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JUVENILE COURT BIDOVER HEARINGS

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On July 1, 1994 extensive amendments to the Ohio Rules of Juvenile Procedure became effective. One of the most important rules, as well as one of the most controversial, is Rule 30 which governs "bindover" proceedings. This procedure, also known as transfer, refers to the process by which a juvenile court relinquishes jurisdiction and transfers a delinquency case to the criminal courts for prosecution. In Ohio juvenile courts have exclusive jurisdiction over persons under the age of 18 who are charged with criminal conduct. R.C. 2151.23(A)(1). However, a juvenile 15-17 years of age who has been charged with a felony may be "boundover" to the criminal court for trial as an adult.

Bindover is unique to juvenile courts. "There is no proceeding for adults comparable directly to the juvenile jurisdiction waiver hearing." *Kempen v. Maryland*, 428 F.2d 169, 73 (4th Cir. 1970). It is part "preliminary hearing" and part sentencing hearing."

Bindover procedures have been part of the juvenile court system since the turn of the century, when the first juvenile courts were established in this country. Virtually every state has some type of bindover procedure. Nevertheless, the procedure remains controversial. The concept of bindover entails an implicit recognition that the juvenile court system should not be available to all children:

Some acts are so offensive to the community that the arbitrary line drawn at eighteen cannot acceptably be used to protect the alleged wrongdoer. The serious offender should not be permitted to escape the criminal justice system simply because he or she is a day or a year short of eighteen. As age eighteen approaches, credible argument can be made that the juvenile court's always inadequate resources should not be devoted to those youthful wrongdoers whose offenses are so serious or who appear to be so incorrigible as to be unworthy of or beyond help. *IJA-ABA Standards Relating to Transfer Between Courts* 3 (1980).

This view of transfer proceedings is not universally accepted: "Others argue that the existence of this loophole [transfer] in the juvenile system indicates a half-hearted commitment to treatment and a continued allegiance to rehabilitation on the part of society, an allegiance that is particularly distasteful because it applies to the very persons whom the separate juvenile court system was designed to

protect." P. Piersma, J. Ganousis, A. Volenik, H. Swanger & P. Connell, *Law and Tactics in Juvenile Cases* 274 (3d ed. 1977).

CONSTITUTIONAL ISSUES

Procedural Due Process

In *Kent v. United States*, 383 U.S. 541 (1966), the United States Supreme Court considered a challenge to transfer proceedings conducted pursuant to the D.C. Code. Kent was taken into custody for rape. As a 16 year old, he was subject to juvenile court jurisdiction. The juvenile court, however, transferred his case for trial as an adult. The transfer was accomplished without a hearing or written reasons. In addition, the juvenile court failed to provide Kent's attorney with access to Kent's social service file.

On review, the Supreme Court held that the transfer proceedings were invalid. According to the Court, transfer is a "critically important" stage of the juvenile process and "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554.

Whether the Court intended to rest its decision in *Kent* on statutory or constitutional grounds is not entirely clear. At one point in the opinion, Justice Fortas wrote: "The Juvenile Court Act and the decisions of the United States Court of Appeal for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further." *Id.* at 556. Nevertheless, other parts of the opinion indicate a constitutional basis. One passage reads: "We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." *Id.* at 557. In another passage, the Court wrote that a transfer hearing "must measure up to the essentials of due process and fair treatment." *Id.* at 562.

A year after *Kent* was decided, the Supreme Court in *In re Gault*, 387 U.S. 1 (1967), revolutionized juvenile court procedure by applying due process safeguards to delinquency hearings. The Court ruled: "[N]either the Fourteenth Amendment [due process] nor the Bill of Rights is for adults alone." *Id.* at 13. The Court also quoted the

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Kent passage on due process and then wrote: "We reiterate this view . . . as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." *Id.* at 30-31.

Most courts now view *Kent* as establishing constitutional standards for bindover. For example, the Third Circuit has stated: "[I]t is our view that *Kent*, particularly in light of the Supreme Court's subsequent opinion in *In re Gault* . . . sets forth certain principles of constitutional dimension." *United States ex rel. Turner v. Rundle*, 438 F.2d 839, 841-42 (3d Cir. 1971).

The Ohio courts have repeatedly treated *Kent* as a constitutional case. See *State v. Adams*, 69 Ohio St.2d 120, 127 n.4, 431 N.E.2d 326, 331 n.4 (1982); *State v. Taylor*, 26 Ohio App.3d 69, 498 N.E.2d 211 (1985); *State v. Oviedo*, 5 Ohio App.3d 168, 170, 450 N.E.2d 700, 703 (1982); *State v. Riggins*, 68 Ohio App.2d 1, 6, 426 N.E.2d 504, 508 (1980); *In re Mack*, 22 Ohio App.2d 201, 203, 260 N.E.2d 619, 621 (1970).

Bindover Criteria

The U.S. Supreme Court, however, has yet to consider the constitutionality of the standards used in bindover proceedings. *Kent* involved procedural due process, not the substantive standard used to transfer a juvenile to criminal court. In *Breed v. Jones*, 421 U.S. 519 (1975), the Court commented that it "has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court." *Id.* at 537.

Constitutional challenges to transfer statutes typically have been based on vagueness grounds, but these challenges generally have failed. *E.g.*, *Speck v. Auger*, 558 F.2d 394 (8th Cir.), cert. denied, 434 U.S. 999 (1977); *Donald L. v. Superior Court*, 498 P.2d 1098, 1104 (Cal. 1972); *People v. Fields*, 199 N.W.2d 217, 222 (Mich. 1972), aff'd on rehearing, 216 N.W.2d 51 (Mich. 1974).

OHIO PROCEDURES

Ohio bindover proceedings are governed by R.C. 2151.26 and Juvenile Rule 30. The 1994 amendments have reduced the differences between these two provisions. Even prior to these amendments, however, the Ohio Supreme Court had indicated that the statute and rule should be construed together. See *State v. Douglas*, 20 Ohio St.3d 34, 35, 485 N.E.2d 711 (1985) ("R.C. 2151.26 and Juv. R. 30 set forth the procedure to be followed by a juvenile court in a bind-over situation").

Generally, only a properly transferred juvenile may be prosecuted in the criminal courts. A prosecution in criminal court on the mistaken belief that the child was over 18 at the time of the offense is a "nullity." R.C. 2151.26(E). Moreover, "[f]ailure to comply with the provisions of R.C. 2151.26 . . . deprives the Court of Common Pleas of jurisdiction over a juvenile defendant." *State v. Riggins*, 68 Ohio App.2d 1, 4, 426 N.E.2d 504, 507 (1980). Accord *State v. Taylor*, 26 Ohio App.3d 69, 498 N.E.2d 211 (1985) (Failure to comply with notice requirements deprives the criminal court of jurisdiction.)

JUVENILES SUBJECT TO TRANSFER

The statute and Rule 30 specify which juveniles are subject to bindover and the applicable criteria for making discretionary bindover decisions. Before a juvenile may be transferred, the court must find that (1) there is probable cause to believe that the juvenile has committed the alleged

act, (2) the act would be a felony if committed by an adult, and (3) the child was 15 years or older. The child's age at the time of the offense, rather than at the time of the transfer hearing, controls.

The age requirement can cause unexpected results. For example, in *In re C*, Alleged Delinquent Child, 61 Ohio Misc.2d 610, 580 N.E.2d 1182 (C.P. 1991), the "delinquent" was not charged until after he was 21 years of age. The rape was alleged to have been committed when the "juvenile" was 14 years of age. A motion for bindover was dismissed because he was not 15 years old at the time of the alleged conduct. *Id.* at 612. The court also ruled that it lacked jurisdiction over the child at this time and therefore could not adjudicate the case. *Id.* at 614.

DISCRETIONARY TRANSFER

The most common type of transfer is discretionary transfer. In this situation, the court must find that there are reasonable grounds to believe (1) that the child is not amenable to care or rehabilitation or further care or rehabilitation in any facility for delinquent juveniles, and (2) that the safety of the community may require legal restraint for a period extending beyond his majority. R.C. 2151.26(A)(1); Juv. R. 30(D).

Juvenile Rule 30: Enumerated Factors

Amended Rule 30(F) requires the court to consider the following factors in determining whether a child is amenable to treatment: (1) age, (2) mental-physical condition, (3) prior juvenile record, (4) prior attempts at rehabilitation, (5) family environment, (6) school record, and (7) the specific facts of the offense. These factors have been applied in numerous Ohio cases:

(1) *Age*: *State v. Watson*, 47 Ohio St.3d 93, 94, 547 N.E.2d 1181 (1989) ("Because of a juvenile's age, there may not be sufficient time remaining for rehabilitation to take place before the twenty-first birthday, even though the juvenile is otherwise amenable to rehabilitation."); *State v. Ruple*, No. 15726 (9th Dist. Ct. App., 8-4-93) at 5 ("sixteen years and seven months old at the time of the incident").

(2) *Mental-physical condition*: *State v. Watson*, 47 Ohio St.3d 93, 94, 547 N.E.2d 1181 (1989) ("[N]o evidence of any psychiatric disorder."); *State v. McDonald*, No. 11228 (2d Dist. Ct. App., 6-5-90) at 12 ("psychological tests 'suggested' that the appellant was intensely hostile and destructive, and had a 'sadistic potential'").

(3) *Prior juvenile record*: *State v. Watson*, 47 Ohio St.3d 93, 94, 547 N.E.2d 1181 (1989) ("[N]o record of trouble with juvenile authorities."); *State v. Douglas*, 20 Ohio St.3d 34, 36, 485 N.E.2d 711, 713 (1985) ("lengthy prior juvenile record"); *State v. Carter*, 27 Ohio St.2d 135, 138, 272 N.E.2d 119, 121 (1971) ("many court appearances"); *State v. Houston*, 70 Ohio App.3d 152, 156, 590 N.E.2d 839 (1990) ("previous juvenile record from Michigan").

(4) *Previous efforts to treat or rehabilitate*: *State v. Carter*, 27 Ohio St.2d 135, 138, 272 N.E.2d 119, 121 (1971) (prior commitment to correctional school); *State v. Parks*, 51 Ohio App.3d 194, 197, 555 N.E.2d 671 (1988) (prior sentence to juvenile facility at Riverview Center and prior stay at Columbus juvenile facility marked by fights and poor attitude); *State v. Whiteside*, 6 Ohio App.3d 30, 35, 452 N.E.2d 332, 338 (1982) (prior treatment at the Ohio Youth Commission); *State v. Oviedo*, 5 Ohio App.3d 168, 171, 450 N.E.2d 700, 704 (1982) (prior probation).

(5) *Family environment*: State v. Houston, 70 Ohio App.3d 152, 156, 570 N.E.2d 839 (1990) ("Appellant's home situation was less than ideal, and little assistance could be expected from his family."); State v. Ruple, No. 15726 (9th Dist. Ct. App., 8-4-93) at 5 ("While Ruple's family environment was good, he had associated himself with friends with whom he had engaged in criminal behavior."); State v. Hawkins, No. 3462 (9th Dist. Ct. App., 6-8-83)(unstable family situation).

(6) *School record*: State v. Watson, 47 Ohio St.3d 93, 94, 547 N.E.2d 1181 (1989) ("[A]verage student who had not caused major discipline problems."); State v. Houston, 70 Ohio App.3d 152, 156, 590 N.E.2d 839 (1990) ("Appellant's school attendance was abysmal and his grades were poor."); State v. Hawkins, No. 3462 (9th Dist. Ct. App., 6-8-83)(suspended from school 8 times).

(7) *Specific facts of the offense that are relevant to physical and mental condition*. This factor was added in 1994 in response to the *Watson* case, which is discussed below.

Supreme Court Cases

The Ohio Supreme Court has discussed the bindover issue several times.

State v. Carmichael (1973)

In State v. Carmichael, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973) (syllabus 1), cert. denied, 414 U.S. 1161 (1974), the Court recognized that the juvenile court "should have considerable latitude within which to determine whether it should retain jurisdiction." *Id.* (syllabus). Moreover, the statutorily-required investigation "is not required to show that the child cannot be rehabilitated as a juvenile but only that there are reasonable grounds to believe that he cannot be rehabilitated." *Id.* at 6.

State v. Douglas (1985)

In State v. Douglas, 20 Ohio St.3d 34, 485 N.E.2d 711, 713 (1985), the Court ruled:

Neither R.C. 2151.25 nor Juv. R. 30 requires the juvenile court to make written findings as to the five factors listed in Juv. R. 30(E) [current (F) which lists 6 factors]. The rule simply requires the court to consider these factors in making its determination on the amenability issue. Although the better practice would be to address each factor, as long as sufficient, credible evidence pertaining to each factor exists in the record before the court, the bind-over order should not be reversed in the absence of an abuse of discretion. *Id.* at 36.

The Court also noted that "there is no requirement that each of the five factors be resolved against the juvenile." *Id.* at 37 (citing State v. Oviedo, 5 Ohio App.3d 168, 171, 450 N.E.2d 700 (1982)).

State v. Watson (1989)

In State v. Watson, 47 Ohio St.3d 93, 547 N.E.2d 1181 (1989), the defendant appealed the decision to transfer him to criminal court, where he was tried for aggravated murder and aggravated robbery. He argued that "amenability to treatment" must be determined solely by reference to the factors listed in Rule 30(F) [then Rule 30(E) which listed only 5 factors]. The Supreme Court rejected this argument, stating that "[t]here is no requirement that each, or any, of the five factors in Rule 30(E) be resolved against the juvenile

so long as the totality of the evidence supports a finding that the juvenile is not amenable to treatment." *Id.* at 95.

The Court added:

Rule 30 calls for a broad assessment of individual circumstances. Mechanical application of a rigidly defined test would not serve the purposes of the public or the juvenile. Further, reduction of the bindover decision to a formula would constrain desirable judicial discretion. We agree with appellant that Rule 30(E) [now (F)] requires consideration of all the listed factors, but we discern nothing in the rule, or in the policy it serves, which prohibits consideration of other relevant factors. *Id.* at 95-96.

The Court went on to rule that the "seriousness of the alleged offense" is a valid factor in determining a juvenile's amenability to care or rehabilitation in the juvenile court system. Again, the court noted that "the juvenile court enjoys wide latitude to retain or relinquish jurisdiction, and the ultimate decision lies within its sound discretion." *Id.* 95.

1994 Amendment

A 1994 amendment to Rule 30 added a sixth factor to reflect the Court's decision in *Watson*. Rule 30(F)(6) provides that "the specific facts relating to the offense for which probable cause was found, to the extent relevant to the child's physical or mental condition" is a proper consideration. The Staff Note (1994) includes the following caution: "While there is a danger that taking note of the facts surrounding a particularly heinous crime could prejudice a court's deliberations on the rehabilitation question, the Supreme Court of Ohio approved a court's ability to consider the totality of the circumstances which have brought the juvenile before the court in *State v. Watson*"

Safety of the Community

In evaluating the "safety of the community," the court may consider the nature of the offense, the existence of aggravating circumstances, and the extent of any apparent pattern of anti-social conduct. See State v. Carter, 27 Ohio St.2d 135, 136, 272 N.E.2d 119, 120 (1971) (juvenile court cited aggravated character of offense - armed robbery - in the transfer order).

In State v. Michael, No. 91-C-39 (7th Dist. Ct. App., 7-23-93), the juvenile was charged with nine counts, including aggravated burglary, aggravated assault, and other crimes. On appeal, the court upheld the decision to transfer:

The juvenile court obviously relied heavily on the serious and sometimes violent nature of the offenses with which appellant was charged. Having considered all factors, but having placed greater weight on the factors dealing with the violent nature of the crimes, it cannot be found that the juvenile court abused its discretion in ordering that appellant be tried as an adult. *Id.* at 4.

R.C. 2151.26(B) requires the court to consider, as an aggravating factor, whether the victim of the alleged offense was 65 years of age or older or was permanently or totally disabled at the time of the offense. See State v. Hurst, No. 89-C-34 (7th Dist. Ct. App., 8-15-90) at 7 ("We find that the trial court properly considered the nature of the offense, the violence involved, and the fact that the victim was eighty-six years of age.").

HEARING AND INVESTIGATION

R.C. 2151.26 and Rule 30 require an investigation and a hearing as a prerequisite to transfer. In *Kent* the U.S. Supreme Court held that "an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order." 383 U.S. at 561. In explaining the hearing requirement, the Court wrote: "We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." *Id.* at 562.

Probable Cause Hearing

Rule 30 establishes a two-step hearing procedure. First, a preliminary hearing is held to determine whether there is probable cause to believe the child has committed a felony. The child, the prosecutor, or the court may move for a preliminary hearing. If the court finds probable cause, the proceedings are continued until a full investigation is completed, at which time a second hearing is held to determine whether jurisdiction should be transferred to the criminal courts.

Amenability Hearing

The focus of the second hearing is the amenability of the child to rehabilitation in the juvenile court system. A social history may be prepared and used for this purpose. Juv. R. 32(A)(2).

It is unclear whether a juvenile can waive the transfer investigation and hearing. In *State v. Newton*, No. F-82-17 (6th Dist. Ct. App., 6-10-83), the court held that the investigation and hearing cannot be waived. Once probable cause is found at the preliminary hearing,

a full investigation is required and a hearing must be held on the matter to determine whether the court should transfer jurisdiction to the trial court. At least one purpose of this hearing is to create a record in which the factual basis of the transfer order might be shown. Therefore, we conclude that the Juvenile Court erred in accepting a "waiver" of these procedures, which are mandatory and cannot be waived. *Id.* at 6-7.

In contrast, the court in *State v. Soke*, No. 62908 (8th Dist. Ct. App., 7-15-93), upheld such a waiver. The court wrote:

Defendant also maintains that there is no authority contained within R.C. Chapter 2151, or Juv. R. 30 which permits a defendant to waive bind over proceedings. We agree that there is no specific authority for waiver of a bind over hearing, but we note that there is likewise no prohibition for waiver of the hearing.

Defendant also maintains that pursuant to the pronouncements of the United States Supreme Court in *Kent v. United States* (1966), . . . a hearing on the issue of the bind over is a critical phase and is mandatory. Critical phases, however, may be knowingly, competently and intelligently waived. *Id.* at 6-7.

MENTAL AND PHYSICAL EXAMINATION

Juvenile Rule 30(B) provides for a mental and physical examination. This examination may be waived, and refusal to submit to the examination constitutes a waiver. Juv. R. 30(G); R.C. 2151.26(C) (waiver must be "competently and intelligently made").

Waiver

In *State ex rel. Doe v. Tracy*, 51 Ohio App.3d 198, 555 N.E.2d 674 (1988), the court ordered a mental examination pursuant to Rule 30. After this examination, the prosecution moved for a second mental examination by a psychologist of the state's choosing. The juvenile attempted to waive this examination but the court refused. When the juvenile, on advice of counsel, refused to answer questions at the second examination, the court cited him for contempt. The appellate court upheld the juvenile's right to waive the examination:

[The statute] makes it equally clear that the decision to submit to or waive the examination rests ultimately with the child. The only requirement is that any waiver must be competently and intelligently made. . . . Accordingly, where the child competently and intelligently waives the mental and physical examination, the court must complete its investigation without it. Any attempt on the part of the court to secure such an examination over a valid waiver would be unreasonable and would constitute an abuse of discretion. *Id.* at 201.

Constitutional Issues

In *State ex rel. a Juvenile v. Hoose*, 43 Ohio App.3d 109, 539 N.E.2d 704 (1988), the juvenile asserted his Fifth Amendment right with respect to a court ordered mental examination by the court psychiatrist. The court rejected this argument.

In essence, the argument raised by counsel for petitioner is that he faces a dilemma in advising his client on whether to submit to a mental examination by a court psychologist because of the potential use of any incriminating statements made by him during such examination.

Contrary to petitioner's concern here, it is our view that any incriminating matter which might be obtained during the mental examination with the court psychologist pertaining to the relinquishment proceeding is expressly precluded from being used for anything other than the waiver determination itself. Juv. R. 32(B).

Consequently, if the juvenile court decides to retain its jurisdiction, the relevant juvenile rule prevents the use of any statements made by petitioner during the course of the ensuing hearing there in determining the status of the charge or charges there. This provision in our judgment also bars the use of such statements if the juvenile is treated as an adult offender in the general division of the common pleas court. *Id.* at 112.

Citing *Ake v. Oklahoma*, 470 U.S. 68 (1985), the juvenile also moved for a private evaluation at the state's expense. In *Ake* the U.S. Supreme Court ruled that a criminal defendant had a due process right to a defense expert under some circumstances. The court of appeals ruled that *Ake* did not apply to transfer hearings because these hearings do not determine guilt or innocence, nor is liberty at stake. *Hoose*, 43 Ohio App.3d at 111 (citing *State v. R.G.D.*, 527 A.2d 834, 842 (N.J. 1987).

RIGHT TO COUNSEL

R.C. 2151.352 and Juvenile Rule 4(A) recognize the right to counsel at all juvenile court hearings. The right to counsel at transfer hearings is also constitutionally required. In

Kent the U.S. Supreme Court stated that "counsel must be afforded to the child in waiver proceedings," 383 U.S. at 562-63, and that "there is no place in our system of law for reaching a result of such tremendous consequences ... without effective assistance of counsel" *Id.* at 554. See also *Kempler v. Maryland*, 428 F.2d 169, 175 (4th Cir. 1970); *Inge v. Slayton*, 395 F. Supp. 560, 566 (E.D. Va. 1975), appeal dismissed, 541 F.2d 277 (4th Cir. 1976); *James v. Cox*, 323 F. Supp. 15, 20 (E.D. Va. 1971).

Waiver

Usually, the right to counsel may be waived. In Ohio, however, the right to counsel at a transfer hearing may not be waived. Juvenile Rule 3 provides that a child's "right to be represented by counsel at a hearing conducted pursuant to Juv. R. 30 may not be waived."

Effective Assistance

The right to counsel includes the right to effective assistance of counsel. This is the rule regarding the Sixth Amendment right to counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984) (Sixth Amendment requires reasonably effective assistance of counsel). The U.S. Supreme Court's references to "effective assistance" of counsel in *Kent* indicates that the same rule applies to the due process right of counsel in transfer proceedings. See *Geboy v. Gray*, 471 F.2d 575 (7th Cir. 1973) (noting counsel showed a "notable lack of zeal" in attempting to find alternatives to transfer).

The function of counsel at a transfer hearing is to challenge the evidence offered by the prosecution and to adduce evidence that the child is amenable to treatment in the juvenile system. In *Kent*, the Court commented that "if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to 'denigrate' such matter." 383 U.S. at 563.

Another court has noted: "The child's advocate should search for a plan, or perhaps a range of plans, which may persuade the court that the welfare of the child and the safety of the community can be served without waiver." *Haziel v. United States*, 404 F.2d 1275, 1279 (D.C. Cir. 1968).

For a discussion of counsel's role at the transfer hearing, see IJA-ABA *Standards Relating to Counsel for Private Parties* 161-68 (1980); Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 Minn. L. Rev. 167, 224-30 (1980).

NOTICE

R.C. 2151.26(D) and Juvenile Rule 30(C) require that written notice of the time, place, and nature of the hearing be given to the parents or guardian and counsel at least three days prior to the hearing.

In *State v. Taylor*, 26 Ohio App.3d 69, 498 N.E.2d 211 (1985), the court ruled that the "notice of hearing requirements ... are mandatory requirements, which cannot be waived by the juvenile by failing to object to non-compliance." *Id.* at 71. The presence of the defendant's sister at the hearing did not satisfy this requirement because she was not the legal custodian. The court also held that the notice requirement was jurisdictional: "[T]he juvenile court, failing to comply with the notice of hearing provisions of R.C. 2151.26, was without jurisdiction to bind the defendant over to the criminal, or general, division of the common pleas court and the latter was without jurisdiction to proceed

on the indictment against him." *Id.* at 72.

In *State v. Parks*, 51 Ohio App.3d 194, 555 N.E.2d 671 (1988), the court distinguished *Taylor*. At the probable cause hearing a detective testified that the defendant's grandmother had told him that she was the legal custodian and guardian. Although the detective never asked for documentation, the court ruled that the "record thus supports that notice was properly made upon the defendant's legal custodian as required by law." *Id.* at 196.

EXCLUSION OF PUBLIC

Juvenile Rule 27(A) and R.C. 2151.35 provide for the exclusion of the general public from juvenile court hearings; only persons with a direct interest in the case must be permitted to attend. However, in *State ex rel. Fyffe v. Pierce*, 40 Ohio St.3d 8, 531 N.E.2d 673 (1988), the Supreme Court refused to issue a writ of prohibition to close a transfer hearing. The Court pointed out that both the rule and the statute make closure discretionary. Moreover, the Court found an adequate remedy at law: "If tried as adults, they can move for change of venue to alleviate any unfairness that pretrial publicity may cause. If change of venue is denied, and relators are subsequently convicted, they can appeal." *Id.* at 9.

In *In re T.R.*, 52 Ohio St.3d 6, 556 N.E.2d 439 (1990), cert. denied sub nom. *Dispatch Printing Co. v. Solve*, 498 U.S. 958 (1990), the Supreme Court again addressed the closure issue, albeit in a dependency case. Due to the need for confidentiality in dependency cases, the Court concluded that "there is no qualified right of public access to juvenile court proceedings to determine if a child is abused, neglected, or dependent, or to determine custody of a minor child." *Id.* at 17. These proceedings are neither presumptively open nor presumptively closed to the press and public.

A trial court may close such a proceeding if, after hearing evidence and argument on the issue, it finds that: (1) there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceedings, and (2) the potential for harm outweighs the benefits of public access. *Id.*

One juvenile court has concluded that "the holding of *T.R.*, which provides that certain juvenile court proceedings are neither presumptively open nor presumptively closed, should be applied to both the preliminary and amenability hearings in Juv. R. 30 proceedings." In *re D.R.*, 63 Ohio Misc.2d 273, 279, 626 N.E.2d 1120 (C.P. 1993).

Another court ruled that "[p]ublic access ought to remain open to those portions of the bindover proceedings which directly relate to the nature of the crime alleged to have been committed. Therefore, the public will have access to the probable cause hearing." In *re N.H.*, 63 Ohio Misc.2d 285, 297, 626 N.E.2d 697 (C.P. 1992). The amenability phase was treated differently. "Certain portions of any amenability hearing ought to be closed, because some portions of such hearings often involve information about a child's psychological, social and family histories" *Id.* at 298.

EVIDENCE

In many jurisdictions the rules of evidence are relaxed in transfer hearings because these hearings are considered dispositional in nature. See S. Davis, *Rights of Juveniles* 4-17 (2d ed 1980).

Ohio Rules of Evidence

At least as a general rule, however, in Ohio the rules of evidence apply in transfer hearings. Evidence Rule 101 provides that the Rules of Evidence "govern proceedings in the courts of this state and before court-appointed referees of this state"

There is, however, an important exception. Evidence Rule 101(C)(6) exempts from the Rules of Evidence proceedings in which other rules prescribed by the Ohio Supreme Court govern evidentiary matters. Thus, where the Rules of Evidence are in conflict with any other procedural rule, the "other rule" prevails. For example, Juvenile Rule 32(A)(2) expressly permits the use of a social history in transfer proceedings, although much of the material contained in a social history would be inadmissible under the Rules of Evidence. Juvenile Rule 2(ii) defines the social history as "the personal and family history of a child or any other party to a juvenile proceeding and may include the prior record of the person with the juvenile court or any other court."

Prior to the adoption of the Rules of Evidence, the Ohio Supreme Court had upheld the use of a social history at a transfer hearing, despite its hearsay character. *State v. Carmichael*, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973), cert. denied, 414 U.S. 1161 (1974). See also *State v. Riggins*, 68 Ohio App.2d 1, 7, 426 N.E.2d 504, 509 (1980) ("The Ohio Supreme Court has held that hearsay evidence is admissible at a relinquishment proceeding in Juvenile Court in the form of psychiatric reports from the Ohio Youth Commission Juvenile Diagnostic Center.").

In *Carmichael*, however, the Court also indicated that the psychiatrists and psychologists whose opinions appeared in the social history could have been called as witnesses: "[T]hey were never called, nor was any effort made to call them by defense counsel, even though counsel had access to those documents for more than two months prior to the hearing." 35 Ohio St.2d at 3-4.

Right of Confrontation

The issue of whether the right of confrontation applies at a transfer hearing was raised in *State v. Riggins*, 68 Ohio App.2d 1, 426 N.E.2d 504 (1980). In that case, the defendant contended that he was denied due process because he was deprived of the opportunity to confront the witnesses against him, i.e., the confession of a codefendant was read into evidence by a police officer. The court overruled this objection because the defendant failed to provide a transcript to support his allegations. *Id.* at 7-8. See also *People ex rel. Guggenheim v. Mucci*, 352 N.Y.S.2d 561, *aff'd*, 360 N.Y.S.2d 71 (App. Div. 1974) (due process requires probable cause determination be based on nonhearsay evidence).

Experts

Expert testimony concerning the juvenile's psychological condition and potential for treatment is admissible. *E.g.*, *State v. Watson*, 47 Ohio St.3d 93, 94, 547 N.E.2d 1181 (1989) ("At the hearing, the court clinic psychiatrist . . . testified that appellant showed 'no evidence of any psychiatric disorder.'"); *State v. Parks*, 51 Ohio App.3d 194, 197, 555 N.E.2d 671 (1988) ("The social worker . . . testified it would be doubtful that the appellant would be amenable to rehabilitation in a juvenile institution.").

The juvenile court, however, "is not bound by the experts'

opinions in making its determination whether the defendant is amenable to rehabilitation." *State v. Houston*, 70 Ohio App.3d 152, 156, 590 N.E.2d 839 (1990) (citing *State v. Dickens*, No. 12967 (9th Dist. Ct. App., 9-23-87)).

SELF-INCRIMINATION

The privilege against self-incrimination applies in transfer hearings. *R.E.M. v. State*, 532 S.W.2d 645, 648 (Tex. Civ. App. 1975). See also *IJA-ABA Standards Relating to Transfer Between Courts* 50 (1980).

In *Gault* the U.S. Supreme Court held the privilege applicable to adjudicatory hearings. 387 U.S. at 55. In other cases, the Court has stated that the privilege is applicable in any proceeding "civil or criminal, formal or informal, where the answers might incriminate [a person] in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

By testifying at a transfer hearing, the child waives the privilege against self-incrimination. Whether the child's statement may later be used at a criminal trial or at an adjudicatory hearing is unclear. If his statements may be used against him at a later time, the child is placed in an untenable position. The juvenile must either give up the privilege or the right to be heard at the transfer hearing. The U.S. Supreme Court considered an analogous situation in *Simmons v. United States*, 390 U.S. 377 (1968), which involved a similar choice facing criminal defendants in suppression hearings:

Thus, in this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. *Id.* at 394.

Several courts in other jurisdictions have applied this reasoning to transfer hearings: "[C]andid testimony by the juvenile at the fitness hearing should be encouraged to aid in the determination of where best to try the minor; fairness to the minor requires that this testimony not be given at the expense of the privilege against self-incrimination." *Sheila O. v. Superior Court*, 178 Cal Rptr 418, 420 (Cal. App. 1981). Accordingly, statements made at transfer hearings have been held inadmissible at subsequent criminal trials and adjudicatory hearings. *Bryan v. Superior Court*, 498 P.2d 1079, 1087 (Cal. 1972), cert. denied, 410 U.S. 944 (1973); *Commonwealth v. Ransom*, 288 A.2d 762, 767 (Pa. 1972); *Sheila O. v. Superior Court*, 178 Cal. Rptr. 418, 420 (Cal. App. 1981) (except for impeachment). See also *IJA-ABA Standards Relating to Transfer Between Courts* 50-51 (1980).

In *State ex rel. a Juvenile v. Hoose*, 43 Ohio App.3d 109, 539 N.E.2d 704 (1988), the court of appeals addressed a similar issue in the context of the mental examination:

In essence, the argument raised by counsel for petitioner is that he faces a dilemma in advising his client on whether to submit to a mental examination by a court psychologist because of the potential use of any incriminating statements made by him during such examination.

Contrary to petitioner's concern here, it is our view

that any incriminating matter which might be obtained during the mental examination with the court psychologist pertaining to the relinquishment proceeding is expressly precluded from being used for anything other than the waiver determination itself. Juv. R. 32(B).

Consequently, if the juvenile court decides to retain jurisdiction, the relevant juvenile rule prevents the use of any statements made by petitioner during the course of the ensuing hearing there in determining the status of the charge or charges there. This provision in our judgment also bars the use of such statements if the juvenile is treated as an adult offender in the general division of the common pleas court. *Id.* at 112.

It is unclear whether this rationale also applies to the juvenile's statements at the hearing.

ACCESS TO REPORTS

Juvenile Rule 32(C) provides for the right to inspect a social history or report of a mental or physical examination a reasonable time prior to the transfer hearing. The U.S. Supreme Court in *Kent* held that counsel had a right of access to social service records. The Court left no doubt that the right of inspection was intended to permit counsel to challenge the accuracy of these reports:

[I]f the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge . . . be subjected . . . to examination, criticism and refutation. While the Juvenile Court judge may, of course, receive ex parte analyses and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise. 383 U.S. at 563.

STATEMENT OF REASONS

RC 2151.26(F) and Juvenile Rule 30(H) require the court to state reasons if it decides to transfer the child. The U.S. Supreme Court in *Kent* also required a statement of the reasons:

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of "full investigation" has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review. 383 U.S. at 561.

In *State v. Newton*, No. F-82-17 (6th Dist. Ct. App., 6-10-83), the court held:

Mere recitation of the conclusory language set forth in Juv. R. 30(C)(1) and (2) is *not* sufficient. Conclusions are not reasons, as contemplated by Juv. R. 30(G). The "reasonable grounds" for the court's belief that a juvenile is not amenable to rehabilitation and that the community's safety may require his legal restraint must be spelled out with reasonable specificity. Stated differently, Juv. R. 30(G) necessitates findings of fact from which to determine the prerequisites in Juv. R. 30(C)(1) and (2) and upon which to base the transfer order. *Id.* at 7.

However, in *State v. Douglas*, 20 Ohio St.3d 34, 485 N.E.2d 711, 713 (1985), the Court ruled:

Neither R.C. 2151.25 nor Juv. R. 30 requires the juvenile court to make written findings as to the five factors listed in Juv. R. 30(E) [current (F) which lists 6 factors]. The rule simply requires the court to *consider* these factors in making its determination on the amenability issue. Although the better practice would be to address each factor, as long as sufficient credible evidence pertaining to each factor exists in the record before the court, the bind-over order should not be reversed in the absence of an abuse of discretion. *Id.* at 36 (emphasis added).

Courts in other jurisdictions have insisted upon specific reasons for transfer. See *Summers v. State*, 230 N.E.2d 320, 325 (Ind. 1967); *Risner v. Commonwealth*, 508 S.W.2d 775 (Ky. 1974); *In re Heising*, 565 P.2d 1105, 1107 (Ore. App. 1977); *Knott v. Langlois*, 231 A.2d 767, 770 (R.I. 1967). See also IJA-ABA *Standards Relating to Transfer Between Courts* 33-34 (1980).

RIGHT TO A TRANSCRIPT

Juvenile Rule 37(A) provides for the right to a complete record of all juvenile court hearings upon request. Moreover, one Ohio court, citing due process and equal protection grounds, has held that an indigent juvenile has a right to a transcript in transfer proceedings. *State v. Ross*, 23 Ohio App.2d 215, 216-17, 262 N.E.2d 427, 429 (1970).

The importance of a transcript is illustrated by *State v. Riggins*, 68 Ohio App.2d 1, 426 N.E.2d 504 (1980), in which the appellate court overruled an alleged error at a transfer hearing because the "appellant has failed to provide this court with a transcript of the hearing before the Juvenile Court at which this evidence was presented." *Id.* at 7-8. See also F. Bailey & H. Rothblatt, *Handling Juvenile Delinquency Cases* 183 (1982) ("insist that the proceedings be transcribed").

POST-TRANSFER ISSUES

Retention of Jurisdiction

If the juvenile court decides to retain jurisdiction, it must schedule a hearing on the merits. Juv. R. 30(D). One court has stated that a juvenile judge is not disqualified from presiding at an adjudicatory hearing because of his involvement in a prior transfer hearing. *In re Terry H.*, 1 O.B.R. 377, 378 (C.P. 1982).

In contrast, the IJA-ABA Standards recognize a child's right to disqualify the transfer hearing judge from participating in subsequent proceedings: "No matter how fair the waiver judge may be in subsequent proceedings, an impression of unfairness will exist." IJA-ABA *Standards Relating to Transfer Between Courts* 52 (1980). See also *Donald L. v. Superior Court*, 498 P.2d 1098, 1101 (Cal. 1972)

("[I]f the referee or judge who hears the issue of fitness decides that the minor should be retained in the juvenile court, he may not thereafter properly preside at a contested hearing on the issue of jurisdiction.").

Transfer of Jurisdiction

If the juvenile court decides to transfer jurisdiction, it will set the terms and conditions for release of the child in accordance with Criminal Rule 46. If the juvenile is in detention he may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of adults. RC 2151.312(A).

The criminal court to which jurisdiction has been transferred may not "review the factual findings of the juvenile court on the issue of amenability." *State v. Whiteside*, 6 Ohio App.3d 30, 36-37, 452 N.E.2d 332, 339 (1982).

Once a child is transferred, a grand jury may indict for any offense appropriate under the facts; the grand jury is not limited to the charges filed in juvenile court. *State v. Adams*, 69 Ohio St.2d 120, 124-25, 431 N.E.2d 326 (1982) (a grand jury does not exceed its authority by returning indictments on charges which were not originally filed in juvenile court); *State v. Klingenger*, 113 Ohio St. 418, 425, 149 N.E. 395, 397 (1925).

Moreover, a criminal defendant's statutory right to a speedy trial does not commence until the juvenile court relinquishes jurisdiction. *State v. Bickerstaff*, 10 Ohio St.3d 62, 67, 461 N.E.2d 892 (1984); *State ex rel. Williams v. Court of Common Pleas*, 42 Ohio St.2d 433, 434, 329 N.E.2d 680, 681 (1975).

APPEALS

In Ohio a juvenile court order transferring jurisdiction to the criminal courts is not a final appealable order. In *re Becker*, 39 Ohio St.2d 84, 314 N.E.2d 158 (1974). *Accord State ex rel. Torres v. Simmons*, 68 Ohio St.2d 118, 428 N.E.2d 862 (1981). Thus, a transfer order may be challenged on appeal only after trial and conviction in the criminal courts. Similarly, a writ of prohibition may not be used to challenge a transfer order. *State ex rel. Torres v. Simmons*, 68 Ohio St.2d 118, 428 N.E.2d 862 (1981). Although a number of jurisdictions permit appeals of transfer orders, the Ohio rule appears to be the majority rule. See *IJA-ABA Standards Relating to Transfer Between Courts* 53 (1980).

The Ohio Supreme Court has provided the following reasons for its position:

To permit interlocutory review of such an order would obviously delay the prosecution of any proceeding in either the juvenile or the criminal division, with the result that the prospect of a just disposition would be jeopardized. In either proceeding the primary issue is the ascertainment of innocence or guilt of the person charged. To permit interlocutory review would subordinate that primary issue and defer its consideration while the question of the punishment appropriate for a suspect whose guilt has not yet been ascertained is being litigated in reviewing courts. We are unwilling to sanction such a procedure. In *re Becker*, 39 Ohio St.2d 84, 86, 314 N.E.2d 158, 159 (1974).

Criticism

There is, however, a serious disadvantage to this rule. The time consumed during the prosecution of the case in criminal court and during the appellate process may place the defendant beyond the age jurisdiction of the juvenile court. In this event, an appellate court that finds error in a transfer proceeding must either free the improperly transferred individual, because neither juvenile nor criminal court has jurisdiction, or reconstruct the transfer process to determine whether a hearing free from error would have resulted in transfer. The difficulty with this procedure is that the reconstructed hearing must "attempt to imagine" the child as he was at the time of the original transfer hearing. *IJA-ABA Standards Relating to Transfer Between Courts* 53 (1980).

DOUBLE JEOPARDY

The United States Supreme Court has applied double jeopardy principles to bindover proceedings. In *Breed v. Jones*, 421 U.S. 519 (1975), the U.S. Supreme Court reviewed a California procedure that permitted transfer *after* a child had been found delinquent in an adjudicatory hearing. The Court held that this procedure violated the double jeopardy clause: "We believe it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Id.* at 529.

In a footnote, however, the Court distinguished the California procedure from a transfer procedure requiring only a finding of probable cause: "We note that nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding. . . . The instant case is not one in which the judicial determination was simply a finding of, e.g., probable cause. Rather, it was an adjudication that respondent had violated a criminal statute." *Id.* at 538 n.18.

In *Sims v. Engle*, 619 F.2d 598 (6th Cir. 1980), cert. denied, 450 U.S. 936 (1981), the Sixth Circuit held that the Ohio transfer procedure, as it then existed, suffered from the same deficiencies that marked the California procedure in *Breed*. According to the court, this procedure violated the double jeopardy guarantee.

The Ohio statute was amended after *Sims*. Unlike the former procedure, the present transfer procedure requires only a finding of probable cause and not a determination of delinquency. The Sixth Circuit has upheld the constitutionality of this procedure: "We reject the contention that the introduction of evidence of probable cause to believe appellant committed the alleged offense without more, transformed the hearing into an adjudicatory proceeding." *Keener v. Taylor*, 640 F.2d 839, 841-42 (6th Cir. 1981).

REFERENCES

W. Kurtz & P. Giannelli, *Ohio Juvenile Law* (3d ed. 1994).