

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2020-1429
Plaintiff-Appellee,	:	
	:	On Appeal from the Second
vs.	:	District Court of Appeals
	:	Case No. 2018 CA 00025
DONOVAN NICHOLAS,	:	
	:	
Defendant-Appellant.	:	

**REPLY BRIEF OF *AMICUS CURIAE* CHILDREN’S LAW CENTER AND CUYAHOGA COUNTY PUBLIC DEFENDER IN SUPPORT OF APPELLANT**

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## INTRODUCTION

Due process requires that amenability proceedings apply clear and consistent standards and burdens. Those Appellant has asked this Court to embrace will ensure that such proceedings are meaningful, enhance the integrity of the juvenile justice system, and align with its founding purpose. This is not a “transformation” of the system as Appellee and its amici contend. Nor are such guiderails inconsistent with the governing law. Rather, Appellant’s propositions of law clarify a proper statutory factor analysis for discretionary transfer under the current legal framework.

The state’s amici advocate for a rudderless scheme, asserting that specific standards and burdens create unnecessary obstacles to their prosecutors’ ability to respond to a claimed increase in juvenile crime. Yet the information upon which this argument relies merely demonstrates the Cuyahoga County Prosecutor’s Office heavy-handed exercise of its discretion in charging and seeking transfer, while providing no reliable data confirming that criminal misconduct among juveniles has increased. To be clear, Appellant and his amici do not seek a fundamental alteration of the bindover process in Ohio, but instead to align it with the constitution and the transfer statute’s intent.

## REPLY ARGUMENT

- I. The procedural safeguards will not negatively impact the ability of the prosecutor to seek transfer or the court’s ability to grant it—rather, it will provide the clarity needed to achieve meaningful amenability determinations that enhance due process.**

This Court’s determination on the issues presented will undoubtedly impact all juveniles throughout the State of Ohio facing the prospect of discretionary transfer to adult court. This Court can and should adopt Appellant’s propositions of law and clarify that a burden and standard applies at amenability proceedings. A clear and convincing evidence requirement does not conflict with the plain language of the statute governing transfer and will provide consistency and certainty in

bindover proceedings for all children in Ohio, as due process requires.

A. Requiring prosecutors to affirmatively prove non-amenable by clear and convincing evidence does not conflict with R.C. 2152.12(D) and (E).

The transfer statute provides a detailed process that must be complied with for discretionary transfer, including a carefully crafted list of factors that shall be considered. Yet, under the current scheme, the state can and will continue to rely solely on the severity of charges it filed to satisfy non-amenable. In this context, the state has free reign to invoke the most severe and numerous offenses.<sup>1</sup> Without clarification, the statute is vulnerable to this manipulation and inconsistent outcomes. If the legislature intended the severity of offense alone to be sufficient evidence of non-amenable, then all youth fourteen and older would be eligible for mandatory bindover for a category one or two offense. That is not the case. But that is precisely what the state and its amici argue.

The plain language of R.C. 2152.12 demands that the *factors for transfer outweigh those against*, creating the presumption that children remain in juvenile court *unless* that burden is met—and it must be met by the state, since they are the party seeking to remove the child from the juvenile system and place him in the adult criminal system. The best way to breathe life into the plain language of the statute, is to clarify the standard and burden that applies in that process.

Procedural safeguards in discretionary transfer proceedings will help ensure that Ohio does not cast too wide a net in transferring juveniles to the adult system, underscoring that transferring juveniles is an exception to the rule as the legislature intended.

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<sup>1</sup> This is not a baseless concern—Cuyahoga County has been identified nationally as a jurisdiction ripe for reform insofar as “charge[ing] only to what the facts support rather than to the highest charges possible. Brian Evans, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005-2020*, at 40, Washington, D.C.: Campaign for Youth Justice (2020).

B. Requiring prosecutors to affirmatively prove non-amenable by clear and convincing evidence does not impact prosecutorial discretion.

Adopting a clear standard that the state must meet to achieve adult transfer does not impinge on the state's ability to choose which children they seek to transfer. Amici's argument that requiring the state to carry the burden of prosecuting its own motion "ignores the public safety consideration" in transfer proceedings is mystifying. (Ohio Prosecuting Attorneys Association (OPAA) brief at 13). The state retains full discretion and authority over charging decisions, and may still request transfer for any felony offense alleged to have occurred when the child was at least fourteen years old. Adopting Appellant's propositions of law will not change that.

The nature of the charges the prosecutor decides to file determines which children are eligible for mandatory and/or discretionary transfer. Once the state initiates the request for transfer, a consistently meaningful amenability proceeding should follow. Our current scheme lacks that consistency. Every child in Ohio, regardless of the jurisdiction, deserves due process in a determination that the US Supreme Court characterized as "critical," since it could mean the "difference between five years' confinement and a death sentence." *Kent v. United States*, 383 U.S. 541, 557, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

There is simply no merit to the Appellant amici's assertion that procedural safeguards will impact "how prosecutors can respond to violent crimes committed by juvenile offenders." (OPAA's brief at 2). If the state's response to "violent crime" (seeking discretionary transfer) cannot withstand a fairly conducted amenability hearing, it only underscores Appellant's concerns—that transfer has become the rule, rather than the exception.

C. Requiring courts to acknowledge that a Juv.R. 30 evaluation is an expert opinion based on specialized scientific knowledge does not limit the court's ability to weigh the factors enumerated in R.C. 2152.12(D) and (E) and does not hamper the prosecutor's ability to make factor arguments based on the report.

Appellee's claim to the contrary, undersigned do not argue that the expert's report on amenability is superior evidence, free from judicial weighing, rendering all other factors "irrelevant." (State's brief at 16). Instead, amici argue the court may not substitute its own opinions as superior to those of the qualified expert tasked with assessing the child's amenability.

The statute mandates that – before considering transfer – courts order an investigation into the child by “a person qualified to make the examination,” and receive the evaluator's report concerning “whether the child is amenable to rehabilitation.” R.C. 2152.12(C). The expert provides its opinion to a reasonable degree of psychological certainty. In making this examination mandatory, the legislature inherently intended for the court to fully consider the expert's opinion as to whether the child is amenable.

D. Requiring courts to consider all dispositional options before granting transfer, including an SYO, is entirely consistent with R.C. 2152.12, and if the state finds the due process requirements of an SYO too onerous a burden, the state can exercise its discretion and choose to not seek an SYO.

Appellant's third proposition would clarify that this statutorily mandated inquiry means considering dispositional options uniquely available in the juvenile system. Such an inquiry could also properly include considering the well-documented harms associated with placing children in the adult criminal system, and particularly, in adult prisons. Indeed, the court is required to determine during amenability whether the services, sanctions, security, and amount of *time* remaining under a juvenile disposition provide a “reasonable assurance” of public safety.<sup>2</sup> The OPAA's argument (at p. 5) that an SYO disposition may not be considered at this phase simply

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<sup>2</sup> The statute requires courts to consider whether the “safety and security of the community may require that the child be subjected to adult sanctions” and whether “[t]here is sufficient time to rehabilitate the child within the juvenile system and [whether] the level of security in the juvenile system provides a reasonable assurance of public safety.” R.C. 2152.12(B)(3), R.C. 2152.12(E)(8).



defies logic.

SYO is the most restrictive option in the juvenile system and, as such, must be considered, particularly where there is uncertainty around the time needed to provide reasonable assurances of safety. With an SYO, the court subjects the child to the same restrictive sentencing he would have received if transferred, but does so with a more informed understanding of whether the child actually needs an adult sanction for the safety of the community. To mitigate the risks for the child, and society at large, juvenile courts should be implored to consider blended sentencing given the extensive research documenting the harm of transfer on communities.

We note that the context in which the OPAA discusses the SYO process is misleading. An SYO disposition is an option just as readily available as bindover.<sup>3</sup> There is not some hidden complication here, as suggested by the state's amici. (OPAA's brief at 23-24). Courts that have "limited a prosecutor's ability to begin a serious youthful offender proceeding" merely require the state to comply with the plain language of the statute for initiating the process (a concept the state and its amici repeatedly emphasize in their briefs). (OPAA's brief at 23).

The state may decide at the time of filing the juvenile complaint to seek an SYO instead of a bindover. Or the state may first seek a bindover and, if the mandatory or discretionary bindover is denied, the state can choose to file a notice of its intention to seek an SYO and then obtain an indictment or information. If the state shows "good cause" why it was unable to follow this procedure, then the court may extend the 20-day requirement. R.C. 2152.13. In either scenario, the state must obtain an indictment or information for the case – a task the state routinely accomplishes successfully when charging adults, or juveniles who have already been transferred – and must be

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<sup>3</sup> Youth eligible for a mandatory or discretionary bindover are likewise eligible for an SYO. *See* R.C. 2152.11.

aware of the filing deadline. No doubt, the state employs qualified and competent practitioners, fully capable of meeting filing deadlines.<sup>4</sup>

**II. OPAA’s public safety arguments mischaracterize actual, reliable data and are more akin to propaganda than sound policy reasoning.**

The OPAA attempts to buttress its position – that amenability proceedings should remain standardless and burdenless in the interest of public safety – by inundating this Court with sensationalized accounts of tragic events involving juveniles. But due process requires that standards and burdens remain consistent, to be applied uniformly at peaks and lulls of juvenile crime.<sup>5</sup>

A. The data presented by OPAA represents the result of an increase in the number of requests for transfer sought by the Cuyahoga County Prosecutor’s Office. It does not reflect actual crime rates in Ohio.

The state’s amici focuses on rhetoric and unreliable information in an attempt to underscore the need for lax standards in discretionary transfer. Rudimentary scrutiny reveals this information for what it is. First, the “survey” of discretionary bindover cases cited are nothing more than cherry-picked examples of some of the types of offenses eligible for discretionary transfer. (OPAA’s brief at 14). No one disputes that discretionary transfer cases can, and do, include serious offenses such as homicide, felonious assault, aggravated robbery, and sexual offenses. However, the scheme likewise

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<sup>4</sup> It is true, as the state maintains, that an SYO sentence may only be imposed where it has properly sought the sentence. However, in some circumstances, the court must impose an SYO sentence. *See* R.C. 2152.13(A), R.C. 2152.121. The state is also correct that the SYO process triggers the juvenile’s entitlement to all of the rights that adults receive, which has a significant impact for the child. (OPAA’s brief at 22). Although it is worth noting that the child is likewise entitled to each of these rights once a court grants transfer. But, because the state has discretion, it certainly can choose not to seek an SYO if it finds these due process requirements too onerous.

<sup>5</sup> Of note, juvenile arrest rates actually reached a new low in 2019, and including significant declines for violent crime arrests. Office of Juvenile Justice and Delinquency Prevention, *The Decline in Arrests of Juveniles Continued Through 2019*, available at: [https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot\\_UCR2019.pdf](https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_UCR2019.pdf) (accessed July 8, 2021).

applies to youth who face transfer for lower level, less serious, or non-violent felony offenses. In fact, in Ohio, discretionary bindover cases often involve the latter. The state's amici cites to twenty bindover cases where adult convictions were secured between 2017 and 2020. During that same time frame, there were 805 children transferred to adult court, and Cuyahoga County is responsible for the majority of those numbers.<sup>6</sup> This "survey" does not, indeed it cannot, support any claim concerning the nature or composition of discretionary bindover cases.

Once the data is examined, what the OPAA characterizes as an increase in juvenile crime in Cuyahoga County, is actually a relatively low portion of delinquency charges. Homicide charges were up in 2020, yet comprised only 1.15% of all delinquency charges in the County (excluding unruly charges).<sup>7</sup> Likewise, robbery charges hit a high in 2020, and comprised only 14.7% of all delinquency charges, while rape charges at their peak in 2018 were only 2.35% of all delinquency charges.<sup>8</sup> Admittedly, the number of *charges* sought by the prosecutor for homicide and robbery have increased in recent years, however, this does not necessarily indicate a corresponding increase in juvenile crime rates. This is simply a reflection of how the prosecutor chooses to charge cases. An increase in number of charges does not extrapolate to the lived reality of offense rates. Prosecutors across Ohio can approach charging youth in various ways for the same scenario.

Moreover, the same is true for selecting cases for bindover. In fiscal year 2019, Cuyahoga

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<sup>6</sup> Statewide Reports Maintained by DYS, *Youth Transferred to Adult Court Profiles*, available at <https://dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys> (accessed July 8, 2021).

<sup>7</sup> Cuyahoga County Juvenile Court, *Annual Reports*, "official delinquency charges" 2020, available at <http://juvenile.cuyahogacounty.us/en-US/AnnualReports.aspx> (accessed July 2, 2021).

<sup>8</sup> *Id.* "official delinquency charges" years 2018, 2019, and 2020.

County accounted for *fifty percent* of Ohio's transfers.<sup>9</sup> Cuyahoga County juvenile prosecutors have exclusive authority over charging. For example, a group of five juveniles can be charged with numerous counts and variations for what is one singular incident, committed by one juvenile within the group, thereby bolstering the *total* number of *charges* and *persons* charged.

In fact, Cuyahoga County has been recognized nationally as an “easily identifiable problem area,” recommended as a jurisdiction that could benefit from the following: training prosecutors to refrain from filing unnecessary adult charges, charging only what the facts support rather than the highest charge possible, and training judges to minimize transfers to adult court.<sup>10</sup> Despite relatively similar populations to Franklin and Hamilton counties, Cuyahoga demonstrates geographic disparities in the number of youth it chooses to transfer to adult court.<sup>11</sup>

The rhetoric contained in the media stories cited is that juvenile crime is “a level of criminal activity that we didn't see 20 years ago” and that “what was once a rare event -- children committing bank robberies, violent carjackings or even homicides for example -- is no longer that unusual of an occurrence.”<sup>12</sup> But, this is not reflected in the data. While robbery charges increased 43.92% from

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<sup>9</sup> Children's Law Center, *Ohio FY19 Bindover Fact Sheet*, available at: <https://static1.squarespace.com/static/571f750f4c2f858e510aa661/t/608c00ea2e6b175146653962/1619788010788/Bindover+Fact+Sheet+FY19.pdf> (accessed July 10, 2021). For the past 10 years, Cuyahoga County has led the state in the number of bindovers, an illustrative example of the wide discretion enjoyed and varied approaches prosecutors choose in addressing juvenile delinquency.

<sup>10</sup> Brian Evans, *Winning the Campaign: State Trends in Fighting the Treatment of Children As Adults in the Criminal Justice System 2005-2020*, at 40, Washington, D.C.: Campaign for Youth Justice (2020).

<sup>11</sup> Evans, at 27.

<sup>12</sup> *Cleveland shootings that killed four, injured five highlight troubling youth gun violence*, March 27, 2017, available at: [https://www.cleveland.com/metro/2017/03/cleveland\\_shootings\\_that\\_kille.html](https://www.cleveland.com/metro/2017/03/cleveland_shootings_that_kille.html) (accessed July 8, 2021).

2017 to 2018 (863 and 1242 charges respectively), homicide charges, person offense charges, and sexual offense charges all decreased between 2017 and 2018 (decline of 12.66%, 9.99%, and 25.25% respectively).<sup>13</sup> Nevertheless, discretionary bindover filings increased 115.23% from 2017 to 2018 (151 and 325 filings respectively) in Cuyahoga County.<sup>14</sup>

If it were true that discretionary bindovers were utilized overwhelmingly for serious offenses, including homicide, felonious assault, aggravated robbery, and sexual offenses, it would also stand to reason that the sentences youth receive in adult court would overwhelmingly be lengthy, commensurate to sentences prescribed for said serious offenses. The data does not support that conclusion, either. Consider the below chart of sentencing data for youth transferred by mandatory – the most serious offenses requiring lengthier prison sentences – and discretionary bindovers.<sup>15</sup>

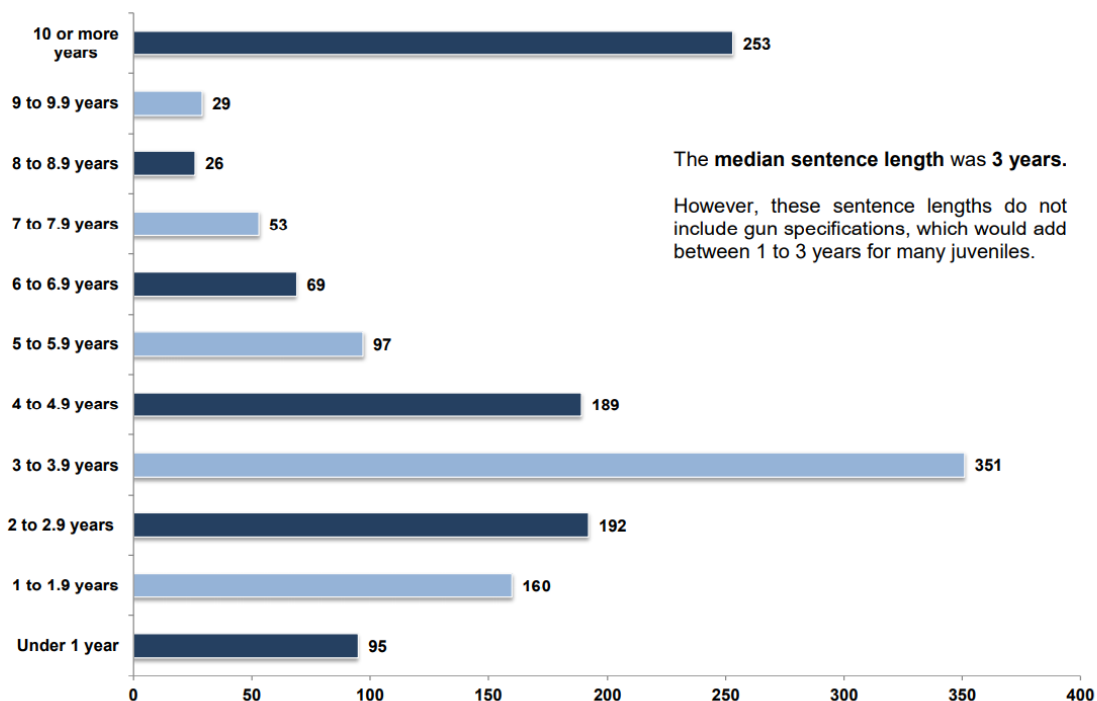
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<sup>13</sup> Cuyahoga County Juvenile Court, *Annual Reports*, “official delinquency charges” 2017, 2018, available at <http://juvenile.cuyahogacounty.us/en-US/AnnualReports.aspx> (accessed July 2, 2021).

<sup>14</sup> Data provided by Cuyahoga County Juvenile Court in response to Public Record Request.

<sup>15</sup> Correctional Institution Inspection Committee, *Juvenile Commitments to the DRC*, Public Record Request.

### Sentence Length of Juvenile Commitments to the DRC FY 2000 – FY 2014



\*Data provided by the Ohio Department of Rehabilitation and Correction.

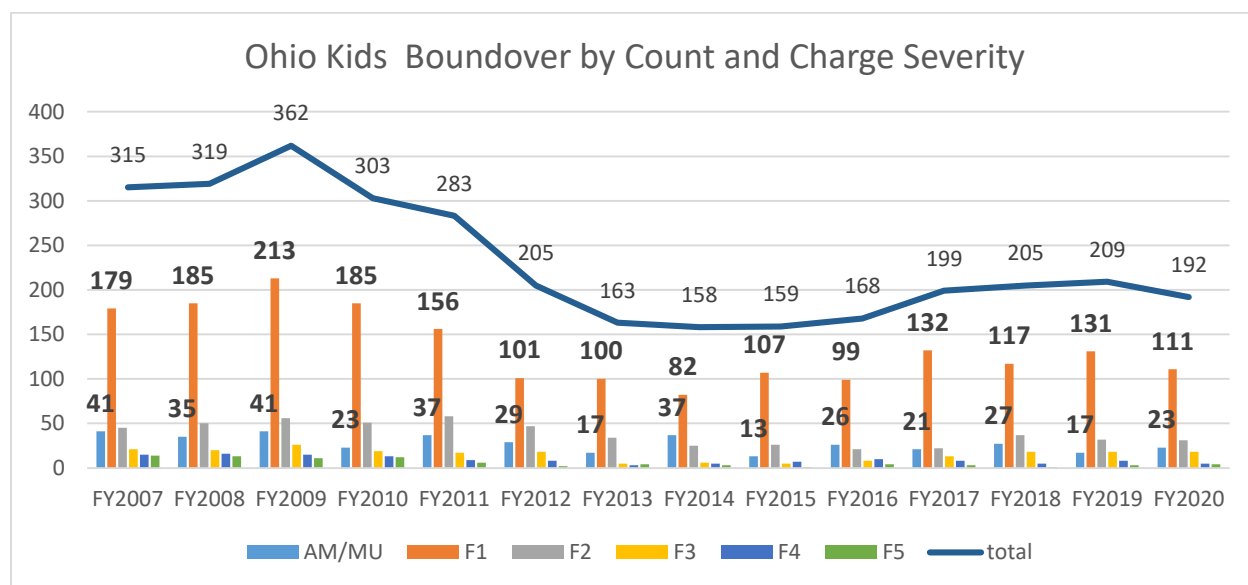
Correctional Institution Inspection Committee  
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Insistence on reliable data, rather than inflammatory rhetoric, when crafting policy is fundamental. The impact of this Court’s decision will affect all children in Ohio, not just twenty cases of the most serious nature selected as straw-man examples.

#### B. OPAA’s return to a “Super Predator” approach to juvenile offenses is misleading.

OPAA’s claim that “our community is under siege by juvenile violence ... a wave like we’ve never seen” is not borne out by the data. (OPAA’s brief at 16 citing, fn. 1). Particularly when comparing recent years with the unprecedented rates of transfer and felony adjudications in Ohio in the late 1990’s and early 2000’s. (*See* charts contained in undersigned amici’s 5/3/2021 brief at 13). Between fiscal years 2007 to 2020, the highest number of Ohio transfers for aggravated murder and murder (AM/MU) were observed in 2007 and 2009 (both with 41 cases), followed next by 2011 and

2014 (both with 37 cases).<sup>16</sup>



In fact, Franklin County Juvenile Court issued a press release in response to these types of unsupported claims advanced by prosecutors in the media, quoting, “[t]hese propaganda efforts smack of the widely debunked ‘Super Predator’ myths of the 1990s. And every juvenile crime statistic available suggests that the juvenile justice reforms implemented since that time have been more effective than the “tough love” approach suggested by less learned stakeholders.”<sup>17</sup> In response to the rhetoric that increased juvenile crime requires tougher punishments, that court cited to official data that directly undercut these assertions, and emphasized that a “dramatic reduction in cases” is directly attributable to the *data-driven approach* to addressing delinquency, employed by

<sup>16</sup> Statewide Reports Maintained by DYS, *Youth Transferred to Adult Court Profiles*, available at <https://dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys> (accessed July 8, 2021).

<sup>17</sup> *Franklin County Juvenile Court Continues Community Collaboration Efforts to Improve Juvenile Justice Outcomes*, February 18, 2021, available at: <https://www.nbc4i.com/wp-content/uploads/sites/18/2021/02/JJCP-RELEASE-FEB-18-2021.pdf> (accessed July 8, 2021).

Franklin County Juvenile Court. The Court warned, “[o]ur communities should be weary of recent demands calling for the deleterious and unnecessary detention” of juveniles.<sup>18</sup>

Besides, across Ohio the trend is consistent—decreased delinquency filings and felony adjudications. In 2019, juvenile arrests nationally hit the lowest rates seen since the 1980’s, including for violent offenses.<sup>19</sup> Additionally, the number of transfers to adult court have steadily declined in Ohio from 2009 to 2016, consistent with the national trend in decreasing transfer rates. However, Cuyahoga County’s overreliance on bindovers has tipped Ohio in an upward trend since 2016, despite the documented decrease in official delinquency filings and felony adjudications during the same time span.<sup>20</sup>

The rhetoric advanced in media articles cited by the state’s amici seeks to elicit from this Court the same moral panic that caught fire during the “Super Predator” era. (OPAA’s brief at 16-17). Coverage of highly tragic, sensationalized violent events has a tendency to be portrayed as commonplace, which is misleading. Consider Philadelphia’s District Attorney in 1995, describing youth crime and violence:

Warning of a crime bomb sweeping over the city that is ‘totally out of control’ ... ‘never seen anything like it.’ [...] We’re not just talking about teenagers. We’re talking about boys whose voices have yet to

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<sup>18</sup> Franklin County Juvenile Court Judge Gill said her years on the bench have convinced her that focusing on mental illness among youth is the “right track” because they “are experiencing stuff at a young age that is unimaginable.” The Columbus Dispatch, *Surge in gun violence among young started months ago, stats show*, available at:

<https://www.dispatch.com/story/news/local/2020/07/17/surge-in-gun-violence-among-young-started-months-ago-stats-show/42080165/> (accessed July 8, 2021).

<sup>19</sup> Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests*, May 2019 available at: <https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf> (accessed July 8, 2021).

<sup>20</sup> Children’s Law Center, *Ohio FY19 Bindover Fact Sheet*, available at: <https://static1.squarespace.com/static/571f750f4c2f858e510aa661/t/608c00ea2e6b175146653962/1619788010788/Bindover+Fact+Sheet+FY19.pdf> (accessed July 10, 2021).



change. We're talking about elementary youngsters who pack guns instead of lunches. [...] In deference to public safety, we will have little choice but to pursue genuine get-tough law-enforcement strategies against the super-predators.<sup>21</sup>

Now consider Cuyahoga County Prosecutors in 2017:

'Right now, our community is under siege by juvenile violence.' 'It's a wave like we've never seen.' Assistant Prosecuting Attorney John Hirschauer deals with the most violent offenders and he sees a disturbing trend. The crimes are more violent and 'the 14 and 15-year-olds are doing things we were seeing seven years ago being done by 16 and 17-year-olds,' said Hirschauer. O'Malley said the goal of juvenile court is to rehabilitate the child. The challenge is the unprecedented increase in crimes committed by juveniles.<sup>22</sup>

The OPAA asks this Court to maintain an ambiguous discretionary bindover scheme that casts an everwidening net, under the guise of "public safety," and implies that adopting Appellant's propositions of law will restrict the state's ability to respond to violent crime. Not so. The data makes that evident.

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<sup>21</sup> John DiLulio, *The Coming of the Super-predators*, November 27, 1995, available at: <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> (accessed July 10, 2021).

<sup>22</sup> Cuyahoga County Prosecutor: *'Our community is under siege by juvenile violence,'* December 2017, available at: <https://www.news5cleveland.com/news/local-news/oh-cuyahoga/-right-now-our-community-is-under-seige-by-juvenile-violence-said-cuyahoga-county-prosecutor> (accessed July 10, 2021).

## CONCLUSION

For the reasons discussed herein and in Amici's initial brief, this Court should adopt Appellant's propositions of law. Applying the requested guidelines in discretionary transfer proceedings will preserve Ohio's juvenile justice system, protect the interests of all of the stakeholders in that system, and provide a needed framework for the juvenile courts' statutory factor analysis in making the transfer decision.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of July, 2021, a true and correct copy of the foregoing  
REPLY BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER AND  
CHILDREN'S LAW CENTER was served by email to Timothy Hackett, Counsel for Appellant,  
Donvan Nicholas and by mail to the Assistant County Prosecutor who represents Appellee, the State  
of Ohio, as well as all other listed AMICI in this matter.

*Erika B. Cunliffe*

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ERIKA CUNLIFFE