9-13-10

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

SUPERIOR COURT DOCKET NO. 1159 WDA 2010

COMMONWEALTH OF PENNSYLVANIA

H321-5

APPELLEE,

vs.

JORDAN ANTHONY BROWN

APPELLANT

BRIEF FOR APPELLANT

Appeal from Order of March 29, 2010, as amended by Order of May 12, 2010 in the Court of Common Pleas of Lawrence County, Pennsylvania Criminal Division, Docket No. 320 of ~~2010~~ 2009, C.R.

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STATEMENT OF JURISDICTION

Jurisdiction to hear the within appeal is conferred upon the Court pursuant to Section 742 of the Judicial Code, 42 Pa.C.S.A. § 702 (b) and by virtue of Pennsylvania Rule of Appellate Procedure 1311 relating to interlocutory appeals by permission.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The review of the issues concerning the interpretation of 42 Pa.C.S.A. § 6322 of the Juvenile Act is plenary, as it involves a question of law. The standard of review is whether an abuse of discretion occurred.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
VS.	:	LAWRENCE COUNTY, PENNSYLVANIA
JORDAN ANTHONY BROWN	:	NO. 320 of 2009, CR.
	:	OTN: K843595-4

ORDER OF COURT

AND NOW, this 29th day of March, 2010, for the reasons set forth in the accompanying Opinion of even date herewith, and after a thorough review of the existing record, it is ORDERED, ADJUGED and DECREED that the Defendant's Petition for Transfer From Criminal Court to Juvenile Court is DENIED.

This case is placed on the May 2010 trial list.

BY THE COURT:

Dominick Motto P.J.

Dominick Motto, P.J.

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
VS.	:	LAWRENCE COUNTY, PENNSYLVANIA
JORDAN ANTHONY BROWN	:	NO. 320 OF 2009, CR
	:	OTN: K843595-4

ORDER OF COURT

AND NOW, this 12th day of May, 2010, after consideration of the Defendant's Application to Amend Order to Include Statement Specified in 42 Pa.C.S. 702(b), and after consideration of the arguments of counsel, although the Court specifically stated that it is not concluding as a matter of law a child must confess in order to be decertified to juvenile court, and that any discussion by the Court of the relationship between taking responsibility for the underlying offense and rehabilitation was solely in reference to addressing and evaluating the evidence on that issue, including expert testimony presented by the Defendant himself, and this Court not having found factually that Defendant must confess in order to be rehabilitated; nevertheless, the Court finds that there exists no Pennsylvania appellate authority that has ever addressed defendant's right against self-incrimination in the context of a proceeding to decertify a criminal case to juvenile court. Accordingly, Defendant's Application to Amend Order to Include Statement Specified in 42 Pa.C.S.A. §702(b) is GRANTED and the Order of Court dated March 29, 2010 is AMENDED to provide that the said Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the matter.

BY THE COURT:

Dominick A. Motto, P.J.

STATEMENT OF THE QUESTIONS PRESENTED

1. At the preadjucative stage, is it an abuse of discretion for the Trial Court to base a decision under 42 Pa.C.S.A. § 6322 that a child is not amenable to treatment and therefore that the case should not be transferred to the juvenile system, on the fact that the child has not admitted to committing the offense prior to the decertification hearing?

SUGGESTED ANSWER: Yes.

2. At a preadjucative stage, did the Trial Court's finding that a child's assertion of innocence demonstrate a lack of amenability to treatment constitute a misinterpretation of 42 Pa.C.S.A. § 6322 that violates Due Process and Fundamental Fairness as guaranteed by the United States and Pennsylvania Constitutions?

SUGGESTED ANSWER: Yes.

3. At a preadjucative stage, did the Trial Court's finding that a child's assertion of innocence demonstrate a lack of amenability to treatment constitute a misinterpretation of 42 Pa.C.S.A. § 6322 that violates the presumption of innocence and right against self incrimination guaranteed by the United States and Pennsylvania Constitutions?

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

On February 21, 2009, Jordan Brown, an 11 year old boy with no prior involvement with the criminal justice system, was charged with Criminal Homicide in connection with the death of his father's pregnant fiancée. The offense was alleged to have occurred on February 20, 2009. While the case had preceded past the Preliminary Hearing stage, no trial had been held and the matter is at a preadjudicative stage.

On October 6, 2009, pursuant to 42 P.S. 6322, a Petition for Transfer from Criminal Court to Juvenile Court was filed on behalf of Jordan Brown. A hearing on the Petition to Transfer was held before Judge Dominick Motto on January 29, 2010. Following the conclusion of the hearing, the Commonwealth asked for time to have an expert for the Commonwealth examine Jordan Brown. Following that examination, the hearing on the petition was resumed and concluded on March 12, 2010.

On March 29, 2010, Judge Dominick Motto issued an Order denying the transfer from adult court to juvenile court. In the Court's Opinion, the Trial Court relied heavily on the fact that Jordan Brown had not admitted committing the crime and therefore had not accepted responsibility. As a result of Jordan Brown's lack of acceptance of responsibility, the Court concluded that the defense had not established that Jordan Brown was amenable to treatment.

A Motion to Amend the Order of March 29, 2010 to allow an interlocutory appeal was presented. And on May 12, 2010, the Lower Court amended the Court

Order of March 29, 2010 to include the statement specified in 42 Pa.C.S.A. § 702(b) certifying that the order involved a controlling question of law to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the matter.

On June 11, 2010, a Petition for Permission to Appeal from an Interlocutory Order was filed with the Superior Court of Pennsylvania. On July 27, 2010, the Superior Court of Pennsylvania issued an order permitting an interlocutory appeal in this matter.

SUMMARY OF ARGUMENT

The trial court's denial of Jordan's petition to be tried in juvenile court must be reversed because the court below misinterpreted and misapplied 42 Pa.C.S. § 6322 in violation of Jordan's constitutional rights to due process and against self-incrimination. The trial court required Jordan to accept responsibility for the alleged offenses in order to demonstrate his amenability to treatment as a juvenile, but this was in error because there is no explicit or implicit requirement for a juvenile to accept responsibility or admit to the charges in order to show his amenability to treatment in the juvenile system. Furthermore, as decertification is a pre-adjudicatory hearing, this was fundamentally unfair because it required Jordan to either forfeit his opportunity to be tried in juvenile court or waive the presumption of his innocence at a later factfinding hearing in either the juvenile or adult system.

The trial court's misapplication of the statute also violated Jordan's constitutional right against self-incrimination because no Pennsylvania statute or court rule specifically prohibits the use of statements made in decertification proceedings to determine guilt at later hearings. The trial court impermissibly conditioned Jordan's ability to demonstrate his amenability to treatment on Jordan "taking responsibility for the underlying offense" (R.R. 35a) *before* the Commonwealth was held to its burden of proving his involvement beyond a reasonable doubt, and to incur the substantial risk that the Commonwealth could

later introduce Jordan's statements as evidence against him on the issue of guilt at trial.

Under the trial court's application of the statute, a child who continues to assert his innocence at the pre-trial stage of his case, as Jordan has done here, is essentially forced to forego his opportunity to be tried in juvenile court, eviscerating the purpose of 42 Pa.C.S. § 6322 and rendering the statute meaningless. Assuming that the legislature intended the statute to provide a meaningful opportunity to juveniles like Jordan to petition for decertification – the only permissible interpretation of the statute -- it cannot be conditioned on the waiver of a constitutional right.

Because the state may not impose substantial penalties on a child who invokes his constitutional rights, the trial court's denial of Jordan's request to transfer to juvenile court must be reversed.

ARGUMENT FOR APPELLANT

On February 21, 2009, Jordan Brown, an 11 year-old boy with no prior involvement with the criminal justice system, was charged as an adult with Criminal Homicide related to the death of his father's pregnant fiancée. Following his arrest, he was briefly lodged at the Allencrest Juvenile Detention Center in Beaver County and then transferred to the Edmund L. Thomas Adolescent Center in Erie County, where he remains.

On January 29, 2010, a hearing on the Petition to Decertify Jordan Brown and transfer the case for prosecution in the Juvenile System was held before Judge Dominick Motto in the Court of Common Pleas of Lawrence County, Pennsylvania. Dr. Kirk Heilbrun, Chairman of the Psychology Department at Drexel University and Director of the Forensic Clinic at the Department of Psychology, testified concerning his examination of Jordan Brown and review of all records, including the records of Jordan's stay at the Edmund L. Thomas Adolescent Center (R.R. 58a – 61a). Dr. Heilbrun testified that half of his forensic practice and half of his patients are juveniles and that his practice deals with both the assessment and treatment of individuals. Dr. Heilbrun testified that he performed a number of tests including risk assessment tests on Jordan and found that Jordan was of average intelligence (R.R. 68a), functioned at grade level or slightly below (R.R. 69a), had strong social support from his father and grandmother (R.R. 73a), demonstrated strong attachment to responsible adults (R.R. 73a), displayed a positive attitude toward authority figures and remediation (R.R. 73a), demonstrated a high level of interest

in motivation with respect to school (R.R. 73a), was involved in positive social activities (R.R. 73a), had no significant history of counseling or therapy (R.R. 75a), and was responding "quite well" during his stay at the Edmund L. Thomas Adolescent Center (R.R. 75a, 76a). Dr. Heilbrun also testified that he made his assessment of Jordan and Jordan's amenability to treatment in two separate manners. The first assessment was made without assuming that Jordan was culpable of the crimes of which he was charged (R.R. 90a). The second method assessed Jordan for amenability to treatment assuming that he was culpable (R.R 90a). Dr. Heilbrun concluded that, in either case, Jordan was amenable to treatment and that the juvenile facilities in the Commonwealth were capable of treating Jordan, if he was adjudicated delinquent (R.R. 97a, 98a, 100a, 131a - 133a). When questioned about treatment of a juvenile that has not admitted committing a crime, Dr. Heilbrun testified that this is a situation that juvenile facilities are faced with and can cope with. He explained that once an adjudication takes place, a juvenile who has denied commission of the offense can be counseled and worked with and treated (R.R. 97a – 101a).

Dr. Heilbrun testified that one of the best indicators of amenability to treatment was Jordan's behavior and response to authorities at the Edmund L. Thomas Adolescent Center during his then, almost one year stay at the adolescent facility (R.R. 75a). Christine McCullum and Neal Stoczynski, counselors at the Edmund L. Thomas Adolescent Center testified that they were the day and afternoon counselors assigned to Jordan. Both testified that the Edmund L.

Thomas Adolescent Center is not a treatment facility and has not provided treatment for Jordan during his stay (R.R. 138a, 163a). Both testified that Jordan works hard day in and day out (R.R. 146a), is willing to do whatever he can at the center (R.R. 146a), volunteers for additional responsibilities (R.R. 146a), can be corrected with simple redirection when needed (R.R. 149a, 180a), does not physically act out (R.R. 152a), is comfortable with the adult staff and is always respectful of the staff (R.R. 153a, 154a, 181a), is always willing to help (R.R. 154a), is one of the most cooperative youths that they have had at the facility (R.R. 154a), has not made any verbal or physical threats during his stay (R.R. 155a, 181a), and has done extremely well during his stay with predominantly positive behaviors (R.R. 159a, 161a, 162a, 182a). The staff members testified that any problems during Jordan's stay at the facility were minor (R.R. 166a). Even Mrs. Sarnowski, the school teacher whose report noted that there were some problems during school, noted that Jordan's overall stay has not been a bad one and that for his age and maturity levels, he handled himself quite well and he is not a difficult child to have in class (R.R. 188a).

Following the conclusion of the January 29, 2010 hearing, the Commonwealth asked for time to have an expert on behalf of the Commonwealth examine Jordan Brown. Dr. John O'Brien, a psychiatrist specializing in general psychiatry and forensic psychiatry, who deals primarily with the forensic assessment of adults (R.R. 262a) and who currently has no juvenile patients (R.R. 263a), testified on behalf of the Commonwealth. Dr. O'Brien testified that in his

opinion, there is no point to an assessment of a juvenile for amenability to treatment unless one conclusively assumes that the juvenile is guilty of the crimes for which he is charged (R.R. 269a). With regard to Jordan, Dr. O'Brien concluded that because Jordan maintained his innocence, he had failed to accept responsibility for his actions and was therefore not amenable to treatment (R.R. 280a, 281a). Dr. O'Brien also testified that he found Jordan to be evasive because when Jordan was asked why the authorities thought he was responsible for the death of his father's fiancée, Jordan referred to the statements made by his father's fiancée's daughter, Janessa Houk (R.R. 276a). Dr. O'Brien incorrectly concluded that Jordan was being evasive based on the fact that Janessa Houk did not testify at the preliminary hearing (R.R. 276a, 277a). Dr. O'Brien admitted that he had not looked at the Affidavit of Probable Cause attached to the Complaint which lists Janessa Houk's statement as the primary basis for the issuance of the arrest warrant (R.R. 554a). The Trial Court's Order concluded that because Jordan had not accepted responsibility for the offense, he was not amenable to treatment.

I. IN RETAINING CRIMINAL JURISDICTION OVER JORDAN, THE TRIAL COURT ABUSED ITS DISCRETION AND MISINTERPRETED 42 PA.C.S. § 6322, IN VIOLATION OF DUE PROCESS AND FUNDAMENTAL FAIRNESS.

The trial court's decision to retain criminal jurisdiction over Jordan in the instant case was erroneous because it misinterpreted 42 Pa.C.S. § 6322[1] in violation

[1] The factors considered and misinterpreted by the Trial Court appear in 42 Pa.C.S. § 6355. 42 Pa.C.S. § 6322 references the factors traditionally considered in a

of Jordan's rights to due process and fundamental fairness. The trial court required Jordan to accept responsibility for the alleged offenses in order to demonstrate his amenability to treatment as a juvenile, one key factor in the analysis of whether the decertification serves the public interest. This interpretation was a misapplication of the law because there is no explicit or implicit requirement for a juvenile to accept responsibility or admit to the charges in order to show his amenability to treatment in the juvenile system. Furthermore, as decertification is a pre-adjudicatory hearing, this was fundamentally unfair because it required Jordan to either forfeit his opportunity to be decertified or waive the presumption of his innocence at a later factfinding hearing in either the juvenile or adult system.

A. Decertification Proceedings Must Comport with Due Process; Any Application of the Decertification Statute that Requires Waiver of a Constitutional Right is Invalid.

When a juvenile's case is directly filed in the criminal division, the juvenile has the option of requesting treatment within the juvenile system by asking the criminal court to transfer his case back to juvenile court. 42 Pa.C.S. § 6322; *Commonwealth v. Aziz*, 724 A.2d 371, 373 (Pa. Super. 1999). This process is often referred to as "decertification." A decision whether to grant an application for transfer is within the sound discretion of the hearing judge. *Commonwealth v. Brown*, 332 Pa. Super. 35, 40, 480 A.2d 1171, 1174 (1984). The judge's broad discretion, however, is subject to the due process requirements of *Kent v. United States*, 383 U.S. 541 (1966) and *In re Gault*, 387 U.S. 1 (1967).

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transfer to criminal jurisdiction proceeding as those which should be considered at decertification as well.

The United States Supreme Court has unequivocally held that juvenile transfer proceedings must conform to "the essentials of due process and fair treatment." *Kent v. United States*, 383 U.S. 541, 562 (1966) (citing *Pee v. United States*, 107 U.S. App. D.C. 47, 50, 274 F. 2d 556, 559 (1959)). *See also Commonwealth v. Pyle*, 462 Pa. 613, 342 A.2d 101 (1975). Finding that certification to adult court is a "critically important" stage of the criminal process the Court held that procedural requirements must be afforded by the state in order to ensure fundamental fairness and due process. *Kent*, 383 U.S. at 562, 86 S. Ct. at 1057. Although the Court refrained from mandating specific procedural guarantees, it clearly held that once a hearing was granted as a matter of statutory right, as under 42 Pa.C.S. § 6322, such hearing must comport with basic due process and fundamentally fair principles. *Id.* Pennsylvania courts have reinforced this holding, requiring due process under both the Pennsylvania and U.S. Constitutions in transfer proceedings. *Commonwealth v. Batty*, 482 Pa. 173, 178, 393 A.2d 435, 438 (1978). At a minimum, due process requires the court to interpret and apply statutory law as the legislature intended.

Statutes are presumed constitutional. In Pennsylvania, the goal of statutory interpretation is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S. § 1921. To ascertain the legislative intent of a statute, it is presumed that that "the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.CS. § 1922(3). *See also* Statutory Construction Act of May 28, 1937, P.L. 1019, § 52(3), 46 P.S. § 552(3); *Brunke v.*

Ridley Tp., 154 Pa. Super. 182, 187, 35 A.2d 751, 753 (1944) (holding the "cardinal principle of statutory construction is that the legislature never intends to violate the Constitution."). Therefore, any application of a statute that leads to a flagrant violation of constitutional rights is a misinterpretation of the statute,[2] and the misapplication of this statute denies Jordan the due process guaranteed by *Kent* and its progeny.

B. 42 Pa.C.S. § 6322 Does Not Require A Consideration of the Juvenile's Willingness to Take Responsibility for the Alleged Offense.

In 1995, the legislature amended 42 Pa.C.S. § 6322, to provide that any juvenile over the age of 15 who committed one of several enumerated felonies with the use of a deadly weapon is to be tried in an adult criminal court. *Commonwealth v. Aziz*, 724 A.2d at 373. These amendments thus added several additional felonies to the Act's historic exclusion of juveniles charged with homicide from the jurisdiction of juvenile court. The amendments served to toughen the punishment received by "...juveniles who are the violent offenders, who have proved they have not been amenable to treatment under the juvenile system...." 1995 Legislative Journal no. 41, at 228; Statement of Sen. Fisher, June 19, 1995. The amendments were specifically created to address the actions of "violent repeat offenders who do it with deadly weapons." 1995 Legislative Journal no. 61, at 435; Statement of Rep. Piccola, October 17, 1995. However, the General Assembly specifically retained the

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[2] There is no argument herein that 42 Pa.C.S. § 6322 is facially unconstitutional. *See Commonwealth v. Cotto*, 708 A.2d 806 (Pa. Super. 1998). Rather, the trial court's *interpretation* of the statute makes its application unconstitutional. *See* Part II.B. *infra*.

decertification option for all juveniles charged as adults, including juveniles charged with homicide. The decertification hearing serves to identify and exclude from juvenile court jurisdiction those "juveniles who are increasingly committing violent offenses with deadly weapons and repeatedly committing violent offenses generally" and whose attempt at rehabilitation in the juvenile justice system is believed to be a waste of the system's resources. 1995 Legislative Journal no. 61, at 435; Statement of Rep. Kukovich, October 17, 1995.

Therefore, one can deduce that the legislative intent of the current decertification statute is to ensure that the youth who do not meet those criteria, and who can be helped by the juvenile justice system's more rehabilitative model, would in fact have the opportunity to benefit from it. This does not preclude, however, the child's ultimate need to be held accountable for his actions, *if* proven guilty. *See Commonwealth v. Cotto*, 708 A2d. 806, 812 (Pa. Super. 1998).[3]

In cases where children are automatically subject to criminal court jurisdiction, the child is required to establish by a preponderance of the evidence that the transfer to juvenile court will serve the public interest. 42 Pa. C.S. §6322(a). To determine whether the child has established that the transfer will serve the public interest, the court must consider: (A) the impact of the offense on the victim or victims; (B) the impact of the offense on the community; (C) the threat

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[3] One stated purpose in the Pennsylvania Juvenile Act is "to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community." 42 Pa.C.S. § 6301.

to the safety of the public or any individual posed by the child; (D) the nature and circumstances of the offense allegedly committed by the child; (E) the degree of the child's culpability; (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors: (I) age; (II) mental capacity; (III) maturity; (IV) the degree of criminal sophistication exhibited by the child; (V) previous records, if any; (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction; (VIII) probation or institutional reports, if any; and (IX) any other relevant factors. 42 Pa.C.S. §6355(a)(4)(iii). The criminal court must consider all the factors set forth in the statute; the statute, however, is silent as to the weight that should be assigned to each factor in making its determination. *Commonwealth v. Sanders*, 814 A.2d 1248 (Pa. Super. 2003). The Court is directed to review the entire record. *Id.* While no single factor is controlling, the misinterpretation of any one factor can lead to an erroneous decision. The trial court's consideration of Jordan's unwillingness to accept responsibility for the offense as evidence of his lack of amenability to treatment in the juvenile system was a misapplication of the law and improperly influenced the trial court's decision to deny decertification.

Admittedly, Pennsylvania appellate courts have sometimes looked to the juvenile's level of remorse for the offense in considering amenability to treatment as a juvenile. *See, e.g., Commonwealth v. Archer*, 722 A.2d 203 (Pa. Super. 1998); *Commonwealth v. Zoller*, 345 Pa. Super. 350, 356, 498 A.2d 436, 440 (1985). These cases are all distinguishable because although remorse was a factor it was not dispositive. [4] Similarly, the defense expert in Jordan's case testified that while remorse is a factor in the determination of risk and rehabilitation, it is more relevant to the assessment of amenability to treatment and rehabilitation *after* conviction. (*See* R.R. 93a).

In the instant case, although the trial court stated that it did not conclude as a matter of law that Jordan could only demonstrate his amenability to treatment, supervision, or rehabilitation as a juvenile *unless* he accepted responsibility for the

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[4] In these cases, each juvenile had confessed and was ultimately convicted in adult court prior to the appellate court's review. As the court had the benefit of hindsight, the conviction likely had some bearing on the court's affirmance of the trial court's decision not to decertify. In *Zoller*, this court found that the trial court did not abuse its discretion in refusing the juvenile's request for transfer of his murder case to juvenile court, where this court found both appellants gave statements to the police following the arrest admitting to their participation in the murder of the victim. *Commonwealth v. Zoller*, 345 Pa. Super. 350, 356, 498 A.2d 436, 440 (1985). In considering the defendant's lack of remorse this court stated that the juvenile "showed a hardness of heart that bodes ominously for future persons with who appellant may come in contact, who are "depersonalized", the term used by appellant to explain his killing of [the victim]." *Id.* Similarly in *Commonwealth v. Archer*, a police officer observed the actions of Archer and four other youths as they robbed and killed a university student. *Commonwealth v. Archer*, 722 A.2d 203 (Pa. Super. 1998). After being arrested and brought into the station, an officer noted that Archer and one of his codefendants showed no remorse, "laughing and talking" as they awaited processing, and indulging in "morbidly inappropriate behavior, signing rap songs and boasting that [his codefendant's] nickname was 'homicide'." *Id.*

alleged offense, it effectively required him to do so by interpreting the experts' opinions to conclude that amenability can only be determined after an admission to the offense. The Court stated,

> Experts from both the Defendant and the Commonwealth have agreed that in order for rehabilitation to occur in the Juvenile Court system, Defendant must take responsibility for the offense and at this juncture, has failed to do so. The Court can only conclude upon this record that the Defendant has failed to meet his burden to prove by a preponderance of the evidence that the transfer of this case to juvenile court will serve the public interest.

(R.R. 37a).

C. The Trial Court's Interpretation of 42 Pa.C.S. § 6322 Requires That Any Child Who Asserts His Innocence Effectively Forfeits his Right to Decertification, and Any Child Who Seeks Decertification Must Waive his Presumption of Innocence at Trial.

The only issue before the judge in a decertification proceeding is whether the juvenile should be prosecuted and, if found responsible for the offense, sentenced as a juvenile or as an adult. This Court has previously stated "[t]he decision to transfer has no bearing on either the procedural or substantive aspects of the criminal conviction in criminal court (i.e., it is still the Commonwealth's burden to prove every fact necessary to constitute murder beyond a reasonable doubt)." *Cotto*, 708 A.2d at 813 (rejecting a challenge to the decertification provision of the Juvenile Act as unconstitutional because it placed the burden of demonstrating that the transfer serves the public interest on the juvenile). The juvenile adjudicatory hearing differs greatly in purpose and scope from a transfer proceeding. *Id.* During the adjudicatory stage of the trial, whether in adult or juvenile court, a full trial is

held on the offenses charged and a final determination of guilt is made. *Id.* However, at the juvenile transfer proceeding, the focus of the inquiry is on determining the appropriate *venue* for the determination of the juvenile's guilt or innocence; importantly, no actual determination of guilt takes place. *Cotto*, 708 A.2d at 814. The requisite inquiry into the underlying charge and the nature and circumstances of the crime is limited to determining the child's amenability to treatment and the need to protect the public. *Id.* The *Cotto* court noted that, "although the punishment ultimately imposed is related to the decision made at the transfer proceeding, the imposition of punishment does not occur until *after* the Commonwealth has met its burden of proving each element of the crimes charged beyond a reasonable doubt." *Id.* (emphasis added).

Any person accused of a crime is entitled to a presumption of innocence prior to the conclusion of the factfinding hearing. *Coffin v. United States*, 156 U.S. 432 (1895). This guarantee applies equally to juveniles and adults charged with crimes. Juveniles, like adults, are entitled to a factfinding hearing where every element of the offense must be proved beyond a reasonable doubt, and until each element is so proven, the juvenile must be deemed innocent. *In re Winship*, 397 U.S. 358 (1970). The trial court in the instant case flouted this right, stating,

> [w]hile the Court respects the presumption of innocence, the Juvenile Act specifically requires the court to consider the nature and circumstances of the offense allegedly committed and the degree of the child's culpability. The premise that taking responsibility for the underlying conduct as being a first step towards rehabilitation is not a statement of law but is a matter of evidence that was put forth by the Defendant himself through his own expert witness.

(R.R. 36a).

It is evident that the trial court's assessment of Jordan's amenability to treatment as a juvenile was contingent upon Jordan's acceptance of responsibility for the offense charged and his failure to do so was the controlling factor in its erroneous decision to retain criminal jurisdiction. This violates due process, as it effectively required Jordan to forfeit his right to a fair trial and factfinding hearing. If Jordan had admitted to the offense charged in order to seek transfer to juvenile court, he would have been forced to waive the presumption of his innocence at a later factfinding hearing and waive his right to have the Commonwealth prove every element of the alleged offense beyond a reasonable doubt. Yet here, because he maintained his innocence, the trial court used Jordan's assertion of his innocence as a basis for determining that he is not amenable to treatment within the juvenile system.

Foregoing the opportunity to be tried in juvenile court in order to maintain one's right to the presumption of innocence has grave consequences.

> The juvenile system inherently confers substantial benefits. For instance, the juvenile system's goal is to rehabilitate the juvenile on an individual basis without marking him or her as a criminal, rather than to penalize the juvenile. The juvenile is also shielded from publicity. He or she may be confined, but with rare exceptions, may not be jailed along with adults. He or she may be detained, but only until attaining the age of twenty-one (21) years. The child is also protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him or her in subsequent proceedings, and disqualification for public employment. Therefore, the decision to forgo the substantial benefits conferred by the juvenile system is crucial...[a]s with the forfeiture of any important right, such as a criminal defendant's right to trial by jury, right to counsel, Miranda rights and the privilege against self-incrimination, which must be

> knowing, voluntary and intelligent, the waiver of the special protections afforded by the juvenile system must also be knowing, voluntary and intelligent.

Com. v. Ghee, 889 A.2d 1275, 1279 (Pa.Super. 2005). *See* Brief of Campaign for Youth Justice *et al.* as *Amici Curiae* (describing the important consequences for youth of the decertification decision).

The ultimate decision as to whether or not a juvenile should be certified to stand trial as an adult is at the sole discretion of the decertification court. *Commonwealth v. Sanders*, 2003 Pa. Super. 4, 814 A.2d 1248, 1251 (2003) citing *Commonwealth v. Jackson*, 555 Pa. 37, 722 A.2d 1030, 1033 (1999). However, the opportunity to seek adjudication and rehabilitation in the juvenile system can never be conditioned on the waiver of a constitutional right.

II. THE TRIAL COURT'S RELIANCE ON JORDAN'S FAILURE TO ADMIT HIS INVOLVEMENT IN THE ALLEGED OFFENSE TO DEMONSTRATE HIS NON-AMENABILITY TO TREATMENT VIOLATED JORDAN'S RIGHT AGAINST SELF-INCRIMINATION, IN THE ABSENCE OF CONTROLLING PENNSYLVANIA AUTHORITY PROHIBITING THE USE OF SUCH AN ADMISSION ON THE ISSUE OF GUILT IN A SUBSEQUENT ADJUDICATORY HEARING OR CRIMINAL TRIAL.

The trial court's misapplication of Pennsylvania's decertification statute placed an unconstitutional burden on Jordan because it *de facto* required Jordan to admit his involvement in the crime charged at the pre-trial stage of his case in order to meet his burden of proof to transfer his case back to juvenile court. This reading of the statute violated Jordan's constitutional right against self-incrimination because no Pennsylvania statute or court rule specifically prohibits

the use of statements made in decertification proceedings to determine guilt at later hearings. Thus, the trial court's application of the statute impermissibly required Jordan to "[take] responsibility for the underlying offense" (R.R. 35a) *before* the Commonwealth was held to its burden of proving his involvement beyond a reasonable doubt, and to incur the substantial risk that the Commonwealth could later introduce Jordan's statements as evidence against him on the issue of guilt at trial.

Indeed, under the trial court's application of the statute, a juvenile defendant in Jordan's shoes can only avoid self-incrimination by "choosing" not to seek decertification to juvenile court altogether; however, the consequences of certification are so serious as to render this a Hobson's "choice." *See Kemplen v. Maryland*, 428 F.2d 169, 174 (4th Circ. 1970). A child who continues to assert his innocence at the pre-trial stage of his case, as Jordan has done here, is essentially forced to forego his opportunity to be tried in juvenile court, eviscerating the purpose of 42 Pa.C.S. § 6322 and rendering the statute meaningless. Assuming that the legislature intended the statute to provide a meaningful opportunity to juveniles like Jordan to petition for decertification – the only permissible interpretation of the statute -- it cannot be conditioned on the waiver of a constitutional right.

A. Jordan Has a Constitutional Right Against Self-incrimination At The Pre-trial Stage of His Criminal Case When The Government Has Not Yet Been Held To Its Burden of Proving Beyond a Reasonable Doubt That He Committed the Offense For Which He is Charged.

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[n]o person ... shall be compelled in any criminal case to be witness against himself." U.S. Const., Amends. V, XIV. *See also Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment to the United States Constitution is applicable to the states through the due process clause of the Fourteenth Amendment). Similarly, the Pennsylvania Constitution provides that "[i]n all criminal prosecutions the accused ... cannot be compelled to give evidence against himself." Pa. Const. Art. I, § 9. The privilege against self-incrimination has long been interpreted to mean that a defendant may refuse "to answer official questions put to him in any ... proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (citation omitted). *See also Miranda v. Arizona,* 384 U.S. 436, 467 (1966) ("[T]he Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."); *In re Gault,* 387 U.S. 1, 55 (1967) (holding that the right against self-incrimination extends to juveniles as well as to adults). The United States Supreme Court has held that the state may not impose substantial penalties, including a harsher sentence, on a defendant who invokes his Fifth Amendment right against self-incrimination. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977). Similarly, Pennsylvania courts have found that the imposition of a harsher sentence based upon the defendant's

exercise of his constitutional rights is an abuse of discretion. *See, e.g., Com. v. Bethea*, 474 Pa. 571, 575-76, 379 A.2d 102, 104 (1977) (holding that it is constitutionally impermissible for trial court to impose more severe sentence because defendant chooses to stand trial rather than plead guilty).

A transfer or decertification hearing has "tremendous consequences" in "determining vitally important statutory rights of the juvenile." *Kent v. United States,* 383 U.S. 541, 554, 556 (1966). "[N]othing can be more critical to the accused than determining whether there will be a guilt determining process in an adult-type criminal trial. The [outcome] can result in dire consequences indeed for the guilty accused." *Kemplen,* 428 F.2d at 174. *See also* Note, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure*, 40 S. Cal. L. Rev. 158, 162 (1967) (Certification of a youth to an adult court is "the worst punishment the juvenile system is empowered to inflict.") In the instant case, the trial court's misapplication of Pennsylvania's decertification statute imposes a substantial penalty on Jordan – if convicted, exposure to a mandatory life without parole sentence and without the rehabilitative services of the juvenile court – for failing to admit his involvement in the alleged offense in an effort to meet his burden for decertification.

Additionally, the right to be free from compelled self-incrimination during a pre-trial psychological or psychiatric examination is protected by the United States Constitution. *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the United States Supreme Court held that statements made to a psychiatrist during a court-ordered

psychiatric examination were inadmissible during both the guilt and penalty phases of a criminal trial. *Id.* at 473. The defendant was charged with murder, and prior to the trial, the trial court ordered a psychiatric examination for the purpose of determining whether the defendant was competent to stand trial. *Id.* at 456-57. The defendant was deemed competent in the psychiatric examination, convicted and sentenced to death. *Id.* at 457-60. During the sentencing hearing, the examining psychiatrist testified to admissions that the defendant made to him, as well as his own personal conclusions as to the continuing danger posed to society by the defendant. *Id.* at 458-60. The Supreme Court held that the admission of the psychiatrist's testimony, which referenced admissions made by the defendant during the course of examination, violated the defendant's Fifth Amendment privilege against self-incrimination. *Id.* at 468-69. Key to its holding were the Court's findings that the evaluator was an agent of the state; the defendant was in custody at the time of the evaluation; and *Miranda* warnings were not administered to the defendant, nor did the defendant make a voluntary and knowing waiver of his *Miranda* rights. *Id.* at 466-67.

The United States Supreme Court's earlier decision *In re Gault,* 387 U.S. 1 (1967), which was cited by and relied upon in *Estelle*, *see* 451 U.S. at 462, makes it clear that the protection against self-incrimination applies to Pennsylvania's decertification proceeding: "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Gault,* 387

U.S. at 49. The admission that the trial court would effectively require Jordan to make in order to meet his burden for decertification would be incriminating and creates just the "exposure" that the Fifth Amendment protects against. This exposure – the possibility of subsequent use of a child's incriminating statements and the child's conviction of a crime based on those statements – violates the child's right against self-incrimination.

B. Because Pennsylvania Law Does Not Explicitly Prohibit the Government From Using Inculpatory Statements Elicited During Decertification at Any Subsequent Trial, the Lower Court's Interpretation of the Decertification Statute Improperly Conditioned Jordan's Motion for Decertification on the Waiver of his Constitutional Rights.

Neither Pennsylvania's decertification statute nor any Pennsylvania court rules prohibit the use of any admissions made by a juvenile during decertification in future proceedings. By contrast, at least 20 other states have secured youths' right against self-incrimination when undergoing examinations conducted to aid the court in determining whether a youth should be tried in juvenile or adult court. *See* Appendices A and B. Twelve states accomplish this by statute;[5] courts in at least

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[5] For example, Michigan law provides the following:

(G) Psychiatric Testimony.

(1) A psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for the purpose of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent.

(2) The juvenile's consent may only be given:

(a) in the presence of an attorney representing the juvenile or, if no

eight states have issued rulings to protect a youth's rights against self-incrimination in the transfer/waiver context even where statute or court rule does not explicitly do so.[6] In addition, with respect specifically to securing the Fifth Amendment rights of the accused during pre-trial evaluations generally, the vast majority of courts and legislatures around the nation strictly limit the admissibility

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attorney represents the juvenile, in the presence of a parent, guardian, or legal custodian;

(b) after the juvenile has had an opportunity to read the report of the psychiatrist, psychologist, or certified social worker; and

(c) after the waiver decision is rendered.

(3) Consent to testimony by the psychiatrist, psychologist, or certified social worker does not waive the juvenile's privilege against self-incrimination.

Mich. Comp. Law Ann. § 3.950(G)(1) (West 2010).

Similarly, Maryland's statute substantially limits the admission into evidence at adjudicatory hearings and criminal trials of statements made during pre-trial evaluations and in transfer hearings. Md. Code Ann., Cts. & Jud. Proc. § 3-8A-12(b) and (c) (West 2010). *See* Appendix A for a complete list of state statutes.

[6] For example, in an Arizona transfer case, the court ordered the youth to undergo a mental examination but failed to also order limits upon the use of any statements made by the youth during the evaluation. *In re Appeal In Pima County, Juvenile Action No. J-77027-1*, 679 P.2d 92, 93-94 (Ariz. App. Ct. 1984). Consequently, the youth, on advice of counsel, refused to participate in the examination. *Id.* at 93. The court later ordered that the case be transferred to adult court based on its determination that the youth was not amenable to treatment; the record demonstrated that the court's determination was based in large part on the juvenile's refusal to cooperate in the court-ordered psychological examination. *Id. at 94-95.* The Arizona appellate court held that by failing to order limits on the use of the youth's statements, and then "penalizing" the youth for refusing to cooperate by transferring the case to criminal court, the juvenile court violated the youth's right against self-incrimination. *Id.* at 95-96.

into evidence of pre-trial evaluations administered to aid the court in making critical decisions in the defendant's case. *See* Appendix C.[7]

These protections in both statute and case law recognize that the accused's "description and explanation of the circumstances of the alleged offense ... may significantly affect decisions about punishment or transfer for adult proceedings," and that "[a]s to the circumstances and gravity of the offenses alleged, the juvenile may be the only witness who can present any mitigating circumstances for the court to consider." *Ramona R. v. Superior Court,* 693 P.2d 789, 792 (Cal. 1985) (citations

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[7] The Pennsylvania legislature has acknowledged the holdings of *Estelle and Gault* in upholding the right against self-incrimination in statutory provisions governing pre-adjudicatory examinations outside the decertification context. Thus, for example, when an accused undergoes a court-ordered competency examination,

> The person shall be entitled to have counsel present with him and shall not be required to answer any questions or to perform tests unless he has moved for or agreed to the examination. Nothing said or done by such person during the examination may be used as evidence against him in any criminal proceedings on any issue other than of his mental condition.

50 P.S. § 7402(e)(3). Similarly, in another statute governing juvenile delinquency proceedings, the Pennsylvania legislature has provided in pertinent part that:

> No statements, admissions or confessions made by or incriminating information obtained from a child in the course of a screening or assessment that is undertaken in conjunction with any proceedings under this chapter, including, but not limited to, that which is court ordered, shall be admitted into evidence against the child on the issue of whether the child committed a delinquent act under this chapter or on the issue of guilt in any criminal proceeding.

42 Pa.C.S.A. § 6338(c).

In creating these provisions, the Pennsylvania legislature has affirmatively acted to protect a defendant's right against self-incrimination in the pre-trial stage.

omitted). *See also In the Interest of Bruno*, 388 So. 2nd 784, 787 (La. 1980) (citation omitted) (Examinations conducted to aid the court in determining decertification can involve "evidence of a testimonial or communicative nature" that falls within the scope of the privilege against self-incrimination). A youth facing the possibility of prosecution in adult court should not be faced with the "unfair choice" of withholding critical information from the examiners in an effort to be decertified to juvenile court, or divulging such information and having his statements used against him in subsequent juvenile or criminal proceedings. *Ramona R.,* 693 P.2d at 792 (citations omitted). Strict limits on the use of information obtained in such evaluations are necessary because the "privilege against self-incrimination requires the prosecution in a criminal trial to produce sufficient evidence to establish the defendant's guilt *before* he must decide whether to remain silent." *Id.* at 794 (citation omitted) (emphasis in the original).

Jordan is not asserting that Pennsylvania's decertification statute is unconstitutional on its face because it does not immunize statements made by youth during transfer proceedings; this Court has already found that the absence of such a provision does not render the statute invalid. *Com. v. Cotto*, 708 A.2d 806, 814 n.3 (Pa. Super. 1998) (upholding constitutionality of transfer law upon facial challenge). In reaching this finding in *Cotto*, this Court specifically noted that transfer statutes do not violate a juvenile's right against self-incrimination when they do not require "an admission of guilt by the juvenile in order for the juvenile court to exercise jurisdiction in the case." *Id.* (citing *State in Interest of A.L.,* 638 A.2d 814, 822 (N.J.

Superior 1994)). However, if a child must admit guilt at a pre-adjudicatory stage in order to move his case to juvenile court, this Court has recognized that specific proscriptions against the admissibility of the child's statements on the issue of guilt at future hearings must be in place in order to secure the child's privilege against self-incrimination. *Id.* *See also State in Interest of A.L.*, 638 A.2d at 822 (holding that "even assuming that an admission of guilt is implicitly required in order for a juvenile to have a chance to remain in family court, this admission has no adverse legal consequences" and the juvenile "is not penalized in any sense" where "the juvenile's testimony is fully immunized by [statute]."); *Com. v. Wayne*, 606 N.E.2d 1323, 1332, 1329 n. 8 (Mass. 1993) (holding that juveniles can be ordered to participate in examination by Commonwealth expert if juveniles voluntarily choose to offer expert psychiatric evidence on transfer issue where juvenile's statements are not admissible at any proceeding adjudicating his guilt). Thus, Jordan challenges the trial court's application of the decertification statute because the court required him to "take responsibility" for the alleged offenses when no controlling authority prohibits the admission into evidence of any statements made during decertification in a later proceeding as to his guilt.

In discussing Jordan's likelihood of being rehabilitated prior to the expiration of juvenile court jurisdiction, the trial court's analysis focused on the fact that Jordan asserted his innocence to both his own expert psychologist as well as the Commonwealth's psychiatric expert. The trial court found particularly persuasive the Commonwealth's expert's opinion that because Jordan did not admit that he

committed the offense at this pre-trial stage (i.e., the psychiatrist characterized Jordan as being "evasive" and "avoidant" about talking about the offense when he continued to state that he did not do it (R.R. 33a)), it is unlikely that Jordan would ever take responsibility and, therefore, his amenability to treatment is quite limited and rehabilitation within the juvenile court's jurisdiction is unlikely to occur. (R.R. 33a-35a). Thus, Jordan was effectively penalized – the trial court found that he did not sustain his burden of proof regarding his amenability to treatment and denied his decertification petition – for continuing to assert his innocence at the pre-adjudicatory stage of his case.

The trial court noted in its opinion that the defense expert testified, as did the Commonwealth's expert, that the first step toward rehabilitation is taking responsibility for the offense. (R.R. 34a). But the defense expert did not testify that Jordan's refusal to admit to the alleged conduct at the pre-trial stage indicated that Jordan is not amenable to treatment.[8] Nor did he testify that Jordan's assertion of

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[8] Indeed, in response to the Commonwealth's question as to what extent Jordan's denial that he committed the charged offense affected his opinion as to Jordan's chances for rehabilitation, the Defense expert testified as follows:

> It's difficult or impossible at a pre-trial stage to say that someone who is responding to a question about their legal culpability by saying no is in denial about that, because it's always, for me, virtually impossible to separate out what's good legal strategy and how they may have been advised from being in denial and not being willing to – to admit to something that would help the treatment along. All that changes, of course, once the person has been through trial. If they've been convicted and they're still sitting there, post-conviction, and saying, this is all a big mistake, I didn't do it, then that's a problem for treatment.

innocence in the pre-adjudicatory stage essentially overrides all the other statutory factors that demonstrate his ability to be rehabilitated. Instead, this is what the government's expert asserted (R.R. 549a and 277a, 280a-281a, 296a-297a),[9] and what the trial court concluded. (R.R. 33a-35a). It is this interpretation and application of the Juvenile Act's decertification provision that Jordan challenges in this appeal, as it effectively requires that any child who asserts his innocence at the pre-trial stage forfeit his right to decertification.

Under the trial court's interpretation, the only way for the child to demonstrate amenability and thus be transferred back to juvenile court is for the child to waive his presumption of innocence before trial. The fundamental unfairness of this interpretation of the statute is exacerbated by the fact that even if Jordan admitted his involvement in the offense, the judge still had the discretion to deny decertification. Jordan was penalized for continuing to assert his innocence to the experts who examined him and refusing to be a witness against himself. Because the state may not impose substantial penalties on a child who invokes his Fifth Amendment right against self-incrimination, *Lefkowitz at* 805, the trial court's

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(R.R. 93a).

[9] In his report, the Commonwealth's expert stated because Jordan had continued to assert his innocence in his pre-trial evaluation, "it is my opinion that Mr. Brown has not demonstrated any suggestion of a likelihood to take responsibility" for the offense charged, and, therefore, "I do not see any indication that Jordan Brown will be any different from many of the PCRA litigants I evaluate who, twenty and thirty years after an offense, still maintain their innocence, a posture, however, which would render it impossible for Mr. Brown to be treated or rehabilitated at any point in time, let alone by the time he turns twenty-one years of age." (R.R. 549a).

denial of Jordan's request to transfer to juvenile court must be reversed. [10] This Court should further instruct the trial court that future decertification proceedings must be conducted in accordance with the constitutional requirement that a child does not have to take responsibility for the alleged offense at the pre-adjudicatory stage in order to demonstrate that he can be rehabilitated within the juvenile justice system.

[10] As this Court has noted, it is up to the legislature to enact a statutory provision that provides absolute immunity to statements made in the decertification/transfer context by making such statements inadmissible on the issue of guilt in future proceedings. *Cotto*, 708 A.2d at 814 n.3 (noting that while the Juvenile Act does not immunize statements made in the context of transfer hearings, "inclusion of an immunity provision would be prudent and *merits legislative consideration.*") (emphasis added). Given the current state of Pennsylvania law, this Court can only provide relief to Jordan by reversing the trial court's denial of his decertification request.

CONCLUSION

For the foregoing reasons, and any other reasons that may appear to this Honorable Court, Jordan respectfully requests that this Court reverse the trial court's denial of Jordan's petition for decertification and remand the case for new decertification proceedings in accordance with the federal and state Constitutions and any further instructions from this Court.

Appendix A

State statutes securing youths' right against self-incrimination when undergoing examinations for transfer/waiver

Alabama. Ala. Code § 15-19-5 (West 2010) (statements made by the defendant during examination to determine youthful offender status may not be used against defendant until sentencing after defendant has been found guilty); **Georgia.** Ga. Code Ann. § 15-11-30.2(e) (West 2010) (prohibiting use of statements made by juvenile in transfer proceedings in later criminal proceedings over juvenile's objection); **Iowa.** Iowa Code Ann. § 232.45(11)(b) (West, West 2010) (statements made during intake or waiver hearing are inadmissible in case-in-chief in subsequent criminal proceedings over child's objections); **Louisiana.** La. Child. Code Ann. art. 862(C)(2) (2009) (transfer hearing record is not admissible in subsequent criminal proceedings except for impeachment); *See also In Interest of Bruno*, 388 So. 2d 784, 787 (La. 1980) (statements made in court-ordered examination for purposes of waiver hearing inadmissible at trial on the issue of guilt or innocence); **Maryland.** Md. Code Ann., Cts. & Jud. Proc. § 3-8A-12(b) and (c) (West 2010) (statements in court-ordered evaluations are inadmissible at any adjudicatory hearing except on the issue of respondent's competence to participate in such proceedings and responsibility for his conduct, or in a criminal proceeding prior to conviction) (statements made at waiver hearing cannot be used in adjudication or criminal trial unless a person is charged with perjury and the statement is relevant to that charge); **Michigan.** Mich. Comp. Law Ann. § 3.950(G)(1) (West 2010) (psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for the purpose of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent); **Mississippi**. Miss. Code Ann. § 43-21-157(7) (West 2010) (testimony at the hearing

is not admissible in any proceeding other than the transfer hearing); **New Jersey.** N.J. Stat. § 2A:4A-29 (West 2010) (testimony at waiver hearing is not admissible in any hearing to determine delinquency or guilt); **North Dakota.** N.D. Cent. Code § 27-20-34(6) (2009) (statements made by the child at the transfer hearing are not admissible against the child over objection in the criminal proceedings following the transfer except for impeachment); **Tennessee.** Tenn. Code Ann. § 37-1-134(f)(1) (West 2010) (statements made by the juvenile at a transfer hearing are not admissible against the child, over objection, in further criminal proceedings); **Virginia.** Va. Code Ann. § 16.1-269.2(A) (West 2010) (any statement by a juvenile at a transfer hearing shall not be admissible against him over objection in any criminal proceedings following the transfer, except for impeachment purposes); **Wyoming.** Wyo. Stat. Ann. § 14-6-237(e) (2010) (statements made by juvenile in transfer hearing are not admissible against him over objection in criminal proceeding following the transfer).

Appendix B

State case law securing youths' right against self-incrimination when undergoing examinations for transfer/waiver

Alaska, *R.H. v. State,* 777 P.2d 204, 211 (Alaska Ct. App. 1989) (court-ordered psychological evaluation for use in determining amenability violates a child's privilege against self-incrimination); **Arizona**, *See In re Appeal In Pima County, Juvenile Action No. J-77027-1*, 679 P.2d 92, 95-96 (Ariz. Ct. App. 1984) (court's failure to order limits upon use which could be made of juvenile's statements made pursuant to a court-ordered mental evaluation for transfer determination and its penalizing of juvenile for refusing to cooperate in the mental evaluation violated juvenile's privilege against self-incrimination); **California**, *Ramona R. v. Superior Court,* 693 P.2d 789, 792 (Cal. 1985) (testimony of minor during fitness hearing, or statements made to probation officers, cannot be used at trial); **Colorado**, *In the Interest of A.D.G.*, 895 P.2d 1067, 1072-73 (Col. App. Ct. 1994), *cert. denied* June 5, 1995 (juvenile cannot be ordered to undergo psychological examination over objection in transfer proceeding because it would infringe on is or her Fifth Amendment right against self-incrimination); **Indiana**, *Cf. Clemons v. State,* 317 N.E.2d 859, 866 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 859 (1975) (Fifth Amendment privilege against self-incrimination is inapplicable in the juvenile court waiver hearing setting where a confession by the juvenile may not be viewed as inculpatory and where it may not be used in a later criminal or delinquency adjudication; **Minnesota**, *In re S.J.T.*, 736 N.W.2d 341, 350 (Minn. Ct. App. 2007) (Presumptive certification does not violate privilege against self-incrimination because courts can grant tranasactional immunity to provide protection against further use of testimony and compelled investigation); **Nevada**, I*n the Matter of William M.*, 196 P.3d 456, 464 (Nev. 2008) (holding that statute requiring juveniles to admit to the

charged criminal conduct to rebut certification to adult court violated the Fifth Amendment and therefore was unconstitutional); and **New Mexico**, *Christopher P. v. State*, 816 P.2d 485, 488-89 (N.M. 1991) (privilege against self-incrimination prohibits forcing juvenile to make inculpatory statements during court-ordered evaluations prepared for transfer hearing).

Appendix C

State statutes, court rules and case law limiting the admissibility of pre-trial evaluations

Alabama. Ala. R. Crim. P. 11.2(b)(1) (results of compulsory examination of defendant's mental competency to stand trial are not admissible as evidence in a trial for the offense charged); Ala. R. Crim. P. 11.8 (the state may not use evidence obtained by a compulsory mental examination of the defendant to assess competency in a criminal proceeding unless the defendant offers evidence in support of a plea of not guilty by reason of mental disease or defect); Ala. R. Evid. 503(d)(2) (statements in court-ordered evaluation only admissible with respect to the particular purpose for which the examination is ordered unless the court orders otherwise); **Alaska.** Alaska R. Evid. 504(d)(6) (statements in court-ordered evaluation only admissible with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise); **Arizona**. 16A A.R.S. R. Crim. Proc. 11.7 (statement in court-ordered examination inadmissible unless defendant raises insanity defense); **Arkansas.** Ark. R. Evid. 503(d)(2) (statements in court-ordered evaluation only admissible with respect to the particular purpose for which the examination is ordered unless the court orders otherwise); **California**. *Baqleh v. Superior Court*, 122 Cal. Rptr. 2d 673, 692-93 (Cal. Ct. App. 2002) (statements made during competency evaluation inadmissible at guilt and sentencing phases); **Colorado**. Colo. Rev. Stat. Ann. § 19-2-1305(3) (West 2010) (mental competency examination inadmissible as to issues raised by not guilty plea); **Connecticut**. Conn. Gen. Stat. Ann. § 46b-124(j) (West 2010) (statements in mental health evaluations conducted in juvenile matter may only be used for treatment and planning purposes); **Delaware.** Del. R. Evid. 503(d)(2) (statements in court-ordered evaluations not privileged with respect to the particular purpose for which the examination is ordered unless the

court orders otherwise); **Florida**. Fla. R. Juv. P. 8.095(d)(5) (information learned in competency evaluation admissible only for the limited purpose of determining competency to proceed); Fla. R. Crim. P. 3.211(d) (limiting use of competency evidence against defendant for any purpose other than determining competency); **Hawaii.** Haw. R. Evid. 504.1(d)(2) (statements in court-ordered evaluations not privileged with respect to the particular purpose for which the examination is ordered unless the court orders otherwise); **Idaho**. Idaho R. Evid. 503(d)(2) (exception to psychotherapist-patient privilege with respect to particular purpose for which examination is ordered by the court order); **Illinois**. 740 Ill. Comp. Stat. Ann. 110/10(a)(4) (West 2010) (statements in court-ordered evaluations admissible only on issues regarding physical or mental condition and only if defendant informed that statements would not be confidential); **Maryland**. Md. Code Ann., Cts. & Jud. Proc. § 3-8A-12 (West 2010) (statements in court-ordered evaluations are inadmissible at any adjudicatory hearing except on the issue of respondent's competence to participate in such proceedings and responsibility for his conduct, or in a criminal proceeding prior to conviction); **Massachusetts**. Mass. Gen. Laws Ch. 233, § 20B(b) (West 2010) (if a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt); **Michigan**. Mich. Comp. Laws Ann. § 330.2028(3) (West 2010) (results of examination of defendant's mental competency to stand trial inadmissible as to guilt); **Minnesota**. 49 Minn. Stat. Ann., R. Crim. P. 20.02(5) and (6) (West 2010), Minn. R. Juv. Del. P. 13.04 (West 2010) (statements in court-ordered evaluations only admissible as to defense of mental illness or mental deficiency); **Mississippi**. Miss. R. Unif. Cir. And Cty. Ct. 9.07 (when

defendant raises insanity defense, no statement made by accused in examination to determine mental state shall be admitted against defendant on issue of guilt in any proceeding); Miss. R. Evid. 503(d)(2) (no privilege in court-ordered examination with respect to particular purpose for which examination was ordered); **Missouri**. Mo. Sup. Ct. R. 123.01, Mo. Rev. Stat. § 552.020(14) (West 2010) (No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt); **Nebraska**. Neb. Rev. St. § 27-504(4)(b) (West, Westlaw through First Reg. Sess. 100th Leg. 2007) (statements in court-ordered examinations not privileged only in respect to the particular purpose for which the examination is ordered unless judge orders otherwise); **New York.** N.Y. C.P.L.R. § 730.20(6) (McKinney 2010) (statement made by a defendant in a competency examination shall be inadmissible in evidence except on the issue of mental condition); **Ohio**. Ohio Juv. R. 32(B) (statements in court-ordered examinations may be utilized only for purposes specified in court order until there is an admission or adjudication of child); **Oregon**. Ore. Rev. Stat. Ann. § 419A.255(3) (West 2010) (no information in court-ordered evaluations may be admitted into evidence to establish criminal or civil liability; such evidence may be admitted as part of pre-sentence investigation after guilt has been established or admitted in criminal court, or in connection with a proceeding in another juvenile court); Or. Rev. Stat. Ann. § 40.230(4)(a) (West 2010) (if judge orders examination of the physical condition of the patient, no privilege exists with respect to the purpose for which the judge ordered the examination unless judge orders otherwise); **Pennsylvania**. 50 Pa. Stat. Ann. § 7402(e)(3) (West 2010) (Nothing said or done by such person during the examination may be

used as evidence against him in any criminal proceedings on any issue other than of his mental condition); 42 Pa. Cons. Stat. Ann. § 6338(c) (West 2010) ("No statements, admissions or confessions made by or incriminating information obtained from a child in the course of a screening or assessment that is undertaken in conjunction with any proceedings under this chapter, including, but not limited to, that which is court ordered, shall be admitted into evidence against the child on the issue of whether the child committed a delinquent act under this chapter or on the issue of guilt in any criminal proceeding.") **Rhode Island**. R.I. Gen. Laws § 40.1-5.3-3(n) (2009) (statements made during examination to determine defendant's mental competency to stand trial inadmissible as to any issue other than mental condition); **South Carolina.** S.C. Code Ann. § 44-22-90(A)(4) (2009) (information in court-ordered evaluations admissible only on issues involving the patient's mental condition); *see also Hudgins v. Moore*, 524 S.E.2d 105, 108 (S.C. 1999) (recognizing the need to protect the integrity of a court-ordered mental health examination by forbidding the use of the information obtained for purposes other than that ordered by the court); **Tennessee.** Tenn. Code Ann. § 24-1-207(a)(2) (West 2010) (statements in court-ordered evaluation admissible only on issues involving the patient's mental or emotional condition and only if patient advised that communications not privileged); Tenn. R. Crim. P. 12.2 (no statement made by the defendant in court-ordered evaluation, no testimony by the expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony); **Vermont**. Vt. Stat. Ann. tit. 13, § 4816(c) (2010) (no statement made in the course of the examination by the person examined, whether or not he has consented to the examination, shall be admitted as evidence in any criminal proceeding for the purpose of proving the commission of

a criminal offense or for the purpose of impeaching testimony of the person examined); **Virginia**. Va. Code Ann. § 16.1-360 (West 2010) (statements made during examination of defendant's mental competency to stand trial inadmissible at adjudicatory or disposition hearings); **Washington**. *See State v. Decker*, 842 P.2d 500, 503-04 (Wash. Ct. App. 1993) (holding that the court may grant immunity – use and derivative use – to respondent in a pre-dispositional evaluation); **Wyoming.** Wyo. Stat. Ann. § 33-27-123(a) (2010) (limited exceptions to privilege for communications to psychologists, including when examination is court ordered).

COMMONWEALTH OF PENNSYLVANIA, Plaintiff VS. JORDAN ANTHONY BROWN, Defendant	:	IN THE COURT OF COMMON PLEAS LAWRENCE COUNTY, PENNSYLVANI NO. 320 of 2009, CR. OTN: K843595-4

APPEARANCES

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OPINION

MOTTO, P.J. March 29, 2010

Before the Court for disposition is the Defendant's Petition for Transfer from Criminal Court to Juvenile Court. The dispositive issue is whether the Defendant has met his burden to establish by a preponderance of the evidence that a transfer to Juvenile Court will serve the public interest, based upon a consideration of the factors contained in §6355(a)(4)(iii) of the Juvenile Act, 42 Pa.C.S.A. §6355(a)(4)(iii).

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Defendant is charged with Criminal Homicide, 18 Pa.C.S.A. §2501 and Homicide of an Unborn Child, 42 Pa.C.S.A. §2603 relative to the February 20, 2009 murder of Kenzie Marie Houk and her unborn fetus. Defendant, 11 years old at the time of the killing, resided in New Galilee, Lawrence County, Pennsylvania with his father, the victim, who was father's fiancée and 8½ months pregnant at the time of the killing, and Houk's children, Janessa, age 7 and Adalyn, age 4. The victim died of a single gunshot wound to the back of her head and neck, and her viable fetus died as result of a lack of oxygen brought about by the death of the victim mother. This Court has previously denied a Motion by the Defendant for Writ of Habeas Corpus, finding that the Commonwealth has submitted sufficient evidence to establish a prima-facie case that the Defendant was the killer. As noted in the previous Opinion of the Court dated October 1, 2009, the Commonwealth submitted sufficient evidence from which a fact finder could infer that after the Defendant's father left for work, and before Defendant and Janessa Houk left for school, the Defendant shot the victim, removed the spent shell, returned his shotgun to his bedroom, and then left for school with Janessa, depositing the spent shell along a pathway traveling down the driveway from the residence to roadway.

Where a child is charged with murder, the offense must be prosecuted under criminal law and procedures; however, the child may request that the case be transferred to the Juvenile Division of the Court. 42 Pa.C.S.A. §6355(e); 42 Pa.C.S.A. §6322(a).

Section 6322(a) of the Juvenile Act provides that in a criminal proceeding charging murder, where the Defendant is a child, the case may be transferred, and, in determining whether to transfer a case charging murder, the child shall be required to establish by preponderance of the evidence that the transfer will serve the public interest. In determining whether the child has so established that the transfer will serve the public interest, the Court shall consider the factors contained in §6355(a)(4)(iii) of the Juvenile Act. Those factors are set forth as follows:

(A) the impact of the offense on the victim or victims;

(B) the impact of the offense on the community;

(C) the threat to the safety of the public or any individual posed by the child;

(D) the nature and circumstances of the offense allegedly committed by the child;

(E) the degree of the child's culpability;

(F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and

(G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) age;

(II) mental capacity;

(III) maturity;

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(IV) the degree of criminal sophistication exhibited by the child;

(V) previous records, if any;

(VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the Juvenile Court to rehabilitate the child;

(VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;

(VIII) probation or institutional reports, if any;

(IX) any other relevant factors.

42 Pa.C.S.A. §6355(a)(4)(iii)

Thus, on a transfer petition of a juvenile charged with murder, criminal court automatically has original jurisdiction; the burden then rests on the juvenile to prove that the case shall be transferred to juvenile court; once the juvenile's case is vested in the criminal court, the public policies affording juveniles different treatment than adults are no longer applicable. Commonwealth v. Carter, 855 A.2d 885, (Pa.Super. 2004), Appeal denied 863 A.2d 1142, 581 Pa. 670. The Criminal Court deciding whether to decertify a case to juvenile court must consider all the statutory factors set forth in §6355(a)(4)(iii) of the Juvenile Act; however, the Juvenile Act is silent as to the weight to be assessed to each factor by the Court. Commonwealth v. Sanders, 814 A.2d 1248 (Pa.Super. 2003), Appeal denied 827 A.2d 430, 573 Pa. 704. The Court is required to carefully consider the entire record. Sanders, Id.

In determining whether the public interest can be served by a transfer to Juvenile Court, the Court must consider the impact of the offense on the victim or victims. Here, the impact is obvious as the victim Kenzie Marie Houk was killed by a shotgun blast to the back of her head and her unborn fetus died as a result of a lack of oxygen. The killing brought about an immediate end to two innocent lives.

The next factor to be considered is the impact of the offense on the community. Defendant presented no evidence as to this factor.

The threat to the safety of the public or any individual posed by the child is a factor that the Court must consider. The Court views this factor as related to the highly litigated issue of whether the child can be rehabilitated through the juvenile system, therefore, this factor will necessarily be addressed as part of the analysis of the evidence relating to whether Defendant is amenable to treatment, supervision or rehabilitation as a juvenile.

The Court is required to consider the nature and circumstances of the offense allegedly committed by the child. The evidence presented by the Commonwealth showed that the victim, Kenzie Marie Houk, 8½ months pregnant, was in bed at the time she was murdered. She was totally defenseless at the time her life and the life of her unborn fetus was taken by a shotgun blast to the back of her head. There is no indication of any provocation by the victim that led to her killing. This offense

was an execution-style killing of a defenseless pregnant young mother. A more horrific crime is difficult to imagine.

The evidence relating to the degree of the child's culpability consisted of the evidence presented by the Commonwealth at the preliminary hearing, supplemented by the testimony of Trooper Martin at the transfer hearing. As this Court has previously found, the Commonwealth established a prima-facie case that the Defendant was the killer, and acted alone. The Commonwealth's evidence indicates that on the morning of the shooting, Defendant's father had left for work, leaving the Defendant, the victim, Kenzie Houk, and her children, Janessa and Adalyn in the residence. Of the three children, only the Defendant was experienced in firing a shotgun and removing an expended shell. There were no signs of forced entry into the residence nor any signs of a struggle, robbery, or theft. As a result of the light covering of snow, it was observable that the only footprints were those of the Defendant and Janessa when they left for school at approximately 8:14 a.m. There were no other footprints or tire tracks of any person or vehicle that would have approached the residence during the time in which the killing could have occurred. The Defendant owned and had access to a youth 20-gage shotgun located in his bedroom, along with other guns. Of the six guns found in the bedroom, Defendant's 20-gage shotgun had the strong odor of gun powder residue indicating that it had been recently fired. Along the path of the footprints of the Defendant from the residence to the roadway was located a shotgun shell in pristine

condition, indicating it had been recently placed in that location. A ballistics report showed that the shell was fired from the Defendant's shotgun. Gun powder residue was found in clothing taken from the Defendant at the time of arrest, including the shirt which Defendant was wearing when he left for school that day. The gun powder residue on the right shoulder of the shirt was consistent with the Defendant's manner of shooting a shotgun which was to shoot from his right shoulder. Defendant was familiar with the use of a shotgun having been observed to have loaded and unloaded the gun, remove spent shells, and to have been successful in a turkey shoot several days before the killing.

In assessing this evidence, what is of significance relative to the issue before the court is the degree of pre-meditation involved in the killing, as Defendant would have had to have retrieved the shotgun in order to effectuate the killing. Additionally, the acts of returning the shotgun to the bedroom, removing the spent shell, and depositing the spent shell in the yard area of the path taken from the residence to the roadway demonstrates an effort, immediately after the killing, to conceal any indication that the Defendant was responsible for the killing.

Relative to the factor of the adequacy and duration of dispositional alternatives available under the Juvenile System and in the Adult Criminal Justice System, Defendant produced the testimony of Lee Shultz, Court Program Specialist for the Department of Public Welfare's Bureau of Juvenile Justice

Services and of Patrick Micco, Chief Juvenile Probation Officer for the County of Lawrence. Mr. Shultz testified as to the existence of State facilities that deal with seriously violent crimes. The most appropriate facility would be the Loysville Youth Development Center, which provides a wide-range of services based on psychological, social, educational, medical, and transition services to and from the facility. However, Mr. Shultz could not offer any opinion on amenability and treatment, as that is not his role. Patrick Micco also concurred with Mr. Shultz in the availability of facilities in Pennsylvania for juveniles, including juveniles adjudicated of crimes as serious as homicide. Mr. Micco did confirm that the juvenile system would have jurisdiction over the Defendant only until he is age 21.

The Court is next required to consider whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the factors set forth in §6355(a)(4)(iii)(G)(I-IX). The Court therefore reviews those factors as hereafter set forth.

I. Defendant is 12 years of age. Defendant was 11 years age at the time of the incident. Defendant's date of birth is August 30, 1997.

II and III. Defendant's mental capacity and maturity level is consistent with that of an 12 year old child.

IV. The commission of the crime demonstrated a degree of criminal sophistication. The offense was necessarily premeditated. Death was administered by the discharge of a

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shotgun to the back of the head of the victim. Subsequent to the killing, the shotgun utilized was returned to the bedroom in which it was ordinarily stored and a spent shell was removed from the gun and discarded outside of the home along the pathway from the home to the roadway.

V. and VI. Defendant has no previous juvenile record nor is there any record of any prior involvement with the juvenile justice system.

VII. The Court is required to specifically address whether the child could be rehabilitated prior to the expiration of the juvenile court jurisdiction. Since Defendant is 12 years of age and Juvenile Court jurisdiction ends at age 21, Defendant would be under the jurisdiction of the juvenile court for a period of 9 years if the case were transferred. Both the Defendant and the Commonwealth have presented expert testimony specifically addressing the issue of the amenability of the Defendant for rehabilitation in the Juvenile Justice System.

Defendant presented the testimony of Dr. Kirk Heilbrun, a psychologist with a clinical specialization and a forensic sub-specialization, who is a faculty member at Drexel University and Chair of the Psychology Department. Dr. Heilbrun has a Ph.D. in Psychology with a Postdoctoral Fellowship in Psychology and Criminal Justice.

Dr. Heilbrun did a forensic evaluation of the Defendant. Background information was reviewed including more current information available from the Edmund L. Thomas Adolescent Center and the report of Lee Shultz, Court Program Specialist,

and administered tests including the Wechsler Intelligence Scale for Children, the Wide-range Achievement Test, the MAYSI Test and the Structured Assessment of Violence Risk in Youth Test, also known as the SAVRY. Dr. Heilbrun opined that Defendant would respond well in juvenile placement.

On cross-examination Dr. Heilbrun was asked if he considered Defendant's culpability for the offense in doing his evaluation. Dr. Heilbrun responded that if the current charges were excluded, Defendant is at low risk for future violation; however, if the present charges are established as factually accurate, then future risk would increase somewhat. Dr. Heilbrun further stated that when questioned about whether he had committed the offense, the Defendant denied having committed the offense. Dr. Heilbrun was then asked to what extent does Defendant's denial affect the treatment plan or the possibility of recidivism. Dr. Heilbrun eventually stated:

> "If it were established as factually accurate, that Defendant had committed the offense, then there are some other things that are not evident right now that probably went into that, other risk factors, other problems, those would have to be investigated along with the behavior in order to address it and - work on the rehabilitation." (Notes of Testimony, 1/29/10 p. 43).

At page 44 of the transcript, when speaking of the hypothesis that the Defendant committed the crime, Dr. Heilbrun stated:

> "So there are some things that if-if it's established as factually accurate that he committed this murder, then there are some things that I am not able to describe right now that are going to have to be addressed."

Dr. Heilbrun went on to explain the approach that would have to be taken if it were factually determined that the Defendant committed the crime with which he is charged. However, the ultimate conclusion of Dr. Heilbrun as to the program for rehabilitation that would be necessitated, the likelihood of success and in what time frame, and the prospects for rehabilitation, if it were actually determined that the Defendant committed the crime, is vague and uncertain. On redirect examination, Defendant's counsel at page 80 of the transcript, asked Dr. Heilbrun if the facts were determined adversely to Defendant, would the risk factors as determined by Dr. Heilbrun's evaluation on the SAVRY still be low. The response was:

> "That's hard to answer without knowing whatever risk factors might uncovered if the facts, ... were determined adversely to Jordan."

The defense also called Christine McCollum and Neal Stoczynski to testify. These two individuals are counselors at the Edmund L. Thomas Adolescent Center assigned to the Defendant. Defendant became housed at the detention center shortly after his arrest on these charges. Both witnesses testified that Defendant has done very well during his stay at the adolescent center. His behavior level was testified to as being appropriate and he has participated well in activities and his behavior has fell well within the guidelines of being acceptable. Defendant receives visits almost daily from his relatives, including his father. He has done exceptionally well with the point system utilized as a behavior modification tool

in order to encourage and reward appropriate behavior. His social skills and character are age appropriate. He has never needed to be physically restrained. Simple redirection has been sufficient to address any behavioral issue. His interactions with staff and authoritative figures is age appropriate. Defendant is respectful to staff. On cross-examination, witness McCollum acknowledged that there were times that Defendant bullied and intimidated other residents. This witness also acknowledged the report of Mrs. Sarnowski's, Jordan's teacher at the center, which stated that the teacher found it "worrisome" that he does not show a lot of emotion; that when caught doing something wrong, he tries desperately to get out of the situation and seldom shows remorse for it; that he tries to place blame on others for his misdeeds." The report of Mrs. Sarnowski also references that Defendant does get angry quickly.

Defendant also presented the testimony of three adults who have had occasion to interact with the Defendant prior to the arrest, all of whom described the Defendant as respectful, non-violent, and not in need of any treatment of any kind. One of the witnesses even opined that the Defendant should be released, even if he were adjudicated to be guilty or delinquent relative to the offense as charged.

The Commonwealth presented the testimony of Dr. John O'Brien, a Physician-Psychiatrist, as well as an attorney. The witness has taught at Jefferson Medical College and presently teaches at the University of Pennsylvania School of Medicine. He has specialty certifications in General Psychiatry and

forensic psychiatry as well as being a member of the Bar of the Commonwealth of Pennsylvania.

Dr. O'Brien conducted a psychiatric evaluation of Defendant on February 24, 2010. Dr. O'Brien also reviewed the report of Dr. Heilbrun. Relative to the report of Dr. Heilbrun, Dr. O'Brien stated his opinion that if one does not consider the culpability of the juvenile for the offense, then one is not in the position to assess their amenability to treatment and rehabilitation. Dr. O'Brien stated that in performing an assessment of amenability to treatment and rehabilitation, one has to consider not only the juvenile and what shows up about the juvenile in the records and during the clinical evaluation, but one also has to consider the offense and the factual allegations underlying the offense and to look for contrasts and consistencies between all of the materials reviewed in drawing a conclusion or an understanding of the adolescence. In examining the Defendant, Dr. O'Brien found the Defendant to be evasive. Dr. O'Brien also found the Defendant to be avoidant in talking about the offense. Dr. O'Brien also opined that Defendant has no diagnosable psychiatric condition. The doctor found that his avoidance of discussing the factual allegations responsible for his detention was consistent with appeared in the records from the Edmund L. Thomas Center in terms of his not taking responsibility for his misdeeds. Dr. O'Brien offered his opinion that Defendant does not have an illness that needs to be treated in a strictly mental illness sense; that his amenability to rehabilitation is limited because of tendency to minimize, to

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deny and to shift blame and that the first step towards rehabilitation cannot be taken unless he would come forward and take responsibility for his actions, which is not likely to occur.

In evaluating the foregoing testimony, including the testimony of both experts and the evidence presented relative to Defendant's progress at the Edmund L. Thomas Adolescent Center, the Court concludes it is not likely Defendant can be rehabilitated prior to the expiration of the Juvenile court jurisdiction. Both Dr. Heilbrun and Dr. O'Brien agree that the first step towards rehabilitation is to take responsibility for the underlying offense. Dr. Heilbrun talked about the need to sit down with the individual after a conviction and try to get that individual to be forthcoming and to admit culpability. Here, the prospects of that occurring is speculation. Dr. Heilbrun's conclusions, based on the assumption that the Defendant would be convicted, are extremely vague and do not address the risk of re-offending in the event of a conviction. Dr. O'Brien's testimony is persuasive that Defendant is an individual with significant personality problems that are complicated by his presenting to people in authority a version of himself that does not include the negative aspects of his personality, yet those negative elements appear in institutional records where it is reported that he is unwilling to take responsibility for his behavior, he is not straightforward and he is easily angered. Those factors should be considered in the context of the evidence that the offense was not committed in

the context of a confrontation or in response to any type of abuse from the victim. It is also relevant that the nature of the commission of the offense shows a significant degree of forethought, planning, and an effort on the Defendant's part to make sure that it would be impossible or difficult to determine that he was the person responsible for the incidents. Dr. O'Brien also pointed out that the incident happened in the context of the impending birth of his half-brother, his being moved out of his room at the house in order to make way for the baby, and records that show that he harbors resentment for what he perceives as being unfair treatment. Thus, from both expert witnesses we find agreement on the conclusion that rehabilitation requires taking responsibility for the underlying offense; and, persuasive reasoning from Dr. O'Brien that the taking of such responsibility is unlikely to occur, thus making the prospects of rehabilitation within the confines of juvenile court jurisdiction likely to be unsuccessful.

Defendant argues that there is no legal basis for the court to consider Dr. O'Brien's assumption that unless the child confesses, the juvenile justice system is not appropriate for the case. The Court here is not concluding that as a matter of law a child must confess in order to be decertified to juvenile court. However, in order to decertify a case, the court must conclude that this particular Defendant can be rehabilitated in the juvenile justice system. It is the Defendant's burden to prove that he can be rehabilitated through the Juvenile Justice System. Defendant's own expert has testified that taking

responsibility for the underlying offense is a necessary step to rehabilitation. The ultimate question is what is the likelihood of this particular defendant's rehabilitation in the juvenile justice system. The likelihood that Defendant would take responsibility in the event of a conviction is a consideration offered by Defendant's own expert witness. However, that factor has not been reviewed in isolation, but in conjunction with the evidence of the underlying offense, evidence of Defendant's culpability relative to that offense and factors in Defendant's background, prior incidents and records which are consistent with the nature of the offense. While the court respects the presumption of innocence, the Juvenile Act specifically requires the court to consider the nature and circumstances of the offense allegedly committed and the degree of the child's culpability. The premise that taking responsibility for the underlying conduct as being a first step towards rehabilitation is not a statement of law but is a matter of evidence that was put forth by the Defendant himself through his own expert witness.

VIII. The last factor to be considered by the court is a result of probation or institutional reports, if any. Here there are no reports relative to any probation of the Defendant as he has not been on probation, but the Court has considered institutional reports and the testimony of his counselors at the Edmund L. Thomas Adolescent Center, including the report of Defendant's teacher, and Defendant's school records. The relevance of those records has been considered in the context of

considering whether the Defendant can be rehabilitated prior to the expiration of the juvenile court jurisdiction.

After considering all of the factors above discussed, the Court concludes that the Defendant has failed to meet his burden to prove that the transfer of this case to Juvenile Court will serve the public interest.

In addressing Defendant's petition, the Court is required to consider the entire record, including the evidence presented by the Commonwealth as to defendant's commission of the crime, not for the purpose of adjudicating guilt or innocence but for the purpose of evaluating the factors applicable to transfer pursuant to §6355(a)(4)(iii) of the Juvenile Act.

Their evidence exists that the Defendant, without laboring under the effect of any mental illness, killed his father's fiancée who was 8½ months pregnant, by administering a shotgun blast to the back of her head. The evidence further shows that Defendant acted alone and without any provocation from the victim. Further, a degree of sophistication was shown in concealing evidence of the commission of the crime. Experts from both the Defendant and the Commonwealth have agreed that in order for rehabilitation to occur in the Juvenile Court System, Defendant must take responsibility for the offense and at this juncture, has failed to do so. The Court can only conclude upon this record that Defendant has failed to meet his burden to prove by a preponderance of the evidence that the transfer of this case to juvenile court will serve the public interest.

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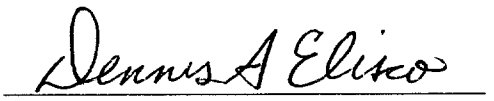
RULE 1925 (B) STATEMENT

I hereby aver that no order requiring a Rule 1925(b) Statement was entered by the Trial Court.

Respectfully submitted by,

David H. Acker, Esquire



Dennis A. Elisco, Esquire

Attorneys for Appellant,
Jordan Anthony Brown

CERTIFICATE OF SERVICE

We hereby certify that on September 13, 2010, seven copies of the Brief for Appellant were mailed by U.S. First Class Mail to Eleanor R. Valecko, Deputy Prothonotary, Superior Court of Pennsylvania, 600 Grant Building, Pittsburgh, Pennsylvania, 15219 and two copies of the Brief for Appellant were served on Christopher D. Carusone, Esquire, PA Office of Attorney General, Strawberry Square, Harrisburg, PA 17120 by U.S. First Class Mail.

Date: 9/13/10

David H. Acker, Esquire

Dennis A. Elisco, Esquire