March 27, 1997

OPINION NO. 97-013

The Honorable David E. Bowers
Allen County Prosecuting Attorney
410 Colonial Building
212 N. Elizabeth Street
Lima, Ohio 45801

Dear Prosecutor Bowers:

We have received your letter concerning a juvenile offender whose case is transferred to the common pleas court for criminal prosecution as an adult pursuant to R.C. 2151.26. You have asked whether the juvenile can, upon conviction, be ordered or committed to a community-based correctional facility established for adult offenders pursuant to R.C. 2301.51 and related provisions.

To understand your question, it is helpful to be familiar with community-based correctional facilities. A community-based correctional facility is a secure residential facility created pursuant to R.C. 2301.51-.58, with the approval of the Division of Parole and Community Services of the Department of Rehabilitation and Correction. *See* R.C. 2301.51(B); R.C. 2301.52(A); R.C. 5120.10; R.C. 5120.111; 15 Ohio Admin. Code Chapter 5120:1-14. Such a facility is established and operated by a judicial corrections board, consisting of judges of the court or courts of common pleas that are served by the facility and its program. R.C. 2301.51. It consists of a general treatment program that is applied individually to persons in the program. The program includes a thirty-day evaluation period; temporary release for work-release programs, vocational training, education, or rehabilitation; and use of community resources. R.C. 2301.52; 15 Ohio Admin. Code 5120:1-14-01(G); 15 Ohio Admin. Code 5121:1-14-03(J). A community-based correctional facility is designed and established for adult offenders, and is not part of the juvenile justice system. The statutes and rules governing community-based correctional facilities and programs do not specifically address juveniles who are convicted as adults and, accordingly, do not distinguish between them and adult offenders. *See* R.C. 2301.51-.58; 15 Ohio Admin. Code Chapter 5120:1-14.

Let us now examine the statutory provisions that govern the transfer of a juvenile case for criminal prosecution, commonly known as a "bindover." We begin with the understanding that R.C. 2151.23(A)(1) grants the juvenile court exclusive original jurisdiction concerning a child who is alleged to be a delinquent child. There are various conditions, however, that permit — or, in

certain circumstances, require — a case involving an alleged delinquent juvenile to be transferred to another court for criminal prosecution. R.C. 2151.26; R.C. 2151.23(H).

When a case involving a juvenile is transferred for criminal prosecution, "the juvenile court shall state the reasons for the transfer and order the child to enter into a recognizance with good and sufficient surety for the child's appearance before the appropriate court *for any disposition that the court is authorized to make for a similar act committed by an adult.*" R.C. 2151.26(F) (emphasis added). The plain language of the statute thus indicates that, when a juvenile is prosecuted as an adult, the court may order "any disposition" that it could order for an adult who commits a similar act.

R.C. 2151.26(F) also states that, when a case involving a juvenile is transferred for criminal prosecution, "the case then shall be within the jurisdiction of the court to which it is transferred as described in [R.C. 2151.23(H)]." R.C. 2151.23(H) grants the court to which the case is transferred for criminal prosecution:

> jurisdiction subsequent to the transfer to hear and determine the case *in the same manner as if the case originally had been commenced in that court*, including, but not limited to, jurisdiction to accept a plea of guilty or another plea authorized by Criminal Rule 11 or another section of the Revised Code and jurisdiction to accept a verdict and to enter a judgment of conviction pursuant to the Rules of Criminal Procedure against the child for the commission of the offense that was the basis of the transfer of the case for criminal prosecution, whether the conviction is for the same degree or a lesser degree of the offense charged, for the commission of a lesser-included offense, or for the commission of another offense that is different from the offense charged.

R.C. 2151.23(H) (emphasis added). The court receiving the case thus has discretion to hear and determine the case as if it had commenced in that court. After a juvenile case is transferred for criminal prosecution, the person who is the subject of the case is deemed not to be a child in the transferred case. R.C. 2151.011(B)(1).

When an individual is convicted of or pleads guilty to a criminal offense, the court may impose a sentence in accordance with applicable provisions of law. *See* R.C. Chapter 2929; *State v. Beasley*, 14 Ohio St. 3d 74, 75, 471 N.E.2d 774, 775 (1984) ("[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void"); *City of Toledo v. Reasonover*, 5 Ohio St. 2d 22, 213 N.E.2d 179 (1965); *Colegrove v. Burns*, 175 Ohio St. 437, 438, 195 N.E.2d 811, 812 (1964) ("[c]rimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute"); *State v. Hartman*, 61 Ohio App. 3d 729, 573 N.E.2d 1133 (Van Wert County 1988). Certain statutes contain special provisions governing juveniles. For example, an individual who was under eighteen at the time of commission of the offense of aggravated murder may not be sentenced to death. *See, e.g.*, R.C. 2929.02; R.C. 2929.023; R.C. 2929.03; R.C. 2929.05(C). Within the statutory limits, the court has discretion to impose an appropriate sentence. *See, e.g.*, R.C. 2929.13; R.C. 2929.15; R.C. 2929.221; *State v. Turner*, 37 Ohio App. 3d 38, 523 N.E.2d 326 (Cuyahoga County 1987).

In examining a criminal court's discretion to sentence juveniles, it is appropriate to look at statutory provisions governing the manner in which a juvenile may be detained or held. These have been amended recently and, for purposes of providing guidance for the future, this opinion considers the provisions as they will be in effect on March 31, 1997.[1]

As recently amended, R.C. 2151.311 states that, "[i]f a child has been transferred to an adult court for prosecution for the alleged commission of a criminal offense, subsequent to the transfer, the child may be held as described in [R.C. 2151.312(C) or R.C. 5120.16(B)]." R.C. 2151.311(C)(2).[2] This statute thus describes two manners in which a child may be held after the child's case is bound over for criminal prosecution.

The first manner of holding a child following a bindover is that described in R.C. 2151.312(C). The reference to R.C. 2151.312(C) is to a portion of R.C. 2151.312 requiring that a juvenile whose case is transferred for criminal prosecution be held apart from adult detainees when transferred for detention "pending the criminal prosecution." That portion of R.C. 2151.312 is designated division (F) by recent legislation. *See* Sub. H.B. 265, 121st Gen. A. (1996) (eff. March 3, 1997). It applies only to the detention of juveniles charged with crime pending criminal prosecution and not to juveniles who have been convicted of crime. Therefore, it is not relevant to your question.

The second manner of holding a child following a bindover is that described in the recently enacted provision R.C. 5120.16(B).[3] R.C. 5120.16(B) applies when a juvenile is convicted of or

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[1] This opinion considers provisions adopted by Am. Sub. H.B. 124, 121st Gen. A. (1996) (eff. March 31, 1997), and Sub. H.B. 265, 121st Gen. A. (1996) (eff. March 3, 1997). Am. Sub. H.B. 124 amended some of the same sections as Sub. H.B. 265 without incorporating the changes made by Sub. H.B. 265. It appears, however, that the amendments can be harmonized so that effect is given to both. *See* R.C. 1.52(B); note 7, *infra*. *See generally* Am. Sub. H.B. 124, 121st Gen. A. (1996) (eff. March 31, 1997) (section 7, uncodified); *State v. Wilson*, 77 Ohio St. 3d 334, 673 N.E.2d 1347 (1997).

[2] This version of R.C. 2151.311 was enacted by Am. Sub. H.B. 124, 121st Gen. A. (1996) (eff. March 31, 1997).

[3] R.C. 5120.16(B) states:

> If the case of a child who is alleged to be a delinquent child is transferred for criminal prosecution to the appropriate court having jurisdiction of the offense pursuant to division (B) or (C) of section 2151.26 of the Revised Code, if the child is convicted of or pleads guilty to a felony in that case, if the child is sentenced to a prison term, as defined in section 2901.01 of the Revised Code, and if the child is under eighteen years of age when delivered to the custody of the department of rehabilitation and correction, all of the following apply regarding the housing of the child:

pleads guilty to a felony, is sentenced to a prison term,[4] and is under age eighteen when delivered to the custody of the Department of Rehabilitation and Correction. It defines the conditions in which the Department may hold such a juvenile — namely, by housing the child "in a housing unit in a state correctional institution separate from inmates who are eighteen years of age or older" until the child is eighteen, unless the child does not observe the rules or otherwise creates a security risk, or, if

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> (1) Until the child attains eighteen years of age, subject to divisions (B)(2), (3), and (4) of this section, the department shall house the child in a housing unit in a state correctional institution separate from inmates who are eighteen years of age or older.
> (2) The department is not required to house the child in the manner described in division (B)(1) of this section if the child does not observe the rules and regulations of the institution or the child otherwise creates a security risk by being housed separately.
> (3) If the department receives too few inmates who are under eighteen years of age to fill a housing unit in a state correctional institution separate from inmates who are eighteen years of age or older, as described in division (B)(1) of this section, the department may house the child in a housing unit in a state correctional institution that includes both inmates who are under eighteen years of age and inmates who are eighteen years of age or older and under twenty-one years of age.
> (4) Upon the child's attainment of eighteen years of age, the department may house the child with the adult population of the state correctional institution.

See Am. Sub. H.B. 124, 121st Gen. A. (1996) (eff. March 31, 1997).

[4] R.C. 5120.16(B) refers to "prison term, as defined in section 2901.01 of the Revised Code." No such definition appears in R.C. 2901.01. However, R.C. 2929.01 defines "prison" and "prison term" as follows:

> (CC) "Prison" means a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction.
> (DD) "Prison term" includes any of the following sanctions for an offender:
> (1) A stated prison term;
> (2) A term in a prison shortened by, or with the approval of, the sentencing court pursuant to section 2929.20, 2967.26, 2967.27, 5120.031 [5120.03.1], 5120.032 [5120.03.2], or 5120.073 [5120.07.3] of the Revised Code;
> (3) A term in prison extended by bad time imposed pursuant to section 2967.11 of the Revised Code or imposed for a violation of post-release control pursuant to section 2967.28 of the Revised Code.

R.C. 2929.01. Because a community-based correctional facility is operated by a judicial corrections board, rather than by the Department of Rehabilitation and Correction, it is not a prison or state correctional institution.

there are not enough inmates under age eighteen to fill a housing unit, with inmates who are under age twenty-one.

The general provisions of R.C. 2151.311(C)(2) thus describe two manners in which a juvenile may be held following a bindover and do not include reference to community-based correctional facilities. Those general provisions, however, are not phrased in exclusive language and, therefore, do not preclude the possibility that there are other manners in which a juvenile may properly be held after a bindover. *Cf.* R.C. 2151.312(A) (providing that certain children "may be held only in the following places"). Rather, the statutes permit the conclusion that a juvenile who is bound over and convicted of a crime may be sentenced to a facility other than a prison.

This conclusion finds support in the history of R.C. 2151.311(C)(2). Until the effective date of its recent amendment,[5] R.C. 2151.311(C)(2) states:

> If a child has been transferred to an adult court for prosecution for the alleged commission of a criminal offense, subsequent to the transfer, the child may be held as described in division (C) of section 2151.312 of the Revised Code *or, if that division does not apply, may be held in a state correctional institution or other place where an adult convicted of crime, under arrest, or charged with crime is held.*

R.C. 2151.311(C)(2) (emphasis added). As discussed above, R.C. 2151.312(C) [designated division (F) by Sub. H.B. 265, 121st Gen. A. (1996) (eff. March 3, 1997)] provides for the separation of a child from adult detainees "pending the criminal prosecution," and does not apply following conviction. Hence, under the language of R.C. 2151.311(C)(2) currently in effect, a juvenile who was convicted of a crime can be "held in a state correctional institution or other place where an adult convicted of crime, under arrest, or charged with crime is held." R.C. 2151.311(C)(2). Such a place can include a correctional facility other than a prison.

The amendment enacted by Am. Sub. H.B. 124 and effective on March 31, 1997, eliminates the italicized portion of R.C. 2151.311(C)(2) quoted above and makes minor changes in R.C. 2151.312(C) [designated division (F) by Sub. H.B. 265, 121st Gen. A. (1996) (eff. March 3, 1997)] concerning the manner in which a juvenile whose case has been transferred for criminal prosecution may be detained pending criminal prosecution. It also moves the provisions directing the Department of Rehabilitation and Correction to house juveniles separately in state correctional institutions from R.C. 2151.23(H)(2) to R.C. 5120.16(B), and it modifies those provisions. Am. Sub. H.B. 124 includes among its purposes "to clarify the manner of imprisonment of a child who is bound over, convicted, and sentenced to prison." Am. Sub. H.B. 124, 121st Gen. A. (1996) (eff. March 31, 1997) (title). The language of the act does not indicate an intention to restrict a court's discretion with respect to the sentence given to a child who is bound over and convicted.[6]

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[5] *See* Am. Sub. H.B. 124, 121st Gen. A. (1996) (eff. March 31, 1997).

[6] The Final Analysis of Sub. H.B. 124 prepared by the Legislative Service Commission contains the following description of the effect of the amendments to R.C. 2151.311 and 2151.312:

Therefore, it is appropriate to construe R.C. 2151.311(C)(2) as describing two manners in which a child who has been bound over may be held, but not as restricting the court in its discretion to commit a juvenile to a facility other than a prison following conviction.

> *Detention of a child whose case is bound over for criminal prosecution*
> Under prior law, subject to a few limited exceptions, a child cannot be held in a state or local correctional institution or other place where an adult convicted of a crime, under arrest, or charged with a crime is held. If none of the exceptions apply, the official in charge of the state or local correctional institution or other facility must inform the juvenile court immediately when a child who is or appears to be under 18 years of age is received at the institution or facility and must deliver the child to the court upon request or transfer the child to a detention facility designated by the court. (Sec. 2151.312(B).)
> One exception to the general prohibition specifies that, if a case is transferred to another court for criminal prosecution under mandatory or discretionary bindover provisions, the child may be transferred for detention pending the criminal prosecution in a jail or other facility in accordance with the law governing the detention of persons charged with a crime. Any child so held must be confined in a room totally separate by both sight and sound from all adult detainees and must be supervised at all times during the detention. (Sec. 2151.312(C).) A second exception specifies that, if a child's case is bound over but the detention-related provision described in the preceding sentence does not apply, the child subsequently may be held in a state correctional institution or other place where an adult convicted of a crime, under arrest, or charged with a crime is held (sec. 2151.311(C)(2)).
> The act retains the general prohibition against holding a child in a detention or correctional institution where an adult is held but modifies the two above-described exceptions to the general prohibition. Under the act, if a child is held under authority of the first exception, the child must be confined in a "manner that keeps the child beyond the range of touch of all adult detainees" instead of in a "room totally separate by both sight and sound from all adult detainees"; as under continuing law, the child still must be supervised at all times during the detention (sec. 2151.312(C)). The second exception is narrowed to specify only that, if a child's case is bound over for criminal prosecution, the child may be held as described in the first exception or as in the provision described below in "*Housing of juvenile prisoner by Department of Rehabilitation and Correction*" (sec. 2151.311(C)(2)).

Ohio Legislative Service Commission, Final Analysis, Sub. H.B. 124, 121st General Assembly, at 11-12 (Dec. 6, 1996). This language describes the amendment as a narrowing of the exception that permits a child whose case is bound over to be held in an adult facility. To the extent that it suggests that a juvenile whose case is bound over may be sentenced only to prison, I respectfully disagree.

Other provisions governing the manner in which a juvenile may be held appear in R.C. 2151.312. As discussed above, R.C. 2151.312(C) [designated division (F) by Sub. H.B. 265, 121st Gen. A. (1996) (eff. March 3, 1997)] pertains to detention in case of a bindover but only pending criminal prosecution and not following conviction. The remaining provisions of R.C. 2151.312 govern the detention of children who are alleged or adjudicated delinquent, unruly, or juvenile traffic offenders, not children whose cases have been bound over. Thus, R.C. 2151.312 does not restrict the authority of a criminal court to sentence a child who has been tried and convicted as an adult.[7] *See* note 8, *infra*.

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[7] R.C. 2151.312 has been amended by Sub. H.B. 265, 121st Gen. A. (1996) (eff. March 3, 1997), and Am. Sub. H.B. 124, 121st Gen. A. (1996) (eff. March 31, 1997), and neither of those acts reflects amendments made by the other. A composite statute can be formed, however, by incorporating the amendments made by both acts. *See* R.C. 1.52; note 1, *supra*. With the amendments reconciled in this manner, R.C. 2151.312(D) and (E) state:

> (D) Except as provided in division (C) [now (F)] of this section or in division (C) of section 2151.311, in division (C)(3) of section 5139.06 and section 5120.162, or in division (B) of section 5120.16 of the Revised Code, a child who is alleged to be or

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> is adjudicated a delinquent child may not be held in a state correctional institution, county, multicounty, or municipal jail or workhouse, or other place where an adult convicted of crime, under arrest, or charged with crime is held.
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> (E) Unless the detention is pursuant to division (C) [now (F)] of this section or division (C) of section 2151.311, division (C)(3) of section 5139.06 and section 5120.162, or division (B) of section 5120.16 of the Revised Code, the official in charge of the institution, jail, workhouse, or other facility shall inform the court immediately when a child, who is or appears to be under the age of eighteen years, is received at the facility, and shall deliver the child to the court upon request or transfer the child to a detention facility designated by the court.

R.C. 5139.06(C)(3) and R.C. 5120.162 concern situations in which a child who has been committed to the Department of Youth Services is transferred to a correctional medical center established by the Department of Rehabilitation and Correction when the child has an illness, physical condition, or other medical problem.

The restrictions imposed by R.C. 5120.16(B) upon the manner in which a juvenile may be housed apply only to a juvenile who is convicted of or pleads guilty to a felony, is sentenced to a prison term, and is under age eighteen when delivered to the custody of the Department of Rehabilitation. Clearly there will be instances in which juveniles who are prosecuted as adults are convicted only of misdemeanors or are not guilty of conduct that warrants a prison term. In those circumstances, the court must have authority to commit a juvenile to a facility other than a prison. *See, e.g.*, R.C. 2929.13; R.C. 2929.221.[8]

As discussed above, in a criminal case a court has discretion to impose an appropriate sentence, within limitations imposed by statute. When a juvenile is criminally prosecuted as an adult, the court has the same authority to resolve that case as it has with an adult. It follows that the court may select from the available programs and facilities a sentence that is appropriate for the juvenile, as it would for an adult, within applicable statutory restrictions.

The statutes governing the Department of Youth Services give it responsibility for delinquent children, but do not contemplate that the Department will be responsible for juveniles who have been prosecuted as adults. *See* R.C. 2151.355; R.C. 5139.03; R.C. 5139.04-.06; R.C. 5139.13; 16 Ohio Admin. Code Chapter 5139-1 to 5139-65. Rather, it is appropriate for juveniles who are prosecuted as adults to be sentenced as adults, subject to statutory restrictions applicable to juveniles, such as the provisions of R.C. 5120.16(B) that govern the housing of juveniles in state correctional institutions.

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[8] The fact that references to R.C. 5120.16(B) appear in R.C. 2151.312(D) and (E) as exceptions to the prohibition against holding children in places where adult offenders are held might suggest that, absent a similar reference, a juvenile who has been convicted as an adult cannot be sentenced to any adult facility other than a prison. *See* note 7, *supra*. That implication must be rejected, however, because R.C. 2151.312(D), as amended by Sub. H.B. 265, 121st Gen. A. (1996) (eff. March 3, 1997), by its terms applies only to children who are alleged or adjudicated delinquent. Further, R.C. 2151.312(E) indicates that a child may be held in a facility designated by the court. Therefore, R.C. 2151.312(D) and (E) cannot reasonably be construed as restricting the sentencing of a juvenile who has been prosecuted as an adult.

As discussed above, the provisions governing community-based correctional facilities and programs do not distinguish between adult offenders and juveniles who are convicted as adults and, accordingly, impose no restrictions upon the commitment of those juveniles. *See* R.C. 2301.51-.58; 15 Ohio Admin. Code Chapter 5120:1-14. Therefore, juveniles who are convicted as adults may be committed to community-based correctional facilities and programs in the same manner as adults.

By statute, there are several different ways in which an individual may be ordered or committed to a community-based correctional facility. An individual may be sentenced to the facility and program by a court pursuant to the provisions of R.C. 2929.16 or R.C. 2929.17, which provide for the imposition of sanctions upon certain felony offenders. An individual may be released to the facility and program by the Department of Rehabilitation and Correction under R.C. 2967.23, which provides for release, with the approval of the judicial corrections board and subject to disapproval by the sentencing judge, for the last one hundred twenty days of a prisoner's stated prison term. The statutes also provide generally for the admission of persons "otherwise committed or admitted pursuant to law to the facility and program," R.C. 2301.52(A)-(B), including the admission of persons by the parole board pursuant to R.C. 2967.28. *See* R.C. 2301.51(B)(2); R.C. 2301.52(A)-(B); *see also* R.C. 2301.52(E); R.C. 2929.13; R.C. 2929.15; R.C. 2929.221(D); 15 Ohio Admin. Code 5120:1-14-01(H); 15 Ohio Admin. Code 5120:1-14-03(J)(3); 15 Ohio Admin. Code 5120:1-14-04(B)(2). A juvenile who has been convicted as an adult may, in appropriate circumstances, fit within one of these categories and be eligible for commitment to a community-based facility.

Therefore, it is my opinion, and you are advised, that in appropriate circumstances, a juvenile offender whose case has been transferred to the court of common pleas for prosecution as an adult pursuant to R.C. 2151.26 may, upon conviction, be ordered or committed to a community-based correctional facility established pursuant to R.C. 2301.51-.58.

Respectfully,

BETTY D. MONTGOMERY
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March 27, 1997

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SYLLABUS: 97-013

In appropriate circumstances, a juvenile offender whose case has been transferred to the court of common pleas for prosecution as an adult pursuant to R.C. 2151.26 may, upon conviction, be ordered or committed to a community-based correctional facility established pursuant to R.C. 2301.51-.58.