Case No. 2021-0579

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
MAHONING COUNTY COURT OF APPEALS,
CASE NO. 18MA22

STATE OF OHIO,
Respondent-Appellee,

v.

CHAZ BUNCH,
Petitioner-Appellant.

MERIT BRIEF OF APPELLANT CHAZ BUNCH

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CASE SUMMARY

M.K. did not positively identify sixteen-year-old Chaz Bunch as one of her assailants until she saw a news report, with his picture, that identified him as one of her suspected assailants. In a timely amended postconviction petition, Chaz presented an eyewitness-identification expert who reviewed M.K.'s testimony at trial and at a suppression hearing, as well as this court's recitation of the facts in a 2015 opinion. That expert explained that M.K.'s identification of Chaz is unreliable because she was initially not sure whether Chaz was involved, and only became sure when she saw his photo in the newspaper identifying him as one of the suspects.

The trial court rejected the argument for three flawed reasons. First, the trial court held that M.K. had a strong belief in the accuracy of her identification. But as the expert explained, confidence in an identification does not correlate with accuracy, and M.K.'s confidence in her misidentification was understandable based on contamination from the news report.

Second, the trial court cited the self-serving testimony of a co-defendant who named Chaz as an assailant. But the trial court failed to consider that the co-defendant received a very favorable plea agreement in return for naming Chaz.

Lastly, the trial court used the wrong standard to measure prejudice. The trial court ruled "that an eyewitness identification expert would not have altered the trial's

outcome," but the standard is whether there's a reasonable probability of a different outcome.

The trial court erred by rejecting this claim without an evidentiary hearing.

STATEMENT OF THE CASE AND THE FACTS

I. The crime.

A brutal attack followed by an uncertain identification.

On the evening of August 21, 2001, M.K., a twenty-two-year-old Youngstown State student, arrived at work. T.p. 857.[1] When she got out of her car, 15-year-old Brandon Moore approached her, demanded money, and ultimately forced her back into her car. *Id.* at 863. Brandon got into the driver's seat and drove away in her car, following a second car; which contained eighteen-year-old Andre Bundy, who was driving, and twenty-one-year-old Jamar Callier, who was the passenger. *Id.* at 1258–62. While driving, Brandon ordered M.K. to give her jewelry to him, and she complied. *Id.* at 868. At one point, Brandon stopped the car, and picked up another passenger known as "Shorty Mack." *Id.* at 873–4.

Brandon, M.K. and Shorty Mack continued driving again, and, while driving, Brandon sexually assaulted M.K. several times with his fingers. *Id.* at 877–8. After both cars pulled into a gravel lot, Brandon and Shorty Mack raped M.K. several times while Jamar went through M.K.'s trunk. *Id.* at 889–92. In an effort to stop the assault, M.K.

[1] Unless otherwise state, all transcript references are to the trial transcript.

stated that she was pregnant, and Jamar told Brandon and Shorty Mack to stop and let M.K. leave. *Id.* at 892.

The DNA tests exclude Chaz as a donor; his fingerprints were not found.

As soon as the assault ended, M.K. drove to her boyfriend's house, and she was then taken to the hospital, where she arrived at 11:12 p.m. *Id.* at 902, 1030. The hospital promptly conducted DNA tests, which found only Brandon's DNA. T.p. 1670. The DNA test excluded Chaz as a potential donor. *Id.* at 1685.[2] In addition to the exclusion of his DNA, none of Chaz's fingerprints were found. *Id.* at 794, 1895–96.

About a half an hour after the crime, Chaz was with the attackers.

Later that night, at a local gas station, a police officer pulled behind a black car with a license plate that closely matched M.K.'s description. *Id.* at 1061. Surveillance video shows Chaz at that gas station at 11:30 p.m. *Id.* at 960. He had an earring that Brandon had taken from M.K. *Id.* at 921. After leaving the gas station, the officer followed the car. *Id.* at 1062–63. The car eventually pulled into a driveway, and the officer approached the car. *Id.* at 1063. Brandon, Jamar, and Andre were still in the car, and the driver was no longer there. *Id.* Jamar and Brandon told the police that the driver was Shorty Mack. *Id.* at 1167. Shortly thereafter, police spotted Chaz nearby and

[2] Chaz later asked the trial court to test remaining DNA samples with more sensitive tests, but the state successfully blocked the effort. *State v. Bunch*, 7th Dist. Mahoning No. 14 MA 168, 2015-Ohio-4151.

spoke with him. *Id.* at 1161. Chaz told the officer his correct name, and the officer did not detain him. *Id.*

The victim positively identifies three attackers, but she's not sure about Chaz.

M.K. subsequently identified Andre, Jamar, and Brandon—but not Chaz—from proper photographic line-ups. *Id.* at 1147–49. When shown a photo array, M.K. said she was "drawn to" a photo of Chaz as the possible passenger "Shorty Mack." *Id*. at 915. She did not positively identify Chaz as a perpetrator until she later saw a photograph of him, in isolation, in a local newspaper identifying him as a suspect. *Id.* at 916, 1449.

II. Court proceedings—bindover, trial, sentencing, and postconviction and appellate proceedings.

Chaz was bound over to adult court and convicted without an amenability finding.

Chaz was initially charged in the Mahoning County Juvenile Court, but his case was transferred to adult court without an amenability hearing. Judgment Entry (Oct. 18, 2001), Apx. A-34. Chaz and Brandon were tried jointly over Chaz's objection. Defendant Chaz Bunch's Response in Opposition to State's Motion to Consolidate Trials (Jul. 19, 2002). In return for a reduced prison term, Jamar testified at the joint trial that both Chaz and Brandon had raped M.K. *Id.* at 1256. Chaz, however, has asserted his innocence throughout.

Chaz challenges his conviction and sentence.

Chaz was convicted of multiple counts of rape and other offenses related to that night, and the trial court sentenced him to a total of 115 years in prison. Judgment Entry of Sentence (Oct. 29, 2002). The Seventh District affirmed his conviction but held that the trial court improperly failed to merge some of the firearm specifications. *State v. Bunch*, 7th Dist. Mahoning No. 02 CA 196, 2005-Ohio-3309. The trial court resentenced Chaz to a total of 89 years in prison, and the Seventh District affirmed. *State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106, 2007-Ohio-7211. Chaz unsuccessfully challenged his sentence in federal court. *Bunch v. Smith*, 685 F.3d 546, 548 (6th Cir.2012), *cert. den.*, *Bunch v. Bobby*, 569 U.S. 947, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013). The Seventh District then denied his application to reopen his appeal. *State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106 (August 8, 2013).

Chaz amends a timely postconviction petition that the state and the trial court had ignored.

Shortly after he was convicted, Chaz filed a timely postconviction petition pursuant to R.C. 2953.21. Petition to Vacate or Set Aside Judgment of Conviction or Sentence (June 12, 2003). Both the state and the trial court ignored the petition. After his co-defendant Brandon won a new sentencing hearing from this court, Chaz amended his timely postconviction petition as of right, and he challenged his transfer under the then-existing precedent of *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, his sentence under *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d

1127, and his trial counsel's ineffectiveness for failing to obtain an eyewitness identification expert. First Amended Postconviction Petition of Defendant Chaz Bunch (Feb. 22, 2017).

In support of the eyewitness identification claim, Chaz submitted an affidavit from Dr. Scott Gronlund, an expert who explained that the procedure used in his case created an unreliable victim identification. *Id.* at Exhibit 1. The identification is unreliable because M.K. did not positively identify Chaz until after she saw a local television network identify him as a suspect. *Id.* The expert also explained that M.K.'s certainty does not correlate with accuracy. *Id.* More importantly, Dr. Gronlund explained that M.K. was likely inaccurate when she said she was "drawn" to Chaz's photo in the first lineup. *Id.*

The state conceded that Chaz was entitled to a new sentencing hearing under *Moore*, and Chaz conceded that the trial court was bound by this court's decision reconsidering its first decision in *Aalim*. The trial court rejected Chaz's eyewitness identification claim without a hearing. Findings of Fact and Conclusions of Law (Jan. 29, 2018), Apx. A-36.

An appeal, briefing, and then a limited remand.

Chaz filed a timely appeal of the denial of his innocence and juvenile bindover claims. Notice of Appeal (Feb. 27, 2018). The Seventh District granted a limited remand that authorized the trial court to resentence Chaz. Judgment Entry (Jul. 11, 2018);

Judgment Entry (May 28, 2019). The parties filed briefs concerning the bindover and innocence issues while the case was remanded. Briefs (Oct. 10, 2018) and (Nov. 19, 2018). The trial judge recused himself, so the sentencing hearing proceeded before a different judge. Judgment Entry (Aug. 29, 2018).

At his resentencing hearing, Chaz explained his childhood until he was 16 years old, when he often had to raise himself and learned the drug trade to survive.

At his resentencing hearing, Chaz presented a report from Psychologist Dr. A.J. McConnell, which included supporting affidavits from those who knew Chaz as a child and demonstrated his traumatic past. Sentencing Memorandum (Jun. 28, 2019). The trial court did not find that any of Chaz's evidence lacked credibility.

Chaz had to raise himself because his mother[3] regularly abused drugs and his father was frequently absent. Re-Sentencing Evaluation, 3, 13.[4] He learned from three of his older brothers how to use the drug trade to survive. Chaz said that he started dealing drugs because, "[i]t was my environment. That is what people did." *Id.* at 13. Two of his brothers, Darin and William, had "ranking powers in the drug trade." *Id.* Darin was murdered as part of his drug dealing. *Id.* When Chaz was a child and

[3] Chaz's mother passed away while he has been in prison. Affidavit of Ruby Bunch Strain, ¶ 10.

[4] Unless otherwise noted, all citations to facts related to Chaz's background are from exhibits to his Sentencing Memorandum filed on June 28, 2018.

adolescent, the police "raided" his home several times. *Id.* 4, 13. The PSI confirms that at age 14, he was frequenting a "drug house." PSI, 13.

As a child, Chaz moved back and forth between Youngstown and Washington D.C. This transience disrupted his education and made it hard for him to find and maintain positive social supports. Affidavit of Ruby Bunch Strain, ¶ 7–9. According to the material presented to Dr. McConnell, because his parents did not make him come home after school, Chaz often went out on the streets and stayed there until late at night. Re-Sentencing Evaluation, 16.

Charmaine Cunningham, his half-sister, explained the turmoil she and Chaz grew up in. Their father was "a full-blown alcoholic." Affidavit of Charmaine Cunningham, ¶ 3. She explained that Chaz's father met his mother at an Alcoholics Anonymous meeting shortly after he had married another woman. *Id.* at ¶ 4.

Chaz's aunt, Ruby Bunch Strain also explained that when Chaz lived in Washington, his mother's apartment was in an area known as the "haunted house projects." Affidavit of Ruby Bunch Strain. ¶ 7. "It was a bad area where there was a lot of violence and drug dealing." *Id*. Chaz moved to Ohio and Ruby lost touch with him. He visited again after a number of years, but he "looked different." *Id.* at ¶ 8. He was still a child age-wise but dressed and looked as if he was grown. "I believe he was forced to grow-up quickly because of things he saw as a child and lack of parental support from" his mother and father. *Id*. Ruby added, "When he moved to

Youngstown, things only got worse for Chaz. There was no stability in his life. I think he often had to fend for himself, and he went down the wrong path when there were no positive influences." *Id.* at ¶ 10.

Unrebutted psychological testimony shows that the survival skills Chaz learned as a child made the normal deficiencies of youth worse.

Dr. McConnell explained that "from a neurodevelopmental perspective," Chaz "is literally not the same person now as he was at the time of the offense for which he is now incarcerated." Re-Sentencing Evaluation, 14. Further, the evidence indicates that Chaz's "neurodevelopment was negatively impacted by exposure to significant, complex trauma during the course of his childhood." *Id.* As a result, it's likely that Chaz, "given his environment and history of trauma, was focused on survival rather than learning." *Id*.

Further, at the time of the attack on M.K., and as a result of his repeated childhood traumas, lack of parental support, and negative role models, Chaz's actions and decision-making "reflected immature and risk-taking behavior that was beyond what is expected of a typical adolescence as well as what is expected of an adult." *Id*.[5] Dr. McConnell noted that the actions Chaz was convicted of in this case were "impulsive," which is consistent with the fact that he was "neurodevelopmentally

[5] As shown in his first proposition of law, Chaz has always maintained his innocence, and his conviction was based largely on a faulty eyewitness identification. But at the sentencing hearing, Chaz's arguments respected the jury's verdict.

vulnerable to engaging in impulsive, oppositional, reckless, and immature behavior…." *Id*. at 15.

Testing results corroborate a common sense understanding of how Chaz's youthful trauma influenced his decision making.

The Adverse Childhood Experience ("ACE") Questionnaire is designed to help determine whether a person has experienced "early adverse childhood experiences" that have been shown to cause physical and emotional problems in adults. Re-Resentencing Evaluation, 7.

The standard ACE test indicated significant trauma, but it "did not fully capture the level of parental neglect, lack of consistent supervision, and lack of stability in his living environment that Chaz experienced throughout his childhood. Mr. Bunch's engagement in maladaptive behaviors and illegal activities was modeled by several of his family members." *Id.* at 8. As a result, Dr. McConnell administered the Philadelphia Urban ACE Survey Questionnaire, which "reinforce[d] the fact that Mr. Bunch's childhood experiences likely had a negative impact on his neurodevelopment." *Id*.

Dr. McConnell specifically found that the following developmental markers were likely present for Chaz as a result of the significant and complex childhood trauma he experienced:

- Cognitive Development: Difficulties in attention regulation and executive functioning; problems focusing on and completing tasks; difficulty planning and anticipating; problems understanding responsibility; learning difficulties.

- Social Development: Problems with boundaries; distrust and suspiciousness of caregivers, peers, and other adults; interpersonal difficulties; difficulty attuning to other people's emotional states; difficulty with perspective taking.
- Emotional Development: Difficulty with emotional self-regulation, difficulty labeling and expressing feelings, difficulty communicating wishes and needs; poor modulation of impulses, engagement in self-destructive behavior; aggression towards others; pathological self-soothing behaviors; substance abuse; oppositional behavior; difficulty understanding and complying with rules.

The challenges that Dr. McConnell found Chaz faced are very similar to what the United States Supreme Court has identified as making youthful culpability constitutionally different than adult culpability. Specifically, that children have a " 'lack of maturity and an underdeveloped sense of responsibility' leading to recklessness, impulsivity, and heedless risk-taking." *Miller v. Alabama*, 567 U.S. 460, 471, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); quoting *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Also, that children "are more vulnerable to negative influences," and that negative traits in children are "less fixed" so their "actions are less likely to be 'evidence of irretrievabl[e] deprav[ity].' " *Id.*, citing *Roper* at 570.

Chaz shows that he has made progress.

Chaz reported that in prison, he has completed programing, including becoming a certified mason and obtaining his GED, as well as participating in anger management classes and Alcoholics Anonymous. Re-Sentencing Evaluation, 15.

Chaz's plans if granted a meaningful opportunity for release.

At the psychologist's request, Chaz described his plans if he is ever released. He said,

> I want to get my own garden, have more kids, build rapport with my daughter, and live life with my family. I want to open something up in commemoration of my mom. I want to buy her old house and renovate it. I will put computers and desks on the first floor for single moms and kids to use. I will call it "Jean's House." I want to move back to D.C. but also have a house here (referring to Youngstown) on my grandma's property.

Id.

The victim told the court of the trauma this offense caused her.

M.K., the victim, explained how the assault on her had traumatized her. T.p. 13–23 (Sept. 6, 2019). Among other hardships, her relationships have suffered, and she has had to live with an eating disorder. *Id.* at 14, 22. Chaz has never contested that she was brutally raped that night. He has never disputed her explanations of the hardships that resulted.

The trial court imposes a 49-year prison term.

The trial court's entire explanation of the role of youth in Chaz's sentence was:

> The court has also taken into consideration the fact that the defendant was a minor at the time of the offense, and considers his capacity for change, and that a minor has a diminished sentence (sic) of culpability.

Id. at 76.

The trial court recited the statutory findings for consecutive sentences:

> The court finds that consecutive sentences are necessary to protect the public from future crime, to punish the defendant, and that consecutive

> sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the defendant poses to the public. Court finds that at least two multiple offenses were committed as a part of a course of conduct, that the harm caused by two or more of these offenses has been so great and unusual that no single prison term for any of the offenses committed as part of the course of conduct would adequately reflect the seriousness of the offender's conduct. The court finds that based on the offender's history and criminal conduct, consecutive sentences are necessary to protect the public from future crimes

Id. at 80–81.

The trial court then imposed ten years each for one count of aggravated robbery, three counts of rape, three counts of complicity to rape, and one count of kidnapping. *Id.* at 78–79. Each count carried a three-year firearm specification, but the eight specifications were merged into three. The trial court ordered that the prison terms for the firearm specifications, aggravated robbery, and the three rape counts be served consecutively, and that all remaining sentences be served concurrently. The court also imposed a concurrent six-month sentence for a misdemeanor count of aggravated menacing. The total prison term was 49 years. Judgment Entry of Sentence (September 17, 2019).

After the court announced the sentences for each count, the court added:

> The court will also consider the defendant's opportunity to demonstrate he is worthy to re-enter society and lead a meaningful life at the appropriate time.

T.p. 79–80 (Sept. 6, 2019).

The trial court finds Chaz to be a sexual predator after the state presents factually incorrect information and Chaz presents unrebutted evidence that he is not likely to reoffend.

The court then held a sexual predator hearing. Chaz presented psychological evidence that he was not likely to reoffend. McConnell Letter (Mar. 7, 2018). The state presented no new evidence at the predator hearing, but incorrectly told the trial court that it had dropped a juvenile felonious assault case against Chaz because it could not find the victim. *Id.* at 8. In fact, the alleged victim in that case was in state custody facing felony charges while Chaz's felonious assault case was pending. Docket, *State v. Adams*, Mahoning CP No. 2000CR103.[6]

The state also alleged that due to a history of probation violations, Chaz posed a risk to reoffend. *Id.* at 83. But the PSI reveals that Chaz's three probation violations were for a traffic violation while on house arrest, "frequenting a drug house," and for talking back to a teacher—all when he was 14 years old. PSI, 12.

The trial court found Chaz to be a sexual predator. The court's entire explanation for the decision was, "Based on the sentencing just handed down by this court, the court finds the defendant shall register as a sexual predator pursuant to Ohio Revised Code 2950.04." T.p. 86 (Sept. 6, 2019); Apx. A-5.

[6] This court can take judicial notice of dockets from other cases. *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8.

An amended notice of appeal joining the amenability, postconviction, and sentencing issues.

Eleven days after the trial court journalized the sentence and predator finding Chaz filed an amended notice of appeal. Notice of Appeal (Oct. 1, 2020). The Seventh District granted his motion for leave to amend the notice. Judgment Entry (Oct. 30, 2019). After receiving supplemental briefing, the Seventh District affirmed the conviction and sentence. *State v. Bunch*, 7th Dist. Mahoning No. 18 MA 0022, 2021-Ohio-1244. This court accepted Chaz's discretionary appeal, *State v. Bunch*, 163 Ohio St.3d 1501, 2021-Ohio-2307, 170 N.E.3d 889.

ARGUMENT

Proposition of Law No. I: Trial courts should not deny a hearing on a postconviction petition based on a blanket rule that it is automatically a reasonable strategic decision to rely on cross-examination alone instead of consulting with and calling an expert witness.

I. Factual summary.

M.K. did not positively identify Chaz Bunch as one of her assailants until she saw a news report with his picture that identified him as one of her suspected assailants. The other evidence against Chaz consisted of the self-serving statements of those involved with the crime, a video showing him with those people at a gas station about half an hour after the attack, and his possession of an item one of the people at the gas station took from her. In a timely amended postconviction petition, Chaz presented an affidavit from Dr. Scott Gronlund, an eyewitness-identification expert who reviewed M.K.'s testimony at trial and at a suppression hearing, as well as the Seventh District's recitation of the facts in a 2015 opinion. He explained that given her initial uncertainty, her identification of Chaz is not reliable.

II. Key statutes.

A. R.C. 2953.21(D).

> Before granting a hearing on a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript.

B. R.C. 2953.21(F).

> Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues.

III. Standard of Review: When the trial court's findings are supported by competent, credible evidence, the standard of review is abuse of discretion. Applying the wrong legal standard is an abuse of discretion.

When a trial court's ruling on a postconviction petition is supported by competent and credible evidence, this court reviews the decision for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 49–51, citing *State v. Mitchell*, 53 Ohio App.3d 117, 119, 559 N.E.2d 1370 (1988); and *State v. Mullins*, Franklin App. No. 96APA01-32, 1996 Ohio App. LEXIS 2759, 1996 WL 362073, *3 (June 25, 1996). Applying the wrong legal standard is an abuse of discretion. *Thomas v. City of Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶ 15 (8th Dist.); *Rhoades v. Rhoades*, 11th Dist. Ashtabula No. 2013-A-0051, 2014-Ohio-1869, ¶ 14; *In re L.R.M.*, 89 Ohio App.3d 37, 2015-Ohio-4445, 42 N.E.3d 799, ¶ 16 (12th Dist.).

IV. Discussion.

A. Introduction.

The trial and appellate courts applied the wrong standard because they speculated that trial counsel had a "strategy" for not employing an eyewitness identification expert without considering whether the strategy was reasonable. Worse, they held that the failure to call an expert is always a strategic decision to rely on cross-examination only. Specifically, the trial court rejected Chaz's ineffective assistance

arguments, holding that trial counsel's reliance "on cross examination *rather than* an expert to challenge [M.K.] and Jamar Callier's identifications was a matter of trial strategy." (Emphasis added.) The Seventh District affirmed, noting that this court has held that "the failure to call an expert and instead rely on cross-examination [does] not constitute ineffective assistance of counsel." *State v. Bunch*, 7th Dist. Mahoning No. 18 MA 0022, 2021-Ohio-1244, ¶ 24, Apx. A-14, citing *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993); *State v. Thompson*, 33 Ohio St.3d 1, 9, 514 N.E.2d 407 (1987); and *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 97–99. But nothing in the record demonstrates that trial counsel made a choice not to rely on an expert or that such a strategy could have been reasonable.

B. The trial court did not and could not have found that trial counsel had a *reasonable* trial strategy to rely on mere cross-examination because the reliability of M.K.'s identification was the "core of the prosecution's case."

The trial court did not hold that the "strategy" it attributed to trial counsel was reasonable, and only *reasonable* strategic decisions are given deference when analyzed for ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 690–691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, the trial court points to no reasonable strategy that would have included challenging M.K.'s identification solely through cross-examination. In some criminal cases, like this one, "the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*, 571 U.S. 263, 273, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014), quoting

Harrington v. Richter, 562 U.S. 86, 106, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011), and citing *Strickland*. This is especially true where the "core of the prosecution's case" is at issue. *Hinton* at 273.

M.K.'s testimony and identification was at the "core of the prosecution's case" against Chaz. While the trial court is correct that a Dairy Mart video places Chaz in the car used to commit the offense, that was more than an hour after M.K. was attacked.

More importantly, M.K.'s later confidence in her initially tentative identification does not increase the chance that it was correct. To the contrary, as Dr. Gronlund explained, M.K.'s change in opinion renders the identification less reliable, not more:

> Research indicates that eyewitness confidence (the subjective probability that the person chosen is the perpetrator) is closely tied to eyewitness accuracy on a first, fair test of memory (Wixted, Mickes, Clark, Gronlund, & Roediger, 2015; see also Brewer & Wells, 2006; Wixted & Wells, 2017). This means that a high confidence ID on an initial test of memory is very likely to be accurate, and conversely, that a lower confidence ID (as in the present case) is likely to be inaccurate.

First Amended Postconviction Petition of Defendant Chaz Bunch (Feb. 22, 2017), Exhibit 1.

Here, Chaz's defense counsel repeatedly challenged M.K.'s identification of Chaz. T.p. 949–999. In his closing argument, Chaz's attorney conceded that M.K. had been brutally raped, and he argued, "If you believe that Chaz Bunch is the person who did it, then convict him." T.p. 1879, 1888. He also argued that the trauma M.K. suffered made her identification of Chaz less reliable by telling the jury in closing that "she could

be mistaken by the horrible brutality of what she had to endure that night." T.p. 1888. In fact, Chaz's attorney told the jury that misidentification was "the most important" reason for the jury to acquit Chaz. T.p. 1899. But because trial counsel did not have an expert, his opinions in closing argument were just lay opinion. He needed an expert to make his case.

There is no competent or credible evidence that trial counsel had a strategy not to employ an expert who could have explained to the jury exactly why M.K.'s memory was unreliable and that her confidence was evidence of mistake, not accuracy.

C. Chaz does not claim that trial counsel should have engaged an eyewitness identification expert to challenge his co-defendant's self-serving testimony.

Dr. Gronlund explained that suggestive identification procedures made M.K.'s sincere identification of Chaz, someone she had not seen before, unreliable because of a sincere but mistaken recollection. First Amended Postconviction Petition of Defendant Chaz Bunch (Feb. 22, 2017). Exhibit 1. In addressing Jamar Callier's self-serving testimony, the trial court held that Dr. Gronlund's statement didn't impeach Jamar's identification of Chaz because Jamar previously knew Chaz. Apx. A-8. But Chaz *never* claimed that Jamar's self-serving identification of Chaz was the result of a *mistake*. Instead, Chaz asserted that Jamar's testimony was unreliable because it was self-serving— Jamar's statements diminished his own role in the offense, and he received a favorable plea agreement in return for the statements. T.p. 1256.

D. The trial court used the wrong standard to analyze prejudice: Some competent and credible evidence supports Chaz's claim that his trial counsel's deficient performance prejudiced him.

As previously explained, to obtain an evidentiary hearing, Chaz need only present *some* competent and credible evidence that there is a *reasonable probability* of a different result had trial counsel been effective. *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, 123 N.E.3d 955, ¶ 264. But the trial court required him to show that the outcome of the trial *would have been* different with the additional evidence: "Thus, this court finds that an eyewitness identification expert *would not have altered* the trial's outcome, because [M.K.'s] identification was corroborated by Jamar Callier's testimony and his identification of Defendant Chaz Bunch." (Emphasis added.) Findings of Fact and Conclusions of Law/Judgment Entry, Apx. A-43.

Further, the trial court ignored the fact that Jamar's self-serving testimony was given in return for a very favorable plea agreement. T.p. 1256. As this court has explained, such an agreement allows counsel to "effectively argue to the jury" that the witness has an "incentive not to tell the truth but to please the prosecutor. *State v. Cornwell*, 86 Ohio St.3d 560, 571, 715 N.E.2d 1144 (1999), citing *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1146–1147 (C.A.2, 1978). *See also People v. Manning*, 434 Mich. 1, 18, 450 N.W.2d 534 (1990).

Dr. Gronlund's affidavit, the credibility of which the trial court did not question (except for stating that Dr. Gronlund did not mention Jamar's self-serving statement)

coupled with the other evidence in the case, is competent, credible evidence supporting Chaz's claim. The trial court abused its discretion by failing to hold a hearing.

V. Conclusion

Trial counsel's performance was deficient for failing to obtain an eyewitness identification expert, and that decision prejudiced Chaz. Chaz asks this court to reverse the trial court decision and to remand this case for an evidentiary hearing at which the state can cross examine the expert and at which Chaz would have the ability to compel testimony from his trial attorney.

Proposition of Law No. II: A child cannot be transferred to adult court without a finding that they are not amenable to treatment in juvenile court.

On December 22, 2016, this court determined that Ohio's mandatory transfer law was unconstitutional. *See State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 31 ("*Aalim I*"). On January 3, 2017, the government asked this court to reconsider its decision. And, on May 25, 2017, a newly comprised version of this court granted the request, vacated *Aalim I*, and issued a new opinion holding that the mandatory transfer law was constitutional because it provided a procedure. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 4 ("*Aalim II*").

I. This case is about requiring an amenability hearing before transfer; it's not about ending bindover.

As was true in *Aalim*, the question posed in this case is whether mandatory transfer is unconstitutional. It simply asks whether a juvenile court judge must make

the determination about whether a youth can benefit from the resources and rehabilitative efforts of the juvenile court system before transfer. This case is not about ending transfer altogether. Ohio prosecutors retain full discretion to seek to transfer to adult criminal court any youth age 14 or older, who has been charged with a felony-level offense.

II. Summary of arguments presented in *Aalim*: mandatory transfer offends children's due process rights because it forbids an individualized assessment.

"Although Ohio's mandatory-transfer statute provides some process before depriving a child offender of access to the juvenile-justice system, that process is inadequate under the applicable balancing test established by the United States Supreme Court." *Aalim II*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 75 (O'Connor, C.J., dissenting).

A. Mandatory transfer prohibits an individualized determination, but discretionary transfer requires it.

Ohio law recognizes that an amenability determination is a "critical stage of the juvenile proceeding" which is a "vital safeguard," but denies this safeguard for 16- or 17-year-old children, like Chaz. *See State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 12, 17. Mandatory transfer renders amenability irrelevant, and prohibits any judicial inquiry or determination regarding a particular child in the circumstances of an individual case.

In this case, the juvenile court judge was precluded from considering any mitigating facts or circumstances about Chaz's family, history, education, mental health, adolescent development, or youth.[7]

Conversely, Ohio's discretionary transfer law *requires* consideration of those circumstances. R.C. 2152.12(C), (D), (E). At amenability, after investigation, the juvenile court judge is required to consider the following factors in determining the child's suitability for juvenile court treatment:

- the type and amount of harm suffered by the victim;
- the child's relationship with the victim;
- whether the victim induced, facilitated, or provoked the act;
- whether the child's participation was gang related;
- whether the child was the principal actor, or acted under the influence or coercion of another person;
- whether or not the child had a firearm during the act;
- whether the child had "reasonable cause to believe that harm of that nature would occur";
- the child's history with the juvenile court system;
- results of past rehabilitation;
- whether or not the child is mature enough for transfer;
- whether the child has a mental illness or intellectual disability; and
- the amount of time available to rehabilitate the child within the juvenile court system.

Compare R.C. 2152.12(A) *with* R.C. 2152.12(C), (D), (E).

[7] The juvenile court judgment entry refers to mandatory transfer as delineated in R.C. 2151.26 and Juv.R. 30. "In 2000, R.C. 2151.26 was amended and recodified as R.C. 2152.12." *Aalim II* at ¶ 2, fn. 1.

After the probable cause standard of "mere suspicion of guilt" is met, the mandatory transfer statute presumes that the 16- or 17-year-old child is as culpable as an adult who commits the same offense. It presumes that there are no juvenile court resources available for the youth. It presumes that the child is not amenable. The juvenile court judge has no choice but to transfer the child's case to criminal court for prosecution as an adult. R.C. 2152.12(A).

B. The mandatory transfer law violates due process because it prohibits an individualized determination about the child's amenability to rehabilitation in the juvenile system.

> The right to due process of law is not limited to adults facing a deprivation of liberty. Rather, it is an essential and eternal promise of the Constitution to all Americans, including our youth. Although a child is too young to vote for their legislators and, in Ohio, their judges, those legislators and judges cannot ignore the constitutional protections safeguarding a child's liberty.

Aalim II, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 56 (O'Connor, C.J., dissenting). The mandatory transfer law falls woefully short of due process protections guaranteed to children. The law is fundamentally unfair. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (determining that the applicable due process standard in juvenile delinquency proceedings is fundamental fairness).

1. In *Kent v. United States*, the U.S. Supreme Court recognized that a transfer decision is "critically important."

Over five decades ago, in overturning a 16-year-old child's transfer to adult court, the U.S. Supreme Court held that "there is no place in our system of law for

reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). To ensure that a child's interest in the juvenile court's protection and rehabilitative opportunities was protected, "full investigation" necessarily meant that the child be given a hearing, access to reports and files, and a statement of reasons for transfer by the juvenile court judge. *Id.* at 557. On remand, factors related to the offense, the child's history, and rehabilitative opportunities in juvenile court were to be considered by the court in the transfer decision. *Id.* at 566–567. Commensurate with the purposes of the juvenile court system, the court noted that "[i]t is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases." *Id.* at 560–561, quoting *Harling v. United States*, 295 F.2d 161, 165 (App.D.C. 1961).

2. Individual consideration is the hallmark of treating children differently than adults.

Some 45 years later, in *Miller v. Alabama*, the court held that "a judge or jury must have the opportunity to consider mitigating circumstances [of youth] before imposing the harshest possible penalty for juveniles." *Miller v. Alabama*, 567 U.S. 460, 489, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). "*Miller's* central intuition" is that "children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016) (creating a "substantive rule of constitutional law"); *see*

also State v. Moore, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 42 ("The most important attribute of the juvenile offender is the potential for change."). The mitigating factors to be considered include:

- "chronological age and its hallmark features," including immaturity, impetuosity, and failure to appreciate risks and consequences;
- "family and home environment";
- circumstances of the offense;
- incompetencies associated with youth;
- reduced culpability due to age; and
- capacity for change.

See Miller at 479. The waiver factors set forth in *Kent* and in Ohio's discretionary scheme mirror many of these factors. *Compare Kent*, 383 U.S. at 566–567, 86 S.Ct. 1045, 16 L.Ed.2d 84 and R.C. 2152.12(C), (D), (E) *with Miller* at 479.

But, Ohio's mandatory transfer law prohibits consideration of mitigating facts. It presumes that the child is not amenable to treatment. It assumes that a 16- or 17-year-old child is as culpable as and is deserving of the same punishment as an adult.

Contrary to the juvenile court's purpose, the scheme makes adult criminal court treatment the rule, and not the exception for 16- and 17-year-old children who are alleged to have committed a category two offense, such as rape. *See* R.C. 2152.02(BB) (defining "category two"), and *Aalim II*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 88, 100 (O'Connor, C.J., dissenting); *contra J.D.B. v. North Carolina*, 564 U.S. 261, 274, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) ("'[O]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults.").

Unlike the court's recognition of the "critically important" stage of the transfer proceedings, Ohio's mandatory transfer provision prohibits the juvenile court judge from considering individual facts about the child, including circumstances about his background, development, and most importantly, his prospects for rehabilitation. *See Kent*, 383 U.S. at 558, 566–567, 86 S.Ct. 1045, 16 L.Ed.2d 84. What remains is a "superficial hearing" where the child has no opportunity to speak about his youthfulness. *Aalim II* at ¶ 104 (O'Connor, C.J., dissenting). Because mandatory transfer forbids the juvenile court from conducting a meaningful review of all the individualized information necessary to make a finding of such tremendous consequence, it is fundamentally unfair and cannot withstand constitutional scrutiny.

3. Under *Mathews v. Eldridge*, the deprivation of an individualized determination is a procedural due process violation.

In retreating from *Aalim I*, this court determined that the legislature can and has set the procedure needed to effect mandatory transfer, and the procedure was followed. *Aalim II* at ¶ 26. But, the majority did not undertake a procedural due process analysis or cite to *Mathews* in its opinion. "Because the requirements of due process are 'flexible and call for such procedural protections as the particular situation demands,'" "*Mathews* requires consideration of three distinct factors": 1) "the private interest that will be affected by the official action," 2) "the risk of an erroneous deprivation," and 3)

the state's interest. *Aalim II* at ¶ 81–82 (O'Connor, C.J., dissenting), quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

a) Children have an enormous interest in their juvenile status.

First, the U.S. Supreme Court has recognized that transfer from juvenile to adult criminal court "is a matter of great significance to the juvenile." *Breed v. Jones*, 421 U.S. 519, 535, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). The transfer decision not only forever forecloses the child to juvenile court rehabilitation, but it also subjects the child to adult penalties and sanctions, lifelong collateral consequences, and physical and emotional harm. *See Aalim II*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 84–87 (O'Connor, C.J., dissenting).

Mathews does not require that only fundamental rights be considered; rather, a state's procedure can create the private interest at stake. *Id.* at ¶ 76–90. In Ohio, "[t]he General Assembly first created a discretionary-transfer scheme, then later created a mandatory-transfer scheme as the procedural mechanisms by which to deprive a child of his or her juvenile status and, as a result, access to the juvenile-justice system." *Id.* at ¶ 79.

Because he was a child, Chaz had an enormous interest in his juvenile status and access to the juvenile system. And, he didn't have any opportunity to speak to that interest in mandatory transfer. At the hearing, the juvenile court judge was only

permitted to hear his numerical age and limited evidence regarding the purported offenses. Judgment Entry, (Oct. 18, 2001), Apx. A-34. R.C. 2152.10(A), 2152.12(A).

b) Under mandatory transfer, there is a high risk of erroneous deprivation of that juvenile status.

Secondly, although the majority opinion in *Aalim II* focused on the due process rights guaranteed at the probable cause hearing, those rights have not been born out in practice. *Compare Aalim II*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 27 *with State v. Fuell*, Case No. 2021-0794 (accepted for review) ("What necessitates this court's review now is that these decisions rest on deeply flawed legal premises that: (1) cross examination isn't a due process right; (2) transfer does *not* implicate a child's liberty interests; and that (3) these hearings are mere perfunctory exercises no different from a 'prelim' in adult court."). But, even if those rights were adhered to, the probable cause hearing alone is inadequate.

Ohio's mandatory transfer scheme prohibits a juvenile court judge from considering any mitigating factors about the child's youth, or home and family circumstances. R.C. 2152.10(A), 2152.12(A). A court "misses too much" when it is forced to treat every 16- and 17-year-old child the same as each other and the same as an adult, without an individualized determination. *See Miller*, 567 U.S. at 478, 132 S.Ct. 2455, 183 L.Ed.2d 407.

This mechanical procedure is in stark contrast to the U.S. Supreme Court and this court's "recent teachings regarding juveniles." *Aalim II*, 150 Ohio St.3d 489, 2017-Ohio-

2956, 83 N.E.3d 883, at ¶ 61 (O'Connor, C.J., dissenting) (referring to *Miller* v. *Alabama* and *J.D.B. v. North Carolina*); *see also State v. Patrick*, *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, ¶ 37 ("It is *because* a court must consider youth and its attendant circumstances in its individualized sentencing decision that the court *may* impose a sentence of life without the possibility of parole * * *."). Without an amenability hearing, "there is significant risk of turning a delinquent [child] capable of rehabilitation into a lifelong criminal. Thus, the risk of erroneous deprivation of the child's status as a juvenile offender is substantial." *Aalim II* at ¶ 89 (O'Connor, C.J., dissenting).

c) The government's interest isn't overly burdened by removing mandatory transfer; Ohio's prosecutors retain full discretion to seek to transfer any child age 14 or older through the discretionary procedure.

Finally, the addition of the mandatory scheme to Ohio's transfer process was not because of costs or procedural hurdles, but rather to address a "misperceived" increase in juvenile rates of offending. *Aalim II* at ¶ 86–71 (O'Connor, C.J., dissenting). In fact, the "superpredator myth" responsible for the change has been widely discredited and denounced. Carroll Bogert & LynNell Hancock, *"Analysis: How the media created a 'superpredator' myth that harmed a generation of Black youth*," ABC News (Nov. 20, 2020), https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101; Equal Justice Initiative, *"The*

superpredator myth, 25 years later" (Apr. 7, 2014), https://eji.org/news/superpredator-myth-20-years-later/.

Absent mandatory transfer, the state retains full authority to seek to transfer any child age 14 or older through the discretionary procedure. R.C. 2152.10(B), 2152.12(B). In addition to the probable cause hearing, the discretionary process requires an investigation into amenability, a hearing, and the juvenile court judge's consideration of delineated mitigating factors. R.C. 2152.12(B). The juvenile court judge is familiar with rehabilitation and weighing of factors, and has an expertise in understanding the types of programming and treatment options available for youth under its care. *See* R.C. 2152.19.

Affording judicial discretion in all transfer cases is not overly burdensome or costly for the state. In fact, the state is better served when only truly non-amenable children are transferred to the adult system after an individualized determination. Any burdens on the government are slight and pale in comparison to the child's interest in being treated as a juvenile.

Due process requires a meaningful opportunity to be heard. *Aalim II*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 108 (O'Connor, C.J., dissenting), citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). A transfer hearing without the ability to consider a child's youth or prospects for rehabilitation is not meaningful—it violates a child's right to due process and is unconstitutional. *Id.*

III. This court should overrule *Aalim II* and return to its decision in *Aalim I*.

In *Aalim I*, after declaring mandatory transfer unconstitutional, this court severed the mandatory transfer portion of the statute as follows:

> Clearly, the mandatory-transfer provisions and discretionary-transfer provisions are capable of separation, can be read independently, and can stand independently. Furthermore, it is possible to carry out transfers of juveniles to adult court once the unconstitutional provisions are stricken. And no words or terms need to be inserted in the discretionary-transfer provisions in order to give effect to them. Therefore, having held that the mandatory-transfer provisions of R.C. 2152.10(A) and 2152.12(A) are unconstitutional, we sever those provisions. After the severance, transfers of juveniles previously subject to mandatory transfer may occur pursuant to R.C. 2152.10(B) and 2152.12(B).

See Aalim I, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, at ¶ 29.

Matthew Aalim's case was reversed and remanded to the juvenile court for an amenability hearing. *Id.* at ¶ 32. In other decisions from this court, errors in the transfer process have resulted in reversals as well. *See State v. Wilson*, 73 Ohio St.3d 40, 46, 652 N.E.2d 196 (1995) (affirming the judgment of the court of appeals which vacated the criminal court judgment of conviction); *Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 617–618, 757 N.E.2d 1153 (2001) ("While Johnson may indeed be subject to a discretionary bindover in the future, * * * she is entitled to release from prison now because her sentencing court patently and unambiguously lacked subject-matter jurisdiction to try, convict, and sentence her for the charged offenses.").

The reasoning in these decisions is that the error meant that the transfer of jurisdiction from juvenile to adult criminal court wasn't properly effectuated. *Wilson* at

45–46; *Timmerman-Cooper* at 617–618. Therefore, in one route, this court could sever the mandatory transfer statute, vacate Chaz's conviction, and send it back to the juvenile court for an amenability hearing.

However, in *Kent*, in fashioning the remedy for the violation of due process rights, the U.S. Supreme Court held:

> Because the juvenile was then over 21 years old and no longer subject to juvenile court jurisdiction, the Court remanded the case to the district court for a hearing de novo on the waiver issue. It directed that if waiver was inappropriate, the convictions should be vacated, but if waiver was found to be proper, the district court should enter an appropriate judgment.

Kent, 383 U.S. at 564–565, 86 S.Ct. 1045, 16 L.Ed.2d 84. In that case, the juvenile court's jurisdiction ended at age 21, and the court limited the relief it could provide.

Ohio law has a unique carve out in R.C. 2152.121. "Reverse waiver" or "reverse bindover" aims to ensure that the juvenile court is afforded full discretion to determine which children will benefit from rehabilitative measures, even if it wasn't initially afforded that discretion. R.C. 2152.121(B)(3)(b); *see also State v. D.B.*, 150 Ohio St.3d 452, 2017-Ohio-6952, 82 N.E.3d 1162, ¶ 12–13.

Therefore, in modeling a remedy similar to the one set forth in *Kent*, this court could also sever the mandatory transfer statute, and apply R.C. 2152.121, which would remand Chaz's case to the juvenile court for an amenability hearing. If the juvenile court determines that it would have retained jurisdiction but for the mandatory transfer

statute, the conviction must be vacated. *Kent* at 564-565; R.C. 2152.121(B)(3)(b). If not, the conviction remains intact.

IV. Conclusion

Individualized determinations about children and rehabilitation are imperative. *See State v. Hanning*, 89 Ohio St.3d 86, 88, 728 N.E.2d 1059 (2000) ("Since its origin, the juvenile justice system has emphasized individual assessment * * *."); *Miller*, 567 U.S. at 461, 489, 132 S.Ct. 2455, 183 L.Ed.2d 407 (noting that none of what the court has said "about children is crime-specific"). A child has an extraordinary interest in a meaningful process whereby a juvenile court judge, with expertise in juvenile justice research and available treatment and programming, has the opportunity to determine whether the child should be subject to adult sanctions or juvenile rehabilitation. For the foregoing reasons, this court should overrule its decision in *Aalim II*, and return to its decision in *Aalim I*.

Proposition of Law No. III: When making a sexual predator finding, it is reversible error for the trial court to fail to state that it is holding the hearing pursuant to R.C. 2950.09(B).

I. Trial courts must specify that they are making a "sexual predator" determination pursuant to R.C. 2950.09(B).

Under R.C. 2950.09(B)(4), if a court finds a person to be a "sexual predator," the court "shall specify that the determination was pursuant to division (B) of this section."[8] As the Eighth and Ninth Appellate Districts have correctly found, failure to make this finding is grounds for reversing the sexual predator finding. *State v. Hardy*, 9th Dist. Summit No. 21788, 2004-Ohio-2242, ¶ 5–8, followed by *State v. Edwards*, 8th Dist. Cuyahoga No. 84660, 2005-Ohio-2441, ¶ 2.

It is not sufficient for a trial court to say only that it "considered the factors in R.C. 2950.09(B)." Opinion at ¶ 79, quoting Judgment Entry of Sentence, 4, Apx. A-47. The "factors" in R.C. 2950.09(B) are listed only in R.C. 2950.09(B)(3), but R.C. 2950.09(B)(4) requires that the trial court state that it held the hearing according to the "Division (B)," which requires more than merely considering the factors in R.C. 2950.09(B)(3). Division (B)(1) puts limits on when the hearing can occur. Division (B)(2) requires specific notice and requires that opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert

[8] The version of Ohio's sex-offender-registration statute that applies to this case is 2950.09, 2006 Am.Sub.S.B. No. 260, Apx. A-52. *See Lingle v. State*, 164 Ohio St.3d 340, 2020-Ohio-6788, 172 N.E.3d 977, ¶ 9.

witnesses regarding the determination as to whether" the person meets the requirements to be labeled a "predator." Division (B)(4) sets forth the burden of proof.

II. The trial court in this case did not specify that it made its determination pursuant to R.C. 2950.09(B).

As in *Hardy*, the trial court in Chaz's case failed to specify either at the predator hearing or in the entry declaring him to be a predator that the finding was pursuant to R.C. 2950.09(B). And even though Chaz need not show prejudice, this error is particularly important because the trial court gave no explanation for its decision, so its failure to comply with this minimal requirement should cast doubt on whether it correctly followed the statute. As a result, this court should vacate Chaz's sexual predator finding and remand this case for a new hearing on whether he is a sexual predator.

III. The error was not harmless.

Contrary to the opinion of the court of appeals, the error was not harmless. The unrebutted expert testimony from psychologist Dr. Allen McConnell was that Chaz presented a low risk of recidivism and therefore should not be labeled a "sexual predator." The trial court never found Dr. McConnell's statement to lack credibility, and the state presented no contrary evidence.

As Dr. McConnell explained, "juveniles with only one sexual offense have a low rate of recidivism in adulthood." McConnell Ltr. (Mar. 7, 2018), 2. Specifically, Dr. McConnell also found that even considering the facts of the offense in this case, and

"with a reasonable degree of psychological certainty, that the classification that best matches Mr. Bunch's presentation is a 'Sexually Oriented Offender.'" *Id.* at 1. Chaz was in the lowest level of risk of re-offending. Dr. McConnell had personally examined Chaz for three and a half hours. Re-Sentencing Evaluation at 2. The evaluation included an extensive record review, and testing related to trauma and adverse childhood experiences, including a test designed specifically for children like Chaz who grew up in difficult urban environments. *Id.* at 2–8.

The state argued that Chaz had a prior history of violence because he was "accused of a felonious assault even though it was dismissed when the victim could not be found." T.p. 83. But that argument was factually incorrect. The PSI reveals that the alleged victim was Dujuan Adams, who was nineteen years old at the time.[9] (Chaz was fifteen at the time.) PSI, 13. And Dujuan Adams was then either in custody or regularly appearing at court, facing charges of attempted murder. As the Seventh District noted in his case, Mr. Adams's offense of attempted murder occurred on January 8, 2000. Further, the Docket of Mr. Adams' case shows that he did not post a bond until June 2000, the month after the state dismissed charges against Chaz. PSI, 13; *State v. Adams*, Mahoning County CP Case No. 2000CR103. As a result, the state was simply wrong that

[9] https://appgateway.drc.ohio.gov/OffenderSearch/Search/Details/A395935 (visited Sept. 24, 2021. This court has cited to the Offender Search of the Ohio Department of Rehabilitation and Correction to establish the ages of people in prison. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 2.

Chaz's juvenile felonious assault case was dismissed because the alleged victim couldn't be found.

Further, the alleged activities that the state referred to were not relevant factors for the trial court to consider. A trial court must consider offenses to which the defendant as a child has been adjudicated of, but no rule permits a trial court to consider hearsay reports of charges that did not result in adjudications. R.C. 2950.09(B)(3)(f) (2006).

The state also cited Chaz's unspecified "probation violations" as risk factors, but the only three probation violations listed in the PSI involved talking back with vulgarity to a teacher, going to a "drug house," and "receiving a traffic summons." PSI, 12.

It's true that the facts as described by M.K. demonstrate the cruelty described in R.C. 2950.09(B)(3)(i), but the rest of the factors either do not apply or support a finding that Chaz does not pose a risk to re-offend:

- R.C. 2950.09(B)(3)(a), the child's age: Chaz was 16 at the time;
- R.C. 2950.09(B)(3)(b), prior delinquency record: Chaz has not even allegedly committed another sex offense, and the closest thing to a violent adjudication on his record was resisting arrest when he was 13 years old. PSI at 11.
- R.C. 2950.09(B)(3)(c), the age of the victim: The victim was an adult.
- R.C. 2950.09(B)(3)(d), number of victims: There is no evidence that Chaz abused anyone except the victim in this case.
- R.C. 2950.09(B)(3)(e), use of alcohol: The assailants did not use alcohol or drugs to impair the victim.
- R.C. 2950.09(B)(3)(f), whether previous dispositional orders were completed: Nothing in the record indicates that Chaz was still under a disposition of any other offense when this crime occurred.

- R.C. 2950.09(B)(3)(g), mental illness: There is no evidence that Chaz suffers from a mental illness that would make recidivism more likely.
- R.C. 2950.09(B)(3)(h), nature of conduct/pattern of conduct: There is no evidence Chaz was involved in any other sexual assaults.
- R.C. 2950.09(B)(3)(i), any other behavior: Other than this offense, the state presented no evidence of any behavior by Chaz that would indicate that he is a danger to reoffend as a sex offender.

The General Assembly requires trial courts to make a very specific finding when sentencing a person to a lifetime of registration. The trial court here did not make that finding. This court should vacate the sexual predator finding and remand this case for a new hearing.

Proposition of Law No. IV:

The trial court erred when it sentenced Chaz Bunch because the findings supporting consecutive sentences are clearly and convincingly not supported by the record and the sentence is contrary to law.

The trial court read the rote findings in R.C. 2929.14(C) to explain its consecutive sentences. But even where a trial court makes those findings, a defendant may still argue on appeal that the record clearly and convincingly does not support the findings and that the consecutive sentences are contrary to law. *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169, ¶ 19–20, applying R.C. 2953.08(G)(2)(a).

I. The record clearly and convincingly does not support the trial court's finding relating to Chaz's alleged risk to reoffend.

Under R.C. 2929.14(E)(4), a trial court can only impose consecutive sentences if they are "*necessary to protect the public from future crime* or to punish the offender and

that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the *danger the offender poses to the public* * * *" (Emphasis added.) Here, as Dr. McConnell's unrebutted statements explain, these offenses occurred when Chaz was a child, and do not show that he will be dangerous as an adult. McConnell Letter (Mar. 7, 2018).

The facts of the crime in this case are horrible, but a finding that consecutive sentences are necessary to sufficiently punish a person is only one of several that a trial court must find before imposing consecutive sentences. Here, the state presented no evidence other than the offense itself. As explained in Proposition of Law No. III, the only probation violations Chaz had were for non-violent infractions—a traffic violation, going to a "drug house," and talking back to a teacher. PSI, 12. And the prosecuting attorney knew exactly where to find the alleged victim in the felonious assault they suspected Chaz of committing because that office was prosecuting the alleged victim for a separate violation. *See supra,* 36–37.

The record in this case clearly and convincingly does not support the trial court's finding that consecutive sentences are needed to protect the public based on an offense that happened 18 years earlier. The same is true for the finding that the sentence is not disproportionate to the danger Chaz poses to the public.

II. The trial court's findings related to Chaz's youth are contrary to law and clearly and convincingly not supported by the record.

At the sentencing hearing, the trial court issued only a brief rote finding about the role of youth:

> The court has also taken into consideration the fact that the defendant was a minor at the time of the offense, and considers his capacity for change, and that a minor has a diminished sentence of culpability.

T.p. 76 (Sept. 6, 2019). The trial court's judgment entry contains no findings related to youth. Judgment Entry of Resentence (Sep. 27, 2019), Apx. A-44.

As this court recently explained, the "United States Supreme Court 'has repeatedly noted to us that minors are less mature and responsible than adults, that they are lacking in experience, perspective, and judgment, and that they are more vulnerable and susceptible to the pressures of peers than are adults.' " *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, ¶ 27, quoting *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 33 (O'Connor, C.J., concurring), citing *J.D.B. v. North Carolina*, 564 U.S. 261, 273–276, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), applying the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. In addition, this court explained that "[w]e also know that the characteristics of youth include diminished culpability and heightened capacity for change." *Patrick* at ¶ 39, *see also Graham v. Florida*, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (noting the "capacity for change" of some convicted of an offense committed as a child).

In *Patrick*, this court reversed a sentence because this court could not determine "from the record whether, and if so, how, the trial court considered … youth" because the trial court failed to articulate any such consideration in the sentencing record. *Id.* at ¶ 48. This court can determine *whether* the trial court considered youth as a mitigating factor, but because the trial court's statement is as brief as it is rote, this court cannot determine *how* the trial court did so.

As a result, the record clearly and convincingly does not support the findings related to Chaz's risk to re-offend and his youth, those findings are contrary to law, and this court should remand the case for a new sentencing hearing. R.C. 2953.08(G)(2)(a) and (b).

CONCLUSION

This court should reverse the decision of the court of appeals and remand this case for an amenability hearing in juvenile court, a hearing on Chaz's postconviction petition, and, if needed, a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Assistant Mahoning County Prosecuting Attorney Ralph Rivera, rrivera@mahoningcountyoh.gov, on this 28th day of September, 2021.

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