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# PUBLIC DEFENDER REPORTER

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## TRANSFER OF JURISDICTION FROM THE JUVENILE COURT

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Transfer of jurisdiction refers to the process by which a juvenile court relinquishes jurisdiction and transfers a juvenile case to the criminal courts for prosecution. This process, variously described as waiver, certification, or bind-over, has been a unique part of the juvenile court system since the establishment of the first juvenile court. See *Kempen v Maryland*, 428 F(2d) 169, 173 (4th Cir 1970) ("There is no proceeding for adults comparable directly to the juvenile jurisdiction waiver hearing."). Although virtually all jurisdictions permit transfer, the criteria and procedures for transfer vary from state to state. See *IJA-ABA Standards Relating to Transfer Between Courts* (1980) [hereinafter cited as *IJA-ABA Standards*]; S. Davis, *Rights of Juveniles* ch 4 (2d ed 1980).

The concept of transfer 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* at 3.

See also *In re Mack*, 22 App(2d) 201, 203, 260 NE(2d) 619, 620-21 (1970) ("The purpose of [transfer] is to protect the public in those cases where rehabilitation appears unlikely and circumstances indicate that if the charge is ultimately established society would be better served by the criminal process by reason of the greater security which may be achieved or the deterring effect which that process is thought to accomplish.").

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 retribution 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 de-

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

In Ohio, transfer proceedings are governed by RC 2151.26 and Juvenile Rule 30. See *State v Adams*, 69 OS(2d) 120, 123, 431 NE(2d) 326, 329 (1982) ("R.C. 2151.26 and Juv. R. 30 provide the procedural mechanism by which a juvenile offender may be 'bound over' to the adult court . . ."). Juvenile courts have exclusive jurisdiction over persons under the age of 18 who are charged with criminal conduct. RC 2151.23(A)(1). Only a properly transferred juvenile may be prosecuted in the criminal courts. As one court has stated: "Failure 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 App(2d) 1, 4, 426 NE(2d) 504, 507 (1980). A prosecution in criminal court on the mistaken belief that the child was over 18 at the time of the offense is a "nullity." RC 2151.26(E). Generally, a hearing is required before a child can be transferred to the criminal courts. However, there is one situation in which a transfer hearing is not required. RC 2151.26(G) provides that a child who has been transferred and convicted and who is subsequently charged with aggravated murder, murder, an aggravated felony of the first or second degree, or a felony of the first or second degree shall be prosecuted as an adult.

Constitutional considerations also affect transfer procedures. In *Kent v. United States*, 383 US 541 (1966), the U.S. 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 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," *id.* at 556, stage of the juvenile process and "there is no place in our system of law for reaching a result of such tremendous consequences without

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ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” *Id.* at 554. See generally Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 *The Supreme Court Review* 167.

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. Moreover, the dissenting Justices believed the case involved only a statutory issue. *Id.* at 568 (“This case involves the construction of a statute applicable only to the District of Columbia.”). Nevertheless, other parts of the Fortas 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 he wrote that a transfer hearing “must measure up to the essentials of due process and fair treatment.” *Id.* at 562. Significantly, the Court quoted this passage in *In re Gault*, 387 US 1 (1967): “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.

Although there are some exceptions, most courts view *Kent* as establishing constitutional standards. 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). *Accord Geboy v Gray*, 471 F(2d) 575, 579 (7th Cir 1973); *Powell v Hooker*, 453 F(2d) 652, 654 (9th Cir 1971), *overruled on other grounds*, *Harris v Procunier*, 498 F(2d) 576 (9th Cir 1974); *Kempen v Maryland*, 428 F(2d) 169 (4th Cir 1970); *Inge v Slayton*, 395 F. Supp 560, 564-65 (ED Va 1975), *appeal dismissed*, 541 F(2d) 277 (4th Cir 1976). *But see State v Steinhauer*, 216 So(2d) 214, 217-18 (Fla 1968), *cert. denied*, 398 US 914 (1970); *In re Bullard*, 22 NC App 245, 248, 206 SE(2d) 305, 307, *appeal dismissed*, 285 NC 758, 209 SE(2d) 279 (1974); *Cradle v Peyton*, 208 Va 243, 246, 156 SE(2d) 874, 877, *cert. denied*, 392 US 945 (1967).

The Ohio Courts treat *Kent* as a constitutional case. See *State v Adams*, 69 OS(2d) 120, 127 n.4, 431 NE(2d) 326, 331 n.4 (1982); *State v Oviedo*, 5 App(3d) 168, 170, 5 OBR 351, 353, 450 NE(2d) 700, 703 (1982); *State v Riggins*, 68 App(2d) 1, 6, 426 NE(2d) 504, 508 (1980); *In re Mack*, 22 App(2d) 201, 203, 260 NE(2d) 619, 621 (1970).

## JUVENILES SUBJECT TO TRANSFER

RC 2151.26 and Juvenile Rule 30 specify which children are subject to transfer and what criteria apply. Transfer is permitted only for juveniles of specified ages and for certain types of offenses. In addition, the court must find that there is probable cause to believe that the child has committed the offense and that he is not amenable to treatment in the juvenile system.

The U.S. Supreme Court has yet to consider the constitutionality of the standards used in transfer proceedings. In *Breed v. Jones*, 421 US 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 been rejected. *E.g.*, *Speck v. Auger*, 558 F(2d) 394 (8th Cir.), *cert. denied*, 434 US 999 (1977) (construing the Iowa statute); *Donald L v Superior Court*, 7 Cal(3d) 592, 601, 498 P(2d) 1098, 1104, 102 Cal Rptr 850, 856 (1972); *Davis v State*, 297 So(2d) 289, 291-93 (Fla 1974); *State v Gibbs*, 94 Idaho 908, 916, 500 P(2d) 209, 217 (1972); *State v Smagula*, 117 NH 663, 669, 377 A(2d) 608, 612 (1977); *In re Bullard*, 22 NC App 245, 247-48, 206 SE(2d) 305, 307, *appeal dismissed*, 285 NC 758, 209 SE(2d) 279 (1974). *But see State ex rel Hunter*, 387 So(2d) 1086, 1090 (La 1980).

## Age

A child 15 years or older may be transferred to the criminal courts for trial. RC 2151.26(A)(1); Juv R 30(A). Accordingly, children under 15 years of age are not subject to transfer, regardless of the crime charged. The child’s age at the time of the offense, rather than at the time of the transfer hearing, controls.

## Offenses

Transfer is permitted only if the complaint alleges that the child has committed an act that would constitute a felony if committed by an adult. RC 2151.26(A); Juv R 30(A). There are no common law crimes in Ohio—only statutory crimes. RC 2901.03(A). An offense specifically classified as a felony in the Revised Code is a felony regardless of the penalty which may be imposed. RC 2901.02(D). Similarly, an offense classified as a misdemeanor is a misdemeanor regardless of the penalty which may be imposed. *Id.* Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty. RC 2901.02(E).

## Probable Cause

Before a child may be transferred, the court must find that there is probable cause to believe that he has committed the alleged act. RC 2151.26(A)(2); Juv R 30(A). There must be probable cause (1) that a felony has been committed and (2) that the child is the person who has committed that felony. See generally IJA-ABA Standards 37-38; *Davis, The Efficacy of a Probable Cause Requirement in Juvenile Proceedings*, 59 NC L Rev 723 (1981).

## Amenability to Treatment

Before a child may be transferred, the court must find that there are reasonable grounds to believe (1) that he 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. RC 2151.26(A)(3); Juv R 30(C).

Juvenile Rule 30(E) requires the court to consider the following factors in determining whether a child is amenable to treatment:

(1) *Age*. See *State v Tilton*, No. 384 (7th Dist Ct App, Harrison, 6-23-83) (due to the maturity of the child, he would not be amenable to treatment as a juvenile); *State v Holt*, No. 81AP-661 (10th Dist Ct App, Franklin, 3-30-82) (18 years old at time of trial);

(2) *Mental and physical health;*

(3) *Prior juvenile record.* See *State v Carter*, 27 OS(2d) 135, 138, 272 NE(2d) 119, 121 (1971) ("many court appearances"); *State v Whiteside*, 6 App(3d) 30, 35, 6 OBR 140, 145, 452 NE(2d) 332, 338 (1982) ("appellant had a record as a juvenile delinquent"); *State v Oviedo*, 5 App(3d) 168, 171, 5 OBR 351, 354, 450 NE(2d) 700, 704 (1982) ("history of delinquency . . . included such charges as petty theft, breaking and entering, receiving stolen property, theft, criminal mischief and criminal damaging.").

(4) *Previous efforts to treat or rehabilitate.* See *State v Carter*, 27 OS(2d) 135, 138, 272 NE(2d) 119, 121 (1971) (prior commitment to correctional school); *State v Whiteside*, 6 App(3d) 30, 35, 6 OBR 140, 145, 452 NE(2d) 332, 338 (1982) (prior treatment at the Ohio Youth Commission); *State v Oviedo*, 5 App(3d) 168, 171, 5 OBR 351, 354, 450 NE(2d) 700, 704 (1982) (prior probation); *State v Ridgley*, No L-80-241 (6th Dist Ct App, Lucas, 3-27-81) (4 prior commitments to Ohio Youth Commission);

(5) *Family environment.* See *State v Hawkins*, No. 3462 (9th Dist Ct App, Lorain, 6-8-83) (unstable family situation); *State v Arnold*, No. L-80-269 (6th Dist Ct App, Lucas, 6-12-81) (family had a long history of antisocial behavior and criminal activity); and

(6) *School record.* See *State v Hawkins*, No 3462 (9th Dist Ct App, Lorain, 6-8-83) (suspended from school eight times); *State v Arnold*, No. L-80-269 (6th Dist Ct App, Lucas, 6-12-81) (truancy problem and not currently attending school).

Although the juvenile court must consider all of these factors, "not all of the relevant factors need be resolved against the juvenile in order to justify the transfer . . ." *State v Oviedo*, 5 App(2d) 168, 171, 5 OBR 351, 354-55, 450 NE(2d) 700, 705 (1982). 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 antisocial conduct. *Id.* at 171-72. See also *State v Carter*, 27 OS(2d) 135, 136, 272 NE(2d) 119, 120 (1971) (juvenile court cited aggravated character of offense—armed robbery—in the transfer order). RC 2151.26(B) requires the court to consider 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 Grooms*, No 374 (4th Dist Ct App, Adams, 9-3-81) (78 year old victim).

One survey of juvenile court judges revealed that the following factors, in the order of the frequency of their listing, were considered in making transfer decisions:

- (1) seriousness of the alleged offense;
- (2) record and history of the juvenile, including prior contacts with police, court, or other official agencies;
- (3) aggressive, violent, premeditated, or willful manner in which the offense was committed;
- (4) sophistication, maturity, emotional attitude of the juvenile;
- (5) proximity of juvenile's age to maximum age of juvenile court jurisdiction;
- (6) existence of more appropriate procedures, services, and facilities in the adult court that would increase the likelihood of reasonable rehabilitation;
- (7) the possible need for a longer period of incarceration;
- (8) existence of evidence sufficient for a grand jury

indictment;

(9) the trial of the juvenile's associates in the alleged offense in an adult court;

(10) other factors;

(11) effect of transfer on public's respect for law enforcement and law compliance;

(12) community attitude toward the specific offense.

President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: *Juvenile Delinquency and Youth Crime* 78 appendix (1967). See also Note, *Waiver of Jurisdiction in Juvenile Courts*, 30 Ohio St LJ 132 (1969) (surveying factors Ohio juvenile judges used in making transfer determinations under prior statute).

The IJA-ABA Standards adopt a restrictive approach to transfer, permitting it only for "extraordinary juveniles in extraordinary factual circumstances." IJA-ABA Standards at 39. The criteria for transfer are: (1) the seriousness of the offense, (2) prior record of *adjudicated* delinquency involving the infliction or threat of significant bodily injury, (3) the likely inefficacy of the dispositions available to the juvenile court *as demonstrated by previous dispositions of the juvenile*, and (4) the appropriateness of the services and dispositional alternative available in the criminal justice system for dealing with the juvenile's problems, and whether they are, in fact, available. *Id.* (emphasis added). The Standards reject "the public interest as a justification for waiver." *Id.* at 40.

## PROCEDURE

### Hearing and Investigation

In Ohio RC 2151.26 and Rule 30 govern the transfer hearing and investigation. In *Kent* the 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.

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. See *United States v Williams*, 459 F(2d) 903, 908-09 (2d Cir 1972) (child should be advised of his right to be proceeded against as a juvenile and of all the consequences of waiving that right). 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.

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). The "full investigation" required by the rule and statute also includes a mental and physical examination by a public or private agency or other qualified person. This examination may be waived by the juvenile, and refusal to submit to the examination

constitutes a waiver. RC 2151.26(C) (waiver must be "competently and intelligently made"); Juv R 30(F). Although the mental and physical examinations may be waived, neither the investigation nor the hearing may be waived. *State v Newton*, No. F-82-17 (6th Dist Ct App, Fulton, 6-10-83).

### Right to Counsel

Juvenile Rule 4(A) provides for the right to counsel at all juvenile court hearings. See also RC 2151.352. The right to counsel at transfer hearings is also constitutionally required. See *Geboy v Gray*, 471 F(2d) 575, 579 (7th Cir 1973); *Kemplen v Maryland*, 428 F(2d) 169, 175 (4th Cir 1970); *Inge v Slayton*, 395 F. Supp 560, 566 (ED Va 1975), *appeal dismissed*, 541 F(2d) 277 (4th Cir 1976); *James v Cox*, 323 F. Supp 15, 20 (ED Va 1971); *Steinhauer v State*, 206 So(2d) 25, 27 (Fla 1968), *cert. denied*, 398 US 914 (1970). In *Kent* the U.S. Supreme Court stated that "counsel must be afforded to the child in waiver proceedings," 383 US 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.

Rule 4(A) also provides that in the case of indigency, the child has the right to appointed counsel. See also RC 2151.352. This right is also constitutionally required. *Kemplen v Maryland*, 428 F(2d) 169, 175 (4th Cir 1970). In criminal trials the Sixth Amendment right to counsel includes the right to appointed counsel for indigent defendants. See *Gideon v Wainwright*, 372 US 335 (1963); *Argersinger v Hamlin*, 407 US 25 (1972); *Scott v Illinois*, 440 US 367 (1977). In *Gault* the court held that the appointment of counsel is required in a delinquency adjudication if the child is "unable to afford to employ counsel." 387 US at 42.

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 to determine whether the juvenile court shall relinquish its jurisdiction for purposes of criminal prosecution may not be waived."

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*, 104 S Ct 2052 (1984) (Sixth Amendment requires reasonably effective assistance of counsel). The 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. 383 US at 558. 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. As the Supreme Court noted in *Kent*: "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 US at 563. Another court has commented: "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." *Hazel v United States*, 404 F(2d) 1275, 1279 (DC Cir 1968). See also 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

Juvenile Rule 30(B) requires that written notice of the time, place and nature of the transfer hearing be given to the parties at least three days prior to the hearing. See also RC 2151.26(D) (notice to parents or guardian and counsel). Adequate notice is an essential aspect of due process. See *Wolff v McDonnell*, 418 US 539, 564 (1974) (prison disciplinary hearings); *Morrissey v Brewer*, 408 US 471, 489 (1972) (parole revocation hearings). Notice must be given sufficiently in advance of the hearing to permit adequate preparation. See *Geboy v Gray*, 471 F(2d) 575, 578-79 (7th Cir 1973); *Kemplen v Maryland*, 428 F(2d) 169, 175 (4th Cir 1970); *Miller v Quatsoe*, 332 F. Supp 1269, 1276 (ED Wis 1971). See also *In re Gault*, 387 US 1, 33 (1967) ("Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded . . .").

Notice also must be sufficiently specific to appraise the parties of the nature of the charges. See *United States ex rel Turner v Rundle*, 438 F(2d) 839, 842 (3d Cir 1971). See also *In re Gault*, 387 US 1, 33 (1967) ("Notice, to comply with due process requirements . . . must set forth the alleged misconduct with particularity."). Moreover, it must indicate the purpose of the hearing. See *James v Cox*, 323 F. Supp 15, 20 (ED Va 1981); *State v Gibbs*, 94 Idaho 908, 914-15, 500 P(2d) 209, 215-16 (1972). Finally, the proper parties must receive notice. See *Miller v Quatsoe*, 332 F. Supp 1269, 1276 (ED Wis 1971); *Crandell v State*, 539 P(2d) 398, 401 (Okla Crim App 1975).

### Standard of Proof

Juvenile Rule 30(C) requires the court to find *reasonable grounds to believe* that the child is not amenable to rehabilitation and that the safety of the community may require legal restraint beyond the child's majority. See also RC 2151.26(A)(3). Commenting on this standard, the Ohio Supreme Court has written: "[T]he '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." *State v Carmichael*, 35 OS(2d) 1, 6, 298 NE(2d) 568, 572 (1973), *cert. denied*, 414 US 1161 (1974). The Court also held that the juvenile court has "considerable latitude within which to determine whether it should retain jurisdiction." *Id.* (syllabus 1 & 2). See also *State v Whiteside*, 6 App(3d) 30, 452 NE(2d) 332 (1982).

In other jurisdictions, the standard of proof on the issue of nonamenability varies. Some jurisdictions require "substantial evidence," while others require a "preponderance of evidence." Still others have adopted a "clear and convincing evidence" standard, a standard also found in the IJA-ABA Standards. See S. Davis, *Rights of Juveniles 4-17* (2d ed 1980). IJA-ABA Standards at 39.

### 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). *But see In re Anonymous*, 14 Ariz App 466, 484 P(2d) 235 (1971) (only competent evidence admissible); *In re Harris*, 218 Kan 625, 544 P(2d) 1403 (1976) (transfer may not be based on inadmissible hearsay); *People v Morris*, 57 Mich App 573, 226 NW(2d) 565, *cert. denied*, 423 US 849 (1975) (only legally admissible evidence may be introduced).

At least as a general rule, however, in Ohio the rules of evidence appear to 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 . . ." Accordingly, the Rules of Evidence apply in transfer hearings. 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 rule prescribed by the Supreme Court, 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(21) 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 OS(2d) 1, 298 NE(2d) 568 (1973), *cert. denied*, 414 US 1161 (1974). See also *State v Riggins*, 68 App(2d) 1, 7, 426 NE(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 OS(2d) at 3-4.

The issue of whether the right of confrontation applies at a transfer hearing was raised in *State v Riggins*, 68 App(2d) 1, 426 NE(2d) 504 (1989). 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. Under Evidence Rule 801, the confession of a codefendant is inadmissible hearsay.

### Self-Incrimination

The privilege against self-incrimination applies in transfer hearings. *REM v State*, 532 SW(2d) 645, 648 (Tex Civ App 1975). In *In re Gault*, 387 US 1, 55 (1967), the U.S. Supreme Court held the privilege applicable to adjudica-

tory hearings, and 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 US 70, 77 (1973). The Court has also held that a criminal defendant's exercise of his right to remain silent may not be commented upon or used against him at trial. *Griffin v California*, 380 US 609 (1965). See also *In re Jackson*, 21 OS(2d) 215, 220-21, 257 NE(2d) 74, 78 (1970) (no *Griffin* violation found).

By testifying at a transfer hearing, the child waives the privilege against self-incrimination. Whether the child's statement may be later 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. He either must give up the privilege or his right to be heard at the transfer hearing. The U.S. Supreme Court considered an analogous situation in *Simmons v. United States*, 390 US 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 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*, 125 Cal App(3d) 812, 816-17, 178 Cal Rptr 418, 420 (1981). Accordingly, statements made at transfer hearings have been held inadmissible at subsequent criminal trials and adjudicatory hearings. *Ramona R v Superior Court*, 210 Cal Rptr 204 (Cal 1985); *Bryan v Superior Court*, 7 Cal(3d) 575, 586-87, 498 P(2d) 1079, 1087, 102 Cal Rptr 831, 839-40 (1972), *cert. denied*, 410 US 944 (1973); *Commonwealth v Ransom*, 446 Pa 457, 467-68, 288 A(2d) 762, 767 (1972); *Sheila O v Superior Court*, 125 Cal App(3d) 812, 816-17, 178 Cal Rptr 418, 420 (1981) (except for impeachment). See also IJA-ABA Standards at 50-51 (1980).

### 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 the purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise. 383 US at 563.

Rule 32(C) grants the court authority to deny or limit inspection for good cause. The court may also order that the contents of the report be withheld from specified persons. The court, however, must state reasons for its action.

### Right to Present Evidence

Although the Juvenile Rules do not specifically recognize a child's right to present evidence at a transfer hearing, there seems little question that this right exists. See *Summers v State*, 248 Ind 551, 560, 230 NE(2d) 320, 325 (1967); *In re Brown*, 183 NW(2d) 731, 733 (Iowa 1971); *In re Doe*, 86 NM 37, 38, 519 P(2d) 133, 134 (1974). The right to counsel, the right to notice, and the right of access to the social history all imply a right to present evidence. In a different context, the U.S. Supreme Court has commented: "Ordinarily, the right to present evidence is basic to a fair hearing . . ." *Wolff v McDonnell*, 418 US 539, 566 (1974). The Ohio Supreme Court has implicitly recognized this right. In one case the Court commented on a defense counsel's failure to make any effort to call witnesses at a transfer hearing. *State v. Carmichael*, 35 OS(2d) 1, 298 NE(2d) 568 (1973), *cert. denied*, 414 US 1161 (1974). See also *State v Yoss*, 10 App(2d) 47, 50, 225 NE(2d) 275, 277-78 (1967) (*Kent* requires the Juvenile Court to consider additional evidence offered by a juvenile in a transfer hearing).

### Statement of Reasons

RC 2151.26(F) and Juvenile Rule 30 (G) 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 therefore. 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 US at 561.

The Ohio courts are divided over this requirement. In *State v. Oviedo*, 5 App(3d) 168, 450 NE(2d) 700 (1982), the court held that Rule 30(G) is satisfied if the transfer order demonstrates that the "full investigation" requirement has been met and the issue has received the full attention of the court. In contrast, the court in *State v. Newton*, No. F-82-17 (6th Dist Ct App, Fulton, 6-10-83), required more:

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.

See also *State v Reuss*, No. WD-81-26 (6th Dist Ct App, Wood, 8-7-81) (bare recitation of factors in Juv R 30(E) is insufficient). Courts in other jurisdictions have also insisted upon specific reasons for transfer. See *Summers v State*, 248 Ind 551, 569-70, 230 NE(2d) 320, 325 (1967); *Risner v Commonwealth*, 508 SE(2d) 775 (Ky 1974); *In re Heising*, 29 Or App 903, 907-08, 565 P(2d) 1105, 1107 (1977); *Knott v Langlois*, 102 RI 517, 524, 231 A(2d) 767, 770 (1967). See also IJA-ABA Standards at 33-34.

### 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 App(2d) 215, 216-17, 262 NE(2d) 427, 429 (1970). The importance of a transcript is illustrated by *State v. Riggin*, 68 App(2d) 1, 426 NE(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, 426 NE(2d) at 509. 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 OBR 377, 378 (CP 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 at 52. See also *Donald L. v Superior Court*, 7 Cal(3d) 592, 598, 498 P(2d) 1098, 1101, 102 Cal Rptr 850, 853 (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. Juv R 30(H). If the child 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

App(3d) 30, 36-37, 452 NE(2d) 332, 339 (1982).

RC 2151.26(F) provides that "transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint." This provision appears to require that the juvenile court transfer jurisdiction over *all* delinquent acts before these acts can be prosecuted in the criminal courts. In *State v. Adams*, 69 OS(2d) 120, 431 NE(2d) 326 (1982), however, the Ohio Supreme Court ruled otherwise. According to the Court, once a child is properly transferred, he is considered bound over for all felonies, even if the other felonies have not been subject to transfer proceedings. *Id.* at 126-27. Moreover, once transferred, a child may be tried in the criminal courts for any subsequent felonies that he has committed. *Id.* RC 2151.26(G) now provides that once transferred and convicted, a child is automatically subject to criminal court jurisdiction for subsequent charges of aggravated murder, murder, an aggravated felony of the first or second degree, or felonies of the first or second degree. This provision was not applicable at the time the child in *Adams* was transferred. 69 OS(2d) at 126-27 n.3.

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. *Id.* at 124-25 (a grand jury does not exceed its authority by returning indictments on charges which were not originally filed in juvenile court); *State v. Klingenberger*, 113 OS 418, 425, 149 NE 395, 397 (1925). Moreover, a criminal defendant's statutory right to a speedy trial does not commence until the juvenile court relinquishes jurisdiction. *State ex rel Williams v Court of Common Pleas*, 42 OS(2d) 433, 434, 329 NE(2d) 680, 681 (1975); *State v. Steele*, 8 App(3d) 137, 8 OBR 194, 456 NE(2d) 513 (1982); *State v. Trapp*, 52 App(2d) 189, 368 NE(2d) 1278, 1279-80 (1977); *State v. Young*, 44 App(2d) 387, 388, 339 NE(2d) 668, 669 (1975). In addition, a defendant is entitled to good time credit for the time spent in juvenile custody. *State v. Young*, 44 App(2d) 387, 388-89, 339 NE(2d) 668, 669-70 (1975). By pleading guilty in criminal court, a defendant does not waive the right to contest the validity of the transfer decision. *State v. Riggins*, 68 App(2d) 1, 4-5, 426 NE(2d) 504, 507-08 (1980).

### APPEALS

In Ohio a juvenile court order transferring jurisdiction to the criminal courts is not a final appealable order. In *re Becker*, 39 OS(2d) 84, 314 NE(2d) 158 (1974). *Accord State ex rel Torres v Simmons*, 68 OS(2d) 118, 428 NE(2d) 862 (1981); *State v. Whiteside*, 6 App(3d) 30, 6 OBR 140, 452 NE(2d) 332 (1982). See generally Comment, *Juvenile Court and Direct Appeal from Waiver of Jurisdiction in Ohio*, 8 Akron L Rev 499 (1975). 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 OS(2d) 118, 428 NE(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 53.

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 OS(2d) 84, 86, 314 NE(2d) 158, 159(1974) (quoting *People v Jiles*, 43 Ill(2d) 145, 150, 251 NE(2d) 529, 531 (1969)).

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. IJA-ABA Standards at 53. The *Kent* case illustrates this problem. By the time the U.S. Supreme Court reversed Morris Kent's conviction, he was over 21 years of age and thus no longer subject to juvenile court jurisdiction. The Court remanded the case to the District Court for a de novo consideration of the transfer issue, i.e., a reconstructed waiver hearing. 383 US at 564-65. 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 at 53.

### DOUBLE JEOPARDY

In *Breed v. Jones*, 421 US 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 US 936 (1981), the Sixth Circuit held that the Ohio procedure operative in that case suffered from the same deficiencies that marked the California procedure in *Breed*. Under that procedure a juvenile court was required to make a delinquency finding prior to transfer.

See *State v Carter*, 27 OS(2d) 135, 272 NE(2d) 119 (1971); *In re Jackson*, 21 OS(2d) 215, 257 NE(2d) 74 (1970). According to the Sixth Circuit, this procedure violated the double jeopardy guarantee: "Once the Juvenile Court, possessing the jurisdiction and power to enter final orders levying a wide range of possible sanctions, began a hearing, not limited in scope by statute to a preliminary hearing or probable cause hearing, jeopardy attached and appellant possessed the constitutional right to have the Juvenile Court, as the original trier of fact, determine his fate." 619 F(2d) at 605. See also *Johnson v Perini*, 644 F(2d) 573 (6th Cir 1981) (*Sims* does not apply if the record plainly establishes that the transfer hearing was limited to a probable cause determination).

The statute that the Sixth Circuit found constitutionally defective in *Sims* has since been amended. 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). Accord *State v Salmon*, No 43328 & 43329 (8th Dist Ct App, Cuyahoga, 5-21-81).

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