

IN THE SUPREME COURT OF OHIO

IN RE: A.J.S., : Case No. 2007-1451  
A MINOR CHILD. :  
: On Appeal from the  
: Franklin County Court of  
: Appeals, Tenth Appellate  
: District, No. 06AP-597

---

BRIEF OF AMICUS CURIAE JUSTICE FOR CHILDREN PROJECT  
IN SUPPORT OF APPELLANT A.J.S.

---

KATHERINE HUNT FEDERLE (0069334)  
(of record)

RON O'BRIEN (0017245)  
Franklin County Prosecutor

ANGELA MARIE LLOYD (0076150)

KATHERINE J. PRESS (0023422)  
Assistant Prosecuting Attorney

ERIN A. STEINER (Legal Intern)

Ohio State University Moritz College of Law  
Justice for Children Project  
55 W. 12<sup>th</sup> Ave.  
Columbus, Ohio 43210  
614/292-9177  
614/292-5511 (fax)  
COUNSEL FOR *AMICUS CURIAE*,  
THE JUSTICE FOR CHILDREN PROJECT

Franklin County Prosecutor's Office  
14<sup>th</sup> Floor, Hall of Justice  
373 S. High Street  
Columbus, Ohio 43215  
614/462-3555  
614/462-6103 (fax)  
COUNSEL FOR APPELLEE, THE STATE  
OF OHIO.

DAVID H. BODIKER (0016590)  
Franklin County Public Defender

ELIZABETH R. MILLER (0077362)  
Assistant Public Defender

Office of the Ohio Public Defender  
8 East Long Street – 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
614/466-5394  
614/752-5167 (fax)  
COUNSEL FOR APPELLANT,  
A.J.S.

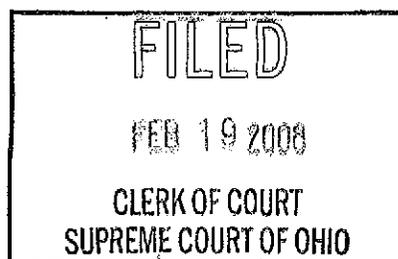


TABLE OF CONTENTS

TABLE OF AUTHORITIES .....iii

STATEMENT OF INTEREST OF AMICUS CURIAE ..... 1

STATEMENT OF THE CASE AND FACTS..... 1

ARGUMENT ..... 2

Amicus' Proposition of Law: The standard of review on appeal from a  
judicial determination to transfer a minor to the criminal division of the  
court of common pleas for trial is abuse of discretion ..... 2

CONCLUSION..... 10

CERTIFICATE OF SERVICE ..... 11

## TABLE OF AUTHORITIES

### Cases

<i>Berk v. Matthers</i> (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301.....	6
<i>In re Anderson</i> (2001), 92 Ohio St.3d 63, 748 N.E.2d 67 .....	8
<i>In re Gault</i> (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527.....	7
<i>Haley v. Ohio</i> (1948), 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224.....	7
<i>Kent v. United States</i> (1966), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84.....	7
<i>Pierce v. Underwood</i> (1988), 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 ...	2, 3, 5, 7
<i>Roper v. Simmons</i> (2006), 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 .....	8
<i>State v. DeHass</i> (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212.....	5, 6

### Statutes

R.C. 2151.358 .....	8
R.C. 2152.10 .....	3
R.C. 2152.12 .....	3, 4
R.C. 2152.13 .....	8
R.C. 2152.26 .....	8
S. Ct. R. VI, Sec. 6 .....	1

### Secondary Sources

Steven Alan Childress & Martha S. Davis (1999), <i>Federal Standards of Review</i> , 3 <sup>rd</sup> ed .....	2
Patrick Griffin (2003), <i>Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws</i> , National Center for Juvenile Justice.....	4
Robert Hahn, et al. (2007) <i>Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from Juvenile to the Adult Justice System</i> , Center for Disease Control, National Center for Health Marketing 56(RR09).....	8
Martin et al. (1989), <i>Youth and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy</i> , 40 Juv. & Fam. Ct. J. 1.....	9
Eric Lotke and Vincent Schiraldi (1996), <i>An Analysis of Juvenile Homicides: Where They Occur and The Effectiveness of Adult Court Intervention</i> .....	9

## STATEMENT OF THE INTEREST OF AMICUS CURIAE

*Amicus Curiae*, the Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights.

Because of the extremely important interests raised in this case, the Justice for Children Project hereby offers this *amicus* brief and urges this Court to reverse the Tenth District Court of Appeals.

*Amicus* has no relationship to any of the individuals involved in this litigation. This brief is submitted pursuant to S. Ct. R. VI, Sec. 6.

## STATEMENT OF THE CASE AND FACTS

*Amicus Curiae* hereby adopts the Statement of Case and Facts set forth in the Brief of the Appellant.

## ARGUMENT

### Amicus Proposition of Law:

The standard of review from a judicial determination to transfer a minor to the criminal division of the court of common pleas for trial is abuse of discretion.

As derived from *Pierce v. Underwood*, the appropriate standard of review in a mandatory bindover case is abuse of discretion. *Pierce v. Underwood* (1988), 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490. Courts are required to apply different standards of review to decisions made by the trial court based on the amount of discretion to be given to the trial court. *Id.* at 558. The Supreme Court has held that questions of law must be reviewed de novo, questions of fact are reviewed for clear error, and matters of discretion for an abuse of discretion. *Id.* Yet the category into which the reviewable decision falls is not always inherently apparent. Where “neither a clear statutory prescription nor a historical tradition exists,” an appellate court must evaluate the “significant relevant factors” to determine which standard to apply. *Id.* at 558-59.

When determining the proper standard of review, *Pierce* identified several “significant relevant factors:” (1) whether deference can be inferred from the statute, (2) whether the trial or appellate court, as a matter of the sound administration of justice, is better positioned to decide the issue being reviewed, (3) the practicability of formulating a rule of decision for the issue and (4) the extent to which potential liability and consequences call for more intensive review. *Pierce*, 487 U.S. at 559-63; see also Steven Alan Childress & Martha S. Davis (1999), *Federal Standards of Review*, 3<sup>rd</sup> ed., Vol. II, § 7, page 55 (citing *Pierce*).

As there is no “long history of appellate practice” addressing mandatory bindovers in Ohio, the *Pierce* factors must be used to determine the standard of review.

Abuse of discretion is the appropriate standard as the “language and structure” of the governing statutes, the nature of legal and factual issues involved, the impracticality of forming a rule of decision, and the potential consequences all require deference to the juvenile court’s decision. Therefore, the decision below must be reversed because the split decision the Tenth District Court of Appeals, simultaneously applying a de novo standard of review and misapplying an abuse of discretion standard, errs in its review of the trial court’s probable cause determination.

- A. Abuse of discretion is the proper standard of review because the statutes governing bindovers grant discretion to the trial court.

When a statute indicates, through explicit command or intent, that judicial discretion is required, abuse of discretion is the proper standard of review. *Pierce*, 487 U.S. at 558-559. The *Pierce* Court reasoned that because the legislature could have chosen to eliminate any judicial discretion by wording the statute differently, the intent of the statute was to preserve judicial discretion. *Id.* at 559. Thus, the Court held that the preservation of judicial discretion mandated appellate review based on an abuse of discretion. *Id.* Similarly, the Ohio Legislature chose to preserve judicial discretion in mandatory bindover cases by requiring a probable cause hearing prior to transfer. R.C. 2152.10, 2152.12. In mandatory transfer cases, a child will be transferred to the criminal justice system only if it is found at a hearing that there is probable cause to believe the child committed aggravated murder, murder or attempted murder at the age of sixteen or seventeen. R.C. 2152.12(A)(1)(a).

When enacting its bindover provisions, the Ohio legislature had the full range of transfer options available to it. Seventy-four percent of American states have adopted

either a direct file law, allowing a prosecutor to file an indictment directly with the criminal court, or a statutory exclusion provision, mandating the filing of certain charges directly in the criminal court. Patrick Griffin (2003), *Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws*, at 3, National Center for Juvenile Justice. Both direct file and statutory exclusion provisions make transfer to criminal court automatic by removing any decision making by a judge. Thus, the Ohio legislature could have enacted an “automatic” transfer law. If the Ohio legislature intended to excise any judicial discretion from a mandatory transfer and create a mere “rubber stamp” process, then the legislature would have followed the majority of states and promulgated either direct file or statutory exclusion schema. Yet, the legislature required a probable cause hearing which preserves the judicial role in mandatory bindovers and requires an appellate court to review such decisions for an abuse of discretion.

Moreover, the Ohio statutes governing transfer specifically acknowledge that other states may require an “automatic” transfer. See R.C. 2152.12(A)(2)(b). As a result, of a child domiciliary of another state, which employs automatic transfer, commits an offense in Ohio that would be eligible for such transfer if committed in his home state, the Ohio judge must transfer the child to criminal court regardless of the factors that are to be considered under Ohio law. R.C. 2152.12(A)(2)(b). Considering that the statutory scheme explicitly acknowledges instances in which there is no judicial discretion, it is reasonable to conclude, that all other determinations regarding transfer are made on a case-by-case basis at the discretion of a judge. See R.C. 2152.12.

In the case at bar, the trial court found that there was no probable cause to warrant transferring A.J.S. to criminal court. Because the mandatory bindover statute clearly envisions the exercise of judicial discretion, the applicable standard of review is abuse of discretion. To uphold the appellate court's decision would be to affirm a de novo review, and eliminate the statutory requirement that the trial judge must exercise her discretion when making the probable cause determination.

- B. Abuse of discretion is the proper standard of review because the trial court is better positioned to weigh the evidence presented and judge the credibility of the witnesses.

The *Pierce* Court held that establishing the appropriate standard of review requires determining which judicial actor is best positioned to decide the issue in question. 487 U.S. at 559-560. In *Pierce*, the Court recognized that the "district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon." *Id.* at 560. Thus, because the nature of the question under review in *Pierce* was so fact intensive, the Court found that abuse of discretion is the appropriate standard of review. *Id.* The Ohio Supreme Court also has recognized the importance of deferring to the trial court on factual determinations. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. In *DeHass*, the Ohio Supreme Court held that questions regarding witness credibility and the weight to be given specific testimony are matters best left to the juvenile court, whose opportunity to make those determinations is superior to that of a reviewing court. *Id.* at 231.

In the case presently before the Court, the record is replete with conflicting testimony. The identity of the shooter, critical to the bindover determination, was, itself, in doubt. One witness, Rochelle Farr, testified that the defendant was the shooter. (Tr.

221). Another witness, Joseph Morgan, initially identified Antwan Smith as the shooter. (Tr. 79). Still, Joseph Morgan and Michael Miracle testified that they never actually saw anyone holding a gun. (Tr. 82, 178).

In addition, the record in A.J.S. presents conflicting evidence about the target of the gun shots. Rachelle Farr testified that the shots were fired at the ground to scare the shop workers. (Tr. 228). Joseph Morgan testified that a grease trap was hit with a bullet. (Tr. 65-67). In the face of such conflicting accounts, the juvenile court was tasked with determining which story to believe and whether the testimony amounted to probable cause for attempted murder. Only the fact finder, in this case, the trial judge, is adequately positioned to evaluate the demeanor and presentation of each witness and thus to assign weight to each witness's testimony.

The de novo review conducted only by the author of the majority opinion in A.J.S. was patently erroneous as it expropriated the role of the fact finder. The appellate court improperly substituted its own judgment as to witness credibility for the determination made by the trial court. *Berk v. Matthers* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301; *DeHass*, 10 Ohio St.2d at 231. By failing to give proper deference to the juvenile court's evaluation of witness credibility, the appellate court erred when it reversed the decision of the juvenile court. As the probable cause determination turned on issues of fact and not law, the decision below must be reversed.

- C. Abuse of discretion is the proper standard of review because the factually complex situations confronted in bindover proceedings make the development of a rule of decision impractical.

*Pierce* held that abuse of discretion review is appropriate if forming a rule of decision is impractical because the situation at issue involves multifarious and novel

facts. 487 U.S. at 562. Bindover decisions by their true nature, involve novel and various facts.

Moreover, probable cause determinations are not simple. The decisions hinge on whether the state can establish that there is probable cause to believe that a child committed the offense charged. As the *Pierce* Court recognizes, at issue are “novel facts.” Where facts are in issue, there must be a fact finder positioned uniquely to weigh the credibility and persuasiveness of the evidence. There exist an unlimited number of factual situations, so no strict rule may be applied. Thus, pursuant to *Pierce*, when reviewing the trial court’s finding as to probable cause, the appellate court must reverse only if there is an abuse of discretion.

- D. Abuse of discretion is the proper standard of review because the potential consequences to the child are grave and long lasting.

The *Pierce* Court held that one factor in determining the standard of review is consequences which flows from the trial court’s factual determination. 487 U.S. at 563. The U.S. Supreme Court in *Gault* found that “neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.” *In re Gault* (1967), 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (citing *Haley v. Ohio* (1948), 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224). Moreover, “[i]t is clear beyond dispute that waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.” *Kent v. United States* (1966), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84.

No “liability” for the state, to utilize the *Pierce* Court’s language, is created by the juvenile court’s determination of probable cause. Whether or not the juvenile court finds

probable cause, the child remains subject to prosecution for the alleged crime(s). The question is in which court the child will be prosecuted. By contrast, the potential consequences suffered by the child when transferred to adult court, in comparison to those suffered by the state when a transfer is denied, are so grave that the interests of justice cannot afford such a mistake.

A more intensive appellate review would threaten the integrity of mandatory bindover decisions. Upon leaving juvenile court, children are forced to give up many rights and privileges. While in the juvenile system, the child is protected against consequences of adult conviction, including the loss of civil rights, the use of the adjudication against him in subsequent proceedings, and disqualification from public employment because juvenile convictions are not criminal convictions. *In re Anderson* (2001), 92 Ohio St.3d 63, 69, 748 N.E.2d 67. In addition, juvenile records are automatically sealed when a young adult reaches the age of 23 and may be expunged, under certain circumstances. R.C. 2151.358. A child tried in juvenile court may not be held in an adult correctional facility, be given a life sentence or receive the death penalty, and may not serve any adult portion of a sentence upon successful completion of juvenile dispositions. R.C. 2152.26(C); *Roper v. Simmons* (2006), 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1; R.C. 2152.13(D)(1).

Most dramatically, children suffer consequences far beyond the formation of a criminal record when transferred to the criminal justice system. Studies have shown that, when controlling for variables such as severity of crime and socioeconomic status, those who are transferred are more likely to be arrested for subsequent crimes than those who remained in the juvenile justice system. Robert Hahn, et al. (2007) *Effects*

*on Violence of Laws and Policies Facilitating the Transfer of Youth from Juvenile to the Adult Justice System*, Center for Disease Control, National Center for Health Marketing 56(RR09); 1-11. Furthermore, studies also have found that youth incarcerated in adult institutions are five times more likely to be sexually assaulted, twice as likely to be beaten by staff, and 50 percent more likely to be attacked with a weapon than their counterparts in a juvenile facility. See Martin et al. (1989), *Youth and Training Schools: Perceptions and Consequences of the Treatment-Custody Dicotomy*, 40 Juv. & Fam. Ct. J. 1; 10. A transfer to adult court is more than a mere change in courtrooms; it may be a sentence to continual criminal behavior and victimization.

In contrast, the denial of a transfer to criminal court inflicts no injury on the state. With or without transfer, the state has the opportunity to try the juvenile for the offense. Moreover, the community is afforded no less protection upon the denial of a transfer to criminal court. Rates of transfer and rates of juvenile homicide are not correlated, suggesting that transfer does not enhance protection of the community through a general deterrent effect. Eric Lotke and Vincent Schiraldi (1996), *An Analysis of Juvenile Homicides: Where They Occur and The Effectiveness of Adult Court Intervention*. Furthermore, a child transferred to criminal court is more likely to re-offend than one in the juvenile system.

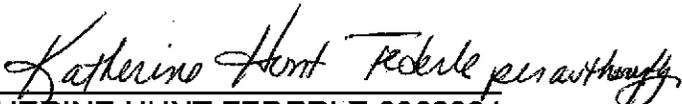
The grave consequences suffered by the juvenile as a result of transfer demonstrate that to sacrifice the superior position of the juvenile court judge to evaluate the evidence presented would create unacceptable risk of an unnecessary transfer. Therefore, abuse of discretion is the only appropriate standard of review for bindover decisions. Together, these several factors overwhelmingly indicate that abuse of

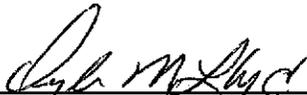
discretion is the appropriate standard of review for all bindover decisions. The decision below must be reversed because the Tenth District Court of Appeals erred in its review of the trial court's determination of probable cause.

CONCLUSION

For all these reasons, *amicus curiae* respectfully requests that this Court reverse the decision of the Tenth District Court.

Respectfully submitted,

  
KATHERINE HUNT FEDERLE 0069334  
Professor of Law and Director

  
ANGELA MARIE LLOYD 0076150  
Associate Clinical Professor of Law

  
ERIN A. STEINER  
Legal Intern

Justice for Children Project  
The Ohio State University  
Michael E. Moritz College of Law  
55 West 12th Avenue  
Columbus, OH 43210  
614/292-9177  
614/292-5511 (fax)

Counsel for *Amicus Curiae*  
Justice for Children Project

CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons,  
by regular U.S. mail on this 19<sup>th</sup> day of February, 2008:

Elizabeth R. Miller  
Office of the Ohio Public Defender  
8 East Long Street – 11<sup>th</sup> Floor  
Columbus, Ohio 43215

Katherine J. Press  
Franklin County Prosecutor's Office  
14<sup>th</sup> Floor, Hall of Justice  
373 S. High Street  
Columbus, Ohio 43215



---

Erin A. Steiner  
Legal Intern for *Amicus Curiae*  
Justice for Children Project