

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: D.M. A Minor Child	: : : : : : : :	Case No. 2013-0579 On Appeal from the Hamilton County Court of Appeals First Appellate District C.A. Case No. C-1200784
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**BRIEF OF AMICI CURIAE, CHILDREN’S LAW CENTER, INC., ET. AL.,
IN SUPPORT OF APPELLANT, D.M.**

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Inst. for Judicial Admin. & Am. Bar Ass'n, <i>Juvenile Justice Standards, Standards Relating To Counsel For Private Parties</i> , available at: http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/JJ_Standards_Counsel_for_Private_Parties.authcheckdam.pdf	<i>passim</i>
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United States Department of Justice Civil Rights Division, Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County (December 17, 2012), available at: <http://www.justice.gov/iso/opa/resources/87720121218105948925157.pdf>.....30

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The **Children's Law Center, Inc. (CLC)** is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For over 20 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, access services, and are represented by counsel. For the past two years, CLC has worked on issues facing Ohio youth prosecuted in adult court and placed in adult facilities, including collecting data and issuing a report on this topic and conducting interviews of youth in the adult court and their families.

The **Office of the Ohio Public Defender** is a state agency, designed to represent criminal defendants, adults and juveniles, and to coordinate defense efforts throughout Ohio. The Ohio Public Defender, through its Juvenile Division, provides juveniles who have been committed to the Ohio Department of Youth Services their constitutional right of access to the courts. *See generally John L. v. Adams*, 969 F.2d 228 (6th Cir.1992). Like this Court, the Ohio Public Defender is interested in the effect of the law that is case will have on those parties who are, or may someday be involved in, similar litigation. The Ohio Public Defender has represented and currently represents other juveniles who are subject to transfer to adult court. Accordingly, the Ohio Public Defender has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law. To this end, the Ohio Public Defender supports the fair, just, and correct interpretation and application of Ohio's Juvenile Rules.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to

the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

National Legal Aid & Defender Association (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For 100 years, NLADA has pioneered access to justice and right to counsel at the national, state and local level through the creation of many public defender systems and development and refinement of nationally applicable standards for legal representation. NLADA serves as a collective voice for our country's public defense providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays particular attention to procedures and policies that affect the constitutional rights of the accused and the delivery of public defense services. NLADA has a specific interest in this case due to the critical importance of ensuring juveniles have early access to specialized defense counsel, that all defendants have access to full and fair discovery, and in ensuring that courts recognize the vital importance of considering the unique factors of youth at all stages of proceedings.

The **Ohio Justice & Policy Center** (OJPC) is a non-profit law office working to create fair, intelligent, and redemptive criminal justice systems. OJPC seeks to address root causes of crime, decrease recidivism, address unconstitutional conditions of confinement, and promote successful community reentry of formerly incarcerated individuals. OJPC performs this work through zealous client-centered advocacy, innovative policy reform, and cross-sector community education. This case implicates the fairness concerns at the heart of OJPC's mission, and it is of particular concern because of the serious consequences that result from a youth's bindover to adult court.

STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the Statement of the Case and Facts set forth in Appellant's merit brief.

ARGUMENT

PETITIONER'S PROPOSITION OF LAW: A JUVENILE IS ENTITLED TO FULL DISCOVERY PRIOR TO A PROBABLE CAUSE HEARING HELD PURSUANT TO R.C. 2152.12.

“The determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal proces[s] * * * is ‘critically important.’” *Kent v. United States*, 383 U.S. 541, 562, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). Because transfer of youth to the adult criminal system can result in harsh consequences, including “adult criminal sanctions and the label ‘felon,’ any hearing to transfer a youth to adult court “must measure up to the essentials of due process and fair treatment.” *In re D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894 ¶ 12, quoting *Kent* at 560 and citing *Pee v. United States*, 274 F.2d 556, 559 (D.C.Cir.1959). Due process protections are implicit in Juv.R. 24, which applies to all juvenile court cases, including transfer proceedings. In order to ensure that a child’s right to due process is adequately protected during transfer proceedings, the State must provide full discovery at the probable cause hearing.

I. Juvenile courts have exclusive jurisdiction over children charged with delinquent acts; thus, the Juvenile Rules apply in juvenile court proceedings unless and until a child is transferred to adult court.

Section 4(B), Article IV of the Ohio Constitution provides that “courts of common pleas and divisions thereof shall have original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.” “With regard to criminal cases, R.C. 2931.03 provides that the court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses in courts inferior to the court of common pleas.” *State v. Wilson*, 73 Ohio St.3d 40, 42, 652 N.E.2d 196

(1995). But the General Assembly has assigned certain matters to the exclusive original jurisdiction of specific subdivisions of the courts of common pleas, including juvenile courts.

“The juvenile court is established and its jurisdiction is defined by [R.C.] 2151 * * *.” *State ex rel. Schwartz, Judge v. Haines*, 172 Ohio St. 572, 573, 179 N.E.2d 46 (1962); Ohio Constitution, Article IV, Section 1. The Revised Code dictates that juvenile courts have exclusive jurisdiction over children who are alleged to be delinquent. R.C. 2151.23(A)(1). In delinquency proceedings, a “child” is a person who is under 18 years of age, except as otherwise provided” in R.C. 2152.02(C)(2)-(6). R.C. 2152.02(C)(1); *In re Andrew*, 119 Ohio St.3d 466, 2008-Ohio-4791, 895 N.E.2d 166, ¶ 4-17.

Juvenile Rule 30 provides a narrow exception to the general rule that juvenile courts have exclusive subject matter jurisdiction over cases involving “a child.” Ohio law authorizes juvenile courts to transfer a case involving an alleged delinquent child to criminal court in certain circumstances. R.C. 2152.10(A); R.C. 2152.12(A)-(B). There are two types of transfer in Ohio: mandatory and discretionary. R.C. 2152.10; R.C. 2152.12; *see generally State v. Hanning*, 89 Ohio St.3d 86, 728 N.E.2d 1059 (2000).

Mandatory transfer “removes discretion from judges in the transfer decision in certain situations.” *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894 at ¶ 10. Eligibility for mandatory transfer is determined by a youth’s age, offense type, and in certain cases, delinquency history. R.C. 2152.10; R.C. 2152.12. According to R.C. 2152.12(A)(1)(a), a child is eligible for mandatory transfer if a complaint was filed alleging that he is delinquent of aggravated murder, murder, attempted aggravated murder, and attempted murder if he was 16 or 17 at the time of the offense; or if he was 14 or 15 years of age and is eligible for transfer under R.C. 2152.10(A)(1)(b); and there is probable cause to believe he committed the act charged.

Under R.C. 2152.10(A)(1), (2), and 2152.12(A)(1)(b), a child is eligible for mandatory transfer if a complaint is filed alleging that he is delinquent of a category two offense, excluding kidnapping, committed when he was 16 or 17 years of age; there is probable cause to believe he committed the offense; and he either was previously adjudicated delinquent of a category one or two offense and was committed to the Ohio Department of Youth Services for that offense; or was alleged to have a firearm on his person or under his control at the time of the offense, and displayed, brandished, indicated possession, or used the firearm to facilitate the offense.

Discretionary transfers are governed by R.C. 2152.10(B) and 2152.12(B), and allow juvenile court judges to “transfer or bind over to adult court certain juveniles who do not appear to be amenable to care or rehabilitation within the juvenile system.” *D.W.* at ¶ 10. After the probable cause hearing, the court must conduct a full investigation, which includes a mental evaluation and a second hearing—the amenability hearing—to determine whether the youth should remain within the juvenile court’s jurisdiction. Juv.R. 30(C); R.C. 2152.12(B)(3); (C).

In the case below, D.M. was subject to mandatory transfer. *Op.* at ¶ 2. Thus, he was only entitled to a probable cause hearing prior to transfer. R.C. 2152.12(A). Unlike youth subject to discretionary transfer, once the Hamilton County Juvenile Court found that probable cause existed to believe that D.M. committed the offense charged, his prosecution as an adult would immediately follow. R.C. 2152.12(A). With only one opportunity to challenge the State’s evidence against him, his due process protections were of utmost importance. But, rather than protect D.M.’s due process rights, the First District disregarded them.

The First District found that “the outcome of a bindover proceeding necessarily determines whether Juv.R. 24 or Crim.R. 16 will govern discovery in a given case.” *Op.* at ¶ 9. But this finding contradicts clearly established Ohio law—that juvenile courts have exclusive

jurisdiction over a youth's case unless and until the court relinquishes its jurisdiction to the adult criminal court through a valid transfer proceeding. Juv.R. 30; R.C. 2152.12(A)-(C). By presuming that neither Juv.R. 24 nor Crim.R. 16 apply to youth during transfer proceedings, the First District has created a jurisdictional impossibility. For if neither set of rules applies, then a child is left without any established rules to protect their due process rights during transfer, including the right to discovery.

II. Juveniles are entitled to full due process protections.

“Under our Constitution, the condition of being a boy does not justify a kangaroo court.” *In re Gault*, 387 U.S. 1, 28, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Forty-five years ago, the United States Supreme Court held that children charged with delinquency have a fundamental constitutional right to notice of the charges, right to counsel, right to confront and cross-examine accusers, right against self-incrimination, and the right to appeal a decision of the juvenile delinquency court under the Due Process clause of the Fourteenth Amendment. *Id.* at 10. The Court stated:

There is no material difference in this respect between adult and juvenile proceedings * * *
*. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him.

(Citations omitted). *Id.* at 28-29.

Although *Gault* did not mandate the wholesale incorporation of adult constitutional criminal procedure into juvenile delinquency proceedings, the Court cautioned that the juvenile court process must remain procedurally fair:

[W]e do not mean * * * to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

Id. at 30, citing *Kent*, 383 U.S. at 562, 86 S.Ct. 1045, 16 L.Ed.2d 84. Further, the Court held that fundamental fairness requires that, in juvenile delinquency proceedings, the State must prove its case beyond a reasonable doubt, due to the liberty interests at stake. *In re Winship*, 397 U.S. 358, 365-366, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

This Court has held, “Juvenile court proceedings are civil, rather than criminal, in nature.” *In re Anderson*, 92 Ohio St.3d 63, 65, 748 N.E.2d 67 (2001). But, juvenile proceedings have not been regarded as devoid of criminal aspects merely because they have been labeled ‘civil.’ *Kent* at 554. Today, delinquency laws feature inherently criminal aspects, and “the state’s goals in prosecuting a criminal action and in adjudicating a juvenile delinquency case are the same: ‘to vindicate a vital interest in the enforcement of *criminal* laws.’” (Emphasis sic). *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 76, quoting *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 26, citing *Breed v. Jones*, 421 U.S. 519, 531, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

This notion is reiterated by the American Bar Association, which states “the fact that the purpose of [juvenile court] commitment is rehabilitative and not punitive [does not] change its nature * * *. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken.” *See* Inst. for Judicial Admin. & Am. Bar Ass’n, *Juvenile Justice Standards, Standards Relating To Counsel For Private Parties*, 6 (hereinafter “IJA-ABA Juvenile Justice Standards Relating to Counsel”) (quoting *Breed* at n. 12, which rejected the rigid categorization of juvenile proceedings as civil, and extended the protection offered by the Double Jeopardy Clause, which had traditionally been applied only to criminal proceedings, to juvenile proceedings).

Available at:
<http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocument>

s/JJ_Standards_Counsel_for_Private_Parties.authcheckdam.pdf (accessed September 2, 2013).¹

The modern version of the juvenile court imposes penalties that have serious implications on a child's personal liberty. *C.S.* at ¶ 66. For these reasons, this Court has found that "numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings." *Walls* at ¶ 26.

Both this Court and the Supreme Court of the United States have held that due process protections must be afforded to youth who are subject to transfer proceedings. Just one year prior to *Gault*, the Supreme Court established that juveniles have a constitutional right to due process, including the right to counsel, with respect to transfers to adult court. *See generally Kent*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84. In *Kent*, the Court held that while the juvenile court "should have considerable latitude" in determining whether a child should be certified to the adult court, "this latitude is not complete." *Id.* at 553. "At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'" *Id.*

A. Children in delinquency proceedings have the same right to discovery as adults, as established under the Fifth and Fourteenth Amendments of the United States Constitution, Supreme Court jurisprudence and Ohio law.

Fifty years ago, the Supreme Court held, "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Non-disclosure of exculpatory evidence is a violation of a defendant's right to due process under the

¹ All other references to this document are also available at this web-posted pdf.

Fifth and Fourteenth Amendments to the United States Constitution. *Id.* at 86. This Court has applied *Brady* to mandatory bindover procedures in juvenile court. *State v. Iacona*, 93 Ohio St.3d 83, 87, 752 N.E.2d 937 (2001), paragraph one of the syllabus.

The Supreme Court has defined what materials and information must be disclosed under *Brady* to meet due process requirements, including evidence that may be used to impeach a State witness or otherwise cast doubt on the government's case. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (finding that impeachment evidence falls within *Brady* because it is exculpatory). More recently, the Court found that due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, or to bolster the defense case against prosecutorial attacks. *Kyles v. Whitley*, 514 U.S. 419, 445-46, 452, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Indeed, in *Kyles*, the Court viewed the right to discovery of this information so important that a defendant need not prove that a different result would have occurred if the evidence had been disclosed, but rather that the government's actions in non-disclosure undermined the fairness of the hearing. *Id.* at 424. The provision of such discovery material provides for procedural regularity and applies regardless of how a state has chosen to structure its discovery process. And since the Court's decision in *Gault*, these discovery requirements have applied equally to youth in juvenile court as to adults in criminal court. *See Gault*, 387 U.S. at 36, 87 S.Ct. 1428, 18 L.Ed. 527 1967); *see also Kent*, 383 U.S. at 553, 86 S.Ct. 1045, 16 L.Ed.2d 84 (finding that a child facing certification to the adult court is entitled to procedural regularity to satisfy the basic requirements of due process and fairness). Unfortunately, "nondisclosure of *Brady* material is still a perennial problem." *United States v. Tavera*, 719 F.3d 705, 708 (6th Cir.2013).

B. Requiring the State to provide full discovery during transfer proceedings protects a child's right to due process and a fair trial.

The Supreme Court of the United States, this Court, and the Ohio discovery rules provide relevant guidance on why discovery is critically important—all of which are particularly relevant in this case. In order for counsel to provide constitutionally effective assistance, counsel must be able to conduct pretrial investigation and information gathering. *See Coleman v. Alabama*, 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). Similarly, the discovery function of a probable cause hearing is a legitimate defense interest. *Id.* And most importantly, “the goals of adequate disclosure of all relevant information and the achieving of just results in juvenile proceedings can best be obtained by counsel assuming in the juvenile court the functions of counseling and advocacy in the same manner as in other courts of civil and criminal jurisdiction.” IJA-ABA Juvenile Justice Standards Relating to Counsel, *Introduction* p.7.

In *Kent*, the Supreme Court specifically addressed a child's right to counsel in the context of waiver, stating that “[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a “critically important” decision is tantamount to denial of counsel.” *Kent*, 383 U.S. at 561-562, 86 S.Ct. 1045, 16 L.Ed.2d 84. The right to the effective assistance of counsel, therefore, would be of little avail if the State is permitted to circumvent counsel's effectiveness by preventing counsel from inspecting routine documents, such as police reports, in a matter as serious as the one at bar.

Counsel's ability to provide effective representation and present a meaningful defense rests on whether counsel is aware of all the facts and circumstances surrounding the allegations against the client, including whatever information the State possesses and used to draft the

complaint against the child. Thus, counsel's obligation specifically includes demanding discovery. See National Juvenile Defender Center, National Juvenile Defense Standards (2012) (hereinafter "Nat'l Juv. Def. Standards"), 3.6, 4.5; IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 7.3*; Juvenile Delinquency Guidelines, *Guidelines 30-31*. Specifically, the Juvenile Justice Standards provide:

Discovery practice is no less important in juvenile court matters. Petitions * * * are often couched in vague and conclusory language insufficient to inform respondents of the charges they must face * * *. Indeed, reliance on discovery is often of special importance in juvenile court representation since other avenues for learning about the case such as the preliminary hearing or grand jury presentation typically are not available.

IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 7.3(a)* cmt. "Failure by defense counsel to undertake necessary discovery may result in denial of effective representation and thereby denial of the Sixth Amendment right to counsel, particularly where an available defense is neglected in consequence of such a failure." *Id*; see also Part III, *infra*.

Obtaining adequate information on an accusation can always pose a challenge for defense counsel, especially given the current realities of the criminal justice system and resources available to the defense bar. This is especially true at the probable cause stage of the proceedings, where the fact of whether an offense even occurred has not been established. Aside from the problems this poses for innocent defendants, "the problem [of acquiring adequate information for investigation] exists well outside of the innocence context." Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 Fordham Urb. L.J. 1003 (2003). The assumption that defense counsel can gather all information necessary to present a defense from the client ignores the fact that many defendants suffer from impediments that often interfere with their ability to be an "adequate, sole source for investigative leads." *Id*.

A lack of discovery can also impede the court's decision-making ability, which requires independent review of the facts and circumstances before making a decision. Although the state statute addressed in *Kent* called for a "full investigation" before a youth could be transferred to adult court, the Court stated that "[m]eaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver, including of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons." *Kent*, 383 U.S. at 561, 86 S.Ct. 1045, 16 L.Ed.2d 84. In the case at bar, the State asked the juvenile court to make a decision regarding probable cause without the court making an independent judgment as to whether the police reports supported the motion.

In the criminal justice process, discovery has several distinct purposes. As this Court has found, "[t]he purpose of the discovery rules is to prevent surprise and the secreting of evidence favorable to one party." *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987). "Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." *Taylor v. Illinois*, 484 U.S. 400, 411-412, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). In short, the overall purpose of discovery "is to produce a fair trial." *Papadelis* at 3.

In the criminal context, the discovery rules also aid in removing "the element of gamesmanship from a trial." *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, ¶ 18, citing *State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912 (1978). Crim.R. 16 was recently amended to increase the protections afforded to a criminal defendant during discovery. The rule now provides:

This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice

system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

The purpose of the recent revisions to Crim.R. 16(A) was “to provide for a just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice.” *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 29. The current rule “balances a defendant’s constitutional rights with the community’s compelling interest in a thorough, effective, and just prosecution of criminal acts.” *Id.*

Thus, while juvenile discovery is governed by Juv.R. 24, instead of Crim.R. 16, the underlying goal in its application is the same. *In re A.C.*, 6th Dist. No. L-10-1025, 2010-Ohio-4933, ¶ 110. In fact, Juv.R. 24 was modeled after the former Crim.R. 16(A). “Juv.R. 1 mandates that the Juvenile Rules be interpreted and construed in a manner that ensures a fair hearing, enforces the constitutional rights of the parties, and secures a simple and uniform procedure.” *In re D.S.*, Slip Opinion No. 2013-Ohio-3687, ¶ 14 (O’Connor, C.J., dissenting), citing *In re L.A.B.*, 121 Ohio St.3d 112, 2009-Ohio-354, 902 N.E.2d 471, ¶ 56.

The First District’s determination that youth are not entitled to full discovery at probable cause hearings denies those juveniles the same due process protections that apply to youth whose cases are handled in the juvenile court; it also denies them the protections that are afforded adults in criminal court.

Further, and even more egregious, is the First District’s holding that “prior to a probable-cause bindover hearing, the state must provide to a juvenile upon request only (1) any *Brady* materials in its possession and (2) the evidence that the state intends to use at the probable cause

hearing.” *Op.* at ¶ 9. The court’s determination not only offends the U.S. and Ohio Constitutions, but it also undercuts this Court’s holding in *Iacona* in which this Court found:

A prosecutor is under a duty imposed by the Due Process Clauses of the Ohio Constitution and the United States Constitution and Juv.R. 24 to disclose to a juvenile respondent all evidence in the state’s possession favorable to the juvenile respondent and material either to guilt or punishment that is known at the time of a mandatory bindover hearing * * * and that may become known to the prosecuting attorney after the bindover.

Iacona, State v. Iacona, 93 Ohio St.3d 83, 91, 752 N.E.2d 937 (2001).

In *Iacona*, this Court announced a broad discovery requirement, based on *Brady* and the Juvenile Rules, finding that “a juvenile’s right to a hearing includes the right of access to any social records that would be considered by the court in determining waiver of jurisdiction.” *Id.* This Court further determined that “basic principles of fairness and due process similarly require that counsel for a juvenile be provided access to information possessed by the state that might tend to disprove probable cause at the bindover stage.” *Id.* Such information “is material to punishment, as contemplated by *Brady*.” *Id.* But, the First District below expressly limited the State’s obligation to only turning over material that it intends to use at the probable cause hearing. *Op.* at ¶ 9. This does not comport with fundamental fairness.

The First District correctly observed that “[a] probable-cause hearing is not an adjudication, jeopardy does not attach, and a juvenile facing bindover does not present a defense in the traditional sense of the word.” *Op.* at ¶ 9, citing *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 44. But, the appellate court failed to acknowledge *Iacona*’s requirement, that prior to transfer, the State must present “credible evidence of every element of an offense to support a finding that probable cause exists to believe that the juvenile committed the offense.” *A.J.S.* at ¶ 42, citing *Iacona* at 93. And, in doing so, the State “must produce evidence that raises more than a mere suspicion of guilt.” *Id.* Although proof beyond a

reasonable doubt is not required at the bindover stage, the court must be able to evaluate the “quality of the evidence presented by the State in support of probable cause as well as any evidence presented by the respondent that attacks probable cause.” *A.J.S.* at ¶ 43. Thus, while the standard of proof varies, the nature of the evidence presented at trial and at the bindover stage is the same.

“It is imperative that [this Court] impose every reasonable safeguard that ensures a fair trial” for youth in juvenile court. *D.S.*, Slip Opinion, 2013-Ohio-3687, ¶ 16 (O’Connor, C.J., dissenting). But the First District’s decision below fails to do that. Instead, it places juveniles at a distinct disadvantage and violates their due process rights. In the case of mandatory transfer, the probable cause hearing is the only opportunity the youth will have to challenge the State’s allegation prior to having his case transferred to criminal court. R.C. 2152.12(A). The State must “disclose to respondent’s counsel all evidence, known or that may become known to the prosecuting attorney, favorable to the respondent and material either to guilt or punishment.” Juv.R. 24(A). Although guilt is not decided nor punishment imposed until the conclusion of the proceedings in adult court, the decision to transfer starts the process of imposing lengthier and more severe punishments, and potentially lifelong collateral consequences. *A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, at ¶ 43. Given the requirements of Juv.R. 24 and the overriding purpose of discovery, it is not fundamentally fair for the State to withhold any relevant information at the probable cause stage of a bindover proceeding.

Police reports contain information that other forms of discovery (i.e., witness statements), do not. Specifically, law enforcement reports contain information pertaining to the defendant, potential statements, circumstances surrounding his arrest, his demeanor, and other characteristics. Such information is of much greater significance in juvenile transfer proceedings

than in a traditional criminal case because the end result of the proceeding will result in children being subject to adult treatment and adult sanctions.

The Supreme Court of the United States has held that children are constitutionally different from adults for purposes of sentencing. *See generally Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 245, 183 L.Ed.2d 407 (2012) (finding mandatory life without the possibility of parole sentences unconstitutional for any person under 18); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (finding the death penalty unconstitutional for all persons under 18); and *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (holding that sentencing youth to life without the possibility of parole for non-homicide offenses constitutes cruel and unusual punishment under the Eighth Amendment). Given their “diminished capacity” and greater prospects for reform, juveniles are “less deserving of the most severe punishments.” *Graham*, 560 U.S. 48, 130 S.Ct. at 2026, 176 L.Ed.2d 825, citing *Roper* at , 543 U.S. at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1. Although the death penalty and mandatory life without parole sentences may not be imposed on youth who are bound over to adult court, the remaining punishments that accompany transfer to adult court are not insignificant.

If the First District’s decision stands, the transfer process would be increasingly susceptible for use as a leveraging tool for plea negotiation. While *Brady*’s requirements and Ohio’s corresponding constitutional requirements apply regardless of whether the prosecutor acts in good or bad faith, it is worth noting that police reports are documents that the defense would surely obtain in routine course if this case were permitted to proceed to trial. Allowing the State to plainly refuse a court order to turn over the police report achieves no end for which justice would demand, but rather opens up the very real possibility that the State can seek to push an

otherwise weak case through the transfer process as a mere formality, then use the leveraging power of criminal court's extremely harsher sentences to negotiate from a very different perch.

III. National standards, model rules, and guidelines direct that the court, prosecutor, and defense counsel are responsible for ensuring that a youths' right to due process, including the right to counsel and discovery is protected throughout the juvenile court process.

A. National standards, model rules, and guidelines affirm the juvenile's right to discovery at all stages of a juvenile proceeding, including the probable cause hearing preceding transfer to adult court.

National juvenile defense practice standards, model rules, and best practice guidelines recognize the necessity of protections for youth in delinquency cases and illustrate that juveniles are entitled to discovery at all stages of a juvenile court proceeding, as they would be entitled in adult proceedings. These contemporary standards require that defense counsel provide their clients with zealous advocacy, which includes the duty to investigate and seek full discovery from the State in order to protect the youth's due process rights and ensure fundamental fairness in proceedings. Further, these standards and guidelines provide for no deviation in or exceptions to the type of discovery that a juvenile is entitled to at a probable cause hearing when compared to any other juvenile court proceeding.

In 1980, the American Bar Association, in collaboration with the Institute of Judicial Administration produced twenty-three volumes of Juvenile Justice Standards. The volume on the role of counsel in delinquency proceedings contains recommendations to aid attorneys in providing quality representation for children. *See generally* IJA-ABA Juvenile Standards Relating to Counsel. Additionally, although the volume on role of counsel includes a part on transfer proceedings, there is also a volume specifically dedicated to transfer. *Id.*

More recently, in 2012, the National Juvenile Defender Center, which was created in 1999 under the American Bar Association and became an independent organization in 2005,

promulgated standards to provide guidance, support, and direction to juvenile defense attorneys and other juvenile court stakeholders. See National Juvenile Defender Center, National Juvenile Defense Standards (2012) (hereinafter Nat'l Juv. Def. Standards) available at <http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf> (accessed September 2, 2013).² Part VIII of these standards focuses on the role of juvenile defense counsel when the client faces the risk of adult prosecution. Nat'l Juv. Def. Standards, *Part VIII Role of Juvenile Defense Counsel When Client Faces Risk of Adult Prosecution*.

In 2005, the National Council of Juvenile and Family Court Judges, through the support of the Office of Juvenile Justice and Delinquency Prevention, published *The Juvenile Delinquency Guidelines*, a benchbook of best practices developed by a committee of judges, prosecutors, defense attorneys, juvenile justice practitioners, and other professionals representing key stakeholders in the juvenile justice system. See National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005) (hereinafter "Juvenile Delinquency Guidelines") available at <http://www.ncjfcj.org/resource-library/publications/juvenile-delinquency-guidelines-improving-court-practice-juvenile> (accessed September 2, 2013).³ These guidelines set forth the essential elements of effective practice in juvenile delinquency cases and recommended best practices throughout the juvenile delinquency court process—from determining whether a case should enter the system, to obligations surrounding discovery, to whether the youth should remain under juvenile court jurisdiction or be transferred to criminal court.

The standards set forth in the juvenile context are mirrored in the context of adult court, meaning that regardless of the court—adult or juvenile—discovery has been universally

² All other references to this document are also available at this web-posted pdf.

³ All other references to this document are available at this web-posted pdf.

recognized as an essential component of the juvenile and criminal justice process. *See* National Legal Aid & Defender Association Performance Guidelines for Criminal Defense Representation (hereinafter “NLADA Guidelines”), the American Bar Association’s Model Rules of Professional Conduct (see Model Rules, *infra.*), and the National District Attorney Association Standards (hereinafter “NDAA Standards”).

Taken together, these Standards, Model Rules and Guidelines support that juveniles are entitled to discovery at all stages of a juvenile court proceeding, as they would be entitled to discovery in adult proceedings, including at the probable cause hearing for mandatory or discretionary transfer offenses.

B. The standards establish that a key defense counsel function is to protect the juvenile’s rights, including their right to discovery, at all stages of the juvenile court proceeding.

Youth need attorneys to help them navigate the complexities of the justice system. “Counsel must provide competent, diligent, and zealous advocacy to protect the client’s procedural and substantive rights.” Nat’l Juv. Def. Standards *Section 1.1*; *see also* IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 1.1, 3.1, 4.1*; and Model Rules of Professional Conduct R. 1.1, 1.3, 1.3 cmt. (2010) (hereinafter “Model Rules”) available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (accessed September 2, 2013).⁴ From the onset of a juvenile’s case, the juvenile defender’s obligation is to preserve the client’s rights. Nat’l Juv. Def. Standards, *Standard 3.6*; and IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 4.1*; and Juvenile Delinquency Guidelines, *Guidelines 30-31*.

⁴ All other references to this document are available at this web-posted pdf.

Discovery to which the defense is constitutionally entitled to “extends to evidence known to police investigators or other government actors, even if the prosecutor is not personally aware of the evidence.” Nat’l Juv. Def. Standards, *Standard 4.5* cmt. *see generally Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S.Ct. 1936, 114 L.Ed.2d 286 (1999) citing *Kyles*, 514 U.S. at 437, 115 S.Ct 1555, 131 L.Ed.2d 490. *See also* IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 4.3 (a)*. In order to preserve a juvenile client’s due process rights, defense counsel “must seek to examine all police documentation and records related to the case.” Nat’l Juv. Def. Standards, *Standard 4.6*; IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 4.3(a)*. Counsel should be familiar with all police forms and documentation police prepare in the investigation of a case, and the circumstances that require each to be filled out. Nat’l Juv. Def. Standards, *Standard 4.6(c)*. Law enforcement records and reports often provide the foundation for the State’s case as they contain witness statements, impeachment material and information necessary to plan for an effective cross-examination at a hearing or trial. Nat’l Juv. Def. Standards, *Standard 4.6* cmt. Discovery from law enforcement that juvenile defense counsel may seek to obtain, includes but is not limited to, “the client’s incident and arrest report; supplemental reports; booking information; arrest photographs; taped recordings of 911 calls; witness reports; written confessions; firearm, drug, and property reports; photographs and diagrams; law enforcement regulations and policy statements; use of force reports; officer disciplinary records; and search and arrest warrants.” Nat’l Juv. Def. Standards, *Standard 4.6* cmt. *See* IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 7.3(a)* cmt.

The State’s failure to comply with a discovery request for law enforcement records and reports interferes with the juvenile client’s due process right to investigate the case. Nat’l Juv.

Def. Standards, *Standard 4.6* cmt. Counsel should file motions challenging interference to compel production, and in the case of adverse rulings, file an appeal to preserve the client's due process rights. Nat'l Juv. Def. Standards, *Standard 4.6* cmt. "Where the circumstances warrant, counsel should promptly make any motions material to the protection and vindication of the client's rights, such as motions to dismiss the petition, and/or] to suppress evidence * * *." IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 7.3(b)*. See also Juvenile Delinquency Guidelines, *Guidelines 30-31*.

The National Legal Aid & Defender Association (hereinafter "NLADA") Guidelines (hereinafter "NLADA Guidelines") and a resolution passed in 2011 by the American Bar Association reiterate that the juvenile standards outlined above apply in the adult criminal context. The ABA resolution confirms that the ABA encourages the adoption of disclosure rules that "require[s] the prosecution to seek from its agents and to timely disclose to the defense before the commencement of trial all information known to the prosecution that tends to negate the guilt of the accused, mitigate the offense charged or sentence, or impeach the prosecution's witnesses or evidence, except when relieved of this responsibility by a protective order." American Bar Association, *Resolution 105 D* (Adopted, August, 2011) available at http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/policies_guidelines.html (accessed September 3, 2013).

The NLADA Guidelines establish that defense counsel has three specific duties. First, the attorney must conduct an independent investigation as promptly as possible regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. NLADA Guidelines *Guideline 4.1(a)* available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines (accessed

September 3, 2013). Second, counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, including through formal and informal discovery, unless a sound tactical reason exists for not doing so. *Id.* at *Guideline 4.1 (a)(4)*. Finally, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. *Id.* at *Guideline 4.1. (a)(5)*.

Therefore, it is clear that both juvenile and adult standards require counsel to investigate allegations against his client at the onset of the case and to gather material information through discovery and other means—including police reports—in the course of zealous representation of the client. These standards apply consistently throughout all juvenile and adult court proceedings without exception, including the probable cause hearing required before a youth may be transferred to adult court.

C. Prosecutors are constitutionally and ethically required to provide discovery in both juvenile and adult court, which is further supported in national standards and guidelines.

A prosecutor has both a legal obligation as well as a specific ethical duty as a member of the bar to disclose evidence to opposing counsel. The prosecution has a responsibility to turn over discovery materials as requested by defense counsel. Juvenile Delinquency Guidelines, *Guideline 29*. “Because a breakdown in the exchange of discovery materials can lead to adjudication by ambush and a disposition that fails to consider important information, the prosecutor should turn over all discovery materials as defined by court rule, or as properly requested by counsel for youth as soon as possible.” *Id.* The American Bar Association Standards of Professional Conduct also state that, the “prosecutor in a criminal case shall * * * make timely disclosure to the defense of all evidence or information known to the prosecutor that

tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal * * *.” Model Rules, *Rule 3.8*.

In recent years, the role of prosecutor as it relates to discovery has been the subject of increased national attention, with significant support for full and open discovery procedures. *See* Justice Denied, Recommendation 16—“Prosecutors should adopt open file discovery policies in order to promote the fair administration of criminal and juvenile justice.” Letter to the Attorney General of United States, Eric Holder, From the American Council of Chief Defenders section of NLADA, dated January 20, 2012). Indeed, as the Attorney General of the United States, Eric Holder, publicly directed Assistant US Attorneys, “[y]our job * * * is not to convict people. Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored.” *See* Nedra Pickler, *US Attorneys Told to Expect Scrutiny*, Associated Press, April 9, 2009. The Department of Justice has also supported and advised the early and wide-ranging discovery. “Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor’s good faith determination of the scope of appropriate discovery is in error.” David W. Ogden, Memorandum for Department Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (January 4, 2010).

Similarly, national standards developed by prosecutors themselves calls for similar levels of disclosure. The NDAA Standards state that a “prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery,

namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process. To further these objectives, the prosecutor should pursue the discovery of material information, and fully and promptly comply with lawful discovery requests from defense counsel.” NDAA Standard 4-9.1. Additionally, the commentary to the Standards provides that “[w]hile it is well established that any doubt about whether something is subject to disclosure should be resolved in favor of the defendant, and that disclosure of material exculpatory and impeachment evidence is required, further disclosures may be required by statute, case law, and rules of ethical conduct in some jurisdictions.” Commentary to Rule 4. available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> (accessed August 30, 2013).

D. The constitutional and ethical discovery obligations of both prosecutors and defense counsel apply to all proceedings in juvenile court, including probable cause hearings.

Undoubtedly, a proceeding to transfer a juvenile from the jurisdiction of the juvenile court to an adult criminal court is a critical stage in both juvenile and criminal justice processes and requires competent representation by counsel to ensure protection of the juvenile’s constitutional due process rights. *See* IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 8.1*. As with adult clients at a probable cause hearing, counsel for the juvenile protects the client’s due process rights by requiring the State to meet its burden of showing that the act charged was committed and presenting evidence to establish that the juvenile committed the alleged offense. Nat’l Juv. Def. Standards, *Standard 3.7*. *See also* IJA-ABA Juvenile Justice Standards Relating to Transfer Between Courts, *Standards 2.3(E), 2.3 (E)-(H)* cmt., (1980) (hereinafter “IJA-ABA Juvenile Justice Standards Relating to Transfer”).

Probable cause hearings in juvenile court are typically held in two primary circumstances. First, when a juvenile is detained without a warrant issued with a judicial finding of probable cause, the state must justify that detention within a set time frame by showing that there is probable cause that a crime was committed by the juvenile. Second, where state law, such as in Ohio, provides for mandatory or discretionary transfer to adult court for a youth charged with specific bindover offenses, a probable cause hearing is held. R.C. 2152.12(A). If the prosecutor charges the youth with a mandatory bindover offense, the youth is only entitled to one hearing—a probable cause hearing in juvenile court. R.C. 2152.12(A). If, upon hearing, the juvenile court finds probable cause that the youth committed the offense charged, the youth is automatically bound over to adult court. R.C. 2152.12; Juv.R. 30. For a juvenile charged with a mandatory bindover offense, the probable cause hearing is the only time when the prosecutor’s decision to charge the youth with an offense that transfers jurisdiction to adult court, can be challenged in juvenile court. As such, full discovery compliance by the prosecutor is critical to give the youth full opportunity to disprove probable cause and demonstrate that the youth’s case should remain in juvenile court.

In either of these circumstances, the State must show there is probable cause that a crime was committed by the juvenile charged. Nat’l Juv. Def. Standards, *Standards 3.7*, 3.7 cmt. See also *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (finding the Fourth Amendment requires that, in order for a State to detain someone arrested without a warrant, a neutral judicial officer must make a “prompt” finding of probable cause); *Alfredo A. v. Superior Court*, 6 Cal. 4th 1212, 26 Cal. Rptr. 2d 623, 865 P.2d 56, 59, 68-69 (1994), (“It is beyond dispute that *Gerstein’s* constitutional requirements of prompt judicial determination of probable cause * * * applies to juveniles as well * * *.”). See United States Department of Justice Civil

Rights Division, Investigation of Shelby County Juvenile Court (April 26, 2012) (hereinafter DOJ Shelby County Report).⁵ available at http://www.justice.gov/crt/about/spl/documents/shelbycountyjuv_findingsrpt_4-26-12.pdf (accessed September 2, 2013). Additionally, standards reiterate the government's obligation and burden to establish probable cause that the crime was committed by the juvenile and "the defense has an obligation to hold the prosecution to that burden." Nat'l. Juv. Def. Standards, *Standard 8.4* cmt.

Prior to the start of the probable cause hearing, the juvenile court should already have "the petition, affidavit, waiver motion, and any other filed motions and reports concerning the alleged law violation." Juvenile Delinquency Guidelines, *Guideline 106*. In their *Juvenile Delinquency Guidelines*, the National Council of Juvenile and Family Court Judges (NCJFCJ), make clear that the juvenile is entitled to full discovery at all stages of a juvenile proceeding, and that issues surrounding discovery should be resolved well in advance of a hearing to determine if there is probable cause to transfer a youth to criminal court. Juvenile Delinquency Guidelines, *Guideline 102*. NCJFCJ states that because only the most serious cases are considered for transfer to criminal court, it is probable that the juvenile is already in detention when the prosecutor moves to transfer the youth's case to criminal court. *Id.*, at *Guideline 102*. The *Guidelines* presume that all discovery and pre-trial issues will be resolved at the initial or detention hearing and "discovery delays and disputes, which are a common cause for unnecessary continuances and slow resolution of juvenile delinquency court cases, have been avoided." *Id.*

⁵ All other references to this document are available at this website.

Additionally, for transfer proceedings, many standards call specifically for defense counsel to “promptly investigate all circumstances of the case bearing on the appropriateness of transfer and should seek disclosure of any reports or other evidence that will be submitted to or may be considered by the court in the course of transfer proceedings.” IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 8.2(b)*. Counsel for the juvenile has a legitimate interest in any available records and reports, including police reports, surrounding the alleged offense and should seek remedies if the disclosure is withheld. *See Kent*, 383 U.S. 541, 562-63, 86 S.Ct. 1045, 16 L.Ed.2d 84. *See also* IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 8.2(b)* cmt.

The importance of adhering strictly to due process in juvenile proceedings recently was made clear in a Department of Justice investigation in Tennessee. In April 2012, after a three-year federal investigation into, the Department of Justice Civil Rights Division released a report with findings that the Memphis and Shelby County Juvenile Courts of Tennessee failed to provide constitutionally required due process and equal protection to children appearing for delinquency proceedings. *See generally* DOJ Shelby County Report. In addition to finding that the court discriminated against African American youth facing transfer to adult court, the report also found that systemic discovery deficiencies were circumventing juveniles’ due process rights. *Id.* at 49. The report stressed the importance of discovery in a juvenile proceeding stating “[d]iscovery is a crucial part of a case’s investigative stage as it can inform and/or direct the defense strategy.” *Id.* Additionally, the report emphasized the need for effective assistance of counsel, whereby counsel for the youth through adversarial testing must employ “sufficiently rigorous challenging of the state’s evidence to ensure due process at the probable cause hearing and trial.” *Id.* at 47.

The nationwide implications of this report were made clear in December 2012, when the Justice Department and the county signed an extensive agreement to overhaul the county system and resolve the findings of serious and systemic failures that violate children's due process and equal protection rights. See United States Department of Justice Civil Rights Division, Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County (December 17, 2012) (hereinafter "DOJ Shelby County Agreement") available at <http://www.justice.gov/iso/opa/resources/87720121218105948925157.pdf> (accessed September 3, 2013).

Assistant Attorney General for the Civil Rights Division, Thomas E. Perez, stated "[t]his first of its kind agreement reflects a powerful commitment to upholding constitutional rights of all children appearing before the Juvenile Court. We hope that juvenile courts around the country review this agreement to ensure that they are protecting the constitutional rights of children." Press Release "Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee" (December 18, 2012) available at <http://www.justice.gov/opa/pr/2012/December/12-crt-1511.html> (accessed September 2, 2013).

In addition to providing guidance on how transfer proceedings should take place, various standards also address the questions of whether and under what circumstances transfer of youth to adult court should occur—if at all. Each year an estimated nearly 250,000 youth under age 18 end up in the adult criminal justice system. United States Department of Justice National Institute of Corrections, *You're an Adult Now: Youth in Adult Criminal Justice Systems*, p. 2 (2011) available at <http://static.nicic.gov/Library/025555.pdf> (accessed September 3, 2013). However, research has consistently shown that transferring youth to adult court can produce long-term harms both to youth and to their communities, which each of the standards reflect.

The NCJFCJ Guidelines state that “[a] review of 50 studies of juvenile transfers to the criminal justice system reveals that recidivism rates are higher among juveniles transferred to criminal court than among those retained in the juvenile justice system, and that transferred juveniles are more likely to reoffend, to reoffend more quickly, and to reoffend at a higher rate.” Juvenile Delinquency Guidelines, *Guideline 102* (citing J.C.Howell, *Preventing & Reducing Juvenile Delinquency: A Comprehensive Framework* (2003)). Similarly, the NJDC Standards provide that “[t]ransfer to adult court presents serious, lifelong consequences that almost always outweigh any potential benefits” and “is antithetical to the rehabilitative aspects of the juvenile court.” Nat’l Juv. Def. Standards, *Standard 8.4* cmt. *See also* Juvenile Delinquency Guidelines. *Guideline 102* (The juvenile court should maintain jurisdiction up until a youth’s 18th birthday - transfer of juvenile to adult court should be rare.).

Given the detrimental implications of transfer to adult court, the standards recognize that “[w]hile counsel has an obligation to thoroughly investigate every case, comprehensive and early investigation is critical in cases when adult prosecution is a possibility.” Nat’l Juv. Def. Standards, *Standard 8.3* cmt.; *see also* IJA-ABA Juvenile Justice Standards Relating to Counsel, *Standard 8.2(a)* (where transfer is likely, counsel should seek to discover at the earliest opportunity). Finally, the IJA-ABA Standards go further, stating that “[s]ound social policies require a presumption that all persons under the juvenile court’s maximum age jurisdiction should remain subject to the juvenile court’s jurisdiction. Only extraordinary juveniles in extraordinary factual situations should be transferred to the criminal court and then only in accordance with procedures designed to accord maximum procedural protections to the juvenile and in compliance with precise and exacting behavioral standards.” IJA-ABA Juvenile Justice Standards Relating to Transfer, *Introduction*.

The First District's decision contravenes these national standards, model rules, and guidelines, making it impossible for youth to fully access their constitutional right to counsel, holding prosecutors to a constitutional and ethical floor instead of a ceiling, and creating a vacuum of due process at a point in the juvenile court system that has been widely acknowledged as one of the most critical.

CONCLUSION

The decision to transfer a youth to adult court is one of grave magnitude and great care must be taken to safeguard the youth's due process rights and ensure fundamental fairness. The First District's decision violates a youth's right to discovery, due process, and national standards, model rules, and guidelines. The consequences of transfer are significant; and, in mandatory transfer cases, the only protection for youth facing adult court is a probable cause hearing that strictly comports with due process and fundamental fairness. Especially at this stage, any youth charged with a mandatory transfer offense must be afforded due process, including full discovery as requested—inclusive of police reports and law enforcement materials—that may allow the youth to challenge probable cause and prevent transfer to adult court. To do less denies youth due process and fundamental fairness at a life-altering stage for the youth. For these reasons, Amicus Curiae respectfully request that this Court grant Appellant's Proposition of Law.

Respectfully submitted,



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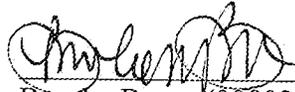
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been filed with the Clerk of Court on the 3d day of September, 2013 and served upon the following counsel of record: Joseph T. Deters, Hamilton County Prosecutor and Philip R. Cummings, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202 and Gordon C. Magella, Hamilton County Public Defender's Office, 230 E. Ninth Street, Third Floor, Cincinnati, Ohio 45202, by depositing it in the U.S. Mail with postage prepaid and addressed to their offices on this 3d day of September, 2013.

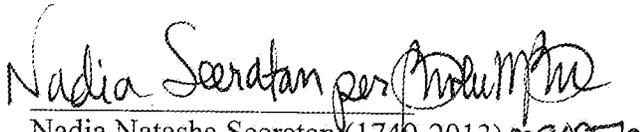
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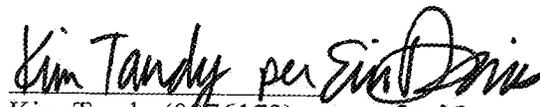
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