

**IN THE
SUPREME COURT OF OHIO**

13-0579

IN RE D.M.,

:
:
:

Appeal No. C-1200794
Trial No. 12-9552Z

A Minor Child.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS
HAMILTON COUNTY, OHIO

**CHILDREN'S LAW CENTER MEMORANDUM OF AMICUS CURIAE IN SUPPORT OF JURISDICTION
ON BEHALF OF D.M.**

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STATEMENT OF INTEREST

The Children's Law Center, Inc. (CLC) is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For over 20 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, access services, and are represented by counsel. For the past two years, CLC has worked on issues facing Ohio youth prosecuted in adult court and placed in adult facilities, including collecting data and issuing a report on this topic and conducting interviews of youth in the adult court and their families.

STATEMENT OF BASIS FOR APPEAL

This case raises a substantial constitutional question and is a case of both public and great general interest.

As this Court and the U.S. Supreme Court has recognized, the decision to transfer a youth from juvenile court to adult court can be a life-changing event. Recent research confirms the gravity of this decision and indicates that transferring a youth to adult court and placing youth in adult jails and prisons can result in long-lasting harms not only to a youth, but to his or her community. Given the gravity of these consequences, any decision to bind a youth over to adult court must follow strict adherence to guaranteed, well-established due process protections. Strictly following procedural due process is particularly important in mandatory bindover proceedings, in which a youth only has one hearing – a probable cause hearing – before the juvenile court determines whether the youth can remain in juvenile court or must be sent to adult court. In examining probable cause hearings in cases of youth transferred to adult court, case

law and national professional standards establish that due process protections require both attorneys and the juvenile court to consider all discoverable information relevant to the case, particularly materials prepared by law enforcement, and to err on the side of including more information rather than less.

Therefore, denying discovery materials to a youth subject to transfer to adult court and the juvenile court hearing the case is a constitutional violation that could have lifelong impact on all Ohio youth eligible for mandatory bindover, their families, and their communities.

STATEMENT OF THE CASE AND FACTS

In October 2012, the State filed a complaint against D.M. and filed a motion to transfer D.M. to adult court. Despite D.M.'s discovery request for police reports prepared by Cincinnati police officers, who were listed as witnesses for the probable cause hearing, and the juvenile court judge's multiple demands for compliance with D.M.'s request, the prosecution refused to turn over the police reports. After the prosecution refused to provide the documents, the juvenile court held that "the State errantly, and in violation of a direct Court order, refused to provide discoverable information in violation of Defendant's rights to due process" and dismissed the case without prejudice. The State appealed and the First District reversed the trial court's decision, finding that "the state must provide to a juvenile upon request only (1) any *Brady* materials in its possession and (2) the evidence that the state intends to use at the probable-cause hearing." *In re D.M.*, 1st Dist. No. C-120794, 2013-Ohio-668 ¶ 9; *see also Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

ARGUMENT

I. First Proposition of Law of Amicus Curiae: Because Transferring a Youth To Adult Court Can Have Lifelong Negative Consequences for Youth and Their Communities, A Judge Must Consider All Relevant Evidence Before Making a Determination to Bind A Youth Over to Adult Court.

This Court has confirmed a long-standing tenet of the U.S. Supreme Court that transferring youth to adult court can result in harsh consequences, including “adult criminal sanctions and the label ‘felon.’” *In re D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 12, quoting *Kent, v. United States*, 383 U.S. 541, 560, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). Also, in *Iacona*, this Court clearly laid out the differences between juvenile and adult court for youth, stating “[m]andatory bindover, and diversion out of the juvenile justice system, undeniably affects the length of confinement to which an accused minor is exposed.” *State v. Iacona*, 93 Ohio St.3d 83, 91, 752 N.E.2d 957.

As a result the Court has established that the “issues determined at a mandatory bindover hearing are therefore a ‘critically important’ stage in juvenile proceedings. Therefore, such a hearing must ‘measure up to the essentials of due process and fair treatment.’” *Iacona*, at 91, quoting *Kent* at 562. In recent years, research has shed light on the harsh consequences described by the Court in *Iacona* and *D.W.* in terms of how transferring youth to adult court can have negative effects on both the youth and his or her community. Therefore, for the reasons outlined below and for the good of both the youth individually and public safety generally, due process should include the court’s consideration of as much evidence as possible in making its decision about whether to bind a youth over to adult court.

Research indicates that, during their involvement with the adult criminal justice system, youth placed in adult facilities – which are not designed to address the unique needs of youth – face physical and emotional harm. In adult jails and prisons, youth are at a great risk of physical

and sexual assaults by both inmates and staff. Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (2007), p. 13. Statistics show that youth admitted to adult prisons before the age of 18 have the highest rate of sexual victimization throughout their stay in prison. Bureau of Justice Statistics, *National Former Prisoner Survey, 2008: Sexual Victimization Reported by Former State Prisoners* (2012), p. 16. Research also indicates that a large portion of youth transferred to the adult criminal justice system have mental health needs and may manifest some of the most substantial mental health treatment needs among all juveniles involved in the justice system. See e.g. Murrie, Daniel C., Henderson, Craig E., Vincent, Gina M., Rockett, Jennifer L, and Mundt, Cynthia, *Psychiatric Symptoms Among Juveniles Incarcerated in Adult Prison*, *Psychiatric Services*, Vol. 60 No. 8 (August 2009). However, youth in adult facilities frequently do not have access to mental health professionals, particularly professionals trained to work with the unique developmental needs of youth. As a result, youth in adult facilities may not receive adequate mental health care throughout their incarceration and youth in adult jails and prisons are much more likely – 36 times and 8 times respectively – to commit suicide when compared to youth in juvenile facilities. *Jailing Juveniles*, pg, 13 and Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (2010), pg. 7.

Second, with regard to long-term negative effects, research indicates that youth who are transferred to adult court are 34% more likely on average to recidivate when compared to youth charged with similar offenses and with similar prior juvenile justice system involvement, but who were retained in the juvenile justice system. Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to*

the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services, MMWR 2007; 56 (No. RR-9) (2007). Although it is unclear why this increase occurs, researchers have pointed to several potential causes, including “the stigmatization and other negative effects of labeling juveniles as convicted felons[,] the sense of resentment and injustice juveniles feel about being tried and punished as adults[,] the learning of criminal mores and behavior while incarcerated with adult offenders[, and] the decreased focus on rehabilitation and family support in the adult system.” Redding, p. 7. Given that the vast majority of youth bound over to adult court return to their communities in five years or less, these average higher recidivism rates are not beneficial either for youth or their communities. Children’s Law Center, *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System* (2012), at pg. 10

Additionally, even after a youth is released from the adult criminal justice system, adult system involvement carries consequences that can impede the youth from becoming a productive, contributing member of their community. For example, an adult criminal record can lead to the denial of educational opportunities, including financial aid for higher education, as well as difficulty in attaining employment. Campaign for Youth Justice, *Key Facts: Youth in the Justice System* (June 2010). In addition, because prisons are not designed to meet youths’ unique mental health, educational, and life skills needs, many youth leave may leave these facilities without having received required programming necessary for the youth to get on a positive path.

The research described above shows that binding over a youth to the adult criminal justice system can have a profound negative effect on the both the youth sent to the adult system and the community into which he is released. Therefore, the juvenile court has a duty to consider all information it determines is relevant and permissible under Ohio’s laws, regulations,

and rules when making a decision about whether a youth should be moved from juvenile to adult court.

II. Second Proposition of Law Amicus Curiae: Both Case Law and National Standards Establish that Due Process Requires the Youth's Attorney to Have Access to and the Court to Consider All Relevant Information Before Making A Decision to Transfer Youth to Adult Court.

Given that the decision to waive a youth into adult court can mean the difference between the potential life-long negative consequences associated with adult court involvement and rehabilitation and treatment within the juvenile justice system, both case law and practice require the court to ensure due process by considering all relevant evidence before determining whether to bind a youth over to adult court.

Under Ohio law, youth under the age of 18 can be bound over to adult court under either mandatory or discretionary bindover charges and all bindover proceedings begin in juvenile court. R.C. 2152.10 and 2152.12. For mandatory bindover, a youth who is 16 or 17 years old must be charged with a Category One offense or a Category Two offense committed with a gun specification. R.C. § 2152.10. If the prosecutor decides to charge a youth with a mandatory bindover offense, the youth is only entitled to one hearing – a probable cause hearing – in juvenile court. R.C. § 2152.12. If the juvenile court finds probable cause that the youth committed the offense charged, the youth is automatically bound over to adult court. *Id.*

In Ohio mandatory bindover cases, the probable cause hearing is particularly critical from a due process perspective because it is the only hearing in which the juvenile court, which is specifically designed and trained to consider the unique characteristics of youth, hears evidence regarding the youth's case. In addition, in mandatory bindover cases, the probable cause hearing is the only time when the prosecutor's decision to charge a youth with a mandatory bindover offense can be challenged in juvenile court. For example, police records could indicate that the

youth did not have possession of a gun during the commission of the offense, which could result in a failure to find probable cause for a mandatory bindover offense. Therefore, in *Iacona*, this Court held that the youth must “be provided access to information possessed by the state that might tend to disprove probable cause at the bindover stage” and that “a prosecutor is under a duty imposed by the Due Process Clauses of the Ohio Constitution and the United States Constitution and Juv. R. 24 to disclose to a juvenile respondent all evidence in the state’s possession favorable to the juvenile respondent and material either to guilt or punishment that is known at the time of a mandatory bindover hearing held pursuant to R.C. 2151.26 and that may become known to the prosecuting attorney after the bindover.” *Iacona*, 93 Ohio St.3d 83, 91, 752 N.E.2d 937.

The Court’s finding in *Iacona* is supported by standards set forth by national organizations, such as the National Juvenile Defender Center, the National Council of Juvenile and Family Court Judges and the Institute of Judicial Administration and American Bar Association, which provide specific guidance on what information the juvenile court should consider in any hearing that could result in a youth being transferred to adult court. Nat’l Juv. Defender Center, *National Juvenile Defense Standards* (2012) [hereinafter NJDC Standards]; Nat’l Council Juv. & Fam. Ct. Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005) [hereinafter NCJFCJ Guidelines]; and Inst. of Jud. Admin. & A.B.A., *Standards for Juvenile Justice: Standards Relating to Transfer Between Courts*, (1982) [hereinafter IJA-ABA Standards].

A. National Juvenile Defender Center Standards

In 2012, the National Juvenile Defender Center released a set of standards for attorneys who represent youth to establish a framework for defense attorneys to follow to ensure zealous

representation of their clients. Several of the NJDC Standards, including those relating to representing youth in adult court, probable cause, and discovery (particularly with regard to law enforcement documents) are relevant to the case before the Court.

First, the NJDC Standards recognize the unique role of defense counsel in bindover cases, as “transfer to adult court presents serious, lifelong consequences that almost always outweigh any potential benefits” and “is antithetical to the rehabilitative aspects of the juvenile court.” NJDC Standard 8.4 Commentary. In light of this, the NJDC Standards recognize the heightened importance of early investigation in bindover proceedings, stating that “[w]hile counsel has an obligation to thoroughly investigate every case, comprehensive and early investigation is critical in cases when adult prosecution is a possibility” and calling on defense counsel to challenge the prosecution’s inability to prove probable cause. NJDC Standard 8.3 and Commentary **Error! Bookmark not defined.**

The NJDC Standards also specifically address the role of defense counsel in probable cause hearings and require defense attorneys to “protect the client’s due process rights by challenging any assertion of probable cause and requiring any allegations be supported by evidence.” NJDC Standard 3.7(b). This standard is particularly relevant in any hearing to transfer a youth to adult court, where the standards note that “the prosecution always has the burden of establishing probable cause that the crime was committed by the juvenile. The defense has the obligation to hold the government to that burden.” NJDC Standard 8.4 Commentary.

Finally, the NJDC standards call for defense attorneys to aggressively pursue discovery options by “zealously investigat[ing] the facts of the case” and “pursu[ing], as soon as practicable and by all available means, all discovery to which the client is entitled.” NJDC Standard 4.1 and 4.5. This investigation should include discovery for prosecution witnesses to

determine “their identity and evidence impacting their credibility...; misconduct; reasons to curry favor with the government;...and evidence of witnesses’ bias or impairment to observe, perceive, or recall events.” NJDC Standard 4.5 Commentary. The NJDC Standards also set forth very specific standards addressing how defense attorneys must pursue law enforcement witnesses and records, stating that “[c]ounsel should interview all officers involved in the arrest and investigation of the case and must seek to examine all police documentation and records related to the case” as these records may contain material relevant for witness impeachment and cross-examination purposes as well as “vital information that can be used at evidentiary and fact-finding hearings.” NJDC Standard 4.6 and Commentary. Indeed, the standard specifically calls for the defense attorney to seek “the client’s incident and arrest report; supplemental reports;...witness reports;...firearm, drug, and property reports; photographs and diagrams;...use of force reports; officer disciplinary records; and search and arrest warrants.” *Id.* Finally, the NJDC Standards explicitly establish that police reports are not prosecution materials, but third party documents. *Id.*

B. National Council of Juvenile and Family Court Judges Standards

The NCJFCJ also has specific standards regarding probable cause hearings for cases in which a youth can be transferred to adult court. First, the NCJFCJ Standards recommend that prosecution witnesses be present at the probable cause hearing. NCJFCJ Standards, Chapter V(D)(1). Second, the NCJFCJ Standards also state that the defense should “seek disclosure of any reports or other evidence that will be submitted to, or may be considered by the court, in the course of transfer proceedings.” NCJFCJ Standards, Chapter V(C). Third, before proceeding on the probable cause hearing, the NCJFCJ Standards establish that the juvenile court should have access to “the petition, affidavit, waiver motion, and any other filed motions and *reports*

concerning the alleged law violation” NCJFCJ Standards, Chapter V(D)(2) (emphasis added). Finally, during the probable cause hearing, the NCJFCJ Standards state that the “prosecutor should be required to present evidence as to the alleged offender’s identity as the perpetrator, and of probable cause regarding every element of the alleged offense...[and] evidence that is more substantive than the affidavit and petition alone.” NCJFCJ Standards, Chapter V(D)(3).

C. Institute of Judicial Administration and American Bar Association Standards

Finally, the ABA standards address probable cause hearings in transfer proceedings. The standards establish that the youth should be able to examine all evidence available to the court that either supports or refutes the transfer motion. IJI-ABA Standards, Part II: 2.3 (D). For decisions to transfer a youth to adult court, the ABA states that “[a] decision of that magnitude should be considered on the basis of a fully adversary hearing in which the state must establish the propriety of the result that it urges. The prosecutor should bear the burden of proof and the risk of nonpersuasion” and the youth should be able to argue against the prosecution’s evidence, “including persons who prepare reports which the prosecution introduces in support of waiver.” IJI-ABA Standard 2.3 (E)-(H) Commentary. The IJI-ABA Standards also recognize the strategic and long term importance of the probable cause hearing, which “encourages reliable factual allegations by the prosecutor. A prosecutorial tactic for overreaching the juvenile in plea bargaining is to threaten treatment as an adult. That threat can be particularly effective when the prosecutor can inflate the potential criminal charge without jeopardizing the case for waiver. Forcing the juvenile to bargain under such circumstances is unfair.” IJI-ABA Standard 2.2 (B) Commentary.

As case law, research, and the standards above confirm, the consequences of transfer are significant and, in mandatory bindover cases, the only protection between a youth and adult court

is a probable cause hearing in juvenile court that strictly comports with due process. Therefore, any youth charged with a mandatory bindover offense must be afforded the highest possible level of due process, including allowing the youth access to as much evidence and information as possible – specifically police reports and law enforcement materials – that may allow the youth to challenge the transfer to adult court at the probable cause hearing. To do less cannot provide adequate due process protections before a life-altering decision for the youth and their community is rendered by a court.

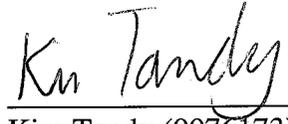
CONCLUSION

For the foregoing reasons, *Amicus Curiae* CLC respectfully requests that this court grant the relief requested by Appellant.

WHEREFORE, the Children’s Law Center, Inc., the undersigned counsel, respectfully requests this Court submit this brief of *amicus curiae* in support the Appellant, D.M..

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been filed with the Clerk of Court on the 15th day of April, 2013 and served upon the following counsel of record: Joseph T. Deters, Hamilton County Prosecutor and Philip R. Cummings, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202 and Gordon C. Magella, Hamilton County Public Defender's Office, 230 E. Ninth Street, Third Floor, Cincinnati, Ohio 45202, by depositing it in the U.S. Mail with postage prepaid and addressed to their offices on this 15th day of April, 2013.

Respectfully submitted,



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