

OBJECTIONS TO JUVENILE TRANSFER

A Practice Guide for Juvenile Defenders



Published by the Office of the Ohio Public Defender, 2018



INTRODUCTION

This practice guide is intended to assist the juvenile defender in preventing a child from being transferred to adult court. This guide provides general due process, probable cause, mandatory transfer, and discretionary transfer objections, along with supportive reasoning to be used throughout the case.

Each objection may not be appropriate for each case. Counsel should evaluate his or her case and determine which objections are most appropriate to achieve the client's goals. Additionally, counsel should review the juvenile rules and statutes to determine if other courses of action are appropriate for his or her case, including raising the issue of competency, ensuring adequate notice, etc.

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MOTION TO DISMISS

If the State's motion for transfer does not provide a specific basis for the filing of the motion, counsel may file a motion to dismiss prior to the probable cause hearing.

GENERAL DUE PROCESS OBJECTION

General due process objection that can be combined with other objections for support

OBJECTION

This Court's _____ decision violates [the child's] right to due process. While this Court has significant discretion to determine whether a child should remain in the juvenile court system or be transferred to the adult court system, _____ procedures must be followed in order to satisfy due process and the fairness that is necessary for such a critical action. (*Kent v. United States*, 383 U.S. 541 (1966)).

Juv.R. 30 sets forth procedural requirements for transfer proceedings. And, the juvenile rules must be interpreted to ensure that the parties receive "a fair hearing and the recognition and enforcement of their constitutional and other legal rights." (Juv.R. 1(B)).

PROBABLE CAUSE

Objections related to discovery issues

OBJECTION

Full discovery must be ordered at the probable cause stage because the basic principles of fairness and due process require that counsel be provided access to information possessed by the State that might tend

to disprove probable cause. (*State v. Iacona*, 93 Ohio St.3d 83 (2001); *In re D.M.*, 2014-Ohio-3628 (2014)).

OBJECTION

Brady material must be provided at the probable cause stage because the Due Process Clauses of the U.S. and Ohio Constitutions and Juv.R. 24 require the State to disclose to a child all evidence in the State's possession favorable to the child, and material either to guilt or punishment that is known at the time of the proceedings. (*State v. Iacona*, 93 Ohio St.3d 83 (2001); *In re D.M.*, 140 Ohio St.3d 309 (2014)).

Objections related to evidentiary issues

OBJECTION

The Rules of Evidence must apply at probable cause hearings because bindover has been recognized as a "critically important" proceeding by the U.S. and Ohio Supreme Courts. (Evid. R. 101(A); *Kent v. United States*, 383 U.S. 541 (1966); *State v. D.W.*, 133 Ohio St.3d 434 (2012)).

The State must provide credible evidence of every element of an offense to support a finding that probable cause (more than a mere suspicion of guilt) exists to believe that the child committed the offense. In determining the existence of probable cause, this Court must evaluate the quality of the evidence presented by the State as well as any evidence by the child that attacks probable cause. (State v. Iacona, 93 Ohio St.3d 83 (2001); Kent v. United States, 383 U.S. 541 (1966)).

OBJECTION

[The child] must be allowed to present evidence that attacks probable cause because the basic principles of fairness and due process require this Court to evaluate the quality of evidence presented by the State in support of probable cause, as well as any evidence presented by the child that attacks probable cause. (*State v. Iacona*, 93 Ohio St.3d 83 (2001); *In re D.M.*, 2014-Ohio-3628 (2014)).

Objections related to suppression issues. (Alternatively, counsel may file in limine).

OBJECTION

This Court must permit the suppression of evidence and statements collected in violation of [the child’s] Fourth and Fifth Amendments because [the child] does not forfeit constitutional rights at the probable cause stage of the proceedings. (*State v. Iacona*, 93 Ohio St.3d 83 (2001); *Kent v. United States*, 383 U.S. 541 (1966)).

While this Court’s ultimate decision is jurisdictional in nature, the decision is based on a mixed legal and factual finding that probable cause exists. Were a child precluded from challenging probable cause in any way, there would be no need for a hearing at all; and the State would have unbridled authority to say and do what it pleased in support of a transfer motion. This result is untenable and unsupportable under Kent and its progeny.

Objections related to identification issues

OBJECTION

The State failed to present sufficient identification evidence to establish probable cause. R.C. 2152.12(A)-(B) and Juv.R. 30 require that the State provide credible evidence of every element of an offense to support a finding of probable cause to believe that [the child] committed the offense before this Court can transfer the case to adult court. (*In re A.J.S.*, 120 Ohio St.3d 185; *State v. Iacona*, 93 Ohio St.3d 83 (2001)).

- *Transfer hearings are a “critically important” stage in juvenile proceedings and must “measure up to the essentials of due process and fair treatment.”* (*State v. Iacona*, 93 Ohio St.3d 83 (2001); *Kent v. United States*, 383 U.S. 541 (1966)).
- *To establish probable cause, the State must produce evidence that raises more than a mere suspicion of guilt, but need not provide*

evidence proving guilt beyond a reasonable doubt. (In re A.J.S., 120 Ohio St.3d 185; State v. Iacona, 93 Ohio St.3d 83 (2001); In re C.G., 2012-Ohio-5286 (8th Dist.); State v. J.T.S., 2015-Ohio-1103 (10th Dist.)).

OBJECTION

The in-court identification is not credible or reliable and violates [the child's] due process rights. (*Neil v. Biggers*, 409 U.S. 188 (1972)).

- “An identification derived from unnecessarily suggestive procedures, which have a likelihood of leading to a misidentification, violates a defendant’s right to due process.” (State v. Fields, 2014-Ohio-301 (8th Dist.); *Neil v. Biggers*, 409 U.S. 188 (1972)).
- The U.S. Supreme Court has listed five factors that must be considered when evaluating reliability under the totality of the circumstances test: 1) the witness’s opportunity to view the offender at the time of the crime; 2) the witness’s degree of attention at the time of the crime; 3) the accuracy of the witness’s prior description of the offender; 4) the witness’s level of certainty when identifying the suspect at the confrontation; and 5) the length of time that has elapsed between the crime and the confrontation. (*Neil v. Biggers*, 409 U.S. 188 (1972)). The following facts demonstrate that the identification is unreliable: _____.

Objections related to the sufficiency of probable cause evidence

OBJECTION

The State failed to present evidence for each element of the alleged offense. The State must provide credible evidence of every element of an offense to support a finding of probable cause to believe that [the child] committed the offense before this Court can transfer the case to adult court. (R.C. 2152.12(A)-(B); Juv.R. 30; *In re A.J.S.*, 120 Ohio St.3d 185 (2008); *State v. Iacona*, 93 Ohio St.3d 83 (2001)).

- Transfer hearings are a “critically important” stage in juvenile proceedings and must “measure up to the essentials of due

process and fair treatment.” (State v. Iacona, 93 Ohio St.3d 83 (2001); Kent v. United States, 383 U.S. 541 (1966)).

- *To establish probable cause, the State must produce evidence that raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt. (In re A.J.S., 120 Ohio St.3d 185 (2008); State v. Iacona, 93 Ohio St.3d 83 (2001); In re C.G., 2012-Ohio-5286 (8th Dist.); State v. J.T.S., 2015-Ohio-1103 (10th Dist.)).*

MANDATORY TRANSFER

Because of the Supreme Court of Ohio’s decision in State v. Aalim II, due process and equal protection challenges to mandatory transfer have been decided. Counsel should continue to make due process objections to specific violations of the mandatory transfer statute and rule. However, the Supreme Court has not decided a challenge to mandatory transfer based on the Eighth Amendment.

OBJECTION

The mandatory transfer of juvenile offenders to adult court violates the prohibition against cruel and unusual punishments. (Eighth and Fourteenth Amendments, U.S. Constitution; Article I, Section, Ohio Constitution).

DISCRETIONARY TRANSFER

General objections to the amenability process

OBJECTION

According to the plain language of R.C. 2152.12(B)(3), this Court must make two supported findings—1) that the child is not amenable to

the juvenile court’s rehabilitative services and 2) the safety of the community requires that the child be subject to adult sanctions.

OBJECTION

According to the plain language of R.C. 2152.12(B)(3), the statute creates a presumption that the child will be retained in the juvenile court system unless the factors in favor of transfer (subsection D) outweigh the factors in favor of retention (subsection E).

OBJECTION

Counting or tallying of the factors violates [the child’s] right to fundamental fairness, as there are more enumerated factors listed in subsection D than are listed in subsection E. Instead, the factors are to be used to assist this Court in making a determination about whether or not [the child] is amenable and whether or not the safety of the community requires that [the child] be subject to adult sanctions; and, in this case the evidence demonstrates the following: _____.

OBJECTION

This Court’s weight determination violates due process. Unlike mandatory transfer, the facts of the offense are not determinative in discretionary transfer; rather, [the child’s] amenability to rehabilitative opportunities is the important question that must be answered.

The U.S. Supreme Court (Roper, Graham, Miller, and Montgomery) has emphasized a child’s prospects for rehabilitation and reduced culpability—and not the facts of the offense—as the salient factors in determining punishment for a child.

OBJECTION

This Court’s weight applied to and finding of ___ factor violates due process. There was no evidence presented to prove the existence of the factor in favor of transfer.

OBJECTION

This Court’s decision to not apply weight to or reject ___ factor violates due process. The following evidence proved the existence of the factor in favor of retention: _____.

OBJECTION

The plain language of R.C. 2152.12(C) requires that the evaluation investigate whether [the child] is amenable to juvenile court rehabilitation. The evaluation in this case violates due process because it does not conform to the statute's requirements. Specifically, the evaluation fails to address the following: _____.

OBJECTION

This Court should not disregard an expert evaluator's conclusion when it is mandated by statute and when there is no competing evidence to rebut the expert's conclusion. (*State v. White*, 113 Ohio St.3d 12 (2008)).

Constitutional objections to the amenability process

OBJECTION

This Court's factual determination of non-amenable, without proof beyond a reasonable doubt or the benefit of a jury determination, violates Sixth Amendment to the U.S. Constitution because it authorizes a judge to increase the maximum allowable punishment for [the child]. (*Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

- *In Apprendi, the U.S. Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."*
- *Apprendi has been applied to bindover cases in Massachusetts and New Mexico. (Commonwealth v. Quincy Q., 753 N.E.2d 781 (Mass.2001) (holding that the bindover statute authorizes judges to increase the punishment for juveniles convicted of certain offenses beyond the statutory maximum otherwise permitted for juveniles); New Mexico v. Rudy B., 216 P.3d 810 (N.M.App. 2009) (holding New Mexico's juvenile sentencing scheme unconstitutional as violating Apprendi because it required that the judge, not the jury, determine whether a juvenile would be amenable to rehabilitation with solely a juvenile sentence)).*

OBJECTION

R.C. 2152.12(B) violates a child's right to due process and equal protection because it is unconstitutionally vague as to how to consider [the child's] age and youth, and results in the arbitrary and discriminatory enforcement of the law. (Fifth and Fourteenth Amendments, U.S. Constitution; Article I, Section 16, Ohio Constitution; *Smith v. Gougen*, 415 U.S. 566 (1974)).

OBJECTION

The statutory structure of R.C. 2152.12(B), wherein this Court must determine whether [the child] is amenable to the juvenile justice system prior to finding that [the child] is delinquent, violates [the child's] right to due process, the effective assistance of counsel, and effectively his right against self-incrimination because retaining [the child] seems unlikely when he maintains innocence.

- *All children accused of a crime are presumed innocent until proven delinquent beyond a reasonable doubt. But, the specific factors and the exercise of weighing the factors presumes that the child is guilty of the offense as charged. (Fifth Amendment, U.S. Constitution; In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1967)).*
- *[The child's] right to the effective assistance of counsel is violated when counsel must fight to demonstrate [the child's] amenability to treatment while simultaneously protecting [the child's] constitutional right to a fair trial. (Sixth Amendment, U.S. Constitution).*

Specific objections to R.C. 2152.12 (D) factors in favor of transfer

Factor (1): The victim suffered physical or psychological harm, or serious economic harm.

OBJECTION

This Court's weight applied to and finding of this factor violates due process. Unlike in mandatory transfer, the facts of the offense are not

determinative in discretionary transfer; rather, [the child’s] amenability to rehabilitative opportunities is the important question that must be answered. The U.S. Supreme Court (Roper, Graham, Miller, and Montgomery) has emphasized a child’s prospects for rehabilitation and reduced culpability—and not the facts of the offense—as the salient factors in determining punishment for a child.

OBJECTION

This Court’s weight applied to and finding of this factor violates due process. There has only been a demonstration of probable cause and not a finding that [the child] is guilty beyond a reasonable doubt; therefore, the facts of the offense must be given less weight.

Factor (2): The physical or psychological harm suffered by the victim was exacerbated because of the physical or psychological vulnerability or the age of the victim.

OBJECTION

This Court’s weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove the harm suffered by the victim was exacerbated by vulnerability or age.

Factor (3): The child’s relationship with the victim facilitated the act.

OBJECTION

This Court’s weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that [the child’s] relationship with the victim facilitated the act.

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

OBJECTION

This Court’s weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that [the child] committed the act as part of a gang or other organized criminal activity.

- *Normal childhood behavior should not be used to penalize a child. Children are highly susceptible to peer pressure and it is normal childhood development for children to spend time with peers.*
- *The legal definition of organized criminal activity includes the “planned utilization of * * * participants” rather than activities carried out by multiple individuals acting spontaneously or impulsively. (State v. Martinez, 2002-Ohio-735 (6th Dist.)).*

Factor (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 is not R.C. 2923.12, and the child, during the commission of the act, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

OBJECTION

This Court’s weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that [the child] was the principal offender; rather, it was a co-defendant that possessed and used the firearm.

Factor (6): At the time of the act, 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.

OBJECTION

This Court’s weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that [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, within the plain language of the statute.

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

OBJECTION

This Court's weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that the services offered to [the child] were in connection with the juvenile court system.

OBJECTION

This Court's weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that the services offered to [the child] exhausted other services available within the juvenile court system.

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

OBJECTION

The explanation that [the child] was "almost" ___ years old violates due process because the U.S. Supreme Court has never separated younger children from older children; rather, the jurisprudence has always focused on the unique characteristics and underdeveloped brains shared by all children under the age of 18.

OBJECTION

This Court's weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that [the child] was mature enough for transfer. Research demonstrates that placing children in adult settings increases their risk of harm, including suicide and abuse; and adult placements are not designed to offer developmentally appropriate programming and services.

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

OBJECTION

This Court's weight applied to and finding of this factor violates due process because there was insufficient evidence presented to prove that there was not sufficient time to rehabilitate [the child] in the

juvenile system. The following services and programs are available until [the child's] 21st birthday: _____.

The State may request a blended SYO disposition if the bindover motion is denied.

Specific objections to R.C. 2152.12 (D) factors in favor of retention

Factor (1): The victim induced or facilitated the act.

OBJECTION

This Court's rejection of this factor violates due process because there was sufficient evidence presented to prove that the victim induced or facilitated the act.

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

OBJECTION

This Court's rejection of this factor violates due process because there was sufficient evidence presented to prove that [the child] acted under provocation in allegedly committing the act.

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

OBJECTION

This Court's rejection of this factor violates due process because there was sufficient evidence presented to prove that [the child] was not the principal actor and/or [the child] was under the negative influence of peers or an adult.

OBJECTION

This Court's rejection of this factor violates due process because there was sufficient evidence presented to prove that [the child] was with a

family member when the offense occurred. The U.S. Supreme Court has recognized that children lack the means to extricate themselves from dysfunctional and brutal home environments.

Factor (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.

OBJECTION

This Court’s rejection of this factor violates due process because there was sufficient evidence presented to prove that a reasonable child in [the child’s] shoes would not have known/believed that _____ would occur.

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

OBJECTION

This Court’s rejection of this factor violates due process because there was sufficient evidence presented to prove that [the child] has not been adjudicated previously, within the plain language of the definition.

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

OBJECTION

This Court’s rejection of this factor violates due process because there was sufficient evidence of _____ presented to prove that [the child] is not mature enough for transfer.

Factor (7): The child has a mental illness or intellectual disability.

OBJECTION

This Court’s rejection of this factor violates due process because there was sufficient evidence presented to prove that [the child] has a mental illness or intellectual disability as follows: _____.

OBJECTION

This Court's use of [the child's] _____ diagnosis as an aggravating element or in favor of transfer violates due process.

Factor (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.

OBJECTION

This Court's rejection of this factor violates due process because there was sufficient evidence presented to prove that there is sufficient time to rehabilitate [the child] in the juvenile system. The following services and programs are available until [the child's] 21st birthday: _____.

The State may request a blended SYO disposition if bindover is denied.

Amenability Hearing Preparation Worksheet

Attorney work product

General objections to the amenability process

Constitutional objections to the amenability process

Objections to R.C. 2152.12(D) factors in favor of transfer

(1): *Victim suffered physical/psychological/serious economic harm*

(2): *Physical/psychological harm was exacerbated by physical or psychological vulnerability/age*

(3): *Child's relationship with victim facilitated the act*

(4): *Child allegedly committed act for hire/as a part of a gang or other organized criminal activity*

(5): *Child had gun on /about his person/under his control and used/displayed/brandished/indicated possession*

(6): *Child was awaiting adjudication or disposition/was under community control sanction/on parole*

(7): *Results of previous juvenile sanctions and programs indicate that rehabilitation will not occur*

(8): *Child is emotionally/physically/psychologically mature enough for transfer*

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

Objections to R.C. 2152.12(E) factors in favor of retention

(1): *Victim induced/facilitated the act*

(2): *Child acted under provocation in allegedly committing the act*

(3): *Child was not principal actor/was under the negative influence or coercion of another*

(4): *Child did not cause physical harm/have reasonable cause to believe that harm of that nature would occur*

(5): *Child previously had not been adjudicated a delinquent child*

(6): *Child is not emotionally/physically/psychologically mature enough for transfer*

(7): *Child has mental illness/intellectual disability*

(8): *There is sufficient time to rehabilitate and level of security provides reasonable assurance of public safety*

Office of the Ohio Public Defender
250 E. Broad Street
Suite 1400
Columbus, Ohio 43215

614.466.5394
www.opd.ohio.gov

