition that the offender not violate the provisions of the disposition order and not commit a new offense." *Id.* The statute further directs that if "a person convicted as an extended jurisdiction juvenile has violated the conditions of the stayed sentence, or is alleged to have committed a new offense, the court may, without notice, revoke the stay and probation and direct that the offender be taken into immediate custody." *Id.*, subd. 5(a).

The addition of EJJ to Minnesota's juvenile justice system at the same time it reformed adult certification provisions for 16- and 17-year-olds tells us several important things. First, adding the EJJ dispositional option to the juvenile justice system was a major reform recommended by the task force specifically to provide "one last chance" for serious youthful offenders in the juvenile system. *See* Task Force Report at 603. It reflects the longstanding and broadly accepted understanding that children—even children who have committed serious crimes—are still maturing and should have a chance at rehabilitation, that the State should provide such rehabilitation in an age-appropriate setting if possible, and that children are too vulnerable for the adult system. Second, EJJ prosecution allows more time—3 more years—for a child to successfully engage with juvenile treatment and rehabilitation. Third, EJJ prosecution provides a toggle to the adult system for those who violate court-imposed conditions; children who violate conditions go to adult prison with an adult conviction. In other words, one important practical outcome for a child prosecuted EJJ and a child certified to adult court would be the same: the child would have an adult sentence imposed in both cases. Accordingly, EJJ prosecution provides an important

additional layer of community-safety protection when children are retained in the juvenile system.

In summary, the certification statute presumes that retaining children who are 14 and 15 years old in the juvenile system, even when they have committed serious crimes, is the optimal way to serve public safety. And the statute imposes a heavy burden on the State to move the dial from the presumption that *juvenile proceedings are best suited to serve public safety*, to *juvenile proceedings (including an EJJ with a stayed adult sentence looming) cannot serve public safety* in a particular instance.

The court's analysis does nothing more than recite that H.B.'s case is not a presumptive certification case. Beyond that recitation, its analysis disregards the operation of the statutory presumption *against* certification and reads no differently than a presumptive certification case would for a 16- or 17-year-old.

Before moving on to the application of these standards to the question of whether the juvenile court abused its discretion in retaining jurisdiction over H.B., I briefly review what the State must demonstrate to overcome the presumption that public safety is served by retaining juvenile court jurisdiction over a 15-year-old offender. The statute directs courts to consider the following six factors when deciding whether the State carried its burden of proving that public safety *cannot be served* by keeping a 15-year-old offender in the juvenile system: (1) "the seriousness of the alleged offense," (2) "the culpability of the child," (3) "the child's prior record of delinquency," (4) "the child's programming history," (5) "the adequacy of the punishment or programming available in the juvenile justice system," and (6) "the dispositional options available for the child." Minn. Stat.

§ 260B.125, subd. 4. The statute also directs the court to "give greater weight to the seriousness of the alleged offense and the child's prior record of delinquency." *Id.* Two observations are worth noting prior to discussing these factors in more detail in Section B.2 below.

First, rehabilitation is central to (indeed, the preferred option for) promoting the public safety when a child under 16 commits an offense.

> The purpose of the laws relating to children alleged or adjudicated to be delinquent is to promote the public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law prohibiting certain behavior and by developing individual responsibility for lawful behavior. This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth.

Minn. Stat. § 260B.001. subd. 2 (2020). The Legislature further directed that "[t]he laws relating to juvenile courts," including the adult certification statute and the application of the public safety factors, "shall be liberally construed to carry out [that] purpose." *Id.*, subd. 3. The task force report that led to the 1994 reforms similarly observed that "the juvenile justice system should provide a continuum of supervision and appropriate programming which meets the needs of juvenile offenders, provided in the least restrictive environment that is consistent with public safety." Task Force Report at 598. And during the Senate Crime Prevention Committee hearings leading up to the 1994 statutory reforms, it was emphasized that "rehabilitation should remain a strong element," even for serious offenders, and because of that, the juvenile justice system must "treat kids differently" because "we have not abandoned rehabilitation as we have with adults." Hearing on Juvenile Justice System Advisory Task Force Report, S. Comm. Crime Prevention, 78th

Minn. Leg., January 19, 1994. Rehabilitation as a priority for juvenile offenders of all ages remained a prominent theme throughout the 4 months of hearings preceding the enactment of the 1994 reforms.

Second, the analysis of the six public safety factors is a balancing process where we assess how the factors interact with each other. It "is not a check-the-box, prescriptive analysis." *See State v. Mikell*, 960 N.W.2d 230, 245 (Minn. 2021) (discussing the multi-factor balancing test in speedy-trial cases); *see also Olson v. One 1999 Lexus*, 924 N.W.2d 594, 606 (Minn. 2019) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)) (observing that the *Mathews* factors applied in procedural due process cases "are more than a checklist of items to be ticked through selectively or by rote. The flexibility required of the due process analysis demands that the factors be actively balanced."). Further, we must balance the interrelated factors in the service of answering the essential statutory question of whether public safety cannot be served by retaining a 15-year-old child in the juvenile system and can be served only when the child is certified for trial in adult court, sentenced to an adult sentence, and incarcerated in adult prison. *See* Minn. Stat. § 260B.125, subd. 2(6)(ii); *see also Mikell*, 960 N.W.2d at 245 (citing *Barker v. Wingo*, 407 U.S. 514, 533 (1972)) (observing that the balancing of the *Barker* speedy-trial factors must be directed "to answer[ing] the essential question of whether the State brought the accused to trial quickly enough to avoid endangering the values that the right to a speedy trial protects"). The factors do not exist as independent concepts; they are lenses through which to answer the question of whether public safety cannot be served if the child remains under juvenile jurisdiction. Stated another way, the individual public safety factors are relevant

only to guide the court in answering the ultimate question of whether the State has overcome by clear and convincing evidence that public safety cannot be served by retaining a 15-year-old child in the juvenile system.

2.

I now turn to the analysis of the six public safety factors to assess whether the juvenile court abused its discretion when it determined that the State did not carry its heavy burden to prove by clear and convincing evidence that public safety cannot be served if H.B. is designated as an EJJ.

The standard of review is critical in this case. We review the juvenile court's decision regarding certification of a child to adult court for an abuse of discretion. *In re Welfare of J.H.*, 844 N.W.2d 28, 34 (Minn. 2014). "Specifically, we review questions of law de novo, and we review findings of fact under the clearly erroneous standard." *Id.* at 34–35 (citation omitted); *see also id.* at 39–40 (stating that "[o]n matters of credibility and the weight to be given the testimony of witnesses, we defer to the juvenile court" and finding that the juvenile court did not abuse its discretion when it "made written findings regarding each [public safety] factor" and expressly stating that it gave greater weight to factors one and three). "In determining whether the juvenile court's findings are clearly erroneous, we view the record in the light most favorable to the juvenile court's findings," *In re Welfare of J.H.*, 844 N.W.2d at 35, and we will not disturb the court's findings regarding public safety unless "on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed," *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (citation omitted) (internal quotation marks omitted).

Thus, we must take care as a reviewing court not to overstep and usurp the role of the juvenile court by imposing our own preferred way of resolving the case. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("We have criticized before the court of appeals' misapplication of the scope of review when it has usurped the role of the trial court by reweighing the evidence and finding its own facts . . . ."); *In re Welfare of Child of M.D.O.* 462 N.W.2d 370, 374 (Minn. 1990) ("When an appellate court ignores or abandons the standard of review, it usurps responsibilities properly left in the able hands of the trial court."). In *Sefkow*, we reversed the court of appeals' reversal of a custody determination under nearly identical circumstances to those before us now: the trial court expressly supported each of its findings with reference to testimony and evidence, expressly stated that it was relying on testimony of witnesses that it had found were credible, and analyzed every required statutory factor. *Sefkow*, 427 N.W.2d at 210–13. "[C]lear-error review does not permit an appellate court to reweigh the evidence." *Kenney*, 963 N.W.2d at 217. Yet that is what the court does here.

Further, even when there is evidence in the record to support a different assessment than that reached by the juvenile court as to each of the six public safety factors, we may not impose our preference because "it is the role of the trial court to make that determination." *See Sefkow*, 427 N.W.2d at 211 (finding that the trial court did not abuse its discretion in making a custody decision for the father when the evidence would have also supported a decision in favor of the mother); *see also Kenney*, 963 N.W.2d at 223 (quoting *Don Kral Inc. v. Lindstrom*, 173 N.W.2d 921, 924 (Minn. 1970)) ("When the

record reasonably supports the findings at issue on appeal, 'it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.' ").

The nature of the inquiry into a juvenile court's findings in adult certification cases demands particular care in applying this deferential standard. As discussed, when considering whether to certify a 15-year-old child offender like H.B. as an adult, the juvenile court must weigh and balance a series of fact- and case-specific factors to determine whether the State has carried its burden of proving by clear and convincing evidence that public safety can be served only if the child (if found guilty) is immediately sentenced as an adult and placed in an adult prison. *See Thornton v. Bosquez*, 933 N.W.2d 781, 795 (Minn. 2019) (acknowledging that the relevant statutory framework that mandated analysis of multiple factors and operative presumptions "required the district court to strike a fine balance" and that the district court did not abuse its discretion because it "ably recognized this fine line and provided ample support for its conclusions"). The complexity of balancing the interrelated factors makes it particularly problematic when a reviewing court extracts short quotes from a juvenile court's extensive findings of fact rather than considering the findings of fact in full.

Here, the juvenile court heard extensive testimony, reviewed several expert reports, and issued a 30-page order that documented, in detail, its "findings of fact and conclusions of law as to why certification [was] not ordered." *See* Minn. Stat. § 260B.125, subd. 8(b). The juvenile court included written findings on H.B.'s delinquency and programming history, current offenses, the credibility of witnesses, facts in the record, and relevant testimony to support both its findings on each of the statutory public safety factors and to

support its ultimate determination that the State had failed to meet its heavy burden to prove that public safety cannot be served if the juvenile court retained jurisdiction over H.B. and designating the matters for EJJ prosecution.[6]

Seriousness of the offense

Murder and armed robbery, by definition, are serious offenses. But that is not the inquiry. Rather, the question is whether the circumstances and conduct surrounding the specific murder and robberies committed by H.B. establish that the way he committed the offenses make them more serious than most murders or robberies.

Stated another way, I disagree that the seriousness of the offense should be assessed based on the seriousness of the *type* of the offense: second-degree murder is always more serious than first-degree assault, which is always more serious than an aggravated robbery. *See* Minn. Sent. Guidelines 4.A (providing that second-degree murder is a severity level 11 offense, first-degree assault is a severity level 9 offense, and aggravated robbery is a severity level 8 offense, and that each crime is a presumptive commitment to state imprisonment for first-time offenders). The statute does not support that approach.

First, section 260B.125, subdivision 2(6)(ii), imposes the clear presumption that all offenses committed by children under 16 years old should proceed in juvenile court unless the State proves otherwise by clear and convincing evidence. In contrast, when crafting

---

[6] The juvenile court's order in this case is impressive in the detail, comprehensiveness, and humanity of its consideration of each of the six public safety factors in this case. I wish I could include the juvenile court's order as an appendix so the public could assess the work of the juvenile court for itself. For important reasons, however, such juvenile records remain confidential.

the presumption in favor of adult certification for children 16 and older, the Legislature made an express distinction between types of crimes. The presumption in favor of adult certification is limited to cases where "the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the Sentencing Guidelines." Minn. Stat. § 260B.125, subd. 3(2).[7] The Legislature clearly knew how to vary the presumption in favor of adult certification or juvenile court according to the severity of the offenses under the sentencing guidelines but chose not to do so for offenders younger than 16. *See Gen. Mills, Inc. v. Comm'r of Revenue*, 931 N.W.2d 791, 796–97 (Minn. 2019) (finding it reasonable to read a Minnesota statute that incorporated an entire section of the Internal Revenue Code to incorporate all parts of that section of federal law because, in other related provisions, the Legislature expressly limited the incorporation of the Internal Revenue Code to specific subsections of the law).

Second, while I acknowledge that this is a case about adult certification and not about an upward sentencing departure, I also observe that the Legislature specifically directed the juvenile court to consider "the existence of any aggravating factors recognized by the Sentencing Guidelines" in assessing the seriousness of the offense. Minn. Stat. § 260B.125, subd. 4(1). In contrast to the sentencing guidelines' severity levels, the aggravating factors are used to distinguish between two instances of the same crime and enhance punishment when the circumstances surrounding a particular incident are

[7] Section 260B.125, subdivision 3(2), also makes adult certification presumptive for 16- and 17-year-old offenders when the child used a firearm in the course of the offense, even when the offense is not a presumptive commitment to prison under the sentencing guidelines.

particularly egregious in a way that justifies more severe punishment than the typical punishment for that crime. Minn. Sent. Guidelines, 2.D.1, 2.D.3.b. These contrasts reveal that section 260B.125, subdivision 4(1), focuses on facts that make a particular instance of the specific offense more serious than the typical case.

The Legislature's reference to the aggravating factors in the sentencing guidelines also tells us that overcoming the presumption against certifying children younger than 16 requires that the facts and circumstances that make a particular instance of an offense more serious than a typical instance be substantial and compelling. When section 260B.125 was enacted, the sentencing guidelines instructed as follows:

> The aggravating or mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favor of the guideline sentence. The purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be reduced if judges depart from the guidelines frequently. Certainty in sentencing cannot be attained if departure rates are high.

Minn. Sent. Guidelines II.D. cmt. II.D.03 (1993). That principle remains true to this day. *See* Minn. Sent. Guidelines 2.D. cmt. 2.D.103 (2022).

The statute also makes clear that the use of a firearm in committing a particular offense makes that specific instance of the crime more serious than a case where the offense was committed without the use of a firearm. Minn. Stat. § 260B.125, subd. 4(1); *see also id.*, subd. 3(2) (providing that adult certification is presumed for 16- and 17-year-old children who use a gun while committing any felony offense whether or not the offense would typically result in a presumptive commitment to prison). The impact of the crime

on the victim must also be considered when assessing the seriousness of the offense. *See id.*, subd. 4(1).

The parties do not dispute that these were serious crimes. I agree with that assessment. The juvenile court's determination that the murder and armed robberies that H.B. is presumed to have committed were serious offenses is right on point.[8] As required

---

[8] The juvenile court also noted that H.B. "planned out his crimes in advance, prepared for them by bringing a face covering and a gun, worked closely with an accomplice, and then carefully selected his victims looking for an easy target. This sort of planning and selection of victims increases the seriousness of the crime." I agree that these sorts of considerations are worthy of attention, but it is less clear whether they are relevant to assessing the seriousness of the offense or whether they are better considered in assessing the culpability of the child under section 260B.125, subdivision 4(2).

On the one hand, some of the facts identified by the juvenile court look like aggravating factors that could be considered, consistent with the nonexclusive list of aggravating factors set forth in section 2.D.3.b. of the sentencing guidelines. In particular, I agree that the act of selecting victims because the person looks like an easy target makes the crime more serious than the typical crime.

On the other hand, the Legislature specifically directed courts to consider the "child's participation in planning and carrying out the offense" under the culpability inquiry. Minn. Stat. § 260B.125, subd. 4(2). The statutory text's reference to aggravating and mitigating factors in the "seriousness" and "culpability" prongs respectively, suggest that the Legislature intended for the court to consider things that made the offense more serious—aggravating factors—under subdivision 4(1) and to consider things that minimize or mitigate a child's involvement in the crime (including lack of participation in planning and carrying out the offense, which may be common when a child is acting under the control of an adult) under the culpability inquiry. Although that issue need not be resolved here, two points are important.

First, regardless of the factor under which facts like H.B.'s planning of the crimes in advance, preparing for them by bringing a face covering and a gun, working closely with an accomplice, and selecting his victims by looking for an easy target are considered, they should be considered only once. Second, the question of where to consider these facts demonstrates the profound interrelation of the six public safety factors identified by the Legislature. It is imperative to consider them not only individually, but also to balance the factors carefully together to answer the fundamental question for adult certification of a child less than 16: did the State prove by clear and convincing evidence that it is not possible to serve public safety if the case remains in the juvenile court?

by the statute, the juvenile court noted that all three crimes involved "the use of a gun." It further considered how the specific circumstances of the murder here differed from a typical case of murder. The juvenile court observed that "[p]ublic safety is in grave danger when gunshots are fired" at a moving car in a busy area of Minneapolis at 5 p.m. on a weekday. The juvenile court noted the high risk of harm that such actions posed to others in the community. Finally, and critically, the court followed the directive of the Legislature and considered the impact on the victims in assessing the seriousness of the crime:

> The Court listened very carefully to the testimony of the victim's mother, whose grief is inconsolable. [The victim] is dead, murdered by two youth in the course of a random car jacking. His family will never be the same.
>
> . . . .
>
> The victim [in one of the robbery cases] was "visibly shaking and crying when officers arrived."

The juvenile court's findings on, and analysis of, the seriousness factor (as with its consideration of all the factors) was thorough and is well-founded on the facts. There is no basis to reject them as an abuse of discretion.

But it is important to note that the conclusion that the crime was serious does not end the inquiry on the import of that determination in making the final adult certification decision. At the end of its analysis, when the juvenile court balances all six individual factors (and places greater emphasis on the seriousness of the crime and the record of delinquency), it must ultimately consider whether the reasons the crime is serious render it impossible to serve public safety if the case remained in the juvenile court. That is why it

is important that we do not consider the factors in isolation. I will turn to the question of whether the district court abused its discretion in that analysis in Section B.3 below.[9]

Culpability

The next factor considered is H.B.'s culpability in committing the alleged offenses. Here, the juvenile court ultimately concluded that H.B.'s culpability "does not weigh in favor of certifying these matters for adult prosecution." In my opinion, the juvenile court did not abuse its discretion in making this determination.

The culpability inquiry for adult certification cases involving children under the age of 16 is whether the State has proven by clear and convincing evidence that the child was more culpable for the crimes committed than a typical defendant who commits those same crimes. The child has no burden to prove that they were somehow *less* culpable than a typical defendant who commits the same crimes.

This conclusion is supported by the text and structure of the statute. The court's contrary position, that a child is either culpable or not and that no consideration should be given to the level of culpability, fails to give effect to the ordinary meaning of culpability and the structure of the statute, as I will explain below. But it also ignores that, for children under the age of 16, the burden of establishing the need for adult certification is on the State. If the only question were whether the petition alleges that the child is culpable in

---

[9] Section 260B.125, subdivision 4, makes it clear that, along with the child's prior record of juvenile delinquency, "the court shall give greater weight to the seriousness of the alleged offense" than other factors in determining whether the State has demonstrated by clear and convincing evidence that retaining the proceeding in juvenile court does not serve public safety. That greater weight should be addressed in the final step of balancing the factors. Accordingly, I will discuss it in Section B.3.

the sense that "this person did this bad act"—something that will be true of *every* petition—the State will always carry its burden, and children under 16 years old are treated no differently from children ages 16 and older. Such an approach effectively collapses the statutory age divide between the required burdens of proof in certification cases.

Turning to the statute, the language of section 260B.125, subdivision 4(2), directs the juvenile court to consider factors that may increase or diminish the child's culpability; a clear indication that the statute is not limited to the simple question of whether the child is culpable or not. For instance, section 260B.125, subdivision 4(2), prompts the juvenile court to consider "the level of the child's participation in planning and carrying out the offense" as part of the culpability inquiry. This directive to consider the level of the child's participation in planning and carrying out the offense applies both to offenders under 16 years old and offenders 16 years old and older. The context makes clear that the common-sense operating assumption under section 260B.125, subdivision 4(2), is that a typical offender participates to some degree in the planning and carrying out of an offense. It is the variation from that baseline that matters.

For example, consider a child who is 16 years old at the time they commit a presumptive-certification crime. In such a case, the child must prove they are *less* culpable than the typical offender who commits that crime. In other words, proof that the child did *not* actively participate in the planning and carrying out of the crime (but merely followed the directives of adults who masterminded and directed the child's conduct, for example), would mitigate against adult certification. In the case of a child under 16 years old, when the presumption is that the child *should not* be certified as an adult, variation from the

baseline means that the level of the child's participation in the planning or carrying out of an offense must be more than just joining in the planning and carrying out of the offense.

The juvenile court stated as an initial matter that the "facts tend to indicate that" H.B. was "fully culpable and participated in the planning and carrying out" of each offense. In making that statement, the juvenile court determined that H.B. factually participated in planning and carrying out the offenses.[10] But it is not clear from that determination, or from anything in the record, that H.B.'s actions make him *more* culpable than a typical defendant who commits those same crimes. Among other things, while H.B. was wielding a gun during all three crimes, he did not fire the gun until after the other child shot the victim during the carjacking that resulted in murder—and he then shot at the back of the car after it was driving away. Stated differently, it is far from clear that the State proved that most other offenders who commit murder and aggravated robbery *do not* participate at some level in planning and carrying out crimes; the State certainly did not prove that H.B.'s culpability varied from the typical case by clear and convincing evidence.

In addition to the level of the child's participation in planning and carrying out the offense, section 260B.125, subdivision 4(2), also requires the court to consider "the existence of any mitigating factors recognized by the Sentencing Guidelines." The juvenile court determined that "[t]here are no mitigating factors recognized by the Minnesota

---

[10] The juvenile court did not make inconsistent findings on culpability. Rather, it considered the facts of the three offenses to assess whether H.B. participated in planning and carrying out the offenses and it considered expert testimony about H.B.'s past trauma and its effect on his decision making and impulse control relative to other children his age. The juvenile court appropriately approached the question in all its complexity and nuance. The court now improperly plucks one statement concerning culpability out of context.

Sentencing Guidelines present in the circumstances surrounding the commission of any of these alleged offenses." Of course, the absence of mitigating factors is not proof that H.B. was more culpable than the typical defendant, which is the question for a 15-year-old offender.

Further, as the juvenile court found, there is extensive evidence in the record that H.B. was less culpable for his conduct than the typical offender. After recounting the facts of H.B.'s life challenged by abuse, neglect, and instability, the juvenile court noted that multiple experts testified that H.B.:

> [S]uffers from posttraumatic stress disorder, that his ability to think and make executive decisions is not as advanced as a neuro-typical child of the same age . . . that he is very reactive . . . . [and] may have a lack of impulse control and an impaired ability to think through the potential consequences of [his] actions.

The juvenile court found the experts to be credible. The juvenile court also properly drew reasonable inferences from those facts, something we routinely allow factfinders to do. The juvenile court determined that the facts of H.B.'s vulnerability to peer influence, decreased ability to think and make executive decisions, and his extreme reactivity stemming from his traumatic past and multiple mental health diagnoses "weigh[] against assigning full culpability." That determination is fully supported by the series of medical examinations and other records presented to the juvenile court, as well as the expert reports and testimony. The evidence upon which the juvenile court relied was individualized and specific to H.B. and go beyond his mere status as a juvenile. Moreover, the State

introduced absolutely nothing to counter the expert opinions supporting H.B.'s diminished capacity for thinking or making executive decisions.[11]

H.B.'s trauma-induced diminished capacity for thinking and making executive decisions, lack of impulse control, and impaired ability to consider the consequences of his actions relative to his peers are certainly relevant to his culpability from any ordinary perspective. These considerations impact his blameworthiness. The ordinary meaning of the word "culpability" is "the quality or state of [meriting condemnation or censure esp. criminal]" or "blameworthiness." *Culpability*, *Webster's Third New International Dictionary* (1976); *Culpable*, *Webster's Third New International Dictionary* (1976). The

---

[11] The juvenile court relied on a line of Supreme Court cases as legal authority for it to consider expert testimony, based on scientific and academic research, relevant to its consideration of the culpability factor. *See Roper v. Simmons*, 543 U.S. 551, 571 (2005) (holding that the death penalty for juveniles is unconstitutional based on their "diminished" and "lesser" culpability); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (relying on its culpability analysis in *Roper*); *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012) (holding that sentencing schemes must consider juveniles differently from adults because of their reduced moral culpability). The Court's culpability analysis in all three cases relied on "common sense" and on "science and social science." *See Miller*, 567 U.S. at 471. The juvenile court's reliance on those cases to supplement its understanding of the record was proper. Citation to these cases as additional context does not render clearly erroneous the juvenile court's decision that the facts of H.B.'s vulnerability to peer influence, decreased ability to think and make executive decisions, and his extreme reactivity stemming from his traumatic past and multiple mental health diagnoses "weigh[] against assigning full culpability."

The juvenile court did not rely merely on H.B.'s generic status as a juvenile to support its conclusion. Rather, the record before the juvenile court is replete with evidence *specific to H.B.* and his individualized culpability to support its conclusion that he is not sufficiently culpable to support a determination that public safety cannot be served unless he is certified to adult court and adult prison. Indeed, the two paragraphs discussing the Supreme Court cases could be eliminated from the juvenile decision and its findings on and analysis of H.B.'s individualized culpability, and the import of those findings on its conclusion—that H.B.'s culpability does not support overturning the presumption that H.B. should remain under juvenile jurisdiction—would not change.

juvenile court's conclusion that H.B.'s culpability does not weigh in favor of adult certification certainly is not an abuse of discretion under any test this court has ever applied.

Perhaps most tellingly, however, the court does not deny that expert testimony and other record evidence support the juvenile court's determination of diminished capacity and culpability, that the juvenile court found the experts to be credible, and that the State offered no rebuttal to the expert testimony. Instead, the court simply chooses to ignore the evidence and (like the court of appeals) claims that section 260B.125, subdivision 4(2), prohibits juvenile courts from *ever* considering in *any* adult certification case individualized expert testimony that a child who has suffered trauma may have diminished capacity for thinking, making executive decisions, and impulse control relative to his peers. The court's decision on this point is unjustified and unjustifiable.

The statutory text simply does not support the court's reading of the statute. To quote: "the court shall consider . . . the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines." Minn. Stat. § 260B.125, subd. 4(2). The court reads those words to say that the *only* and *exclusive* things that may be considered under section 260B.125, subdivision 4(2), is the culpability of the child, the level of the child's participation in planning and carrying out the offense, and the existence of any mitigating factors recognized by the sentencing guidelines. Because the child's psychological state and immaturity are not explicitly listed, the court (like the court of appeals) concludes that they are impermissible

factors to consider. That is a remarkable interpretation for a court that usually prides itself on its textualism and deference to the Legislature in matters of statutory interpretation.[12]

---

[12] I understand the court to be adopting the court of appeals' reading of the statute. The court of appeals held that the only factors a juvenile court may consider under section 260B.125, subdivision 4(2), are culpability, participation in the planning and carrying out of the offenses, and mitigating factors recognized by the Minnesota Sentencing Guidelines. The court of appeals did not reject the evidence about H.B.'s impaired decision-making, impulse control, and inability to contemplate the consequences of his actions because such evidence is irrelevant to H.B.'s blameworthiness generally. Rather, the court refused to recognize that evidence because it did not rise to the level of mental impairment that would justify reduction of an adult sentence under a specific provision of the sentencing guidelines. *In re Welfare of H.B.*, 956 N.W.2d at 13 (citing *State v. Wilson*, 539 N.W.2d 241, 247 (Minn. 1995)). In other words, like the court's analysis, the court of appeals determined that the text of the statute categorically prohibited the juvenile court from considering the evidence.

The court, however, may be reading the court of appeals' decision differently. The court states:

> While the presumptive and non-presumptive distinctions for adult certification place the burden of production on one party or the other, the district court ultimately decides whether the record is sufficient to support the certification decision by weighing the six public safety factors. The court of appeals here did not shift the burden to H.B. Instead, the court of appeals engaged in *a sufficiency analysis* to review the record and determine whether the evidence supported the district court's ultimate decision not to certify H.B. for adult prosecution.

Supra at 26 (emphasis added). If all the court means by "sufficiency analysis" is that it is proper to exclude evidence (here, H.B.'s undisputed traumatic history and mental diagnoses) because the Legislature provided in the statute that it cannot be considered, then I have no quibble with this passage (although, of course, I disagree with the statutory interpretation). But if the court means that it was permissible for the court of appeals to reweigh the evidence to determine its sufficiency, then I strenuously disagree on the ground it is counter to decades of our case law.

Similarly, to the extent that (in the court's words) the court of appeals "used the lack of expert testimony on the ultimate question [of public safety] to support its conclusion that retaining H.B. in juvenile court did not serve public safety," *supra* at 26, the court of appeals was impermissibly reweighing the evidence and not affording appropriate clear-error deference to the juvenile court. I agree with the court that an expert is not

First, if "culpability" is a separate consideration independent of participation in planning and carrying out an offense and the existence of mitigating factors—a point that the court is extremely fuzzy on—then (as discussed above) the undisputed evidence of H.B.'s trauma-induced diminished capacity for thinking and making executive decisions, lack of impulse control, and impaired ability to consider the consequences of his actions

---

prohibited from expressing an opinion on the ultimate fact of risk to public safety. On the other hand, (and I understand the court to agree on this point), expert testimony on the ultimate question of risk to public safety—a decision the juvenile court judge must ultimately make—is not *required*. In a similar setting, in a recent case involving the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act, we were asked to decide whether a qualified expert witness must testify as to the ultimate issue of whether continued custody is likely to result in serious emotional or physical damage to a child. *In re Welfare of Children of S.R.K. & O.A.K.*, 911 N.W.2d 821, 829 (Minn. 2018). We concluded that such testimony was not needed—the Legislature did not impose a requirement that the expert utter a "magic phrase"—because the question was one for judicial determination. *Id*. (internal quotation marks omitted). The expert testimony simply needed to support the ultimate judicial determination. *Id.* Here, credible expert testimony supports the juvenile court's judicial determination of diminished culpability, and neither the court of appeals nor this court may disregard the juvenile court's assessment of that expert testimony and substitute its own.

When all is said and done, the question here—whether H.B.'s culpability strongly suggests that public safety cannot be served if H.B. stays in the juvenile system—is a question of fact. Based on its consideration of the record evidence, including H.B.'s history of trauma and mental diagnoses and the inferences it reasonably drew therefrom, the juvenile court answered that question in the negative. As appellate courts, neither we nor the court of appeals may reweigh the evidence in the record and ignore the factual determination of the juvenile court on how culpability should weigh in the balance of factors if there is evidence in the record to support that determination—at least we may not do so without upsetting our long-standing clear-error jurisprudence. Accordingly, the court's substituted finding that H.B.'s culpability supports overturning the presumption that he should remain under juvenile jurisdiction can be sustained *only* if the juvenile court's consideration of H.B.'s undisputed history of trauma and the expert mental diagnoses is *prohibited* as a matter of law. In short, the court's substituted finding on culpability rises or falls on its strained reading of the statute and the word "including." *See infra* at D-34.

relative to his peers is certainly relevant to his culpability from any ordinary understanding of the word culpability. The court simply ignores this fact.

Second, the court's interpretation is structurally strained. Subdivision 4(2) identifies a general category (culpability) followed by illustrative examples of things that may bear on culpability.[13] An ordinary user and reader of English would immediately pick up that the Legislature is concerned with culpability generally and offered two nonexclusive factors that must be considered in assessing culpability; only a lawyer squinting really hard could read the language to preclude any other indicia of greater or lesser culpability. Had the Legislature intended that a court could consider only the level of the child's participation in planning and carrying out the offenses and the existence of mitigating factors recognized by the sentencing guidelines, it would have been simpler just to say that—"the court shall consider the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines." Instead, the Legislature prefaced subdivision 4(2) with the broad

---

[13] The same structure is also used in subdivisions 4(1) and 4(4) of section 260B.125. But the court does not adopt the position that the consideration of the seriousness of the crime under subdivision 4(1) is limited to the existence of aggravating factors, the use of a firearm, and the impact on the victim. *See supra* at 21. The court may dodge that inconsistency by noting that the issue is not before us, but the State refused to concede at oral argument that a court's consideration of the seriousness of the offense was limited to the existence of aggravating factors, the use of a firearm, and the impact on any victim. *See In re Welfare of P.C.T.*, 823 N.W.2d 676, 683 (Minn. App. 2012) (concluding in a case of a 16-year-old offender that a court may consider more than the specifically enumerated "meaningful participation in programming" when assessing "the child's programming history" under section 260B.125, subdivision 4(4)), *rev. denied* (Minn. Feb. 19, 2013).

and general reference to the culpability of the child.[14] Contrary to the court's position, this context does not suggest "including" is meant to be interpreted narrowly because the word is used to specify precisely what the court must consider. Rather, the language tells us that the court must consider culpability generally and, in doing so, must consider (among other things) the level of child's participation in planning and carrying out the offense and the existence of any sentencing guidelines mitigating factors.

Third, "including" does not mean "including only" or "including exclusively." Dictionaries of both common and legal usage agree that "including" means to contain part of a whole and is not a term of limitation. *See, e.g.*, *Including*, *New Oxford American Dictionary* (3d ed. 2010) ("containing as part of the whole being considered"); *see also Include*, *Black's Law Dictionary* (10th ed. 2010) (stating that "[t]he participle *including* typically indicates a partial list" and noting that the phrases "*including without limitation*" and "*including but not limited to*" mean the same thing as simply "*including*"); *Including but Not Limited To*, Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3d ed. 2011)

[14] The strain that the court's interpretation places on the statutory text is also demonstrated by the fact that at times the court seems to read the words "the court shall consider . . . the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines," Minn. Stat. § 260B.125, subd. 4(2), as "the court shall consider (1) the culpability of the child in committing the alleged offense, (2) the level of the child's participation in planning and carrying out the offense, and (3) the existence of any mitigating factors recognized by the Sentencing Guidelines." Such an interpretation reads the word "including" entirely out of the text. And, as noted, the incoherence of the interpretation is also demonstrated by the fact that the court also seemingly refuses to recognize any separate indicia of culpability aside from the level of planning and carrying out the alleged offense and the existence of any mitigating factors that are not explicitly recognized by the Sentencing Guidelines.

("[T]he word *including* itself means that the list is merely exemplary and not exhaustive . . . .").

Courts also widely agree that the term "including" is "not one of all-embracing definition," but connotes simply an "illustrative application of the general principle." *See Fed. Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941); *G&I IX OIC LLC v. County of Hennepin*, 979 N.W.2d 52, 58 (Minn. 2022) (quoting *Including*, Bryan A. Garner, *Garner's Dictionary of Legal Usage* 439 (3d ed. 2011) ("[Including] should not be used to introduce an exhaustive list, for it implies that the list is only partial.")); *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 19 (Minn. 2012) (holding that "[t]he use of the word 'includes' indicates legislative intent" that a claim can be proven by the example included (sexual harassment), but that singular example "does not provide the exclusive means to establish" that claim); *see also, e.g.*, *P.R. Mar. Shipping Auth. v. Interstate Com. Comm'n*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list . . . is illustrative, not exclusive.").

Further, " '[w]hen "include" is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded.' " *Bloate v. United States*, 559 U.S. 196, 219 (2010) (quoting 2A N. Singer & J. Singer, *Sutherland Statutes and Statutory Construction* § 47:23, (7th ed. 2007), and collecting cases); *see also Janssen v. Janssen*, 331 N.W.2d 752, 756 (Minn. 1983) ("[T]he word 'includes' . . . conveys the conclusion that there are other items includable, though not specifically enumerated." (citation omitted) (internal quotation marks omitted)); *White v. Nat'l Football League*, 756 F.3d 585, 595 (8th Cir. 2014) ("While at times, 'the expression of one thing excludes others not

expressed,' '[w]hen a statute uses the word "includes" . . . it does not imply that items not listed fall outside the definition.' " (citation omitted) (alteration in original) (first quoting *Bailey v. Fed. Intermediate Credit Bank of St. Louis*, 788 F.2d 498, 500 (8th Cir. 1986); then quoting *United States v. Whiting*, 165 F.3d 631, 633 (8th Cir. 1999))); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) (stating that "the word 'including' does not lend itself to such destructive significance" so as "to shrivel a versatile principle to an illustrative application").

The court's assertion that we have occasionally interpreted "including" as exclusive does not create an automatic ambiguity. Unless there is good reason from the context to set aside the broadly accepted inclusive meaning of including, we should not do so in an effort to create ambiguity. And based on the statutory context, reading "including" as exclusive is not compelling or applicable here.[15] Nothing in the text or structure of the

---

[15] The court cites only one of our previous cases to support its conclusion that our precedent is "split" on the legal or technical meaning of "including." In *Becker v. State Farm Mutual Automobile Insurance Co.*, we were tasked with interpreting the meaning of "insured" as defined in the statutory scheme of the Minnesota No-Fault Automobile Insurance Act. 611 N.W. 2d 7, 11 (Minn. 2000). The provision at issue stated that an insured is:

> [A]n insured under a plan of reparation security as provided by sections 65B.41 to 65B.71, including the named insured and the following persons not identified by name as an insured while (a) residing in the same household with the named insured and (b) not identified by name in any other contract for a plan of reparation security complying with sections 65B.41 to 65B.71 as an insured: (1) a spouse, (2) other relative of a named insured or (3) a minor in the custody of a named insured or of a relative residing in the same household with a named insured.

certification statutes suggests that "including" should be read as anything other than its ordinary meaning. *See, e.g.*, *Phelps Dodge*, 313 U.S. at 211 (" '[I]ncluding' may preface an illustrative example of a general power already granted, or it may serve to define that power . . . . Whether it is the one or another must be determined by the purpose of the Act, to be ascertained in the light of the context, the legislative history, and the subject matter to which the statute is to be applied."); *Lowry v. City of Mankato*, 42 N.W.2d 553, 559 (Minn. 1950) (holding that the definition of "including" depends on the circumstances of its use and, accordingly, the word "including" indicated that a "private garage" is one example of an "accessory building").

Further, we have clarified that a statutory definition including factors or a list must not be interpreted as exclusive when it would narrow the meaning of a statute in ways that would contravene its operational assumptions. *See Gill v. Gill*, 919 N.W.2d 297, 306 n.12 (Minn. 2018) (citing *Janssen*, 331 N.W.2d at 756). Interpreting "including" in section 260B.125, subdivision 4(2), to mean that courts may not consider all the facts relevant to the child's culpability contravenes the statute's core operational presumptions. Such an interpretation would severely limit the juvenile court's discretion in an area where we have repeatedly recognized and protected its very broad discretion, it would prevent courts from considering factors that the Legislature and this court have recognized are imperative when

---

See id. at 11 (quoting Minn. Stat. § 65B.43, subd. 5 (1998)). Interpreting the list of individuals subject to statutory qualifications that were "insured" to be illustrative in that context would have resulted in rendering the remaining provisions in that subdivision meaningless and undermined the entire underlying scheme of the insurance statutes. *Id.* at 12–13. That rationale has no application when interpreting section 260B.125, subdivision 4.

considering juvenile culpability for serious crimes, and it would impermissibly impede the juvenile court's ability and discretion to retain its jurisdiction over young serious offenders in the interest of public safety. There is simply nothing in this context that limits the meaning of "including" to exclude relevant mitigating factors that are not listed in the sentencing guidelines from the court's consideration. *See generally Peterson v. City of Minneapolis*, 878 N.W.2d 521, 524–25 (Minn. App. 2016), *aff'd*, 892 N.W.2d 842 (Minn. 2017) (finding that because "including" is inclusive and not exclusive, when the statute did not define "dispute resolution process" but followed it with the phrase "including arbitration, conciliation, mediation or grievance procedures," that list is not exhaustive and thus does not exclude other, unlisted, complaint processes (quoting Minn. Stat. § 363A.28, subd. 3 (2014))). The court's suggestion that "context"—the fact that the word "including" references something specific (the sentencing guidelines)—"strongly suggests that the word 'including' is a limitation," *see supra* at 18, begs the question: when would there ever be a time when a list beginning with "including" does not reference something specific? The court's analysis if applied to statutes generally (including statutes we have previously interpreted) entirely swallows the widely accepted, common understanding of "including" as nonexclusive.

Moreover, the mitigating factors, or reasons for departure, in the sentencing guidelines themselves are not exclusive. *See* Minn. Sent. Guidelines 2.D.1.d. (stating that "the departure factors in this section are advisory"); *id.*, 2.D.3.a.5 (including in its mitigating factors "[o]ther substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense"); *id.*, 2.D.3 cmt. 2.D.301

("The Commission provides a *non-exclusive list of factors* that may be used as departure reasons . . . . The factors cited are illustrative and *are not intended to be an exclusive or exhaustive list*." (emphasis added)). We have recognized that sometimes the factors listed in the sentencing guidelines do not fit a specific case and that "the list is nonexclusive." *State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981) (affirming a downward departure from the sentencing guidelines for first-degree arson based on the fourth factor in Minn. Sent. Guidelines II.D.2.a (1981): "other substantial grounds exist which tend to excuse or mitigate the offender's culpability").[16] In *Wright*, we held that the trial court did not abuse its discretion when its justification for departure from the guidelines "focused more on [the] defendant as an individual and whether the presumptive sentence would be best for him and for society." *Id.* at 462; *see also id.* at 462–63 (noting that the "[d]efendant may well present a danger to the public safety if he is not supervised; but the trial court, relying on the opinion of the psychiatrist and the agent who prepared the presentence investigation report, basically concluded that there was a strong reason for believing that [the] defendant would be victimized in prison and that both [the] defendant and society would be better off" with a probationary treatment approach). Interpreting "including" as excluding consideration of anything not included in an explicitly nonexclusive list makes no logical sense.

[16] The language of the sentencing guidelines currently reads "Other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines 2.D.3.a(5).

The court offers a few additional "contextual" arguments that "including" is a word of exclusive limitation and should be interpreted to mean "including only." First, the court selectively includes a partial quote from the purpose provision of the delinquency provisions of the Juvenile Court Act: "to promote public safety and reduce juvenile delinquency by maintaining the integrity of the substantive law . . ." Minn. Stat. § 260B.001, subd. 2 (2020). It is not clear why those general words tell us that we are to interpret the statute narrowly so as to send children to prison more readily. More fundamentally, the court ignores the remainder of the language in the subdivision including the directive that the child-delinquency statutes "should be pursued through means that are fair and just, *that recognize the unique characteristics and needs of children*, and that give children access to opportunities for personal and social growth." *Id.* (emphasis added). The full definition points decisively in the direction of reading "including" as nonexclusive and applying the culpability factor broadly such that children younger than 16 remain in juvenile court. The court also notes legislative history suggesting that the Legislature was interested in an objective rather than subjective certification analysis. It is not clear to me how an individualized assessment of a child's culpability is anything other than objective.

In summary, there is simply no reasonable reading of section 260B.125, subdivision 4(2), that prohibited the juvenile court from considering the credible and uncontested individualized expert testimony that H.B. suffered trauma that has diminished his capacity for thinking, making executive decisions, and impulse control when assessing H.B.'s culpability compared with that of his peers. Further, if the juvenile court's consideration of those items was proper, its determination that H.B.'s culpability did not weigh in favor

of adult certification is not clearly erroneous. The court implicitly concedes as much. Consequently, the court is working hard to prohibit the consideration of plainly meaningful information about a child's culpability in order to overturn (under an abuse-of-discretion standard) a juvenile court's thoroughly reasoned assessment, and I am frankly baffled by the court's decision to do so.

Prior record of delinquency

The third factor courts must consider is the child's record of delinquency. We have said that the phrase " 'prior record of delinquency' unambiguously refers to records of petitions to juvenile court and the adjudication of alleged violations of the law by minors." *In re Welfare of N.J.S.*, 753 N.W.2d 704, 710 (Minn. 2008) (quoting Minn. Stat. § 260B.125, subd. 4(3) (2006)). The juvenile court identified one prior offense on which H.B. had been adjudicated delinquent (theft of a motor vehicle in February 2019) as well as the three pending charges at issue in this case and three other pending charges for burglary. The juvenile court concluded that H.B.'s prior record of delinquency suggests that he may be more of a public safety risk than a child without such a record. Once again, I agree; the juvenile court did not abuse it discretion on the implications of H.B.'s record of delinquency for his future risk to public safety.

Programming history

The fourth factor a court must consider when assessing whether public safety is not served by retaining the proceeding in juvenile court is "the child's programming history, including the child's past willingness to participate meaningfully in available programming." Minn. Stat. § 260B.125, subd. 4(4).

The juvenile court correctly noted that H.B.'s "programming history is marked by his unwillingness to engage in treatment and his absconding from shelters, programs, and treatment facilities" and that "[i]t is clear . . . that his instinct is to run away if he can." The juvenile court identified several instances starting when H.B. was 12 years old where H.B. ran away from programs.

The juvenile court also noted that H.B. had a different experience at Bar None—his last placement before his arrest for the crimes at issue in this case. The juvenile court found as follows:

> From November 14, 2018 through January 10, 2019, [H.B.] was at Bar None's MSU program. There is consensus among the staff at Bar None and Drs. Therson, Renkin and Gearity that [H.B.] participated in treatment, developed relationships with staff and made some progress during this time. [H.B.] appeared in Court on January 10, 2019, and was ordered to return to Bar None to complete additional programming. [H.B.] told the judge that he "has made great effort to improve his situation and comply with programming." Several hours later, while being transported back to Bar None, [H.B.] absconded from the transport vehicle and was again on the run. Once again, [H.B.] began to offend and was arrested on a new felony charge on February 3, 2019.
>
> After being arrested, he was ordered back to Bar None where he remained from February 19, 2019 through March 14, 2019. Bar None lost its license and [H.B.] was forced to leave through no fault of his own.

The juvenile court found that despite his inclination to run away, H.B. "did participate in treatment at Bar None, sought out staff and began to develop relationships with them, and did make some progress." The juvenile court concluded that H.B.'s record at Bar None, while far from unblemished, demonstrated an amenability to, as well as a

willingness to participate meaningfully in, programming.[17] Following the closure of Bar None, H.B. was placed in the Hennepin County Home School from which he later absconded.

Bearing in mind that the burden is on the State to prove by clear and convincing evidence that retaining juvenile jurisdiction over H.B. makes it impossible to serve public safety, the juvenile court also noted that the record provides a dearth of information about the type of programming offered to H.B. in the programs to which he was sent. In particular, there is no evidence that, in any of his prior programs, H.B. received the intensive trauma-informed treatment in a secure facility that the experts say he needs to succeed. The type of treatment he received in the programs is certainly relevant to any reasonable assessment of his prior programming.

The juvenile court took H.B.'s entire programming history into account, including information about the type of programming he was offered and temporal considerations, and determined that it did not support the conclusion that public safety cannot be served if H.B. remains in juvenile jurisdiction. Certainly, H.B.'s programming history is mixed and includes many false starts and failures. A different judge may have reached a different conclusion about whether H.B.'s programming history demonstrates that H.B. cannot be successfully treated in a juvenile facility. But that is not the question. On this record, I

---

[17] The Certification Study for H.B. (which recommended adult certification) referred to H.B.'s participation in several groups at Port Boys Home: TruThought, Anger Management, Group Therapy, Character Development, Big Changes Big Choices, Skill Streaming Group, and some individual therapy sessions. The Certification Study noted that H.B. made progress in the Port Boys Home programs, despite setbacks when he absconded.

cannot support the court's conclusion that the juvenile court abused its discretion or clearly erred in its findings of fact.

Adequacy of punishment or programming available in the juvenile justice system and the dispositional options available to the child

The fifth and sixth factors a court must consider are the adequacy of the punishment or programming available in the juvenile justice system (fifth factor) and the dispositional options available (sixth factor). The juvenile court certified H.B. as an EJJ for all three offenses. As discussed in detail above, if H.B. is adjudicated delinquent of the offenses, the court must impose one or more juvenile dispositions and it must also impose a stayed adult criminal sentence. Minn. Stat. § 260B.130, subd. 4(a).

The record discloses that treatment at the secure juvenile facility at Red Wing includes a minimum stay for loss-of-life cases of 18 to 24 months, but jurisdiction would continue until H.B. turned 21, which the juvenile court found was sufficient time for the 2 to 3 years of treatment recommended by the expert witnesses in this case. An offender cannot be released without court approval, and any release back into the community is planned, gradual, intensely supervised, and probationary. An individualized treatment plan developed at intake by an extensive team of experts and participation in treatment programming is mandatory. Critically, Red Wing offers trauma-informed treatment that guides juveniles through "trauma repair" in both individual and group settings—precisely the type of treatment in a secure facility that the experts said H.B. needs to succeed and which he was not offered in previous programs.

Multiple knowledgeable experts testified that H.B. would likely benefit from the treatment offered at Red Wing, and no testimony was offered to the contrary.[18] Finally, if H.B. fails to satisfy any of these or other dispositional conditions, including mandatory participation in treatment, or if he commits another offense, his adult sentence will be executed and he will be sent to adult prison to serve an appropriate adult sentence. Minn. Stat. § 260B.130, subd. 4(a)(2).

Based on this record, the juvenile court found that the dispositional options and programming at Red Wing would be "adequate" to provide a "meaningful opportunity for rehabilitation" and thus provide the "best chance of protecting public safety." Indeed, it specifically determined that "[t]he combination of trauma-informed treatment in a secure facility, transitional programming, intense probationary supervision, and the threat of a stayed adult sentence is more likely to protect the public in the long-term than long-term confinement in an adult prison."[19] Accordingly, the juvenile court determined that the fifth

---

[18] Notably, the corrections officer at the Youthful Offenders Program housed at the Minnesota Correctional Facility-Lino Lakes testified that juveniles serving adult sentences are housed separately from the adult population until they turn 19. However, they are given no individualized treatment; programming is limited to "cognitive skills workbooks" and "videos on hygiene, anxiety and depression." The record demonstrates that such lack of treatment would be counterproductive. Expert testimony established that the lack of treatment "can add to [H.B.'s] adversity and likely perpetuate antisocial functioning."

[19] As the Legislature noted when enacting the presumption against adult certification for children under 16 years of age and as the juvenile court emphasized, the rehabilitative goals of the juvenile system serve public safety. The presumption that public safety is not served by certifying children under 16 years old to adult court arises in part from the understanding that transfer to adult court "forecloses the possibility that psychologically flexible juvenile offenders will receive the treatment necessary to prevent them from reoffending." *See* Anthony R. Holtzman, Comment, *Juvenile Justice? The Increased*

and sixth factors did not support the conclusion that public safety cannot be served if it retained jurisdiction over H.B. That determination is not clearly erroneous.

Propensity for Juvenile Transfer to the Criminal Court System in Pennsylvania and the Need for a Revised Approach to Juvenile Offenders, 109 Penn. St. L. Rev. 657, 680 (2004); *see also* John Brigham, *Serious and Violent Juvenile Offenders: Why Should You Pay Attention?*, Prosecutor 40, 42 (2001) ("Juveniles, by virtue of their age alone, are uniquely susceptible to reform and rehabilitation.").

Research shows that "the public is not necessarily better protected by treating minors as adults because incarcerating juveniles in adult prisons has led to increased recidivism rates." Bree Langemo, Comment, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 Ohio N.U.L. Rev. 141, 157 (2004) (discussing research revealing that juveniles transferred to adult court are " 'three times more likely to reoffend and reoffended sooner than those kept in the juvenile court system' " (quoting Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 San Diego L. Rev. 783, 819 (2000))). Researchers have repeatedly found that transfer of juveniles to adult court "is more likely to aggravate recidivism than to control it" and have concluded that over both the short and long term, the " 'net effect of transfer is to increase the likelihood, the rate, and the severity of re-offending and to decrease the time to re-arrest.' " *See* Kelly M. Angell, Note, *The Regressive Movement: When Juvenile Offenders Are Treated As Adults, Nobody Wins*, 14 S. Cal. Interdisc. L.J. 125, 141 (2004) (quoting Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. Fla. J.L. & Pub. Pol'y 129, 138 (1998)); *see also* Holtzman, *supra* note 19, at 677.

Further, "substantial research has shown that criminal behavior is *accentuated* after a juvenile offender is released from an adult institution." Langemo, *supra* note 19, at 157 (emphasis added). Indeed, juveniles treated by juvenile courts are 29 percent less likely to be re-arrested because the "rehabilitation, treatment, and prevention" measures available in the juvenile system "improve the minor's personal situation in ways that help him or her not to re-offend." Kathleen A. Strottman, Note and Comment, *Creating a Downward Spiral: Transfer Statutes and Rebuttable Presumptions as Answers to Juvenile Delinquency*, 19 Whittier L. Rev. 707, 749 (1998).

In other words, the broad assumption that transferring more juveniles to adult courts will protect public safety by creating a "general deterrent effect" and reduce juvenile crime rates is not supported by the evidence. *See* Holtzman, *supra* note 19, at 659; *see also* Strottman, *supra* note 19, at 749 (noting that rehabilitation "recognizes that there are more effective ways to prevent crime than warehousing offenders in prison").

If public safety were viewed conceptually as merely protecting the community from exposure to the offender for a limited period of time, adult proceedings would nearly always swallow juvenile proceedings.

3.

I now widen the lens from each individual factor to a wholistic assessment of the risk to public safety. I turn to balancing the six public safety factors to determine whether the juvenile court abused its discretion by concluding that the State did not carry its burden of proving by clear and convincing evidence that public safety cannot be served by designating H.B. as an EJJ.

The offenses that H.B. is alleged to have committed are serious—more serious than the typical instances of those offenses. H.B. used a firearm, selected victims who looked like easy targets, and committed the murder in a particularly dangerous way by firing gunshots at a moving car in a busy area of Minneapolis at 5 p.m. on a weekday. In addition, the juvenile court found that H.B.'s actions had a particularly profound effect on the victims (including family member victims) of the crimes. Further, H.B. unquestionably has a long record of juvenile delinquency, engaging in a series of crimes of escalating severity. Accordingly, the nature of H.B.'s specific actions and his record of delinquency suggest that, *if nothing else changes*, he poses a more serious risk to public safety when he returns to society from custody in a correctional facility than a typical 15-year-old offender. But as I discuss below, the embedded assumption that nothing will change if H.B. is designated as an EJJ and obtains trauma-informed treatment in the secure juvenile facility at Red Wing is far from clear.

Analysis of the culpability factor does not support the conclusion that it is impossible to serve public safety by designating H.B. as an EJJ or that an adult sentence served in adult prison is required to serve public safety. Certainly, H.B. participated in

planning and carrying out the offenses. But it is not clear that his participation in planning and carrying out the offenses is significantly different from other offenders. We cannot overlook the fact that H.B.'s 16-year-old accomplice is the one who shot directly at Steve Markey. H.B. did not know that was going to happen. He fired shots at the back of Steve Markey's car after the fact. Further, the juvenile court's determination that, due to the trauma, instability, and abuse inflicted on H.B. throughout his childhood, his ability to make executive decisions, control impulses, and think through the potential consequences of his actions is less developed than other 15-year-old children is well supported by credible and extensive expert testimony—expert testimony that was unrefuted by the State.

In addition, the record (including the credible expert testimony) supports the juvenile court's determination that H.B. never received the type of treatment and support services he needed to overcome the years-long impact of the trauma, abuse, and instability inflicted on him. This fact provides important context for assessing H.B.'s programming history. Moreover, his most recent programming experience at Bar None—which most closely approached the treatment in a secure facility that the undisputed expert testimony says he needs—demonstrates that H.B. is likely to meaningfully participate in treatment when the conditions and treatment match his needs. And, critically, the juvenile system offers just such trauma-informed treatment in the secure facility at Red Wing.

The expert testimony supports the juvenile court's determination that in the program at Red Wing, H.B. can succeed in addressing the unmet needs and mental health diagnoses that make him a public safety risk. On the other hand, the record is clear that if H.B. goes

immediately to adult prison, he will emerge into society in less than a decade having had absolutely zero meaningful treatment for his trauma-related pathologies.

Finally, because the juvenile court designated H.B. as an EJJ as the dispositional option in this case, if H.B. does not meaningfully participate in his treatment at Red Wing or continues to otherwise offend, the simultaneously imposed adult prison sentence will be executed—he will end up in precisely the same place that he would have had he been certified without having had the opportunity to seek treatment and rehabilitation at Red Wing. All of this suggests that there are reasons to believe that, *despite* H.B.'s prior record of delinquency and the seriousness of his crimes, public safety may still be served by maintaining his case in the juvenile system designated as EJJ.

After balancing all these factors with all the deference we must afford the juvenile court's factual and credibility determinations, I cannot support the court's conclusion that the juvenile court abused its discretion or that the State proved by clear and convincing evidence that public safety cannot be served by retaining juvenile jurisdiction over H.B. and designating H.B. as an EJJ. The court is imposing its own preferences and fears without regard for the juvenile court and the Legislature's clear intent for a distinct and robust juvenile justice system that retains presumptive jurisdiction over children under 16 years old. Therefore, I dissent.