

NO. 2020-1429

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CHAMPAIGN COUNTY
SECOND APPELLATE DISTRICT
NO. 2018 CA 00025

STATE OF OHIO
Plaintiff-Appellee

-vs-

DONOVAN NICHOLAS
Defendant-Appellant

**BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN
SUPPORT OF APPELLEE**

Counsel for Plaintiff-Appellee

Kevin S. Telebi (#0069198)
Champaign County Prosecutor

By: Jane A. Napier (#0061426)
Assistant Prosecuting Attorney
200 North Main Street, #102
Urbana, Ohio 43078
(937) 484-1900

Counsel for Defendant-Appellant

Timothy B. Hackett (#0093480)
Assistant State Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215

**Counsel for Ohio Prosecuting Attorneys
Association-Amicus Curiae**

Michael C. O'Malley
Cuyahoga County Prosecutor

By: Daniel T. Van (#0084614)
Assistant Prosecuting Attorney
200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7865

Other Counsel Listed On Service

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STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Prosecuting Attorneys Association (OPAA) is a private nonprofit membership organization founded to help the 88 county prosecutors. Each county prosecutor is charged under R.C. 309.08(A) with inquiring into the commission of the crime and prosecuting on behalf of the state, all complaints, suits, and controversies in which the state is a party. The founding attorneys developed the original mission statement, which is still adhered to. It reads: “to increase the efficiency of its members in the pursuit of their interest; to broaden their interest in government; to provide cooperation and concerted actions on the polices which affect the office of the Prosecuting Attorney, and to aid in the furtherance of justice. Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members.”

The mission is to further justice, guarantee that the laws of the State of Ohio are faithfully executed, and that the public’s safety is ensured. Prosecutors across Ohio have an interest in ensuring that the public is protected from violent offenders. As noted by this Court, in response to a rise in rates and severity of juvenile crime and the belief that not all juveniles can be rehabilitated, the General Assembly in 1969 enacted a statutory scheme that provides for some juveniles to be removed from a juvenile court’s authority and transferred to adult court for criminal prosecution. *State v. D.W.*, 133 Ohio St. 3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶9.

In light of these circumstances, the Ohio Prosecuting Attorneys Association has considered the issues raised in this appeal to be important due to its impact on how prosecutors can respond to violent crimes committed by juvenile offenders. The arguments raised by Appellant concerning the standard of review and burden proof seek to transform the discretionary transfer process in a matter inconsistent with a plain reading of the Revised Code. Appellant's argument that a juvenile court consider a Serious Youthful Offender specification before relinquishing jurisdiction is also inconsistent with the language of the Revised Code.

raises arguments that a juvenile court need to consider a Serious Youthful Offender disposition before relinquishing jurisdiction. This argument conflicts with prosecutorial discretion in filing the serious youthful offender process, which under R.C. 2152.13 can be started after a decision has been made by the juvenile court to deny transfer.

STATEMENT OF THE CASE AND FACTS

According to the Second District's opinion in *State v. Nicholas*, 2nd Dist. Champaign No. 2018-CA-25, 2020-Ohio-3478, Appellant was 14 years old when he killed Heidi Taylor. *Nicholas*, ¶7-8. Taylor was the live in girlfriend of Appellant's father and Appellant called Taylor "mother." *Id.*

The State of Ohio moved to transfer the matter to the common pleas court and Appellant's counsel orally moved for a competency hearing and was evaluated by Dr. Daniel Hrinko. Appellant was found by Dr. Hrinko competent to stand trial. *Id.* ¶11.

When the competency hearing was conducted the juvenile court found that Appellant was 14 years old at the time of the offense and that probable cause existed for the charged offenses of aggravated murder and murder. *Id.* On September 5, 2017, Appellant's counsel asked the court to order an amenability and treatment evaluation. Appellant was transferred for evaluation with Dr. Amy Hoisington-Stabile, M.D. At the defense request, the amenability hearing was continued until October 31, 2017. *Id.* ¶11-12. An amenability hearing was held, which the court of appeals detailed. *Id.* ¶21-44. The juvenile court found these factors favored transferred:

- The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.
- The child's relationship with the victim facilitated the act charged.
- 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.
- The child is emotionally, physically, or psychologically mature enough for the transfer.
- There is not sufficient time to rehabilitate the child within the juvenile system.

Id. ¶52.

The juvenile court found the factors against transfer were: (1) that the child previously has not been adjudicated a delinquent child; and (2) the child has a mental illness or intellectual disability. *Id.* ¶53.

After transfer, Appellant was indicted by a Champaign County Grand Jury on Aggravated Murder with firearm specifications and Murder with firearm specifications. After a jury trial, Appellant was found guilty and he was sentenced to prison on Aggravated Murder.

On appeal Appellant raised five assignments of error. The first assignment of error was the only assignment of error related to the bindover procedure. Appellant's first assignment of error stated, "The Juvenile Court Abused Its Discretion and Violated [Nicholas's] Right to Due Process of Law When It Disregarded Uncontroverted Evidence and Transferred This Case for Criminal Prosecution." *Id.* ¶49;

The court of appeals in *Nicholas* noted that the first assignment of error consisted of several arguments. The majority rejected Appellant's first argument that the trial court abused its discretion by arbitrarily disregarding Dr. Hrinko's expert conclusion. In applying the abuse of discretion standard and rejecting Appellant's argument, the majority noted the factors listed under R.C. 215212(D) and (E) and noted the factors favoring transfer and the factors weighing against transfer *Id.* ¶52-54, 57, 71. The majority rejected the argument that no evidence supported the juvenile court's transfer order and found that the juvenile court considered the appropriate statutory factors to support the

court's findings and found no abuse of discretion. *Id.* ¶73. Finally, the majority rejected the argument that the juvenile court should have considered a serious youthful offender disposition, finding that even if Appellant were eligible, the disposition is unavailable unless the court elected not to transfer the child. *Id.* ¶75-78.

LAW AND ARGUMENT

APPELLANT'S FIRST PROPOSITION OF LAW: BECAUSE STANDARDS OF REVIEWS ARE FUNCTIONS OF DUE PROCESS, NON-AMENABILITY DECISIONS FOR DISCRETIONARY TRANSFER MUST BE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Appellant's first proposition of law argues that decisions for discretionary transfer must be supported by clear and convincing evidence. Appellant's argument that there is a standardless and arbitrary procedure to transfer cases from juvenile court to adult court is ungrounded in the statutory procedure to transfer cases for adult prosecution.

Appellant's proposition of law ignores the plain language of the discretionary transfer statute, R.C. 2152.12(B). When construing statutes, such as the bindover statutes, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42. Moreover, a court may not add words to an unambiguous statute and must apply the statute in a manner consistent with the plain meaning of the statutory language. *Portage Cty. Bd. of Commrs.*, 109 Ohio St.3d 106, 2006-Ohio-954, 846

N.E.2d 487, ¶52. See also *Al Minor & Assoc., Inc. v. Martin*, 117 Ohio St.3d 58, 2008-Ohio-292, 881 N.E.2d 850, ¶18 citing *Iddings v. Jefferson Cty. Sch. Dist. Bd. Edn.*, 115 Ohio St. 287, 290, 44 O.O. 294, 98 N.E.2d 827. Words that are not defined in the statute must be given its plain and ordinary meaning. *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234, ¶17 citing *State v. Anthony*, 96 Ohio St.3d 173, 2002-Ohio-4008. Plain language of a statute cannot be interpreted to mean something it does not say. *State ex rel. Jean-Baptiste v. Kirsch*, 4th Dist. Scioto No. 10CA3338, 2011-Ohio-3368, ¶11 citing *State v. Hix*, 38 Ohio St.3d 129, 131, 527 N.E.2d 784 (1988).

There are standards and procedures that apply to transfer proceedings. R.C. 2152.12(B) provides that a juvenile court may transfer the case if: (1) the child was fourteen or older at the time of the act charged; (2) there is probable cause to believe that the child committed the act charged; and (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. The procedures tell us that the preliminary issue as to any transfer decision is whether there is the juvenile's age and whether there is probable cause to believe that the juvenile committed the charged acts. Next the statute tells us that a transfer decision is grounded in considerations of whether the juvenile is amenable to care or rehabilitation within the juvenile justice system *and* the safety of the community. Appellate courts have recognized that the seriousness of the underlying offenses and safety of the community are relevant factors in the transfer determination.

State v. Marshall, 1st Dist. Hamilton No. C-150383, 2016-Ohio-3184, ¶ 22 citing *State v. Amos*, 1st Dist. Hamilton No. C-150256, 2016-Ohio-1319 ¶ 43, [**14] citing *State v. West*, 167 Ohio App.3d 598, 2006-Ohio-3518, 856 N.E.2d 285 ¶ 30, and *State v. Watson*, 47 Ohio St.3d 93, 547 N.E.2d 1181 (1988).

The discretionary transfer statute provides the procedure for the juvenile court to follow before relinquishing jurisdiction and transferring the case for adult prosecution. Before an amenability hearing is held, the juvenile court is to order an investigation into the child's social history, education, family situation, and any other factor bearing on whether the child is amenable to juvenile rehabilitation. The statute requires that the investigation be completed and submitted to the court not more than forty-five days after the court orders the investigation. See R.C. 2152.12(C). Juv. R. 30(C) also provides the rule of procedure for discretionary transfer. The procedures here are grounded in due process and other constitutional protections. See *State v. D.W.*, 133 Ohio St. 3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶20.

As for the amenability hearing, R.C. 2152.12(B)(3) provides that in making the transfer decision, a juvenile court is to consider the applicable factors listed under R.C. 2152.12(D) and R.C. 2152.12(E). The statute only requires that the juvenile court weigh the applicable factors and does not require the juvenile court to make any findings by clear and convincing evidence.

R.C. 2152.12(D) provides a non-exhaustive list of factors that a juvenile court considers that weigh in favor transferring a case for adult prosecution. The statute states the factors in favor of transfer:

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.

R.C. 2152.12(E) provides a non-exhaustive list of factors that a juvenile court considers that weigh against transferring a case for adult prosecution. The statute states the factors against transfer:

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 intellectual disability.
- (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.

The rule and statute require the juvenile court to consider the applicable factors in making its determination on the amenability issue. *State v. Douglas* (1985), 20 Ohio St.3d 34. Although, the statute is silent with regard to how a juvenile court should weigh the factors in R.C. 2152.12(D) and (E), the juvenile court has discretion to determine how

much weight should be accorded to any given factor. *State v. Marshall*, 1st Dist. Hamilton No. C-150383, 2016-Ohio-3184, ¶15 citing *State v. Morgan*, 10th Dist. Franklin No. 13AP-620, 2014-Ohio-5661, ¶37. The appropriate question is not whether the appellate court would have reached the same conclusion

On appeal the juvenile court's weighing of the factors is review under an abuse of discretion standard. The abuse of discretion standard is well-settled any by its own terms prevents unreasonable, arbitrary or unconscionable decisions. *In re M.P.*, 124 Ohio St. 3d 445, 2010-Ohio-599, ¶14, *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶39. See also *State v. Watson* (1989), 47 Ohio St.3d 93, 95; *State v. Carmichael*, 35 Ohio St.2d 1, 64 O.O.2d 1 (1973); *State v. Douglas*, 20 Ohio St.3d 35, 36-37 (1985); and *State v. Golphin*, 81 Ohio St.3d 543 (1998). Indeed, a survey of decisions since 2018 show that appellate courts have continued to follow the abuse of discretion standard. See *State v. Watkins*, 12th Dist. Clermont No. CA2017-03-013, 2018-Ohio-46, ¶14, *State v. Carberry*, 1st Dist. Hamilton No. C-170095, 2018-Ohio-1060, ¶5, *State v. Cleveland*, 8th Dist. Cuyahoga No. 105443, 2018-Ohio-1185, ¶32, *State v. Collins*, 10th Dist. Franklin No. 17AP-433, 2018-Ohio-1162, ¶11, *State v. Everhardt*, 3d Dist. Hancock No. 5-17-25, 2018-Ohio-1252, ¶19, *State v. Howard*, 2d Dist. Montgomery No. 27198, 2018-Ohio-1863, ¶14, *State v. Pryor*, 1st Dist. Hamilton No. C-170334, 2018-Ohio-2985, ¶10, *State v. Evans*, 1st Dist. Hamilton No. C-170420, 2018-Ohio-3129, ¶34, *State v. Collins*, 8th Dist. Cuyahoga No. 106545, 2018-Ohio-4857, ¶27, *In re M.A.*, 12th Dist. Brown No. CA2018-07-005, 2019-Ohio-829, ¶26, *State v.*

Crosby, 8th Dist. Cuyahoga Nos. 107392, 107551, 2019-Ohio-2217, ¶28, *State v. Reese*, 1st Dist. Hamilton Nos. C-180126, C-180412, 2019-Ohio-3680, ¶14, *State v. J.L.S.*, 10th Dist. Franklin No. 18AP-125, 2019-Ohio-4173, ¶21, *State v. Hennings*, 8th Dist. Cuyahoga Nos. 108043, 108044, 108045, 2019-Ohio-4675, ¶12, *State v. LaRosa*, 11th Dist. Trumbull No. 2018-T-0097, 2020-Ohio-160, ¶28, *State v. Hughley*, 8th Dist. Cuyahoga No. 108518, 2020-Ohio-1277, ¶53, *State v. Kimbrough*, 8th Dist. Cuyahoga Nos. 108172, 108173, 2020-Ohio-3175, ¶58, *State v. Hughley*, 8th Dist. Cuyahoga No. 108771, 2020-Ohio-4741, ¶23, *State v. Cuffie*, 2d Dist. Clark No. 2019-CA-8, 2020-Ohio-4844, ¶10.

Appellant’s arguments refers to other types of proceedings that require a clear and convincing evidence standard. This defeats Appellant’s arguments. Had the General Assembly wanted to do so, would have specifically provided for a clear and convincing standard for discretionary transfer decisions. See *Walden v. State*, 47 Ohio St. 3d 47 (rejecting State’s argument that “clear and convincing evidence” standard or proof applied to wrongful imprisonment claim).

After weighing the factors and transferring the case, the juvenile court is only required to:

(I) *** 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.

As the majority in *Nicholas* held, “due process is satisfied when a juvenile court issues a decision stating its reasons for the transfer after conducting a hearing at which the juvenile is represented by counsel.” *Nicholas* ¶56 citing *State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956, ¶24 and *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

The clear and convincing evidence standard, which Appellant advocates for, is not the standard that controls transfer decisions. An abuse of discretion standard applies when reviewing a juvenile court’s decision to transfer a case for adult prosecution. The settled standard of review should not be disturbed.

Appellant’s argument that a transfer determination requires clear and convincing evidence is not grounded in the plain language of R.C. 2152.12. The Court should not hold R.C. 2152.12 requires a clear and convincing standard for transfer determinations, where such a standard has not been expressly provided by statute. Amicus curiae urges this Court to reject the first proposition of law.

APPELLANT'S SECOND PROPOSITION OF LAW: AS THE PARTY MOVING FOR DISCRETIONARY TRANSFER UNDER R.C. 2152.12(B) PROSECUTORS TYPICALLY BEAR THE BURDEN OF PROVING THE CHILD IS NOT AMENABLE TO JUVENILE COURT TREATMENT. A TRANSFER DECISION WITHOUT ANY AFFIRMATIVE PROOF OF NON-AMENABILITY MUST BE REVERSED

Appellant's second proposition of law likewise ignores the plain language of R.C. 2152.12 when he argues that prosecutors bear a burden to present proof of non-amenability. This proposition of law ignores the plain language of R.C. 2152.12 and ignores the public safety consideration of aspect of transfer determinations. As with the first proposition of law, Appellant would have this Court write words into R.C. 2152.12 that do not exist and conflicts with how the juvenile court is to make its amenability determinations.

First, the statute requires the court to order an investigation into the child. R.C. 2152.12(C). Second, R.C. 2152.12(D) and R.C. 2152.12(E) only requires the trial court to weigh the factors supporting transfer with the factors against transfer. Weighing of the factors does not require the juvenile court to accept all testimony presented by the juvenile. In making a transfer decision, a juvenile court is not bound by any expert opinion and may assign any weight to the expert opinion that it deems appropriate. *State v. Everhardt*, 3d Dist. Hancock No. 5-17-25, 2018-Ohio-1252, ¶ 43; *State v. Easley*, 10th Dist. Franklin Nos. 16AP-9 and 16AP-10, 2016-Ohio-7271, ¶ 15. Contrary to any argument that

the juvenile court was somehow bound to testimony, the First District has held that juvenile courts are not bound:

This court has held that the juvenile court is entitled to disagree with the opinion of a medical expert and may take into account the severity of the offenses. *Evans*, 1st Dist. Hamilton No. C-170420, 2018-Ohio-3129, at ¶ 33; *Marshall*, 1st Dist. Hamilton No. C-150383, 2016-Ohio-3184, at ¶ 21. Reese argues that we should overrule our cases on that point. We see no reason to do so. To hold otherwise would constrain judicial discretion and allow expert testimony to usurp the function of the juvenile court, which is the ultimate decision maker.

State v. Reese, 1st Dist. Hamilton Nos. C-180126, C-180412, 2019-Ohio-3680, ¶ 18

Thus, testimony that is offered against transfer can be rebutted and support for transfer may be found with considerations of public safety. Also important to any decision to transfer a case from juvenile court for adult prosecution is the severity of the acts charged. A survey of discretionary bindover cases illustrates the severity of the cases subject to transfer, which often involve homicides, sexual violence, or gun violence at the hands of juveniles. *State v. Watkins*, 12th Dist. Clermont No. CA2017-03-013, 2018-Ohio-46, ¶2 (robbery with firearm), *State v. Carberry*, 1st Dist. Hamilton No. C-170095, 2018-Ohio-1060, ¶2 (gross sexual imposition), *State v. Cleveland*, 8th Dist. Cuyahoga No. 105443, 2018-Ohio-1185, ¶2 (shooting and robbery), *State v. Collins*, 10th Dist. Franklin No. 17AP-433, 2018-Ohio-1162, ¶2, 5-6 (felonious assault, kidnapping, and gross sexual imposition with firearm), *State v. Everhardt*, 3d Dist. Hancock No. 5-17-25, 2018-Ohio-1252, ¶2 (felonious assault with firearm), *State v. Howard*, 2d Dist. Montgomery No. 27198, 2018-

Ohio-1863, ¶2 (robbery), *State v. Pryor*, 1st Dist. Hamilton No. C-170334, 2018-Ohio-2985, ¶2 (felonious assault and having weapons while under disability), *State v. Evans*, 1st Dist. Hamilton No. C-170420, 2018-Ohio-3129, ¶1-2 (aggravated robbery with firearm specifications, robbery, carrying concealed weapons), *State v. Collins*, 8th Dist. Cuyahoga No. 106545, 2018-Ohio-4857, ¶1, 5-18 (multiple robberies with firearms), *In re M.A.*, 12th Dist. Brown No. CA2018-07-005, 2019-Ohio-829, ¶2-9 (rape committed by repeat offender), *State v. Crosby*, 8th Dist. Cuyahoga Nos. 107392, 107551, 2019-Ohio-2217, ¶3 (four separate robberies, one with firearm), *State v. Reese*, 1st Dist. Hamilton Nos. C-180126, C-180412, 2019-Ohio-3680, ¶3-12 (30 delinquency complaints related to burglaries and other property offenses between July 17, 2016 and October 5, 2016), *State v. J.L.S.*, 10th Dist. Franklin No. 18AP-125, 2019-Ohio-4173, ¶2- (conspiracy to commit murder), *State v. Hennings*, 8th Dist. Cuyahoga Nos. 108043, 108044, 108045, 2019-Ohio-4675, ¶12, *State v. LaRosa*, 11th Dist. Trumbull No. 2018-T-0097, 2020-Ohio-160, ¶2-18, *State v. Hughley*, 8th Dist. Cuyahoga No. 108518, 2020-Ohio-1277, ¶3-27 (aggravated vehicular homicide, failure to comply, aggravated vehicular assault, and receiving stolen property), *State v. Kimbrough*, 8th Dist. Cuyahoga Nos. 108172, 108173, 2020-Ohio-3175, ¶2-3 (aggravated robbery, felonious assault, receiving stolen property, tampering with evidence, escape, inciting violence aggravated riot, vandalism, possession of criminal tools and disorderly conduct), *State v. Hughley*, 8th Dist. Cuyahoga No. 108771, 2020-Ohio-4741, ¶1 (aggravated murder, aggravated robbery, felonious assault, and having weapons while

under disability), *State v. Cuffie*, 2d Dist. Clark No. 2019-CA-8, 2020-Ohio-4844, ¶2-5, fn. 2 (having weapons while under disability, carrying concealed weapons, improperly handling of a firearm in a motor vehicle; and obstruction official business, with prior involvement in juvenile justice system).

Amicus curiae cites to limited statistics to suggest that an increase in the number of granted bindovers is not a result of an increase in crime. See Amicus Curiae Brief in Support of Appellant, pg. 12, fn. 15. Reliance on generalized statistics is unhelpful in interpreting whether R.C. 2152.12 provides a clear and convincing standard for transfer decisions. Contrary to this suggestion there have been reports of an increase in juvenile violence, the Cuyahoga County Prosecutor's Office has observed this new wave of youth violence as being committed by individuals between 14 and 21 years old. Figures released by the Cuyahoga County Prosecutor's Office to the media in 2017 showed that, from 2011 to 2016, juveniles charged with murder went up 300 percent, felonious assault charges went up 156 percent and robbery went up 344 percent. A media review of court data showed that the number of juveniles charged in homicide-related cases has for the most part steadily increased since 2012 and the number of juveniles charged in robberies also spiked in 2016, to 1,047¹. On March 27, 2017, it was reported that there were 195

¹ News 5 Cleveland, *Cuyahoga County prosecutor: 'Our community is under siege by juvenile violence'* <https://www.news5cleveland.com/news/local-news/oh-cuyahoga/-right-now-our-community-is-under-seige-by-juvenile-violence-said-cuyahoga-county-prosecutor> (accessed June 22, 2021)

pending juvenile cases that involved a firearm in Cuyahoga County². These trends are not isolated to Cuyahoga County, as the Columbus Dispatch recently reported that juveniles represented 23% of suspects in homicide cases in the first half of 2020, and in a 18-month period beginning in January 2019, 16 juveniles in Franklin County were charged with delinquency murder or reckless homicide and one with attempted murder. All but one were caused by guns³. Juvenile crimes remain in an upward trend in Central Ohio.⁴

The point here is that characteristics of the offense are factors that can weigh in favor of transfer under R.C. 2152.12(D). Again, R.C. 2152.12 only requires a court to weigh the factors and make a decision. As with the first proposition of law, amicus curiae urges this Court to reject the second proposition of law as it is not grounded in the language of R.C. 2152.12.

²Cleveland.com, *Cleveland shooting that killed four; injured five highlight troubling youth gun violence*, http://www.cleveland.com/metro/index.ssf/2017/03/cleveland_shootings_that_kille.html (accessed June 22, 2021)

³ The Columbus Dispatch, *Surge in gun violence among young started months ago, stats show*, <https://www.dispatch.com/story/news/local/2020/07/17/surge-in-gun-violence-among-young-started-months-ago-stats-show/42080165/> (accessed June 22, 2021)

⁴ NBC4i.com, *Juvenile crime remains a concern for police chiefs in Franklin County*, <https://www.nbc4i.com/news/local-news/juvenile-crime-remains-a-concern-for-police-chiefs-in-franklin-county/> (accessed June 22, 2021)

APPELLANT'S THIRD PROPOSITION OF LAW: TO MEANINGFULLY DECIDE WHETHER JUVENILE OFFENDERS ARE NOT AMENABLE TO JUVENILE COURT TREATMENT, JUVENILE COURT JUDGES MUST FIRST WEIGH ALL AVAILABLE DISPOSITIONAL OPTIONS, ESPECIALLY, WHERE PROVIDED BY STATUTE, A SERIOUS YOUTHFUL OFFENDER DISPOSITION.

Appellant's third proposition of law would require a juvenile court to consider the availability of a serious youthful offender disposition before transferring a case for adult prosecution. Such a consideration is not mandated under R.C. 2152.12(D)-(E) and goes against the procedures for beginning a serious youthful offender indictment.

A majority of the Second District rejected Appellant's legal arguments. As the majority in Donovan held,

R.C. 2152.02(W) defines a serious youthful offender as "a person who is eligible for a mandatory SYO or discretionary SYO but who is not transferred to adult court under a mandatory or discretionary transfer and also includes, for purposes of imposition of a mandatory serious youthful dispositional sentence under section 2152.13 of the Revised Code, a person upon whom a juvenile court is required to impose such a sentence under division (B)(3) of section 2152.121 of the Revised Code."

As a preliminary matter, Nicholas does not fit within this definition, as his case was, in fact, transferred to adult court. Under R.C. 2152.10(B), if the court chooses not to transfer a child to adult court and adjudicates the child delinquent, the court is required to issue a dispositional order in accordance [***50] with R.C. 2152.11. If the case had not been transferred, Nicholas would have been eligible for mandatory SYO under R.C. 2152.11(B)(1); he would not have been eligible for "[t]raditional juvenile" disposition. R.C. 2152.11(B)(3). In this situation, the court would have imposed the available adult court sentence, as well as a traditional juvenile

disposition, but would have stayed the adult sentence pending successful completion of the juvenile disposition. See R.C. 2152.13(D)(1)(a)-(c).

The fact that Nicholas would have been eligible for SYO disposition does not mean that the court was required to take this into consideration before deciding amenability. To the contrary, this disposition is not available unless the court has elected not to transfer the child. The juvenile court would have been aware of this fact. And finally, as the State notes in its brief, in situations like the present, "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" R.C. 2152.13. See R.C. 2152.13(A).

State v. Nicholas, 2020-Ohio-3478, 155 N.E.3d 304, ¶¶ 75-77 (2d Dist.)

The dissenting judge on the other hand opined:

Although the majority suggests a blended sentence is not a consideration in the amenability determination, this ignores the imperative that transferring a child to an adult court should be a last resort. Blended sentencing provides "a middle ground between the grave sanctions of adult court and the limited jurisdiction of juvenile court." Albaugh & Wamstad, *Striking a Fair Balance: Extended Juvenile Jurisdiction in North Dakota*, 88 N.D.L.Rev. 139, 158 (2012). "This blended sentencing option 'provide[s] a viable dispositional option for juvenile court judges facing juveniles who have committed serious offenses and gives juveniles one last chance at success in the juvenile system with the threat of adult sanctions as disincentive.'" (Citation omitted.) *Id.* at 154-55. Of course, for Nicholas, this would be both his first and last chance. Nicholas did not have any demonstrated failure to respond to treatment, as none was ever undertaken. Notably, even absent psychiatric care, his six month pre-transfer stay at OCYC was uneventful and wholly non-violent. Thus, Nicholas had demonstrated a favorable reaction to supervision in a secure environment.

The juvenile judge had this blended sentencing tool in her arsenal if she denied transfer. At a minimum, she should have considered it as requested in a motion filed by Nicholas's counsel. It would have given her the power to sentence Nicholas conditionally, first as a juvenile and later as an adult,

depending upon whether subsequent review indicated that adult sentencing was warranted. With blended sentencing, the court could have taken advantage of lock-down facilities and therapeutic and rehabilitation services which are uniquely available for a child. The court could have observed how Nicholas performed until the age of 21. Upon his majority, the court would then have had a record of treatment and performance upon which to base a more informed, predictive decision about the possibility for success versus risk to society. Blended sentencing affords an opportunity for redemption while retaining institutional control over the juvenile for the protection of society, which can be a win-win proposition. Such an option is not solely at the State's discretion, as an adjudication of responsibility for this charge mandates such a disposition.

State v. Nicholas, 2020-Ohio-3478, 155 N.E.3d 304, ¶ 212-213 (2d Dist.) (Donovan, J. dissenting).

Contrary to dissenting opinion, there is nothing under R.C. 2152.12(D) & (E) that explicitly requires a juvenile court to consider a blended-sentencing option before determining whether to transfer a case for adult prosecution. Nothing in the statute gives a juvenile the ability to request a serious youthful offender disposition from a judge rather than have the case bound over for criminal prosecution. To make such a consideration mandatory, Appellant would have this Court write words into that statute that do not appear.

It can also be problematic to mandate juvenile courts to consider whether a blended-sentence is an alternative to relinquishment of jurisdiction, because it will require the juvenile court to consider an issue not yet before it. The potential for a serious youthful offender disposition is not properly before a juvenile court unless the process is started in a statutorily approved manner. Appellant would have the juvenile court

consider the potential for a blended-sentencing option at the bindover stage and at a time where the serious youthful offender option is not before juvenile court. This makes Appellant's proposed proposition of law improper.

A "serious youthful offender" is "a person who is eligible for a mandatory SYO or discretionary SYO but who is not transferred to adult court." R.C. 2152.02(W). "A juvenile charged as a potential serious youthful offender does not face bindover to an adult court; the case remains in the juvenile court." *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 18. A juvenile who is found to be a serious youthful offender is given a "blended sentence - - a traditional juvenile disposition coupled with the imposition of a stayed adult sentence." *Id.* "Theoretically, the threat of the imposition of an adult sentence encourages the juvenile's cooperation in his own rehabilitation, functioning as both carrot and stick". *Id.* The plain language of R.C. 2152.13 permits a juvenile court to impose a serious youthful offender disposition only if the prosecuting attorney of the county begins the process. R.C. 2152.13(A). The prosecuting attorney may begin the process in one of these 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.

According to the statute, the process to obtain a serious youthful offender indictment can begin after the juvenile court decides not to transfer the case under section 2152.12 of the Revised Code. Beginning the serious youthful offender process has significant impact for the juvenile, as the juvenile is entitled to a grand jury determination, and jury and speedy trial rights attach. The statutory speedy trial right begins upon: (1) the date the indictment or information is filed; (2) the date in which an original complaint is filed, requesting a serious youthful offender dispositional sentence; or (3) on the date the prosecuting attorney files written notice of intent to seek a serious youthful offender dispositional sentence. See R.C. 2152.13(C). The juvenile will have right to bail and right to counsel that cannot be waived.

A serious youthful offender disposition is not automatically available if a juvenile court denies transfer as some appellate courts require the prosecution to follow a specific procedure to properly make the serious youthful offender disposition available. A prosecutor who had a request for discretionary transfer denied, may seek a serious youthful offender disposition due to the factual circumstances of any given case.

However, courts have limited a prosecutor's ability to begin a serious youthful offender proceeding by reading R.C. 2152.13(A) narrowly. For instance, in *In re T.S.*, 2018-Ohio-3680, 108 N.E.3d 1287 (8th Dist.), a complaint was filed against T.S. but did not contain the serious youthful offender specifications. The juvenile court denied the State's bindover motion. A grand jury returned an indictment that contained the request for a serious youthful offender dispositional sentence. The juvenile court dismissed the indictment which was filed more than 20 days after the denial of bindover, reasoning that the State did not comply with the 20-day limitation found in R.C. 2152.13(A)(4), and rejected the State's argument that the 20-day notice requirement did not apply because the State obtained an indictment. *In re T.S.* ¶¶7-8. See also *In re R.G.*, 8th Dist. Cuyahoga No. 107081, 2018-Ohio-4517 and *In re K.A.*, 8th Dist. Cuyahoga No. 107080, 2018-Ohio-4599. Even when a serious youthful offender indictment has been returned within 20 days of the denial of transfer, juvenile courts have dismissed the serious youthful offender indictment because a written notice was not first filed. See *In re E.S.*, 2020-Ohio-1029, 152 N.E.3d 1213 (8th Dist.). In short, the court of appeals in these cases hold that if a serious youthful offender request is not contained in the initial complaint, the availability of a serious youthful offender disposition is only made available where the prosecution follows a precise process after a juvenile court denies bindover. But see *In re J.B.*, 12th Dist. Butler No. CA2004-09-226, 2005-Ohio-7029. While some appellate panels have delved into the proper procedure for making the serious youthful offender

disposition, available after the juvenile court has denied a motion to transfer, it is notable that the law permits the prosecution to seek a serious youthful offender disposition after the juvenile court has declined transfer. This makes practical sense, because the question in a discretionary bindover proceeding is whether the juvenile is amenable for rehabilitation in the juvenile justice system now. In the case of a serious youthful offender specification, the question of whether the juvenile is amenable for rehabilitation during the remaining period of juvenile jurisdiction, is reached at some point in the future – provided that the statutory criteria is met. See generally R.C. 2152.14.

Assuming that the prosecution properly initiates the process to make a serious youthful offender disposition available, the juvenile court would not have to impose a blended-sentence in all circumstances — discretionary SYO. See R.C. 2152.11(H). In other words, even if the prosecution requests a serious youthful offender disposition, the juvenile is not required to impose, as part of the disposition, a blended-sentence for a discretionary SYO. This also shows that consideration of whether a serious youthful disposition is available is not properly made as part of a bindover hearing. A juvenile court should not be required to consider the serious youthful offender disposition as part of the transfer proceedings.

As with the first and second propositions of law, Appellant asks this Court to adopt a rule of law that is not grounded in R.C. 2152.12. A mandatory requirement that a juvenile court consider the serious youthful offender disposition is found nowhere in

R.C. 2152.12(D) & (E). Amicus curiae urges this Court to reject the third proposition of law.

CONCLUSION

Based on the plain language of R.C. 2152.12, the Ohio Prosecuting Attorneys Association asks the Court to reject the propositions of law advanced by Appellant, and to affirm the judgment of the court of appeals in *State v. Nicholas*, 2nd Dist. Champaign No. 2018-CA-25, 2020-Ohio-3478.

Respectfully Submitted,
MICHAEL C. O'MALLEY (#0059592)
Cuyahoga County Prosecutor

/s/ Daniel T. Van
Daniel T. Van (#0084614)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7865
dvan@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of this Amicus Brief of Amicus Curiae Ohio Prosecuting Attorneys Association in support of the State of Ohio has been sent by electronic mail to the following:

Children's Law Center	Amicus Curiae on behalf of Appellant	Leah Winsberg (#0095830) lwinsberg@childrenslawky.org
Disability Rights Ohio	Amicus Curiae on behalf of Appellant	Kevin Truitt (#0078092) ktruitt@disabilityrightsohio.org
National Association for Public Defense	Amicus Curiae on behalf of Appellant	Henry Sirkin (#0024573) Emily Hughes emily-hughes@uiowa.edu
Franklin County Public Defender	Amicus Curiae on behalf of Appellant	Timothy E. Pierce (#0041245) tepierce@franklincountyohio.gov
Cuyahoga County Public Defender	Amicus Curiae on behalf of Appellant	Erika Cunliffe (#0074480) ecunliffe@cuyahogacounty.us
Hamilton County Public Defender	Amicus Curiae on behalf of Appellant	Jessica Moss (#0085437) JMoss@hamiltoncountypd.org
Montgomery County Public Defender	Amicus Curiae on behalf of Appellant	Kay Locke (#0014049) LockeK@mcohio.org
Justice for Children Project	Amicus Curiae on behalf of Appellant	Kimberly Jordan (#0078655) jordan.723@osu.edu
Juvenile Justice Coalition	Amicus Curiae on behalf of Appellant	Kenza Kamal kenza@jjohio.org
Juvenile Law Center	Amicus Curiae on behalf of Appellant	Marsha Levick mlevick@jlc.org

Ohio Attorney General Dave Yost	Amicus Curiae on behalf of Appellee	Benjamin Flowers Benjamin.flowers@OhioAGO.gov
Donovan Nicholas	Appellant	Timothy B. Hackett (#0093480) timothy.hackett@opd.ohio.gov
State of Ohio	Appellee	Jane A. Napier (#0061426) jnapier@champaignprosecutor.org

/s/ Daniel T. Van
Daniel T. Van (#0084614)