



# APPEALS 101:

BUILDING A RECORD FOR A PERFECT APPEAL



# OUR LEGAL LANDSCAPE

2007-2012



Now...



# WHERE WE ARE HEADED

- Snapshot of a Case (*In the Interest of N.H.*)
- Preserving the Record for Appeal
- Appellate Rules and Requirements
- Best Practices
- What if...



*IN THE INTEREST OF N.H., 226 N.J. 242 (2016)*

*QUESTION:*

whether a juvenile is entitled to full discovery when the State seeks transfer to criminal court.

*HOLDING:*

the State is required to disclose *all discovery in its possession* when it seeks transfer.

How did it happen?

SO...

Where do we begin?

# JUV.R. 40: MAGISTRATE'S ORDERS VS. MAGISTRATE'S DECISIONS

## Magistrate's Orders

- Generally rulings that are procedural in nature
- Examples include
  - Admissibility of evidence (i.e. suppression, limine)
  - Detention hearings (Rule 7)
  - Continuances
  - Pre-trial proceedings
- Not reviewed by the Judge automatically

**ORDER**

## Magistrate's Decisions

- Rulings are more substantive in nature
- Examples include
  - Adjudication
  - Disposition
  - Competency determination
  - Dismissals
- Requires Judge's review and signature to be effective



# MAGISTRATE'S ORDERS VS. MAGISTRATE'S DECISIONS

## What to File?

- Magistrate's Order → Motion to Set Aside

Deadline: 10 days!

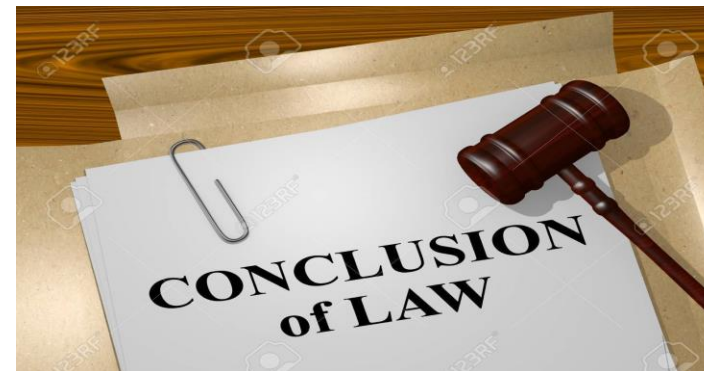
- Magistrate's Decision → Objection

Deadline: 14 days



# SO YOU WANT TO OBJECT, NOW WHAT?

- I. Do you want findings of fact and conclusions of law?





## SO YOU WANT TO OBJECT, NOW WHAT?

- 1. Request Findings of Fact and Conclusions of Law? (objections only)
- 2. Order Transcript
  - Must support objection by transcript of the evidence submitted to the magistrate
  - Must be filed within 30 days after filing objection (can be extended)

## SO YOU WANT TO OBJECT, NOW WHAT?

- 1. Request Findings of Fact and Conclusions of Law? (objections only)
- 2. Order Transcript
- 3. File the Objection or Motion to Set Aside
  - Can be general (for the moment!)
  - Reserve right to amend/supplement objection upon review of transcript

## SO YOU WANT TO OBJECT, NOW WHAT?

- 1. Request Findings of Fact and Conclusions of Law? (objections only)
- 2. Order Transcript
- 3. File the Objection or Motion to Set Aside
- 4. Seek leave to file memorandum in support of Objection/ supplement objection

# SO YOU WANT TO OBJECT, NOW WHAT?

what are other  
words for  
particularity?



singularity, peculiarity,  
feature, individuality,  
characteristic, character,  
trait, distinctiveness



Thesaurus.plus

- Be specific!
  - Objections must be “stated with particularity” or the objection can be found to have been waived! Juv.R. 40(D)(3)(b)(ii)
  - See *In re D.R.*, 2012-Ohio-5341

## MAGISTRATE'S ORDER V. MAGISTRATE'S DECISION: WHAT IF I FORGET TO FILE?

- The failure to file an objection waives all but plain error! Juv. R. 40(D)(3)(iv).
- There is no similar waiver provision within the plain language of Juv. R. 40(D)(2) with regard to the failure to file motions to set aside
  - But see....Crawford v. Hawes, 2nd Dist. Montgomery No. 23209, 2010-Ohio-952, ¶ 25 and J & B Fleet Indus. Supply, Inc. v. Miller, 7th Dist. Mahoning No. 09 MA 173, 2011-Ohio-3165, ¶¶ 32-36
- But.....
  - Juv.R. 40(D)(5) does permit untimely objections/motions to set aside for “good cause shown”



## OBJECTION: THE HEARING

- Judge is to undertake a *de novo* review of the objected matter
- Court *must* rule on the objection



# OBJECTION: THE DECISION

- The options:
  - Adopt or reject magistrate's decision in whole
  - Adopt or reject magistrate's decision in part
  - Modify the magistrate's decision
  - May hear the matter
  - May take additional evidence
  - Return the matter to the magistrate
- Must enter own Judgment!
  - *In re D.P.* 2006-Ohio-5098 (10<sup>th</sup>)
  - *In re Elliot* , 1998 WL 101352 (4<sup>th</sup>)
  - *In re A.T.* , 2017-Ohio-5821 (1<sup>st</sup>)



# OBJECTION OVERRULED: NOW WHAT?

- Motions to Set Aside
  - Was it an evidentiary issue?
  - Renew the objection at trial
- Objections
  - Any other opportunity to renew objection?
  - Prepare for appeal



## PRESERVING THE FACTUAL RECORD:

- Videos/Recordings → Time Stamp the Record!
  - Examples: Client Statements; Body Cam, Dash Cam, etc.

4           A.     I don't remember what -- I remember  
5 one of them had tobacco, but other than that I  
6 don't remember what I pulled out of their  
7 pockets.

8           Q.     Okay. Would watching the body-worn  
9 camera refresh your recollection?

10          A.     Yes.

11          Q.     So for the record, this is being  
12 started at 39 seconds.

22           Q.     And for the record, the tape is  
23 stopped at two minutes and 13 seconds. Okay.

## PRESERVING THE FACTUAL RECORD:

- Evidence/Testimony Excluded? → Proffer it!
  - Object each time or ask for continuing objection



## PRESERVING THE FACTUAL RECORD:

Demonstrations by the witness → “Like this”

A. She was standing right here, her  
momma was sitting down. I was like I walked up  
to her, like what's your problem. Next thing you  
know, I -- I just was trying to grab her.

Q. Grab her.

A. Grab her like this, trying to grab  
her like this.

## PRESERVING THE FACTUAL RECORD

- Demonstrative Exhibit?
- Or at least have the witness be more specific

13 Q. -- where would you say that the  
14 body -- what position would the body be laying  
15 in your opinion?

16 A. Well, we've got blood here, and  
17 we've got an even larger area of blood here, and  
18 it looks like we've also got blood here at the  
19 corner of the bed up there.

20 Q. Okay.

21 A. So biggest blood here, a little bit  
22 of blood there, can't tell if that's on the end  
23 of the bed or if it might be possibly on the  
24 wall, and a big blood puddle here and some blood  
25 there, and maybe a little bit right there.

5 (The video was played in open  
6 court.)

7 Q. So what is happening now?

8 A. (Unintelligible.)

9 REPORTER'S NOTE: The testimony is  
10 unable to be transcribed due to the  
11 video volume is so loud that the  
12 witness on the witness stand cannot  
13 be heard.

14 Q. So what did they just say?

15 A. Just advised me he was in and out  
16 (unintelligible due to video volume.)

17 Q. Approximately how long has it been  
18 that you've been waiting?

19 A. I'd say at least (unintelligible  
20 due to video volume) at this point in time.

# FOLLOWING THE RULES (APPELLATE, THAT IS)

- Timely and Not-so-Timely Appeals
  - Rule 3
    - Notice filed with the trial court clerk
    - Specify: party; judgment appealed; and court to which it is taken
    - Other ancillary documents

Hint: use  
initials!

Hint: file five  
copies

# FOLLOWING THE RULES (APPELLATE, THAT IS)

- Rule 4
  - Timely = 30 days after the date on which a judgment becomes final and appealable
    - R.C. 2505.02
- Rule 5
  - Motion for Leave filed with the court of appeals
    - Must state reason for not timely filing
  - All other appeal documents filed in the trial court clerk (copy thereof to court of appeals)

Watch out  
for non-final  
orders!

# FOLLOWING THE RULES (APPELLATE, THAT IS)

- Requesting a Stay – Rule 7
  - Must first seek in trial court
  - Sought in court of appeals
    - Show that stay in the trial court is not practicable; or
    - That trial court has (through an entry) denied the request
  - Conditioned on bond (transfer and adult)
  - For juveniles
    - Suitable provision for the maintenance, care, and custody of the child
    - Supported by affidavits, proof of employment, residence, custody, etc.





# THE MAILBOX RULE AND OTHER FUN FACTS



- The Mailbox Rule
  - Rule 14(C) – whenever a party has a right to do some act within a prescribed period after service or notice of service by mail, three days shall be added to the prescribed period.
- Expedited vs. Accelerated Calendar
  - Priority vs. Way too fast!
- Oral Argument
  - Some districts need a request
  - Some need a waiver

# CORRECTING AND SUPPLEMENTING YOUR RECORD

- Rule 9: it's our fault (even if it's not)
  - 9(A): everything must be recorded – if not, see Rule 9(C) and/or Juvl.R. 37
  - 9(B): order the transcript of proceedings
  - 9(C): if something is missing, can you find it or recreate it?
    - If you find it – file a motion to correct
  - 9(D): agreed statement on the record
  - 9(E): if something should have been included, but wasn't, for some reason – file a motion to supplement

# BEST PRACTICES

Bindover  
Cases

Case  
Continuity

Think, Relay!

What's Up  
Elsewhere

It's Crazy!  
Until it Isn't.

On  
remand....

Finding Friends  
(Amicus Help)

# IN PRACTICE: COMPETENCY

## Case Facts

- JJ is 12 years old
- Diagnoses: ADHD; excoriation (skin picking); OCD; disruptive mood dysregulation disorder; bipolar disorder.
- Charges: 2 counts felonious assault; aggravated menacing
- No previous court experience

## Your Observations

- Difficulty discussing offenses
- Not able to focus during court proceedings

What pre-trial motions do you want to file?

# IN PRACTICE: COMPETENCY

## Case Facts

- JJ found incompetent, but restorable
- Attainment services for 6 months
- Found competent upon re-evaluation

## Your Observations

- Still difficult to discuss the case
- Condition deteriorating
- You do not believe he is competent

What do you file to preserve his competency claim?

What if the Magistrate denies your request for second evaluation?

# IN PRACTICE: COMPETENCY

## Case Facts

- Court grants request for second evaluation
- Second evaluator finds JJ incompetent
- Competency hearing: JJ and his parents fail to show
- Capias issued
- JJ AWOL for several months
- Expert conducts updated evaluation – JJ still not competent

## Competency Hearing

- Original evaluator and expert testify
- Magistrate excludes the updated report and finds JJ competent

How do you preserve the issue during the hearing?

What would you do to preserve the issue for appeal?

# IN PRACTICE: FOURTH AMENDMENT CHALLENGE

## Case Facts

- Police receive a call that one black female and two black males (aged 13-14) robbed an intoxicated woman leaving a local bar and grill (wallet stolen)
- Boys described by shirt color (one wearing dark blue / one wearing light blue golf shirt)
- DJ and his friend are walking in a nearby park
- DJ is wearing a red striped shirt; his friend is wearing a light blue polo
- No girl is with them

## The Stop

- Officers turn on their lights and immediately apprehend and handcuff the boys
- Officer does a full search of DJ/checks pockets and finds nothing
- DJ is put in the back of the squad car
- No *Miranda* rights
- Second officer questions DJ about stolen wallet
- Inebriated victim does show up and identifies DJ and friend as perpetrators
- In cruiser, friend is recorded talking about the wallet

What do you want to file pretrial?

# IN PRACTICE: FOURTH AMENDMENT CHALLENGE

## Suppression Hearing

- State concedes no *Miranda* and that statement should be suppressed
- You try to elicit testimony about the statements the boys made about the wallet when they were alone and being recorded
- State objects
- You argue that the statements were a direct result of the questioning prior to arrest
- Magistrate precludes you from questioning the officer about the facts prior to the recorded video statements

## Suppression Denied

What can you do during the hearing to preserve your argument about the statements made while in police custody?

After the decision is issued, what is the best way to preserve the issue for appeal?

What would your objections be?

What is your strategy with regards to the Magistrate's Decision to rule prematurely?



## IN PRACTICE: FOURTH AMENDMENT CHALLENGE

OH NO! The Judge denies your objection in total 😞  
During trial, how do you preserve the issue for appeal?

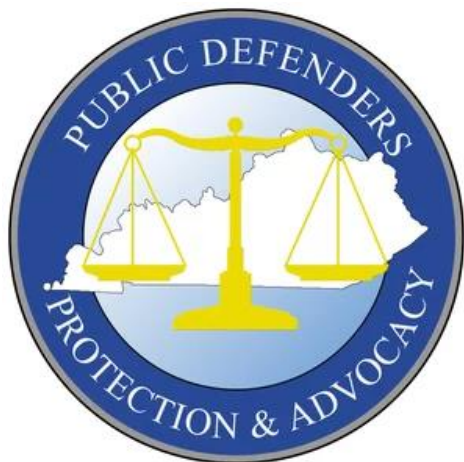
# RESOURCES

- American Civil Liberties Union: <https://www.aclu.org/>
- National Juvenile Defender Center: <http://njdc.info/>
- Juvenile Law Center: <https://jlc.org/>



OTHER QUESTIONS?

THANK YOU!



Kristina Kersey  
[Kristina.Kersey@opd.nj.gov](mailto:Kristina.Kersey@opd.nj.gov)  
973.648.3470



Brooke M. Burns  
[Brooke.Burns@opd.ohio.gov](mailto:Brooke.Burns@opd.ohio.gov)  
614.728.9401



Julie Kahrs Nessler  
[JKNessler@cms.Hamilton-co.org](mailto:JKNessler@cms.Hamilton-co.org)  
513.946.8256