No.

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE CHAMPAIGN COUNTY COURT OF APPEALS
SECOND APPELLATE DISTRICT
CASE NO. 2018 CA 00025

STATE OF OHIO,
Plaintiff-Appellee,

v.

DONOVAN NICHOLAS
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT, DONOVAN NICHOLAS

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THIS CASE INVOLVES CONSTITUTIONAL QUESTIONS OF GREAT PUBLIC IMPORT

At age 14, Donovan Nicholas committed his first and only criminal offense while suffering from a mental disease so severe he experienced dissociations from reality: after assuming the appearance of a deranged comic-strip figure named "Jeff the Killer," he carved a permanent smile into his face and stabbed and shot his stepmother.

Donovan's crime was dismaying. "[This Court's] job [however] in the face of those facts, is to ensure that all constitutional guarantees were met." *State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634, ¶ 43 (French, J., concurring). Beyond the ghastliness of Donovan's offense, the central question in this case has *always* been about how our justice system must respond to those children most in need. What, exactly, is required before casting them aside? As noted by the dissent:

> The rights of a mentally-ill child should not be denied because of a lack of government "resources." The availability of resources has absolutely nothing to do with an individual assessment of blameworthiness, maturity, and amenability. * * * The trial court relied upon faulty logic and a lack of evidence when it concluded ODYS did "not have the resources or capability of treating D.I.D." * * * That finding was not supported by the totality of the record and is fundamentally at odds with the goals of the juvenile justice system and the tenets of due process and equal protection[.]
>
> Transferring a 15-year-old mentally-ill child such as Nicholas (5 ft. 3 in., 102 lbs, who was 14 at the time of the offense), who has absolutely no juvenile history of delinquency and no previous mental health intervention, after years of cutting behavior, should be a last resort.
>
> ***
>
> This was unquestionably a heinous offense, but the record simply does not support a lack of amenability. Dr. Hrinko, the GAL, and Book, the DYS representative, all testified favorably to Nicholas. We should not lose sight of the fact that transfer to adult court is a grave step, and since the State bears the burden of production of evidence for transfer, it necessarily fails where the totality of the evidence supports retention in juvenile court.

(Emphasis added) (A-1, pp.89-90, 92-93).

Two legal questions of great practical significance. Both remain open questions in Ohio.

In all contexts, clear, litigable standards are central to the fair and even administration of justice. The arguments and decisions in this case present an ideal chance to answer, *for the first time*:

1) What is the proper *standard of proof* on the question of non-amenability?

2) Who bears the *burden of proof* on this ultimate question?

The statute is silent, and the discretion alone is not an invitation to arbitrariness. Guidance is needed.

There are exceedingly important reasons for answering these questions here.

First, neither question has ever been addressed by this Court; and resultantly, decisions at every level have varied by jurisdiction. As the majority correctly noted: "[c]oncerning [whether] the state has the burden of proof regarding amenability, research fails to disclose any cases other than the one cited by Nicholas[.]" (A-104, p.6). And yet, the majority also curiously claimed that there is no dispute regarding the standard of proof for amenability. (A-104, p.12). It's true: R.C. 2152.12 generally prescribes a factor analysis. But, it's left open the degree to which non-amenability must be proven. It's also silent on who bears the burden on that question. Practical answers are available. To clarify the proper procedure and ensure uniformity, a clear ruling from this Court is all that's needed.

Second, a clear decision now will have considerable practical impact. Hundreds of attorneys, judges, and—most important, children—must hew to a currently-amorphous framework each year. A ruling is indispensable here for Donovan, and far beyond.

And third, this case also presents a suitable record for review. All agree that Donovan tragically killed his stepmother at 14. Equally clear is that prosecutors failed to present any substantive evidence whatsoever regarding amenability or DYS' ability to treat him. Donovan thus challenged this on appeal, explaining that Ohio law presumes children are amenable and that prosecutors must prove otherwise. The majority disagreed. Donovan and the dissent responded that the majority improperly shifted the burden. The analyses below thus perfectly capture the confusion plaguing these hearings and decisions, and their review.

This Court should take this case, clarify the correct legal framework for transfer, and plainly hold that prosecutors must prove non-amenability by clear and convincing evidence.

STATEMENT OF THE CASE AND FACTS

The starting point: a severely mentally-ill boy was desperately in need of care.

This case began shortly after Donovan turned 14 years old. His preteen years were riddled with anxiety and depression. According to medical records, "Donovan reported feeling isolated and separated from those around him for several years." (Marciani Insanity Eval., p.5). He was shy, meek, and reclusive. "[T]here were clear indications of moderate levels of anxiety and depression." (Hrinko Competency Eval., p.8). By age 11, Donovan wanted to die. He started contemplating how he would kill himself by the sixth grade, when he first held a gun to his head. (Hrinko Amenability Eval., p.8). These feelings intensified greatly, and at 13, he started cutting himself daily. No one seemed to notice.

Donovan's mind eventually turned in on itself.

Eventually, the physical catharsis turned to psychological coping. Recognizing "there was a good him and a bad him," "[t]he bad side [became] too overwhelming to function." (Hendrickson Insanity Eval., p.14). He "grew into two people slowly." And "soon the bad side was talking to him."

> He then stated that "it was like cell division. I grew into two people slowly. Soon the bad side was talking to him. At first, I was talking to myself but it slowly turned into Jeff. It would say "I am Jeff the Killer."

(Hrinko Amenability Eval., p.17; *see also* 7/18/18 T.pp.605-608).

As one psychologist would later explain: "the available evidence suggests that at the time of the alleged offense, the defendant's thinking and perception were influenced by the existence of an alternate personality, which had been developing for several months and had a history of 'taking charge' and leading to angry and impulsive actions.'" (Hrinko Insanity Eval., pp.15-16). "This alternate personality ha[d] become a channel for his anger, resentment, and frustrations being able to consider actions inconceivable for Donovan." (Hrinko Competency Eval., p.19).

The voice inside his head: Jeff the Killer.

For his part, Donovan later described his existence leading up to the offense as a constant, internal struggle—Jeff would berate him about his weaknesses. Jeff "was also trying to convince Donovan that Donovan is him." (Marciani Insanity Eval., p.8). And he was constantly ranting homicidally. He "wanted to kill people that deserved to die," Donovan recalled. "Sometimes I would let him out, sometimes I wouldn't, and he would force his way out. I would just let him out sometimes, so he would just leave me alone." (Hendrickson Insanity Eval., p.15). Jeff "started actually doing stuff he said he was going to do." "He started stabbing walls and the bed, then he made a drawer with his own [clothes and favorite knife]." (Hendrickson Insanity Eval., pp.15, 57). Donovan never expected that within months, his distortions would compel him to murder his stepmother in the family home.

The state moved to try Donovan as an adult. The only medical expert deemed him amenable to juvenile court treatment.

Donovan was evaluated for amenability. At defense counsel's request, he was assessed by one psychologist, Dr. Daniel Hrinko, and a guardian ad litem. Both concluded he was amenable and recommended that he be retained in juvenile court.

The doctor and a GAL reported that Donovan was ill and could in fact be treated.

Dr. Hrinko reported that Donovan "does suffer from a serious mental disorder consistent with the diagnosis of Dissociative Identity Disorder." (Hrinko Amenability Eval., p.27). He also discounted fabrication, noting: "Donovan has no history of any involvement with mental health treatment and therefore cannot be said to be incapable of benefitting from treatment." More telling:

> Research suggests that Dissociative Identity Disorder can be effectively treated in a residential treatment setting with a specific focus on eliminating misperceptions about the personalities and themselves and to begin to integrate the skill possessed by each personality in a manner consistent with the well-being of the individual.

(Hrinko Amenability Eval., p.27). He thus explained that while an untreated Donovan could of course pose a risk to the community, he "is amenable to rehabilitation within the services available[.]"

The GAL concurred: "I believe it is in Donovan's best interest to remain in Juvenile Court. I based this recommendation on both evaluations from Dr. Hrinko, as well as my own interactions with Donovan. Dr. Hrinko stated to me that there is a prescribed course of treatment for [D.I.D.] and that Donovan Could be successful in his treatment in the Juvenile Court System." (GAL Report, p.7).

The prosecution adduced no evidence at all.

Dr. Hrinko also testified in support of his findings. Based on his review of "10 to 15 studies published over time," he reiterated that psychological reintegration therapy—typically lasting one to five years—is the prevailing treatment. He did not note the authors of the studies, but he further explained that with intensive psychological support, Donovan could reintegrate Jeff, which would dramatically reduce the "likelihood of Donovan ever engaging in the kinds of behaviors Jeff would."

As a corollary, Ms. Sarah Book, a licensed professional clinical counselor and Chief of Behavioral Health Services at DYS, testified that DYS could in fact provide the necessary support. (10/31/17 T.pp.142-143). According to Ms. Book, DYS currently has 7 licensed psychologists on staff, plus a psych assistant, who are available Monday through Friday and on weekends as well. (10/31/17 T.p.158). In cases of emergency, she explained that "[t]he current policy and procedure that we have for that right now is that the psychology supervisor would be called. If they were not there, they would provide some consultation. We do have the ability to have other licensed folks do the risk assessment for that [too]." (10/31/17 T.p.159). She also expressly confirmed that if a person needs a psychologist they will get one, and that "where a child is deemed to need a particular service[,]" DYS would connect them to it. (10/31/17 T.pp.142-143).

Rather than presenting testimony or evaluations to rebut this evidence, the prosecutor only confounded the record with groundless speculation, repeatedly opining that DYS couldn't provide adequate treatment because it does not "have the means or ability or know of any experience to address someone with [D.I.D.]." (10/31/17 T.p.147). To which Ms. Book responded he was

"oversimplifying a complex [assessment] process," and that she "would need to know what the treatment recommendations were in order to answer [his questions.]" (10/31/17 T.pp. 147-148; 153).

In short, the prosecutor kept referring to a specific treatment plan or option without ever specifying for Ms. Book what that plan was: "what I am trying to get from you is whether or not that treatment option is something that is available." (10/31/17 T.p.154). It was as if he assumed Ms. Book overheard Dr. Hrinko's testimony. Ms. Book again explained:

> I don't know what the evaluating clinician recommended for the treatment for that individual. I don't know that * * * that's generally not how it goes. You have a problem. You have anxiety or depression * * * and there are options. Sometimes individuals need only medication and they can be maintained on that. Some individuals need medication and psychotherapy * * * So I think that is the part where I'm struggling is that you keep referring to a treatment recommendation for this diagnosis and I don't know what that is.

(10/31/17 T.pp.153-155). At no point did she ever testify DYS could not accommodate Donovan.

Notably, without any evidence from the state, the record is also devoid of any information about *DRC's* treatment capabilities, as opposed to DYS's.

Rather than procuring treatment, the juvenile judge transferred the case to criminal court.

Upon review, the juvenile judge agreed that Donovan "has a mental illness—likely Dissociative Identity Disorder." ("D.I.D."). (11/17/17 Entry). Yet, she further found that "the factors favoring transfer outweigh the factors against transfer. In particular, <u>because ODYS cannot offer the specific treatment necessary to rehabilitate the juvenile, the juvenile system cannot provide a reasonable assurance of public safety.</u>" (Emphasis added.) (11/17/17 Entry). Without any mention of a blended sentence, or any alternative treatment options, the court granted the State's motion and transferred Donovan for criminal prosecution.

After, Donovan could not rely on his illness—the main reason for his transfer—as a defense.

Once in criminal court, Donovan entered NGRI pleas, invoking the very illness giving rise to his transfer. He was evaluated by three forensic psychologists, including Dr. Hrinko, who determined

that while Donovan knew his actions were wrong, he "was not able to conform his conduct to the standards of the law or what is expected at that time due to experiencing an irresistible impulse in the form of the alternate personality dominating." (Hrinko Insanity Eval., pp.15-16). Given that, Donovan requested an irresistible impulse defense under the Eighth Amendment (to account for unique mixture of youth, and D.I.D.). The court denied his request and barred him from asserting NGRI. Donovan was then convicted by a jury and sentenced to life in adult prison with parole eligibility after 28 years.

The dispute on appeal.

On appeal, Donovan focused mainly on the transfer decision, raising both due process and abuse of discretion claims. He argued as he does now that Ohio law presumes amenability, and so prosecutors must prove otherwise (although, as noted in the brief, the *level* of proof is still unsettled). The prosecution failed to carry that burden; and the juvenile court's decision was unsupported by the evidence and testimony—all of which, as noted by the dissenting judge, was favorable to Donovan. (A-1, p.94). The juvenile judge also arbitrarily disregarded expert testimony while also drawing improper inferences about DYS' capabilities. As a matter of record, in fact, the suggestion that DYS was somehow incapable of treating Donovan "was merely imbedded in [questions] asked by the State," which of course were not evidence. (A-1, p.99). Donovan assigned further error to the juvenile court's failure to consider counsel's request for a serious youthful offender ("SYO") sentence.

In a split decision, a two-judge majority rejected Donovan's position. The majority affirmed the juvenile court's decision because, in its view, "the evidence concerning ODYS's capability to successfully treat Nicholas was vague, was sometimes conflicting, and was variable." (A-1, p.37). According to the majority—though noted nowhere in the juvenile court record itself—"the reasoning and underlying bases of Dr. Hrinko's opinions regarding amenability were rife with limitations, variables, and conditions." (A-1, p.38).

As for Donovan's SYO argument, the majority adopted the prosecutor's claim that "a juvenile court may impose a serious youthful offender dispositional sentence on a child only if the prosecuting attorney * * * initiates the process." (A-1, p.41). The majority thus concluded that "[t]he fact that Nicholas would have been eligible for SYO disposition does not mean that the court was required to take this into consideration before deciding amenability." (A-1, p.41).

Citing again to the state's burden, Donovan moved for reconsideration.

Donovan timely moved for reconsideration and en banc review, citing the Second District's own decision in *State v. Valentine*, 2nd Dist. Montgomery No. 6024, 1979 WL 208379, *4 (holding that "[a]s the maker of the motion asking the juvenile court to relinquish its jurisdiction the burden of proof is clearly on the state."). He reiterated that the state failed to carry its burden without any evidence. More important, though, was that this effectively shifted the burden *to him*. Donovan also addressed the majority's failure to resolve the standard of proof issue first submitted in his merit brief.

Judge Donovan's initial dissent buttressed Donovan's claims. Her opinion forcefully explained that the juvenile judge mischaracterized the testimony and relied upon faulty logic because its central finding was speculative and was not based on any facts established at the hearing. She also criticized the majority for overlooking salient testimony, and reaffirmed that the burden to produce evidence of non-amenability is indeed on the state. (A-104, p.17). Judge Donovan further agreed that SYO was the proper resolution, and in her view, "this case raises disturbing questions about a juvenile system that cannot or will not handle children charged with the most serious crimes." (A-1, p.102).

After extensive briefing below, this timely jurisdictional appeal follows.

INTRODUCTION TO ARGUMENT

Revised Code Section 2152.12(B) was enacted as a "narrow exception" to the general rule that juvenile courts have exclusive subject matter jurisdiction over cases involving children. *State v. Wilson*, 73 Ohio St.3d 40, 43, 652 N.E.2d 196 (1995). In pertinent part, the statute provides that juvenile

courts may not transfer jurisdiction without first finding that "[t]he child is to care or rehabilitation within the juvenile system, and the safety of the community may not amenable require that the child be subject to adult sanctions."(Emphasis added). In making this determination, juvenile courts must "consider whether the applicable factors * * * indicating that the case should be transferred outweigh the applicable factors * * * indicating that the case should not be transferred." R.C. 2152.12(B)(3). The statute, however, does not delineate the level of proof needed or which party bears the burden of proof on the ultimate question of non-amenability. Those omissions, coupled with the fact that lower courts have not filled them, is precisely why this Court's review is merited.

LAW AND BRIEF ARGUMENT IN SUPPORT

First Proposition of Law: Because standards of review are functions of due process, non-amenability decisions for discretionary transfer must be supported by clear and convincing evidence.

Where a child's liberty is at stake, and a potential life sentence hangs in the balance, precision regarding the standard of proof at amenability is indispensable. This is especially true here, where the outcome turned so closely on limited evidence and the soundness of the judge's reasoning.

Towards that end, standards of proof are functions of due process. The purpose of a standard of proof is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "The standard [thus] serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). "Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss." *Santosky v. Kramer*, 455 U.S. 745, 758, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *see also Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

There are mainly three standards for different case-types:

Standard	Allocation of Risk
1. The "**preponderance of the evidence**" standard used in most civil cases, like those involving private monetary disputes	The litigants share the risk of error in equal fashion because society has only a minimal concern with outcome of such private suits.
2. The intermediate, "**clear and convincing**" standard is reserved to protect particularly important interests in civil cases, or a defendant's interests in quasi-criminal cases.	The interests at stake in these cases are deemed to be "particularly important" and "more substantial than mere loss of money." This level of certainty preserves fairness in proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."
3. Proof "**beyond a reasonable doubt**" in criminal prosecutions.	The interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment

As Donovan noted in his merit brief, Ohio's leading juvenile law treatise expressly confirms that that standard of proof for non-amenability in Ohio is not settled. *See* Gannelli & Yeomans, Ohio Juvenile Law (2019 Ed.) 198, Section 17:10. Contrary to the majority's assertion, there is widespread confusion on this question—because no court has ever decided it, as a matter of due process or otherwise. The majority's analysis simply confounds the standard of review with the standard of proof required in the first instance.

In any event, to protect against arbitrary decision making, and to ensure proper review on appeal, this Court urgently needs to adopt a clear, litigable standard of proof.

Beyond that, the proper analysis compels a clear and convincing evidence standard. This Court has long accepted that transfer hearings are "critically important" proceedings that must "measure up to the essentials of due process and fair treatment." Even more to the point, the decision made there is material to punishment and undoubtedly bears on the length of a child's incarceration. *State v. Iacona,*

93 Ohio St.3d 83, 91, 2001-Ohio-1292, 752 N.E.2d 937 (2001); *see also State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 87 (O'Conner, C.J., dissenting) ("juveniles who are transferred to adult court for a criminal trial are more likely to be incarcerated, more likely to receive longer periods of incarceration, and have significantly higher rates of recidivism and reoffend more quickly").

In fact, as this case itself demonstrates, the "decision as to waiver of jurisdiction and transfer of the matter to [adult court] is [as] potentially as important * * * as the difference between five years' confinement and a [lifetime] sentence." *Kent v. United States*, 383 U.S. 541, 557, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). As such, due process requires more than *minimal certainty*—as if these cases were no more important than trifling monetary disputes—before subjecting a child to the rigors of adult prosecution and punishment. *See Addington*, 441 U.S. at 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (noting that a mere preponderance is used where "society has a minimal concern with the outcome of such private suits"). On the other hand, if nothing else, the term "outweigh," in R.C. 2152.12(B) suggests a preponderance; which, though troubling, is still more desirable than having no standard at all.

Considering the proper analysis—with an eye towards ensuring accuracy, reliability, and uniformity—this Court should accept this case, and adopt the first proposition of law.

Second Proposition of Law: As the party moving for discretionary transfer under R.C. 2152.12(B), prosecutors typically bear the burden of proving the child is not amenable to juvenile court treatment. A transfer decision without any affirmative proof of non-amenability must be reversed.

Turning to Donovan's second proposition, the burden—or who should bear the risk of error—is logically entwined. Fortunately, this Court need look no further than ordinary conventions to properly allocate the burden of proof. "It is elementary that the person who asserts an issue has the burden of proving it." *McFadden v. Elmer C. Breuer Transp. Co.*, 156 Ohio St. 430, 433, 103 N.E.2d 385, 387 (1952). Indeed, "[t]he burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore

naturally should be expected to bear the risk of failure, or proof of persuasion." *Schaffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).

Where, as here, a statute is "'silent on the allocation of the burden of persuasion, the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.'" *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 177, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009), quoting *Schaffer* at 56. Thus, [a]s the maker of the motion asking the juvenile court to relinquish its jurisdiction the burden of proof is clearly on the state." *Valentine*, 2nd Dist. Montgomery No. 6024, 1979 WL 208379, at *4. As noted by Judge Donovan in dissent: "At a minimum, on the State's motion, the State must bear some measure of production of evidence and/or proof." (A-104, p.17).

Not only did the majority panel wrongly decline to follow *Valentine* (its own precedent), but it also failed to account for these general litigation norms as well. In short, the upshot of the majority's analysis is exactly backwards.

Moreover, while R.C. 2152.12 is technically silent on this issue as well, the rule urged now inheres in the statute's language and structure. As noted briefly above, R.C. 2152.12(D) and (E) create a presumption in favor of retention by requiring courts to decide whether factors in favor of transfer "outweigh" those favoring retention, "Outweigh" is the operative term, and it must be read in context and given its full effect. R.C. 1.42, 1.47, 1.49; *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Com.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969) ("It is the duty of [a] court to give effect to the words used [in a statute], not to delete words used or to insert words not used.").

The majority in this case renders that structure meaningless.

In addition, placing the burden on the prosecution comports with this Court's assurances that amenability decisions should occur only rarely. Transfer, in other words, has always been regarded as the "narrow exception,"—which finds further support in this Court's repeated recognition that science, too, "recommends transferring youth to the adult court system rarely." Ohio Supreme Court,

Youth in Adult Court Bench Card, available at https://tinyurl.com/srexmxr (accessed Nov.16, 2020), citing Children's Law Center, *Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System* (2012), available at https://tinyurl.com/y3nb8m4h (accessed Nov. 19, 2020).

Stating that the burden falls on the moving party is uncontroversial: it simply reinforces this general understanding, which applies in nearly every other legal context.

Finally, adopting Donovan's second proposition puts Ohio on par with most states throughout the country—whose approaches may be instructive at this juncture. To name just a few: Pennsylvania, Kentucky, and California all place the burden on the state by a preponderance. In Alaska, the burden is on the state by a mere preponderance; but for more serious offenses, a burden-shifting framework is employed. Given Ohio's statute, burden shifting could be a feasible option. In Oklahoma, the burden is on the state, but standard is clear and convincing evidence. Accordingly, there are easily-adoptable standards to aid in this Court's decision. We need only take that next step.

This Court should take this case, and adopt the second proposition of law as well.

Third Proposition of Law: To meaningfully decide whether juvenile offenders are not amenable to juvenile court treatment, juvenile judges must first weigh all the available dispositional options, especially, where provided by statute, a serious youthful offender disposition.

Finally, the facts and decisions in this case also invite further clarification regarding the role of juvenile courts themselves. Findings must be supported by a known and predictable level of evidence; and the state should prove its allegations; but, what other responsibilities do juvenile judges have before relinquishing their exclusive jurisdiction? Because they occupy such a unique place in our legal system, juvenile courts "should be open to innovation that may help the system reach its important objectives." *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶ 55.

Chapter 2152 of the Ohio Revised Code sets forth several different juvenile dispositional choices, ranging from mere probation to blended sentencing for serious youthful offenders ("SYO"). "Bindover is not the best option for all serious offenders." *Juvenile Sentencing in Ohio* (1999), p. 28,

(accessed Nov. 16, 2020). Rather, in many cases, "[t]he criminal system might be too harsh on [children] who could benefit from the greater rehabilitative opportunities in the juvenile system." *Id.* Ohio thus created blended sentencing for serious offenses. "The goal is to make the blended sentence a 'last chance at rehabilitation' for serious juvenile offenders." *Id.* A blended sentence, in short, "gives the court time to learn if the child simply needs guidance under the juvenile system and the tools to deal with a juvenile who poses an ongoing threat." *Id.*

That is precisely what the facts of this case called for. In fact, Donovan's attorney expressly requested, in writing, that Donovan be retained and given an SYO sentence. (10/16/17 Motion). The juvenile court did not address it. And the majority here said it didn't have to. More than that, it said that courts cannot do so unless the *prosecutor* requests it.

The dissent took serious issue with this as well:

> Although the majority suggests a blended sentence is not a consideration in the amenability determination, this ignores the imperative that transferring a child to an adult court should be a last resort. * * * This blended sentencing option 'provides a viable dispositional option for juvenile court judges facing juveniles who have committed serious offenses and gives juveniles one last chance at success in the juvenile system.
>
> ***
>
> The juvenile judge had this blended sentencing tool in her arsenal if she denied transfer. At a minimum, she should have considered it as requested in a motion filed by Nicholas' counsel.

(A-1, pp. 96-97). And Judge Donovan was right:

> With blended sentencing, the court could have taken advantage of lock-down facilities and therapeutic and rehabilitation services which are uniquely available for a child. The court could have observed how Nicholas performed until the age of 21. Upon his majority, the court would have then have had a record of treatment and performance upon which to base a more informed, predictive decision about the possibility for success versus risk to society. * * * Such an option is not solely at the State's discretion, as an adjudication of responsibility for the charge mandates such a disposition.

(Emphasis added). (A-1, p.97).

This is by no means an isolated occurrence. Statewide statistics show SYO is drastically underused. This Court should therefore accept this case, and reaffirm Ohio's commitment to making "every effort to avoid [kids] being attainted as criminal before growing to the full measure of adult responsibility." *In re Agler*, 19 Ohio St.2d 70, 71-72, 249 N.E.2d 808 (1969). Indeed, how can courts truly decide a child is not amenable to juvenile court treatment, without first considering all treatment?

CONCLUSION

There are compelling reasons to take this weighty felony case. The stakes are high, guidance is clearly needed, and the record is suitable for a ruling. This Court should accept jurisdiction.

Respectfully submitted,

Office of the Ohio Public Defender

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CERTIFICATE OF SERVICE:

A copy of the foregoing **Memorandum in Support of Jurisdiction of Defendant-Appellant, Donovan Nicholas** was sent by facsimile mail this 23rd day of November 2020, to Kevin Talebi, Champaign County Prosecutor, at Champaign_County_Prosecutor.937-484-1901@fax2mail.com.

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Timothy B. Hackett #0093480
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No.

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE CHAMPAIGN COUNTY COURT OF APPEALS
SECOND APPELLATE DISTRICT
CASE NO. 2018 CA 00025

STATE OF OHIO,
Plaintiff-Appellee,

v.

DONOVAN NICHOLAS
Defendant-Appellant.

APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT, DONOVAN NICHOLAS