No. 2020-1429

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.

MERIT BRIEF OF DEFENDANT-APPELLANT, DONOVAN NICHOLAS

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INTRODUCTION

Donovan Nicholas was only 14 years old when, suffering from severe mental illness, he killed his stepmother. He was tried as an adult, convicted of aggravated murder, and sentenced to life with the possibility of parole after 28 years. In juvenile court, Donovan presented substantial evidence of his own amenability to treatment in the juvenile system. The prosecution presented none. The dissenting judge on appeal reminded the majority:

> 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.
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> ***
>
> 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.

State v. Nicholas, 2d Dist. Champaign No. 2018CA00025, 2020-Ohio-3478, ¶ 200, 203 (Donovan J., dissenting) ("6.26.20 Opinion").

* * * * *

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 520-521, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). "There is always in litigation a margin of error, * * * Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder [.]" *Id.*

This Court accepted this case to resolve which party bears the burden on the issue of non-amenability, and by what standard of proof.

STATEMENT OF THE CASE AND FACTS

I. Factual Background.

A. At 14, Donovan was severely mentally ill and needed 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.

B. Without treatment, his mind 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).

A juvenile psychologist, Dr. Daniel Hrinko, 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).

C. The voice inside his head: Jeff the Killer.

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.

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 knife]." (Hendrickson Insanity Eval., pp.15, 57). Donovan never expected that his distortions would compel him to murder his stepmother in the family home.

But that's what happened.

II. Procedural Background.

A. The only expert and GAL deemed Donovan amenable to juvenile court treatment. He was ill and could in fact be treated.

The state filed delinquency charges, but moved to try Donovan as an adult, alleging he was not amenable to juvenile-court treatment. Donovan was evaluated for amenability and assessed by Dr. Hrinko, as well as a guardian ad litem (GAL). Both submitted reports to the juvenile court, concluding Donovan was amenable and should remain there.

Specifically, Dr. Hrinko concluded that Donovan "does suffer from a serious mental disorder consistent with the diagnosis of Dissociative Identity Disorder." (Hrinko Amenability Eval., p.27). He discounted malingering, noting that "several [independent]

sources of information suggest that the experiences are genuine and were occurring prior to the instant offense."(Id.). Further, Dr. Hrinko observed that: "Donovan has no history of any involvement with mental health treatment and therefore cannot be said to be incapable of benefitting from treatment."

As for that treatment, Dr. Hrinko explained:

> 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).

Untreated, Donovan could of course pose a risk to the community; but within a reasonable degree of psychological certainty, Donovan "is amenable to rehabilitation within the services available[.]" (Hrinko Amenability Eval., p.28).

The court-appointed 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." (10.8.17 Guardian Ad Litem Report, p.7).

B. Dr. Hrinko and the Chief of Behavioral Health Services at DYS testified in favor of Donovan.

Dr. Hrinko 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 didn't make note of 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." (10.31.17 T.pp.93, 123-124).

According to Dr. Hrinko, successful treatment would require a psychologist willing to spend the time necessary to work with him individually to talk about how to reintegrate, so "[w]eekly sessions would be wise. Plus the ability to be available so that if he was in an environment where he was having a conflict * * * they could get ahold of somebody to talk it through and help Donovan figure out how to handle this assertively[.]" (10.31.17 T.p.94). Dr. Hrinko advised that "the 24/7 supervision and support would allow him the real-world assistance at making the better decisions to reintegrate those personalities." (10.31.17 T.p.94). The obvious next question, then, was: where would Donovan go?

To that point, counsel presented further testimony from the Department of Youth Services' Chief Behavioral Health Services, who testified that DYS could in fact provide the necessary support to Donovan. (10.31.17 T.pp.142-143).

In particular, Ms. Sarah Book informed the court that DYS has 7 licensed psychologists on staff, plus several psych assistants. (10.31.17 T.pp.157-158). All are available Monday through Friday, with availability on weekends as well. (Id.).

Counsel:	What about psychiatric services?
Ms. Book:	Each facility contracts with a psychiatrist that provides services on site at each facility to a varying degree on a multi basis.
Counsel:	Are psychologist and psychiatric services available as needed for such juveniles?
Ms. Book:	Yes. If they are assessed to need those services, then they will receive them.
Counsel:	If a person needs a psychologist, they will get one?

Ms. Book: Yes. So if a youth is deemed to need a particular service, we would connect them with the service they need.

(10.31.17 T.pp.142-143).

Ms. Book specifically testified that DYS can provide cognitive behavioral and psychiatric services to kids who need them. (10.31.17 T.p.153). And from there, she even explained that in cases of emergency, say at night or on the weekends, "the current policy and procedure that we have for that right now is that the psychology supervisor would be called." (10.31.17 T.p.159). Would Donovan be face-to-face with a psychologist 24/7? Of course not. Could anyone anywhere? But, "[i]f they were not there, they would provide some consultation. We do have the ability to have other licensed folks to do that assessment [too]." (10.31.17 T.p.159).

C. The prosecution adduced no evidence at all.

Rather than presenting testimony or evaluations to rebut this evidence, the prosecutor only confounded the record with groundless speculation, repeatedly opining that DYS could not 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 that 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).

Ms. Book: We do our best to follow court orders. In most times, the thing that is mandated we have to offer.

Prosecutor: I don't understand what you're telling me.

Ms. Book: The recommendation or treatment that is being requested we have that to offer and so we will provide that.

Prosecutor: Well, then as it related to Mr. Nicholas in his current situation, that is my concern. * * * So if the Court were to order you to

follow a treatment plan specific to Dissociative Identity Disorder, as it stands today, you don't have any ability or means or know of any experience to address someone with those issues, do you?

Ms. Book: I think I would need to know what the treatment recommendations were in order to answer that.

(10.31.17 T.p.148).

The prosecutor kept referring to a specific treatment plan or option without ever specifying for Ms. Book what that plan was—as if she was privy to Hrinko's testimony. The exchange resembled an unfortunate replay of "Who's on First?"

Ms. Book: * * * can I provide CBT and psychiatric services? Yes.

Prosecutor: But if the diagnostic assessment that you conducted at [DYS] * * * does not return a diagnosis of Dissociative Identity Disorder, then no treatment for Dissociative Identity Disorder will take place?

Ms. Book: What are you referring to as treatment for Dissociative Identity Disorder?

Prosecutor: Well, we just heard testimony from Dr. Hrinko, who did the evaluation, who talked somewhat specifically about [what] the primary purpose of psychotherapy would be for someone who suffers from Dissociative Identity Disorder. And so what I am trying to get from you is whether or not that treatment option is something that is available.

Ms. Book: No, I don't know what the evaluating clinician recommended for the treatment for that individual. No I don't know that.

***

Ms. Book: 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.p.154).

Beyond that, the state presented no witnesses of its own. No documentary evidence; no countervailing reports. Perhaps most notably, the record is also devoid of any information whatsoever about the *adult system's* rehabilitative services for juveniles.

D. Rather than procuring treatment, the juvenile judge relinquished jurisdiction. Donovan was convicted as an adult and sentenced to life with parole eligibility.

After the hearing, the judge agreed that Donovan has "a mental illness—likely Dissociative Identity Disorder." (11.17.17 Entry). Yet, without any evidence from the state, the judge further found that "the factors favoring transfer outweigh the factors against transfer. *In particular, because ODYS cannot offer the specific treatment necessary to rehabilitate the juvenile, the juvenile system cannot provide a reasonable assurance of public safety*." (Emphasis added.) (11.17.17 Entry). With that, the state's motion was granted.

Once in criminal court, Donovan 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). Donovan thus requested an irresistible impulse defense under the Eighth Amendment (to account for unique mixture of youth, and the nature of his serious illness). The request was denied.

In the end, Donovan was barred from relying on the very illness supposedly justifying his presence in adult court in the first place. He was then convicted by a jury and sentenced to life with parole eligibility after 28 years.

III. The Direct Appeal.

On appeal, Donovan explained that Ohio's discretionary transfer scheme presumes children are amenable to juvenile court treatment, and so prosecutors must prove otherwise before trying children as adults. Rather than presenting "a garden-variety abuse of discretion question," Donovan explained, this case thus involved unsettled legal questions about the state's burden and degree of proof needed for discretionary transfer. He argued the state failed to carry that burden and the juvenile court, in turn, abused its discretion and violated due process by finding him not amenable, without evidentiary support. The juvenile court also committed reversible error because it failed to consider a blended serious-youthful-offender sentence ("SYO") as a potential option, despite a written request from defense counsel.

In a split-panel 2-1 decision, the Second District rejected Donovan's claims.

A. The majority first used a garden-variety abuse of discretion review.

Noting only the existence of R.C. 2152.12(B)'s statutory factors, the majority denied Donovan's due process claim in short shrift, holding due process is satisfied so long as a juvenile court issues a decision after a hearing. (10.26.20 Opinion at ¶ 56). Saying nothing of whether the state had met its evidentiary burden, it then found no abuse of discretion, concluding: "[t]he juvenile court considered the appropriate statutory factors and there is some rational and factual basis in the record to support the court's findings[.]" (Id. at ¶ 58).

Though found nowhere in the juvenile court's decision, that basis, in the majority's view, was that "the evidence concerning ODYS's capability to successfully treat Nicholas was vague, was sometimes conflicting, and was variable." (Id. at ¶ 67). The majority also denied Donovan's SYO claim, holding "[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." (Id. at ¶ 77).

B. The dissent insisted on procedural regularity and state's evidence.

In dissent, Judge Donovan observed: "[t]his was unquestionably a heinous offense, but the record simply does not support a lack of amenability. Dr. Hrinko, the GAL, and [Ms.] Book, the ODYS representative, all testified favorably to Nicholas." (Id. at ¶ 203). "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 at transfer, it necessarily fails where the totality of the evidence supports retention in juvenile court." (Id.).

Noting the majority had only selectively reviewed the record, the dissent concluded:

> [T]he juvenile court herein actually mischaracterized Hrinko's and Book's testimony regarding Nicholas's treatment needs and the ability of the juvenile system to meet those needs. In other words, the court's conclusion that ODYS 'does not have the resources or capability of treating D.I.D., which requires long-term intensive treatment that may require 24 hours/7-day supervision and support," was not supported by the record. This finding was not premised upon facts established at the hearing and was speculative. Furthermore, it ignored the availability of other institutions/resources, both public and private, within the community and/or State which are not operated by ODYS.

(Id. at ¶ 219).

After taking note of the still-unsettled standard of proof question first presented in Donovan's briefs, the dissent further emphasized that "[t]he state did not produce sufficient evidence herein to support bindover. Quite simply, Hrinko, Book, and the GAL all provided testimony favorable to Nicholas. The state did not produce any substantive evidence to rebut the opinions and assertions of Hrinko, Book, and the GAL." (Id. at ¶ 206).

Finally, whereas the majority decided SYO was not an option for the judge to consider, the dissent recounted its virtues, noting SYO "'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 with the threat of adult sanctions as a disincentive.'" (Id. at ¶ 212). The majority thus "ignore[d] the imperative that transferring a child to an adult court should be a last resort." (Id.).

C. Donovan moved for reconsideration. The majority found there is no burden on the government, and that factors and discretion alone foreclose the standard of proof issue.

Donovan sought reconsideration and en banc review, reiterating that the state failed to carry its burden. (7.1.20 Reconsideration Motion, p.4). The majority's post hoc analysis of perceived shortcomings in Dr. Hrinko's testimony effectively *shifted the burden to him*, by wrongly assuming Donovan was required to prove amenability in the first place. (7.1.20 Reconsideration Motion, p.5). And, he noted the majority failed to resolve the standard of proof question—"[i]n a case turning so closely on the sufficiency of limited evidence and the soundness of the juvenile court's treatment thereof, precision matters: indeed, the gap between a mere preponderance and clear and convincing evidence can make all the difference." (7.1.20 Reconsideration Motion, p.6).

The majority again rejected Donovan's claims, deciding statutory factors alone obviate the need for burdens or standards of proof. (A-1; 10.8.20 Decision and Entry denying Reconsideration, pp.4-15). The majority opined the state need not offer evidence of non-amenability because "Ohio courts have held the State has the burden of proof to establish probable cause * * * [and] [n]o similar findings have been made with respect to amenability." (Id., p.5).

It further declared "there is no dispute or confusion in Ohio law about the standard of proof or what standards apply to review amenability decisions." (Id., p.12). So long as

juvenile judges consider the factors to their own satisfaction, rather, and an appellate court can find a basis to support it, their decisions will be upheld. (Id.). In fact, the majority went so far as to hold that "juvenile courts are not required to make written findings about the factors; they need only consider [them]." (Id., p.13).

The dissent noted the majority again mis-framed the issue: "At a minimum, on the State's motion, the State must bear some measure of production and/or proof." (Id., p.17). "As emphasized by Nicholas, the question for this Court to decide on appeal is whether the state met its burden of showing non-amenability." (Id.).

* * * * *

ARGUMENT SUMMARY

> To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.
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> * * *
>
> Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.

Speiser, 357 U.S. at 520-521, 78 S.Ct. 1332, 2 L.Ed.2d 1460.

A decision on amenability is no different. "The admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." *Kent v. United States*, 383 U.S. 541, 555, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). These hearings, rather, must comport with due process and fair treatment and courts must ascertain what degree of process is due. *Id.*; *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 8.

This at least involves discerning the proper burdens and standards of proof on the chief, disputed question. The answer to that question abridges important liberty interests. And while parental and police interests are implicated too, those interests wane significantly where a child is not *convincingly* non-amenable to treatment. On a sliding scale of competing interests, the standard of proof is the fulcrum: the more a child is amenable to juvenile court treatment, the less interest the state has in prosecuting him as an adult. Due process thus requires the burden and risk of an erroneous decision be placed on the government, and that non-amenability must be proven by clear and convincing evidence.

For the following reasons, the decisions below must be reversed.

ARGUMENT

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.

Notwithstanding the decision below, "[c]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." *In re Winship*, 397 U.S. 358, 365–366, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Present applications of Ohio's current standardless scheme yield unsupported, unpredictable, and inconsistent results. The proper standard must therefore be identified to highlight the importance of transfer, and to adequately protect the significant liberty interests at stake.

I. Adopting a standard is necessary for ensuring fundamental fairness.

A. Clear standards are indispensable where liberty is threatened.

Adopting the proper standard of proof for discretionary transfer is far more than "an empty semantic exercise." *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). "[W]hether civil or criminal, '[t]he standard of proof reflects the value society places on individual liberty.'" *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), quoting *Addington* at 425.

As "embodied in the Due Process Clause and in the realm of factfinding," "[t]he function 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.'" *Addington* at 423, quoting *Winship* at 370. At a minimum, therefore, it "*serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision*." (Emphasis added.) *Addington* at 423.

B. Ohio's standardless scheme permits arbitrary decision-making. This case presents foundational questions that may not be decided on a piecemeal basis.

Absent a standard, Ohio's system ensures neither orderliness nor fairness. It also leads to inconsistent results. Though the statute contains factors, it's unknown how certain judges must be before sending a child to adult prison. If we don't even know *that*, what protections do children have against ad hoc decision making?

This case shows that under the current standardless scheme, prosecutors may trigger transfer by alleging a child is not amenable, but then leave it to the child to prove that he is. Further, even when a child presents ample evidence of his own amenability as Donovan did here, he's still apparently not safe—so long as an appellate court finds the judge *considered* the factors and the court on review devises some rational basis in support, the transfer stands. In this way, R.C. 2152.12(B)'s statutory factors may have been *designed* to guide a court's discretion, but they've become a Potemkin village wherein empty recitals alone suffice. Indeed, according to the appellate court, even that's not required.

Despite the majority decision below, "litigants and factfinders must know at the outset of a given proceeding how the risk of error will be allocated[.]" *Santosky*, 455 U.S. at 756, 102 S.Ct. 1388, 71 L.Ed.2d 599. The Supreme Court thus requires that where liberty interests are threatened, "standards of proof must be calibrated in advance." *Id.*

"Retrospective case-by-case-review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." *Id.* Rather, "the degree of proof required in a particular type of proceeding 'is the [exact] kind of question which has traditionally been left to the judiciary to resolve.'" *Id.,* quoting *Woodby v. INS*, 385 U.S. 276, 284, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966). And far from leaving

it to individual judges in individual counties and districts—to be fleshed out by rudderless abuse-of-discretion reviews—the standard must be "shaped by the risk of error inherent in the truth-finding process as applied to the *generality* of cases[.]" *Id.*, quoting *Mathews v. Eldridge*, 424 U.S. 319, 344, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Given the liberty interests at stake, discerning the proper standard of proof for non-amenability is thus integral to the fair and uniform application of Ohio's discretionary transfer statute. A clear ruling from this Court not only reduces the risk of erroneous amenability decisions (thereby ensuring transfer is reserved for the rare offender), but it structures litigation and impresses upon decisionmakers (both juvenile and appellate alike) the critical importance of the decisions being made.

II. Due process requires clear and convincing evidence of non-amenability.

To this end, the appropriate standard of proof is determined by due process. "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* at 758; *see also Mathews*, 424 U.S. at 335, 96 S.Ct. 893, 47 L.Ed.2d 18.

Even more to the point, "[i]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 455 U.S. at 755, 102 S.Ct. 1388, 71 L.Ed.2d 599. The "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 283, 110

S.Ct. 2841, 111 L.Ed.2d 224 (1990); *see also Addington,* 441 U.S. at 425, 99 S.Ct. 1804, 60 L.Ed.2d 323, citing *Mathews* at 335.

Thus, while considering the private and governmental interests, the proper standard turns on how best to allocate the risk of error between them.

A. Clear and convincing evidence governs where interests are more important than money.

This analysis has produced three general standards for different case types. At the bottom of the spectrum, a mere preponderance standard is used for civil monetary disputes. This lesser standard "indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.'" *Santosky* at 755, quoting *Addington* at 423.

At the opposite end of the spectrum, the highest standard is beyond a reasonable doubt. This is reserved for criminal and delinquency adjudications. Facing final judgment, a defendant's interests 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." *Addington*, 441 U.S. at 423, 99 S.Ct. 1804, 60 L.Ed.2d 323. Given the stakes, society, in short, has chosen to "impose almost the entire risk of error upon itself." *Id.*

In between is the intermediate, or clear and convincing standard, which is most proper here. This standard is reserved for protecting "particularly important" civil or quasi-criminal interests. Regarding this standard, the Supreme Court has explained:

> One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's

> burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases.

Addington at 424.

In other words, "*due process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake * * * are both 'particularly important' and 'more substantial than mere loss of money*.'" (Emphasis added). *Cooper v. Oklahoma*, 517 U.S. 348, 362–363, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996).

In this context, Donovan sat across from a judge at 5'3', 14 years old and barely 100 pounds. The question for that judge was whether to condemn this boy to an adult court where he would face a lifetime sentence in an adult prison. The experts advised he could be treated in the juvenile system. The state erected a smokescreen, presenting no evidence otherwise. Without any real guidance, the court had to decide. The question now, is whether we are only minimally concerned with the outcome of that decision. Whether this decision, resulting in a life sentence, "is more important than the mere loss of money." *Id.*

B. Non-amenability decisions seriously affect a child's liberty interests.

On this score, there's no real debate. 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* at 557. Later, in *Breed v. Jones*, the Supreme Court reiterated that "[t]he possibility of transfer from juvenile court to a court of general criminal jurisdiction is a matter of great significance to the juvenile." 421 U.S. 519, 535, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

The reason, of course, is that "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." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 87 (O'Connor, C.J., dissenting), citing Bishop, Frazier, Lanza-Kaduce, & Winner, The Transfer of Juveniles to Criminal Court: Does It Make a Difference?, 42 Crime & Delinquency 171, 183 (1996).

Further, the "collateral legal consequences associated with a felony conviction are severe and obvious." *Aalim* at ¶ 85, quoting *State v. Golston*, 71 Ohio St.3d 224, 227, 643 N.E.2d 109 (1994). And what's more, juvenile offenders "face far greater risks of violent attacks and suicide after being sentenced to imprisonment in adult facilities." *Id.* at ¶ 86, citing Kimbrell, It Takes A Village to Waive A Child ... or at Least A Jury: Applying Apprendi to Juvenile Waiver Hearings in Oregon, 52 Willamette L.Rev. 61, 65 (2015). In fact, "[j]uveniles in adult facilities are five times more likely than adult offenders, and eight times more likely than juvenile offenders in juvenile facilities, to commit suicide." *Id.* at 66.

That amenability is a critically important hearing affecting vitally important liberty interests is thus settled. "[T]here should be no debate that a child's liberty interest in retaining juvenile status is substantial." *Aalim* at ¶ 83. This Court should therefore adopt a clear and convincing evidence standard because it accurately bespeaks the weight gravity of the decision being made there.

C. A child's liberty interests are aligned with those constitutional interests protected by this standard. They are also far more important than most statutory interests that are.

This stricter standard makes the most doctrinal sense, too. The deprivations of liberty after a finding of non-amenability are on par with various other constitutional interests already protected by this standard:

- Termination of parental rights, *Santosky, supra;*
- Civil commitment for the severely mentally ill, *Addington, supra;*
- Deportation, *Woodby, supra;*
- Denaturalization*, Chaunt v. United States,* 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960).

Addington is particularly instructive given the similarities between the determination there, and the one made at amenability—namely, whether the defendant was mentally ill and required hospitalization for his own welfare and the protection of the community. *Addington*, 441 U.S. at 420, 99 S.Ct. 1804, 60L.Ed.2d 323.

The Court explained: "whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Id.* at 429. The Court held that a mentally-ill person's interest in the outcome of the commitment proceeding is "of such weight and gravity" that due process requires the standard to inform the factfinder that proof must be greater than a preponderance. *Id.* at 433. Such persons "should not be required to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the State." *Id.* at 425.

So too here. Critically important non-amenability determinations must be supported by the same standard because children too face harsher punishment, a greater risk of physical abuse, and other collateral consequences because of the decision. *See Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 87 (O'Connor, C.J., dissenting).

Adding to that, Ohio uses clear and convincing evidence to protect far *lesser* interests *by statute* as well:

- Will contests, R.C. 2107 et seq.;
- Civil forfeiture actions, R.C. 2981.05;
- Driver-training-school license revocations, R.C. 4508.06;
- Allegations against county treasurer or auditor, R.C. 319.26; R.C. 321.37;
- Punitive or exemplary damages in civil tort actions, R.C. 2315.21; and
- Disciplinary proceedings for attorney's alleged misconduct, Gov.Bar R. V(12).

Two statutory outliers more in line with transfer include sex offender classification proceedings under R.C. 2950.01 et seq. and serious youthful offender invocation proceedings under R.C. 2152.13—which like transfer do not result in criminal convictions per se, but in the incarceration of children in the adult prison system.

The point is that decisions straddling transfer in importance require clear and convincing evidence; and there is no sound basis for requiring a lesser showing here, where the decision leads to adult conviction. *Speiser*, 357 U.S. at 525, 78 S.Ct. 1332, 2 L.Ed.2d 1460 ("[W]here a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue.").

Thus, not only does a stronger standard properly allocate risk and mark the decision as critically important, but it makes the most doctrinal sense, too, because it's already used to protect both greater and lesser interests than those abridged by transfer.

D. The Institute of Judicial Administration, and the American Bar Association already require clear and convincing evidence for non-amenability.

In fact, this is precisely why the American Bar Associations and the Institute of Judicial Administration have long required that non-amenability decisions be supported by clear and convincing evidence. Institute for Judicial Administration-American Bar

Association Joint Commission on Juvenile Justice Standards: Standards Relating to Transfer Between Courts, Standard 2.2. C, p.39 ("IJA-ABA Model Standards").

The Standards even expressly require that *both* the ultimate determination and *each* statutory factor be found by clear and convincing evidence. *Id.*, Standard 2.2. C, commentary, p.44 ("If any of the required determinations cannot be made on the basis of clear and convincing evidence, the juvenile should not be waived.").

The commentary to Model Standard 2.2 C aptly explains:

> [Clear and convincing evidence] is a compromise between the widely used standard of proof of the justification for waiver by a preponderance and the beyond-a-reasonable-doubt standard required in juvenile adjudications.
>
> Use of the [beyond-a-reasonable-doubt standard] would unduly restrict the juvenile court's power to waive jurisdiction. Determinations [of non-amenability] are exercises in judgment of the sort never entirely free from doubt. A lesser [intermediate standard], which nonetheless requires a thorough demonstration of the need for waiver—which a mere preponderance test does not—is appropriate.

IJA-ABA Model Standard 2.2 C, commentary, p.44.

Since "a child's liberty interest in retaining his or her status as a juvenile subject to the juvenile-justice system is [also] significant," these renowned associations also conclude that clear and convincing evidence is appropriate. *Aalim,* 50 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 87.

E. A weaker standard will misallocate the burden and risk of error, while producing absurd doctrinal results.

Even so, a lesser standard may still be at this Court's practical disposal. Donovan even noted below that that a preponderance *could* be an option, given R.C. 2152.12's use of the term "outweigh," which may suggest 'more likely than not.' And this too *would* be better than no guidance at all. But in truth, reading the statute this way betrays sound analogical reasoning, eschews the proper due process analysis, and denigrates the interests at stake.

To illustrate, where else is society only minimally concerned with the outcome, such that the parties share the risk of error equally? In these contexts:

- Parking infractions, R.C. 4521.08;
- Civil actions for damages by a cable provider, R.C. 2307.62;
- Product liability suits, R.C. 2307.73, et seq.

Such proceedings pale in importance to those whose outcomes make the difference between five years confinement with treatment available, and a life sentence in prison.

In sum, there is no sound basis for allocating to children the large share of the risk of a faulty amenability decision, especially since the government is the one seeking transfer and increased punishment to begin with. On the contrary, the clear and convincing standard is the soundest answer because it properly allocates the risk of error and strikes the fairest balance between the rights of children and the state's concerns.

III. Adopting a standard does not overly burden government interests.

A. A standard of proof fairly tests the government's real and purported interests.

As for those concerns, the government has legitimate parental and police interests at stake. Before anything, it must be concerned with "preserving and promoting the welfare of the child." *Santosky*, 455 U.S. at 766, 102 S.Ct. 1388, 71 L.Ed.2d 599. In Ohio, this means providing for "the care, protection, and mental and physical development of children." R.C. 2152.01(A). Founded *parens patriea*, the state, in short, has a stake in rehabilitating its children. *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 50.

At the same time, the state also has a police interest in protecting the community. "[J]uvenile delinquency laws feature inherently criminal aspects," and the state's goals in prosecuting a criminal action and in adjudicating a juvenile delinquency case are the same:

'to vindicate a vital interest in the enforcement of criminal laws.'" *State v. Walls,* 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 26.

Adopting a clear standard of proof serves both of these interests. Requiring that transfer decisions be justified by clear and convincing evidence ensures that actors are "making every effort to avoid [a child's] being attainted as criminal before growing to the full measure of adult responsibility." *In re Agler*, 19 Ohio St.2d 70, 71, 249 N.E.2d 808, 810 (1969). Making sure that transfer is truly necessary encourages courts to utilize the full range of rehabilitative resources the juvenile system—by design—has to offer. These services are better tailored to the needs of children in particular, and thus increase the likelihood of a child's responsiveness to treatment, *i.e.*, of a child's rehabilitation. There are even indications that incarceration in adult prisons is detrimental to that same goal.

Moreover, nothing in a standard of proof bars the state from vindicating its police interests—or from obtaining transfer where necessary. A litigable standard, rather, merely ensures *to some calculable degree* that transfer is, in fact, necessary. The more a child is amenable, the greater the parens patriae interest is in retaining him; and, at the same time, the lesser the police interest is in prosecuting him as an adult *Cf. Addington* 441 U.S. at 426, 99 S.Ct. 1804, 60L.Ed.2d 323 (noting that while the state has interest in caring for the mentally ill, and police power to protect the community from them, it has *no interest* in involuntarily committing people not shown to be mentally ill).

By that same token, the lesser the burden placed on the State (or worse yet, if there is none), the more likely it is that amenable children will wrongly be tried as adults—with all its costs and harms—even if they don't need to be. What degree of confidence should we have in the correctness of a juvenile court's amenability decision?

Finally, it bears emphasis that however important, neither interest justifies placing on mere children the onus of proving they should remain a child, anyway. "[T]he relevant question when considering the third *Mathews* factor is not whether the process will burden the state at all but, rather, whether the burden of additional procedural safeguards *outweighs* the child's liberty interest in retaining juvenile status and the risk of erroneously depriving the child of that status." *Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 92 (O'Connor, C.J., dissenting). Here, they do not.

B. A clear standard sharpens the decisions-making process while ensuring principled appellate review.

Additionally, governmental interests are not limited to those of the prosecutor. They include those of the system at large, counting our judicial system. Under Ohio's current standardless scheme, we have cases like this one, where prosecutors present nothing on amenability; the child carries all the weight; and then, whatever real evidence was adduced (by the child) is discarded anyway. The weight of a fair-minded judge's burden under such circumstances is understandably enormous.

But at the same time, a discretionary system without any guidelines leads to the very type of strained and unprincipled decision-making giving rise to this appeal; not to mention a major waste of time and resources—and all at *the child's* expense. Donovan's case is but one (albeit, prime) example.

The problem is then only compounded on appeal, where, absent a standard of proof in the first place, the standard of appellate review rings hollow at best: in any given case, an appellate court can easily say that a judge *considered* the existence of certain aggravating or mitigating factors justifying transfer—the question, though, is: 'based on what?' Without an actual standard, empty recitations of the factors obscure the same abuses of discretion the

factors are in theory designed to prevent. But it's even worse than that: the appellate court here said *recitations* aren't even necessary—that there's no abuse of discretion so long as the *appellate court* can find justification in retrospect.

The liberty interests at stake are far too important for this to be the norm. A knowable standard will bring clarity to juvenile justice that will not hinder broader governmental interests but, in many ways, serve them.

IV. The decisions below must be reversed under any standard.

Absent affirmative evidence of non-amenability of any sort, the court of appeals wrongly rejected Donovan's due process claim that prosecutors failed to carry their burden. This Court should therefore adopt the standard of proof required by due process, and reverse the decisions below. Alternatively, this Court should summarily reverse the appellate court's judgment that "there is no standard of proof issue to be resolved," and remand with further instructions. Whatever the precise standard may be, the decisions giving rise to this appeal cannot stand.

* * * * *

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.**

Donovan's first proposition subsumes (and answers) the second. But, even if this Court declines to adopt the first, it should still hold that the state bears the burden at amenability. This is an easier question; and it's largely been resolved above. In addition to properly allocating the risk of error, litigation norms, statutory language and structure, and this Court's prior decisions all support to the conclusion that children are presumed amenable, and that, to try them as adults, prosecutors must prove they are not.

I. The Justice Department, the IJA, and the ABA all also require that prosecutors bear the burden of proving non-amenability.

On appeal, Donovan offered statutory construction, treatises, this Court's prior guidance and basic norms to confirm this interpretive framework. Disagreeing, the court of appeals wrongly suggested a lack of authority to that end. (10.8.20 Decision and Entry Denying Reconsideration, pp.4-10). In fact, cited in Donovan's briefs were the above-referenced IJA-ABA Model Standards, which have long provided that "the prosecuting attorney should bear the burden of proving * * * that the child cannot be handled by the juvenile court." IJA-ABA Model Standards, p.49. More specifically:

> The waiver hearing will determine whether a juvenile is denied juvenile court handling or is exposed to the practices and punishments of the criminal court. A decision of that magnitude should be considered on the basis of a fully evidentiary hearing in which the state must establish the propriety of the result that it urges. The prosecutor should bear the burden of proof and the risk of non-persuasion.

IJA-ABA Model Standards, Standard 2.3 H, commentary, p.49.

Decades later, the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention agrees: "Discretionary waiver statutes prescribe broad standards to be applied, factors to be considered, and procedures to be followed in waiver decision-making and require that prosecutors bear the burden of proving that waiver is appropriate." U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting, p. 2 (Sept. 2011), available at https://www.ojp.gov/pdffiles1/ojjdp/232434.pdf (accessed April 23, 2021).

Were it otherwise, Ohio would be no different than a *Presumptive Waiver* system, wherein kids are presumed transferred, and the burden shifts to *them* to justify why they should be kept in the juvenile system. *See id.*, at pp.1-6 (explaining the differences between various statutory transfer systems). This was precisely the argument raised below. (10.8.20 Decision and Entry, p.3 ("Nicholas contends that we improperly placed the burden of proof on his shoulders rather than on the state.")). The court wrongly rejected it.

II. A prosecutorial burden is consistent with basic litigation norms.

Ordinary conventions also confirm Donovan's reading. "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). "The 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. It only follows 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." *State v. Valentine*, 2nd Dist. Montgomery No. 6024, 1979 WL 208379, *4. As noted by Judge Donovan in dissent below: "At a minimum, on the State's motion, the State must bear some measure of production of evidence and/or proof." (10.8.20 Decision and Entry, 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—which apply in virtually every other conceivable context.

III. This rule comports with Ohio's statutory scheme.

Finally, while R.C. 2152.12 is just as silent on the burden as it is on the standard, the proper allocation can be gleaned from the broader statutory scheme, as well as from the statutory language and structure itself.

The net of the statutory scheme is that juvenile courts have exclusive subject matter jurisdiction over cases involving children, and that now R.C. 2152.12 created a "narrow exception" to that rule. *See* R.C. 2152.23(A); R.C. 2152.12; *Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 2. From there, R.C. 2152.12(D) and (E) create a presumption in favor of retention, i.e., amenability, by requiring courts to decide whether factors in favor of transfer "outweigh" those favoring retention. The text reads:

> In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred *outweigh* the applicable factors under division (E) of this section indicating that the case should not be transferred.

> The record shall indicate the specific factors that were applicable and that the court weighed.

R.C. 2152.12(B)(3).

Donovan emphasized below that "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. This Court has also said "[i]t 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." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Com.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). Yet, noting only that "various factors are outlined for courts to consider in deciding whether cases should be transferred to adult court[,]" the majority's statutory analysis stops there. It says nothing of the statute's text or structure.

IV. This rule squares with this Court's guidance on transfer, too. Rejecting it would have dire consequences.

Lastly, in similar fashion, the court also failed to contend with this Court's understanding that amenability decisions should occur only rarely. *In re Agler*, 19 Ohio St.2d 70, 71–72, 249 N.E.2d 808, 810 (1969) (recognizing "the considered opinion of society" that even grave childhood offenses should "seldom warrant adult sanctions and that the decided emphasis should be upon individual, corrective treatment.").

This Court has confirmed time and again that R.C. 2152.12 merely "creates a narrow exception to the general rule that juvenile courts have exclusive subject matter jurisdiction over any case involving a child." (Emphasis added.) *State v. Hanning*, 89 Ohio St.3d 86, 89, 728 N.E.2d 1059 (2000). And, this Court has rightly noted that science, too, "recommends transferring youth to the adult court system rarely." Youth in Adult Court Bench Card, available at https://tinyurl.com/srexmxr (accessed April 20, 2021), 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 April 21, 2021).

Adopting the appellate court and state's argument now would mark a significant break from this judicious view. Denying that prosecutors carry the burden at this juncture would also signal to lower courts and prosecutors that the state doesn't have to do *anything* in support of its motion for transfer. The de facto rule, perfectly shown below, would be to shift the burden to *children* to justify why they should be retained. But this, again, constitutes a *Presumptive Waiver* system, which Ohio does not have.

Accordingly, Donovan's second proposition offers a sound and logical approach to structuring amenability hearings. As the maker of the motion alleging non-amenability, prosecutors bear the burden of proving it. This rule both flows from and gives proper effect to Ohio's statutory transfer structure; and it squares with this Court's guidance and that of leading national authorities. If the government wants to try a child as an adult, they have to do something to prove it is necessary.

* * * * *

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.**

Whereas the majority rejected Donovan's first two due process claims based on sweeping judicial discretion, it denied his SYO requesting claiming no such discretion exists. Before the amenability hearing, his attorney requested a blended SYO disposition as an alternative to bindover. (10.26.17 Memorandum Opposing Transfer of Jurisdiction). The juvenile court did not even consider it. The majority on appeal then decided "[t]he fact that Donovan would have been eligible for SYO disposition does not mean the court was required to take this into consideration before deciding amenability." (6.26.20 Opinion at ¶ 77). And in fact, the majority said, it wasn't even an available option. Discouraging judges from considering what was always meant to be a "middle ground" is at odds with the goals of SYO and of the juvenile system at large. This Court should reject that reading.

I. SYO was created with this very scenario in mind.

First, the appellate court's cramped reading of the statute fails to account for its history, and the considerations animating SYO's adoption. In response to a perceived rise in juvenile crime, Ohio enacted its current bindover statutes in 1996. *Hanning*, 89 Ohio St.3d at 89, 2000-Ohio-436. But, R.C. 2152.12 provides only "a narrow exception." And, recognizing that "the criminal justice system might be too harsh on those who could still benefit from greater rehabilitative opportunities in the juvenile system," Ohio quickly paved a third path to redemption: blended, or "SYO" sentencing. Ohio Criminal Sentencing Commission, A Plan for Juvenile Sentencing in Ohio (1999), p.28, available at https://tinyurl.com/y64pvgsb (accessed April 27, 2021).

The Sentencing Commission expressly decided "[t]he solution lies in a flexible sentencing structure involving both juvenile and adult sanctions." *Id.* "Blended sentencing [thus] lets the court tailor a sentence using the treatment flexibility of the juvenile system and the more punitive sanctions of the criminal system." (Emphasis added.) *Id.*

That is precisely what this case called for. Donovan had no prior criminal or disciplinary history. He was never in trouble in school; he did not have any substance abuse issues. And, he had never received any prior juvenile-court or mental health treatment. Ever. At the same time, the evidence showed Donovan's actions resulted from a severe mental illness, which, although grave, was treatable. The weight of the evidence then established that Donovan was amenable to that treatment and that, had he been retained, he was eligible for at least six more years of intensive court services, plus whatever adult-court sentence the court deemed fit.

Clearly, "[b]indover is not the best option for all serious offenders." *Id.* The goal of SYO goal is to make the blended sentence a 'last chance at rehabilitation' for serious juvenile offenders. If they quit harming and threatening others, the case ends with the juvenile disposition." *Id.* "If they commit more serious crimes or seriously threaten the juvenile system, the juvenile court judge could invoke the adult sentence" which can readily include a lengthy or even life-tail sentence. *Id*.; R.C. 2929.13; 2903.02. 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."

In this way, SYO was designed specifically for extreme cases like Donovan's, where on the one hand the child is desperately in need of treatment and amenable thereto; and on the other, the juvenile court, with its supposed expertise, is best suited to sentence the

child, but simply "needs more options." Juvenile Sentencing in Ohio (1999), p.28, (accessed Aug. 5, 2019).

II. The majority's conclusion betrays the central mission of the juvenile system, and it is wrong on the merits.

A. The juvenile system rests on dispositional flexibility. R.C. 2152.12 expressly permits consideration of "any other factor."

"Juvenile courts are unique and are tied to the goal of rehabilitation." *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 54. By statute, the overriding purposes of juvenile dispositions "are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." R.C. 2152.01. And "[s]ince its origin, the juvenile system has emphasized individual assessment, the best interest of the child, treatment, and rehabilitation, with a goal of reintegrating juveniles back into society." *Hanning*, 89 Ohio St.3d at 88, 728 N.E.2d 1059. Referencing Ohio's SYO statute, this Court has specifically said juvenile courts "should be open to innovation that may help the system reach its important objectives." *D.H.* at ¶ 55, citing Smallheer, Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle (1999), 28 Hofstra L.Rev. 259, 285.

Towards that end, 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").

> Under R.C. 2152.11(A), a juvenile defendant who commits certain acts is eligible for "a more restrictive disposition." That "more restricted disposition" is a "serious youthful offender" disposition and includes what is known as a blended sentence—a traditional juvenile disposition coupled with the imposition of a stayed adult sentence. R.C. 2152.13. The adult sentence remains stayed unless the juvenile fails to successfully complete his

> or her traditional juvenile disposition. R.C. 2152.13(D)(2)(a)(iii). Theoretically, 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 at ¶ 18.

Regarding potential *placement* for children in need of intensive treatment, the Code offers even more flexibility. Courts may:

> Commit the child to the temporary custody of any school, camp, institution, or other facility operated for the care of delinquent children by the county, by a district * * * or by a private agency or organization, within or without the state, that is authorized and qualified to provide the care, treatment, or placement required, including, a school, camp, or facility * * *.

R.C. 2152.19.

This is why the dissent aptly noted that "ODYS was not the solitary option for Nicholas [anyway], as Twin Valley and Mary Haven were referenced by the GAL and Book as potential placements." (6.26.20 Opinion at ¶ 210). And, "in fact, the evidence adduced established Nicholas responded well to a structured supportive environment (of six months duration) during his prehearing evaluation and detention and, as Dr. Hrinko noted, Nicholas's potential for learning to manage his behavioral mental illness appropriately would likely increase with ongoing supervision and guidance." (Id. at ¶ 211). Thus, "at a minimum we must require the juvenile court judge to assess the possible rehabilitation of a child by use of procedures (including psychiatric evaluations at the State's expense, when needed), medications, services, and facilities currently available to the court in the State of Ohio." (Id.).

Relatedly, as for considerations at amenability hearings in particular, the Code also contemplates flexibility, permitting judges to consider any other relevant factor when consider whether a child is not amenable. R.C. 2152.12(C)-(E). In Donovan's case, blended

sentencing would have given the juvenile judge "the power to sentence [him] conditionally, first as a juvenile and later as an adult, depending upon whether subsequent review indicated that adult sentencing was warranted." (6.26.20 Opinion at ¶ 213).

"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 * * * Blended sentencing affords an opportunity for redemption while retaining institutional control over the juvenile for the protection of society, which can be a win-win proposition." (Id.). Given the specific task at amenability, one would hope such considerations are deemed relevant for R.C. 2152.12

Thus, to hold as the majority did here that juvenile courts may not consider SYO at the amenability stage is at odds with the founding principles of the juvenile system itself and the dispositional flexibility inherent in the Revised Code. This holding is also especially troubling given the majority justified Donovan's bindover based on what it saw as near-unbridled juvenile court discretion.

B. By statute, SYO is not off the table until the state's statutory 20-day notice deadline has lapsed.

Further, the decision strains credulity and the SYO statute itself. As a general matter, it is absurd to say an outcome isn't possible because it hasn't happened yet. Beyond that, R.C. 2152.13 specifically says SYO is a possibility up to 20 days after the juvenile court has decided not to relinquish jurisdiction.

Given that SYO is a dispositional option by statute; that courts are to remain open to flexible solutions; that courts may consider any other relevant factor when considering to transfer a child; and that at the point of decision, prosecutors still have 20 more days to ask

for the SYO sentence, why would anyone *not* be thinking about SYO? Worse, what good reason is there to discourage anyone from doing so? Given that the juvenile system elevates rehabilitation and individual assessment over retribution and punishment, SYO should have at least entered the court's calculus before sending 14-year-old Donovan to criminal court, where he faced the potential for life imprisonment without the possibility of parole.

C. Pretending Donovan would not *have received a blended sentence*—despite SYO being mandatory—*is unconvincing.*

This is especially true considering that Donovan would have been subject to a mandatory SYO sentence under R.C. 2152.11 had he been retained. *See* R.C. 215.12.11 (B); *see also* R.C. 2152.19(A). On appeal, the state countered this point by contending it alone has the discretion to institute SYO proceedings. And, the majority found this to counsel against SYO consideration, saying: "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 child allegedly occurred initiates the process." (6.26.20 Opinion at ¶ 77). With that, the majority concluded "Nicholas's argument concerning the options the juvenile court should have considered is not well-taken." (Id. at ¶ 78).

But, this position is a red herring. Practically, there is no realistic possibility prosecutors would *not* have asked for a blended sentence after a finding of amenability here—especially if the state's own contentions about the necessity of bindover are to be believed. In fact, had the court found Donovan amenable, SYO would have been mandatory. And in any event, if the prosecutor *is* to be believed that the state would not have sought an SYO, what then does that say about the claimed necessity of bindover in the first place?

III. Judicial decisions should encourage not deter the use of tailored sentencing in juvenile court.

Thus, contrary to the appellate court's holding, SYO could and should have been considered by the juvenile judge here. The central inquiry at amenability hearings is precisely whether the child is or is not "amenable to care or rehabilitation within the juvenile system." The only way to reach that decision is to actually consider the care and rehabilitative options offered within the juvenile system. By statute, that includes a blended sentence—which is statutorily available until 20 days after the decision. As correctly noted by the dissent, the juvenile judge "had this blended sentencing tool in her arsenal if she denied transfer[,] and "[a]t a minimum, she should have considered it as requested in a motion filed by [counsel]." (10.26.20 Opinion at ¶ 213).

The majority's contrary decision thus sends a dangerous signal that judges ought not consider all their options before transfer, which not only risks needless transfer decisions, but also runs counter to the primary goals of the juvenile system. It's also rooted in neither law, sound policy, nor logic and it should be reversed. This Court should write instead that juvenile judges must first weigh all available dispositional options, on the record, before issuing a finding of non-amenability. In the very least, it should reverse and make abundantly clear that juvenile judges *may* in fact consider SYO in lieu of bindover when considering amenability.

CONCLUSION

For all of these reasons, the decisions below must be reversed. This Court should hold that: (1) prosecutors bear the burden of proving non-amenability; (2) the standard of proof for non-amenability is clear and convincing evidence; and (3) juvenile judges must (or at least may) consider SYO in lieu of bindover when determining amenability.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

A copy of the foregoing **Merit Brief of Defendant-Appellant, Donovan Nicholas** was sent by facsimile mail this 3rd day of May 2020, to Kevin Talebi, Champaign County Prosecutor, at Champaign_County_Prosecutor.937-484-1901@fax2mail.com.

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