

COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
CASE NUMBER: 2009-SC-115

FILED

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SUPREME COURT CLERK

JAMES JACKSON

APPELLANT

VS.

Appeal from McCracken Circuit Court  
Hon. Craig Zeiss Clymer, Judge  
Case No: 05-CR-00008

COMMONWEALTH OF KENTUCKY


APPELLEE

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**BRIEF FOR APPELLANT**

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Respectfully Submitted,

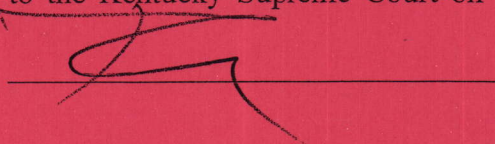
  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2010, the foregoing "Brief for Appellant" (as amended to correct the deficiency noticed by this Court on December 13, 2010) was served by first class mail or messenger mail upon the following:

- Hon. Craig Z. Clymer, Circuit Judge, McCracken County Courthouse, 301 South 6<sup>th</sup> Street, Paducah, Kentucky 42003-1794;
- Hon. Tim Kaltenbach, Commonwealth's Attorney, McCracken County Courthouse, 301 South 6<sup>th</sup> Street, Paducah, Kentucky 42003-1794;
- Hon. Dan Boaz, McCracken County Attorney, McCracken County Courthouse, 301 South 6<sup>th</sup> Street, Paducah, Kentucky 42003-1794; and
- Hon. Joshua Farley, Assistant Attorney General, Capital Center Complex, 1024 Capital Center Drive, Third Floor, Frankfort, Kentucky 40601.

I also certify that the record was returned to the Kentucky Supreme Court on December 13, 2010.



**INTRODUCTION**

At age fifteen (15), appellant was erroneously transferred to the circuit court to be tried as a youthful offender. Though he pled guilty to several charges in the circuit court as a result of his transfer, appellant subsequently filed a motion to vacate his final sentencing order given the illegality of the transfer order based upon his statutory immunity from criminal prosecution as a youthful offender pursuant to KRS 635.020.

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellant requests oral argument, and believes it will be helpful to the court in resolving the issues presented in this appeal.

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## STATEMENT OF THE CASE

On October 15, 2004, James Jackson, then fifteen (15) years old, was taken into custody, placed in a juvenile detention center and charged with three misdemeanors, and one Class C felony: trafficking in a controlled substance, first degree; possession of marijuana; use/possession of drug paraphernalia; and possession of a handgun by a minor (TR Supp. 6-8<sup>1</sup>). At the juvenile detention hearing held on October 19, 2004, an officer with the Paducah City Police Department was called to testify to the events leading up to appellant's detention (TE audio Supp.)<sup>2</sup>. During the course of the officer's testimony, he explained that while searching appellant, authorities found a loaded gun in his pants (*Id.*). Thereafter, the juvenile court judge presiding over the detention hearing interrupted the Commonwealth's direct examination of the witness to ask: "Should these charges then be firearm enhanced?" And the following exchange took place between the Judge and the Assistant County Attorney:

Judge: Should these charges be firearm enhanced? Should these charges be firearm enhanced?

ACA: Uh, yes your honor I would think so, and we-

Judge: And I, and I assume then we are talking about a transfer hearing?

ACA: And we will be making a motion your honor, just for the record, to certify him as an adult.

Judge: Well. Yeah, that is what I was just saying.

(TE audio Supp.)

Though no verbal transfer motion had been made and no written transfer motion filed, the juvenile court judge set a transfer hearing for November 10, 2004 (TE audio Supp.). Moreover, the judge made the following notations on the docket sheet that day:

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<sup>1</sup> For purposes of this brief, "TR Supp." shall refer to the written juvenile court record in Juvenile Case No. 00-J-00370-011 certified to the Court of Appeals by the McCracken Circuit Court as part of the Supplemental Record in this case on June 25, 2007.

<sup>2</sup> For purposes of this brief, "TE audio Supp." shall refer to the audiotape certified by the McCracken Circuit Court as part of the Supplemental Record in this case on June 25, 2007. This audiotape contains the recording of the detention hearing conducted on October 19, 2004 in Juvenile Case No. 00-J-00370-011. It is a single audiotape, which was provided by separate envelope.

CA motions to certify as adult  
All charges are firearm enhanced  
(TR Supp. 10).

Prior to the hearing held on November 10, 2004, the Commonwealth never filed a written transfer motion (TR Supp. 1-14). Likewise, the Commonwealth never moved to formally amend the charges to include the alleged firearm enhancement (Id.). Nonetheless, a transfer hearing took place on November 10, 2010 without a motion to transfer or even a motion to amend the charges (TE audio)<sup>3</sup>. Indeed, the statutory authority for the transfer of this fifteen-year-old to the circuit court as a youthful offender was never specified either verbally or in writing (Id.). After a brief verbal review of the discretionary factors for transfer set forth in KRS 640.010(b), the Judge ordered the transfer of appellant to the circuit court as a youthful offender (Id.). The written order does not list the legal authority for appellant's eligibility to be certified as a youthful offender (TR Supp. 14). Nor does the order list in writing which factors in KRS 640.010(2)(b) the judge found to favor transfer (TR Supp. 14).

On March 4, 2005, pursuant to a plea agreement, appellant entered a guilty plea in circuit court to four charges in exchange for which he received a total sentence of ten (10) years to serve (TR 26-39). Trial counsel for appellant did not raise the issue of James Jackson's charges being ineligible for transfer in either the district or circuit courts (TR, TR Supp., TE audio Supp. and TE audio).

On November 20, 2007, appellant filed a motion to vacate the "Final Judgment/Sentence of Imprisonment" pursuant to RCr 11.42, CR 60.02, U.S.Const, Amends VI and XIV, Ky.Const.

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<sup>3</sup>For purposes of this brief, "TE audio" shall refer to the two audiotapes certified by the McCracken Circuit Court as part of the initial record filed in this appeal. Both audiotapes contain a different portion of the recording of the transfer hearing conducted on November 10, 2004 in Juvenile Case No. 00-J-00370-011. The beginning of the transfer hearing is recorded on the audiotape with the label of "Master # 04-J-62." This tape includes the testimony of the two witnesses and a portion of the defense counsel's closing argument. A second tape, labeled "Master # 04-J-63" contains the end of defense counsel's closing arguments, the County Attorney's closing argument and the Judge's verbal findings. Because these are audiotapes, undersigned counsel is unable to provide citation to specific times on the tapes. However, undersigned counsel notes that an unofficial transcript of the transfer hearing was attached as Exhibit C to the original "Motion to Vacate" (for easy reference of the circuit judge), which was filed in the McCracken circuit court and has been made a part of the appellate record in this case.



§§ 2, 11, and all other applicable law (TR 51-67<sup>4</sup>). A three-page response was filed by the Commonwealth on December 11, 2006 (TR 73-75) and a reply was filed by appellant on December 14, 2006 (TR 76-81). On December 21, 2006, the circuit court entered an order denying appellant's motion to vacate "for the reasons set forth in the Commonwealth's Response" (TR 90-91). Additionally, the circuit court entered another order on December 21, 2006 imposing final judgment/sentence of imprisonment and remanding appellant to the Department of Corrections (TR 87-89).

James Jackson appealed the circuit court decision to the Court of Appeals on the same grounds he raised in his circuit court motion to vacate his convictions: (1) he was not eligible for transfer to the circuit court as a youthful offender under the criteria (non-discretionary factors) set forth in KRS 635.020, and (2) his trial counsel was ineffective for failing to raise the issue of his ineligibility for transfer. Though the Court of Appeals did not grant the relief appellant sought on the grounds that appellant advanced in his brief, the court did remand the matter to the circuit court "for reconsideration under *Sparks* as to the voluntariness of Jackson's guilty plea." Before the matter could be remanded, Appellant filed a timely Petition for Rehearing asking the court to reconsider its denial of his request that the conviction be vacated as void. Thereafter, the same panel of the Kentucky Court of Appeals issued an order denying the Petition for Rehearing. However, Judge Thompson (one of the three judges on the panel) voted to grant the petition and filed a separate opinion finding that the court had misapplied the law in its October opinion.

Thereafter, appellant filed and was granted discretionary review by this Court.

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<sup>4</sup>As noted by the clerk on TR 51, the Motion was accompanied by Exhibits A, B and C, which were provided to this Court as part of the record in this case via a separately labeled exhibit envelope.

## ARGUMENT

### I. APPELLANT'S CONVICTION AS A YOUTHFUL OFFENDER RESULTING FROM THE DISTRICT COURT'S TRANSFER OF HIM TO CIRCUIT COURT WHEN HE WAS FIFTEEN YEARS OLD, DESPITE THE FACT THAT HE WAS STATUTORILY IMMUNE FROM CRIMINAL PROSECUTION, WAS A DUE PROCESS VIOLATION OF SUCH MAGNITUDE THAT IT MUST BE VACATED AS A RESULT OF THIS COLLATERAL PROCEEDING

**Preservation:** This issue is properly preserved for appellate review by the "Motion to Vacate" and the "Reply" to the Commonwealth's "Response to Defendant's Motion to Vacate", both having been filed prior to appellant's final sentencing pursuant to KRS 640.030(2) (TE 51-66; TE 76-80); RCr 9.22.

Since filing his petition in the circuit court in November 2006, appellant has consistently asserted that his criminal convictions must be vacated because the circuit court never acquired jurisdiction. Specifically, appellant argued that based upon the irrefutable facts of record in this case, the Commonwealth could not and did not demonstrate that the mandatory statutory criteria set forth in KRS 635.020 were met. In other words, appellant was ineligible for transfer to the circuit court for treatment as a youthful offender. The criteria listed in KRS 635.020 are not discretionary (unlike KRS 640.010(2)(b)(1)-(8)), and are mandatory prerequisites that must be satisfied before a transfer hearing can even be entertained by the district court judge. Those mandatory criteria were absent from the record in this case.

#### A. Mandatory Versus Discretionary Criteria for Transfer

Kentucky's Unified Juvenile Code (Juvenile Code) includes two key statutory provisions that set forth the process for the courts and the Commonwealth to follow in determining whether a juvenile may be tried as an adult. See KRS 635.020 and KRS 640.010. First, KRS 635.020 provides that the County Attorney has the authority to request transfer of a juvenile to the circuit court for trial as a youthful offender in five (5) discrete situations. In other words, the existence of at least one of the discrete situations described in KRS 635.020 is a prerequisite that must be

satisfied before transfer of a juvenile offender may even be considered by a district court judge.

The five(5) discrete circumstances include:

- (1) when the juvenile is at least fourteen (14) years old and charged with a capital offense, an A felony or a B felony;
- (2) when the juvenile is at least sixteen (16) years old and has had one prior felony adjudication;
- (3) when the person is currently eighteen (18) years old, but has been charged with committing any felony when he was still a juvenile;
- (4) when the juvenile is charged with any felony and has previously been convicted as a youthful offender for another offense; or
- (5) when the juvenile is at least fourteen (14) and charged with a felony in which a firearm was used.

See KRS 635.020(2)-(5) and (7). If the County Attorney believes that any one of the circumstances listed above has been met, he may (after consultation with the Commonwealth Attorney) motion for a hearing in the district court for the judge to consider transferring the juvenile offender to the circuit court. See id.

If a motion to transfer is filed by the County Attorney pursuant to any one of the first four (4) circumstances listed above, the Juvenile Code's second key statutory provision requires the district judge to hold a preliminary proceeding. See KRS 640.010. Among other things, the district judge must determine at the preliminary hearing whether "the child is of sufficient age and has the requisite number of prior adjudications, if any, necessary to fall within the purview of KRS 635.020." KRS 640.010(2)(a). In short, the district judge is required to decide whether the child is eligible for transfer to circuit court as a youthful offender by determining whether at least one of the four circumstances set forth in KRS 635.020(2), (3), (5) or (7) has been satisfied. If the court determines that the child falls within the purview of on of those four provisions (and is therefore eligible for transfer), only then does the district judge have the authority to consider the *discretionary* factors listed in KRS 640.010(2)(b) to determine whether the child's case ought to be transferred to the circuit court.

If a motion to transfer is filed by the County Attorney pursuant to the fifth circumstance listed above (use of a firearm), a preliminary hearing is still required to be held by the district

court judge. See KRS 635.020(4). However, during that proceeding, the district judge is not statutorily mandated to consider the discretionary factors set forth in KRS 640.010. Rather, the district judge must determine whether there is probable cause for the charged felony; that a firearm was used in the commission of the charged felony; and that the child had reached the requisite age. See KRS 635.020(4). Under the fifth circumstance, the determination of eligibility for transfer is based upon a judicial finding that the mandatory criteria in KRS 635.020(4) have been satisfied.

**B. James Jackson Was Not Eligible for Transfer Under Any of the Five Circumstances Set Forth in the Mandatory Criteria Listed in KRS 635.020**

As set forth in the Statement of the Case, the County Attorney never made a written or verbal motion to transfer James Jackson to circuit court as a youthful offender (TR Supp, *all*). Moreover, the district court's transfer order provided no recitation of the authority the judge relied upon at the preliminary hearing to issue the transfer order (TR Supp. 14). Thus, there is no explicit authority referenced in the record for James Jackson's eligibility for transfer to circuit court. Accordingly, this Court must assess the record through a process of elimination.

KRS 635.020(3) requires that the child be at least sixteen (16) years of age at the time the Class C or D felony was alleged to have occurred. Similarly, KRS 635.020(7) requires that the person be at least eighteen (18) years of age when they appear before the district court for any felony that occurred prior to their eighteenth birthday. Because James Jackson was only fifteen (15) at the time the Class C felony charge was alleged to have occurred and was still fifteen (15) when he was brought before the district court on the charge (TR Supp. 6), he was ineligible for transfer under both of these statutory criteria. See KRS 635.020(3) and (7). Moreover, his age at the time the alleged offense occurred was a fact of record, which was never challenged by the Commonwealth.

Eligibility for transfer to the circuit court under KRS 635.020(5) requires that the juvenile be previously convicted as a youthful offender. Again, the facts of record in this case establish that James was never previously convicted of an offense as a youthful offender. (TR 51<sup>5</sup>).

To establish eligibility for transfer under KRS 635.020(4), the Commonwealth must establish by probable cause that the firearm was used in the commission of the alleged felony. See Darden v. Commonwealth, 52 S.W.3d 574(2001)(deciding that possession does not equal use for the purpose transferring jurisdiction under KRS 635.020(4)). None of the allegations in this case include use of the firearm in question (TR Supp. 6; TR audio Supp.; TE audio). On the contrary, appellant was charged with possession of a handgun by a minor (TR Supp. 6). Moreover, the record of the transfer hearing establishes that of the five (5) potential theories of eligibility for transfer, this was the only theory that neither the Commonwealth nor the court relied upon to authorize the transfer motion. Specifically, the Commonwealth, in its closing, stressed a number of the discretionary factors set forth in KRS 640.010(2)(b) to persuade the court that transfer was appropriate (TE audio - Master # 04-J-63). These factors included the seriousness of the offense, the child's prior record and the prospects of adequate protection of the public (Id.; KRS 640.010(2)(b)(1, 4 and 6). Likewise, the district judge's verbal findings indicated he was examining the discretionary factors under KRS 640.010 and relying on factors such as the seriousness of the offense, whether the offense was against a person or property, the maturity of the child, etc. (TE audio - Master # 04-J-63). Because transfer pursuant to KRS 635.020(4) (*use of a handgun*) does not require the court to make findings based upon the discretionary factors set forth in KRS 640.010, this could not have been the provision either the Commonwealth or court relied upon as basis for appellant's eligibility for transfer.

By process of elimination, this Court is left with only one other theory of eligibility for transfer to consider. KRS 635.020(2) provides in relevant part "If a child charged with a capital

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<sup>5</sup>As previously noted, Exhibits A, B, and C of appellant's Motion to Vacate filed in the circuit court were made a part of the appellate record in this Court. Exhibit B contains a certified copy of appellant's entire juvenile court record, which demonstrates that there were no previous transfers to the circuit court as a youthful offender.

offense, Class A felony, or Class B felony, had attained the age of fourteen (14) at the time of the alleged commission of the offense” the County Attorney may move for transfer and the proceeding shall carry on pursuant to KRS 640.010. This provision, of any of the five statutory provisions concerning eligibility for transfer, appears to be the most consistent with the exchange that took place during the detention hearing. At that time, the district judge asked the County Attorney whether the charges should be firearm enhanced and then immediately noted her assumption that there would be a transfer motion (TE audio Supp). Presumably, the district judge and County Attorney believed that in consideration of a firearm enhancement appellant’s only felony charge - trafficking in a controlled substance, first degree, a Class C felony(KRS 218.A1412)- would be bumped up to a Class B felony (Compare KRS 218A.1412 with KRS 218.992).

Though the County Attorney and court may have expected the enhancement statute to be sufficient to meet the eligibility requirement of KRS 635.020(2)<sup>6</sup>, this legal theory crumbles under minimal scrutiny. KRS 218A.992 (1)(a) provides in pertinent part:

- (1) . . . any person who is convicted of any violation of this chapter who was at the time of the commission of the offense in possession of a firearm, shall:
  - (a) be penalized one (1) class more severely than provided in the penalty provision pertaining to that offense if it is a felony.

See Law of July 15, 1994, ch. 396, §5 (current version at KRS 218A.992(1)(a))(emphasis added). In short, KRS 218A.992 requires that a person be convicted of a violation of an offense listed in chapter 218A before his or her penalty may be enhanced. After all, “KRS 218A.992 is nothing more than a sentencing statute” resulting in enhancement of the punishment on the underlying offense. Kotila v. Commonwealth, 114 S.W.3d 226, 247-48 (Ky. 2003)<sup>7</sup> *overruled on*

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<sup>6</sup> This Court can only assume this was the intention of the district court judge and County Attorney because there was never a written transfer motion filed or verbal transfer motion made, which would have identified the criteria in KRS 635.020 that the County Attorney relied upon for transfer (TR Supp.; TE audio Supp.).

<sup>7</sup> The portion of Kotila quoted above was a quote from the Opinion in Adams v. Commonwealth, 931 S.W.2d 465, 468 (Ky.App. 1996), which has not been overruled on any grounds.

other grounds by Parks v. Commonwealth, 192 S.W.3d 318 (Ky. 2006). Because a conviction of a juvenile can only take place in the circuit court (as a youthful offender), a sentencing enhancement statute cannot be used in district court to inflate a felony charge for the sole purpose of meeting the eligibility criteria for a transfer to circuit court. In sum, a conviction can only occur after a proper transfer; and a proper transfer can only occur when the criteria for eligibility are met.

Here, appellant could not have been convicted of the Class C felony listed in the juvenile petition (KRS 218A.1412) until he was transferred to circuit court. And since a Class C felony does not meet the criteria for transfer under KRS 635.020(2) – any reliance on the possibility of enhancement to justify his transfer was improper. This Court’s decision in Phelps v. Commonwealth, 125 S.W.2d 237, 241 (Ky. 2004), stands in accord with this proposition.

In Phelps, the Court accepted discretionary review “in order to resolve whether juvenile court ‘adjudications’ could properly be deemed ‘convictions’ for the purpose of enhancing [certain] criminal charges.” Phelps, 125 S.W.3d at 238. In that case, the Commonwealth argued that the failure to equate a juvenile “adjudication” to a “conviction” would lead to an absurd result. See id. at 240. Specifically, it would prevent juveniles from being charged with certain offenses that required a prior “conviction.” See id. This Court rejected the Commonwealth’s argument, finding that it was the legislature’s intent to treat adjudications and convictions differently. See id. This interpretation was not only evident from the plain language of KRS 635.040, but also from the legislative purposes listed in Kentucky’s Unified Juvenile Code (KRS Chapters 600 – 645). See id. at 240-241.

In addition to differentiating between the two terms, this Court addressed the Commonwealth’s concerns:

[I]t is not entirely true that a juvenile could never be charged with certain firearm and drug offenses that require a prior “conviction” . . . , as a prior conviction of a juvenile who was previously tried as a youthful offender in circuit court could form the basis for enhancement of those offenses.



. . . [O]nce a juvenile has been transferred to circuit court and ultimately is convicted in that court, those convictions can be used in any subsequent proceedings against the juvenile to charge him or her as a second offender.

Phelps, 125 S.W.3d at 240-241(emphasis added). In other words, once a juvenile has been legitimately transferred to the circuit court as a youthful offender any "conviction" may be used to enhance his sentence. However, proper transfer pursuant to KRS 635.020 is a prerequisite for that conviction. The reasoning of Phelps controls in this case.

Here, the plain meaning and intent of the KRS 218A.992(1)(a) is to enhance a sentence after the accused is convicted of the Chapter KRS 218A principle offense. Since the felony charged in this case could not have been enhanced until after conviction, the Class C felony charged in the juvenile petition failed to meet the eligibility criteria of KRS 635.020(2). And the reliance of the district judge and County Attorney on the sentence enhancement provision of KRS 218A.992 was grievously misplaced.

**C. Due Process Violations Of Such Magnitude May Be Remedied Pursuant To A Collateral Proceeding**

In 1966, the Supreme Court of the United States recognized that the theory of most juvenile court systems throughout the country

is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection of the child and of society, not to fix criminal responsibility, guilt and punishment.

See Kent v. United States, 383 U.S. 541, 554, 86 U.S. 1045, 1054, 16 L.Ed.2d 84 (1966).

Accordingly, "whether a child will be deprived of the special protections and provisions of the" juvenile justice system is a critically important issue. See Kent v. United States, 383 U.S. 541, 553, 86 U.S. 1045, 1053, 16 L.Ed.2d 84 (1966). The General Assembly of Kentucky recognized that transfer is a critically important issue and therefore put many procedural and substantive

protections in place for juveniles. Here, where the procedural and substantive protections were ignored, appellant's convictions must be vacated.

Appellant argued in his post conviction petition to the circuit court that his convictions as a youthful offender should have been vacated because the circuit court never acquired proper jurisdiction. Specifically, James Jackson argued that under the facts of his case, he did not meet any of the statutory criteria in KRS 635.020 necessary for a juvenile court to transfer jurisdiction to the circuit court. In short, the criteria listed in KRS 635.020 (unlike KRS 640.010(2)(b)(1)-(8)) are not discretionary - they are mandatory prerequisites for a transfer hearing. Thus, the legislature made a critical distinction among two classes of juveniles. Children who do not meet the requirements of KRS 635.020 are among a class of juveniles whom the legislature determined ought never to be deprived of the special protections of the juvenile court system. Whereas children who satisfy one or more of the criteria in KRS 635.020 could be transferred to circuit court as a youthful offender, if the juvenile court judge deemed transfer appropriate after consideration of the discretionary factors within KRS 640.010.

Relying on their 1977 opinion in Schooley v. Commonwealth, 556 S.W.2d 912 (Ky. App. 1977), the Kentucky Court of Appeals rejected appellant's request to vacate his conviction for lack of subject matter jurisdiction in the circuit court. In Schooley, the court determined that issues related to validity of a transfer order should generally be raised on direct appeal, as that is the best way to ensure that the relief granted will provide the juvenile with a practical benefit. Id. at 917-18. However, the court went on to write that there was an exception to the general rule for those cases when "the error [is of] such magnitude as to render the judgment of conviction so fundamentally unfair that the defendant can be said to have been denied due process of law." Id. at 917.

The holding in Schooley was based upon a *successive* RCr 11.42 filing, which alleged that the transfer order was void "because it failed to state the reasons for the transfer with sufficient particularity." Schooley, 556 S.W.2d at 916. In other words, Schooley was eligible for transfer, and the only error may have been the failure of the juvenile court judge to write

down the discretionary factors under KRS 640.010 upon which it relied to order the transfer. Plainly stated, Schooley was not within the class of juveniles the general assembly chose to protect from criminal prosecution as a youthful offender. Schooley's eligibility for transfer was contemplated by the General Assembly and dependent upon the juvenile judge's consideration of certain discretionary factors.

Appellant's case is easily distinguishable from the Schooley case. Appellant does not claim that the juvenile court failed to make adequate findings, or failed to consider (properly or improperly) the discretionary factors under KRS 640.010. As outlined at length above, James Jackson has consistently argued that the mandatory criteria set forth under KRS 635.020 for eligibility could never have been satisfied. Thus, no statutory authority existed for the County Attorney and district judge to transfer appellant to the circuit court as a youthful offender. Appellant was never eligible for transfer. Indeed, James Jackson fell within the protected class of juveniles whom the legislature determined ought never to be deprived of the special protections of the juvenile court system.

If the concept of "due process and fair treatment" is to have any meaning, it must ensure that a juvenile who is statutorily immune from criminal prosecution has a constitutionally protected interest in enforcing that immunity. See Kent v. United States, 86 S.Ct. 1045 (1966); U.S. Const., Amend XIV. Accordingly, this Court must hold that the due process error in this case, which is apparent from the record, is of such magnitude as to render the judgment of conviction fundamentally unfair and appellant's criminal convictions must be vacated and dismissed with prejudice.

## II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO ARGUE AT BOTH THE DISTRICT AND CIRCUIT COURT LEVEL THAT HE WAS INELIGIBLE FOR TRANSFER

**Preservation:** This issue is properly preserved for appellate review by the “Motion to Vacate” and the “Reply” to the Commonwealth’s “Response to Defendant’s Motion to Vacate” (TE 51-66; TE 76-80; RCr 9.22).<sup>8</sup>

In this case, trial counsel rendered ineffective assistance of counsel by failing to raise the issue of improper transfer in both the district and circuit courts. Strickland v. Washington, 466 U.S. 668 (1984) controls the question of whether a defendant has been rendered constitutionally ineffective assistance by utilizing a two-pronged test. First, counsel's performance must be deficient and below the objective standard of reasonableness. Second, the deficient performance must be prejudicial, depriving the defendant of both a fair trial and a reliable result. In other words, but for counsel's unprofessional errors, there is a reasonable probability that the result would have been different. See Sims v. Livesay, 970 F.2d. 1575, 1581 (6th Cir. 1992); McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1987). Here, appellant was denied ineffective assistance of counsel because counsel failed to raise the issue of his ineligibility for transfer to the circuit court as a youthful offender. Since appellant was among a protected class of juveniles whom the legislature determined ought never to be deprived of the special protections of the juvenile court system, great prejudice resulted from his subsequent criminal convictions in circuit court.

### A. Counsel’s Performance Was Deficient and Fell Below the Accepted Standard of Reasonableness

Kentucky courts have long recognized that “Adequate preparation by an attorney employed by one charged with a crime includes . . . study of the facts and the law applicable thereto . . .” Morgan v. Commonwealth, Ky., 399 S.W.2d 725, 726 (1966). “At the heart of

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<sup>8</sup> In this case, the circuit court’s denial of the Motion to Vacate did not specifically address appellant’s claim of ineffective assistance of counsel (TR 90-91). Presumably, this is because the court did not find any merit in the primary argument – that appellant was improperly transferred to the circuit court as a youthful offender – as set forth above (Id.). Nevertheless, appellant will reiterate his previous arguments on appeal.

effective representation is the independent duty to investigate and prepare.” Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983), citing Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). On this subject, the American Bar Association has stated:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

ABA Standards for Criminal Justice, Standard 4-4.1, at 4-53 (2d. ed. Supp. 1986); Sims v. Livesay, 970 F.2d 1575, 1580 n.1 (6th Cir. 1992).

This Court has observed that “there can be no question that a waiver order is of critical importance to a minor accused of crime. It can make a difference between a brief period of regenerative treatment and life imprisonment and even death.” Buchanan v. Commonwealth, above, 652 S.W.2d at 88 (1983). The U.S. Supreme Court has similarly affirmed that the transfer hearing is a “critically important” stage in the proceeding, one which “must measure up to the essentials of due process and fair treatment.” Kent v. United States, 86 S.Ct. 1045, 1057 (1966). Therefore, it is essential for any attorney representing a juvenile, who is facing prosecution as an adult, to first determine whether there are sufficient legal grounds to justify prosecuting the child in that forum. Where, as here, the determination hinges on the statutes under which the Commonwealth is making the motion to transfer jurisdiction, the defense lawyer must familiarize himself or herself with that record and must determine whether his client meets the requirements for eligibility under the statutes relied upon by the courts and the Commonwealth.

In this case, counsel failed to object when the district judge stated her “assumption” that the matter would be on for a transfer hearing based upon the weapons enhancement (TR audio Supp.). Counsel failed to object when the court, without formal motion by the County Attorney

to transfer, set the matter for a transfer hearing less than a month after the detention hearing (*Id.*). Prior to transfer, counsel failed to make the argument, as set forth above, that James Jackson was ineligible for transfer pursuant to the mandatory eligibility criteria in KRS 635.020 (TR Supp.; TE audio Supp.; TE audio). Such an argument could have been put forth after a careful reading of the statutes. Moreover, the argument should have been tendered after a relatively simple search of the relevant case law.

Under the circumstances, there is no doubt that counsel unreasonably failed to provide competent professional assistance. In addition to failing to object on the grounds of ineligibility, counsel failed to challenge the validity of the transfer order once it was entered on either the jurisdictional issue or its failure to explicitly state the court's findings under KRS 635.020 or KRS 640.010. See *Osborne v. Commonwealth*, 43 S.W.3d 234, 239 (Ky. 2001) (recognizing KRS 640.010's requirement that the court must state its reason for transfer in the order); *Phelps, supra*, (holding that even though Phelps could have been transferred without the felony enhancements charged, the matter would be remanded to the district court to hold a new transfer hearing and enter an order specifically stating its basis for transfer, if it determined Phelps should be transferred on remand).

In short, trial counsel's performance was deficient given her failure to adequately prepare for this critical hearing by identifying a defense which would have ensured her client's immunity from criminal conviction.

**B. The Prejudice to Appellant can be Gleaned from the Facts of Record in this Case. Remand for a Determination of the Voluntariness of the Plea is Unnecessary Where it is Clear that Appellant was Among a Protected Class of Juveniles Whom the Legislature Determined Ought Never to be Deprived of the Special Protections of the Juvenile Court System.**

On the record before this Court, there is no doubt that the result would have been different had counsel timely and properly objected to the transfer based upon appellant's ineligibility under the mandatory criteria in KRS 635.020. Since this issue goes to the

appellant's eligibility for transfer, the district court would have been required to overrule the County Attorney's motion to transfer and appellant would have remained in the juvenile court where he would have received the special protections guaranteed by the legislature.

Courts have reversed cases on the grounds of ineffective assistance of counsel because of deficient performance at a transfer hearing. See, e.g., State v. Bryant, 567 A.2d 212 (N.J. Super. Ct. App. Div. 1988), *reversed in part on other grounds*, 569 A.2d 770 (N.J. 1989)(failure to present evidence of rehabilitation in a transfer hearing constituted ineffective assistance of counsel under Strickland). More importantly, Kentucky courts have held that "it is ineffective assistance of counsel to fail, without a reasonable basis, to present a defense which would compel a dismissal of the charges." <sup>9</sup>Ivey v. Commonwealth, Ky.App., 655 S.W.2d 506 (1983). And the failure to raise a defense which would have resulted in immunity from criminal prosecution is precisely the situation presented in this case.

The record demonstrates that appellant never intended to waive the issue of transfer to the circuit court. At the transfer hearing in the district court, trial counsel cross-examined the Commonwealth's witnesses and made arguments against transfer at the close of the hearing (TE audio). However, these arguments and questions focused solely on the discretionary factors set forth in KRS 640.010 (Id.). Counsel failed to object to appellant's transfer to circuit court as a youthful offender because none of the mandatory prerequisites for transfer set forth in KRS 635.020 were met (Id.).

It is inconceivable that James Jackson would instruct his counsel to argue in favor of the protections of the juvenile court system based on the court's evaluation of discretionary factors, if

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<sup>9</sup>Courts have likewise reversed cases for ineffective assistance of counsel where trial counsel failed to object or preserve reversible error for appeal. Flores v. Demskie, 215 F.3d 29 (2<sup>nd</sup> Cir.), *cert. denied*, 531 U.S. 1029 (2000)(trial counsel's waiver of automatically reversible error was ineffective); Vaz v. State, 626 So.2d 1022 (Fla. Dist. Ct. App., 1993)(failure to join in co-defendant's motion was ineffective, where co-defendant's case was reversed on appeal on those grounds); Commonwealth v. Butler, 566 A.2d 1209 (Pa. Super. Ct. 1989)(failure to challenge trial court's jurisdiction ineffective); Gilchrist v. State, 534 So.2d 1120 (Ala.Crim.App. 1988)(failure to object to reversible error ineffective); Commonwealth v. Groff, 548 A.2d 1237 (Pa.Super.Ct. 1988)(failure to assert statute of limitations ineffective); Salkil v. State, 736 S.W.2d 428 (Mo.Ct.App. 1987)(failure to object to defective verdict ineffective).



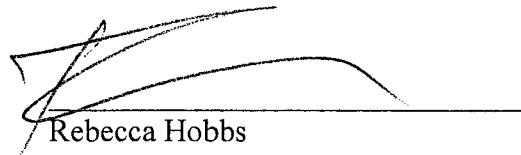
he had known that an argument under the mandatory criteria in KRS 635.020 would be determinative of the issue – ensuring that he would avoid criminal conviction. Appellant had nothing to gain by not objecting to the transfer under the theory that he was ineligible.

Accordingly, this Court should find that counsel acted ineffectively in failing to object to appellant's transfer to circuit court and further remand this matter with instructions that the circuit court vacate his criminal convictions and dismiss the charges with prejudice. U.S.Const. Amends. VI, XIV, and Ky. Const. §§ 2, 3, 10, 11, 14.

### CONCLUSION

For the reasons stated above, this court should vacate the final judgment/sentence of imprisonment and dismiss all charges with prejudice.

Respectfully Submitted,  
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