

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. _____
	:	
PLAINTIFF-APPELLEE	:	
	:	ON APPEAL FROM THE FRANKLIN
V.	:	COUNTY COURT OF APPEALS
	:	TENTH APPELLATE DISTRICT
RAYMOND MORGAN,	:	
	:	
DEFENDANT-APPELLANT.	:	C.A. CASE NO. 13AP-620

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT RAYMOND MORGAN

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Franklin County Prosecutor's Office

Seth L. Gilbert #0072929  
Assistant Prosecuting Attorney

373 South High Street  
Columbus, Ohio 43215  
(614) 525-3555  
(614) 525-6103 – Fax  
slgilbert@franklincounty.gov

Counsel for the State of Ohio

The Office of the Ohio Public Defender

Charlyn Bohland #0088080  
Assistant State Public Defender  
(Counsel of Record)

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 – Fax  
charlyn.bohland@opd.ohio.gov

Counsel for Raymond Morgan

Table of Contents

Page No.

Explanation of why this case is one of public or great general interest and involves a substantial constitutional question.....1

Statement of the Case and Facts.....2

Argument.....5

**Proposition of Law I: A child does not need to request a GAL in the absence of his parents, guardian, or legal custodian at a juvenile court hearing.....5**

**Proposition of Law II: A child does not need to show prejudice to support a reversal on appeal when the juvenile court fails to appoint a GAL when required by law.....5**

**Proposition of Law III: The failure to notify a parent, guardian, legal custodian, or GAL substitute of the amenability hearing renders the transfer of jurisdiction void .....9**

**Proposition of Law IV: R.C. 2125.12(B)(3) creates a presumption that the child will be retained in the juvenile system unless the factors in favor of transfer outweigh the factors against transfer .....11**

Conclusion .....15

Certificate of Service .....16

Appendix:

*State of Ohio v. Raymond Morgan, Franklin County Court of Appeals Case No. 13AP-620, Decision (December 23, 2014)..... A-1*

*State of Ohio v. Raymond Morgan, Franklin County Court of Appeals Case No. 13AP-620, Memorandum Decision (April 16, 2015)..... A-24*

*State of Ohio v. Raymond Morgan, Franklin County Court of Appeals Case No. 13AP-620, Journal Entry (April 21, 2015)..... A-31*

**Explanation of why this case is one of public or great general interest  
and involves a substantial constitutional question**

“The role of *parens patriae* is not the juvenile court’s sole focus during an amenability hearing.” *See State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 13. In order to balance the enforcement of criminal laws while protecting a child’s best interest, a child’s parent, guardian, or legal custodian is a necessary party in the transfer proceedings. But, when a child’s parents are recently deceased and there is no other legal guardian, the juvenile court must appoint a guardian ad litem (GAL) to fill that role. Juv.R.4(B)(1); R.C. 2151.281(A)(1); *see also In re A.K.*, 9th Dist. Summit No. 26291, 2012-Ohio-4430, ¶ 28 (“The [GAL] has the \*\*\* responsibility to protect the best interest of the child.”).

In this case, the Tenth District Court of Appeals found that the juvenile court erred when it failed to appoint a GAL when 16-year-old Raymond’s mother was not present because she died just before his amenability hearing. Dec. 23, 2014 *Decision* at ¶ 23. But, the Tenth District determined that the failure did not rise to the level of plain error because the child did not request a GAL and did not show prejudice from the lack of a GAL. *Id.* at ¶ 25-26. Specifically, the Tenth District noted “we have no way of knowing what a [GAL] would have argued because one was not appointed.” *Id.* at ¶ 25.

This Court has recognized that an amenability determination is a “critical stage of the juvenile proceeding.” *D.W.* at ¶ 12. And, “[p]rocedural protections are vital.” *Id.* at ¶ 13. When determining whether a child should remain in the juvenile system for rehabilitation, or should be transferred to the criminal system to be treated as an adult,

the best interests perspective is imperative. Yet, the Tenth District's decision that prejudice be demonstrated when a juvenile court fails to appoint a GAL when it is required by law, disregards the importance that this Court has placed on amenability proceedings. *See D.W.* at ¶ 12. The lack of a GAL at the amenability hearing is outcome determinative in the most fundamental sense.

In *D.W.*, this Court recognized two vital safeguards in transfer proceedings: 1) the right to counsel and 2) "the right to an amenability hearing." *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, at ¶ 16-17. And, in *D.M.*, this Court recognized that discovery is also vital in preparing for a probable cause hearing in transfer proceedings. *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 2 (applying Juv.R. 24's requirements to bindover hearings). This case presents this Court with an opportunity to recognize another vital safeguard during the transfer proceedings: a juvenile court must appoint a GAL to represent and protect a child's best interest when the parent is unavailable to do so.

This case also presents this Court with the opportunity to recognize that transfer of children to adult court should be rare. This Court should accept jurisdiction of this case and hold that R.C. 2152.12(B)(3) creates a presumption that the child will be retained in the juvenile system unless the factors in favor of transfer outweigh the factors against transfer.

### **Statement of the Case and Facts**

Like most children, 16-year-old Raymond's legal guardians were his father and his mother. But, Raymond's father passed away in January 2012 after battling cancer for

three years. Raymond and his mother, Mrs. Morgan, who was ill with renal failure, cared for Raymond's father "at the end, when he died at home."

Raymond was charged with very serious offenses just weeks after his father's death. The complaints alleged that Raymond was involved in shooting three people. As the investigation continued, the evidence, including Raymond's admissions, demonstrated that Raymond was not the principal actor in these offenses.

In juvenile court case number 12JU-2947, Raymond admitted to police officers that "he was with the shooter of both [victims] at the time of both of these shootings." The State conceded that its theory for probable cause was that Raymond "was complicit and/or the shooter" because it was unknown who shot the victims. In juvenile court case number 12JU-3513, the State admitted that Raymond was complicit because "he did not have a firearm in his hand at the time, but he participated in the aggravated robbery of [the victim]." And, in juvenile court case number 12JU-4138, Raymond admitted to police officers that he received a stolen camera. The State agreed that all of the charges against Raymond were "discretionary in nature, not mandatory."

Early in his case, Raymond did not believe that his attorney was providing effective assistance and requested that the juvenile court appoint another attorney to represent him. Raymond's attorney admitted that there was a breakdown in the attorney-client relationship. But, the juvenile court did not grant Raymond's request because it determined that defense counsel was "one of the pretty good lawyers."

After a stipulation to a finding of probable cause, the juvenile court ordered that Raymond be evaluated to determine his amenability for rehabilitation in the juvenile

system. After an in-depth amenability determination, Dr. Bergman, a clinical and forensic psychologist, determined that Raymond was in the high range for treatment amenability. Dr. Bergman based her conclusion on Raymond's lack of prior criminality, his values and behaviors, the rapid disintegration of his immediate family, and his high likelihood of success in treatment. Dr. Bergman recommended "structured intervention with supervised community control and therapy," which could be conducted in the home environment so that Raymond could take care of his mother, just as he had taken care of his father.

Although very ill and receiving dialysis treatments three times per week, Mrs. Morgan appeared at every juvenile court hearing and supported Raymond. But, Mrs. Morgan passed away just before Raymond's amenability hearing.

When the juvenile court held the amenability hearing, Raymond had no parent to support him or to represent his best interests. And, the juvenile court did not appoint a GAL to fill that role. Despite Dr. Bergman's conclusions, the juvenile court determined that Raymond was not amenable to treatment in the juvenile system.

After transfer and grand jury indictment, Raymond pleaded guilty to an amended complaint of burglary; two counts of felonious assault, enhanced with firearm specifications; and, aggravated robbery, enhanced with a firearm specification. The court sentenced Raymond to 18 years in prison.

On appeal, Raymond assigned error to the juvenile court's failure to appoint a GAL to represent his best interests; the juvenile court's abuse of discretion because Dr. Bergman's conclusions were resoundingly in favor of retention in the juvenile system

and the juvenile court's reasoning in favor of transfer did not overcome the statute's presumption in favor of retention; the juvenile court's failure to investigate Raymond's allegation of ineffective assistance of counsel; the trial court's failure to make the necessary findings in order to impose consecutive sentences; and, defense counsel's ineffective assistance. The Tenth District overruled all of Raymond's assignments of error, except regarding consecutive sentencing. *Decision* at ¶ 1. Raymond requested a reconsideration and requested that the Tenth District certify conflicts. The Tenth District denied both requests. Apr. 16, 2015 Memorandum Decision at ¶ 1.

### **Argument**

#### **Proposition of Law I**

**A child does not need to request a GAL in the absence of his parents, guardian, or legal custodian at a juvenile court hearing.**

#### **Proposition of Law II**

**A child does not need to show prejudice to support a reversal on appeal when the juvenile court fails to appoint a GAL when required by law.**

Ohio law requires the juvenile court to appoint a GAL "to protect the interests of a child \* \* \* in a juvenile court proceeding when [t]he child has no parents, guardian, or legal custodian." Juv.R. 4(B)(1); R.C. 2151.281(A)(1). This is because a GAL plays an important role in a juvenile case. The GAL must provide the juvenile court with a recommendation for the child's best interests. Sup.R. 48(D)-(F) (providing that a GAL must interview the child, parents, school personnel, and other providers working with the child; investigate and observe the child's home environment; review all records pertaining to the child; and, submit written reports to the juvenile court about the child's best interests). This role is distinct from the role of counsel. Nat'l Juvenile

Defender Ctr., *National Juvenile Defender Standards* (2012), 19, available at <http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf> (accessed May 26, 2015) (“Counsel’s primary and fundamental responsibility is to advocate for the [child’s] expressed interests.”).

This obligation is true no matter the type of case—delinquency, abuse, neglect, dependency, or custody. And, it is true no matter the child’s parental situation—when the child has no parent, guardian, or legal custodian because of death, termination of parental rights, or failure to attend the hearing; or, when the child functionally has no parent, guardian, or legal custodian, because the parent, although present, is incapable of representing the child’s interests. R.C. 2151.281(A)-(B); Juv.R. 4(B)(1)-(9). In any situation when a child is without a parent, guardian, or legal custodian, it is the juvenile court’s responsibility to ensure that a responsible adult knows that they are expected to fulfill the parental role—either through appointment of a GAL or selecting a family member to act as the child’s guardian or custodian. R.C. 2151.281(A)-(B); Juv.R. 4(B)(1)-(9).

In this case, Raymond’s mother died of renal failure just before his amenability hearing. *Decision* at ¶ 6. Thus, there was no parent, guardian, or legal custodian at the amenability hearing to represent or advocate for Raymond’s best interests. And, the juvenile court did not appoint a GAL to represent Raymond’s best interests.

The presence of a parent, guardian, or legal custodian is imperative in discretionary transfer cases. This Court has recognized that an amenability determination is a “critical stage of the juvenile proceeding” which is a “vital

safeguard." *See D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, at ¶ 12; 17-21. Therefore, the lack of a GAL at the amenability hearing is outcome determinative in the most fundamental sense.

The Tenth District acknowledged that "because the statute and rule both use mandatory language for the appointment of a [GAL] in this situation, we agree with appellant that it was error for the trial court to fail to appoint a [GAL]." *Decision* at ¶ 23. But, the Tenth District did not reverse because Raymond did not request a GAL and did not demonstrate prejudice from the juvenile court's error. *Decision* at ¶ 21. Specifically, the Tenth District noted "appellant does not articulate how, specifically, the juvenile court's failure to appoint a [GAL] here prejudiced him" and "we have no way of knowing what a [GAL] would have argued because one was not appointed." *Decision* at ¶ 25.

The Tenth District's determination is in conflict with a number of other jurisdictions. *See In re Sappington*, 123 Ohio App.3d 448, 453, 704 N.E.2d 339 (2d Dist.1997) (finding that the failure "to appoint a [GAL], when such an appointment is required under the rule or the statute, constitutes reversible error"); *In re A.G.B.*, 173 Ohio App.3d 263, 2007-Ohio-4753, ¶ 15 (4th Dist.) (recognizing that a failure to request a GAL "could not waive the court's mandatory duty to appoint a GAL to represent [the child's] interests"); *In re B.G.*, 5th Dist. Ashland No. 2011-COA-012, 2011-Ohio-5898, ¶ 15-21 (finding that the court "erred in not appointing a [GAL] for appellant" when it was mandated, even when the child was represented by counsel), *overruled in part on other grounds*, *In re I.A.*, 140 Ohio St.3d 203, 2014-Ohio-3155, 16 N.E.2d 653; *In re William*

B., 163 Ohio App.3d 201, 2005-Ohio-4428, ¶ 43 (6th Dist.) (“[W]e find that the trial court committed reversible error by failing to appoint a [GAL], as mandated by R.C. 2151.281.”); *In re K.B.*, 170 Ohio App.3d 121, 124, 2007-Ohio-396, 866 N.E.2d 66 (8th Dist.) (finding that “the absence of an objection does not preclude reversal” and “failure to appoint a [GAL] when these mandatory provisions require such an appointment constitutes reversible error”); *In re Cook*, 11th Dist. No. 2003-A-0132, 2005-Ohio-5288, ¶ 30 (finding that “the absence of an objection does not preclude a reversal due to the juvenile court’s failure to appoint a [GAL]”); *In re Dennis*, 11th Dist. Ashtabula No. 2006-A-0040, 2007-Ohio-2432, ¶ 30 (noting that “the juvenile does not need to specifically request the appointment of a [GAL]”). The Tenth District recognized the lack of consistency among the appellate districts. *Decision* at ¶ 21.

And, the juvenile court’s failure to comply with the statutory requirement and the lack of a record for appellate review must trigger reversal, as it has in other scenarios. For example, when a juvenile court failed to hold a competency hearing when it was required by statute, the Second District Court of Appeals reversed and held that it would not “speculate as to the evidence that might have been presented at a competency hearing if one had been held” because the evaluator “would have been subject to cross-examination,” and the child “might have challenged whether [the evaluator] had used the proper diagnostic techniques and the correct legal standards.” *In re B.M.R.*, 2d Dist. Miami Nos. 2005 CA 1, 2005 CA 18, 2005-Ohio-5911, ¶ 18 (finding that even though the juvenile court could have concluded the child was competent upon consideration of the written evaluation “does not excuse the trial court’s failure to

afford B.M.R. his statutory and constitutional rights"). And, the Tenth District reversed Raymond's sentence when it found "plain error as a matter of law for [the] trial court's failure to make the findings required by R.C. 2929.14(C)(4)," because it prevents meaningful appellate review of the sentence. *Decision* at ¶ 52, 54.

The Tenth District's focus on the child's failure to request a GAL to protect his best interests is misplaced. Rather, the focus must be on the amenability determination as a "critical stage of the juvenile proceeding." *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, at ¶ 12; 17-21. Without requiring the juvenile court to follow the mandatory obligations of the rule and statute, the critical nature of the bindover proceedings is impaired because "vital safeguards" are not in place. *Id.* This case provides this Court with the opportunity to reinforce that notion and ensure that a child's best interests are protected. This Court should accept jurisdiction of this case and hold that a child does not need to request a GAL in the absence of his parents, and does not need to show prejudice to support a reversal on appeal when the juvenile court fails to appoint a GAL when it is required by law.

### **Proposition of Law III**

**The failure to notify a parent, guardian, legal custodian, or GAL substitute of the amenability hearing renders the transfer of jurisdiction void.**

"Procedural protections are vital" in transfer proceedings. *See D.W.* at ¶ 13. It follows that if the juvenile court fails to strictly follow the procedures in the juvenile court, the transfer of jurisdiction from juvenile to common pleas court is void. *See Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 617, 757 N.E.2d 1153 (2001) (finding the

conviction and sentence void because the "sentencing court patently and unambiguously lacked jurisdiction to convict and sentence her on the charged offenses when she had not been lawfully transferred to that court"); *State v. Taylor*, 26 Ohio App.3d 69, 71, 498 N.E.2d 211 (3d Dist.1985) ("Therefore, for failure to follow the due process requirements of the statute to effect a proper bind-over to the common pleas court, the minor could not become an 'adult' for the purpose of being subject to the jurisdiction of the latter court.").

The transfer provisions require the juvenile court to provide "[n]otice in writing of the time, place, and purpose of any hearing \*\*\* to the \*\*\* child's parents, guardian, or other custodian \*\*\* at least three days prior to the hearing, unless written notice has been waived on the record." Juv.R. 30(D); R.C. 2152.12(G). The purpose of R.C. 2152.12(G) is "to protect juveniles by informing their caregivers of any pending actions involving the juveniles so that the caregivers can offer assistance, guidance, and support." *State v. Reynolds*, 10th Dist. Franklin No. 06AP-915, 2007-Ohio-4178, ¶ 12.

In this case, the Tenth District determined that Raymond did not demonstrate prejudice from the juvenile court's failure to follow the notice requirements in Juv.R. 30(D) and R.C. 2152.12(G). *Decision* at ¶ 27-28. When defense counsel alerted the juvenile court that Raymond's mother had recently passed away, the juvenile court should have stopped the proceedings; appointed a GAL to represent Raymond's best interests; and, continued the amenability hearing to allow for proper notification of the amenability hearing date, time, and purpose to the GAL. This continuance would allow the GAL adequate time to prepare a report regarding Raymond's best interests. *See*

Sup.R. 48. The prejudice is found in the fact that no GAL was appointed to inform the juvenile court of Raymond's best interests after investigation, and his substantial rights were not protected.

The Tenth District's holding that prejudice must be shown when a juvenile court fails to comply with the requirement that the court provide notice per R.C. 2152.12(G) and Juv. R. 30(D) is in conflict with the Third District Court of Appeals. In *Taylor*, the Third District held that the transfer of jurisdiction to criminal court is void if the juvenile court fails to comply with the notice requirements for an amenability hearing. *Taylor*, 26 Ohio App.3d at 71, 498 N.E.2d 211 ("Although the record speaks to the presence of an adult sister in juvenile court in all proceedings therein, the sister was not a custodian within the meaning of that term.").

The Tenth District's focus on prejudice fails to acknowledge the importance and critical nature of the amenability proceeding in the transfer process. *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, at ¶ 12; 17-21. This Court should accept jurisdiction of this case and hold that the failure to notify a parent, guardian, legal custodian, or GAL substitute of the amenability hearing renders the transfer of jurisdiction void.

#### **Proposition of Law IV**

**R.C. 2125.12(B)(3) creates a presumption that the child will be retained in the juvenile system unless the factors in favor of transfer outweigh the factors against transfer.**

In a discretionary transfer proceeding, after finding the child's age and that probable cause exists, the juvenile court must determine if the child is amenable to

rehabilitation in the juvenile system while ensuring the safety of the community. R.C. 2152.12(B)(3). In making the amenability determination, the juvenile court must “consider whether the applicable factors \*\*\* indicating that the case should be transferred outweigh the applicable factors \*\*\* indicating that the case should not be transferred.” R.C. 2152.12(B)(3). This statute creates a presumption that the child will be retained in the juvenile system unless the factors in favor of transfer outweigh the factors in favor of retention.

Presumptions exist throughout Ohio law: a person is presumed to be dead when he has completely disappeared from his last place of domicile for a five-year period; a criminal defendant is presumed innocent until proven guilty; a husband is presumed to be the biological father of a child born to his wife during the marriage; and, statutes are presumed to be constitutional. R.C. 2121.02(A)(1); 2901.05(A); 3111.03(A)(1); *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991). “Once the basic facts are established, in the absence of adequate rebuttal evidence contrary to the presumption, the trier of fact, be it judge or jury, is compelled to find the presumed fact.” H.S. Subrin, *Presumptions and their Treatment Under the Law of Ohio*, 26 Ohio St.L.J. 175, 176-177 (1965); see also *Collier* at 269; *In re Braden*, 176 Ohio App.3d 616, 2008-Ohio-2981, 893 N.E.2d 213, ¶ 12 (1st Dist.) (“Once the juvenile court has determined that an offender is not competent to stand trial, however, a presumption of incompetence arises, which the state must rebut by coming forward with evidence of competency.”).

Recognizing a presumption in favor of retention in the juvenile system makes sense for the following reasons:

1) Adult prisons are ill-equipped to protect juveniles and the life-long effects of an adult conviction are onerous. See Children's Law Ctr., Inc., *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System* (2012), 2, available at <http://www.childrenslawky.org/wp-content/uploads/2012/07/Falling-Through-The-Cracks-A-New-Look-at-Ohio-Youth-in-the-Adult-Criminal-Justice-System-May-2012.pdf> (accessed June 1, 2015).

2) Transferring children to the adult system does not increase public safety because research demonstrates that children whose cases are transferred to adult court are more likely to recidivate than youth with similar offenses whose cases were retained in juvenile court. The passage of time, coupled with appropriate services, significantly decreases the likelihood of recidivism. See Dep't of Health & Human Servs., Ctrs. for Disease Control, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System* (Nov. 30, 2007), [www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm) (accessed June 1, 2015).

3) The consensus is changing to support that children are different from adults and should not be prosecuted in the adult system. See Neelum Arya, Campaign for Youth Justice, *Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System* (Mar. 16, 2011), 22-23, available at [http://www.campaignforyouthjustice.org/documents/CFYJ\\_State\\_Trends\\_Report.pdf](http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf) (accessed June 1, 2015).

4) Research demonstrates that children's "transient rashness, proclivity for risk, and inability to assess consequences" not only lessen a child's "moral culpability," but also "enhance[] the prospect that as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" (Internal citations omitted). *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455, 2464-2465, 183 L.Ed.2s 407 (2012).

And, recognizing this presumption comports with the governing body of juvenile court judges's guidelines that the "transfer of juveniles to adult court should be rare." Nat'l Council of Juvenile & Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases: Motions to Waive Jurisdiction and Transfer to Criminal Court* (2005) 102, available at <http://www.ncjfcj.org/sites/default/files/juvenile-delinquency-guidelines-compressed%5b1%5d.pdf> (accessed May 28, 2015).

In this case, the Tenth District found that the juvenile court did not abuse its discretion in making the amenability determination. *Decision* at ¶ 41. But, the Tenth District did not recognize that the statute created a presumption of retention in the juvenile court system; therefore, it did not consider the assignment of error under the heightened standard that the statutory presumption provides. *See Id.* at ¶ 30-31.

In Raymond's case, Dr. Bergman, a qualified clinical and forensic psychologist, was appointed by the court to conduct the amenability evaluation. R.C. 2152.12(C). After an extensive evaluation, Dr. Bergman concluded "within a reasonable degree of psychological certainty, that Raymond presents as amendable to rehabilitation within the juvenile justice system." Dr. Bergman further stated that any risk for future violence stemmed from unique factors in Raymond's case "which are presently likely exerting undue influence," including "the recent death of his father, the rapidly failing health of his mother, and the disintegration of his siblings support system by virtue of his brothers' involvement in antisocial behavior and the Courts." Dr. Bergman also provided the juvenile court with a plan for rehabilitation in the juvenile system that would address all the unique factors in Raymond's life.

The State presented its arguments in favor of transfer; but, the State presented no evidence or competing evaluation to contradict Dr. Bergman's conclusions and recommendations; and, the State did not question Dr. Bergman about her evaluation or conclusions. Ultimately, although the statute requires the psychologist's expert opinion to be included in the amenability investigation, the juvenile court stated that it "significantly discount[ed]" Dr. Bergman's conclusions and recommendations.

With recognition of the presumption created by R.C. 2152.12(B)(3), coupled with Dr. Bergman's conclusions resoundingly in favor of retention in the juvenile system, the Tenth District could not have found that the juvenile court's reasoning in favor of transfer overcame the statute's presumption against transfer. Once it is established that the child is amenable to treatment in the juvenile system and in the absence of adequate rebuttal evidence to the contrary, the juvenile court judge must retain the child in the juvenile system. This Court should accept jurisdiction of this case and hold that R.C. 2152.12(B)(3) creates a presumption that the child will be retained in the juvenile system unless the factors in favor of transfer outweigh the factors against transfer.

#### **Conclusion**

This case provides this Court with the opportunity to emphasize the critical nature of the amenability hearing in the transfer proceeding. This Court should accept this appeal because it raises a substantial constitutional question, concerns felony-level offenses, and is of great general interest.

Respectfully submitted,

The Office of the Ohio Public Defender

/s/: Charlyn Bohland

Charlyn Bohland #0088080

Assistant State Public Defender

250 East Broad Street, Suite 1400

Columbus, Ohio 43215

(614) 466-5394

(614) 644-0708 – Fax

charlyn.bohland@opd.ohio.gov

Counsel for Raymond Morgan

### Certificate of Service

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Raymond Morgan** was served by ordinary U.S. Mail this 4th day of June, 2015 to Seth L. Gilbert, Franklin County Prosecuting Attorney, Franklin County Prosecutor's Office, 373 South High Street, Columbus, Ohio 43215.

/s/ Charlyn Bohland

Charlyn Bohland #0088080

Assistant State Public Defender

Counsel for Raymond Morgan

#4421812

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