IN THE SUPREME COURT OF OHIO

SCT NO.

IN RE A.W.	:	
Appellant	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of
	:	Appeals
	:	CA: 105845

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT A.W.

MARK A. STANTON
Cuyahoga County Public Defender
BY: CULLEN SWEENEY, ESQ. (COUNSEL OF RECORD)
0077187
FRANK CAVALLO, ESQ. #0073428
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
(216) 443-7583
csweeney@cuyahogacounty.us
COUNSEL FOR APPELLANT A.W.

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
BY: JEFFREY M. MAVER, ESQ. #0091126
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE OF OHIO

TABLE OF CONTENTS

PAGES

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST:

A.W. sits in an adult prison even though he did everything the juvenile court ordered him to do during the juvenile portion of a serious youthful offender ("SYO") sentence. The events by which he arrived in an adult prison with a permanent criminal record are both unsettling and capable of recurring to every SYO delinquent child.

On October 23, 2016, the juvenile court judge imposed an SYO sentence of seven months in the Ohio Department of Youth Services (ODYS) with the potential of receiving a three-year prison sentence if the juvenile sentence was not successfully completed. When A.W. entered his plea, the juvenile court judge told A.W. that, so long as he does not get into fights during his ODYS incarceration, his case would be over in May, 2017. Although the juvenile court judge indicated that she hoped A.W. would receive sex offender treatment, she did not order such treatment at that time. And A.W. did as he was told. He was a well-behaved juvenile prisoner. He followed the rules.

In January, 2017, the juvenile court judge reviewed A.W.'s status. During that review, the court learned that A.W. "does well in all services" but had not started sex offender treatment in December 2016 when it was first offered. At this point, the juvenile court decided to order A.W. to participate in sex offender treatment as a part of A.W.'s continued juvenile confinement.

And A.W. did as he was told. He continued to be a well-behaved prisoner. He followed the rules. He agreed to participate in sex offender treatment. But ODYS did not put A.W. into sex offender treatment, even though A.W. was willing to go.

In March 2017, the juvenile court judge learned that ODYS had not provided any treatment to A.W. despite A.W.'s willingness to participate as of mid-January 2017. The Court recognized that ODYS had failed A.W.:

> You know he's going to be 21 in May. You know that he has an SYO, meaning that I can send him to Adult Prison if he doesn't complete my orders. So I don't understand how – I don't understand how – even though you have a closed group and I understand that, how did we not go to Plan B and figure out how to get him the required sex offender treatment? *It's been two months now where I ordered him to do something. He agreed to do it and we're the ones that are failing him.*"

(Emphasis added). The juvenile court then ordered A.W. to participate in both individual and group sex offender treatment and "complete as much of the program as he can" once placed into it.

And A.W. did as he was told. He continued to be well-behaved. He followed the rules. As for sex offender treatment? A.W. fully participated in both individual and group programs. According to the ODYS counselor who individually counseled A.W., A.W. "was very engaged and he did do the work." According to A.W.'s group counselor, A.W. "did well" in the group, "was always on time," "did a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments."

So when A.W. came back in May, 2017, just weeks before he was to be released, A.W. had every reason to believe that, having done as much as he could do in the time provided, he would be able to move into his adult life without a criminal record.

But the juvenile court invoked the adult portion of the SYO sentence anyway on the *sole basis* that A.W. did not *complete* his court-ordered sex offender treatment – even though the juvenile court's journal entry from March stated that A.W. should do "as much as he can."

The question presented for this Court is –at its core—was this fair? Although a majority upheld the lower court's order, the dissenting opinion captured the essence of this case in one

sentence: "The system obviously failed A.W. by depriving him of basic fundamental fairness." Opinion Below, at ¶ 116 (Keough, J. *dissenting*).

If this were a case that involved the life of even one young person, it would still be significant enough to justify this Court's time and attention. But what happened to A.W. can now happen to any SYO offender – none of them can rest easy in the belief that "if I follow the rules, it will be ok." This was not what the General Assembly contemplated would be the effect of an SYO system designed to give children the opportunity to turn their lives around without the life-long stigma of a serious felony conviction.

The legal questions that arise from this case are both substantial and constitutional:

1) Under the SYO Act and constitutional due process, can a juvenile court invoke the adult sentence for a juvenile's failure to complete programming when the juvenile not advised of that possibility at the time of the plea and when it was factually impossible to complete the programming given the short duration of the juvenile sentence?

2) Whether a juvenile court can invoke an adult sentence even without an affirmative act of misconduct by the juvenile? This issue could affect an SYO offender who does not complete every aspect of programming offered by ODYS.

3) Whether a juvenile court can invoke an adult sentence by relying upon material that was not admitted into evidence at the invocation hearing and included unsworn statements from prior status hearings? This affects every SYO offender who ever comes before a juvenile court for the possible invocation of their adult sentence. This Court should instruct lower courts that, while juvenile courts have often employed relaxed procedures, adherence to the rules of evidence and constitutional Confrontation are essential when the potential result is an adult conviction and an adult prison sentence.

4) What is the appropriate standard of review for constitutional violations that occur during an SYO invocation hearing? Here, the Eighth District recognized that A.W.'s Fifth Amendment rights were violated at the invocation hearing, but then evaluated that error in a manner totally inconsistent with the review of constitutional errors in adult cases.

Resolution of each of these questions is critical to ensure consistency and fairness in the application of Ohio's SYO law. If the Eighth District's Opinion Below is correct, then a juvenile can have the adult portion of an SYO sentence invoked for something:

- About which he was not told at the time of his plea;
- Which he could not have done under the conditions of confinement imposed by ODYS; and
- Which was not an affirmative act of misconduct and did not create a substantial risk to anyone.

And all of the above can be accomplished at a hearing based upon unsworn statements from prior status hearings where constitutionally-inadmissible evidence is considered. Moreover, the juvenile court judge that presides over this haphazard procedure can be assured of a more relaxed appellate review for constitutional error than his or her general division colleague who sentences an adult defendant to the same prison term.

If that is a correct statement of law, anything could lead to the invocation of an adult prison sentence and defense attorneys would need to counsel their juvenile clients accordingly. Young offenders may well decide that they are better off eschewing SYO and taking their chances in an adult trial where, at the very least, confrontation and meaningful appellate review will be provided.

And everyone loses: The adult system takes on cases that it need not take; victims are unnecessarily subjected to public trials in general division courts; the General Assembly sees an ineffective SYO procedure; and young offenders are taught that playing by the rules is not enough in the State of Ohio's moving-target juvenile justice system.

STATEMENT OF THE CASE AND FACTS

On April 22, 2014, A.W., a minor child, was charged by complaint in juvenile court with two counts of rape, two counts of gross sexual imposition, and one count of kidnapping. These charges were based on an incident that allegedly occurred eight months earlier, on August 17,

2013, when A.W. was 17 and the alleged victim, A.A., was 13. The prosecution was delayed because A.A. initially claimed that she had been sexually assaulted by a stranger. When A.A. met with the police, she did not admit that she had been texting with A.W. and that she intentionally met him at the festival. And she never gave police his contact information. A.W. was detained on this case on May 12, 2016.

A Plea Bargain to an SYO Sentence

On September 7, 2016, after A.W. spent 122 days in detention, the trial court held a probable cause hearing pursuant to the State's request to bind the case over to adult court. In the midst of the bindover hearing, the State and A.W. agreed to keep the case in juvenile court by adding a SYO specification. The juvenile court judge explained to A.W. that he was going to stay in Juvenile Court and told him that:

> [T]he only way you will go to Adult Court, young man, is if you act out so badly at ODYS that they cannot handle you. Meaning, that you continually fight, you continually create delinquent acts.

On October 12, 2016, the juvenile court judge held a dispositional hearing and imposed the agreed-upon disposition that A.W. would be committed to ODYS for seven months (until his 21st birthday on May 23, 2017). The trial court also imposed a suspended adult sentence of three years that would be imposed if the adult portion of A.W.'s SYO sentence were to be invoked. Although the trial court stated that it wanted "sex offender treatment put in place for ODYS," it did not order A.W. to participate in such treatment.

The First Status Hearing

In January 2017, the juvenile court held a "review hearing" on A.W.'s ODYS commitment. A.W.'s parole officer reported that A.W. "does well in all services;" however he was not participating in sex offender treatment because he "continues to deny the accusations"

and ODYS would not place him into treatment if he was not "completely open and honest about his sexual offending." The juvenile court judge then told A.W. that he "either participate in the sex offender treatment" or he would go to adult prison. A.W. responded that he would participate in the treatment. After this hearing, the juvenile court issued a judgment entry which, *for the first time*, ordered A.W. to "participate" in sex offender treatment and stated that the failure to engage such treatment "may result in the Serious Youth Offender disposition being invoked."

The Second Status Hearing

On March 31, 2017, less than two months prior to A.W.'s 21st birthday, the juvenile court held a second review hearing. When the juvenile court judge learned that ODYS had not started sex offender treatment despite A.W.'s willingness, its frustration with ODYS was palpable:

> "It's been two months now where I ordered him to do something. He agreed to do it and we're the ones that are *failing* him." (Emphasis added).

The juvenile court then ordered A.W. to participate in "some type of tailored individual sex offender treatment" to augment the group treatment beginning on April 5. The juvenile court judge told A.W. "if you do everything you're supposed to, *I will not impose your SYO*." (Emphasis added). In the journal entry, the trial court stated that A.W. simply "needs to complete as much of the program as he can."

The Third Status Hearing

The trial court held a third "review hearing," less than two weeks prior to A.W.'s anticipated release on his 21st birthday. The Court was advised that A.W. had participated in both the individual and group sex offender treatment as ordered After A.W.'s parole officer asked A.W. to be excused from the hearing, she and Dr. Alpert discussed statements that A.W. allegedly made during court-ordered treatment.

Invocation of Adult Sentence

Less than one week before A.W.'s 21st birthday, the State filed a motion to invoke the adult portion of A.W.'s SYO sentence due to A.W.'s alleged failure to complete court-ordered sex offender treatment.

The trial court held a hearing on the State's motion to invoke the SYO specification on May 22, 2017. The State presented three witnesses at the hearing. Dr. Erin Greene engaged A.W. in seven individual counseling sessions, beginning April 1, 2017 and concluding on May 11, 2017. She testified that A.W. "was very engaged and he did do the work." Bonita Reaves testified that she began working with A.W. in April in a group consisting of four kids and that A.W. had completed seven of the lessons. Ms. Reaves testified that A.W. "did well" in the group, "was always on time," "did a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments." Dr. Robin Palmer testified that she was asked by ODYS to evaluate A.W. and provide a report regarding risk factors for sexual reoffending. In A.W.'s case, Dr. Palmer testified that she did not think that therapy would be effective because he "has been diagnosed with antisocial personality disorder with narcissistic tendencies."

During closing argument at the SYO hearing, the State argued that the juvenile court judge should invoke the SYO because A.W. "has not completed the Court-mandated treatment," regardless of whether "that is on ODYS or the juvenile himself." While the State conceded that A.W. "might be doing well," it argued that he "still has a ways to go."

The juvenile court judge stated that it found be clear and convincing evidence that, among other things, A.W. "engaged in conduct that created a substantial risk to safety, and I can clarify that by saying if you had done your treatment, that is the substantial risk to safety." Based on the failure to complete treatment, the trial court terminated the juvenile disposition and

invoked the adult conviction and prison sentence.

LAW AND ARGUMENT

Proposition of Law I: **The adult portion of an SYO sentence cannot be invoked for failure to complete ODYS programming unless the offender was given notice that the failure to comply could trigger invocation of the adult sentence and it was possible for the offender to have completed it.**

The juvenile court's invocation of A.W.'s adult sentence based upon his failure to complete sex offender treatment offends every aspect of due process from its "procedural arbitrariness" to its lack of notice and fundamental unfairness.

The Fourteenth Amendment of the United States Constitution forbids the States from depriving any person of life, *liberty*, or property without due process of law. XIV AMEND. U.S. CONST. *Accord,* Ohio Const. Art. I, Sec. 10. "Due process of law is the primary and indispensable foundation of individual freedom." *In re Gault*, 387 U.S. 1, 20 (1967). The Constitutional protections of the Due Process Clause apply to juvenile proceedings as "[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *Id.* at 13. The juvenile court's unique role in the "'parental' relationship is not an invitation to procedural arbitrariness." *Kent v. United States*, 338 U.S. 541, 554-55 (1966). With respect to juvenile due process, "fundamental fairness is the overarching concern." *In re C.P.*, 131 Ohio St. 3d 513, 532 (2012).

"A serious-youthful-offender disposition consists of a 'blended' sentence: a traditional juvenile disposition and a stayed adult sentence. R.C. 2152.13(D)(2)." *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶ 2, 901 N.E.2d 209. To invoke the adult portion of the SYO sentence, a court must find, by clear and convincing evidence, that the juvenile has engaged further bad conduct under R.C. 2152.14(A) or (B). *State v. D.H.*, 120 Ohio St. 3d 540 at 545.

Invoking the adult portion of A.W.'s SYO sentence was fundamentally unfair and violative of state and federal due process. To begin with, the juvenile court never advised A.W., at the time of the plea, that it was possible to get his adult sentence invoked merely for failing to complete sex offender treatment. On the contrary, the court stated that:

> "[T]he *only* way you will go to Adult Court, young man, is if you act out so badly at ODYS that they cannot handle you. Meaning, that you continually fight, you continually create delinquent acts." (emphasis added).

"Engrained in [the] concept of due process is the requirement of notice." *Lambert v. California* (1957), 355 U.S. 225, 228. Due Process Clause prohibits an individual from being held "criminally responsible for conduct which he could not reasonably understand to be proscribed." *Rose v. Locke* (1975), 423 U.S. 48, 49. When, as here, he is told that his adult sentence will only be invoked by his engaging in delinquent acts, his due process rights are violated when his adult sentence is invoked for some other condition (non-completion of sex offender treatment) of which he was never timely advised.

Secondly, once A.W. was advised that the failure to participate in sex offender treatment could result in the invocation of his adult sentence, he participated as ordered. Although the juvenile court order invoking the SYO specification indicated that treatment was ordered in November 2016, it was not actually ordered by the court until the first review hearing in January 2017. At that time, A.W. was willing to participate and did not start right away due to ODYS's failure to provide treatment. When ODYS finally provided treatment, A.W. fully and successfully participated.

And finally, the juvenile court's SYO invocation proceedings did *not* "measure up to the essentials of due process and fair treatment," *Kent, supra*, because it was impossible for A.W. to meet the juvenile court's new condition that he complete sex offender treatment during the short

duration of his ODYS commitment – which was not what the juvenile judge either said or journalized at the March status hearing.

Nor was compliance possible. A.W. was not assessed for his treatment needs until December 2016. At that point, A.W. had only five months remaining on his ODYS commitment prior to his 21st birthday. Both A.W.'s treating psychologist and the supervising psychologist at ODYS were quite clear that, given the abbreviated duration of A.W.'s ODYS commitment, it would have been impossible for A.W. to complete the sex offender treatment programming. When the failure to comply is not the fault of the defendant, yet the defendant is punished, due process is violated.

Proposition of Law II: **A juvenile court may not invoke the adult portion of an SYO sentence without evidence of further affirmative misconduct that creates a substantial risk to the safety or security of the institution, the community, or the victim.**

The trial court invoked the adult portion of A.W.'s SYO sentence because he did not complete sex offender treatment. A.W. submits this was an insufficient basis for invocation for two reasons. First, it did not constitute an affirmative act of misconduct. Although A.W. did not complete sex offender treatment, he did fully participate once ordered to do so and his initial reluctance lasted only a month. Second, even if A.W.'s reluctance to participate in sex offender treatment for a single month could be construed as affirmative misconduct, the short delay attributable to A.W. act did not create a substantial risk of safety or security to anyone.

The juvenile court invoked the adult portion of A.W.'s SYO sentence in this case in contravention of the very specific criteria for invocation. R.C. 2152.13(A)(2) limits invocation of the adult sentence to those circumstances where either:

> (a) The person committed an act that is a violation of the rules of the institution and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult.

> (b) The person has engaged in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim.

As with any criminal statute, this provision must be construed liberally in favor of the defendant and strictly against the prosecution. R.C. 2901.04, *Liparota v. United States,* 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (Fourteenth Amendment due process dictates rule of lenity).

To invoke the adult portion of the SYO sentence, a court must find, by clear and convincing evidence, that the juvenile has engaged further bad conduct under R.C. 2152.14(A) or (B). *State v. D.H.*, 120 Ohio St. 3d 540 at 545. This Court has consistently recognized that only misconduct rising to the level of "further bad acts" can cause the stayed adult penalty to be invoked. *In re C.P.*, 131 Ohio St. 3d 513 at 517. The "further wrongdoing" must extend beyond the original charge. *State v. D.H.*, 120 Ohio St. 3d 540.[1]

In this case, A.W. was not alleged to have committed a "further bad act" but to have failed to complete the full course of treatment, a program that was longer than the period of his ODYS commitment. Thus, he did not fit the criteria for invocation of an adult sentence. Even if the failure to complete programming could be considered misconduct within the meaning of the SYO invocation statute, the failure to complete programming, by itself, must create a "substantial risk" to the "safety or security of the institution, the community, or the victim." R.C. 2152.14(A)(2)(b). Here, at the worst, A.W. did not immediately participate in sex offender

[1] Other than the instant case, only one court in Ohio has invoked the adult portion of an SYO sentence for a failure to complete treatment. *See In re D.J.*, 9th App. Dist. No. 28472 & 28473, 2018-Ohio-569. In light of the statutory criteria, this decision is in error. Nonetheless, even that case is D.J. was "defiant" in failing to complete a course of treatment that typically took no more than 18 months during the course of 29 months in ODYS custody. In contrast, A.W. did not complete treatment because his time in custody was too short, a situation that was exacerbated by ODYS' failure to begin treatment when ordered to do so.

treatment after he was assessed by ODYS in December 2016.[2] However, once he was ordered by the judge to participate at the January 18, 2017 status hearing, A.W. agreed to participate. There is simply no basis in the record to conclude that A.W.'s *de minimus* delay in agreeing to participate in sex offender treatment created *any* additional risk to the community, let alone a substantial one.

That he was subjected to an adult sentence in light of the lack of evidence is a violation of due process of law under the Fifth and Fourteenth Amendments, and Article I, Section 10 of the Ohio Constitution.

Proposition of Law III: **When a juvenile court relies on evidence admitted in violation of the Fifth Amendment in invoking the adult portion of an SYO sentence, the invocation must be reversed unless admission of the improperly admitted evidence is harmless beyond a reasonable doubt.**

In the Court of Appeals, A.W. maintained that his constitutional protections against self-incrimination were violated when the juvenile court considered, at the May hearing to invoke the adult sentence, statements A.W. was compelled to make during his sex offender treatment. The Eighth District majority agreed that the trial court erred in considering "incriminating statements A.W. made to his counselor" in violation of the Fifth Amendment. Opinion Below, at ¶ 56. After finding the constitutional violation, the Court noted that the remedy for a Fifth Amendment violation is "suppression of the tainted evidence" and then independently evaluated the sufficiency of the remaining evidence. *Id.* at ¶¶ 57-61.

In engaging in this analysis, the Court confused the *pretrial* remedy for Fifth Amendment

---

[2] Sex offender treatment had not been ordered by the court at this time, and whether ODYS had ordered it, or just invited A.W. to participate is a point of contention. *Cf. Opinion Below* at ¶ 26 (Officer Dansby reported that A.W. had been ordered to participate and refused to comply) with at ¶ 80 (Dansby did not report that A.W. had been ordered to participate, but rather said that he does not participate and "they have given him until January 31st to weigh his options as to whether he'll participate in treatment or not, but as of this date he's not participating.")

violations with the appropriate *standard of appellate review* of evidence that is improperly considered by the factfinder in violation of the Fifth Amendment.

Suppression is, of course, an appropriate *pretrial* remedy to exclude evidence obtained in violation of the Fourth and Fifth Amendments. However, when such evidence is improperly considered by the factfinder, the question on review becomes whether or not the evidence received in violation of the Fifth Amendment is "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 22-24, 87 S. Ct. 824, 827-828 (1967). If there is a "reasonable probability" that the constitutional error "might have contributed" to the factfinder's conclusion, then the error is not harmless beyond a reasonable doubt and reversal is required. *Id.* That is a very different question from the one answered by the court below – whether "the record contains sufficient evidence to support the trial court's decision to invoke A.W.'s adult sentence without A.W.'s incriminating statements." *In re A.W.*, 2018-Ohio-2644, at ¶ 57. This Court has specifically rejected the Eighth District's sufficiency-of-the-remaining evidence analysis as incompatible with *Chapman*. *State v. Conway*, 108 Ohio St. 3d 214, 228 (2006). In *Conway*, this Court explained that the "harmless beyond a reasonable doubt" standard "is not simply an inquiry into the sufficiency of the remaining evidence." Rather, the question is whether there is a "reasonable possibility" that the evidence might have contributed to the conviction." *Id.*

Applying the appropriate standard of review makes clear that reversal is required in the instant case. This is not a case of overwhelming evidence of misconduct by A.W. The *sole* complaint was that he did not start sex offender treatment when he first arrived at ODYS. However, it is abundantly clear from the record that the mere fact he did not immediately start sex offender treatment was not enough for the trial court to invoke the adult sentence. As late as the March 31, 2017 hearing, the trial court still was advising A.W. that if he did as much of the

treatment program as he could in the short time remaining on his commitment, "I will not impose your SYO." And, from that point forward, it is undisputed that A.W. completed as much of the program as he could.

The only change between March 31, 2017 (when the judge indicated that she would not invoke the SYO if he did his treatment from that point on) and the date of the invocation hearing was that A.W. gave compelled "incriminating statements" in violation of the Fifth Amendment which were considered by all parties, led to the filing of the motion to invoke, and ultimately resulted in the invocation of A.W.'s adult conviction sentence. Indeed, the trial court referenced several of these compelled, incriminating statements in its entry invoking the adult sentence.

Because there is a reasonable possibility that A.W.'s compelled incriminating statements might have contributed to the trial court's decision to invoke the adult conviction and sentence, the Fifth Amendment violation cannot be deemed "harmless beyond a reasonable doubt."

Proposition of Law IV: **The only evidence that may be considered to invoke the adult portion of an SYO sentence is that which is admitted at the invocation hearing.**

In its attempt to sustain the juvenile court's invocation of A.W.'s adult sentence despite the constitutional violation, the Eighth District relied upon several pieces of "evidence" that were not properly admitted as evidence at the invocation hearing. Opinion Below at ¶60.

Primarily, the Eighth District relied on the prior, unsworn statements of Dr. Alpert, who did not believe A.W. was making sufficient progress. Dr. Alpert did not actually testify at the invocation hearing itself and only offered his unsworn opinions (which were not subject to cross-examination) that were not based on first-hand knowledge, during a prior review hearing. Moreover, Dr. Alpert's opinion was also derived directly from the very same statements the Eight District determined were obtained in violation of A.W.'s Fifth Amendment rights.

The Eighth District also relied on a specific portion of Robin Palmer's testimony.

Although Robin Palmer did testify at the invocation hearing, the portion of her testimony that the majority specifically relied on to uphold the invocation of A.W.'s adult sentence was not properly admitted into evidence. The Eighth District relied on the following: "Dr. Palmer stated that A.W. attended sex offender classes and did what he was supposed to do, not because he was interested in reforming his behavior, but because he wanted to avoid prison. (May 22, 2017 tr. 39.) He was "just going through the motions." Opinion Below ¶60. The passage relied upon by the Eighth District does not appear at page 30 of the May 22nd transcript. Rather, the discussion regarding A.W.'s desire to avoid prison and his participation in treatment appears on page 32 of the transcript. On that same page of the transcript, the juvenile court elected to strike all of that material as coming from a report which was not prepared by the witness, about which she had no first-hand knowledge, and which was not in the possession of any of the parties.

In short, none of what the court Eighth District majority determined to be additional, clear and convincing evidence—aside from the statements obtained in violation of A.W.'s Fifth Amendment rights—was ever actually "in evidence." As such, this Court should reverse the Eighth District's decision and vacate the adult portion of A.W.'s sentence.

CONCLUSION

For the foregoing reasons, Appellant A.W. respectfully asks this Court to accept jurisdiction over this matter as it presents a substantial constitutional question for review, to adopt his propositions of law, and reverse the judgment of the Eighth District.

Respectfully Submitted,

/s/ Cullen Sweeney
FRANK CAVALLO, ESQ.
CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon MICHAEL C. O'MALLEY, ESQ., Cuyahoga County Prosecutor, and/or a member of his staff at The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 via ordinary mail, on this 20th day of August, 2018.

/s/ Cullen Sweeney
FRANK CAVALLO, ESQ.
CULLEN SWEENEY, ESQ.
Counsel for Appellant