IN THE SUPREME COURT OF OHIO

CASE NO. 2018-1182

IN RE: A.W., A MINOR CHILD	:
Appellant	:
	:
	:

MERIT BRIEF OF APPELLANT A.W.

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INTRODUCTION

When A.W. admitted to a juvenile offense with a Serious Youthful Offender (SYO) specification, the juvenile court told him that "the 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." (9/13/16 Tr. at 77-78).

During his time at ODYS, A.W. did not act out, did not get in fights, and did not commit any delinquent acts. A.W. held up his end of the bargain and thus should have been assured to remain in juvenile court.

The juvenile court invoked the adult sentence and sent A.W. to adult prison anyway. In electing to saddle A.W. with an adult conviction and send him to adult prison, the trial court disregarded what it had promised A.W. at the time of his plea and invoked the SYO specification for an entirely different reason; namely, A.W. had not completed sex offender treatment. Such a result offends basic notions of fairness and violates due process in this case for three reasons:

1. Improper notice: A.W. was not told at the time of his plea that the failure to complete sex offender treatment could result in the invocation of the adult sentence and conviction.

2. Impossibility: A.W.'s short ODYS disposition did not allow for time to complete sex offender treatment.

3. Arbitrariness: When A.W. was finally placed on notice that the failure to comply with sex offender treatment could result in the invocation of his adult sentence, he fully complied with sex offender treatment. And the trial court invoked his adult sentence anyway—despite promising that it would not.

Due process required the court to provide A.W. with notice of what was required of him to avoid the invocation of the adult sentence, so that the plea was entered knowingly, voluntarily and intelligently, and so that A.W. could conform his conduct to avoid the imposition of serious adult sanctions. A.W. was put on notice of a set of conditions, in accord with the plain language of the SYO dispositional statute. He did not violate those terms. He was nevertheless sanctioned with the imposition of a suspended adult sentence for a supposed violation of an entirely different condition,

one which he had not been informed about at the time of his plea, which was factually impossible to complete, and which he satisfied to the extent possible once he was actually informed. Due process cannot countenance such a patently unfair result.

STATEMENT OF THE CASE AND FACTS

A. A.W. is charged, as a teenager, with sexual assault in April 2014.

On April 22, 2014, A.W. was charged by complaint in juvenile court with two counts of rape, two counts of gross sexual imposition, and one count of kidnapping. (9/7/16 Tr. at 4). 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 tell them that she had been texting with A.W. prior to meeting him at a festival or that she had intentionally met up with him. (9/7/16 Tr. at 56 and 60). She never gave police his contact information. (9/7/16 Tr. at 56-57).

B. Nearly three years after the alleged assault, the juvenile court begins to hold a bindover hearing.

A.W. was detained on this case on May 12, 2016. 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. At the hearing, the State presented the testimony of S.W., the alleged victim's mother, and A.A., the alleged victim.

In his opening statement, the prosecutor asserted that A.A. "was pulled into the woods and forcibly raped by a stranger, someone she had not known, never met before in her life" and that the perpetrator remained "unknown" to the police until DNA testing connected the case to A.W. (9/7/16 Tr. at 12-13). While that description of the event reflected what A.A. told the police, A.A. provided a different story when she testified under oath at the probable cause hearing.

According to A.A., she went to the "Warrensville Festival," on August 17, 2013, with her mom and a couple of friends. (9/7/16 Tr. at 17-18, 22, 23, and 36). Prior to and during the festival, A.A. had been texting with A.W, an individual she had met through a social media account. (9/7/16 Tr. at 11, 43, 52, 54 and 57). A.A. testified that she did not "remember how we started talking" but that she and this person had communicated "[t]hrough texting." (9/7/16 Tr. at 43 and 52).

At some point, A.A. got a text message from A.W. asking to meet up with her and she went to meet him with her friend. (9/7/16 Tr. at 41 and 58-59). A.A.'s friend then left. (9/7/16 Tr. at 59). A.A. testified that she was holding A.W.'s hand, that she talked to him for about five or ten minutes, and that they then walked over to the woods together. (9/7/16 Tr. at 41, 44, and 59). A.A. testified that A.W. had vaginal and anal sex with her. (9/7/16 Tr. at 44-45 and 63). A.A. testified that she did not consent to anything and that she "tried to stop" but A.W. "wouldn't let me." (9/7/16 Tr. at 44, 46, and 61).

A.A. did not say anything to her mom that night. (9/7/16 Tr. at 20). However, the next day, A.A. told someone at her church that she had been sexually assaulted the night before. (9/7/16 Tr. at 20-21 and 48). A.A. went to the police station and then to Hillcrest Hospital "to be examined by a SANE nurse." (9/7/16 Tr. at 21). When she met with the police, A.A. did not tell them that she had been texting with A.W. prior to the festival or that she had intentionally met up with him. (9/7/16 Tr. at 56 and 60). She never gave police his contact information. (9/7/16 Tr. at 56-57).

C. A.W. and the State agree to keep the case in Juvenile Court and resolve the case by adding a Serious Youthful Offender ("SYO") specification.

After A.A. testified and before the bindover hearing had concluded, the parties approached the Juvenile Court with a resolution. Specifically, A.W. and the State agreed to keep the case in juvenile court by adding a serious youthful offender specification. (9/13/16 Tr. at 76-77). Pursuant to the agreement, A.W. admitted to one count of rape with a serious youthful offender specification,

and the State withdrew its bindover request and dismissed the remaining charges. (9/13/16 Tr. at 77-78).

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.

(9/13/16 Tr. at 77-78). The juvenile court judge then engaged in a colloquy with A.W, during which A.W. admitted to the sole remaining charge of rape. (9/13/16 Tr. at 87). After A.W.'s admission, the juvenile court judge asked A.W. about his version of events. (9/13/16 Tr. at 87). A.W. explained that A.A. said she was 16, that A.A. initiated the sexual contact, and that the sex was consensual. (9/13/16 Tr. at 88-89).

D. The juvenile court judge committed A.W. to Ohio's Department of Youth Services ("ODYS") for a period of approximately seven months (until A.W.'s 21st birthday on May 23, 2017).

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). (10/12/16 Tr. at 15). 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. (10/12/16 Tr. at 17). 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. (10/12/16 Tr. at 18). [1]

E. Although A.W. had been committed to ODYS, the juvenile court held a "review hearing" in January 2017 and stated that A.W. is "doing really well" and that the "only issue is he needs to fully participate in sex offender treatment." (1/18/17 Tr. at 8-9).

[1] The juvenile court judge also resolved two other cases at the disposition hearing that did not involve an SYO specification are not related to the issues on appeal.

Although the juvenile court had relinquished control over A.W. by committing him to ODYS, the juvenile court nonetheless held a "review hearing" on January 18, 2017, approximately three months into A.W.'s ODYS commitment.

At the hearing, Cynthia Dansby, A.W.'s parole officer, reported that A.W. "does well in all services except sex offender treatment." (1/18/17 Tr. at 4). She stated that A.W. participates in substance abuse treatment and individual and group sessions on his unit with the social worker. (1/18/17 Tr. at 4). However, according to reports from the psychologist and social worker, A.W. "continues to deny the accusations" and thus does not participate in sex offender treatment. (1/18/17 Tr. at 4).

The juvenile court judge stated the following:

> I get the fact that you might have been upset that your girlfriend broke up with you and you might have posted a photo of her on Instagram with no clothes on. I get the fact that you got into another argument with your girl and you pushed her down. And I also get the fact that you hooked up with a 13-year-old girl at a fair and you thought she was 17 and it was perfectly fine.
>
> Regardless, which means, you know, in spite of all that, you are looking at prison. I'm not playing with you. I'm not messing around. You either participate in the sex offender treatment or you can sit for the next, I don't know what your tail was, six years?

(1/18/17 Tr. at 5). A.W. then told the judge that he was going to participate in the treatment. (1/18/17 Tr. at 8). And the juvenile court judge concluded that "the long and short of it is that he's doing really well" and that the "only issue is he needs to fully participate in sex offender treatment." (1/18/17 Tr. at 8-9).

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." (1/20/17 JE). On January 25, 2017, the juvenile court also retroactively altered the October 12, 2016 entry to include, for the first time, a requirement that A.W. "participate" in sex offender treatment. (1/25/17 JE).

F. The juvenile court judge held a second "review hearing" on March 31, 2017 and learned that ODYS had not started group sex offender treatment for A.W. despite his willingness to participate.

Less than two months prior to A.W.'s 21st birthday, the juvenile court held a second review hearing. At the start of the hearing, A.W. told the judge that he was not scheduled to start his sex offender treatment until April 5, 2017. (3/31/17 Tr. at 3).

In response to the judge's questions about the delay, Dr. Alpert, the psychologist, explained the history. Dr. Alpert stated that, at A.W.'s initial assessment in December 2016, A.W. denied his offense and that she told A.W. that she would not place him into treatment if he was not "completely open and honest about his sexual offending." (3/31/17 Tr. at 4). Because A.W. would not admit to his "sexual offending," the treatment team "shifted the focus of his treatment to Treatment Orientation Curriculum hoping that he could learn the benefit of engaging in treatment" and also put him in a "Music Therapy Program." (3/31/17 Tr. at 4).

After the January review hearing, Dr. Alpert met with A.W. again and "[a]t that time he was forthcoming about his sex offending." (3/31/17 Tr. at 5). However, because the sex offender group that began in September was "well under way," Dr. Alpert did not want to add A.W. to that group and was not able to place him into a group sex offender treatment program until April 5. (3/31/17 Tr. at 5).

The juvenile court judge was incredibly frustrated with ODYS and Dr. Alpert and stated:

> 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.*"

(3/31/17 Tr. at 5-6) (emphasis added).

The juvenile court judge asked whether ODYS could do "some type of tailored individual sex offender treatment" to augment the group treatment beginning on April 5. (3/31/17 Tr. at 9). Dr.

Alpert told the judge that "[w]e can do that." (3/31/17 Tr. at 9). So the judge explained to A.W. that he was "going to start" sex offender treatment on April 5 and that they were "going to accelerate it by doing an individual program along with it." (3/31/17 Tr. at 10). The juvenile court judge told *A.W. "if you do everything you're supposed to, I will not impose your SYO."* (3/31/17 Tr. at 10 emphasis added). The juvenile court judge concluded by telling A.W. not to "screw up because prison is not a place you want to hang out" and that "[t]hey'll take a cute little boy like you and it will be miserable for you." (3/31/17 Tr. at 16).

After this hearing, the juvenile court issued another judgment entry which indicated that A.W. had expressed a desire to participate in sex offender treatment but was told by ODYS that "the next class was not until April 5, 2017, and would take approximately nine months." (4/3/17 JE). The juvenile court further indicated that A.W. was turning 21 on May 23, 2017, and "*needs to complete as much of the program as he can*." (4/3/17 JE) (emphasis added). The juvenile court also ordered ODYS to provide "an additional individualized program to accelerate [A.W.'s] progress" and ordered A.W. to participate in "individualized sex offender treatment." (4/3/17 JE).

G. The juvenile court judge held a third "review hearing" on May 8, 2017 and was told by supervising psychiatrist that A.W.'s initial involvement in treatment had revealed a "vast amount of issues" that could not have been adequately addressed even if A.W. had begun sex offender treatment "on his first day in ODYS."

The trial court held a third "review hearing," less than two weeks prior to A.W.'s release on his 21st birthday.

Although Dr. Alpert did not personally provide any of the treatment for A.W., she reported to the juvenile court judge that A.W. "began [group] sex offender specific treatment on April 5th [with Ms. Reaves] and it's being augmented by individual therapy with Dr. Greene." (5/8/17 Tr. at 4, 5, and 7). Dr. Greene told the juvenile court judge that she was engaged in individualized counseling and sex offender treatment with A.W. (5/8/17 Tr. at 5). According to Dr. Greene, A.W. has been "very willing, I'll say to talk about a lot of very sensitive issues which has been important" and that

they have "talked pretty extensively about his triggers." (5/8/17 Tr. at 6). Ms. Reaves did not appear at the hearing to report on A.W.'s participation in group treatment. And while she did not have any first-hand information, Dr. Alpert claimed, with respect to the group treatment, that A.W. attends the sessions but is "superficially engaged" and "doesn't really buy into the treatment or feel that he needs treatment, but he is going." (5/8/17 Tr. at 4).

Dr. Alpert stated that the "bottom line is the treatment providers and behavioral health find that [A.W.] has a vast amount of issues that contribute to his dangerous predator behaviors and he needs the ongoing clinical attention." (5/8/17 Tr. at 7). The juvenile court judge asked Dr. Alpert if there is "any glimmer of hope for [A.W.] that he can see beyond his issues and actually garner the knowledge that he needs not to continue to offend." (5/8/17 Tr. at 8). And Dr. Alpert stated "[n]ot prior to turning 21, your Honor." (5/8/17 Tr. at 8). A.W. told the judge:

> Judge Rini, I'm doing my treatment. I'm doing everything I'm supposed to do. I'm not missing treatment, I'm doing the homework. I'm talking to Ms. Greene. I'm doing everything you told me to do. I haven't missed a day of treatment. I've been doing all my homework, bringing it back on time. Everything. I mean I talk about my treatments, my thinking cycle, things I'm not going to do when I get out. I'm trying my hardest not to get bonded over.

(5/8/17 Tr. at 8-9).

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 treatment that constituted "fantasizing about his rapes" and that he enjoyed "violent pornography, which he has made clear that he's going to continue to watch when he leaves here." (5/8/17 Tr. at 12-13). When A.W.'s attorney pressed Dr. Albert on the amount of time needed for adequate treatment, Dr. Albert responded that:

> Even if [A.W.] would have engaged in sex offender treatment on his first day in ODYS, that would not be enough time. Sex offender treatment is at least nine months, but [A.W.] does have a vast amount of issues that need ongoing clinical attention.

(5/8/17 Tr. at 14). Dr. Greene also stated that A.W. has reported being a victim of sexual abuse himself. (5/8/17 Tr. at 18).

H. The trial court invoked A.W.'s adult sentence and imposed an adult conviction because A.W. had made disclosures during treatment that suggested he remained a risk to the community and because he did not complete sex offender treatment.

Less than a 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, the psychologist who had engaged A.W. in individual counseling for a month and a half; Bonita Reaves, the social worker who had facilitated the group sex offender treatment that A.W. had engaged in since April 5, 2017; and Dr. Robin Palmer, who was asked by ODYS to evaluate A.W. and provide a report regarding risk factors for sexual reoffending.

1. A.W.'s individual therapist testified that A.W. was "very engaged" in the counseling and "did do the work" but that he would need a "significant amount of additional treatment" to make "any lasting change."[2]

Dr. Erin Greene is a licensed psychologist who "conducts individual and group sexual offender treatment" at Cuyahoga Hills Correctional Facility. (5/31/17 JE at 2). Dr. Greene explained that the group sex offender treatment program consists of two phases, with the first phase lasting approximately 4-5 months. (5/31/17 JE at 2). Dr. Greene explained that, in order to be accepted into the group treatment program, the youth "must discuss all the offense in detail." (5/31/17 JE at 2). She testified that, once a youth receives a sex offender assessment, he "enters Phase 1 with the next available group." (5/31/17 JE at 2). According to Dr. Greene, "[s]ince the groups are closed, once a group begins, a youth may not join and must wait until a new group begins." (5/31/17 JE at 2).

[2] A portion of Dr. Greene's testimony was not transcribed because the recording device was not turned on until after she began testifying. Accordingly, some of her testimony is taken from the juvenile court's summary in its judgment entry.

Dr. Greene engaged A.W. in seven individual counseling sessions, beginning April 1, 2017 and concluding on May 11, 2017. (5/22/17 Tr. at 5; 5/31/17 JE at 2).). She testified that A.W. "was very engaged and he did do the work." (5/22/17 Tr. at 7). Dr. Greene's concern was that A.W. was not processing the information "at a deeper level" and was not ready to stop engaging in the "major risky triggers in his life," such as "viewing pornography." (5/22/17 Tr. at 7; 5/31/17 JE at 2). Dr. Greene specifically testified about statements made by A.W. during their individual counseling sessions. (5/31/17 JE at 2).

Dr. Greene testified that A.W. had probably completed 10 to 15% of the sex offender treatment and that if he had begun six months ago "he could potentially be, you know, 60 to 70% done. But again, it's very variable." (5/22/17 Tr. at 9).

2. A.W.'s group therapist testified that A.W. "did well" in the group, did "a lot of sharing," was "attentive," asked "relevant questions," and "completed all of his homework assignments" and that A.W. was not, to her knowledge, considered for group treatment until April 2017.

Bonita Reaves testified that, as a social worker at the Cuyahoga Hills Juvenile Correctional Facility, she is responsible for Phase 1 of the group sex offender programming. (5/22/17 Tr. at 11-12). Ms. Reaves testified that Phase 1 consists of 35 lessons and typically takes about four to six months to complete. (5/22/17 Tr. at 12-13). Ms. Reaves testified that she began working with A.W. on April 19, 2017 in a group consisting of four kids and that A.W. had completed seven of the lessons. (5/22/17 Tr. at 13-14). 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." (5/22/17 Tr. at 15 and 19). Having just had A.W. for about 30 days, Ms. Reaves testified that A.W. should continue counseling and that his sex offender treatment was incomplete. (5/22/17 Tr. at 18).

Ms. Reaves testified that, although she had a prior sex offender group, "we don't just put kids into – it's a closed group." (5/22/17 Tr. at 17). Once a group starts, they do not add kids to the group

"because we're always building on what we learn the day before." (5/22/17 Tr. at 21). She testified that A.W.'s name was never mentioned as being included in a group prior to April 2017. (5/22/17 Tr. at 17). And while there are three social workers who do Phase 1 group sex offender treatment at the facility, Ms. Reaves did not know why it took from January, when A.W. agreed to participate in the group, to April to get him into a group. (5/22/17 Tr. at 23-24).

3. Dr. Robin Palmer authored a report regarding A.W.'s risk factors "correlated to sexual reoffending" and opined that treatment would have little or no impact on A.W.

Dr. Palmer testified that she was asked by ODYS to evaluate A.W. and provide a report regarding risk factors for sexual reoffending. (5/22/17 Tr. at 27-29). Dr. Palmer testified that she interviewed A.W. on May 15, 2017 and that A.W. was cooperative during the interview. (5/22/17 Tr. at 29-31). According to Dr. Palmer, A.W. told her that "he really felt that he needed counseling, sex offender specific counseling" and that "he was more than willing to participate in it." (5/22/17 Tr. at 33).

Dr. Palmer testified that A.W. had 20 of the 25 risk factors in the ERASOR evaluation tool that are "correlated to sexual reoffending." (5/22/17 Tr. at 36 and 41). Dr. Palmer testified that, when someone has a large number of risk factors, that person "probably has a higher propensity to possibly again – this is not a direct correlation – to engage in some kind of illegal inappropriate sexual behavior." (5/22/17 Tr. at 37). Dr. Palmer acknowledged, however, that the ERASOR tool, had not been validated for use on 20-year-olds who are transitioning from the juvenile system; however, she stated that "doesn't make it absolutely wrong to use that instrument." (5/22/17 Tr. at 42).

In A.W.'s case, Dr. Palmer testified that she did not think that therapy would be effective for A.W. because he "has been diagnosed with antisocial personality disorder with narcissistic tendencies." (5/22/17 Tr. at 39 and 44). According to Dr. Palmer, "there isn't any supported, any research that supports treatment out there for antisocial personality disorder." (5/22/17 Tr. at 44).

Dr. Palmer testified that she believed a "correctional approach" would "be the most effective." (5/22/17 Tr. at 40).

4. The juvenile court judge invoked A.W.'s adult sentence because he did not complete sex offender treatment.

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." (5/22/17 Tr. at 58 and 68). While the State conceded that A.W. "might be doing well," it argued that he "still has a ways to go." (5/22/17 Tr. at 59).

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." (5/22/17 Tr. at 29-31). In its written judgement entry, the juvenile court concluded that A.W. "has placed the community at Risk since Court Ordered Sexual Offender Treatment was offered upon the youth entering ODYS at Cuyahoga Hills Correctional Institution and the youth refused treatment and did not engage in until April 2017." (5/31/17 JE at 5).

Accordingly, the trial court terminated the juvenile disposition and sentenced A.W. to two years in prison. (5/22/17 Tr. at 74-76). The juvenile court also classified A.W. as a Tier III sex offender. (5/22/17 Tr. at 76-77).

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.

A.W. was sent to an adult prison because he did not complete sex offender treatment. Such a result violates due process for three reasons:

1. A.W. did not receive adequate notice of that condition at the time of his plea;
2. A.W. could not complete that treatment due to his short commitment at ODYS;
3. A.W. fully complied with treatment once advised that the failure to do so could result in the invocation of his adult sentence.

If this Court finds that due process was violated on any of these grounds, the adult conviction and sentence must be vacated.

A.W.'s argument is divided into three sections. Section A provides an overview of the Serious Youthful Offender statute and its invocation procedure. Section B outlines the three different due process arguments. And finally, Section C, in keeping with this Court's admonition to avoid constitutional questions when the case can be resolved on other grounds, presents a threshold statutory interpretation issue: Does the failure to complete treatment constitute "misconduct" as contemplated by the SYO statute? If, as A.W. submits, the answer to that question is no, this Court can avoid addressing the due process issues in this case.

A. Ohio's Serious Youthful Offender (SYO) specification

In this case A.W. was adjudged a Serious Youthful Offender (SYO) under R.C. 2152.13. "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). The court may enforce the adult portion of the sentence at a later time if the juvenile commits certain acts that indicate that the juvenile disposition has been unsuccessful in rehabilitating him. R.C. 2152.14." *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶ 2, 901 N.E.2d 209. "R.C. 2152.14 installs procedural protections for

juveniles before the adult portion of their disposition can be invoked." *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, ¶ 79, 967 N.E.2d 729. The invocation procedure can only be initiated through a defined process. "[T]he stay on the adult portion of the blended sentence may not be lifted unless certain procedural safeguards are satisfied." *In re T.D.R.,* 11th Dist. No. 2014-L-209, 2015-Ohio-3541, ¶ 18.

R.C. 2152.14 governs the circumstances under which a juvenile court may invoke the adult portion of a serious youthful offender sentence. *D.H.*, 120 Ohio St. 3d at 545. To invoke the adult portion of the SYO sentence, a trial court must find by clear and convincing evidence that:

1. The person is "serving the juvenile portion of a serious youthful offender dispositional sentence." R.C. 2152.14(E)(1)(a).

2. The person is at least fourteen years old and has been admitted to a DYS facility, or criminal charges are pending. R.C. 2152.14(E)(1)(b).

3. The "person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. R.C. 2152.14(E)(1)(c), or

4. And the person engaged in a further act or acts of "misconduct"[3] which either:

    - Is a violation of the rules of the institution or the conditions of supervision *and* could be charged as any felony or as a first-degree misdemeanor. R.C. 2152.14(A)(2)(a), (B)(1), and (E)(1)(c).

    - "[C]reates a substantial risk to the safety or security" of the institution, community, or victim. R.C. 2152.14(A)(2)(b), (B)(2), and (E)(1)(c).

Id. (emphasis added). This Court has held that in order for a juvenile court to impose the adult portion of an SYO sentence "the juvenile must commit a *further* bad act while in custody before the invocation process can begin." *In re C.P.*, at 534 (emphasis in original).

When the adult portion of an SYO sentence is "invoked," a juvenile's life is fundamentally transformed and the consequences he endures are radically altered. The juvenile is removed from a

[3] In setting out the requirements for invocation, R.C. 2152.14 requires that "misconduct has occurred" and that any motion to invoke identify at least "one incident of misconduct." R.C. 2152.14(A)(2).

system where rehabilitation is the primary focus, where restraints on his liberty are limited until the age of 21, and where his adjudication and any sex offender registration will not be public.

B. The invocation of the adult portion of A.W.'s SYO sentence based upon the failure to complete treatment violated A.W.'s Due Process rights because he did not receive proper notice, because it was factually impossible to complete, and because it was arbitrarily imposed.

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).

Invoking the adult portion of A.W.'s SYO sentence was fundamentally unfair and violative of state and federal due process for three reasons:

1.) <u>Lack of Notice:</u> A.W.'s Due Process rights were violated when his adult sentence was invoked for failing to complete sex offender treatment despite the fact that he did not receive proper notice of that possibility at the time of his plea.

Due process does not permit a juvenile court to invoke the adult portion of an SYO sentence due to the failure to complete treatment when, as here, the juvenile court does not give the juvenile proper notice of that possibility at the time of his plea.

In the instant case, the juvenile court advised A.W. at the time of his Serious Youthful Offender plea that it was only possible for the adult sentence to be invoked if he committed new offenses or caused significant problems in the juvenile institution. The court did not inform him that failing to complete sex offender treatment could be the basis for such an invocation.

The court stated:

> "[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).

The Court's advisement amounted to an informal statement of the SYO statute's language, which provides two possible reasons for the invocation of an adult sentence: new crimes or behavior that creates a substantial risk of harm to the institution or the community.

"Engrained in [the] concept of due process is the requirement of notice." *Lambert v. California* (1957), 355 U.S. 225, 228. Moreover, the fair warning requirement of the 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. Due process requires laws to give sufficient warning so that individuals "may conduct themselves so as to avoid that which is forbidden." *Id.* at 50; *see also Grayned v. Rockford* (1972), 408 U.S. 104, 108-09; *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162 ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'"). As emphasized by the United States Supreme Court in the context of sex offender registries, notice "serves to apprise individuals of their responsibilities and to ensure compliance" with the law and is important for the law to be enforced by criminal penalties. *Smith v. Doe* (2003), 538 U.S. 84, 96.

Constitutional due process requires that A.W. have specific notice of the conduct that could lead to the invocation of his adult sentence. 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.

2.) **<u>Impossibility</u>: A.W.'s Due Process rights were violated when his adult sentence was invoked for failing to complete sex offender treatment despite the fact that it was factually impossible for him to complete that treatment during his ODYS commitment.**

Due Process does not permit a juvenile court to invoke the adult portion of an SYO sentence due to the failure to complete treatment when, as here, it was factually impossible for the juvenile to complete that treatment.

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.

However, once the treatment was implemented, 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.

For A.W., compliance with the court's belatedly-imposed condition was simply not 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. Moreover, both A.W.'s treating psychologist and the supervising psychologist at ODYS were quite clear that, given the abbreviated duration of A.W.'s total ODYS commitment, it would have been impossible for A.W. to

have completed the sex offender treatment programming, even if it had been fully implemented on the first day he arrived at the institution.

The court's condition of completion of sex offender treatment was fundamentally unfair. A.W.'s invocation of his adult sentence was premised upon him scaling a mountain he could never have climbed. When the failure to comply is not the fault of the defendant, yet the defendant is punished, due process is violated.

3.) **<u>Arbitrariness</u>: A.W.'s Due Process rights were violated when his adult sentence was invoked for failing to complete sex offender treatment despite the fact that A.W. participated in sex offender treatment once he was ordered to do so and advised that the failure to do so could result in his SYO invocation.**

Due Process does not permit a juvenile court to invoke the adult portion of an SYO sentence due to the failure to complete treatment when, as here, A.W. participated in sex offender treatment once he was ordered to do so and advised that the failure to do so could result in his SYO invocation. Such an invocation under those circumstances is arbitrary.

The trial court's decision to invoke A.W.'s adult sentence for failing to complete sex offender treatment rests upon another flawed and fundamentally unfair premise. A.W. was never ordered to complete sex offender treatment. Rather, several months after his disposition, A.W. was ordered to "participate" in treatment and then, beginning in April 2017, "to complete as much of the program as he can," (1/20/17 JE and 4/3/17 JE). A.W. complied with both of those directives.

At the time of A.W.'s plea, the juvenile court did not say anything about sex offender treatment or the consequences of failing to complete such treatment. In January 2017, the juvenile court ordered A.W., for the first time, to "*participate* and engage in sex offender treatment." (1/18/17 Tr. at 5 and 8). This was the first time A.W. had any reason to know that the failure to participate sex offender treatment could carry the severe consequence of an adult conviction, an adult prison sentence, and lifetime registration as adult. And at this point, A.W. unequivocally agreed to participate.

At a review hearing on March 31, 2017, the juvenile court learned that sex-offender treatment had not begun, despite A.W.'s willingness to participate, because ODYS only placed him in a group that was scheduled to start on April 5. (3/31/17 Tr. at 4-5). A.W.'s sex offender treatment (which was not court-ordered until January 18, 2017) was delayed for over two and a half months due solely to the scheduling procedures of the ODYS institution.

The Court was incredulous, stating:

> 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*."

The record is clear that the trial court acknowledged during the March 31, 2017 hearing that the delay in implementing sex offender treatment from January to April was the fault of the scheduling procedures at ODYS, and placed the blame squarely upon the institution. It is also clear that the court informed A.W. at that time, that if he participated *from that point onward,* the adult sentence would not be invoked. Indeed, in its judgment entry, the juvenile court provided that A.W. was turning 21 on May 23, 2017 and "*needs to complete as much of the program as he can*." (4/3/17 JE) (emphasis added). And the court promised A.W. "if you do everything you're supposed to, I will not impose your SYO." (3/31/17 Tr. at 10).

The next hearing in the matter was held on May 8, 2017. The court inquired as to A.W.'s participation in both group and individual treatment. (5/8/17 Tr. at 4). There was no dispute that he was doing both. (5/8/17 Tr. at 4-5). A.W.'s individual therapist, Dr. Greene testified that A.W. was totally engaged in treatment with her:

> So [A.W.] engages in our individual sessions. He's been very willing, I'll say to talk about a lot of very sensitive issues which has been important. Basically, we focus on looking at his underlying thinking error, thoughts, perceptions, feelings that contribute to his behaviors. We talked pretty extensively about his triggers and that's kind of where we're at with things. He is engaging in the conversation and he and I have talked about one of my main concerns is, you know, our discussions of triggers and thinking errors and that we're right at the beginning of treatment.

(5/8/17 Tr. at 6).

Similarly, at the May 22, 2017, the uncontroverted evidence established that A.W. was actively participating in both individual and group sex offender treatment. His individual therapist, Dr. Greene, testified that A.W. "was very engaged and he did do the work." (5/22/17 Tr. at 7). And Bonita Reaves, the social worker who facilitated the group therapy, 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." (5/22/17 Tr. at 15 and 19).

In summary, the evidence in this case established that:

- A.W. was never ordered to complete sex offender treatment.
- A.W. was only ordered to "participate" in treatment as of January 2017.
- A.W. was willing to participate in treatment as of January 2017 but ODYS itself caused a delay in implementing the program from January until early April.
- Once the treatment was implemented, A.W. did participate, in both group and individual therapy.
- The full treatment program was a minimum of nine months, which was longer than the period of A.W.'s commitment to ODYS. (5/8/17 Tr. at 14).

Because the juvenile court never ordered A.W. to "complete" sex offender treatment, it could not invoke his adult sentence on that basis. And when the juvenile court ordered A.W. to "participate" in sex-offender treatment in January and April 2017, A.W. had become engaged in treatment since ODYS made it available to him and complied with the court's April order to "complete as much of the program as he can." When, as here A.W. did exactly what he was ordered to do, it is arbitrary and violates the very fabric of the Due Process Clause to invoke the adult portion of his sentence.

C. The failure to complete treatment does not constitute misconduct to support the invocation of the adult portion of a juvenile's SYO sentence.

Although this Court has accepted the instant case to address the Due Process issues attendant to the invocation of the adult portion of A.W.'s SYO sentence, it is well-established that this Court will decide constitutional questions "only when absolutely necessary." *Norandex, Inc. v. Limbach,* 69 Ohio St. 3d 26, 28; *State v. Moore*, 154 Ohio St. 3d 94, 95 (2018) (addressing statutory arguments

before proceeding to constitutional issues). In this case, A.W.'s due process rights were violated. However, there is a simpler, non-constitutional basis for reversal. Specifically, the SYO invocation statute requires proof of further "misconduct" before the adult portion of an SYO sentence can be invoked and the failure to complete treatment does not constitute misconduct within the meaning of that statute. Because the failure to complete treatment does not constitute misconduct, the trial court erred, as a matter of law, by invoking A.W.'s adult sentence on that basis.

The trial court's sole basis for the invocation of A.W.'s adult sentence was his failure to complete sex offender treatment. Setting aside all of the Due Process problems that occurred in this case, the trial court's invocation order should before reversed because the failure to complete treatment does not constitute a further act of "misconduct" as required by R.C. 2152.14.

R.C. 2152.14 (A)(2) defines the "further misconduct" the court is to consider for invoking the adult portion of an SYO sentence. Under that section the court may consider imposing the sentence if it finds by clear and convincing evidence one of two things:

> **(a)** The person committed an act that is a violation of the conditions of supervision 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 community or of the victim.

While subsections (a) and (b) each contemplates a separate analysis, the standard has been well-established that both require a showing that the juvenile committed some additional act that would form the basis of the SYO invocation. *In re C.P.,* 131 Ohio St. 3d 513.

This Court has stated that in order for a juvenile court to impose the adult portion of an SYO sentence the juvenile must commit "a *further* bad act" or "further serious wrongdoing" while in custody before the invocation process can begin. *In re C.P.*, at 534. (emphasis in original). See *In re C.P.*, 131 Ohio St. 3d 513; 534 ; *State v. D.H.*, 120 Ohio St. 3d 540. This "further wrongdoing" must extend beyond the original charge. *State v. D.H.*, 120 Ohio St. 3d 540.

Because this standard as adopted by the Supreme Court requires the showing of some *additional* misconduct, it precludes the invocation of the adult sentence as further sanction for the original charge. "The juvenile cannot be sent directly to an adult facility for the acts that led to his serious-youthful-offender status." *State v. D.H.*, 120 Ohio St. 3d 540. The standard is clear that "[o]nly further bad acts by the juvenile as he is rehabilitated in the juvenile system can cause the stayed adult penalty to be invoked" *In re C.P.*, 131 Ohio St. 3d 513 at 517.

In this case, A.W. was not alleged to have committed a "further bad act" but was alleged to have failed to complete the full course of treatment, a program that was directly focused on dealing with the issues arising from his original offense. By invoking the adult sentence in the absence of any further misconduct, and only on the basis of his alleged failure to complete court-ordered treatment, the trial court here effectively sanctioned him for his original conduct, and not for any additional misconduct. A.W.'s failure to complete treatment was not an affirmative "further bad act" under the SYO statute or the myriad cases that have examined it. It was not misconduct and thus should not have triggered the invocation of his suspended adult sentence.

Indeed, this case illustrates the constitutional dangers of expanding the basis for invoking the adult portion of the SYO sentence beyond its statutory basis of additional misconduct. As written, only further criminal offenses or affirmative acts that create a substantial risk of safety can provide the basis for invoking a suspended adult SYO sentence. The lower courts' expansion of the statutory requirement of an act of "misconduct" to include a failure to complete institutional programming extends the SYO statute far beyond the spirit of the law itself, and creates innumerable collateral problems, the solutions for which are murky at best.

If the hazy veil of uncertainty cast by this kind of broad reading of the SYO statute were to become well established, then a subjective and capricious standard would be set in stone across the State. Unfettered from any objective reckoning, rooted in the law, both trial courts and

administrators of ODYS would be blessed with wide and unchecked discretion to define whatever acts or omissions they determined to be worthy of invocation.

Further, not only would such a framework offend basic notions of due process, it would defy any attempt by a trial court to conform to the notice requirements necessary to properly advise a juvenile of the potential consequences of an SYO plea. The state of the law would be that an SYO sentence could conceivably be triggered at the whim of the institutional bureaucracy, for whatever conduct they deemed rose to the level of their definition of risk.

A trial court would then be placed in the untenable position of advising a subject juvenile of conditions that were impossible to enumerate. Notice would have to be so broad as to inform the juvenile that virtually anything ODYS decided to require as a matter of institutional programming could conceivably result in an invocation proceeding.

To enshrine such broad notice, encompassing everything conceivable, would inform a juvenile of nothing meaningful. It would effectively write into the law the most arbitrary standard imaginable, one to which no person could ever be expected to tailor or conform their behavior. Because such an absurd result was obviously not intended by the General Assembly, this Court should return to the definition of an act of "misconduct" to its original meaning of further wrongdoing. Because the failure to complete treatment is not encompassed in that definition, it cannot be the basis for invoking the adult sentence.

CONCLUSION

The application of the SYO dispositional framework has been well established since its inception in Ohio. A suspended adult sentence can only be imposed under clearly defined parameters. It must be demonstrated that a youth has committed some actual misconduct while serving the juvenile portion of the sentence, either a new crime or some "further bad act."

The trial court must provide full and fair notice to any juvenile entering into an SYO disposition, informing him of exactly what conduct could result in the invocation of the suspended

adult sentence, so that such a plea can be entered into knowingly, voluntarily and intelligently, and so that a juvenile can conform his conduct to avoid the imposition of adult sanctions.

The invocation in this case imposed A.W.'s adult sentence without a showing of any misconduct or a further bad act, but rather based upon his failure to complete court ordered treatment—a condition the court did not notify him of, and which was impossible for him to satisfy. As such, the invocation here was improper, violating both the standard established by this court and the fundamental due process required by the State and Federal Constitutions.

Respectfully submitted,

s/ Cullen Sweeney

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief was served via email upon Anthony Miranda, Assistant Prosecuting Attorney at amiranda@prosecutor.cuyahogacounty.us on this 29th day of January 2019.

s/ Cullen Sweeney

CULLEN SWEENEY
Assistant Public Defender

IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF APPELLANT A.W.

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NOTICE OF APPEAL OF APPELLANT

Appellant A.W. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District opinion, entered in Court of Appeals case No. 105845 on July 5, 2018.

This case involves a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,

/s/ Cullen Sweeney

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Assistant Public Defender &

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon Michael C. O'Malley, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on August 17, 2018.

/s/ Cullen Sweeney

CULLEN SWEENEY
Assistant Public Defender

[Cite as *In re A.W.*, 2018-Ohio-2644.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105845

IN RE: A.W.
A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 14105159

BEFORE: E.T. Gallagher, P.J., Celebrezze, J., and Keough, J.

RELEASED AND JOURNALIZED: July 5, 2018

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EILEEN T. GALLAGHER, P.J.:

{¶1} Appellant, A.W., appeals a judgment invoking the adult portion of his serious youth offender ("SYO") sentence. He claims the following five assignments of error:

> 1. The trial court violated A.W.'s due process rights by invoking his adult sentence for failure to complete court-ordered sex offender treatment at ODYS when such treatment was not ordered at the time of his disposition, when A.W. received no notice at the time of his disposition that the failure to complete sex offender treatment could result in the invocation of his adult sentence, and when it was factually impossible to complete sex offender programming given the short length of A.W.'s ODYS commitment.
>
> 2. The trial court lacked the authority to order A.W. to engage in sex offender treatment while in ODYS custody.
>
> 3. The trial court erred when it invoked the adult portion of the SYO sentence under R.C. 2152.14(E) upon insufficient evidence of misconduct, invoking it instead upon a failure to complete a court-ordered treatment program that he was never ordered to complete and that was impossible for A.W. to finish.
>
> 4. The trial court violated A.W.'s constitutional protections against incriminating himself by considering statements A.W. was compelled to make during his individual and group sex offender treatment when invoking A.W.'s adult sentence.
>
> 5. The trial court erred by denying A.W. his fundamental right to due process by failing to provide proper notice of the adult sentence invocation hearing as required by R.C. 2152.14(D).

{¶2} In addition to A.W.'s assigned errors, the Juvenile Law Center was given leave to appear as amicus curiae and filed an amicus brief raising the following two assignments of error:

> 1. Using compelled statements made during court-ordered treatment to invoke punishment violates the constitutional privilege against self-incrimination.
>
> 2. The constitutional harm of using compelled statements is compounded because it invoked A.W.'s adult sentence, unjustly exposing him to the harsh consequences of the adult justice system.

{¶3} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶4} In April 2014, the state filed a complaint alleging that A.W. was a delinquent child because he engaged in conduct that constituted two counts of rape in violation of R.C. 2907.02(A)(2) if committed by an adult. The complaint also alleged that A.W. engaged in conduct that would be considered kidnapping and gross sexual imposition if committed by an adult.

{¶5} A.W. failed to appear in court to answer the charges, and a warrant was issued for his arrest. A.W. was eventually arraigned, over a year later, in May 2015. After the arraignment, the state filed a motion asking the juvenile court to relinquish jurisdiction and transfer the case to the general division of the Cuyahoga County Court of Common Pleas for an adult trial. The state argued there was probable cause that A.W. committed the acts alleged in the complaint and that he was not amenable to rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children.

{¶6} The victim, A.A., testified at the probable cause hearing that she did not know A.W. before he contacted her on a text messaging app known as Kik Messenger. In August 2013, A.A. met A.W. at a community festival where A.W. led her into a nearby woods where he vaginally and anally raped her. She was 13 years old, and A.W. was 17 years old at the time of the rapes.

{¶7} A.A.'s mother took A.A. to Hillcrest Hospital where a rape kit was processed. Three months later, the Ohio Bureau of Criminal Investigation discovered that DNA found on A.A.'s clothes matched A.W.'s DNA, which had previously been entered into a national DNA database known as the Combined DNA Index System ("CODIS"). A.A. subsequently identified A.W. as the perpetrator from a photo lineup.

{¶8} On the second day of the probable cause hearing, the parties reached a plea

agreement, and A.W. pleaded guilty to one count of rape, as amended to include an SYO specification. The remaining charges were dismissed. The SYO disposition consists of a "blended sentence" whereby the juvenile court imposes a traditional juvenile disposition and a stayed adult sentence. R.C. 2152.13(D)(2). The blended sentence allows the juvenile court to enforce the adult portion of the sentence at a later time "if the juvenile commits certain acts that indicate that the juvenile disposition has been unsuccessful in rehabilitating him." *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 2.

{¶9} After accepting A.W.'s admission to the rape charge, the court committed him to the legal custody of the Ohio Department of Youth Service ("ODYS") until his twenty-first birthday. The court also imposed a three-year prison term "if the Serious Youth Offender specification is imposed." At the dispositional hearing, the court advised A.W. that if he complied with all terms of the juvenile portion of his sentence, "the serious youth offender sentence will go away * * *." (Oct. 12, 2016 tr. 18.) Moreover, the court stated:

> THE COURT: But young man, I want sex offender treatment put in place for ODYS. You have three sex offenses.[1] So does that mean that you're just a predator? Does that mean you're a stupid kid? What is it that makes you continually have sex offenses, and not just teenage stuff. [A.W.], they're serious, serious offenses.
>
> So I don't know the answer to that, but by the time you get back here in 90 days I want you to have a better understanding of what's appropriate and what's not. Do you understand me?
>
> A.W.: Yes.

(Oct. 12, 2016 tr. 18.)

{¶10} Although the court indicated that it wanted A.W. to undergo sex offender treatment, the journal entry providing the disposition did not order sex offender treatment. The

[1] A.W. was adjudicated delinquent of sex offenses in two other cases in addition to this case.

journal entry simply states that "the youth herein is committed to the Legal Custody of the Ohio Department of Youth Services * * * for institutionalization in a secure facility."

{¶11} Nevertheless, at the review hearing held in January 2017, A.W.'s probation officer, Cynthia Dansby, informed the court that A.W. was participating in all services except sex offender treatment. (Jan. 18, 2017 tr. 4.) Based on Dansby's remarks, the court warned A.W. that if he did not participate in sex offender treatment, he would have to serve the adult portion of his sentence in adult prison. (Jan. 18, 2017 tr. 5.) In a journal entry dated January 20, 2017 (journalized Feb. 13, 2017), the court stated, in relevant part:

> Although the youth was committed for a sex offense, [t]he youth refuses to take responsibility for his actions nor participate in sex offender treatment. The youth shall fully participate in sex offender treatment.

{¶12} The court held another review hearing in March 2017 to assess A.W.'s treatment progress. Dr. Jennifer Alpert informed the court that she assessed A.W. when he first entered ODYS in November 2016, and that A.W. denied committing sex offenses at that time. On December 9, 2016, Dr. Alpert invited A.W. to join a group sex offender class, but he refused. Dr. Alpert further stated:

> I explained to him that I just started a group and I would be willing to take him, but he needed to be completely open and honest about his sexual offending in order to, you know, participate meaningfully in the group. He became angry, he disengaged and he left the room.

(Mar. 31, 2017 tr. 4.) In January 2017, A.W. indicated he was willing to participate in sex offender treatment. (Mar. 31, 2017 tr. 5.) However, because there were no available sex offender groups at that time, Dr. Alpert informed A.W. that he would have to wait until April 2017, when the next group class was scheduled to begin the treatment program. (Mar. 31, 2017 tr. 5.) In response to this information, the court asked:

> So how — I don't understand — 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?

(Mar. 31, 2017 tr. 6.) Dr. Alpert explained that "group sex offender treatment is best practice," and that ODYS does not provide individual sex offender treatment programs because individual treatment is not considered best practice. (Mar. 31, 2017 tr. 6.) Bonita Reaves, an ODYS social worker, later explained at the invocation hearing that youths are not added to group classes that are already in progress "because we're always building on what we learned the day before." (May 22, 2017 tr. 21.)

{¶13} Due to the limited amount of time remaining before A.W.'s twenty-first birthday, ODYS agreed to start A.W. in a new sex offender group and to augment his treatment with individual therapy. However, a social worker from ODYS informed the court that sex offender treatment generally takes nine months for completion and that A.W. would not be able to complete his treatment before his twenty-first birthday.

{¶14} Before the hearing adjourned, A.W.'s probation officer advised the court that it was not the fault of ODYS that A.W. did not start his sex offender treatment sooner. Addressing A.W., Officer Dansby stated:

> You could have been well into sex offender offender treatment had you started when you got there. But because you delayed, that's what's bringing us to today. * * *
>
> It's not on Dr. Alpert and your social worker. This was on you because this didn't have to happen. You could have started treatment in November when you got there, but you choose to do what you do and that's what [sic] brought to today.
>
> So I just wanted to put that out there. That this could have been avoided if you did what you need to do.

(Mar. 31, 2017 tr. 13.)

{¶15} At a review hearing held on May 8, 2017, Dr. Alpert informed the court that although A.W. was participating in the sex offender program, he was only "superficially engaged in his

treatment." The court observed that the state was going to file a motion to invoke the adult portion of A.W.'s SYO sentence. (May 8, 2017 tr. 4.) Officer Dansby also indicated on the record that the consensus at ODYS was that A.W. should be bound over to adult prison. (May 8, 2017 tr. 10.) Accordingly, the trial court scheduled the hearing to invoke the adult portion of A.W.'s sentence for May 22, 2017.

{¶16} The state filed a motion to invoke the adult portion of A.W.'s SYO sentence on May 18, 2017, five days before A.W.'s 21st birthday. At the invocation hearing held on May 22, 2017, defense counsel objected to the state's motion and to the witnesses who testified at the hearing, claiming the motion was untimely. The court proceeded with the hearing over A.W.'s objection.

{¶17} Bonita Reaves testified that A.W. was in her group sex offender class. The classes are conducted in two phases. Phase one covers 35 lessons and generally takes four to six months to complete. As of the date of the hearing, A.W. had only completed seven of the 35 classes in the first phase of treatment. (May 22, 2017 tr. 13.)

{¶18} Robin Palmer, president of the Mokita Center,[2] testified that she evaluated A.W. one week before the hearing. Palmer used an assessment tool called the Estimate of Risk of Adolescent Sexual Offense Recidivism ("ERASOR"), which evaluates 25 risk factors correlated to sexual reoffending. A.W.'s score revealed he had 20 of the 25 risk factors, which correlates to a high risk of reoffending. (May 22, 2017 tr. 36.)

{¶19} Palmer further stated that although A.W. eventually participated in sex offender treatment, he was motivated by his SYO status and wanted to avoid the adult portion of his sentence. (May 22, 2017 tr. 37-38.) Palmer explained that when juveniles are motivated by an external threat such as prison, the treatment is generally not meaningful.

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[2] The Mokita Center is a private business that contracts with the juvenile court to perform assessments, counseling, and monitoring of juveniles charged with sex offenses.

{¶20} According to Palmer, A.W. also had antisocial personality disorder with narcissistic tendencies, which is known to be resistant to treatment. Therefore, Palmer concluded that continued therapy would not be effective and that a correctional approach would be more effective because A.W. would be

forced to understand the seriousness of his conduct and the harm it caused his victims.

{¶21} Based on the evidence presented at the hearing, the juvenile court concluded that A.W. failed to participate in sex offender treatment in a meaningful way and invoked the adult portion of his sentence. However, the court reduced the adult sentence to two years in adult prison followed by five years of mandatory postrelease control. A.W. now appeals the invocation of the adult portion of his SYO sentence.

II. Law and Analysis

A. Due Process

{¶22} In the first assignment of error, A.W. argues the trial court violated his right to due process by invoking the adult portion of his sentence in three ways (1) the trial court did not order sex offender treatment at the time of disposition, (2) A.W. had no notice at the time of his disposition that failure to complete sex offender treatment could result in the invocation of his adult sentence, and (3) it was impossible for A.W. to complete sex offender treatment given the limited duration of his commitment to ODYS.

{¶23} In the second assignment of error, A.W. argues that because the juvenile court failed to order sex offender treatment in its original dispositional order, it lacked authority to impose court-ordered sex offender treatment at the review hearing held three months later. We discuss these assigned errors together because they are interrelated.

1. Authority to Order Sex Offender Treatment

{¶24} When a juvenile court commits a child to the legal custody of ODYS, the court's jurisdiction terminates, except over certain decisions regarding judicial release, early release, and supervised release. *See* R.C. 2152.22; *State v. McCallister*, 5th Dist. Stark No. CA-7264, 1987 Ohio App. LEXIS 10009 (Dec. 7, 1987). In other words, the juvenile court loses jurisdiction to impose new orders on a child once the child has been committed to ODYS. R.C. 2152.22(A) acknowledges the separation of powers between the judiciary's role of defining a definite minimum commitment and ODYS's executive power to determine conditions under which the commitment is served. Therefore, the trial court's judgment dated January 20, 2017, ordering A.W. to "fully participate in sex offender treatment" was a nullity because it was entered after A.W. had already been committed to the legal custody of ODYS.

{¶25} Nevertheless, the court's failure to include an order requiring A.W. to complete sex offender treatment in the original dispositional judgment entry does not mean that the treatment was not ordered or required at the time A.W. entered ODYS custody. Such orders from the juvenile court are unnecessary to require a child to complete sexual offender treatment because ODYS has broad authority to

> [r]eceive custody of all children committed to it under Chapter 2152 of the Revised Code, cause a study to be made of those children, and *issue any orders*, as it considers best suited to the needs of any of those children and the interest of the public, *for the treatment of* each of those children.

R.C. 5139.04.

{¶26} ODYS ordered A.W. to participate in sex offender treatment in November 2016, when he came into ODYS custody. At the first review hearing held in January 2017, Dansby reported that A.W. had been ordered to participate in sex offender treatment and he refused to comply with that order. (Jan. 18, 2017 tr. 4.) Therefore, the trial court's failure to expressly

include an order that A.W. complete sex offender treatment in the original dispositional order is of no consequence since ODYS had authority to make the order.

2. Notice

{¶27} Still, A.W. argues he had no notice at the time of disposition that failure to participate in sex offender treatment could result in invocation of his adult sentence and that such lack of notice violated his right to due process.

{¶28} The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law." Due process rights are applicable to juveniles through the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 23.

{¶29} The concept of due process escapes concise definition because it is "a flexible concept that varies depending on the importance attached to the interest at stake and the particular circumstances under which the deprivation may occur." *Aalim* at ¶ 22, citing *Walters v. Natl. Assn. of Radiation Survivors*, 473 U.S. 305, 320, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). As relevant here, the fair warning requirement of the 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*, 423 U.S. 48, 50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). That is, due process requires that "the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." *Id.*

{¶30} A.W. claims he had no notice that failure to complete court-ordered sex offender treatment at ODYS would result in invocation of his adult sentence. However, the trial court specifically told A.W. at the dispositional hearing that it wanted him to receive sex offender treatment. (Oct. 12, 2016 tr. 18.) As previously stated, the court advised A.W. as follows:

> THE COURT: But young man, I want sex offender treatment put in place for ODYS. You have three sex offenses. So does that mean that you're just a predator? Does that mean you're a stupid kid? What is it that makes you continually have sex offenses, and not just teenage stuff. [A.W.], they're serious, serious offenses.
>
> So I don't know the answer to that, but by the time you get back here in 90 days I want you to have a better understanding of what's appropriate and what's not. Do you understand me?
>
> A.W.: Yes.

(Oct. 12, 2016 tr. 18.)

{¶31} Moreover, the court explained:

> I'm going to be bring you back in 90 days and see how you're doing. That means are you getting your education, *are doing what you're supposed to, are you participating in group therapies* * * * ?
>
> All of those things will matter when you come back and we have a hearing. And I'm going to bring you in so that I can look at you face-to-face. *And if, in fact, you are not doing what you're supposed to, I am going to cut the sentence at ODYS and send you to prison.*

(Emphasis added.) (Oct. 12, 2016 tr. 17.) Therefore, the court warned A.W. that if he failed to comply with the treatment programs imposed by ODYS, which included sex offender treatment, he would serve the adult portion of his sentence. He was on notice.

3. Impossible to Complete

{¶32} Finally, A.W. argues his right to due process was violated because the adult portion of his sentence was contingent on his completing sex offender treatment but completion was impossible due to the short duration of his commitment to ODYS. However, the court never conditioned the adult portion of his sentence on completion of the entire sex offender program. At the dispositional hearing, the court explained that it wanted A.W. "to have a better understanding of what's appropriate and what's not." And, as previously stated, the court advised A.W. that it would not invoke A.W.'s adult prison sentence as long as he did "what [he was] supposed to do" and "participat[ed] in group therapies." (Oct. 12, 2016 tr. 17.) At the

January 2017 review hearing, the court reiterated that "the long and short of it is that he's doing well," which simply means making progress. (Jan. 18, 2017 tr. 8.)

{¶33} Having advised A.W. that the court simply expected participation and progress in the required therapies, it is doubtful the court would have invoked the adult portion of A.W.'s sentence just because he failed to complete the entire program if A.W. had taken his sex offender treatment seriously from the time he entered ODYS. In other words, A.W. could have avoided the adult sentence if he had complied with the required therapies when they were offered to him in December 2016.

{¶34} Therefore, the first and second assignments of error are overruled.

B. Evidence of Misconduct

{¶35} In the third assignment of error, A.W. argues the trial court erred in invoking the adult portion of the SYO sentence where there was insufficient evidence of misconduct. He contends the adult sentence is not supported by legally sufficient evidence because (1) the failure to complete sex offender treatment does not constitute "misconduct" within the meaning of the SYO statute, (2) A.W. fully complied with the trial court's orders to complete as much of the sex offender program as he could, and (3) it is fundamentally unfair to invoke the adult sentence for failing to complete a treatment program that was impossible for him to finish given the length of his disposition.

1. Misconduct

{¶36} A.W. first argues there was insufficient evidence of misconduct because failure to complete sex offender treatment does not constitute misconduct under the SYO statute.

{¶37} R.C. 2152.14 of the SYO statute states, in relevant part:

> (1) The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

> (a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.
>
> (b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.
>
> (c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

R.C. 2152.14(E)(1).

{¶38} Clear and convincing evidence is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶39} The conduct referred to in R.C. 2152.14(E)(1)(c) includes evidence that "'[t]he person has engaged in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim.'" *In re D.J.*, 9th Dist. Summit Nos. 28472 and 28473, 2018-Ohio-569, ¶ 8, quoting R.C. 2152.14(A)(2)(b).

{¶40} In *In re D.J.*, the court held that the youth's delay in commencing sex offender treatment coupled with evidence that the sex offender treatment the youth received failed to achieve the desired results constituted sufficient evidence that the youth engaged in conduct that created a substantial risk to the safety and security of the community. *Id.* at ¶ 11. Therefore, failure to actively participate in sex offender treatment constitutes misconduct under R.C. 2152.14(E)(1)(c) if the failure to participate in treatments results in inadequate rehabilitation.

{¶41} It is undisputed that A.W. was serving the juvenile portion of his SYO sentence in the custody of ODYS and that he was over 14 years of age at the time the court invoked the adult portion of his sentence. Thus, the requirements of R.C. 2152.14(E)(1)(a) and (b) were unequivocally satisfied.

{¶42} As previously stated, A.W. refused to participate in sex offender treatment, and his refusal caused a substantial delay in the start of the treatment program. Bonita Reaves testified that as a result of the delayed start

to treatment, A.W. only completed seven of 35 sex offender lessons in the first phase of the program. (May 22, 2017 tr. 13.) Robin Palmer testified that she administered the ERASOR assessment to A.W. one week before the hearing and that A.W. possessed 20 of the 25 risk factors for sexual reoffending.

{¶43} The delay in starting sex offender treatment significantly reduced the time in which A.W. could receive treatment, and the limited treatment he received was not enough to reduce his likelihood of recidivism. He had only scratched the surface. Because A.W. failed to demonstrate any meaningful progress with the treatment, he continued to pose a substantial risk to the safety of the community. And since A.W. was turning 21 years of age on the day after the hearing, the evidence demonstrated that he was not likely to be rehabilitated during the remaining period of juvenile jurisdiction.

{¶44} Therefore, there is clear and convincing evidence in the record supporting the trial court's judgment invoking the adult portion of A.W.'s SYO sentence.

{¶45} A.W. nevertheless argues that it is fundamentally unfair to invoke the adult portion of his sentence for failing to complete a treatment program that was impossible for him to finish given the short duration of his disposition. However, as previously stated, the trial court never required that A.W. complete the entire sex offender program. It conditioned the adult portion of the sentence on A.W.'s participation in the sex offender treatment program and effective progress in that treatment. The court indicated it would have been satisfied if A.W. had taken responsibility for his actions and actively engaged in sex offender treatment in a meaningful way. The court stated at the dispositional hearing that it wanted A.W. "to have a better understanding

of what's appropriate and what's not." (Oct. 12, 2016 tr. 18.) A.W. never demonstrated an openness or desire to benefit from sex offender treatment.

{¶46} Moreover, A.W. created all of the circumstances that caused his treatment to be curtailed. A.W. failed to appear in court for his arraignment on April 22, 2014, and a warrant was issued for his arrest. Consequently, A.W. was not arraigned until May 2015. Following his arraignment, A.W. was released into the community and again failed to appear in court in September 2015. A second warrant was issued for his arrest.

{¶47} Once A.W. admitted the rape and was committed to the legal custody of ODYS, he refused to participate in sex offender treatment even though the court advised him that sex offender treatment would be part of his rehabilitation program and that failure to comply would result in service of the adult sentence. (Oct. 12, 2016 tr. 17.) A.W. had the ability to avoid the adult sentence but he squandered it, which ultimately caused his lack of time to show progress. We find nothing unfair about the imposition of his adult sentence under these circumstances.

{¶48} The third assignment of error is overruled.

C. Self-Incrimination

{¶49} In the fourth assignment of error, A.W. argues the trial court violated his Fifth Amendment privilege against self-incrimination when it relied on statements he made to his therapists during sex offender treatment to justify the imposition of the adult portion of his sentence. The amici curiae also argue in their first assigned error that "using compelled statements made during court-ordered treatment to invoke punishment violates the constitutional privilege against self-incrimination." In its second assignment of error, the amicus curiae asserts that the constitutional harm of using compelled statements was compounded because it invoked A.W.'s adult sentence and unjustly exposed him to the harsh consequences of the adult justice system. We discuss these assigned errors together because they are closely related.

{¶50} The Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." Article I, Section 10, of the Ohio Constitution contains nearly identical language. Constitutional safeguards such as the Fifth Amendment protection against self-incrimination apply to juvenile delinquency proceedings. *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, 856 N.E.2d 921, ¶ 17.

{¶51} In *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that the state may not use incriminating statements made by a defendant during a custodial interrogation against him in a criminal proceeding unless it proves that procedural safeguards resulted in the defendant's voluntary waiver of his Fifth Amendment rights. These procedural safeguards include informing the defendant, before interrogation, that he has the right to remain silent, the right to speak to an attorney, and the right to have an attorney present during questioning. *Id.*

{¶52} Where a defendant is entitled to these procedural safeguards and the state fails to inform the defendant of his Fifth Amendment rights, the state is precluded from using any incriminating statements made during the custodial interrogation against the defendant. *Id.* at 469. For purposes of the Fifth Amendment privilege against self-incrimination, there is no appreciable difference between the guilt and penalty phases of the criminal proceedings. *Estelle v. Smith*, 451 U.S. 454, 462-463, 101 S.Ct. 1966, 68 L.Ed.2d 359 (1981).

{¶53} Generally, the right to be free from state coerced self-incrimination must be invoked or it is lost. *Roberts v. United States*, 445 U.S. 552, 559, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). If a person, compelled by the state to make self-incriminating statements, chooses to make the statements rather than invoke the privilege, the person has not been compelled by the government and has offered the statements voluntarily. *State v. Evans*, 144 Ohio App.3d 539,

550, 760 N.E.2d 909 (1st Dist.2001).

{¶54} However, there are situations in which the right to be free from self-incrimination is triggered in the absence of its express invocation. In these situations, the right becomes self-executing, and the defendant is excused from asserting the privilege. *Garner v. United States*, 424 U.S. 648, 654, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976). One such situation, known as the "classic penalty scenario," occurs where the assertion of the privilege against self-incrimination is penalized so as to foreclose the right to remain silent. *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), quoting *Garner* at 661. To constitute a "classic penalty situation," the individual must be faced with the government's assertion, either expressly or impliedly, that invocation of the Fifth Amendment will lead to a substantial penalty. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-06, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

{¶55} In *Evans*, the First District Court of Appeals held that Evans, a juvenile, was in the "classic penalty situation" when he made incriminating statements to his counselors during court-ordered therapy. Evans made the statements while he was involuntarily confined in an ODYS facility. In concluding that the "classic penalty" exception to the *Miranda* procedural safeguards applied, the *Evans* court explained that "[h]ad Evans failed to participate, he could have been found in violation of the court order that he do so, and he would have risked transfer to a far more restrictive facility." *Id.* at 547.

{¶56} It is undisputed that A.W. was involuntarily confined by ODYS and that his participation in the sex offender treatment was compulsory. The juvenile court had previously warned A.W. that if he failed to participate in sex offender treatment, he would have to serve the adult portion of his sentence in prison. (Jan. 18, 2017 tr. 5.) A.W. was in the classic penalty situation because had A.W. asserted his right to remain silent, he would have been

penalized by invocation of the adult portion of his sentence. Therefore, incriminating statements A.W. made to his counselor, such as how he fantasizes about his rapes and intends to watch violent pornography after his release from ODYS even though it is a known trigger for sex offending, were privileged under the Fifth Amendment and could not be used against him to invoke the adult portion of his sentence.

{¶57} The remedy for Fifth Amendment violations is suppression of the tainted evidence. *Missouri v. Siebert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). Thus, evidence of A.W.'s incriminating statements could not be used as a basis for invoking his adult sentence. We nevertheless find that 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.

{¶58} As previously stated, A.W. refused to participate in sex offender treatment when it was ordered in November 2016. (Jan. 18, 2017 tr. 4.) Dr. Alpert informed the court that she invited A.W. to join a sex offender group in December 2016, and he once again refused. (Mar. 31, 2017 tr. 4.) Although A.W. eventually agreed to participate in sex offender treatment in January 2017, there were no groups available at that time. When A.W. finally started treatment in April 2017, only one month remained before his twenty-first birthday. Consequently, A.W. only completed seven of the 35 lessons required from the first phase of sex offender treatment at the time of the invocation hearing . (May 22, 2017 tr. 13.)

{¶59} A.W. argues the trial court must have relied on A.W.'s incriminating statements when it imposed his adult sentence because all the other evidence established that he was a model participant. Indeed, Dr. Greene testified that A.W. "was very engaged and he did do the work." Bonita Reeves testified that A.W. "did well" in the group, "was always on time," "did a lot of sharing," "asked relevant questions," and "completed all of his homework assignments."

{¶60} However, Dr. Alpert informed the court that although A.W. attended classes and

did the work, he was only "superficially engaged." 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." Moreover, Dr. Palmer explained that due to A.W.'s late start in the sex offender treatment program, he was unable to make any meaningful progress. (May 22, 2017 tr. 39.)

{¶61} In its judgment entry invoking the adult portion of A.W.'s sentence, the court found that A.W. "placed the community at risk since * * * sexual offender treatment was offered upon the youth entering ODYS at Cuyahoga Hills Correctional Institution and the Youth refused treatment and did not engage in [treatment] until April 2017." (Entry journalized May 31, 2017.) Therefore, the trial court's decision to invoke the adult portion of A.W.'s sentence is supported by clear and convincing evidence as required by R.C. 2152.14(E) even without consideration of statements A.W. made to his therapists during sex offender treatment.

{¶62} A.W.'s fourth assignment of error and both of the assigned errors raised in the amicus brief are overruled.

D. Notice of the Hearing

{¶63} In the fifth assignment of error, A.W. argues the trial court violated his right to due process of law by failing to provide him proper notice of the hearing to invoke the adult portion of his sentence as required by R.C. 2152.14(D).

{¶64} The prosecutor filed the motion to invoke the adult portion of A.W.'s sentence on Thursday, May 18, 2017. The court held the invocation hearing on the following Monday, May 22, 2017. A.W.'s trial counsel objected to the hearing and to the state's witnesses, claiming he had not been served with the state's motion until the day of the hearing. The state asserted that it sent notice to A.W.'s trial counsel electronically, but defense counsel claimed he never

received it. Therefore, A.W. now argues that his right to due process was violated because he was not afforded adequate notice and a reasonable opportunity to prepare a defense to the state's motion to invoke the adult sentence.

{¶65} R.C. 2152.14(D), which governs hearings to determine whether to invoke the adult portion of an SYO, does not provide a time frame within which notice must be provided to the juvenile. A.W. argues that because R.C. 2152.12(G), which governs bindover hearings, requires that counsel receive notice "at least three days prior to the hearing, a three-day notice requirement should apply to invocation hearings under R.C. 2152.14(D). We disagree. If the legislature had intended to legislate this specific notice requirement, it would have expressly included it in R.C. 2152.14(D). We therefore review A.W.'s claim under standard principles of due process.

{¶66} "The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Thus, due process requires that the accused be given "notice and opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

{¶67} A.W. claims he had no notice of the invocation hearing prior to the actual date of the invocation hearing on May 22, 2017. However, the trial court scheduled the invocation hearing on the record at the May 8, 2017 review hearing. (May 8, 2017 tr. 12, 16.) Therefore, A.W. had almost two weeks notice of the invocation hearing.

{¶68} A.W. argues that even though the court scheduled the invocation hearing on May 8, 2017, the court's statements on the record do not constitute adequate notice for due process purposes because he was absent from the courtroom when the court made them. However, his trial counsel was present, represented A.W., and received notice on his behalf. Therefore, A.W. received timely notice of the hearing through his trial counsel.

{¶69} Furthermore, there was only one reason for the invocation hearing; A.W. had not engaged in sex offender treatment in a meaningful way that could result in any amount of rehabilitation. The record shows that the court scheduled the hearing because A.W. was only "superficially engaged" in sex offender treatment and had not made sufficient progress with it. (See generally May 8, 2017 transcript.) ODYS personnel repeatedly informed the court that A.W. complied with all required treatments except sex offender treatment. Therefore, A.W. not only had timely notice of the invocation hearing, he was on notice that his deficient progress in sex offender treatment was the proposed

basis for invoking the adult portion of his SYO sentence. We find no due process violation under these circumstances.

{¶70} Therefore, the fifth assignment of error is overruled.

{¶71} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to Cuyahoga County Common Pleas Court, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
KATHLEEN ANN KEOUGH, J., DISSENTS WITH SEPARATE OPINION

KATHLEEN ANN KEOUGH, J., DISSENTING:

{¶72} This case represents how our juvenile justice system has failed our juveniles. Much emphasis has been placed on A.W.'s failures, which I am not discounting. However, when a system that is put in place to protect our most vulnerable while protecting our community fails, we cannot put the entire blame on A.W. to justify the invocation of the adult portion of his sentence. The system in this case sabotaged any effort that A.W. made or could have made to prevent the adult portion of his sentence to be invoked. The dangling carrot was never going to be caught.

A. The system failed the community by failing to execute the initial arrest warrant, yet blamed A.W. for going "AWOL" on two occasions.

{¶73} On April 22, 2014, the state filed a complaint against A.W., then age 17, for sex offenses committed in 2013. On that same day, the state requested that an arrest warrant for A.W. be issued, and the juvenile court conducted a hearing. The court subsequently issued a journal entry stating that the matter came for a hearing on April 22, 2014, and "notwithstanding receipt of notice, the youth has failed to appear." Accordingly, the juvenile court issued an arrest warrant for A.W. that day. The record is completely silent on how, if, or when A.W. received notice that a complaint was filed against him, that the state requested a warrant be issued, and that the court was hearing the matter, which all occurred on April 22, 2014. Yet the juvenile court and A.W.'s parole officer at ODYS blamed him for going "AWOL" during that time. The record is also silent as to what attempts were made to apprehend A.W. during this time until his arrest on May 26, 2015, over a year later, when A.W. was 18 years old.

{¶74} On May 26, 2015, when A.W. appeared in juvenile court for another matter, he was arrested and arraigned for this case. Admittedly, A.W. failed to appear for a pretrial on September 10, 2015, and a warrant was issued for his arrest. Despite his flight, the record is

again silent as to what attempts were made to apprehend A.W. during this time. When A.W. was finally apprehended on May 8, 2016, he was age 19.

{¶75} I point this out for two reasons. First, A.W. did not go "AWOL" on two occasions. So any delay in his adjudication from the time of the complaint until his arrest in May 2015 should not be attributed to him. And secondly, the state made an issue of A.W.'s criminal history and the danger he posed to the community, yet failed to show what steps it took to secure his appearance other than simply having an arrest warrant issued.

B. The system failed A.W. in the delay of prosecution.

{¶76} Once A.W. was apprehended, the probable cause hearing was originally scheduled for June 28, 2016, but was continued due to an unavailable state's witness. The probable cause hearing, which turned into an adjudication hearing, finally occurred on September 7 and 13, 2016. A.W. was now 20 years old. At this time, the state and the juvenile court knew that any mandatory programs or treatment in ODYS would be for less than eight months before A.W.'s 21st birthday, yet they believed A.W. could be rehabilitated in the juvenile justice system.

C. The system failed A.W. by giving him false hope during adjudication

{¶77} At the time of adjudication, prior to A.W. making his admission to the amended complaint, the court made the following statements on the record:

> So he will stay in Juvenile Court. And the *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. Once you are 21 years of age, this Court loses jurisdiction and the SYO, what we call the serious youth offender specification, goes away. Does that make sense?

(September 13, 2016 tr. 79.). Following this advisement, the court engaged in a conversation with A.W., his mother, and defense counsel explaining the types of behavior that would warrant the imposition of the adult portion of his sentence — "I don't mean just get into random fights. I mean he literally refuses to follow any of the rules and is constantly [a problem]. * * * And I

mean serious. * * * So it has to be fairly severe." (*Id.* at tr. 79-80). The court continued explaining that if he engaged in these types of behaviors, A.W. would come back before the court and following a hearing, the court would determine whether "he in fact is an aggressor and I need to invoke the serious youth offender." (*Id.* at tr. 81.) Defense counsel also read on the record the language in R.C. 2152.14(B) that governs under what circumstances the SYO dispositional sentence will be invoked.

{¶78} Thereafter, the juvenile court engaged in the requisite plea colloquy with A.W. and he admitted to the charges in the delinquency complaint. During the plea colloquy, the juvenile court vaguely advised A.W. that "if in fact you don't do what you're supposed to do in ODYS, that they can impose the sentence and you can be sentenced from anywhere between 3 to 11 years * * *." However, at no time during his plea, did the court explain to A.W. that the adult portion of his sentence would be invoked for failing to comply with counseling, treatment, or any other programs ODYS ordered.

D. The system failed A.W. by depriving him of due process

{¶79} In addition to protection against the deprivation of "life, liberty, or property without due process of law," juveniles, at a minimum, "are entitled to proceedings that 'measure up to the essentials of due process and fair treatment.'" *In re J.V.* 134 Ohio St.3d 1, 2012-Ohio-4961, 979 N.E.2d 1203, ¶ 14, quoting *Kent v. United States*, 383 U.S. 541, 562, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). The fair warning or notice requirement of the Due Process Clause prohibits an individual from being held "'criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Rose*, 423 U.S. at 49, quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct.808, 98 L.Ed. 989 (1954). Although the nature of the due process clause defies a rigid application in juvenile cases, the Ohio Supreme Court has held that "'fundamental

fairness is the overarching concern.'" *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 71, quoting *D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, at ¶ 51.

1. No Order for Sex Offender Treatment

{¶80} As the majority correctly points out, the juvenile court did not specifically order sex offender treatment in its dispositional judgment entry, and any attempt to "correct" that order was a nullity. Additionally, I agree that R.C. 5139.04 allows ODYS to "issue any orders" for the treatment of the children. However, the evidence in the record is insufficient to conclude that ODYS "ordered" A.W. to participate in sex offender treatment. Contrary to the majority's assertion, at no time during the first review hearing on January 18, 2017, did Officer Dansby testify that A.W. was *ordered* to participate in sex offender treatment. She stated:

> [A.W.] continues to deny the accusations. He does not participate in any type of treatment. And according to [the] latest report 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.

(January 18, 2017 tr. 4.) Morever, Dr. Alpert later testified at a subsequent hearing, that she *invited* A.W. to attend her group session in December, which A.W. declined. Accordingly, I cannot say that A.W. was ordered to attend sex offender treatment.

{¶81} Furthermore, I find it reasonable to believe that if ODYS felt that it could order A.W. to engage in sex offender treatment, then there was no necessity for ODYS to confirm with the juvenile court whether treatment "was ordered in the journal entry."

> THE COURT: Okay. All right. So I guess you can take him back. Do you need me to order anything specific, Officer Dansby?
>
> MS. DANSBY: No.
>
> THE COURT: Can you remind him of this conversation when he says, I'm not doing anything?
>
> MS. DANSBY: Yeah, I mean, it's in the journal entry, right, that he has to have sex offender treatment?

THE COURT: Yes.

MS. DANSBY: Okay. That's all they need.

(January 18, 2017 tr. 10-11.)

{¶82} Although it is true that the juvenile court "wanted" A.W. to receive sex offender treatment, no order was issued requiring that he participate or complete treatment. When dealing with individuals in the juvenile justice system, I am mindful that unless they are specifically ordered to do a task and advised of the consequences, it is likely that they will not engage in that activity willingly or voluntarily. This is evidenced by A.W.'s understanding at the January 18, 2017 review hearing, when the juvenile court for the first time advised A.W. that he must participate in sex offender treatment or the adult portion of his sentence would be imposed. A.W. unequivocally stated he understood, and contrary to the majority's position, nothing in the record demonstrates that A.W. refused to participate in such treatment following the court's order. The juvenile court's ultimatum occurred five months before A.W.'s 21st birthday.

2. No Notice of Consequences

{¶83} I also disagree with the majority's conclusion that A.W. knew at the time of disposition that sex offender treatment would be part of his rehabilitation program and that his failure to participate in sex offender treatment would result in invocation of his adult sentence. Rather, the record reflects that at no time during disposition did the trial court order such treatment or advise him of the consequences for failing to participate.

{¶84} Granted, the juvenile court judge stated during the dispositional hearing that she would bring him back for a review hearing and if he was not doing what he was supposed to, she would "cut the sentence at ODYS and send [A.W.] to prison." (October 12, 2016 tr. 17-18). However, I find this statement insufficient to apprise A.W. of the consequences of failing to participate in sex offender treatment, considering the juvenile court's subsequent statement:

> [a]nd if you're still doing everything *you can* by May 23, 2017, you *will have completed* the terms of Juvenile Court, the SYO, the serious youth offender sentence, will go away and you can then go on and live your life.

(*Id.* at tr. 18.)

{¶85} It must be remembered that when A.W. entered his admission to the amended delinquency complaint, the juvenile court was clear with A.W. that the only conduct that would lead to the invocation of his adult sentence were further delinquent acts. Specifically, A.W. was on notice that his adult sentence would be invoked only if he acted up at ODYS, .

{¶86} Subsequently at the disposition hearing, the court vaguely advised A.W. that he could be sent to prison if he "mess[es] up at ODYS at any given time," and "if, in fact, you are not doing what you're supposed to." (October 12, 2016 tr. 15, 17.) And while the juvenile court indicated at disposition that it wanted sex offender treatment put in place at ODYS, it never advised A.W. or issued an order that his failure to participate in treatment would warrant invocation of his adult sentence.

{¶87} Constitutional due process requires that A.W. have specific notice of the conduct that could lead to the invocation of his adult sentence. When, as here, he was told that his adult sentence would only be invoked by his engaging in delinquent acts, his due process rights were violated when his adult sentence was invoked for some other condition — failing to sufficiently participate or engage in sex offender treatment.

3. No Chance to Satisfy — Factual Impossibility

{¶88} The majority summarily disposes of A.W.'s argument that his due process rights were violated when the juvenile court invoked his adult sentence based upon his failure to complete sex offender treatment despite the factual impossibility of him completing such treatment given the short duration of his ODYS commitment. The majority concludes that the court never conditioned the adult portion of his sentence on the *completion* of "the entire sex offender program," because the court only stated at the dispositional hearing that it wanted sex offender treatment put in place at ODYS and for A.W. "to have a better understanding of what's appropriate and what's not." I agree that this was the juvenile court's statement and initial position. However, the record demonstrates that this condition drastically changed following his commitment to ODYS when the court on January 20, 2017, subsequently ordered A.W. to fully participate in sex offender treatment, and stated that failure to do so would result in the invocation of the adult portion of his sentence. Moreover, the juvenile court only required A.W. to participate in treatment, which he did, although apparently not to the satisfaction of ODYS and the juvenile court.

{¶89} The majority's statement that if A.W. had "taken responsibility for his actions and taken his sex offender treatment seriously when he entered ODYS, he could have avoided the adult sentence even if he did not complete the entire sex offender program" is mere speculation on what the juvenile court would have done considering at all relevant times the individuals at ODYS felt prison was the better option for A.W. Morever, I fail to understand the majority's conclusion that the juvenile court's statement made at the January 2017 review hearing that "he's doing well" equates that A.W. was "making progress" toward "what's appropriate" when he had yet to start sex offender treatment.

{¶90} The evidence in the record is clear that A.W. was unfairly punished for a factual impossibility. It must be noted that even though A.W. entered ODYS in November 2016, he

was not assessed for his treatment needs until December 2016. At that point, he only had approximately six months remaining on his ODYS commitment to fully participate in a nine-month sex offender program.

{¶91} Both A.W.'s treating psychologist and supervising psychologist at ODYS were 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. Dr. Alpert testified that "[e]ven if [A.W.] would have engaged in sex offender treatment on his first day in ODYS, that would not be enough time," because treatment is at least nine months and A.W., given his "vast amount of issues," may have required even more time. Dr. Greene likewise testified that even if A.W. had begun his sex offender treatment at the beginning of his ODYS commitment, he "could potentially be, you know, 60 to 70% done though it's very variable." (May 22, 2017 tr. 9.)

{¶92} This factual impossibility was exacerbated by the unreasonable delay in A.W.'s treatment caused by ODYS. At no time during the January 18, 2017 hearing when the court ordered sex offender treatment, did anyone indicate to the court that treatment would be delayed due to the scheduling procedures and treatment preferences of ODYS, or that A.W. would not even satisfactorily "scratch the surface" of the treatment before his 21st birthday.

{¶93} Moreover, despite the juvenile court's order that AW either participate in sex offender treatment or go to prison, ODYS did not make treatment available to A.W. for over 70 days even though A.W. agreed to participate. Furthermore, the record reflects that no one from ODYS advised the court prior to the March 31, 2017 hearing that treatment was not made available to A.W. At that hearing, Dr. Alpert admitted to A.W.'s willingness:

> Okay. When he came back [from being in court in January], his social worker let me know that he wanted to meet with me again. So I did meet with him at the

very beginning of February. At that time he was very forthcoming about his sex offending.

(March 31, 2017 tr. 5.)

{¶94} The Court was bewildered to learn about the delay in treatment, stating:

So how — I don't understand — 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?

(March 31, 2017 tr. 6.) I agree with the juvenile court that the system was failing A.W. The record is clear that the juvenile court acknowledged during the March 31, 2017 hearing that the delay in implementing sex offender treatment from January to April was the fault of the scheduling procedures at ODYS, and placed the blame squarely upon the institution. The juvenile court was very troubled and actually asked for guidance about when she brought A.W. back in April, "are we going to say that he has fulfilled the requirement that this Court set forth for his treatment?" (*Id.* at tr. 8). In my belief, the only person looking out for A.W. was the juvenile court. It was the court that was finding solutions to the situation and making suggestions, whereas the institution was placing blame on A.W., upset that they had to make special arrangements for him and reminding him that he was "not special." (*Id.*, tr. at 9, 15.)

{¶95} Thereupon, the juvenile court made, what I perceive to be, a promise to A.W.:

THE COURT: All right. So what we're going to do is you're going to start and April 5th you're going to do the sex offender treatment. We're going to accelerate it by doing an individual group program along with it. And then what I'm going to do is — when do you turn 21, May 23rd? * * * So we're going to push your April 21st [review hearing] into May *and if you do everything you're supposed to, I will not impose your SYO.* Okay? Do we got a deal?

A.W.: Yes, your honor.

(Emphasis added.) (*Id.*, tr. 10.)

{¶96} Following the review hearing, the court issued another journal entry:

> Although the youth was committed for a sex offense, [A.W.] was refusing in December 2016 to take responsibility for his actions nor participate in sex offender treatment. In February, the youth expressed that he would like to participate in Sex Offender Treatment, although he was told that the next class was not until April 5, 2017 and would take approximately nine months. The youth turns twenty-one on May 23, 2017 and needs to complete as much of the program as he can. [ODYS] agreed to give him an additional individualized program to accelerate the youth's progress.
> IT IS THEREFORE ORDERED that the youth shall participate and engage in individualized sex offender treatment. [ODYS] shall ensure that individualized services are offered to the youth.
>
> IT IS FURTHER ORDERED that the youth shall fully cooperate, including but not limited to engaging in services in the evenings and weekends. Failure to engage with services may result in the Serious Youth Offender disposition being invoked.

(Apr. 3, 2017 Journal Entry).

{¶97} I am not turning a blind eye to the fact that A.W. could have started treatment following his assessment in December, but on January 18, 2017, when everyone was in agreement that counseling was mandatory and failure to do so unequivocally warranted the imposition of his adult portion of his sentence, no programs, treatment sessions, or counseling services were made available to A.W. until after March 31, 2017. This was over 72 days — for 72 days the system failed A.W.

{¶98} In addition to not providing adequate notice of the existence of court-ordered sex offender treatment and consequences, the proceedings in this case do not "measure up to the essentials of due process and fair treatment" because it was impossible to meet the court's unstated expectation that A.W. complete sex offender treatment at ODYS to everyone's satisfaction. The conditions and consequences kept changing, causing the invocation of A.W.'s adult sentence to be based on a flawed and fundamentally unfair premise, which violates the very fabric of the Due Process Clause.

{¶99} Accordingly, I would find that A.W. was deprived due process of law when the juvenile court invoked the adult portion of his sentence.

E. No Evidence of Misconduct — Fifth Amendment Violation

{¶100} Furthermore, once it was discovered that it was impossible to complete sex offender treatment to the state's satisfaction, and A.W. had not engaged in the requisite misconduct to warrant invocation of his adult sentence, A.W.'s incriminating statements made during treatment were used against him to justify the invocation of the serious youth offender specification under the guise that he creates a substantial risk to the safety or security of the community.

{¶101} I agree with the majority's analysis and conclusion that A.W.'s Fifth Amendment privilege against self-incrimination was violated when the juvenile court relied on statements A.W. made to his therapists during sex offender treatment to justify the imposition of the adult portion of his sentence. I further agree that the remedy for this violation is suppression of the tainted evidence, and that A.W.'s incriminating statements could not be used as a basis for invoking the adult sentence.

{¶102} However, I disagree with the majority's conclusion that even absent these statements, the weight of the evidence supports the juvenile court's decision to invoke A.W.'s adult sentence. The majority concludes that failure to actively participate in sex offender treatment constitutes misconduct under R.C. 2152.14(E)(1)(c) if the failure to participate results in inadequate rehabilitation. In some cases this may be true, but as it pertains to the facts presented in this case, I disagree.

{¶103} A juvenile court may invoke the adult portion of a person's serious youthful offender sentence if it finds by clear and convincing evidence that "the person engaged in the conduct or acts charged under division (A), (B), or (C) of [R.C. 2152.14], *and* the person's

conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile detention." (Emphasis added.) R.C. 2152.14(A)(1)(c).

{¶104} "The conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of the rules of the institution or the conditions of supervision and that could be charged as any felony or as a first-degree misdemeanor offense of violence if committed by an adult, R.C. 2152.14(A)(2)(a) and (B)(1), or engaging in conduct that creates a substantial risk to the safety and security of the institution, the community, or the victim. RC. 2152.14(A)(2)(b) and (B)(2)." *D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, at ¶ 36.

{¶105} There is no dispute that A.W. did not commit an act that could be charged as a felony or first-degree misdemeanor. The issue is whether the failure to sufficiently complete sex offender treatment satisfies the requirement of "engaging in conduct that creates a substantial risk to the safety and security of the institution, the community, or the victim."

{¶106} In support of its conclusion, the majority cites to the Ninth District's recent decision in *In re D.J.*, 9th Dist. Summit Nos. 28472 and 28473, 2018-Ohio-569.[3]

{¶107} D.J., age 15, was committed to ODYS following an adjudication for rape and felony murder. He appealed his adjudication, but after doing well during his commitment, he dismissed his appeal. Following the dismissal, the juvenile court noted that D.J.'s sex offender treatment would begin, but D.J. refused to enter the program until nine months before turning 21 years of age. Although he attended and participated in the first phase of the program, he did not meet his goals because he would not identify the triggers for his conduct. This prevented him from continuing with the second phase of his treatment.

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[3] On April 2, 2018, D.J. appealed this decision to the Ohio Supreme Court. *See In re D.J.*, 2018-0479. The jurisdictional memorandum is pending.

{¶108} Less than two months before D.J.'s 21st birthday, the state moved to invoke the adult portion of his sentence. Following a hearing, the juvenile court granted the motion, finding that by failing to complete sex offender treatment, D.J. engaged in conduct that posed a substantial risk to the safety of the community, and that he could not be rehabilitated before turning 21.

{¶109} The Ninth District affirmed the juvenile court's decision. It concluded that D.J. had 29 months to complete sex offender treatment, which typically takes between 9 and 18 months. And by intentionally waiting until he had only 9 months prior to turning 21 to begin treatment, it was too late to finish the treatment in light of his minimal participation and emotional detachment from his offense. The court concluded that D.J., in failing to complete sex offender treatment, engaged in conduct that created a substantial risk to the safety of the community.

{¶110} The facts and circumstances in *D.J.* are distinguishable. The most glaring distinction is that D.J. had over 29 months to complete sex offender treatment. His commitment to ODYS did not create an impossibility, unlike A.W.'s six-month commitment. Additionally, the facts in *D.J.* indicate that the juvenile court ordered sex offender treatment during the disposition hearing. In this case, the juvenile court did not order A.W. to participate and engage in sex offender treatment during disposition. D.J. also refused to participate in treatment from the beginning of his commitment up until nine months before his 21st birthday — he refused for almost two years. Whereas in this case and contrary to the majority's statement, A.W. did not refuse to participate in sex offender treatment once he was ordered to participate and advised that failure to do so would result in the invocation of his adult sentence.

{¶111} Finally, the facts in *D.J.* indicate that D.J. obtained no benefit from the sex offender treatment that he did receive, whereas the facts here show that A.W. responded well to

individualized treatment, and despite only completing seven of the 35 lessons in the first phase of the program, A.W. was benefitting. Dr. Greene, his individual therapist, testified that A.W. was very engaged and did the work. Bonita Reaves, the social worker who facilitated the group therapy, testified that A.W. did well in group, was always on time, did a lot of sharing, asked relevant questions, and completed all of his homework assignments.

{¶112} In addition to his therapists testifying that A.W. was engaged in treatment, A.W.'s social worker, Dorothy Chapman, advised the court that A.W. participated and completed his substance abuse group, completed aftercare group, and participated in his education requirement. She stated, "[H]e reports his goals for the next 30 days as completing or participating in SO program as required, completing Phase 2 of the substance abuse and completing successfully and continue to attend the [inaudible] support group that we have in place." (May 8, 2017 tr. 7.).

{¶113} Accordingly, I find *D.J.* distinguishable from the facts in this case. Moreover, I doubt that failure to adequately engage in treatment and achieve certain desired results is the type of misconduct that the General Assembly intended when it drafted R.C. 2152.14(E)(1)(c).

{¶114} The juvenile court rescinded its promise about not invoking the adult portion of A.W.'s sentence only after A.W.'s incriminating statements made during treatment were relayed to the court. I agree with A.W. that the juvenile court must have relied on his incriminating statements when it imposed his adult sentence because (1) A.W. did not engage in any further wrongdoing or bad acts at ODYS, such as fighting or causing disruption, and (2) the other admissible and untainted evidence establishes that A.W. was doing the best he could in the time he had, which was complying with the exact order the juvenile court issued at the March 31, 2017 hearing.

{¶115} The majority notes that Dr. Alpert testified that A.W. was only "superficially engaged" in group treatment. The rationale for this conclusion, however, was based on A.W.'s

incriminating statements — statements that should have been suppressed. Additionally, the majority relies on Dr. Palmer's statement that A.W. only attended the classes because he wanted to avoid prison, not to reform his behavior. However, as the Ohio Supreme Court has noted, "the threat of the imposition of an adult sentence encourages a juvenile's cooperation in his own rehabilitation, functioning as both carrot and stick." *D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, at ¶ 18. Accordingly, it is not surprising that A.W.'s motivation in cooperating with his own rehabilitation would be to avoid an adult sentence.

F. Conclusion

{¶116} In my opinion, the record is very clear. A.W. was sentenced to ODYS for approximately 6 months before turning 21 years old. Five months before turning 21, he was ordered for the first time by the juvenile court to participate and engage in sex offender treatment or his adult portion of his sentence would be imposed. Despite this order, ODYS sat on its hands until March 31, 2017, when the juvenile court discovered ODYS had not immediately placed A.W. into sex offender treatment or notified the court of its inability to place him into treatment. A.W. was advised on March 31, 2017, that if he participated in sex offender treatment, the adult portion of his sentence would not be invoked. The court's journal entry noted that A.W. would turn 21 on May 23, 2017, and that he needed "to complete as much of the program as he can." And the court promised A.W. that "if you do everything you're supposed to, I will not impose your SYO." (March 31, 2017 tr. 10.) The record reflects that A.W. did everything he was supposed to do from March 31, 2017, yet the juvenile court still invoked the SYO. It can only be deduced from the record that its justification for doing so was because of statements made during A.W.'s full participation in treatment — incriminating statements that

violated his Fifth Amendment right. The system obviously failed A.W. by depriving him of basic fundamental fairness.

{¶117} For the foregoing reasons, I would vacate the juvenile court's order invoking the adult portion of A.W.'s SYO sentence.

COURT OF COMMON PLEAS, JUVENILE DIVISION
CUYAHOGA COUNTY, OHIO

IN THE MATTER OF: A[redacted] W[redacted]

CASE NO: DL14105159
JUDGE: DENISE N. RINI

JOURNAL ENTRY

This matter came on for hearing this 22nd day of May, 2017 before the Honorable Judge Denise N. Rini upon the Motion to Invoke the Adult Portion of the Dispositional Sentence filed by the Assistant County Prosecutor on May 18, 2017.

The Court found that notice requirements have been met. The following persons were present in Court: Youth, A[redacted] W[redacted] with Attorney Barry King; Grandmother, J[redacted] W[redacted]; Parole Officer, Cynthia Dansby; and Assistant Prosecuting Attorney for the State of Ohio, Jeffrey Maver.

The Court explained to the child that he has the right to be present; to receive notice of the grounds upon which the adult sentence portion is sought to be invoked; to be represented by counsel, including counsel appointed pursuant to Juvenile Rule 4(a); to be advised on the procedures and protections set forth in the juvenile rules; and to present evidence, including evidence of mental illness or mental retardation. The youth has Attorney Barry King as counsel.

Attorney King entered an oral Motion to Continue and Objects to the Hearing on the basis that the State's Motion was not timely filed. Further, Attorney King asserts that the youth has not had an opportunity to engage in treatment since placement at the Ohio Department of Youth Services (hereinafter "ODYS"). Attorney Maver objects to a continuance since the Juvenile Court shall lose jurisdiction on May 23, 2017, the youth's 21st birthday. Furthermore, it is a requirement that a letter from the director of ODYS requesting that the adult portion be invoked, was received from Director Reed on or about May 16, 2017.

The Court reviewed the history of the case. On January 18, 2017 the Court held a Review Hearing with the youth present and reiterated that he must engage in treatment and failure to engage may result in the invocation of the adult portion of the sentence. The Journal Entry states "***IT IS FURTHER ODERED*** *that failure to engage with services may result in the adult SYO disposition being invoked*".

On March 31, 2017, a Review Hearing was held whereas the youth was present via video conference. As a result of the Hearing, the Court reiterated that the youth must engage in Sex Offender Treatment. The Journal Entry states "***IT IS FURTHER ORDERED*** *that the youth shall fully cooperate, including but not limited to engaging in services in the evenings and weekends. Failure to engage with services may result in the Serious Youthful Offender disposition being invoked*". Additionally, the Court ordered ODYS to begin individual counseling with the youth.

On May 8, 2017, a Review Hearing was held whereas the youth appeared via video conference. It was reported that the youth began Sex Offender Treatment on April 5, 2017. It was reported that the "*youth is superficially engaged and does not buy in and feels that he does not need treatment*". Dr. Greene reported that he is engaged in individual sessions and is willing to discuss triggers.

Moreover, on May 8, 2017, on the record and in open Court, a hearing was scheduled for May 22, 2017, to invoke the Serious Youthful Offender Disposition. The Court conveyed to all Parties that if the aforementioned

letter was not received by Harvey Reed, Director of the Ohio Department of Youth Services, the May 22, 2017 hearing would be canceled.

Therefore, the Motion to Continue is denied and the Court finds that the youth had notice that the hearing scheduled on May 22, 2017 was for the sole purpose to determine if the Serious Youthful Offender Disposition should be invoked.

The Court heard opening statements from Assistant Prosecuting Attorney Jeffrey Maver and Counsel for the Defense, Barry King.

DIRECT EXAMINATION

The Assistant County Prosecutor called Dr. Erin Greene, who is employed as a psychologist with the Ohio Department of Youth Services since January 2017. Dr. Greene has a Master Degree and Doctoral Degree in Psychology and is in good standing with her license. Dr. Greene conducts individual and group sexual offender treatment at Cuyahoga Hills Correctional Facility.

Attorney King renews his objection to the witness testifying based on the untimeliness of the State's Motion to Invoke. The Court notes Attorney King's ongoing objection.

The Sex Offender Treatment Program has two phases, the first phase is approximately 4-5 months in length and the youth must pass a panel to ensure the material was appropriately acquired. Phase Two consists of victim awareness and the development of a prevention plan.

Upon arrival at ODYS, a youth is enrolled into the treatment program and must discuss all the offenses in detail. The JSOP is administered, (Juvenile Assessment Sexual Offender Treatment) and the youth enters Phase I with the next available group. Since the groups are closed, once a group begins, a youth may not join and must wait until a new group begins.

The youth is engaged with individual counseling to address the underlying issues and thinking errors as it pertains to negative attitudes toward women. The counseling is part of the Cognitive Therapy Program.

The first session with the youth was held on April 1, 2017 and Dr. Greene relayed that part of the youth's cognition is that women are not necessarily worthwhile and should be used predominantly in a sexual manner, "*some women deserve to be raped if they are conceited or act full of themselves*". Dr. Greene opined that the youth is engaged because he is forthcoming and he is concerned about the Serious Youthful Offender Disposition, though believes the engagement is superficial. The youth has attended 7-sessions and has completed all assignments.

Moreover, Sex Offender Treatment has several modalities, initially the youth would not acknowledge the sex offending behavior. The youth engaged in substance abuse treatment and participated in PTSD (Post Traumatic Stress Disorder) Group to explore his personal traumatic history. The sessions with the witness are approximately 1-hour in length and is individualized, though the youth has not had an opportunity to get to the heart of issue.

The opinion of Dr. Greene is that A[redacted] has not received the full benefit of the treatment, especially since the youth plans are to continue to engage is behavior that has been identified as triggers, such as viewing pornography.

The Assistant County Prosecutor offered and introduced **STATE'S EXHIBIT "1": LETTER FROM DIRECTOR REED requesting the invocation of the SYO and STATE'S EXHIBIT "2": 4-PAGE NARRATIVE,** specifically page 4 of 4 which clearly indicates the youth's frustration and need for long term treatment.

CROSS EXAMINATION (ATTORNEY KING)

Upon inquiry, Counsel for the youth confirmed that Dr. Greene has been licensed since October 2016 and has engaged with 8-9 youths for sex offender treatment. Typically Phase I treatment may be longer than 4-5 months if

the youth has learning disabilities and Phase II is building the Relapse Prevention Plan. The youth has intellectual disabilities that were contained in various documents and reports provided, though there was no indication that upon arriving at ODYS, that the disabilities prevented the youth from engaging in the treatment program.

On April 5, 2017, the youth began individual counseling, treatment orientation curriculum and Victim Awareness. The youth was beginning to open up about the sexual offenses. Although the youth's engagement was high, Dr. Greene is uncertain how much the youth is truly understanding.

The Court inquired if the youth had engaged upon his arrival to the facility, would treatment be complete. Dr. Greene opined that if not completed, the youth would be very close to the end of Phase II. Moreover, the youth has the ability to process the curriculum at a deeper level.

Dr. Green stated that a main concern with the youth is whether the youth has a complete and full understanding what the treatment program was providing. Dr. Greene believes that the youth has the cognitive ability to process the treatment program if he remains engaged.

If the youth had begun treatment upon his arrival at ODYS in November, the prognosis would be more definitive since the youth would have or close to completion of the treatment.

DIRECT EXAMINATION

The Assistant County Prosecutor called, Ms. Benita Reaves, Social Worker for 14-years at ODYS, assigned to Cuyahoga Hills Correctional Facility.

The Court notes the continuing objection of Attorney King.

The witness conducts individualized and group counseling which consists of Phase I: sex offending program and cognitive therapy that are 1-hour sessions. There are approximately 2-12 youths in a group and there are approximately 35 lessons. The youth herein has completed 7 lessons thus far, which include the introduction, statutes and laws of sexual behavior.

The youth was participating, completed homework assignments, attentive and sharing experiences. Each session for Phase I is approximately 4-6 months in length, though the groups are on a rolling start, though the youth was not assigned until April.

Currently, the witness has four (4) youths in her group that began on April 19, 2017. The youth is on lesson 7 and has completed all homework assignments and has been candid. The witness opined that the youth is in need of continuing his counseling in order for it to benefit the youth.

CROSS EXAMINATION (ATTORNEY KING)

Upon inquiry, the Ms. Reaves stated that the youths may hesitate to participate due to the stigma of the label of sex offender. Furthermore, the youth asked relevant questions, though has not had sufficient time to determine if the youth has benefitted.

The Court inquired as to the length of the treatment program and the other social workers that also conduct Sexual Treatment Programs. There are three other social workers that do Phase One and the start dates are staggered. The witness had three (3) groups in the year 2016, therefore there may have been nine (9) groups throughout a year. Had the youth not refused treatment upon arriving at the facility, the youth should have completed Phase I and been close to completion of Phase II.

DIRECT EXAMINATION

The Assistant County Prosecutor called Ms. Robin Palmer, President of the Mokita Center for the past thirty-one

years.

Attorney King renews the ongoing objection. Counsel for the Defense stipulated to the credentials of Ms. Robin Palmer.

The witness testified that she prepared a Mokita Assessment for A[redacted] W[redacted] through a referral from ODYS. The Mokita Assessment is a comprehensive diagnostic tool that looks at many aspects of a youth's life to determine if the youth is likely to reoffend. Sources used are information from the youth, school records, police reports, social media websites, and interviews from relatives.

The witness further testified to the youth's date of birth being May 23, 1996 and ODYS requested the Mokita assessment.

The evaluation occurred on May 15, 2017 and the youth was polite and cooperative. Ms. Palmer reviewed collateral material, written reports and emails that were provided. The Assistant County Prosecutor offered and introduced **STATE'S EXHIBIT "3": MOKITA ASSESSMENT 13 pages signed by Ms. Robin Palmer.**

On page 9 of the Mokita Assessment, the recommendation states that in her professional opinion, a correctional approach would be beneficial for the youth so he can understand the harm he has caused to others.

The **ERASOR** (Estimate of Risk of Adolescent Sexual Offense Recidivism) is an instrument that determines sexually reoffending behavior. The **ERASOR** identifies a youth's risk factors by research and the youth herein had twenty (20) factors out of twenty-five (25) on the register. The factors are significant in determining the risk of reoffending, although risk factors are not given priority with any one factor being more important to another.

It is the professional opinion that the youth may be making an effort in treatment in order to manipulate the system to avoid the invocation of the SYO Disposition.

Moreover, the youth admits that he preys on young and fragile individuals. Ms. Palmer opined that the release of the youth places the community at further risk since he is diagnosed with Depression, Anxiety, which are treatable, though further diagnosis of Anti-Social Personality Disorders with Narcissistic Features, are not treatable and counseling would be ineffective.

CROSS EXAMINATION (KING)

Upon inquiry, Ms. Palmer understood that A[redacted] did not wish to engage in treatment until January 2017, after a Review Hearing.

The witness opined that although the **ERASOR** is designed for juveniles, it is valid since the youth is engaged in the Juvenile System.

One motivation of the youth's cooperation is the Serious Youthful Offender Disposition, and although the youth may engage in sex offender treatment in the community, Ms. Palmer's does not believe that A[redacted] will be properly motivated if released.

The witness agrees that the Anti-Social Personality Disorder was cultivated over time, and worsens without intervention. The witness acknowledged that the youth's surroundings contribute to whether he is motivated to change.

Ms. Palmer relayed that the youth showed remorse when he acknowledged that his offending behavior and that he lied to his family.

The Assistant County Prosecutor rested subject to the admission of **EXHIBITS "1", "2" & "3".**

Attorney King entered his continuing objection and to all evidence. The Court notes Attorney King's objection.

The Court admits **EXHIBIT "1",** redacts **EXHIBIT "2"** and admits only page 4, the note written by Dr. Greene, and admits **EXHIBIT "3" in its entirety.**

The Court heard closing arguments.

Upon due consideration, the Court finds that Serious Youthful Offender Disposition sentenced shall be ordered into full force and effect. The Court further finds by clear and convincing evidence that the child has been admitted to a Department of Youth Services facility and the youth's conduct demonstrates that the youth is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. Moreover, the youth has placed the community at Risk since the Court Ordered Sexual Offender Treatment was offered upon the youth entering ODYS at the Cuyahoga Hills Correctional Institution and the youth refused treatment and did not engage until April 2017.
Therefore, the allegations of the motion have been proven by clear and convincing evidence.

In October 2016, the youth was ordered to immediately engage in sexual offender treatment at the Ohio Department of Youth Services, the youth refused to engage until January 2017.
On January 18, 2017 the Court held a Review Hearing with the youth present and explained that he must engage in treatment and failure to engage would result in the adult sentence being invoked. The Journal Entry states "***IT IS FURTHER ODERED*** *that failure to engage with services may result in the adult SYO disposition being invoked*".
On March 31, 2017, a Review Hearing was held whereas the youth was present via video conference. As a result of the Hearing, the Court reiterated that the youth must engage in Sex Offender Treatment. The Journal Entry states "***IT IS FURTHER ORDERED*** *that the youth shall fully cooperate, including but not limited to engaging in services in the evenings and weekends. Failure to engage with services may result in the Serious Youthful Offender disposition being invoked.*
On May 8, 2017, a Review Hearing was held whereas the youth appeared via video conference. It was reported that the youth began Sex Offender Treatment on April 5, 2017. It was reported that the youth is superficially engaged and does not buy in and feels that he does not need treatment. Dr. Greene reported that he is engaged in individual sessions and is willing to discuss triggers.

On the record and in open Court, a hearing was scheduled for May 22, 2017, to determine whether to invoke the Serious Youthful Offender Disposition. The Court conveyed to all Parties that if the letter was not received by Harvey Reed, Director of the Ohio Department of Youth Services, the May 22, 2017 hearing would be canceled.

The youth places the community at risk since he did not participate in appropriate Sex Offender Treatment while placed at ODYS.

The incident occurred on August 17, 2013 and the Complaint was filed on April 22, 2014.
On April 23, 2014, the youth did not appear a warrant was issued.
The youth was arraigned on May 26, 2015, a pretrial was scheduled on June 15, 2015, and a Probable Cause Hearing was scheduled for September 10, 2015, whereas he youth failed to appear once again.
During the pendency of this matter, the Court issued two (2) warrants for the arrest of the youth.
There would have been sufficient time for rehabilitation had the youth availed himself to the Juvenile System.

The Court finds by clear and convincing evidence that the youth is the following;

(1) at least fourteen years of age;

(2) is serving the juvenile portion of a Serious Youthful Offender Dispositional sentence;

(3) is in the institutional custody of the **OHIO DEPARTMENT OF YOUTH SERVICES**; and

(4) there is reasonable cause the youth has reached fourteen years of age: engaged in conduct that created a substantial risk to the safety or security of the institution, the community, or the victim.

The Court further finds by clear and convincing evidence that the youth's conduct demonstrates that the youth is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

The time the youth must serve on a prison term imposed under the adult portion of the dispositional sentence shall be reduced by the days the youth is held in a juvenile facility or in detention after the Order is issued and before the youth is transferred. ***Total number of days is approximately 256 pre-commitment days. Fifty-five (55) days in the Juvenile Detention Center and Two Hundred Days (200) (November 4, 2016 - May 22, 2017) at the Ohio Department of Youth Services.***

IT IS THEREFORE ORDERED that the juvenile portion of the disposition is terminated, and the Adult Portion of the Serious Youth Offender Disposition ordered on October 12, 2016 is hereby ordered into full, force and effect.

IT IS FURTHER ORDERED that the time the Juvenile spent at the Ohio Department of Youth Services is credited toward his prior Juvenile Court sentence.

IT IS FURTHER ORDERED that the youth was sentenced until the age of twenty-one (21) years of age, May 23, 2017, at the Ohio Department of Youth Services and served 200 days at ODYS and has served 56 days in the Cuyahoga County Juvenile Detention Center for a total of 256 pre-commitment days.

The youth is hereby notified that if the adult portion of the youth's sentence is invoked the youth will be subject to the following:

(1) As part of the adult sentence, the parole board may extend the stated prison term for certain violation of prison rules for up to one-half of the stated prison term;

(2) You have been sentenced for a felony of the first degree or a felony degree and offense is a sex offense, you will be subject to a ***mandatory five years of post-release control*** once you are released from prison.

(3) If a period of post-released control is imposed following your release from prison and you violate that supervision or a condition of post-released control, the ***parole board may impose a prison term***, as part of the sentence, up to one-half of the stated prison term originally imposed.

If you are convicted of a felony while you are on post-release control, the judge in the felony case may impose an additional prison sentence of one year or the remaining time of your post-release control supervision, whichever is greater. The additional prison term is to run consecutive to the sentence for the new felony.

IT IS FURTHER ORDERED that the Adult Portion of the youth's sentence shall be invoked and is hereby reduced from three (3) years to (2) years for the offense of ***Rape, in violation of O.R.C. 2907.02(A)(1), a felony of the first degree***.

The Court reviewed the evidence and discussions between counsel. Upon due consideration of all the

enumerated factors, the Court determines the offender should be classified a Juvenile Offender Registrant. Therefore, the Court finds that the above captioned individual is subject to the Mandatory Juvenile Offender Registrant Classification provisions contained in Ohio Revised Code sections §2152 and §2950.

IT IS FURTHER ORDERED that the youth is designated as a Sexually Oriented Offender, Tier III, as defined by Ohio law.

The Court has reviewed the requirements of the reporting and attached the document captioned "Explanation of duties to register as a Juvenile Offender Registrant of Child Victim Offender" and incorporates its findings herein and makes said findings and orders part of this Court order.

IT IS FURTHER ORDERED that the youth is placed in secure detention. The Cuyahoga County Sheriff is ordered to transport the youth from this Court's Detention Center to the Cuyahoga County Jail for transfer to Lorain Correctional Institutional Reception Center in Grafton, Ohio for assignment to an appropriate penal institution.

This entry shall be considered a warrant to convey.

Denise N. Rini

Judge Denise N. Rini
May 24, 2017

USCS Const. Amend. 14, USCS Const. Amend. 14, § 1

Current through PL 115-281, approved 12/1/18

United States Code Service - Constitution of the United States > CONSTITUTION OF THE UNITED STATES OF AMERICA > AMENDMENTS > AMENDMENT 14

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

End of Document

Oh. Const. Art. I, § 10, Part 1 of 3

Current through 2017 Ohio Issue 1

Page's Ohio Revised Code Annotated > CONSTITUTION OF THE STATE OF OHIO > Article I BILL OF RIGHTS

§ 10 Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

History

As amended September 3, 1912.

End of Document

2152.13 Serious youthful dispositional sentence and serious youthful offender dispositional sentence.

(A) A juvenile court shall impose a serious youthful dispositional sentence on a child when required under division (B)(3) of section 2152.121 of the Revised Code. In such a case, the remaining provisions of this division and divisions (B) and (C) do not apply to the child, and the court shall impose the mandatory serious youthful dispositional sentence under division (D)(1) of this section.

In all other cases, a juvenile court may impose a serious youthful offender dispositional sentence on a child only if the prosecuting attorney of the county in which the delinquent act allegedly occurred initiates the process against the child in accordance with this division, and the child is an alleged delinquent child who is eligible for the dispositional sentence. The prosecuting attorney may initiate the process in any of the following ways:

(1) Obtaining an indictment of the child as a serious youthful offender;

(2) The child waives the right to indictment, charging the child in a bill of information as a serious youthful offender;

(3) Until an indictment or information is obtained, requesting a serious youthful offender dispositional sentence in the original complaint alleging that the child is a delinquent child;

(4) Until an indictment or information is obtained, if the original complaint does not request a serious youthful offender dispositional sentence, filing with the juvenile court a written notice of intent to seek a serious youthful offender dispositional sentence within twenty days after the later of the following, unless the time is extended by the juvenile court for good cause shown:

(a) The date of the child's first juvenile court hearing regarding the complaint;

(b) The date the juvenile court determines not to transfer the case under section 2152.12 of the Revised Code.

After a written notice is filed under division (A)(4) of this section, the juvenile court shall serve a copy of the notice on the child and advise the child of the prosecuting attorney's intent to seek a serious youthful offender dispositional sentence in the case.

(B) If an alleged delinquent child is not indicted or charged by information as described in division (A)(1) or (2) of this section and if a notice or complaint as described in division (A)(3) or (4) of this section indicates that the prosecuting attorney intends to pursue a serious youthful offender dispositional sentence in the case, the juvenile court shall hold a preliminary hearing to determine if there is probable cause that the child committed the act charged and is by age eligible for, or required to receive, a serious youthful offender dispositional sentence.

(C)

(1) A child for whom a serious youthful offender dispositional sentence is sought by a prosecuting attorney has the right to a grand jury determination of probable cause that the child committed the act charged and that the child is eligible by age for a serious youthful offender dispositional sentence. The grand jury may be impaneled by the court of common pleas or the juvenile court.

Once a child is indicted, or charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings. The time within which the trial is to be held under Title XXIX of the Revised Code commences on whichever of the following dates is applicable:

(a) If the child is indicted or charged by information, on the date of the filing of the indictment or information.

(b) If the child is charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date of the filing of the complaint.

(c) If the child is not charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date that the prosecuting attorney files the written notice of intent to seek a serious youthful offender dispositional sentence.

(2) If the child is detained awaiting adjudication, upon indictment or being charged by information, the child has the same right to bail as an adult charged with the offense the alleged delinquent act would be if committed by an adult. Except as provided in division (D) of section 2152.14 of the Revised Code, all provisions of Title XXIX of the Revised Code and the Criminal Rules shall apply in the case and to the child. The juvenile court shall afford the child all rights afforded a person who is prosecuted for committing a crime including the right to counsel and the right to raise the issue of competency. The child may not waive the right to counsel.

(D)

(1) If a child is adjudicated a delinquent child for committing an act under circumstances that require the juvenile court to impose upon the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(a) The juvenile court shall impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(b) The juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(c) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(2)

(a) If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(ii) If a sentence is imposed under division (D)(2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20 and, if applicable, section 2152.17 of the Revised Code.

(iii) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(b) If the juvenile court does not find that a sentence should be imposed under division (D)(2)(a)(i) of this section, the juvenile court may impose one or more traditional juvenile dispositions under sections 2152.16, 2152.19, 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(3) A child upon whom a serious youthful offender dispositional sentence is imposed under division (D)(1) or (2) of this section has a right to appeal under division (A)(1), (3), (4), or (5) of section 2953.08 of the Revised Code the adult portion of the serious youthful offender dispositional sentence when any of those divisions apply. The child may appeal the adult portion, and the court shall consider the appeal as if the adult portion were not stayed.

Amended by 129th General AssemblyFile No.29, HB 86, §1, eff. 9/30/2011.

Effective Date: 07-05-2002 .

2152.14 Motion to invoke adult portion of dispositional sentence.

(A)

(1) The director of youth services may request the prosecuting attorney of the county in which is located the juvenile court that imposed a serious youthful offender dispositional sentence upon a person under section 2152.121 or 2152.13 of the Revised Code to file a motion with that juvenile court to invoke the adult portion of the dispositional sentence if all of the following apply to the person:

(a) The person is at least fourteen years of age.

(b) The person is in the institutional custody, or an escapee from the custody, of the department of youth services.

(c) The person is serving the juvenile portion of the serious youthful offender dispositional sentence.

(2) The motion shall state that there is reasonable cause to believe that either of the following misconduct has occurred and shall state that at least one incident of misconduct of that nature occurred after the person reached fourteen years of age:

(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.

(B) If a person is at least fourteen years of age, is serving the juvenile portion of a serious youthful offender dispositional sentence imposed under section 2152.121 or 2152.13 of the Revised Code, and is on parole or aftercare from a department of youth services facility, or on community control, the director of youth services, the juvenile court that imposed the serious youthful offender dispositional sentence on the person, or the probation department supervising the person may request the prosecuting attorney of the county in which is located the juvenile court to file a motion with the juvenile court to invoke the adult portion of the dispositional sentence. The prosecuting attorney may file a motion to invoke the adult portion of the dispositional sentence even if no request is made. The motion shall state that there is reasonable cause to believe that either of the following occurred and shall state that at least one incident of misconduct of that nature occurred after the person reached fourteen years of age:

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

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

(C) If the prosecuting attorney declines a request to file a motion that was made by the department of youth services or the supervising probation department under division (A) or (B) of this section or fails to act on a request made under either division by the department within a reasonable time, the department of youth services or the supervising probation department may file a motion of the type described in division (A) or (B) of this section with the juvenile court to invoke the adult portion of the serious youthful offender dispositional sentence. If the prosecuting attorney declines a request to file a motion that was made by the juvenile court under division (B) of this section or fails to act on a request from the court under that division within a reasonable time, the juvenile court may hold the hearing described in division (D) of this section on its own motion.

(D) Upon the filing of a motion described in division (A), (B), or (C) of this section, the juvenile court may hold a hearing to determine whether to invoke the adult portion of a person's serious juvenile offender dispositional sentence. The juvenile court shall not invoke the adult portion of the dispositional sentence without a hearing. At the hearing the person who is the subject of the serious youthful offender disposition has the right to be present, to receive notice of the grounds upon which the adult sentence portion is sought to be invoked, to be represented

by counsel including counsel appointed under Juvenile Rule 4(A), to be advised on the procedures and protections set forth in the Juvenile Rules, and to present evidence on the person's own behalf, including evidence that the person has a mental illness or intellectual disability. The person may not waive the right to counsel. The hearing shall be open to the public. If the person presents evidence that the person has a mental illness or intellectual disability, the juvenile court shall consider that evidence in determining whether to invoke the adult portion of the serious youthful offender dispositional sentence.

(E)

(1) The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

(2) The court may modify the adult sentence the court invokes to consist of any lesser prison term that could be imposed for the offense and, in addition to the prison term or in lieu of the prison term if the prison term was not mandatory, any community control sanction that the offender was eligible to receive at sentencing.

(F) If a juvenile court issues an order invoking the adult portion of a serious youthful offender dispositional sentence under division (E) of this section, the juvenile portion of the dispositional sentence shall terminate, and the department of youth services shall transfer the person to the department of rehabilitation and correction or place the person under another sanction imposed as part of the sentence. The juvenile court shall state in its order the total number of days that the person has been held in detention or in a facility operated by, or under contract with, the department of youth services under the juvenile portion of the dispositional sentence. The time the person must serve on a prison term imposed under the adult portion of the dispositional sentence shall be reduced by the total number of days specified in the order plus any additional days the person is held in a juvenile facility or in detention after the order is issued and before the person is transferred to the custody of the department of rehabilitation and correction. In no case shall the total prison term as calculated under this division exceed the maximum prison term available for an adult who is convicted of violating the same sections of the Revised Code.

Any community control imposed as part of the adult sentence or as a condition of a judicial release from prison shall be under the supervision of the entity that provides adult probation services in the county. Any post-release control imposed after the offender otherwise is released from prison shall be supervised by the adult parole authority.

Amended by 131st General Assembly File No. TBD, HB 158, §1, eff. 10/12/2016.

Amended by 129th General AssemblyFile No.29, HB 86, §1, eff. 9/30/2011.

Effective Date: 07-05-2002 .