

**ORIGINAL**

**IN THE SUPREME COURT OHIO**

**IN THE MATTER OF:** ) **CASE NO. 2008-1562**  
**MEREDITH POLING,** ) **On Appeal from the Hardin**  
**ALLEGED DELINQUENT CHILD.** ) **County Court of Appeals,**  
**Third Appellate District**  
**Court of Appeals**  
**Case No. 6-08-09**

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**REPLY BRIEF OF APPELLANT - STATE OF OHIO**

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## ARGUMENT

**PROPOSITION OF LAW NO. 1: THE JUVENILE COURT ORDER DENYING THE STATE'S DISCRETIONARY BINDER MOTION TO TRANSFER JURISDICTION IS AN APPEALABLE ORDER AND THE STATE MAY TAKE AN IMMEDIATE APPEAL FROM THE RULING OF THE JUVENILE COURT.**

In the case *sub judice*, the record unequivocally demonstrates complete compliance with the procedural requirements for filing an appeal by leave of court. The State unquestionably filed a Notice of Appeal, a Motion For Leave To Appeal and a Memorandum in Support of the State's Motion For Leave To Appeal, in full compliance with App.R. 5(C), in the Third District Court of Appeals on April 17, 2008. (Court of Appeals Record [hereinafter "A.R."] 1-2). The State sought leave to appeal from the Hardin County Juvenile Court's March 19, 2008 order denying the State's discretionary binder motion seeking to transfer Meredith Poling, who is charged with murder stemming from the execution-style killing of her mother by shooting her in the back of the head with a shotgun on August 31, 2006, to the general division of the Hardin County Common Pleas Court to be criminally prosecuted as an adult.

On April 17, 2008, within thirty (30) days of the juvenile court's March 19, 2008 order, the State of Ohio timely filed a Notice of Appeal concurrently in the juvenile court as well as in the Third District Court of Appeals. (Juvenile Court Record [hereinafter "R."] 187 & A.R. 1). The State also filed an 11 page Motion For Leave To Appeal and a 51 page Memorandum in Support of the State's Motion For Leave To Appeal, containing a 511 page Appendix with 29 exhibits, including but not limited to: three sworn affidavits (A.R. 2, Movant's Exhibits "1-3"); copies of Defense Exhibit "J" from defense counsel and the Court (A.R. 2, Movant's Exhibits "3-A, 3-B & 3-C"); a 194 page Amenability Hearing Transcript (A.R. 2, Movant's Exhibit "10"); and various other entries and exhibits, containing the alleged delinquent child's school records,

juvenile court history in Ohio and West Virginia, police reports, stipulations, and other documentation. The State also filed motions to have exhibits that were under seal in the juvenile court forwarded to the court of appeals for their review, (R. 188, 191; A.R. 3-5), which included the psychological evaluation conducted by David J. Tennenbaum, Ph.D., the social history, the child's counseling records, and the 542 page Probable Cause Hearing Transcript.

Therefore, this case is completely distinguishable from *State v. Wallace* (1975), 43 Ohio St.2d 1, 330 N.E.2d 697 and *State v. Fisher* (1988), 35 Ohio St.3d 22, 117 N.E.2d 911, for in those cases, the State failed to follow the procedures required for seeking leave to appeal. Hence, the Appellee's contention that the State "never perfected its appeal and should not be rewarded with review by this Court, or with appellate review by the court of appeals because it *now* claims it is entitled an appeal as of right," (Appellee's Merit Brief [hereinafter "A.M.B." at p.5])(emphasis in original), simply ignores the record in this case and is devoid of merit. First, the State presented the same seven (7) propositions of law in this Court that it raised when seeking leave to appeal. Second, pursuant to App. R. 5(C), a movant is merely required "to set forth the errors that the movant claims occurred in the proceedings of the trial court" and not all relief requested as a result of the errors committed below.

The Appellee further contends that the issue before this Court is, "how can the State perfect an appeal of a juvenile court's decision to retain jurisdiction in a discretionary-bindover case?" (A.M.B. p.4). The State submits that the threshold question is: Does the denial of the State's discretionary bindover motion constitute a final appealable order from which the State can take an immediate appeal prior to an adjudication? The State further submits that the denial of a discretionary bindover motion is a final appealable order. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629; *In re Stanley*, 165 Ohio App.3d 726, 2006-Ohio-1279, 848

N.E.2d 540. Moreover, it appears from the Appellee's brief that they concede this point. (A.M.B. p.4, Proposition of Law I). If this Court answers this question in the affirmative, then, the procedural issue becomes may the State appeal the denial of a discretionary bindover motion as a matter of right or must the State seek leave to appeal?

Again, the State emphasizes that at the time of filing its appeal to the Third District Court of Appeals on April 17, 2008, this Court had yet to decide the precedent setting case of *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629. This Court's decision in *In re A.J.S.* was issued on October 21, 2008, which was more than six (6) months **after** the State sought leave to appeal to the Third District Court of Appeals and some two and a-half (2 1/2) months **after** the notice of appeal was filed in this Court on August 8, 2008, which held, **"the order of a juvenile court denying a motion for mandatory transfer effectively bars the state from prosecuting a juvenile offender for a criminal offense. It is the functional equivalent of a dismissal of a criminal indictment and therefore constitutes a final order from which the state may appeal as a matter of right."** *Id.* at ¶1(emphasis added). Further, in *In re A.J.S.*, this Court astutely recognized that the controlling issue regarding the State having a right to appeal was not whether the trial court dismissed all or part of a complaint, but rather, the legal effect of the denial of the bindover motion. *Id.* at ¶33. Namely, due to the attachment of double jeopardy, it prevents the state from obtaining a meaningful or effective remedy by way of appeal at the conclusion of those proceedings. *Id.* at ¶28.

The State requests this Court to extend its holding in *In re A.J.S.* to apply to the denial of a **discretionary** bindover motion because while there are procedural differences between the mandatory and discretionary bindover hearings, as with the denial of a motion for a mandatory bindover, the denial of a discretionary bindover motion has the same legal effect regarding the

attachment of double jeopardy once an adjudication commences. This is true because if the State were required to wait to appeal the denial of its discretionary bindover motion until after an adjudication in the juvenile court, the State would be forever barred from prosecuting the alleged delinquent child for murder as an adult even if it prevailed on the appeal because of the prohibition on double jeopardy contained in the United States and Ohio Constitutions. *Breed v. Jones* (1975), 421 U.S. 519, 541, 95 S.Ct. 1779, 44 L.E.2d 346; *In re S.J.* (2005), 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207.

The Appellee's hollow claim that "there is no statutory authority or juvenile or appellate rule which provides the State with an appeal of right of a juvenile court's amenability determination in discretionary-bindover cases" (A.M.B. pp. 5, 11-12), clearly ignores the precedential value of this Court's decision in *In re A.J.S.* and overlooks the application of R.C. §2945.67(A). Regardless of the type of bindover or the reason why a court denies such a motion, if the trial court retains jurisdiction, whether based upon a lack of probable cause in either a mandatory or discretionary bindover hearing; or based upon finding the child amenable; or even because the State did not prove the age of the child, the court must set the matter for an adjudicatory hearing wherein double jeopardy will attach. Juv.R. 30(E); *Accord, In re J.C.S.*, Cuyahoga App. No. 91121, 2009-Ohio-3470. Accordingly, this Court should similarly rule, as it did in *In re A.J.S.*, that the State has the right to appeal the denial of a **discretionary** bindover motion because such judgment also constitutes the functional equivalent of a dismissal and likewise, bars the State from criminally prosecuting Meredith Poling as an adult for murdering her mother. Absent such a ruling, the State will be denied a meaningful or effective remedy.

The Appellee and the Third District Court of Appeals' reliance on *State v. Bistricky* (1990), 51 Ohio St.3d 157, 555 N.E.2d 644 is misplaced. In its June 25, 2008 journal entry

denying the State's Motion For Leave To Appeal, the Third District Court of Appeals relied on *Bistricky* when it stated, "[d]iscretionary appeals such as requested in the State's motion, are typically allowed at the conclusion of trial where the underlying legal question is capable of repetition yet evading review." (A.R. 9 at 2). However in *Bistricky*, after the defendants were acquitted, the underlying case in controversy ceased to exist because the principles of double jeopardy precluded retrial of the defendants. *Id.* at 158-59. This is obviously in stark contrast to the present case where the State is seeking appellate relief **before** the attachment of double jeopardy with an existing case in controversy. Further, the principle set forth in *Bistricky* in no way precludes the allowance of a motion for leave to appeal in other circumstances. Furthermore, the inability of the State to contest the trial court's legal errors and abuses of discretion at any other time than now because of the prohibitions of the double jeopardy clause is the very essence of an issue that is capable of repetition yet evading review.

Additionally, the Third District Court of Appeals' decision denying the State leave to appeal stated that:

Upon consideration of the same [abuse of discretion], the Court declines to exercise its discretion to grant leave and accept the State's appeal of the interlocutory judgment in this case. See *State v. Fisher* (1988), 35 Ohio St.3d 22. **The State does not establish that the juvenile court failed to follow the applicable law or made an error at law that is capable of repetition yet evading review. In fact, the juvenile court's eighteen page decision extensively analyzes and applies the factors in favor of and against transfer, as set forth in R.C. 2152.12(D) and (E). . . .**

Neither, the alleged ex parte conduct of the trial court, nor the trial court's evaluation of the testimony before it, raises any issue of law capable of repetition yet evading review, which would necessitate an interlocutory ruling by this court.

(A.R. 9 p. 2-3). This is an example of why the State contends that absent a right to appeal, a juvenile court's denial of a discretionary bindover is virtually unreviewable because far too often appellate courts deny abuse of discretion claims solely upon finding that the juvenile court

followed the correct law without examining the manner in which the decision was reached. Such an analysis prematurely terminates upon merely determining the statutory criteria were considered by the juvenile court regardless of what other errors occurred in the process.

In *Kent v. United States* (1966), 383 U.S. 541, 561, 86 S.Ct. 1045, 16 L.Ed.2d 84, the United States Supreme Court emphasized that “[m]eaningful review requires the reviewing court should review.” In the instant case, even in light of all of the delineated errors of law, fact, and the judicial misconduct as set forth in the State’s Memorandum in Support of its Motion for Leave, the State was not even permitted to address the merits of its appeal. The question the State is left with while pouring over this vast record, which it respectfully asks this Court is simply: if not now, then when? What set of facts would be necessary for the State to be granted leave to appeal the denial of discretionary bindover?

Public policy supports the State having an appeal of right following the denial of a discretionary bindover because if the State is unable to comply with the arduous process of not only writing a brief or memorandum of law in support of a motion for leave to appeal within thirty (30) days, but in the event that the State is unable to obtain a transcript or parts of the record, or affidavits, in time to incorporate them into the brief or memorandum and attach the same in support, to show the probability that the errors claimed did in fact occur, the State will also be forever barred from prosecuting the juvenile as an adult because a motion for leave to appeal will be denied due to noncompliance and/or lack of support. (A.R. 2, *See Appendix: Movant’s Exhibits: “1,” Affidavit of Inv. David K. Holbrook p.3 at ¶11-15*). However, many factors beyond the State’s control could prevent the availability of parts of the record from being available within thirty (30) days. For example, a court reporter may be unable to prepare even portions of a transcript within that short period of time. Seeking leave to appeal as in the instant

case, may require the record not only from the probable cause hearing but also from the amenability hearing. Hence, requiring the State to seek leave to appeal from the denial of a discretionary bindover, which in all likelihood would contain a far more extensive record than a mandatory bindover, will invariably lead to legitimate appeals involving the most serious cases which pose a significant threat to public safety, escaping criminal prosecution as an adult, if the State is unable to timely and effectively comply with the demanding procedural requirements of App.R. 5(C). Also, an appeal of right will expedite the appellate process which is critical when dealing with juveniles because, as suggested by the Appellee, if the State prevails before this Court, one remedy this Court could avail itself of is to remand the matter to the appellate court to render a decision on the merits.

**PROPOSITION OF LAW NO. II: THE EX PARTE COMMUNICATIONS WITH THIRD PARTIES AND THE CONSIDERATION OF EXTRANEOUS EVIDENCE BY THE JUVENILE COURT JUDGE WERE LEGAL ERRORS REQUIRING REVERSAL OF HIS RULING DENYING THE STATE'S DISCRETIONARY BIDOVER MOTION.**

The Appellee generally and erroneously alleges that the State's second through seventh propositions of law would provide a resolution for this case and for these parties only and that they should be dismissed. (A.M.B. p.19). Further, the Appellee claims that the State is seeking this Court to render yet "a third and different opinion regarding its motion for discretionary bindover" because we are dissatisfied with the decisions reached by the juvenile court and the Third District Court of Appeals. (A.M.B. p.18). Then, on the following page of the Appellee's merit brief, it claims that these issues were not raised in the court of appeals, but if this Court finds that they were, that they are not ripe for review. (A.M.B. p.19).

The only alleged support offered by the Appellee in response to the State's second proposition of law are citations to the juvenile court's self-serving nine-page *sua sponte* journal

entry filed on July 16, 2008. (R. 212). It is important to note that the juvenile court's July 16, 2008 *sua sponte* entry was filed **after** the Third District Court of Appeals filed its June 25, 2008 entry denying the State leave to appeal, (A.R. 9), while the State's Application For Reconsideration was pending in the Third District Court of Appeals (A.R. 10), and while still within the State's time period to file a notice of appeal with this Court. (R. 212). The State timely filed its Notice of Appeal in this Court on August 8, 2008. (A.R. 13). Moreover, Judge Rapp's July 16, 2008 *sua sponte* entry was not part of the record reviewed by the Third District Court of Appeals and should not be considered by this Court when determining if the court of appeals abused its discretion in denying the State leave to appeal; nor should said entry be permitted to be used as an attempt to further justify or correct the juvenile court's original 18 page order issued on March 19, 2008. In fact, the only relevance of the juvenile court's July 16, 2008 entry has to this pending appeal, is that in this entry, Judge Rapp acknowledged contacting Cindi Orley, L.I.S.W., a Social Services Supervisor at HCJ&FS, to inquire about the background and supervision of Vincent Ciola while working with Meredith, although Judge Rapp described these communications as administrative and collateral to the State's pending discretionary bindover motion. (R. 211 at 5-6).

Further, in said entry, which appeared to be the juvenile judge's rebuttal to the legal errors raised in the Third District Court of Appeals, Judge Rapp explained his concerns regarding the lack of a supervisor's signature on Ciola's documents contained in Defense Exhibit "J," which Judge Rapp asserted "if brought to the authorities attention, could place the intern, his supervisor, and the Christian Counseling Center at risk for current and future licensure scrutiny by the State Department of Mental Health and could cause at the very least, embarrassment to the Court, the detention center, and its trustees." (*Id.* at 5). If future licensure issues was the sole

reason for Judge Rapp's investigation, then one must ask why the court did not wait to conduct its investigation until after the March 19, 2008 decision denying the bindover was journalized? The juvenile court and the Appellee's suggestion that because the State stipulated to the admission of Defense Exhibit "J," as a **nine page exhibit** (R. 350), that it somehow lost the right to contest the fact that **three additional pages** were sought out, considered, and relied on by the court while the State's bindover motion was under advisement is without merit.

The juvenile judge and the Appellee's reliance on the fact that Orley and Sanford's letters were distributed to all counsel 21 days before the Court issued its March 19, 2008 order and that no objection was received as an apparent justification to somehow minimize the taint of the trial court's inappropriate conduct, which deprived the proceedings of fundamental fairness, is a flawed and circular argument. (R. 211 at 6). First, while it is true that counsel were provided copies of Orley and Sanford's letters dated February 27, 2008, it is also true that these letters provide absolutely no notice that it was Judge Rapp who initiated these letters by calling Cindi Orley through the course of his investigation regarding the credentials and supervision of Vincent Ciola. Second, it was not until the March 19, 2008 order was received that it was apparent that the juvenile court utilized the extraneous evidence when denying the State's discretionary bindover motion.

Furthermore, the Appellee's contention that "the State never filed a motion for reconsideration" in the juvenile court neglected to mention the State's pending Motion To Strike this entry. (R. 212; A.M.B. 22). On July 28, 2008, the State filed a Motion To Strike the July 16, 2008 *sua sponte* entry (R. 212), and said motion is still pending in the juvenile court. It is significant to note that Judge Rapp's July 16, 2008 entry did not just invite the State to file a motion for reconsideration, but rather, after attempting to rebut the legal errors raised by the

State in the court of appeals, this entry specifically stated:

**[I]f the prosecution believes there to be other inaccuracies of significant, relevant facts that this Court relied upon in concluding it should retain jurisdiction, the prosecution is given leave to set forth those alleged additional inaccuracies in a motion to this Court seeking reconsideration of its ruling. Said motion is to be supported by out of court affidavits. As this matter is set for trial, time is of the essence.**

*Id.* at 8-9(emphasis added).

In the State's Motion To Strike the court's July 16, 2008 *sua sponte* entry, the State explained that this entry was procedurally inappropriate, was a nullity and should be stricken from the record, because "once a final judgment is entered, it cannot be reconsidered by the trial court." *Dahl v. Kelling* (1986), 34 Ohio App.3d 258; 518 N.E.2d 582; (R. 212). It appeared that the juvenile judge engaged in an after-the-fact attempt to supplement the court's original 18 page order denying the State's bindover motion with another 9 page entry for the purposes of appellate review with corrections and additional analysis made while attempting to rebut the legitimate issues raised by the State when filing for leave to appeal. (R. 212).

Finally, as pointed out by the Appellee, while the *ex parte* conduct in *Roberts* and *Riggle* involved contact with counsel, this Court clearly found by considering extraneous evidence outside of the record, the judge violated the fundamental concept that the facts must be established in an orderly and legal manner by means of testimony and witnesses under oath, with the right of cross-examination, and, where a record is being made, such testimony must be made a part of the record. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168; *Nationwide Mut. Ins. Co. v. Riggle* (1962), 173 Ohio St. 288, 290, 19 Ohio Op.2d 157, 181 N.E.2d 696. The controlling issue in those cases was not who the *ex parte* contact was with, but rather, because these communications occurred off the record, this Court had no way of determining what such evidence was or the weight which may have been given it by the trial

judge. *Id.* “Such evidence may have been determinative of the issues.” *Id.*(emphasis added).

Clearly, under such circumstances the judge commits prejudicial error; and [c]onsequently, the cause must be sent back for a retrial.” *Id.*(emphasis added).

**PROPOSITION OF LAW NO. III: THE CONSIDERATION OF  
EXTRANEOUS EVIDENCE THROUGH *EX PARTE*  
COMMUNICATIONS WAS A *PER SE* ABUSE OF DISCRETION  
REQUIRING REVERSAL OF THE RULING DENYING THE  
STATE’S DISCRETIONARY BINDER MOTION.**

The Appellee’s brief completely ignores the State’s third proposition of law. This case presents this Court with the opportunity to set the standard regarding a *per se* abuse of discretion. Contrary to Appellee’s erroneous contention, this Court’s decision will in fact impact appellate practice throughout the State of Ohio by finding, as many other jurisdictions have previously found, that the juvenile court’s consideration of extraneous evidence through *ex parte* communication constitutes a *per se* abuse of discretion requiring reversal of any decision reached through the use of such information. *E.g. Price Bros. Co. v. Philadelphia Gear Corp.* (6<sup>th</sup> Cir. Ohio 1981), 629 F.2d 444.

By calling Cyndi S. Orley, L.I.S.W. at Hardin County Jobs & Family Services, to investigate the credentials and supervision of Vincent Ciola, Judge Rapp engaged in unethical conduct contrary to Canon 3(B)(7) of the Ohio Code of Judicial Conduct. *See Disciplinary Counsel v. Squire*, 116 Ohio St.3d 110, 2007-Ohio-5588, 876 N.E.2d 933. This deprived the State of the opportunity to put this **additional** evidence consisting of the verbal conversations and the February 27, 2008 letters from Orley and Sanford to the test of cross-examination. Ohio’s Juvenile Law Handbook discusses access to reports and discovery in advance of the transfer hearing and specifically states that “[t]he court in *Kent* left no doubt that the right of inspection was intended to permit counsel to challenge the accuracy of these reports [social

services records].” Giannelli and Salvador, *Ohio Juvenile Law* (2009), p. 195, §17:15(citing *Kent v. United States* (1966), 383 U.S. 541, 563, 86 S.Ct. 1045, 16 L.Ed.2d 84). Further *Kent*, stated:

If the staff 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 a juvenile judge may, of course, receive *ex parte* analysis 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.**

*Id.* at 195-96(emphasis added). The State submits that once the juvenile court engaged in unethical conduct and considered extraneous evidence, that the broad discretion traditionally afforded to a juvenile judge when ruling on a motion for a discretionary bindover was relinquished; accordingly, such a decision is no longer entitled to wide latitude by a reviewing court. Therefore, the State is asking this Court to rule that a decision, as in the instant case, arrived at through judicial misconduct constitutes a *per se* abuse of discretion.

Moreover, the State contends that remand to the Third District Court of Appeals as requested by the Appellee, will be an ineffectual remedy because, “[i]t is not the authority for individual judges, in courts other than the Supreme Court, to enforce ethical standards.” *State v. Richards*, Cuyahoga App. No. 85407, 2005-Ohio-6480 at ¶7(quoted *In re Appeal of Juvenile* (1978), 61 Ohio App.2d 235, 401 N.E.2d 937). Further, in *Richards* the Eighth District Court of Appeals stated, “neither this court nor the trial court has jurisdiction over the enforcement of the Code of Judicial Conduct. *Id.* at ¶8(Allegations of judicial misconduct are matters reserved for the discretion of the Disciplinary Counsel). Judge Rapp’s consideration of information outside the record was a *per se* abuse of discretion requiring reversal. Likewise, the Third District Court of Appeals also abused its discretion by not permitting the State’s appeal.

**PROPOSITION OF LAW NO. IV: THE CONSIDERATION OF  
EXTRANEOUS EVIDENCE BY THE JUVENILE COURT JUDGE  
WAS UNETHICAL CONDUCT REQUIRING REVERSAL OF HIS  
RULING DENYING THE STATE'S DISCRETIONARY BINDER  
MOTION AS THE JUDGE'S MISCONDUCT PREJUDICED THE  
STATE AND DEPRIVED THE PROCEEDINGS OF FUNDAMENTAL  
FAIRNESS AND DUE PROCESS OF LAW.**

It is generally recognized that a judgment or order based in part upon *ex parte* communications by the judge is invalid and that such *ex parte* communications constitute reversible error. *E.g. In re Ross* (1995), 107 Ohio App.3d 35 at ¶41, 667 N.E.2d, 1012. Even if this Court would find that the juvenile judge's conduct did not rise to the level of a *per se* abuse of discretion, the State contends that the juvenile court's consideration of extraneous evidence was misconduct that prejudiced the State and deprived the proceedings of fundamental fairness and due process of law. In *State v. Payne* (1997), 118 Ohio App.3d 699, Seneca App. No. 13-96-40, the Third District Court of Appeals held that "[a] juvenile has due process rights and a right to fair treatment in the bind over process from juvenile court to criminal court." *Id.* Further, the *Kent* court stated, "[t]he [bind over] hearing must measure up to the essentials of due process and fair treatment." *Id.* at 562. **"Due process demands that in any fair hearing accused persons are judged by an impartial body. Without the presence of an impartial decisionmaker, fair procedures are meaningless . . ."** *Payne* (1997), 118 Ohio App.3d at 703(emphasis added). **"The discretion vested in the juvenile court is not a license to be arbitrary."** *In re Snitzky* (1995), 73 Ohio Misc.2d 52, 57, 657 N.E.2d 1379 (emphasis added). Further *Snitzky* held, **"[t]here is no place in our system of law for reaching a result of such tremendous consequence without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons."** *Id.*(emphasis added).

It is undisputed that the juvenile judge enjoys wide discretion in reaching its decision on the relinquishment of jurisdiction. *E.g. State v. Watson* (1989), 47 Ohio St.3d 93, 95, 547 N.E.2d 1181. **“But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirements of a full investigation.”** *State v. Yoss* (1967), 10 Ohio App.2d 47, 49, 255 N.E.2d 275(emphasis added). Contrary to the concepts of due process and fundamental fairness, the juvenile judge’s misconduct directly impacted the outcome of the proceeding and unfairly led to the decision to deny the State’s discretionary bindover motion and warrants reversal by this Court.

**PROPOSITION OF LAW NO. V: THE JUVENILE COURT JUDGE ABUSED HIS DISCRETION IN CREDITING VINCENT CIOLA’S LETTER RATHER THAN THE REPORT OF DR. TENNENBAUM AND IN SUBSTITUTING HIS OWN BELIEFS FOR THOSE OF DR. TENNENBAUM.**

Separate and apart from the legal errors committed by Judge Rapp by engaging in *ex parte* communications and considering evidence outside of the record, the court’s ruling constitutes an abuse of discretion. Despite the considered opinion from an extremely experienced psychologist, Judge Rapp arbitrarily disregarded the expert opinion of Dr. Tennenbaum, and instead, relied on the uninformed conclusions of a student intern, which in Judge Rapp’s view warranted further investigation regarding Ciola’s credentials and his supervision “to avoid future licensure scrutiny by the State Department of Mental Health and could cause at the very least, embarrassment to the Court, the detention center, and its trustees” due to the lack of a supervisor’s signature on his documents contained in Defense Exhibit “J.” (R. 211 at 5-6). This capricious conduct inappropriately bolstered the letter from the novice student intern, Vincent Ciola, and constitutes a clear abuse of discretion.

**PROPOSITION OF LAW NO. VI: THE JUVENILE COURT JUDGE ABUSED HIS DISCRETION WHILE WEIGHING THE STATUTORY FACTORS CONTAINED IN R.C. 2152.12(D)-(E), PLACED UNDUE RELIANCE ON THE POSSIBILITY OF A SERIOUS YOUTHFUL OFFENDER DISPOSITION, AND FAILED TO CONSIDER THE OVERRIDING PURPOSES FOR DISPOSITIONS IN R.C. 2152.01.**

When reviewing the record in this case and the statutory criteria in favor of bindover, as enumerated in R.C. 2152.12(D)(1)-(9), (See Appendix p. A-42 ), it is clear that at least seven (7) of the nine (9) factors apply in this case and overwhelmingly support transfer to the adult court. This case did not involve gang activity, murder for hire or other organized activity therefore, R.C. 2152.12(D)(4) is inapplicable to the instant case. Also, while the child was not awaiting adjudication or disposition as a *delinquent* child, was not under a community control sanction and was not on parole at the time of the offense as set forth in R.C. §2152.12(D)(8), Meredith Poling was on diversion at the time of the murder and she was doing very poorly. As the child's Diversion/Probation Officer testified, beginning in April, 2006, about four (4) months before the murder, the child was given multiple chances to be successful on diversion and was ultimately terminated as unsuccessful and was then placed on probation on October 12, 2007. (R. 331; A.H.T. 28, 41). Meredith was adjudicated delinquent on two separate occasions and was placed in detention, in November and December of 2007, for probation violations. (R.332-33; State's Exhibits "86 & 87"). The child's supervising officer explained that Poling's compliance with court orders was quite simply "**bad.**" (Amenability Hrg. Transcript p. 56)(emphasis added).

Similarly, when reviewing the record and considering the factors against transfer, as outlined in R.C. 2152.12(E)(1)-(8), the State submits that none of the factors are applicable in this case. Accordingly, it was an abuse of discretion for the juvenile court to deny the State's discretionary bindover motion. Moreover, the Third District Court of Appeals abused its

discretion in denying the State leave to appeal. The court of appeals specifically stated in its June 25, 2008 entry denying the State's motion for leave to appeal that, **"the court's eighteen page decision extensively analyzes and applies the factors in favor of and against transfer, as set forth in R.C. 2152.12(D) and (E)."** (A.R. 9). While Judge Rapp considered the statutory factors contained in R.C. 2152.12, his attitude in reaching his decision was unreasonable and arbitrary as the court disregarded key facts in its analysis, misconstrued the record, and misapplied the expert opinion of Dr. Tennenbaum. After addressing each of the applicable statutory factors in favor and against transfer, Dr. Tennenbaum stated that "the overwhelming proportion, overwhelmingly suggests transfer." (A.H.T. 126; R. 344 at 18-19). Coupled with the limited time to treat her within the juvenile justice system, which will hold her only "minimally," Dr. Tennenbaum opined that the child was not amenable to rehabilitation. (*Id.*). Therefore, Judge Rapp arbitrarily and unreasonably disregarded Dr. Tennenbaum's expert opinion, while failing to ascribe sufficient weight to the brutal and calculated nature of this heinous crime.

Furthermore, the State contends that this matter presents yet another case of first impression for this Court to determine what, if any, weight may a juvenile judge ascribe to the potential of a Serious Youthful Offender Disposition [hereinafter "S.Y.O."], when deciding whether to relinquish jurisdiction? The State is not aware of any statutory guidance or case law that suggests whether it is proper for the juvenile judge to speculate and weigh possible future filings and the impact on the proceedings, such as a later filing by the State of an intent to seek a blended SYO sentence, when no such request is before the court as it rules on a bindover motion. This case demonstrates why it is premature and inappropriate for the juvenile judge to presume that a SYO disposition will be sought; and further, how this erroneous assumption can detrimentally affect the ruling on a motion for discretionary bindover.

More specifically, in the instant case, while assuming that a “Mandatory Serious Youthful Offender disposition” [hereinafter “M.S.Y.O.”] would be imposed, Judge Rapp presumed a scenario that was only hypothetical and prematurely concluded that if Meredith Poling is not prosecuted as an adult, that she would automatically receive a “M.S.Y.O.” dispositional sentence upon adjudication/conviction, and thus, she would have a strong incentive to successfully rehabilitate herself. (R. 165 at 14). This conclusion erroneously presumes that a M.S.Y.O. pleading will automatically be filed, which is not the case, and is no longer a procedural option in the case. (R. 219).

Accordingly, the State contends that Judge Rapp erroneously assumed and placed undue reliance on the future possibility of a M.S.Y.O. being sought, obtained, imposed, and virtually automatically invoked, in the absence of such a filing being before the court. *See* R.C. 2152.13(A). A juvenile court **may** impose a Serious Youthful Offender Disposition **only if** the prosecutor **initiates the process** against an eligible child. *Id.* (emphasis added); *In re J.B.*, Butler App. No. CA2004–09-226, 2005-Ohio-7029 at ¶17-18. Additionally, even if this Court would find that Judge Rapp was permitted to consider that a M.S.Y.O. disposition may later be sought by the State, in the instant case, Judge Rapp committed an error of law in his analysis, when he erroneously thought that the adult sentence as charged would be that of a felony of the first degree, with a possible 3, 4, 5, 6, 7, 8, 9 or 10 years in prison plus an additional three (3) years in prison for the firearm specification as opposed to Life in prison.

In fact, the juvenile court’s rationale appears to have expressed a preference for lifetime incarceration for the alleged delinquent child as the best measure for the safety of the public, but then erroneously asserted a mistaken belief that lifetime incarceration was not a sentencing

option in this case whether it retained jurisdiction with a presumed M.S.Y.O. disposition, or if the court relinquished jurisdiction. Specifically at page 17 of his order, Judge Rapp wrote:

**Unless she is incarcerated for her lifetime, not a sentencing option available to the Court, the best measure for public safety is an appropriate commitment to imprisonment, other sanctions, incentives and services for rehabilitation.**

(R. 165 at 17)(emphasis added). This quoted passage demonstrates the court's clear misunderstanding of the potential penalties and assumes that a later invoking of a S.Y.O. disposition is an automatic option despite the fact that no such pleading was filed with the court at that time. (R. 219). Thus, Judge Rapp committed an error of law by misapplying the possibility of a M.S.Y.O disposition and the available sentencing options.

Finally, the State contends that the juvenile judge also failed to consider and apply all of the overriding purposes for dispositions as contained in R.C. 2152.01 when denying the State's discretionary bindover motion. As explained in the 2009 Ohio Juvenile Law Handbook, "S.B. 179, adopted in 2002, provided a balancing test for determining discretionary bindover, along with the overriding principles of R.C. 2152.01." Giannelli and Salvador, Ohio Juvenile Law (2008), p. 184, §17:8. The overriding purposes for dispositions as set forth in R.C. 2152.01 are to not only provide for the care, protection and mental and physical development of children, but also to protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. Further, dispositions under this chapter are to be commensurate with and not demeaning to the seriousness of the delinquent child's conduct and its impact on the victim, and are to be consistent with dispositions for similar acts committed by similar delinquent children. R.C. 2152.01(B). The State submits that when considering amenability and public safety, these overriding purposes are paramount and a ruling on a discretionary bindover made absent these considerations fails to address the heart of the

issues regarding restoration of the community and holding this offender accountable for this brutal murder. Thus, it was an abuse of discretion for Judge Rapp to ignore these overriding purposes in denying the State's motion for transfer. The Third District Court of Appeals similarly erred when it failed to permit the State's appeal.

**PROPOSITION OF LAW NO. VII: THE CUMULATIVE ERRORS OF THE JUVENILE COURT JUDGE REQUIRES REVERSAL.**

The Appellee's contention that the State "offered no analysis" to support its seventh proposition of law is without merit. (A.M.B. p.24). A review of the State's Merit Brief at page 49, reveals that the State supported this proposition of law with argument, analysis, and several supporting authorities which are hereby incorporated by reference. Therefore, the Appellee's reliance on this Court's decision in *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7088, 822 N.E.2d 1239, is misplaced and unpersuasive.

Based on the foregoing propositions of law which are all hereby incorporated by reference, it is clear that Judge Rapp committed multiples errors of law and abuses of discretion. Even assuming *arguendo* that this Court would find these legal errors and abuses of discretion, taken individually, do not constitute a basis for reversal, the State respectfully submits that the cumulative effect of the errors, coupled with Judge Rapp's abuses of discretion, requires reversal. This is particularly true in this case since the judge's conduct compromised the fairness of the proceedings. Accordingly, the Third District Court of Appeals also abused its discretion when it denied the State's Motion For Leave to Appeal.

**CONCLUSION**

Based upon this Court's ruling in *In re A.J.S.*, 120 Ohio St. 3d 185, 2008-Ohio-5307, 897 N.E.2d 629, the State of Ohio respectfully requests this Court to find that the denial of the State's discretionary bindover motion is a final appealable order. Further, based upon the nature of

transfer proceedings, coupled with the limited time to rehabilitate delinquent children in the juvenile justice system, the State moves this Court to find that the State may appeal the denial of a discretionary bindover motion as a matter right.

Even if this Court would determine that an appeal of right is unwarranted, the State respectfully requests this Court to find that Judge Rapp abused his discretion in failing to grant the State's discretionary bindover motion. Further, the State submits that the Third District Court of Appeals likewise erred when it denied the State leave to appeal. Accordingly, in light of the fact that Meredith Poling is now over eighteen and one-half years old, the State moves this Court to reverse and remand this matter to the Hardin County Juvenile Court, with an order that the juvenile court grant the State's discretionary bindover motion and transfer this case to the general division of the Hardin County Common Pleas Court for Meredith Poling to be criminally prosecuted as an adult.

In the alternative, the State respectfully requests this Court to remand this matter to the Third District Court of Appeals for an appeal on the merits. Further, the State of Ohio moves this honorable Court for any further relief it deems appropriate and in the interests of justice.

Respectfully submitted,

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**Counsel for the Appellant-State of Ohio**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing, Reply Brief of the Appellant–State of Ohio, was sent by ordinary U.S. mail to Counsel of Record for the Appellee–Meredith Poling, Elizabeth R. Miller, Assistant State Public Defender, at the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Bridget Hawkins, *Guardian Ad Litem* for Meredith Poling, P.O. Box 549, Bellefontaine, Ohio 43311; and Barbara A. Farnbacher and Laura R. Swisher, Assistant Franklin County Prosecutors, Counsel For *Amicus Curiae* Ohio Prosecuting Attorneys Association, at 373 South High Street-13<sup>th</sup> Floor, Columbus, Ohio 43215, on this 24<sup>th</sup> day of August, 2009.

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**Counsel for the Appellant-State of Ohio**

# APPENDIX

JUN 25 2000

*Carol J. Stearns* Clerk  
Hardin Co. Court of Appeals  
3rd Appellate Dist.

**IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO**

**HARDIN COUNTY**

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**IN THE MATTER OF:**

**MEREDITH POLING,**

**CASE NO. 6-08-09**

**ALLEGED DELINQUENT CHILD.**

**JOURNAL  
ENTRY**

**[STATE OF OHIO - APPELLANT].**

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This cause comes on for determination of the State of Ohio's motion for leave to appeal and Defendant's memorandum in opposition to the motion.

The State seeks leave to appeal the juvenile court's judgment denying the State's discretionary bindover motion to transfer jurisdiction over a minor to the general division of the Hardin County Common Pleas Court for prosecution as an adult. The juvenile court found that there is probable cause to believe the minor committed the offense charged, but determined that the minor is amenable to care and rehabilitation in the juvenile system.

Ohio Revised Code 2945.67 provides that the State may request leave to appeal "any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case." The decision to grant a motion for leave to appeal is solely within the discretion of this Court. See *State v. Fisher* (1988), 35 Ohio St.3d 22. Moreover, discretionary appeals such as that

requested in the State's motion, are typically allowed at the conclusion of trial where "the underlying legal question is capable of repetition yet evading review." *State v. Bistricky* (1990), 51 Ohio St.3d 157, 159.

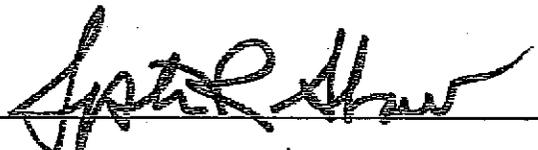
A juvenile court enjoys wide latitude to retain or relinquish jurisdiction, when ruling on a discretionary bindover, with the ultimate decision lying in its sound discretion. *State v. Watson* (1989), 47 Ohio St.3d 93, 95. A decision regarding a bindover should not be reversed absent an abuse of discretion. *State v. Golphin* (1998), 81 Ohio St.3d 543, 546.

Upon consideration of same, the Court declines to exercise its discretion to grant leave and accept the State's appeal of the interlocutory judgment in this case. See *State v. Fisher* (1988), 35 Ohio St.3d 22. The State does not establish that the juvenile court failed to follow the applicable law or made an error of law that is capable of repetition yet evading review. In fact, the juvenile court's eighteen page decision extensively analyzes and applies the factors in favor of and against transfer, as set forth in R.C. 2152.12(D) and (E).

Rather, in essence, the State asserts that the juvenile court improperly investigated the credentials and credibility of various "experts" in an ex parte manner and generally evaluated that testimony in a manner that was against the weight of the evidence. Neither, the alleged ex parte conduct of the trial court, nor the trial court's evaluation of the testimony before it, raises any issue of law

capable of repetition yet evading review, which would necessitate an interlocutory ruling by this court. Accordingly, the motion is not well taken.

It is therefore **ORDERED** that the State of Ohio's motion for leave to appeal be, and hereby is, overruled at the costs of the State of Ohio.

  
\_\_\_\_\_  
  
\_\_\_\_\_  
  
\_\_\_\_\_  
JUDGES

DATED: June 24, 2008

/s/

**IN THE COURT OF COMMON PLEAS OF HARDIN COUNTY, OHIO**  
**JUVENILE DIVISION**

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IN THE MATTER OF  
MEREDITH POLING,  
ALLEGED DELINQUENT CHILD

CASE NO. JD 207 20131  
ORDER REGARDING  
MOTION TO TRANSFER  
JUV R 30(C)  
ORC 2152.12(C)

The prosecution moved this Court, to transfer jurisdiction over the child, Meredith Poling, to the General Division of this Court of Common Pleas for criminal prosecution solely as an adult rather than proceeding with prosecution of the child as a "mandatory serious youth offender" ("MSYO"); however, if this Court retains jurisdiction and if the child is adjudicated as a MSYO, she would receive both a disposition as a child and a sentence as an adult. This Court previously found that the prosecution had presented some credible evidence of every element of the offense of murder at the preliminary or probable cause hearing (entry filed November 7, 2007). The amenability hearing was set for December 19, 2007, but continued, at the request of the defense and without objection, to February 11, 2008.

At this amenability hearing (after which the Court must determine whether to retain the case or transfer jurisdiction to the general division), the Court received into evidence and carefully reviewed numerous exhibits (over 700 total pages of documents) and heard the testimony of two witnesses. For the purpose of this hearing only, the Court must assume guilt, otherwise the issue of amenability to rehabilitation within the "juvenile system" would be irrelevant. A "not guilty" / "not delinquent" child would have no need for rehabilitation either in the juvenile or adult system.

The facts of this case may alternatively arouse sympathy for and prejudice against the accused child herein. The law and the oath of judge require the Court to disregard both sympathy and prejudice, and to not let emotion influence the findings and judgment of the Court. Rather, the Court must act with reason and impartiality without hint of bias, sympathy, or prejudice so that the people of the State of Ohio, the family of Michelle Murnahan, and the accused child, Meredith Poling, may confidently believe that the ruling herein was fairly and impartially rendered.

**FINDINGS OF FACT**

Meredith Poling, (sometimes hereinafter "Meredith" or "child") is the child of Jeffrey A. Willis and Michelle Murnahan. The child has been charged with the Mt.

Victory, Hardin County, Ohio, August 31, 2006, murder of her mother (sometimes hereinafter "Michelle" or "mother") in violation of ORC 2903.02(A) and 2915.02. The child was 15 years and six months of age at the time of her alleged offense. The complaint was filed on March 30, 2007, seven months after the alleged murder, and the child has been in detention on this charge since April 2, 2007.

Regarding the background and behavior of the child before the death of her mother, Meredith was an average to below average student in the elementary grades of the Bellefontaine City Schools. Her grades reflected difficulty in science and spelling (State's Exhibit 89). Her attendance was reasonably good, with an average of five days absent in the 3<sup>rd</sup> through 5<sup>th</sup> grade. She transferred to the Ridgemont School system on April 15, 2003, during her 6<sup>th</sup> grade school year. (Sixth grade attendance and cumulative grades were not in evidence.) At Ridgemont, (7<sup>th</sup> through 9<sup>th</sup> grade) she continued to have below average grades in science. The language arts/English grades deteriorated in the 9<sup>th</sup> grade while her achievement test score in reading was "accelerated." Her attendance at Ridgemont also deteriorated from that of the Bellefontaine school. At Ridgemont she averaged 26 absences during her 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> grade school years. The submitted school records indicate these were excused absences (State's Exhibit 90 at page 11).

However, a truancy complaint (Case No. JU 20620089) was filed in this Court during the child's 9<sup>th</sup> grade school year at Ridgemont (State's Exhibit 85 at page 1). While in the 9<sup>th</sup> grade, Meredith received minor school disciplinary actions on February 6, March 18, and May 9, 2006, for which school detention or Saturday school were assigned as sanctions. The school truancy charge was filed on March 27, 2006, in part because of five (5) "unexcused" days recorded while she was subject to a five (5) day school suspension for smoking on school grounds during a basketball game. The child admitted to school truancy in this Court on April 12, 2006. In other words, she admitted to being an "unruly child" in that she had committed a "status offense," she had violated a law applicable only to children. [At this point she had not been found to be a delinquent child; a delinquent child is a child who has violated a law that would be a crime if committed by an adult or a child who has violated an order of the Court such as rules of probation.]

In all adjudicated unruly and delinquency cases that come before this Court, trained Court staff administer abbreviated assessment "tools" to the child and sometimes the parent(s). These "tools" are research validated aids used: (1) to support a recommendation for a more thorough assessment by, for example, a licensed independent social worker, and (2) to support recommendations from the prosecution and defense as to the appropriate level of sanctions, supervision, and services for the child and family. As Court and community resources (for sanctions, supervision, and services) are limited, all such cases are triaged.

Diversion Officer, Brenda Boecher, on April 18, 2006, administered a risk and needs assessment tool to the child called the "Youth Level of Service/Case Management Inventory" (developed by R.D. Hoge, Ph. D. and D.A. Andrews, Ph. D.)

(Defendant's Exhibit G). The Youth Level of Service/Case Management Inventory standard cut off scores for risk and need classification of children are: ~~0 to 8 (low risk and low need of services and supervision)~~ 4: 21 and low need of services and supervision); 9 to 22 (moderate risk and moderate need); 23 to 34 (high risk and high need); and 35 to 42 (very high risk and very high need for services and supervision). The child's score of five (5) placed her in the middle of the group of children who may come to the attention of juvenile courts but are of low risk and low need for services and supervision. An additional consideration is that Federal law assumes that unruly (including truant) children are low risk and "discourages" the use of court detention and "court detention school" for these "status offenders" through financial sanctions that can be imposed upon court program funding if status offenders are ordered into detention.

During the child's assessment for school truancy, it was reported by Meredith Poling and confirmed by her mother that: the child had no court involvement prior to the truancy complaint; she volunteered that her parents had difficulty in controlling her because of her attitude and outbursts; she reported that both she and her mother were very moody and that her mother was very controlling; the child was very guarded as to what she would discuss with her mother and felt that dad and step-dad were more like friends than fathers. While the child perceived her mother as very controlling, the assessment concluded that her parents had difficulty in controlling her behaviors. On April 18, 2006, during this assessment, the child rated her mother on a 10 point scale (with 5 average and 10 excellent) as being between 6 and 7, and her father and step-father between 7 and 8.

The child attributed her poor grades at the Ridgemont school to her not understanding science and not doing homework in other classes. While she reported a verbal altercation at school with two teenage girls (sisters who are known to the Court), she was confident that none of her friends were unruly or delinquent. The assessment concluded that the child had some disruptive school behavior, low achievement, and problems with peers.

During the April, 2006, Court assessment, the child reported: she had one experiment with beer ("spit it out because of taste"); she denied drug experimentation (Defendant's Exhibit G at page 17); she was involved in school (FFA, art, volleyball, and softball); she was informed prior to the April 18<sup>th</sup> assessment that she could not participate in sports, starting in the fall of 2006, due to her poor grades in the preceding grading period; she was criticized by some and admired by some for speaking her mind; she felt sorry after screaming; and she didn't know why she sometimes got mad.

The screening tool suggested (in April, 2006) that the child had poor frustration tolerance, however, it was significant that the tool did not indicate any of the following risk areas which the tool was designed to expose: physical aggression; tantrums; verbal aggression; inadequate guilt; antisocial or pro-criminal attitudes, not seeking or rejecting help, little concern for others, or defiance of authority (Defendant's Exhibit G at page 6). Assuming that the child murdered her mother just four and one-half months

later, then, either something went terribly wrong in a short period of time, or the assessment tool has significant limitations, or both.

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At that point in her life, her first appearance before a Court, the child appeared to be of low risk to herself and to others and of low need for sanctions, supervision, and services. Meredith showed insight and a willingness to change when she indicated, during the assessment interview, that she would like to be in an anger management group to help her improve her temper. On April 18, 2006, the child's mother agreed that she would cooperate (Defendant's Exhibit G at pages 8 & 9).

On April 19, 2006, the Court gave the child the choice to successfully complete the diversion program. The program required that she complete 15 hours of public service and that she regularly attend school. The truancy case would be dismissed by the prosecution if the child complies or, if not successful, the child would return to Court on June 22, 2006, for disposition (sentencing). She agreed to diversion. A diversion contract was prepared by the diversion officer and was signed by both mother and daughter (State's Exhibit 81). Although the Court had not ordered the child to attend anger management counseling, the contract prepared by Diversion Officer Boecher stipulated that she do so. It is unclear from the evidence why anger management counseling was included but was not then initiated. However, Diversion Officer Boecher recorded her subsequent observation that the family had "trouble communicating and respecting others." Boecher then recommended to the child's mother, Michelle, that the family participate in "Functional Family Therapy." Perhaps, at that time, family therapy appeared to be a higher priority to Boecher than anger management just for the child. However, the mother reported that she did not want to work with the only therapist known to provide family therapy in Hardin County (too many cancelled appointments by the Family Resource Center, Kenton, Ohio, therapist) (Boecher's testimony and State's Exhibit 94 at pages 6 and 20). As a result, Diversion Officer Boecher testified that she met with the family weekly or had weekly phone conferences in an attempt to help the family with communication and with respect issues.

The child did not complete her community service before the scheduled June 22, 2006, disposition hearing. Also, three days prior to the scheduled Court hearing, Meredith and several girlfriends snuck out of her home during the night, walked around the Village of Mt. Victory, and "felt like rebels" (State's Exhibit 83 and State's Exhibit 94 at page 19). A letter from the child dated June 22, 2006, indicates that the diversion officer went to the child's home in Mt. Victory on the previous day; the child acknowledged that she had "messed up" but was remorseful; and she wanted to re-earn trust after she "threw it all away." A second letter from the child proposed that she lose her right to obtain a driver's license until age 18 and, that she be placed on probation if she "was to break the rules just one more time..." (State's Exhibit 82 - two letters from Meredith Poling to Officer Boecher).

Rather than returning to Court on June 22, 2006, a second diversion program behavior contract [amended contract] was agreed to by the child, mother, and diversion officer requiring three behavior changes: (1) after Meredith completes a period of house

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arrest, she will not break curfew; (2) she will not leave home without permission; and (3) she will improve her attitude and respect toward parents and achieve better communication and peace in the home (State's Exhibit 83 – Diversion Program Behavior Contract – Emphasis added). Neither "anger management" nor "Functional Family Therapy" were mentioned in the amended contract. Rather than therapy, this contract set out rewards and consequences for the child. (One substantial benefit of a behavior contract with predetermined consequences is the removal of the perceived need for a parent to yell at a child if the child violates the agreement, thus promoting "peace in the home.") If Meredith changed her behavior as indicated in the contract, she would receive "windows of time off house arrest and would be allowed to have friends visit at the home." If not, provided her mother report the violation(s), it would be recommended by Diversion Officer Boecher that the Court place the child on probation. In agreeing to this contract, Boecher indicated her assessment that the child was still capable of successfully completing diversion, and that the June 22<sup>nd</sup> scheduled Court hearing should be postponed.

Moving forward to the preliminary hearing in this murder case held on September 26, 2007, testimony therein gave the Court some picture of how the Mumahan/Poling family functioned (or disfunctioned), how the child complied (or failed to comply) with the amended contract, and how her mother, Michelle, responded to the child's noncompliance during the next two and one half months prior to Michelle Mumahan death.

Ashley McCullough testified (Joint Exhibit D beginning at page 456) that she was a friend of Meredith's and was at her home on August 24, 2006 (7 days prior to Michelle Mumahan's death). Ashley observed the child's mother bite Meredith on the arm when she reached down to get something off of her mother's plate.

Ashley testified that, shortly thereafter, outside the child's home, Meredith told Ashley that she hated her mother and spoke of an idea she had to kill her mother with a gun. [Again, although the Court is required to presume the child innocent until proven guilty, it considers this testimony to be credible for the purpose of this amenability hearing.]

Ashley McCullough also reported that, on the following day, Friday, August 25, 2006, Meredith accompanied Ashley and her family to a Ridgemon football game. Ashley testified that Meredith's mother, Michelle, brought law enforcement with her to the game in order to escort her daughter home early from the game.

Testimony of Linda Ridgeway ("Mrs. Ridgeway") (Joint Exhibit D beginning at page 11) indicated that her daughter, Erica, and Meredith were friends. Mrs. Ridgeway stated that she had liked Meredith; the child was always polite and never said anything mean-spirited about her mother. Regarding the events of August 31, 2006, the day of Michelle Mumahan's death, Mrs. Ridgeway testified: between 3:30 to 4:00 p.m., her daughter was with Meredith Poling when Mrs. Ridgeway drove her car into Mt. Victory and retrieved her daughter intending to take her to the Richwood Fair, Meredith asked if

she could accompany them to the fair, Mrs. Ridgeway said, "Let's go ask your mom," Mrs. Ridgeway and the two girls found Meredith's mom walking a dog, and Mrs. Ridgeway pulled her car to the side of the street. As witnessed by Mrs. Ridgeway, Meredith's mother immediately yelled at Meredith, "Get the fuck out of that car. Get the fuck out of that car right now," Meredith said to Mrs. Ridgeway, "It doesn't look like I'm going anywhere." There was no evidence that any of these events (from August 24<sup>th</sup> through August 31, 2006) were reported to Diversion Officer Boecher before Michelle Mumahan's death.

The Court heard testimony at the probable cause hearing regarding the child's behavior after her mother's death. Some testimony indicated that the child did not exhibit the behavior that one might expect to see if she were in shock and grief upon the violent death of her mother. For example, one witness saw her crying but: "I did not see any liquid tears." Another: "She was not upset at all. She was more of shocked." (Joint Exhibit G at pages 27 & 473). (This Court is very cautious, if not skeptical, about the ability of lay witnesses, expert witnesses, or even the judge to know what was or is going on in the mind of a defendant.)

On the day after Michelle Mumahan's death, her daughter, as an alleged dependant child (Case No. AD20630015), was initially placed by this Court into the care and temporary legal custody of the Hardin County Department of Jobs & Family Services. The Department then placed the physical custody of the child with her maternal grandmother (Donna Johnson) in Athens, Ohio.

During the child's one month stay with her grandmother, she attended Athens High School from September 12, 2006, to October 12, 2006 (States Exhibit 91). While enrolled, she was disciplined with an in-school suspension on October 2, 2006, possibly for not dressing for physical education and missing "ES"?

On October 12, 2006, by authority of the previous truancy adjudication in this Court, the child was placed on probation, and it was further ordered that custody of the child be transferred from the Hardin County Department of Jobs and Family Services to the child's father, Jeffrey Willis, who resided in Parkersburg, West Virginia. The separate dependency case was dismissed. Meredith attended Parkersburg High School from October 16, 2006, to March 1, 2007 (State's Exhibit 92). While enrolled, she received poor grades, some failing, and five disciplinary actions: one for insubordinate or defiant behavior; one for skipping school; and three for skipping class. The child's father and stepmother were cooperative with the school and with Diversion Officer Boecher. They reported two incidents of truancy to the Parkersburg Police Department as two missing person reports (State's Exhibit 95).

While the murder investigation continued, the child was returned from West Virginia by her father to this Court, at the request of Diversion Officer Boecher, due to an alleged probation violation (unexcused school absence(s)). On November 13, 2006, the child admitted the probation violation and was placed in the Logan County, Ohio, Detention Center for six days (November 13<sup>th</sup> to November 19, 2006). She was also

fined, and was ordered to complete public service. Less than one month later, the child was again returned from West Virginia to this Court by her father for an alleged second probation violation (unexcused school absence(s)). She again admitted the violation and was ordered to serve six additional days in detention (December 11, 2006, to December 17, 2006).

A third probation violation charge was filed on February 9, 2007, in this Court. However, similar school truancy charges had been filed in the Circuit Court of Wood County, West Virginia, on January 17, 2007. The Wood County Court had initiated jurisdiction over the child, and after conferring with the judge of that Court, it was determined that (1) the West Virginia Court could better monitor her behavior, and (2) it was appropriate that the West Virginia Court assume sole jurisdiction over the truancy matter. The duplicated charge in this Court was dismissed.

After the murder charge herein was filed on March 30, 2007, this Court resumed its jurisdiction over Meredith Poling. The child was again placed in the Logan County, Ohio, Detention Center on May 12, 2007; she has remained in secure detention since that date. While in detention, her school attendance and grades were no longer problematic. School classes were on site ("court detention school"). Her grades were greatly improved; daily grades were most often in the +90% range with many 100% grades. Disciplinary issues appeared to be rare and minor (State's Exhibit 93).

Additional revealed history that has relevance to the child's need for and amenability to rehabilitation:

On September 1, 2006, the day after her mother's death and the same day that this Court ordered that Meredith Poling be placed into the temporary legal custody of the Hardin County Department of Jobs and Family Services as an alleged dependant child, this Court also ordered the child to be interviewed and assessed by a counselor of Lutheran Social Services, Kenton, Ohio. The Lutheran Social Services assessor (sometimes hereinafter "L.S.S. assessor") reported that the child's mood was "appropriate." During the interview the child reported that "I am actually calm right now" but in the prior 24 hours she reported that she had, at times, been "nauseous, crying, and pretty much just heartbroken." Perhaps she experienced a full range of emotions.

When asked about prior counseling, the child disclosed to the L.S.S. assessor that she had been sexually abused by a friend of her father when she was approximately 6 or 7 years old. She did not disclose the abuse until she was approximately 13 or 14 years old. Extended family members described Meredith as "a very perfect child" and "a happy excited little girl" that became "a complete stranger." Michelle Murnahan's mother, Donna Johnson, reported that things changed dramatically when "Meredith disclosed that she was sexually molested... She became withdrawn, belligerent; she would get really smart mouthed" (Joint Exhibit A at pages 4 and 6). However, the child subsequently received only limited therapy from the Family Resource Center, Kenton, Ohio, therapist. The therapist "wasn't too bad" but "cancelled too many appointments" (State's Exhibit 94 at pages 6 and 20). (Although they had

been asked about prior counseling during the child's April 18, 2006, risk and needs assessment for school truancy, none of this history had been disclosed to Diversion Officer Boecher by the child or her mother, and the sex abuse therapy records are not in evidence.)

Meredith Poling stated during the assessment by the L.S.S. assessor that, when angry, the child writes in her journal, cries, and confronts the person. "With [my] mom I get really persistent - I argue to get my way... If I wasn't on diversion [mom] would let me do stuff." The child reported that she had lots of arguments with her friends - "Four of us are a really tight group" she disclosed that she once accidentally hit a friend in the mouth when arguing (State's Exhibit 94 at page 18).

The child, Meredith, reported to the L.S.S. assessor that her mother, Michelle, had slapped her in the face and spanked her when younger, the child's first stepfather had threatened to leave Michelle if she hit her child again. Yet the child denied being abused and gave no hint of malice. "Me and my mom had issues." "I have an attitude." "We used to fight a lot." "I used to lie to my mom a lot." She reported impaired memory of what happened yesterday [the day of her mother's death]. Yet, incongruously, "I wish I could be with [my step-dad], but I did what I did, I do what I can" (State's Exhibit 94 at pages 9 and 21) (Emphasis added).

The child, as of September 1, 2006, had consistently reported that she did not use drugs and had only tasted alcohol. The child did not have any dirty drug screens while on diversion and living in Hardin County. As of September 1, 2006, the L.S.S. assessor concluded, as a result of her assessment, that the child, Meredith Poling, was a low risk to herself and a moderate risk to others (State's Exhibit 94 at page 10).

Subsequent to her mother's death, the child had two counseling sessions while living in Athens, Ohio, and then several sessions while residing with her father and stepmother in Parkersburg, West Virginia. (None of these records are in evidence.)

A psychologist of extensive experience in the Court system provided evidence in the form of testimony and a written report submitted to the Court (Joint Exhibit A). He did not counsel the child but conducted an assessment in order to provide information on factors favoring and disfavoring transfer of jurisdiction of the child for criminal prosecution solely as an adult.

The psychologist met with the child on four occasions, approximately two hours each, December 18<sup>th</sup> and 19<sup>th</sup>, 2007, and January 2<sup>nd</sup> and 4<sup>th</sup>, 2008. During these meetings, he administered five tests, assessments, or inventories. He spent more than 10 hours reviewing records and background materials provided by the defense and the prosecution. The psychologist had telephonic interviews or face to face meetings with nine additional people. His investigation appeared to be thorough.

The psychologist acknowledged a known history of the child having "multiple trauma including: sexual abuse [by her father's friend]; intense arguments; instability;

repeated real and potential violence [Meredith witnessed domestic violence as a young child and may have been a victim herself]; rejection; and recurrent abandonment by father figures" (Joint Exhibit A at page 3). In his testimony, the psychologist agreed that Meredith is a product of this history.

The psychologist reported that the child's mother, Michelle, was described as being extremely strict, and controlling, and gave her daughter no freedom at all. Michelle, herself, was also sexually abused at a young age (by a stepfather) and had a very poor relationship with her own mother. As a mother, Michelle was either unavailable physically (because of her work schedule) or emotionally (because of her depression).

The psychologist logically maintained a professional opinion or "perception that the rehabilitation [of the child, Meredith] demands disclosure [confession by the child] and a relatively candid review of that which brings forth the court's involvement." In other words, the psychologist expected the child to explain to him why and how she had murdered her mother. It appears that the psychologist also believed that the child understood she could freely discuss, with him, her role in her mother's death without compromising her right to a trial (Joint Exhibit A, at page 8). However, the Court is not persuaded that she understood and believed this to be true and the weight of the evidence does not support this conclusion. The psychologist concluded that throughout the four assessment interviews, the child was unable or unwilling to present herself with "any discernable emotion" including grief in his presence. However, this Court again notes that one's perception of the emotion of grief in another is a subjective observation that perhaps cannot always be assessed, as the psychologist states, "through defensible data." Her probable lack of understanding or belief that she may freely disclose and discuss her role in her mother's death, without compromising her rights, supports the conclusion of the psychologist that the evaluation was "hugely compromised" (Joint Exhibit A at page 18).

The fact that this child has the right to a trial and the right to remain silent, and she has not yet been adjudicated or convicted, renders an evaluation of her amenability to rehabilitation highly problematic. Did she (at that time 16 years of age) understand that she must candidly disclose to a stranger that she is guilty of a heinous crime and can safely display appropriate indicia of remorse prior to trial in order to be viewed as "open to rehabilitation?" Additionally problematic to this Court is the report of the intern counselor (hereinafter "intern") who has provided treatment to the child throughout her stay in the Logan County, Ohio, Detention Center, wherein he stated that Meredith was "instructed not to speak with anyone concerning her current charges" (Defendant's Exhibit J, at page 5). In further support of this conclusion, the child told the psychologist that "she has never had access to a counselor with whom she may discuss her mother's death" (Joint Exhibit A at page 9). (It would appear she also excluded the psychologist as a "counselor with whom she may safely discuss her mother's death.")

Rather than this child being non-emotional, it is reasonable to conclude that she felt compelled to suppress her emotions at least until her innocence or guilt is

determined by a jury. (It should not be overlooked that this child had a 9-year experience of suppressing her trauma of sexual abuse. The psychologist recognized the child's "tendency toward repression... [and] warehousing memories" in regard to her nondisclosure of being sexually molested as a 6 or 7 year old, finally disclosing her victimization at age 13 or 14, and even today recounting her experience without displaying or allowing herself to feel emotion (Joint Exhibit A at page 9). Again, regarding the circumstances of, and her feelings about, her mother's death: "I don't think about it. It's too hard, and I can't deal with that stuff in here [detention]... I know I need emotional help – my emotions – help understanding them – help sorting them out.") It may also be that, as she reports, "I didn't know how I felt, my feelings were all tangled up" (Joint Exhibit A at page 10).

The child reports positive things [feelings] about her mother. For example: "My mom is a loving person...she is very creative and artistic." But also "my mom used to be really, really strict with me...she wouldn't even let me go out on the front porch; she was scared something was going to happen to me." As Meredith got older her mother withdrew. The psychologist called it "crippling depression." The child explained:

"[My mother] started watching TV all the time. She was reading all the time. She would focus herself out of everyday life... I was always so scared I'd disappoint her, so I wouldn't talk to her about my life, [about] how I was feeling. I didn't really let her in, and I always wanted this really great relationship, but it didn't happen...mom just completely zoned out. Just TV and books. That's when I started not coming home when I was supposed to do, and hanging out with the wrong people" (Joint Exhibit A at page 11) (Emphasis added).

Following the above disclosure by the child, the psychologist states "At no time during this second meeting does Meredith discuss her feelings regarding her mother" (Joint Exhibit A at page 11). I can only assume he meant that the child did not discuss with him her feelings toward her mother prior to killing her. Otherwise, the child clearly had a mixture of emotional feelings about her mother, both good and bad.

In his submitted report, the psychologist opined: "Meredith never compromised her stance that she was in no way responsible for her mother's death." Compare these two statements of the child: "I go downstairs...there's blood all over the place" (her statement to the psychologist, Joint Exhibit A at page 12) and "I wish I could be with [my step-dad] but I did what I did. I do what I can." The second statement is very arguably a confession to the counselor just hours after her mother's death (State's Exhibit 94 at page 9 and page 21). The Court, therefore, must draw a different conclusion than that of the psychologist. Her quoted statements frequently appear to avoid accepting responsibility rather than outright denial. When the psychologist asked the child to tell him about her mother's death and about her feelings, she said "I don't think about it... it's too hard..." It does not appear that the psychologist asked the child what she meant when she stated to the counselor the morning after Michelle Murnahan's death: "I did what I did. I do what I can" (Joint Exhibit A at page 13).

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While the psychologist concluded that the child's testing showed no indication of significant psychopathology or indication of "situational depression," the MMPI-A did suggest she is:

"down hearted and discouraged, that she is somewhat pessimistic regarding her future with suggestions of hopelessness and despair" (Joint Exhibit A at page 15).

The child's feeling of hopelessness and despair (assuming her guilt) should not be surprising.

The psychologist also administered and scored the Risk-Sophistication-Treatment Inventory (RSTI). He acknowledged that he must assume the child guilty of her mother's murder in order that the test have any meaning, and he admitted that giving any weight to the test results in a case such as this is debatable (Joint Exhibit A at page 16 and 17). The psychologist's explanation was that an assessment of the child's amenability to rehabilitation prior to trial presents a:

"convoluted reality as if Meredith indeed did not participate in her mother's death, she would have an entirely contrasting series of scores... this is particularly salient here, as there is no history of known violence [by the child], no history of convictions, [and] no adequate attempt historically toward treatment" (Joint Exhibit A at page 17). (Emphasis added.)

This child and the psychologist are caught in the convoluted statutory scheme of assessing the child's amenability prior to trial. The psychologist "This summary does not presume that Meredith participated in the act charged [murder]..." Then, within three sentences, the psychologist: "[S]eparate possibly, too, from other considerations is Meredith's maintaining innocence. This [maintaining innocence] weighs heavily against retention [of jurisdiction in the juvenile division]..." (Joint Exhibit A at page 20) (Emphasis added). In testimony, the psychologist also acknowledged that children who murder a parent have a very low recidivism rate and by his report concluded: "Meredith's risk to the general public is, of course, at this point minimal" (Joint Exhibit A at page 20) (Emphasis added). A child who is of low risk to the public and a low risk to recidivate would logically be classified as amenable to rehabilitation.

The Court concludes, from a careful review of all the evidence presented, that the psychologist's opinion as to the child's amenability to rehabilitation would have been significantly different had the child understood that she could disclose, to a total stranger, her responsibility for her mother's death (assuming she is in fact responsible) and also that she understood that she could freely disclose her emotions including feelings of guilt and grief, all without foregoing her right to a trial, "particularly [again]... as there is no history of known violence [by the child]; no history of convictions; [and] no adequate attempt historically toward treatment" (Joint Exhibit A at page 17).

Between June 25, 2007, and February 6, 2008, the child received counseling services while in the Logan County Detention Center. The counselor is a student from Case Western University graduate school as an intern, in placement with, and supervised by, the Light of the Way Christian Counseling Center, Bellefontaine, Ohio. Over the course of 30 counseling sessions, he worked with this child in individual counseling for approximately 45 hours with additional group counseling of unspecified duration. The last five individual counseling sessions listed in the intern's report were after the last interview of the psychologist with the child. The intensity of this counseling is of significance and some of the observations and conclusions of the intern were significantly different than those of the psychologist while others were very similar to those reported by the psychologist.

The child's treatment with the intern was focused upon anxiety related to: "grieving the loss of her mother, being in detention (jail); and separation from her social supports." He concluded that the child had difficulty forming secure attachments due to: "lack of emotionally available caregivers; early trauma; and extreme stress as a young child" (Defendant's Exhibit J at page 2).

The intern observed that Meredith struggled with grieving and the emotions associated with the loss of her mother. He reported that she continues to struggle with expressing [those] emotions openly with strangers or people she does not trust. He did not report any suspicion that the child just told him what he wanted to hear.

In contrast to the opinion of the psychologist, the child's intern opines that Meredith Poling has worked on and shown significant improvement regarding trust and attachment while she continues to need counseling services as there "remains much room for improvement." As of the date of his February 6, 2008, report, the intern concluded that the child had made significant improvement and "she is now very emotionally articulate" (Defendant's Exhibit J at page 2).

While the psychologist's report and testimony presented a view that the child's "presentation would make her difficult to treat" (Joint Exhibit A at page 17), the child's intern, in the context of extensive counseling states: "Meredith's progress in counseling provides evidence that there remains significant plasticity in her emotional and cognitive development, and she is able to make significant improvements with adequate and appropriate services" (Defendant's Exhibit J at page 2) (Emphasis added). The Court notes that the psychologist, upon questioning, was unwilling to discredit the report or opinion of the intern. This is possibly because, at that time, the child's intern had counseled the child for approximately 45 hours in individual counseling (plus group counseling) whereas, the psychologist had met her on only 4 occasions during which he administered 5 tests. Obviously, the credentials of and purpose for the professional involvement by the psychologist (to assess) and the intern (to counsel) with this child were quite different.

Again, assuming the child guilty as charged, the Court now reviews statutory factors in favor of transfer of and against jurisdiction.

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Statutory factors in favor of transfer (ORC 2152.12 (D)):

- (1) Was the victim harmed? Yes. Michelle Murnahan died as a result her child's actions. While a homicide survivor victim impact statement from Donna Johnson (Michelle's mother and the child's grandmother) was filed with the Court, it was not presented as evidence in this hearing. The Court, however, assumes grandmother Johnson and other relatives suffered and will suffer psychological harm.
- (2) Was Michelle's murder exacerbated by her ongoing depression? No.
- (3) Did the child's relationship with the victim make the [crime] easier to accomplish? The parent child relationship gave Meredith access to her mother, however, this was not a typical crime of opportunity.
- (4) Was the murder for hire or a gang crime? No.
- (5) Did the child use a firearm? Yes. Murder is a heinous crime. Murder by firearm is a heinous crime, although, at least in this tragedy, not more heinous than if some other weapon or instrumentality of death were employed. Death was instantaneous (Joint Exhibit D at page 60).
- (6) Was the child awaiting [trial] or [sentencing] or on [probation] when the [crime] took place? No. She was on diversion for school truancy.
- (7) Do previous attempts at rehabilitation suggest a future attempt will not succeed within the "juvenile system?" No. The fact that Meredith had violated the truancy diversion contract resulting in her placement on probation (after the murder), and her subsequent violations of probation, none of which were crimes, give scant indication that rehabilitation will not occur within the juvenile system, particularly in light of her good behavior while in detention (jail) (State's Exhibit 93). Murder is, of course, a much different matter than school truancy.
- (8) Is the child emotionally, physically, or psychologically mature enough to transfer? No. The child is not physically or emotionally mature as the brain undergoes dramatic changes and growth during the teen years and early twenties (Joint Exhibit A at page 30). She is just beginning to express her emotions and show significant improvement regarding trust (Defendant's Exhibit A at page 2).
- (9) Assuming her possible release at age 21, is there insufficient time to rehabilitate the child within the juvenile justice system? No. Time is not insufficient. The Court must assume this child, if convicted, will receive appropriate support and counseling while confined in a Department of Youth Services Institution (a juvenile prison), to wit: emotional support from her family; a treatment plan that includes at least weekly individual counseling; at least weekly group counseling; appropriate sanctions and incentives within the institution; the opportunity to complete her high school education; training for independent living and for maintaining gainful employment; and information on how to access mental health and

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other support services upon her release. The Court further recognizes that, if she is not prosecuted solely as an adult, she would be subject to a mandatory "dispositional sentence" as a "mandatory serious youth offender." As such, she would receive, in addition to a commitment to the Department of Youth Services until age 21, the adult sentence for murder (a determinate sentence of 3, 4, 5, 6, 7, 8, 9, or 10 years and an additional 3 year determinate sentence for a gun specification. The adult sentence would be stayed provided she has a "successful completion of the traditional juvenile disposition imposed." (A simple assault committed by this child or any conduct of this child which creates a "substantial risk to the safety or security of the DYS institution or to the community" would add up to 13 years of incarceration after completion of up to 5 years of incarceration in juvenile jail and juvenile prison.) In other words this child's mandatory serious youth offender's "dispositional sentence" could result in this child receiving longer incarceration than if she were tried solely as an adult.

The child has commenced rehabilitation during these last eleven months in detention. The unchallenged evidence indicates she has made progress. She has already completed approximately 49 weeks of incarceration, sanctions, incentives, and counseling in the Logan County Detention Center, and upon completion of additional incarceration by the Department of Youth Services until February 17, 2012, her 21<sup>st</sup> birthday, she will have approximately 259 weeks of the same. If she is not successful at rehabilitation, she may find herself in an adult prison for many years. The stayed prison sentence would be a very weighty incentive for her effort at successful rehabilitation.

The Court is compelled to conclude that Meredith Poling has ample time for successful rehabilitation should she choose to be open to and receive an appropriate treatment regimen. If she chooses to reject treatment, no amount of imprisonment and counseling will succeed.

The Department of Youth Services, unfortunately, has had custody of numerous children who have stories similar to that of Meredith Poling. (Approximately 12 children who were between the ages of 13 to 16 upon admission are currently in its custody for the commission of aggravated murder, murder, or complicity to murder.) While it is true that there remains great room for improvement of the services available at some Department of Youth Services institutions, it is in a much better position than the adult Department of Corrections to provide the appropriate regimen of services and sanctions for successful rehabilitation of a child who murdered her mother. The Department of Youth Services unit to which she will be assigned at the Scioto Juvenile Correctional Facility currently incarcerates and treats 45 girls. It employs 4 psychology staff (2 psychologists and 2 psychology assistants) and 8 licensed social workers. The professional staff to prisoner ratio is (1 to 4). This professional staff will provide the child at least 10 hours per week of individual and evidenced-based structured group counseling in addition to 30 hours per week of high school curriculum all within the secure correctional facility. She will also have prompt access to a psychiatrist and

psychotherapeutic medication if indicated. On the other hand, the adult system (Ohio Reformatory for Women) will provide no counseling except upon request of the inmate, and, if requested, will compare very poorly to the breadth and intensity of the counseling regimen at the Scioto Juvenile Correctional Facility.

**Statutory factors against transfer (ORC 2152.12(E)):**

- (1) Did the victim induce or facilitate the murder? Surely not in any direct manner. As the psychologist acknowledged, the child is a product of her history and her mother created some of that history. Every juvenile court judge must recognize the tremendous impact of parenting upon a child without excusing the child's heinous behavior. I would add that the child possessed free will and was not predestined to commit this heinous crime.
- (2 & 3) Was she negatively influenced or coerced by others? Did provocation facilitate this crime? Yes, she was undoubtedly subject to negative influences. This child's history includes:
  - sexual victimization (per the psychologist)
  - repeated real and potential violence (per the psychologist)
  - abandonment by father figures (per the psychologist)
  - grossly inadequate counseling (per the psychologist)
  - an emotionally unavailable mother (per the psychologist)
  - witness to domestic violence (per Donna Johnson)
  - possible victim of domestic violence (per the counselor and psychologist)
  - a mother who used shocking and provocative confrontation with her daughter in the presence of other people: "Get the fuck out of the cars. Get the fuck out of that car right now" (per Linda Ridgeway) shortly before lethal retaliation by the child. (The Court will not speculate as to what was said by Michelle Mumahan to her daughter after Mrs. Ridgeway left the scene.) All of these influences or provocations are regrettable. None of these excuse this shocking crime. However, the statute does disfavor transfer in the presence of provocation and negative influences (as mitigating factors).
- (4) Could the child reasonably believe that discharging a firearm and propelling a bullet into the head of her mother would not cause death? No.
- (5) Was the child never previously adjudicated a delinquent child? Yes.
- (6) Is the child not emotionally, physically, or psychologically mature enough for transfer? Yes.
- (7) Is the child mentally ill or retarded? No.
- (8) Is there sufficient time to rehabilitate her within the juvenile system and is the security available sufficient for public safety? Yes. There is sufficient time to rehabilitate this child. The Department of Youth Services will protect the public during her incarceration; rehabilitation will protect the public upon her release.

FILED  
JANUARY COUNTY  
JUVENILE COURT

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The Court finds that the factors in favor of transfer of jurisdiction to the general division do not outweigh the factors against transfer, and further finds the child to be amenable to care and rehabilitation in the juvenile justice system.

## CONCLUSION OF LAW

Juvenile Rule 30(c) provides:

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HARSH COUNTY  
JUVENILE COURT

"In any proceedings in which transfer of a case for criminal prosecution is permitted, but not required, by statute, and in which probable cause is found at the preliminary hearing, the court shall continue the proceeding for full investigation. The investigation shall include a mental examination of the child by a public or private agency or by a person qualified to make the examination. When the investigation is completed, an amenability hearing shall be held to determine whether to transfer jurisdiction. The criteria for transfer shall be as provided by statute."

The statute which sets forth the criteria for transfer of jurisdiction to the General Division from the Juvenile Division of the Court of Common Pleas is ORC 2152.12(B):

"Except as provided in division (A) of this section [provisions for mandatory transfer of jurisdiction] after a complaint has been filed alleging that a child is a delinquent child for committing an act that would be a felony if committed by an adult, the juvenile court at a hearing may transfer the case if the court finds all of the following:

- (1) The child was fourteen years of age or older at the time of the act charged. (This is not in dispute.)
- (2) There is probable cause to believe that the child committed the act charged. (This was previously determined.)
- (3) The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed." (The weighing of the factors for and against transfer is the only issue in dispute herein.) (Emphasis added)

The statute and court rule both require a full investigation including a mental examination of the child ORC 2152.12(C). The psychologist submitted his report and was subject to examination.

The statute requires the Court to consider all relevant factors in the statute, "in favor of" and "against transfer" ORC 2152.12(D) & (E). The Court has carefully considered all relevant factors in favor of transfer and against transfer and has specifically discussed its findings regarding those factors herein.

It is, of course, possible that the safety of the community may require that the child be subject to adult sanctions. Adult sanctions may be imposed regardless of whether the child's case is transferred (by invoking the adult portion of the "dispositional sentence") ORC 2152.14.

In weighing the factors for and against transfer, the most compelling reason for transfer is the seriousness of this crime. Michelle Murnahan cannot be restored of her life by a court order of restitution. Restitution must take some other form to have any meaning to those who mourn her death. And, while the child is not accused of aggravated murder (with prior calculation and design), it is possible this crime was an idea she had considered several days before its commission, adequate time for her to reject it in horror. Because of the seriousness of this appalling crime, the Court would prefer an option of a longer commitment to the Department of Youth Services. This is not possible under current law.

Assuming she is guilty of the offense, this child is capable of murder. Unless she is incarcerated for her lifetime, not a sentencing option available to the Court, the best measure for public safety is an appropriate commitment to imprisonment, other sanctions, incentives, and services for rehabilitation. The most likely and appropriate place this child would receive all of the above is through the Department of Youth Services. Transfer to the adult Department of Corrections should be stayed and later invoked should she not successfully complete her traditional juvenile disposition at the Department of Youth Services institution.

Having carefully and dispassionately reviewed the facts before the Court and having weighed the factors indicating this child's case should be transferred against the weight of the factors indicating that this case should not be transferred, and having found that the factors in favor of transfer do not outweigh the factors against transfer, and having also found that the child, Meredith Poling, is amenable to care and rehabilitation in the juvenile system, this Court is therefore not permitted to transfer this case.

### ORDER

The motion to immediately transfer jurisdiction to the General Division of this Court for criminal prosecution solely as an adult rather than proceeding with prosecution

of the child, Meredith Poling, in this division as a mandatory serious youth offender must be and hereby is OVERRULED.

This matter is set for adjudication trial on May 7<sup>th</sup>, 8<sup>th</sup>, & 9<sup>th</sup>, 2008, commencing at 9:00 a.m.

  
\_\_\_\_\_  
JUDGE JAMES S. RAPP

Cc: Hardin County Prosecuting Attorney Bradford W. Bailey  
Defense Attorney William Kluge  
Guardian ad Litem Bridget Hawkins

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HARDIN COUNTY  
JUVENILE COURT

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**IN THE COURT OF COMMON PLEAS OF HARDIN COUNTY, OHIO  
JUVENILE COURT**

**IN RE:**  
**MEREDITH POLING,**  
**ALLEGED DELINQUENT CHILD**

**CASE NO. JD 207 20131**  
**ENTRY**

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HARDIN COUNTY  
JUVENILE COURT

This Court has previously denied the prosecution's motion asking the Court to relinquish its jurisdiction and transfer the jurisdiction of the charges against the Poling child herein to the General Division of this Court. It has come to the attention of this Court that the prosecution may believe it has evidence it could have presented to the Court supportive of its motion but was denied the opportunity to do so.

Pursuant to Juv. R 30 (C) and R.C. 2152.12(B) this Court conducted its "full investigation" and held an amenability hearing. See *In Re Stanley (2006), 165, Ohio App 3<sup>rd</sup> 726*. Neither the statute nor the rule detail the manner of the Court's conduct of its investigation and hearing except to require a "mental examination" of the child. We undoubtedly know that the investigation and hearing process is not an adversarial competition to which the usual rules of evidence apply. The purpose of the investigation and hearing, however, is for the Court to ascertain and then consider the relevant facts (or "factors" that suggest transfer is or is not appropriate), and thereafter exercise its discretion as to whether or not to grant the prosecution's motion. An ultimate purpose, if not the ultimate purpose, of transferring jurisdiction before trial is to impose longer imprisonment after trial. This pre-trial investigation and hearing process is, of necessity, much less formal than a probable cause hearing or a trial, more inquisitorial than adversarial, and more akin to a pre-sentence investigation for an adult convicted of a crime (but without procedural guidance comparable to R.C. 2947.06 and 2951.03). Adults, of course, are entitled to a trial before the court determines how the accused should be punished. This Court was required to determine, prior to trial, if jurisdiction should be retained, wherein the child, if adjudicated delinquent, shall be released from the Department of Youth Services (DYS) at age 21 (R.C. 2152.16 (A)(1)(a)) or, if jurisdiction should be transferred, wherein the child, if convicted, shall definitely be imprisoned for at least 18 years, and possibly be imprisoned for life. We all understand that if the prosecution files notice of intent to "seek serious youthful offender dispositional sentence" prior to trial (R.C. 2152.021 (A)(1)) and later seeks invocation of the adult portion of a "dispositional sentence" (R.C. 2152.14), the child may possibly be imprisoned for life even if this Court retains jurisdiction.

## **"Parens Patriae" and Procedure Due Process.**

The overriding purpose of this unique judicial process (the investigation, hearing, and ruling on the transfer motion) is to do justice as defined by R.C. 2152.01. This Court must strive to achieve all of the following through seemingly conflicting goals:

[1] provide for the care, protection, and mental and physical development of children subject to this chapter, [2] protect the public interest and safety, [3] hold the offender accountable for the offender's actions, [4] restore the victim, and [5] rehabilitate the offender.

The juvenile judge presides over "*an uneasy partnership of law and social work.*" In Re Agler (1969) 19 Ohio St. 2d 70 at 73. A judge serving in the juvenile division of the Court of Common Pleas has a special responsibility, not required of a judge serving in adult criminal court, to provide for the well being ("*mental and physical development*") of a child subject to the Court's jurisdiction whether or not the child is merely accused as in this case, or has been adjudicated delinquent. This judicial responsibility often necessitates hands-on involvement and cannot be met by simply serving as a neutral arbiter of disputed facts that play out in adversarial courtroom contests. A juvenile court judge must pragmatically adhere to the appropriate balance of responsibilities to act as "*parens patriae*" (acting as parent, the foundation principle upon which juvenile courts were established) and to avoid procedural arbitrariness (maintain procedural due process). *Kent v. United States* (1966), 383 U.S. 541; *In Re C.S.* (2007) 115 Ohio St.3<sup>rd</sup> 267.

There are various, specific examples of necessary "hands-on involvement" by a juvenile court judge outside the courtroom. This judge is a governing board trustee of the Logan County Juvenile Detention Center (along with two Logan County Judges, a Sheriff, and two County Commissioners) (R.C. 2152.44). This detention center has housed the Poling child since April 9, 2007. Together, the trustees are responsible for the policies, procedures, and operation of the facility, and the care of the children therein including: monitoring medical health and providing for treatment; monitoring mental health and providing for treatment (including monitoring of suicide concerns); and meeting the education needs of the children placed in the center's care and custody. Additionally, as trustee, the judge must attempt to keep informed of the day to day practices of the facility, and take reasonable precautions in order to prevent harm and to avoid institutional and personal liability (i.e. avoid lawsuits). The title "*trustee*" accurately reflects that children are to be cared for in detention in our trust. It is a fiduciary responsibility.

This judge has identical obligations as a governing board trustee (along with six other judges) of the North Central Ohio Rehabilitation Center in Marion, Ohio (R.C. 2151.65). Our duties include the rehabilitation of children adjudicated delinquent for felony level offences and overseeing the rehabilitation, housing, and security staffs.

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JUVENILE COURT

This Court directly employs four community control counselors (probation officers), a social worker, two teachers, and a part-time substance abuse/mental health therapist. Therapy and psycho-educational services are provided by Court staff and by contract with this Court. These judicial responsibilities are substantially administrative and treatment oriented, having little or nothing to do with trying cases.

This Court is well aware that, because of their role outside the courtroom, juvenile court judges are sometimes bitterly criticized or even sued for damages in state or federal courts for things which happen in therapeutic, educational, custodial, or institutional settings. Because of the juvenile court's responsibility as "parens patriae" and the accountability that flows from that responsibility, its judges are vulnerable; this Court takes every reasonable precaution to see that the Court's charges (the children in its care) are treated professionally and receive high quality services in a safe and, when appropriate, a secure environment. (Consider the recent lawsuit and intense public criticism of the judges in Logan County, Ohio, after a tragedy in which a group home resident broke curfew and murdered an elderly neighbor. Recall the intensive scrutiny that follows when a child commits suicide while in a court or state operated institution.)

Of necessity, this Court must take an activist role in monitoring the services provided by Court staff, the Hardin County Department of Jobs and Family Services ("HCJFS"), the Department of Youth Services (DYS), and private agencies, and attempt to hold all accountable for the services they provide to the "*children subject to this chapter [2152]*" including children alleged to be delinquent. (R.C. 2152.01)

The day after the violent death of the Poling child's mother, Michelle Murnahan, the HCJFS sought from and was granted by this Court an ex parte order of temporary custody of the child due to her being a dependent child (her mother was deceased and the "*Agency being unable to contact [her father] at the time of the mother's death*" – Civil Case No. DC 20630015). No attorney represented the child or her father at the hearing. As a necessary precaution, this Court ordered the child to be assessed regarding her mental health status. Forty-two days later, on October 12, 2006, this Court ordered the child's custody be transferred from the HCJFS to her father. The HCJFS civil dependency case was dismissed.

The prosecution's complaint of delinquency against Meredith Poling was not filed until March 30, 2007. On a warrant issued by this Court, this child was arrested on April 9, 2007, and was placed in the Logan County Juvenile Detention Center upon order of this Court where she has remained to this date.

### **Concerning Pending Litigation?**

During a meeting of the board of trustees of the detention center, in the capacity as a trustee of that detention center, it came to the attention of this judge that: the Poling child had no medical insurance; her father was disabled; she was unlikely to be eligible for a medical card due to her incarceration; she needed eye glasses; she was not enrolled in any school district; and no school had been ordered to pay the cost of

her education (as required by state law) while in the detention center. This trustee/judge was very concerned that the Poling child, subject to the Court's jurisdiction, while awaiting trial, was medically, mentally, and educationally neglected. This trustee/judge promptly initiated several communications as inquiries regarding the child's education, counseling, medical, dental, and optical needs while in detention. The communications included speaking with: Logan County Judges (fellow trustees of the detention center); attorneys from the Ohio Department of Education; the director of Logan County Children Services; and a HCJFS employee. While some of this responsibility may have been delegated to the child's most recently appointed guardian ad litem, due to the urgency of the matters, this trustee/judge was more effective in quickly determining how to secure the necessary services for the child. Some would say: *"The buck stops here."*

After the Court's investigation, which took place during the pendency of this delinquency case, the Court, on its own motion, again ordered the Poling child into the temporary legal custody of the HCJFS (November 21, 2007) so that, while the child remained in detention, the HCJFS would have the responsibility to arrange for the child's medical, dental, optical, and importantly, her mental health needs and payment therefore. By this same entry, this Court ordered that the child be enrolled in the Bellefontaine City School System and that it pay the costs of educating the child while in detention. A copy of this entry, filed in this delinquency case, was served upon the prosecution and defense. The Court received no subsequent objection to this action taken by the Court on its own motion outside the presence of the prosecution and defense. Stated alternatively, the Court's communications were inarguably collateral to the pending delinquency proceedings not addressing substantive issues on the merits.

#### **Did this Court conduct an improper ex parte investigation?**

Subsequent to the February 11, 2008, amenability hearing, while reviewing the admitted exhibits, this Court studied the Stipulated Exhibit "J," a 9 page report and treatment plan regarding the Poling child prepared by Vincent Ciola. Ciola identified himself as a student counselor with the Light of the Way Christian Counseling Center, providing mental health services to the child through his field placement (internship) at Light of the Way Christian Counseling Center. (As a trustee of the detention center, this Judge had been informed that a grant had made it possible for Light of the Way Christian Counseling Center to provide for services to the detention center detainees.) This Court and attorneys who practice in a juvenile division of a court of common pleas and/or work with mental health professionals know that a "student counselor" performing counseling services in the State of Ohio would be an intern under supervision in completion of requirements for a master's degree. The psychologist, Dr. Tennenbaum, arrived at a similar conclusion in referring to Ciola:

He is a counselor who has an MBA who is starting graduate work [in the mental health field]. He's, I assume, working under supervision (transcript of Amenability Hearing, February 11, 2008, at page 129). (Emphasis added.)

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In any event, for the purposes of conducting its investigation and ruling on the prosecution's motion to relinquish jurisdiction, this Court was free to conclude that Ciola was appropriately supervised as the prosecution and defense had stipulated to the report's admission into evidence. This Court found the intern's report to be credible and compelling, much more so than the report and testimony of Dr. Tennenbaum.

By agreeing to the admissibility of the counselor's report, the prosecution not only conceded the materiality and the relevance of the report but left substantially uncontested the credibility of the report. The psychologist, Dr. Tennenbaum, declined to offer any opinion as to the credibility of the counselor's report except to note that the counselor, Ciola, did not have the benefit of the psychologist's report when Ciola prepared his own. (Transcript of Amenability Hearing, at page 130.) The psychologist, Dr. Tennenbaum, not surprisingly, favored his own opinion arrived at after 4 meetings with the child for testing and examination versus the opinions of the counselor arrived at after 30 individual and multiple group counseling sessions with this child. As the prosecution conceded in closing arguments "... I would agree [this] is a fair statement of case law, this Court is not bound by any experts." (Transcript of Amenability Hearing, at page 191.) It is indisputable that the weight and credibility given this stipulated exhibit is a matter within the sole discretion of this Court.

In studying Ciola's report, however, this trustee/judge became concerned, not as to the report's credibility or its author's supervision but that, because of licensure issues, the report should have been signed, not just by the intern, but also by the intern's supervisor. The Court was concerned that this oversight, if brought to the attention of other authorities, could place the intern, his supervisor, and the Christian Counseling Center at risk for current and future licensure scrutiny by the State Department of Mental Health and could cause, at the very least, embarrassment to the Court, the detention center, and its trustees. The Court was also concerned that the HCJFS may not have been following the Court's order of November 21, 2007, as to "monitoring" services for this child's mental health needs.

The Court pointed out its above described concerns (missing signature, possible outside scrutiny, risk to licensure, lack of monitoring of services by the HCJFS, and possible liability) to the HCJFS Social Service Supervisor, the author of the child's HCJFS case plan and the person the Court considered responsible for "monitoring her [the Poling child's] mental...health" as per the November 21, 2007, order of this Court. The supervisor agreed that the monitoring of the child's mental health needs may have been lax. The Court suggested that the supervisor correct the matter and she did so.

Subsequent to the overruling of the transfer motion, a prosecution's investigation apparently included an April 3, 2008, interview with Ciola's supervisor, Sandra Sanford. The investigator reported that Sanford stated the "reason that she, the supervisor, wrote the letter [to HCJFS] was to let [HCJFS] know that she [Sanford] was, in fact, supervising [Ciola] but had neglected to sign off on his letter and paperwork."

HCJFS supervisor had brought Sanford's written response to the Court and the Court immediately directed her to present copies to the parties which she apparently did.

It is exceedingly apparent that the Court's purpose for this communication with the HCJFS supervisor was administrative; it was entirely collateral to the investigation and hearing on the prosecution's motion. It was not intended to address and had no bearing on contested substantive matters or issues on the merits of the motion. Rather, it was to pointedly raise the Court's fiduciary concern as to whether HCJFS was, in fact, monitoring the Poling child's physical health, mental health, and educational needs as had been previously ordered. The Court, as expected, received no objection to this administrative and collateral judicial communication from either the defense or prosecution.

Perhaps the Court was insensitive to possible objections not raised to this Court. However, if the prosecution had a concern regarding a communication by the Court that may have adversely impacted the prosecution's due process rights, it had 21 days after receiving a copy of the letter of Ciola's supervisor to raise that concern by filing a formal objection or a motion for further hearing prior to the filing of the Court's order denying its motion to transfer.

The prosecution chose not to challenge the credibility of Ciola's report beyond the unpersuasive testimony of Dr. Tennenbaum. Further, the prosecution failed whatsoever to raise the credibility of the report in closing argument. The Court reasonably concluded that the prosecution had no additional evidence that would have placed the report of Ciola in question. In a delinquency case, a judge, acting as "*parens patriae*" and in protecting the child's due process rights, must apply the concept of "*fundamental fairness*" to the circumstances of the particular case. *In re C.S., supra, at page 277*. The Court's communication with the HCJFS supervisor was not intended to, and as yet does not appear to have had any negative impact on "*fundamental fairness*" to either the child or the prosecution.

**Did the Court rely upon extraneous evidence (habilitative treatment at DYS vs. rehabilitative treatment at the Department of Rehabilitation and Corrections (DRC))?**

The prosecution appears to object that the Court's has knowledge of the facts regarding treatment at DYS vs. DRC, and that the Court's knowledge differs from the occasionally incredible testimony of the psychologist. The most literally "*jaw dropping*" moment of the amenability hearing occurred when the psychologist testified regarding something of which he was obviously misinformed: "*should [the child] partake of counseling, there are basically the same opportunities within the adult system as there are in the juvenile system as far as counselors.*" The psychologist's curriculum vitae, Joint Exhibit "C," cites no association or involvement with the DRC for 33 years or with the DYS for 22 years.

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For the last ten years, this judge has served as an appointed liaison/representative of the Ohio Association of Juvenile Court Judges on the "DYS/Juvenile Judge Taskforce." Also, ever since the inception of the "DYS Reclaim Advisory Committee" by statutory directive (R.C. 5139.44 effective 09-26-03), this judge has had the honor to serve along with DYS Director Stickrath, on that committee. I have occasionally chaired these committees' meetings. In these and other capacities (e.g. a trustee of NCORC), this judge meets frequently with Director Stickrath and other DYS officials, sometimes at the DYS Training Academy located across the highway from Scioto Juvenile Correctional Facility where female children committed to DYS are housed and treated. (Our next meeting, August 22, 2008, will be held within the Scioto Juvenile Correctional Facility.) This Court is well aware of the pride taken by DYS officials of the exceptional quality of the mandatory mental health treatment at this DYS facility in contrast to the significant concerns of the Department's leadership regarding the treatment of its male children population at some other juvenile facilities and in contrast to the limited and optional mental health counseling at DRC facilities.

In arriving at a just determination as to retaining or transferring jurisdiction of a child accused of a serious offense, it is, of course, clear that a judge is not required to ignore his or her knowledge of facts obtained outside the courtroom hearing. The Court need not ignore the fact that there is no equivalence between the rehabilitative treatment at DYS and the rehabilitation treatment at DRC. This Court takes its guidance from the landmark case, *Williams v. People of State of New York*, (1949) 337 U.S. 241. This decision was in regard to a convicted defendant's due process rights during a pre-sentence investigation and sentencing, and a New York statute that gave the Court guidance on seeking "any information that will aid the Court in determining the proper treatment of" a defendant. The same reasoning as set forth in *Williams* applies to the prosecution's rights in the court investigation and amenability hearing. Justice Black in *Williams* at pages 246 through 251 states:

Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and the extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders... [at page 247] Highly relevant, if not essential, to his selection of an appropriate sentence [treatment] is the possession of the fullest information possible concerning the defendant's life and characteristics and modern concepts of individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial... [at page 249]. A strong motivating force for the changes has been the belief that, by

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careful study of the lives and personalities of convicted offenders [and pre-adjudicated teenage children], many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified... [at page 250]. We must recognize that most of the information now relied upon by judges to guide them in the intelligent impositions of sentences [treatment] would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination... The type and extent of this information make totally impractical, if not impossible, open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration... [at page 251]. In determining whether a defendant shall receive a one year minimum or a twenty year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information in open court. The due process clause should not be treated as a device for freezing the evidential procedure of sentencing [of adults and transfer of pre-adjudicated teenagers] in the mold of trial procedure. So to treat the due process clause would hinder, if not preclude, all courts, state and federal, from making progressive efforts to improve the administration of criminal [and juvenile] justice. (Emphasis and words within brackets added.)

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Notwithstanding the guidance of *Williams*, the prosecution may claim it had no opportunity to confront the alleged "extraneous evidence that the Court later relied on."

This Court regrets two inaccuracies set forth in its order denying the prosecution's motion to relinquish jurisdiction, both inaccuracies due to faulty memory and editing. The corrections:

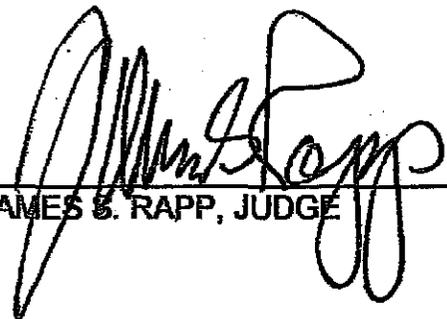
- (1) The time a child is to serve of a prison term (after the imposition of a previously stayed adult sentence) "shall be reduced" by time previously spent in custody on a "dispositional sentences" R.C. 2152.14(F), and
- (2) There are special sentencing requirements for the offense of murder significantly more onerous than those of other first degree felonies.

Neither of the corrections would appear to strengthen the prosecution's argument for transfer. If the child is serving a life sentence, credit for time served would appear to be irrelevant. In fact, the possibility of the imposition of the longer adult sentence (a definite term of 3 years for gun specification and indefinite term of fifteen years to life. R.C. 2929.02 (B)(1)) is even greater "incentive for her [the Poling child's] effort at successful rehabilitation" while in the custody of DYS (see this Court's March 19, 2008, order denying transfer at page 14).

However, if the prosecution believes there to be other inaccuracies of significant, relevant facts that this Court relied upon in concluding it should retain jurisdiction, the prosecution is given leave to set forth those alleged additional inaccuracies in a motion

to this Court seeking reconsideration of its ruling. Said motion is to be supported by out of court affidavits. As this matter is set for trial, time is of the essence.

It is therefore ORDERED that the prosecution shall have until July 28, 2008, to file a motion for reconsideration. The motion shall set forth the specific facts the prosecution believes the Court to have erroneously relied upon in arriving at its decision to retain jurisdiction, and legal memorandum in support of the motion. Further the defense shall have until August 11, 2008, to file a response in opposition.



JAMES S. RAPP, JUDGE

Cc: Bradford W. Bailey, Hardin County Prosecuting Attorney  
William Kluge, Attorney (child's attorney)  
Bridget Hawkins, GAL  
Teresa Glover, Attorney (for BCDJFS)  
Jeffrey Willis, father

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Ohio Rules Of Appellate Procedure  
Title II Appeals From Judgments And Orders Of Court Of Record

Ohio App. Rule 5 (2009)

**Rule 5. Appeals by leave of court**

**(A) Motion by defendant for delayed appeal.**

(1) After the expiration of the thirty day period provided by App. R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

- (a) Criminal proceedings;
- (b) Delinquency proceedings; and
- (c) Serious youthful offender proceedings.

(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney.

**(B) Motion to reopen appellate proceedings.**

If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant's constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment. The motion shall be filed with the clerk of the court of appeals within forty-five days after the conditional writ is granted. A certified copy of the conditional writ and any supporting opinion shall be filed with the motion. The clerk shall serve a copy of a defendant's motion on the prosecuting attorney.

**(C) Motion by prosecution for leave to appeal.**

When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for

leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.

**(D) Motion by defendant for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C).**

(1) When leave is sought from the court of appeals for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C), a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the reason why the consecutive sentences exceed the maximum prison term allowed. The motion shall be accompanied by a copy of the judgment and order stating the sentences imposed and stating the offense of which movant was found guilty or to which movant pled guilty. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the notice of appeal and a copy of the motion to the clerk of the court of appeals who shall serve the notice of appeal and the motion upon the prosecuting attorney.

**(2) Leave to appeal consecutive sentences incorporated into appeal as of right.**

When a criminal defendant has filed a notice of appeal pursuant to App. R. 4, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to R.C. 2953.08(C), and the assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

**(E) Determination of the motion.**

Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

**(F) Order and procedure following determination.**

Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. If the motion for leave to appeal is overruled, except as to motions for leave to appeal filed by the prosecution, the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. If the motion is sustained and leave to appeal is granted, the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

**History:**

Amended, eff 7-1-88; 7-1-92; 7-1-94; 7-1-96; 7-1-03.

*Ohio Juv. R. 30*

OHIO RULES OF COURT SERVICE  
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\*\*\* RULES CURRENT THROUGH MAY 1, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 \*\*\*

Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 30 (2009)

**Rule 30. Relinquishment of jurisdiction for purposes of criminal prosecution**

**(A) Preliminary hearing.**

In any proceeding where the court considers the transfer of a case for criminal prosecution, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that the act would be an offense if committed by an adult. The hearing may be upon motion of the court, the prosecuting attorney, or the child.

**(B) Mandatory transfer.**

In any proceeding in which transfer of a case for criminal prosecution is required by statute upon a finding of probable cause, the order of transfer shall be entered upon a finding of probable cause.

**(C) Discretionary transfer.**

In any proceeding in which transfer of a case for criminal prosecution is permitted, but not required, by statute, and in which probable cause is found at the preliminary hearing, the court shall continue the proceeding for full investigation. The investigation shall include a mental examination of the child by a public or private agency or by a person qualified to make the examination. When the investigation is completed, an amenability hearing shall be held to determine whether to transfer jurisdiction. The criteria for transfer shall be as provided by statute.

**(D) Notice.**

Notice in writing of the time, place, and purpose of any hearing held pursuant to this rule shall be given to the state, the child's parents, guardian, or other custodian and the child's counsel at least three days prior to the hearing, unless written notice has been waived on the record.

**(E) Retention of jurisdiction.**

If the court retains jurisdiction, it shall set the proceedings for hearing on the merits.

**(F) Waiver of mental examination.**

The child may waive the mental examination required under division (C) of this rule. Refusal by the child to submit to a mental and physical examination or any part of the examination shall constitute a waiver of the examination.

**(G) Order of transfer.**

The order of transfer shall state the reasons for transfer.

**(H) Release of child.**

With respect to the transferred case, the juvenile court shall set the terms and conditions for release of the child in accordance with Crim. R. 46.

**History:**

Amended, eff 7-1-76; 7-1-94; 7-1-97.

**CODE OF JUDICIAL CONDUCT**  
**CANON 3**

**A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently**

**(A) Judicial Duties in General.** The judicial duties of a judge take precedence over all of the judge's other activities. The judge's judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply.

**(B) Adjudicative Responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel or others. Division (B)(6) of this canon does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall not initiate, receive, permit, or consider communications made to the judge outside the presence of the parties or their representatives concerning a pending or impending proceeding except:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes, or emergencies that do not address substantive matters or issues on the merits are permitted if the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) As authorized by law.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly and comply with guidelines set forth in the Rules of Superintendence for the Courts of Ohio.

(9) While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. Division (B)(9) of this canon does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. Division (B)(9) of this canon does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

(11)(a) A judge shall not knowingly disclose or cause to be disclosed, without appropriate authorization, information regarding the probable or actual decision in a case or legal proceeding pending before a court, including the vote of a justice, judge, or court in a case pending before the Supreme Court, a court of appeals, or a panel of judges of a trial court, prior to the announcement of the decision by the court or journalization of an opinion, entry, or other document reflecting that decision under either of the following circumstances:

(i) The probable or actual decision is confidential because of statutory or rule provisions;

(ii) The probable or actual decision clearly has been designated to the judge as confidential when confidentiality is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving confidentiality is necessary to the proper conduct of court business.

(b) Nothing in division (B)(11)(a) of this canon shall prohibit the disclosure of any of the following:

(i) A decision that has been announced on the record or in open court, but that has not been journalized in a written opinion, entry, or other document;

(ii) Information regarding the probable or actual decision in a pending case or legal proceeding to a judge or employee of the court in which the matter is pending;

(iii) Other information that is a matter of public record or that may be disclosed pursuant to law.

(c) The imposition of discipline upon a judge for violation of division (B)(11)(a) of this canon shall not preclude prosecution for a violation of any applicable provision of the Revised Code, including, but not limited to, division (B) of section 102.03 of the Revised Code.

### **(C) Administrative Responsibilities.**

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before all judges and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise

the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

**(D) Disciplinary Responsibilities.**

(1) A judge who has knowledge that another judge has committed a violation of this Code shall report the violation to a tribunal or other authority empowered to investigate or act upon the violation.

(2) A judge who has knowledge that a lawyer has committed a violation of the Ohio Rules of Professional Conduct shall report the violation to a tribunal or other authority empowered to investigate or act upon the violation.

(3) A judge having knowledge of a violation by another judge or a lawyer shall, upon request, fully reveal the violation to a tribunal or other authority empowered to investigate or act upon the violation.

(4) Any knowledge obtained by a member or agent of a committee or subcommittee of a bar or judicial association or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers and judges with substance abuse or mental health problems shall be privileged for all purposes under Canon 3(D), provided the knowledge was obtained while the member or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation.

**(E) Disqualification.**

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) The judge served as a lawyer in the matter in controversy, a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter;

(c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than *de minimis* interest that could be substantially affected by the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Has acted as a judge in the proceeding;

(iv) Is known by the judge to have an economic interest that could be substantially affected by the proceeding;

(v) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal fiduciary and economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

**(F) Remittal of Disqualification.** If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, jointly request that the judge should remit his or her disqualification, the judge may approve and participate in the proceeding. The request and approval shall be incorporated in the record of the proceeding.

**(G) Disqualification - Justices of the Supreme Court.**

(1) A justice shall disqualify himself or herself in a proceeding in which the justice's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the justice has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the justice served as a lawyer in the matter in controversy, or a lawyer with whom the justice previously practiced law served during such association as a lawyer concerning the matter, or the justice or such lawyer has been a material witness concerning it;

(c)(i) For merit cases, the justice knows that, individually or as a fiduciary, the justice or the justice's spouse or minor child residing in the justice's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(ii) For miscellaneous motions, motions to certify, or similar matters, the justice knows that, individually or as a fiduciary, the justice or the justice's spouse or minor child residing in the justice's household, has a substantial economic interest in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the outcome of the proceeding.

(d) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the justice to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the justice's knowledge likely to be a material witness in the proceeding.

(2) A justice should keep informed about the justice's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the justice's spouse and minor children residing in the justice's household.

**(H) Remittal of Disqualification - Justices of the Supreme Court.**

A justice disqualified by the terms of Canon 3(G)(1)(c) or Canon 3(G)(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If, based on such disclosure, the parties and lawyers, independently of the justice's participation, all agree in writing that the justice's relationship is immaterial or that the justice's disqualification should be waived, the justice is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

**Commentary:**

**B(4).** The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and

**B(5).** A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as bias or prejudice (including sexual harassment) and must require the same standard of conduct of others subject to the judge's direction and control.

**B(8).** A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. See, e.g., R.C. 2701.02. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to require that court officials, litigants and their lawyers cooperate with the judge to that end.

**B(9).** The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This division does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Ohio Rules of Professional Conduct.

**B(10).** Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case. The foregoing provision shall not preclude the judge from expressing appreciation to the jurors for their service to the judicial system and the community, or from communicating with the jurors, personally, in writing, or through court personnel to obtain information for the purpose of improving the administration of justice.

**B(11).** The premature disclosure of confidential information regarding the outcome of pending cases gives the appearance of partiality and fosters obvious public distrust of the judiciary and legal profession. Among other things, premature disclosure creates the potential for the release of inaccurate information and allows attorneys, litigants, and others with access to the information to use it for personal gain before it becomes public knowledge.

Canon 3(B)(11)(a) prohibits a judge from prematurely disclosing clearly confidential information about the actual or probable decision in a pending case or proceeding under circumstances in which confidentiality is required or warranted. The provision is patterned, in part, after division (B) of section 102.03 of the Revised Code. Canon 3(B)(11)(a) does not prevent the disclosure of information that is intended to be public or communicated to another person. Examples of disclosures that are not prohibited by Canon 3(B)(11)(a) are potential rulings communicated by a judge for purposes of facilitating plea bargain or settlement discussions or communications regarding scheduling or other routine procedural matters. Canon 3(B)(11)(a) also does not bar communications that are permissible under law, including other provisions of the Code of Judicial Conduct.

**C(4).** Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not

relieve the judge of the obligation prescribed by division (C)(4) of this canon.

**D(3).** This division parallels Rule 8.3 of the Ohio Rules of Professional Conduct.

**E(1).** Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in division (E)(1) of Canon 3 apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should timely disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

**E(1)(b).** A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of division (E)(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

**E(1)(d).** The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Division (E)(1)(d)(iii) applies to appellate judges reviewing decisions rendered by them or a relative as defined in division (E)(1)(d) of this canon. It is not intended to prevent trial judges from hearing cases on remand, or that have been refiled after dismissal. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under division (E)(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under division (E)(1)(d)(iv) may require the judge's disqualification.

**F.** A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

**G. and H.** These provisions supersede Divisions (E) and (F) of Canon 3 of the Code of Judicial Conduct as applied to members of the Supreme Court of Ohio.

[Effective: December 20, 1973; amended effective June 1, 1979; January 1, 1982; December 8, 1982; October 24, 1994; May 1, 1997; October 1, 2006; February 1, 2007.]

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AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 6, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 \*\*\*

TITLE 21. COURTS -- PROBATE -- JUVENILE  
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. **2152.01** (2009)

§ **2152.01**. Purposes of dispositions under chapter; application of Chapter 2151

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.

(B) Dispositions under this chapter shall be reasonably calculated to achieve the overriding purposes set forth in this section, commensurate with and not demeaning to the seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders. The court shall not base the disposition on the race, ethnic background, gender, or religion of the delinquent child or juvenile traffic offender.

(C) To the extent they do not conflict with this chapter, the provisions of Chapter 2151. of the Revised Code apply to the proceedings under this chapter.

**History:**

148 v S 179. Eff 1-1-2002.

**Section Notes:**

The effective date is set by section 5 of SB 179.

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TITLE 21. COURTS -- PROBATE -- JUVENILE  
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

**Go to the Ohio Code Archive Directory**

ORC Ann. **2152.12** (2009)

§ **2152.12**. Transfer of case; prosecution of child nullity in absence of transfer; juvenile court loses jurisdiction if child is not taken into custody or apprehended prior to attaining age twenty-one

(A) (1) (a) After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult, the juvenile court at a hearing shall transfer the case if the child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged. The juvenile court also shall transfer the case at a hearing if the child was fourteen or fifteen years of age at the time of the act charged, if section 2152.10 of the Revised Code provides that the child is eligible for mandatory transfer, and if there is probable cause to believe that the child committed the act charged.

(b) After a complaint has been filed alleging that a child is a delinquent child by reason of committing a category two offense, the juvenile court at a hearing shall transfer the case if section 2152.10 of the Revised Code requires the mandatory transfer of the case and there is probable cause to believe that the child committed the act charged.

(2) The juvenile court also shall transfer a case in the circumstances described in division (C)(5) of section 2152.02 of the Revised Code or if either of the following applies:

(a) A complaint is filed against a child who is eligible for a discretionary transfer under section 2152.10 of the Revised Code and who previously was convicted of or pleaded guilty to a felony in a case that was transferred to a criminal court.

(b) A complaint is filed against a child who is domiciled in another state alleging that

the child is a delinquent child for committing an act that would be a felony if committed by an adult, and, if the act charged had been committed in that other state, the child would be subject to criminal prosecution as an adult under the law of that other state without the need for a transfer of jurisdiction from a juvenile, family, or similar noncriminal court to a criminal court.

(B) Except as provided in division (A) of this section, after a complaint has been filed alleging that a child is a delinquent child for committing an act that would be a felony if committed by an adult, the juvenile court at a hearing may transfer the case if the court finds all of the following:

- (1) The child was fourteen years of age or older at the time of the act charged.
- (2) There is probable cause to believe that the child committed the act charged.

(3) The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed.

(C) Before considering a transfer under division (B) of this section, the juvenile court shall order an investigation, including a mental examination of the child by a public or private agency or a person qualified to make the examination. The child may waive the examination required by this division if the court finds that the waiver is competently and intelligently made. Refusal to submit to a mental examination by the child constitutes a waiver of the examination.

(D) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, in favor of a transfer under that division:

(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

(2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

(3) The child's relationship with the victim facilitated the act charged.

(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

(5) The child had a firearm on or about the child's person or under the child's control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

(9) There is not sufficient time to rehabilitate the child within the juvenile system.

(E) In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, against a transfer under that division:

(1) The victim induced or facilitated the act charged.

(2) The child acted under provocation in allegedly committing the act charged.

(3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.

(4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.

(5) The child previously has not been adjudicated a delinquent child.

(6) The child is not emotionally, physically, or psychologically mature enough for the transfer.

(7) The child has a mental illness or is a mentally retarded person.

(8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.

(F) If one or more complaints are filed alleging that a child is a delinquent child for

committing two or more acts that would be offenses if committed by an adult, if a motion is made alleging that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred for \*, and if a motion also is made requesting that the case or cases involving one or more of the acts charged be transferred pursuant to division (B) of this section, the juvenile court, in deciding the motions, shall proceed in the following manner:

(1) Initially, the court shall decide the motion alleging that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred.

(2) If the court determines that division (A) of this section applies and requires that the case or cases involving one or more of the acts charged be transferred, the court shall transfer the case or cases in accordance with the \*\* that division. After the transfer pursuant to division (A) of this section, the court shall decide, in accordance with division (B) of this section, whether to grant the motion requesting that the case or cases involving one or more of the acts charged be transferred pursuant to that division. Notwithstanding division (B) of this section, prior to transferring a case pursuant to division (A) of this section, the court is not required to consider any factor specified in division (D) or (E) of this section or to conduct an investigation under division (C) of this section.

(3) If the court determines that division (A) of this section does not require that the case or cases involving one or more of the acts charged be transferred, the court shall decide in accordance with division (B) of this section whether to grant the motion requesting that the case or cases involving one or more of the acts charged be transferred pursuant to that division.

(G) The court shall give notice in writing of the time, place, and purpose of any hearing held pursuant to division (A) or (B) of this section to the child's parents, guardian, or other custodian and to the child's counsel at least three days prior to the hearing.

(H) No person, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen years of age, unless the person has been transferred as provided in division (A) or (B) of this section or unless division (J) of this section applies. Any prosecution that is had in a criminal court on the mistaken belief that the person who is the subject of the case was eighteen years of age or older at the time of the commission of the offense shall be deemed a nullity, and the person shall not be considered to have been in jeopardy on the offense.

(I) Upon the transfer of a case under division (A) or (B) of this section, the juvenile court shall state the reasons for the transfer on the record, and shall order the child to enter into a recognizance with good and sufficient surety for the child's appearance before the appropriate court for any disposition that the court is authorized to make for a similar act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint, and, upon the transfer, all further

proceedings pertaining to the act charged shall be discontinued in the juvenile court, and the case then shall be within the jurisdiction of the court to which it is transferred as described in division (H) of section 2151.23 of the Revised Code.

(J) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (A) and (B) of this section do not apply regarding the act, and the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case as it has in other criminal cases in that court.

**History:**

RC § 2151.26, 133 v H 320 (Eff 11-19-69); 134 v S 325 (Eff 1-14-72); 137 v S 119 (Eff 8-30-78); 139 v H 440 (Eff 11-23-81); 140 v S 210 (Eff 7-1-83); 141 v H 499 (Eff 3-11-87); 144 v H 27 (Eff 10-10-91); 146 v H 1 (Eff 1-1-96); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 124 (Eff 3-31-97); RC § 2152.12, 148 v S 179, § 3. Eff 1-1-2002.

**Section Notes:**

FOOTNOTE

\* Division (F), so in enrolled bill.

\*\* Division (F)(2), so in enrolled bill.

*Analogous in part to former RC § 2151.26 (GC § 1639-32; 117 v 520; Bureau of Code Revision, 10-1-53; 132 v H 343), repealed 133 v H 320, eff 11-19-69.*

The effective date is set by section 5 of SB 179.

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\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 \*\*\*

TITLE 21. COURTS -- PROBATE -- JUVENILE  
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. **2152.13** (2009)

§ **2152.13**. Serious youthful offender dispositional sentence

(A) A juvenile court may impose a serious youthful offender dispositional sentence on a child only if the prosecuting attorney of the county in which the delinquent act allegedly occurred initiates the process against the child in accordance with this division, and the child is an alleged delinquent child who is eligible for the dispositional sentence. The prosecuting attorney may initiate the process in any of the following ways:

- (1) Obtaining an indictment of the child as a serious youthful offender;
- (2) The child waives the right to indictment, charging the child in a bill of information as a serious youthful offender;
- (3) Until an indictment or information is obtained, requesting a serious youthful offender dispositional sentence in the original complaint alleging that the child is a delinquent child;
- (4) Until an indictment or information is obtained, if the original complaint does not request a serious youthful offender dispositional sentence, filing with the juvenile court a written notice of intent to seek a serious youthful offender dispositional sentence within twenty days after the later of the following, unless the time is extended by the juvenile court for good cause shown:
  - (a) The date of the child's first juvenile court hearing regarding the complaint;
  - (b) The date the juvenile court determines not to transfer the case under section 2152.12 of the Revised Code.

After a written notice is filed under division (A)(4) of this section, the juvenile court shall serve a copy of the notice on the child and advise the child of the prosecuting attorney's intent to seek a serious youthful offender dispositional sentence in the case.

(B) If an alleged delinquent child is not indicted or charged by information as described in division (A)(1) or (2) of this section and if a notice or complaint as described in division (A)(3) or (4) of this section indicates that the prosecuting attorney intends to pursue a serious youthful offender dispositional sentence in the case, the juvenile court shall hold a preliminary hearing to determine if there is probable cause that the child committed the act charged and is by age eligible for, or required to receive, a serious youthful offender dispositional sentence.

(C) (1) A child for whom a serious youthful offender dispositional sentence is sought has the right to a grand jury determination of probable cause that the child committed the act charged and that the child is eligible by age for a serious youthful offender dispositional sentence. The grand jury may be impaneled by the court of common pleas or the juvenile court.

Once a child is indicted, or charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings. The time within which the trial is to be held under Title XXIX [29] of the Revised Code commences on whichever of the following dates is applicable:

(a) If the child is indicted or charged by information, on the date of the filing of the indictment or information.

(b) If the child is charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date of the filing of the complaint.

(c) If the child is not charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date that the prosecuting attorney files the written notice of intent to seek a serious youthful offender dispositional sentence.

(2) If the child is detained awaiting adjudication, upon indictment or being charged by information, the child has the same right to bail as an adult charged with the offense the alleged delinquent act would be if committed by an adult. Except as provided in division (D) of section 2152.14 of the Revised Code, all provisions of Title XXIX [29] of the Revised Code and the Criminal Rules shall apply in the case and to the child. The juvenile court shall afford the child all rights afforded a person who is prosecuted for committing a crime including the right to counsel and the right to raise the issue of competency. The child may not waive the right to counsel.

(D) (1) If a child is adjudicated a delinquent child for committing an act under circumstances that require the juvenile court to impose upon the child a serious youthful

offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(a) The juvenile court shall impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(b) The juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(c) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(2) (a) If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(ii) If a sentence is imposed under division (D)(2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20 and, if applicable, section 2152.17 of the Revised Code.

(iii) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(b) If the juvenile court does not find that a sentence should be imposed under division (D)(2)(a)(i) of this section, the juvenile court may impose one or more traditional juvenile dispositions under sections 2152.16, 2152.19, 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(3) A child upon whom a serious youthful offender dispositional sentence is imposed

under division (D)(1) or (2) of this section has a right to appeal under division (A)(1), (3), (4), (5), or (6) of section 2953.08 of the Revised Code the adult portion of the serious youthful offender dispositional sentence when any of those divisions apply. The child may appeal the adult portion, and the court shall consider the appeal as if the adult portion were not stayed.

**History:**

148 v S 179, § 3 (Eff 1-1-2002); 149 v H 393. Eff 7-5-2002.

ORC Ann. 2505.03

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TITLE 25. COURTS -- APPELLATE  
CHAPTER 2505. PROCEDURE ON APPEAL

**Go to the Ohio Code Archive Directory**

ORC Ann. **2505.03** (2009)

§ **2505.03**. Final order may be appealed; exception

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

**History:**

GC § 12223-3; 116 v 104; 118 v 78; Bureau of Code Revision, 10-1-53; 129 v 582(743) (Eff 1-10-61); 141 v H 158 (Eff 3-1-87); 141 v H 412. Eff 3-17-87.

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TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2945. TRIAL  
BILL OF EXCEPTIONS

**Go to the Ohio Code Archive Directory**  
ORC Ann. **2945.67** (2009)

§ **2945.67**. Appeal by state

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24\* of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with section 2953.08 of the Revised Code, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

(B) In any proceeding brought pursuant to division (A) of this section, the court, in accordance with Chapter 120. of the Revised Code, shall appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive the person's right to counsel.

**History:**

137 v H 1168 (Eff 11-1-78); 146 v S 2. Eff 7-1-96.

**Section Notes:**

Analogous to former RC § 2945.67 (GC § 13446-1; 113 v 123; Bureau of Code Revision, 10-1-53; 131 v 682; 137 v H 219), repealed 137 v H 1168, § 2, eff 11-1-78.

FOOTNOTE

\* Division (A), RC § 2953.24 was repealed by HB 164 (136 v --), § 2, effective 1-13-76.  
The effective date is set by section 6 of SB 2.