No. 2021-0794

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE CLERMONT COUNTY COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
CASE NO. CA2020-02-008

STATE OF OHIO,
Plaintiff-Appellee,

v.

AUSTIN M. FUELL
Defendant-Appellant.

MERIT BRIEF OF DEFENDANT-APPELLANT, AUSTIN M. FUELL

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STATEMENT OF THE CASE

This matter comes to this Court from a juvenile-bindover appeal, taken from a murder conviction. The underlying facts involved an alleged drug deal gone bad, ending, one day later, in a fatal shoot out. (6.12.19 Complaint). Regarding the matter as a "theoretical who done it," the state charged then 17-year-old Austin Fuell alleging: "[t]he listed suspect along with an accomplice, responded to the victim's residence with the intention of committing armed robbery. During the commission of this robbery offense, the suspect and or his accomplice exchanged gunfire with the victim, resulting in his death." (6.12.19 Complaint). The state moved for mandatory transfer and an evidentiary hearing was held. (10.4.19 T.pp.1-159). The juvenile court transferred the case for criminal prosecution. (19.4.19 Transfer Entry). Austin was eventually convicted by plea of murder and sentenced to a mandatory term of 15-years-to-life in adult prison under R.C. 2929.02(B). (2.27.20 Entry). With the mandatory sentence, no mitigation was considered.

Austin appealed. In pertinent part, the question there was whether he was deprived of his right to due process and fundamental fairness when the juvenile court admitted unauthenticated cellphone and cell-tower records over defense counsel's objection, and in violation of its own bar against hearsay. (10.13.20 Merit Brief; *see also* 10.4.19 T.pp.59, 137-139). Based on this Court's decision in *State v. Patrick*, *supra*, Austin also asserted that his mandatory 15-to-life sentence was unconstitutional, since his youth could not be considered as mitigating by the judge at sentencing. The court rejected both claims, affirming the bindover and subsequent lifetime sentence. *Opinion* at ¶ 38, 76. This appeal follows.

STATEMENT OF THE FACTS

I. The proceedings giving rise to the appeal.

A. Despite the juvenile court's own ruling that hearsay is not admissible, testimonial cellphone and cell-tower records are admitted—to prove knowledge and location—over defense counsel's repeated objections.

Between two alleged assailants, prosecutors could not pinpoint the shooter. It instead argued: "I'll highlight * * * participation here because under Ohio law, whether he's the principal act or accomplice here, it's of no consequence. Whether it was Mr. [Bryson] Michaelis or Mr. Fuell who actually fired the deadly, deadly shot is of no consequence." (10.4.19 T.p.142). The question for the juvenile court then, was whether the state could provide sufficient credible evidence that Austin was in the home in the first place.

1. Out of court statements and reports are admitted over objection.

The state's location evidence consisted of two sets of cellphone records—first, supposed cell-tower triangulation data and reports produced by the Bureau of Criminal Investigation ("BCI"). (Exhibit 11). And second, printouts of supposed text messages taken from a third party's cell phone, a guy named Kevin Baird. (Exhibit 7).

The state's theory was that the cell-tower report showed a phone pinging in the vicinity of the crime scene around the time of the robbery and gun fight. (10.4.19 T.p.64). The report lists a number which it assigns as belonging to Austin Fuell. (Exhibit 11). The text message photos were then meant to show that Austin knew the address of the victim's girlfriend, Payge Lacey who later averred that the assailants' faces were covered, but she was certain the shooter was Austin based on the guy's eyes and a demand for $375, which was stolen by her boyfriend the day before. (10.4.19 T.pp.57, 115).

The state repeats this theory even now: "Detective [Dan] Tobias sent a search warrant and subpoena to Sprint for phone records. These records, which included cell tower location data, were analyzed by BCI and the report was sent to Detective Tobias. The cell tower data showed Fuell in the area of the murder around the time Ketring was killed and shows travel across the greater Cincinnati area, ending around 4:10 am in an area near Fuell's residence." (State's Memo in Opposition, p. 6).

The problem was the state did not call as a witness anyone with any personal knowledge of either set of cell records. It did not produce the BCI analyst who supposedly culled the cell-tower triangulation data and produced the forensic report. It did not produce Baird, who was supposed to be the recipient of messages the state claimed were sent from Austin Fuell's phone. And even more troubling, it did not produce any records custodians from any cellphone providers either.

Instead, it relied on suggestion and hearsay presented through the surrogate testimony of the detective, Dan Tobias, to admit the records. Detective Tobias claimed he uncovered Austin's cellphone number from a day-old store receipt (not submitted as evidence) found in a friend's car that was occupied by two other people, whom he also interviewed. (10.4.19 T.pp.78-79). He also admitted, however, that when he subpoenaed all records from Sprint in relation to that cell number, Sprint could not identify the owner of the phone. (10.4.19 T.pp.78-79).

Counsel:	Okay, let's talk about the cell phone for a minute. You said that your BCI report relates to the cell phone of Austin Fuell, correct?
Detective:	Correct.
Counsel:	What cell phone number are we talking about?

Detective: 47…I'm sorry, 513-479-0546.

Counsel: And were you able to determine who that telephone is registered to?

Detective: I issued a search warrant in the subpoena for all of that information and was provided any and all information that Sprint had in reference to that cell phone.

Counsel: Okay, so was Sprint able to identify for you the owner of that phone?

Detective: No, sir.

(10.4.19 T.pp.78-79). And again:

Counsel: But in the end Sprint couldn't identify anybody in the world that phone belonged to?

Detective: I did not, I, I…I received Austin Fuell's search warrant back from Sprint and it did not give me subscriber information.

(10.4.19 T.p.80).

Tobias did not conduct any investigation into who might have purchased a phone associated with that number or who was being billed for it. (*Id.*).

Accordingly, defense counsel objected to the admission of both the cell-tower records collected from BCI, and the text message photographs, asserting that the proper authentication was not made, that the state had not produced the right person to identify the documents, that Sprint was unable to tell the detective whose cell phone it was, and that the contents of the exhibits would be hearsay. (10.4.19 T.pp.59, 61, 137-139). The juvenile court admitted the records into evidence over counsel's objection.

2. The adult co-defendant's out of court admissions are excluded because the court says hearsay is not admissible.

At the same time, the court excluded any question about the adult co-defendant, Bryson Michaelis's admissions to police. The reason this was important was because there was only one shooter. (10.4.19 T.p.85, 97). Regardless, the court retorted: "I have not permitted hearsay to be admitted in my bindover proceedings." (10.4.19 T.p.96).

> Counsel: Now, through your investigation, did anybody identify any statement that Bryson Michaelis made?
>
> Detective: Yes.
>
> Counsel: And specifically *did Bryson Michaelis either brag or if it's not categorized as brag, state that he fired the weapon in that residence?*
>
> Prosecutor: Objection.
>
> Court: Basis for the objection?
>
> Prosecutor: It's hearsay.
>
> Court: I'll sustain the objection.

(Emphasis added.) (10.4.19 T.p.96).

Without success, counsel reminded the court that it had just admitted hearsay documents over counsel's own objection. (*Id.*).

3. "Toolmark analysis" is offered too, without a second thought.

In addition to the cell-records, the government relied on a ballistics report and testimony from a BCI firearms analyst Matthew White. (Exhibit 13a). White testified that he was initially given "two fired bullets. Two fired 9 mm Luger cartridge cases [and] four firearms," one of which was found with a recent purchase-receipt in Austin's home.

(10.4.19 T.p.18). White said he conducted "toolmark analyses" and concluded that the two bullets and fired cartridge cases were, not surprisingly, fired from the same gun.

But, none of the firearms submitted to White were themselves a match. (10.4.19 T.p.21). White testified that he "excluded all of the firearms from the fired cartridge cases and fired bullets." Then, three months later, a single, detached, 9 mm barrel was given to White for further testing. (10.4.19 T.pp.22-24).

Tobias would later allege that the barrel was found in the glovebox of Austin's grandmother's car a day after the shooting. (10.4.19 T.p.72). White confirmed that "[t]he only marking on the barrel itself was 9 mm Luger. There were no other manufacturing markings present." (10.4.19 T.p.29). There were also outstanding questions about who put the barrel there in the first place. (10.4.19 T.p.147).

Even still, White said he *disassembled* the excluded 9 mm firearm taken from Austin's home, and attached the new barrel to *that* gun. (10.4.19 T.p.24). On *that* basis, White said he was then "able to conclude" that the new barrel was responsible for the two fired bullets. (10.4.19 T.p.24-25). On cross examination, White admitted that he could not say whether the barrel "couldn't also fit into another firearm," such as two other 9 mm firearms found in Bryson Michaelis's home. (10.4.19 T.pp.29, 80-81). Nor did White say whether he ever he ever tested the barrel itself for fingerprints. (10.4.19 T.p.16).

In support of his analysis, White further testified that he is a member of the Association of Firearm and Tool Mark Examiners. (10.4.19 T.pp.13-14). On appeal, Austin would explain that the Association itself admits that toolmark conclusions are notoriously "subjective." Report to the President: Forensic Science in Criminal Courts: Ensuring

Scientific Validity of Feature-Comparison Models, Section 5.5, p.112 (Sept. 2016) available at https://tinyurl.com/j29c5ua (accessed Oct. 29, 2021).

He noted the President's Counsel of Advisors on Science and Technology reviewed available research on firearms toolmark analysis and concluded that the method "currently falls short of the criteria for foundational validity, because there is only a single appropriately designed study to measure validity and estimate reliability." *Id; see also Melendez-Diaz v. Massachusetts* , 557 U.S. 305, 321, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), citing National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 138–139, 142–143, 154–155(2009) (discussing problems of subjectivity, bias, and un-reliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis).

Austin also explained that this is now widely known throughout the legal community, at least outside Ohio, since "most courts [across the country] place firm limitations on the proposed [toolmark] expert testimony[.]" *United States v. Harris*, No. 2:14-cr-00127, 12 (S.D. Ohio March 9, 2016), citing *United States v. Ashburn*, 88 F. Supp. 3d, 239, 249, 245 (E.D.N.Y 2015), *United States v. Alls*, No. 2:08-cr-223 (S.D. Ohio Dec. 7, 2009); *United States v. Glynn*, 578 F. Supp. 2d 567, 574 (S.D.N.Y.2008); *United States v. Monteiro*, 407 F. Supp. 2d 351, 355 (D. Mass. 2006); *United States v. Tibbs*, No. 2016 CF1 19431 (D.C. Super. Ct. Sept. 5, 2019) ("[O]n the heels of several major reports emanating from outside of the judiciary calling into question the foundations of the firearms and toolmark identification discipline, recent decisions of the District of Columbia Court of Appeals have imposed significant limitations on the conclusions that an expert in this field can render in court."), citing *Gardner v. United States*, 140 A.3d 1172, 1184 (D.C. Cir.2016).

Even still, White's report and conclusions were admitted and relied upon by the juvenile court, without challenge from counsel. The appellate court rejected Austin's claim that counsel rendered ineffective assistance in this regard.

B. After transfer, then 17-year-old Austin is sentenced to an automatic, mandatory sentence of 15-years-to-life in adult prison.

Based on the evidence and testimony, the juvenile court transferred Austin's case for criminal prosecution. (10.4.19 Entry). The court's entry does not speak to "whether it was Mr. Michaelis or Mr. Fuell who actually fired the deadly, deadly shot[.]" After several motions and hearings in criminal court, Austin, just like his adult co-defendant Bryson Michaelis, was convicted by plea of murder and sentenced to a mandatory term of 15-years-to-life. (2.27.20 Entry). Under R.C. 2929.02(B), it was the only sentence available.

II. The court of appeals upheld the transfer and mandatory lifetime sentence, ruling that children have no due process rights to confront and cross-examine witnesses whose statements are used as a basis for transfer.

On appeal, Austin challenged the constitutionality of his sentence and the sufficiency and manifest weight of the state's evidence offered in support of transfer. More specifically, he argued that the court violated his right to due process and fundamental fairness when it admitted the unauthenticated cell phone and cell tower records over counsel's objection.

As set forth in briefing below, the juvenile court itself ruled that hearsay was not admissible. And, this Court in *State v. Hood* held that admitting unauthenticated cell-tower records based only on a police officer's testimony violates both the rules of evidence and the constitution. 135 Ohio St.3d 137, 984 N.E.2d 1057, ¶ 42. Further, Detective Tobias was not a "qualified witness" with any personal knowledge of either the cell tower analysis or the text conversation.

Austin explained the error was especially egregious here since Tobias himself testified that he contacted Sprint and Sprint itself could not confirm whose phone it was—and yet the report's author still alleged the phone belonged to Austin. Nor did the state subpoena the third-party owner of the other phone, Kevin Baird, to verify the texters or the contents. On this record, Austin argued that these records were near textbook examples of unauthenticated improper hearsay statements. Without any opportunity for cross-examination, their admission prejudiced his defense because the statements in these records formed the basis of the state's case that Austin knew and went to the victim's address. Nothing else put Austin there.

The appellate court disagreed. Suggesting due process does not include basic cross-examination rights—and questioning Austin's reliance on the Fourteenth Amendment—the court declared that transfer hearings are "not a fact-finding trial and the juvenile's liberty is not yet at stake." *Opinion* at ¶ 34-35 ("We agree with the reasoning set forth by our colleagues in the Seventh and Sixth districts."), citing *State v. Garner*, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-4939, ¶ 26 and *In re B.W.*, 7th Dist. Mahoning No. 17 MA 0071, 2017-Ohio-9220, ¶ 37 (deciding that "[t]he right to confrontation through the presentation of a certain quality of evidence is generally considered a 'trial right.'"). On those grounds, it held that "none of the requirements of due process that apply at a juvenile court proceeding were omitted here," and that "admitting evidence that could raise Confrontation Clause issues as a [transfer] hearing is not inconsistent with fundamental fairness and due process of law as described in *Kent* [*v. United States*]." *Opinion* at ¶ 38.

After ordering additional briefing about the effect of this Court's decision in *State v. Patrick*, *supra* (issued while the direct appeal was still pending), it also upheld Austin's

sentence, opining that "there are plausible arguments as to why the reasoning applied in *Patrick* may or may not require a court to hold that R.C. 2929.02(B)(1)'s mandatory sentence is unconstitutional as applied to juveniles, including Fuell." *Opinion* at ¶ 76. But, before a ruling from this Court, it declined to find that *Patrick* covers sentences imposed for murder. *Id.* at ¶ 72, 76.

LAW AND ARGUMENT

First Proposition of Law:

Juvenile offenders have a state and federal due process right to cross-examine witnesses whose hearsay statements are presented to provide probable cause for mandatory transfer to adult court.

I. Constitutional safeguards flow to children through due process.

Given the purpose and history of the juvenile system, "constitutional procedural safeguards in the juvenile context [have come to] find their genesis in the Due Process Clause of the Fourteenth Amendment." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 71, quoting *State v. D.H.*, 120 Ohio St.3d 540, 2009 Ohio 9, 901 N.E.2d 209, ¶ 44; *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 65-79 (explaining that "with time, much of the beneficence that underlay the genesis of juvenile courts eroded. And with that erosion came increased constitutional oversight."). As a threshold matter, therefore, traditional constitutional protections flow to children through due process—rights that otherwise apply to adult criminal defendants through specific guarantees in the Bill of Rights, like those found in the Sixth Amendment. *C.S.* at ¶ 79 (noting this understanding of due process "drove the court's holdings in *Kent, Gault*, and *Winship*" which "make clear that the right to counsel in a juvenile case flows to the juvenile through the Due Process Clause of the Fourteenth Amendment, not the Sixth Amendment").

While the state and decision below muddle this relationship, it is with this doctrinal understanding that the due process question here must be decided.

II. The due process right to confront and cross-examine witnesses.

At the same time, that procedural rights stem from the generality of due process does not diminish their importance. *C.S.* at ¶ 82. Rather, "the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary method presents." *In re Gault*, 387 U.S. 1, 21, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). These rules are meant to "protect the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

A. Decades of precedent confirm that confrontation and cross-examination are core due process protections.

As such, due process defines the minimum procedural protections that a state must afford before depriving an individual of a state-created liberty interest. *Goss v. Lopez* , 419 U.S. 565, 572-573, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Wolff* at 558 (declaring that "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State"). Contrary to the state and lower court's suggestion, confrontation and cross-examination have long been included among these minimum due process safeguards. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognized as essential to due process.").

Indeed, they derive from the right to a hearing itself, which must be "*appropriate to the nature of the case*." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The very purpose of a hearing is to ensure that a person is heard

"*at a meaningful time and in a meaningful manner*." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *see also Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). And this requires not only that a person in jeopardy of loss be given notice of the case against them, but "*an opportunity to meet it.*" *Joint Anti-Fascist Refugee Commt. v. McGrath*, 341 U.S. 123, 171-172, 71 S.Ct. 624, 95 L.Ed. 817 (1951).

The right to an adequate hearing and the right to be heard thus secures "*as a minimum*, a right to examine the witnesses against [you], to offer testimony, and to be represented by counsel." *In re Oliver* , 333 U.S. 257, 274, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (due process "requires * * * an opportunity to be heard, [to] be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own").

In this way, early and enduring Supreme Court jurisprudence confirms what Austin has asserted all along: confrontation and cross-examination are free-standing due process requirements. *See Greene v. McElroy*, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) (these rights have "ancient roots"); *Crawford v. Washington* , 541 U.S. 36, 38, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (examining the historical background leading to the Confrontation Clause beginning with "the right to confront one's accusers is a concept that dates back to Roman times"). Thus, "[t]o deprive an accused of the right to cross-examine witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Insofar as the state and court below doubt this, they are mistaken. *See, e.g.*, State's Memo in Opposition, p.10 (misstating that "the fundamental due process right to confront witnesses *stems from the Confrontation Clause*," rather than the other way around).

B. They are indispensable to fundamental fairness.

And the *reason* these rights are regarded as bedrock protections is just as important. They are "'the principal means by which the believability of a witness and truth of his testimony are tested.'" *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987), quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In fact, so much so that "the Court has regarded cross-examination as the "'*greatest legal engine ever invented for the discovery of truth*.'" (Emphasis added). *Stincer* at 736, quoting *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), quoting 5 J. Wigmore, Evidence § 1367, p. 29 (3d ed. 1940). Thus, "[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it." *Coy v. Iowa*, 487 U.S. 1012, 1019, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). In short, these rights are "critical for ensuring the integrity of the factfinding process." *Stincer* at 736.

C. Because they serve a functional purpose, they apply in adversarial settings where decisions turn on questions of fact.

Calling them "immutable" principles in our jurisprudence, the Supreme Court has famously explained:

> *[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings*, the evidence used to prove the Government's case must be disclosed to the individual *so that he has an opportunity to show that it is untrue*. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion.

Greene, 360 U.S. at 496-497, 79 S.Ct. 1400, 3 L.Ed.2d 1377.

Therefore, *"[i]n almost every setting where important decisions turn on questions of fact*, due process requires an opportunity to confront and cross-examine adverse witnesses." (Emphasis added.) *Goldberg,* 397 U.S. at 269, 90 S.Ct. 1011, 25 L.Ed.2d 287, citing *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103, 83 S.Ct. 1175, 10 L.Ed. 2d 224 (1963). The Court has "spoken out not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny." (Internal citations omitted.) *Goldberg* at 268-269 (holding that welfare recipients must be given "an effective opportunity to defend by confronting adverse witnesses" because termination decisions may be challenged "as resting on incorrect or misleading factual premises"). Indeed, if this assortment of cases shows anything, it's that the settings in which cross-examination has been deemed essential to due process are legion.

The state and lower courts are thus wrong to claim that cross-examination rights are restricted to *criminal trials* where guilt or innocence is finally decided.[1] Or that these rights hinge on superficial labels like "civil" or "preliminary," or "non-adjudicatory." *Greene* at 496; *Goldberg* at 268-269; *see* Crim.R. 5 (specifying that at "preliminary hearings in felony cases," defendants "have full right of cross-examination"); *see also Stincer* at 740, 107 S.Ct. 2658, 96 L.Ed.2d 631 (expressly rejecting the "trial or pretrial proceeding" distinction); *accord United States v. Wade*, 388 U.S. 218, 235, 87 S.Ct. 1926, 18 L.Ed. 2d 1149

[1] This, too, stems from upending the Due Process-Sixth Amendment relationship, and is based on a misreading of leading Sixth Amendment cases themselves, such as *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968), and *Kaley v. United States*, 571 U.S. 320, 338, 134 S.Ct. 1090, 188 L.Ed 2d 46 (2014). Both of those cases confirm these are clearly rights at trial—but neither held they are "trial-only" rights, exclusive of all other contexts. Indeed, the irony of reading *Page* so broadly is that the defendant there *did* cross-examine witnesses at the preliminary hearings. Not to mention the entire rule announced later in *Crawford v. Washington*, *infra*, is predicated on pre-trial cross-examination.

(1967) (rejecting this argument in favor of the landmark "critical-stage" test for right-to-counsel claims, since "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation").

The driving question, rather, is whether the proceeding is *adversarial* such that the decision affects private interests, and turns on disputed questions of fact. *Goldberg* at 269; *Greene* at 496; *Mullane*, 339 U.S. at 313, 70 S.Ct. 652, 94 L.Ed. 865; *see also Ohio Assn. of Pub. School Emples. v. Lakewood City School Dist. Bd. of Edn.*, 68 Ohio St.3d 175, 176-177, 624 N.E.2d 1043 (1994) (confirming that "Confrontation and cross-examination are important where the government action turns on questions of fact."). Under such circumstances, these safeguards are needed to preserve fundamental fairness. *See Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431 (1913) ("All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal*. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding*[.]").

III. Transfer hearings must satisfy due process. Given the stakes, structure, and goal of these hearings, confrontation and cross-examination are vital.

Which brings us to the instant dispute. "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). This is "an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation[.]'" *C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, at ¶ 80, quoting *Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina*, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

The interpretive "task is to ascertain what process is due in a given case, while being

true to the core concept of due process in a juvenile case—to ensure orderliness and fairness." *C.S.* at ¶ 81. Since "[n]ot all situations calling for procedural safeguards call for the same kind[s] or procedure[s], * * * consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Morrissey* at 481, quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81S.Ct. 1743, 6 L.Ed. 2d 1230 (1961). In this way, due process requires a true functional analysis—not a mere semantic one. The state and lower court's analyses fall fatally short.

A. These are adversarial evidentiary hearings.

Applying the proper framework, a review of the rules and characteristics of transfer hearings warrants close attention. "Regardless of the limited scope of bindover hearings, the Supreme Court of the United States has held that the bindover hearing is a 'critically important proceeding' and that the hearing 'must measure up to the essentials of due process and fair treatment.'" *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 11, quoting *Kent,* 383 U.S. at 562, 86 S.Ct. 1045, 16 L.Ed.2d 84. Below, the court correctly observed that *Kent* calls for a hearing, counsel, and a statement of reasons. But, it failed to note that hearings must still be "adequate to the nature of the case." It also avoided the fact that while not guilt-determinative, these hearings are nonetheless adversarial.

1. The law imposes an evidentiary burden on the state. Judges assess evidence, issue credibility findings, and resolve key factual disputes.

At the hearing, the juvenile judge's "role" is "that of a gatekeeper because it is charged with evaluating whether sufficient credible evidence exists to warrant going forward with a prosecution on a charge that the legislature has determined triggers a

mandatory transfer of jurisdiction to adult court." (Internal quotation omitted.) *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 46. Prosecutors "must provide credible evidence of every element of an offense to support a finding that probable cause exists to believe that the juvenile committed the offense before ordering mandatory waiver of juvenile court jurisdiction." *State v. Iacona*, 93 Ohio St.3d 83, 93, 2001-Ohio-1292, 752 N.E.2d 937 (2001). And to meet this burden, "the evidence must *be of sufficient quantity and credibility* to raise more than a mere suspicion of guilt." *Id.*

As such, "[i]n determining the existence of probable cause *the juvenile court must evaluate the quality of the evidence presented* by the state in support of probable cause as well as any evidence presented by the respondent that attacks probable cause." *D.M.* at ¶ 15, citing *Kent*, 383 U.S. at 563. The hearing, in other words, serves a traditional fact-finding function—the point is to determine prosecutive merit based on testimony and evidence presented. *A.J.S.* at ¶ 46.

2. Due process already demands effective counsel and full discovery.

Adding to that, the form of transfer hearings is quintessentially adversarial. Children are represented by defense counsel at the hearing, and "it is *precisely* the role of counsel to 'denigrate' [any] matter" that is "susceptible to challenge or impeachment." (Emphasis added.) *Kent* at 560. Despite the effect of the ruling below, counsel's role at transfer is not just "limited to presenting to the court anything on behalf of the child which might help the court in arriving at its decision." *Id.* Rather, "[i]f a decision on waiver is 'critically important' it is equally of 'critical importance' that the material submitted to the judge * * * subjected, within reasonable limits * * * to examination, criticism and refutation." *Kent* at 563.

This, after all, is the very reason for affording litigants counsel in the first place. And

to this end, the Court's right to counsel cases are just as instructive—imparting not that rights are afforded based on the label given to a particular proceeding, but on whether the hearing represents a critical stage of proceedings, which transfer undoubtedly does. *Kent* at 563; *see also, e.g., Coleman v. Alabama*, 399 U.S. 1, 7, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) ("[W]e scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.").

Finally, for the very same reasons offered in support of Austin here, this Court has already determined "that basic principles of fairness and due process similarly require that counsel for a juvenile be provided access to information possessed by the state that might tend to disprove probable cause at the bindover stage." *Iacona*, 93 Ohio St.3d at 91, 2001-Ohio-1292, 752 N.E.2d 937. This again, was presumably not an empty gesture—it was not intended as an illusory promise. Rather, the purpose of discovery is so that counsel can prepare and try to "disprove the probable cause at the bindover stage." *Id.*; *see also Greene*, 360 U.S. at 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (as a general matter "evidence used to prove the Government's case must be disclosed to the individual *so that he has an opportunity to show that it is untrue*"). In this way, this case is merely the next step in this Court's evolving transfer jurisprudence. The rights claimed here flow straight from those already granted. But, without full confrontation rights, these existing protections are merely illusory.

B. Appellate courts must defer to juvenile-court credibility findings.

Nonetheless, to diminish its import, the decision below still denies that transfer is a "fact-finding" proceeding, only a pretrial hearing. This ignores the realities twice over. This Court has said that much like the ultimate fact finders at trial, juvenile judges at transfer are "'best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, at ¶ 45 (announcing standards of review applied to mandatory transfer decisions), citing *State v. Amburgey*, 33 Ohio St.3d 115, 117, 515 N.E.2d 925 (1987), quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). This Court thus held:

> [A] juvenile court's probable-cause determination in a mandatory-bindover proceeding *involves questions of both fact and law, and thus, we defer to the trial court's determinations regarding witness credibility*, but we review de novo the legal conclusion whether the state presented sufficient evidence to demonstrate probable cause to believe that the juvenile committed the acts charged.

(Emphasis added.) *A.J.S.* at ¶ 51. So, not only do transfer hearings bear the defining features of adversarial proceedings, but the findings made there are subject to the very same standards governing fact findings issued in criminal trial settings. These findings bind appellate courts, who must defer to a juvenile judge's observations. This too, counsels heavily in favor of confrontation and cross-examination. *Louisville & N. R. Co.*, 227 U.S. at 93-94, 33 S.Ct. 185, 57 L.Ed. 431 (explaining cross-examination rights are needed because "[i]n no other way can [we] test the sufficiency of the facts to support a finding[.]").

C. Transfer gravely affects a child's liberty interests.

And so too does a proper accounting of the interests at stake. "The extent to which procedural due process must be afforded the recipient is [also] influenced by the extent to

which he may be condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 168. Agreeing with the Sixth District, the court below concluded children do not have confrontation rights because their "liberty is not yet at stake." *Opinion* at ¶ 34-35. This is simply incorrect. As argued below, "[d]iversion out of the juvenile justice system, *undeniably* affects the length of confinement to which an accused minor is exposed." *Iacona*, 93 Ohio St.3d 83, 91, 752 N.E.2d 937, 946. It "is potentially as important * * * as the difference between five years' confinement and a death sentence." *Kent*, 383 U.S. at 557, 86 S.Ct. 1045, 16 L.Ed.2d 84. Thus, "[t]he possibility of transfer from juvenile court to a court of general criminal jurisdiction 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).

Indeed, even the state of Ohio admitted in *Aalim* that "the crux of the issue is punishment. That's what it's all about. It's not really about process * * * It's about [punishment]." *State v. Aalim (Aalim II)*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 74. Not incidentally, the state there also admitted that children *are* afforded the right to confront and cross-examine witnesses at transfer too. *Id.* at ¶ 12 (setting out the state's position that transfer satisfies due process because they provide for "the right to confront and cross-examine witnesses"); *see also Aalim*, Appellee Brief of State of Ohio, p. 7, *Aalim*, Brief of Amicus Curiae Ohio Attorney General, p.15, Case No. 2015-0677, 0677, docket available at https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2015/0677. The state asserts the exact opposite here.

At any rate, as Chief Justice O'Connor set forth in *Aalim II*:

> [T]here should be no debate that a child's liberty interest in retaining juvenile status is substantial. * * * The child's liberty interests clearly are in jeopardy if the child is treated as an adult, subject to adult penalties, in criminal courts. Not only do many child offenders receive harsher sentences

> in adult court, but all child offenders with adult convictions face the collateral consequences of those convictions—including public awareness of their crimes—in a manner far greater than they would in juvenile court.

Aalim II at ¶ 83 (O'Connor, C.J., dissenting). For Austin, transfer made the difference of four years of treatment or the life-tail sentence he eventually received.

Simply put, therefore, time spent in adult prisons ill-suited to the needs of children is time for juvenile rehabilitation those children will never get back. Ignoring or brushing aside these consequences makes them no less real. Nor does it diminish them. Ohio created a liberty interest when it enacted R.C. 2152.12(B). *Id.*, citing *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005) (confirming that a liberty interest "may arise from an expectation or interest created by state laws or policies"). And given the stakes, that interest is substantial. *See Wolff*, 418 U.S. at 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."). The decision below eschews these consequences altogether.

Thus, given the function, adversarial form, and private interests affected, this Court should make clear that fundamental fairness typically requires an opportunity to confront and cross-examine adverse witnesses at transfer hearings. Anything less rests on a fiction.

IV. With so much at stake, decisions should be made on more, not less information. Absent a clear bar from the Legislature, courts should not withhold traditional due process safeguards.

Finally, such a holding comports with sound policy as well. As discussed, these are functional rights designed to promote accuracy and reliability in the fact-finding process. Juvenile judges are expressly tasked with assessing credibility and these are "the principal means" by which a person's credibility can be judged. *Davis,* 415 U.S. at 316, 94 S.Ct. 1105, 39 L.Ed.2d 347. Only through "the crucible of cross-examination," can defense counsel

meaningfully probe incompetence, inaccuracies, infirmities, ulterior motives, or potential bias. *Id.* This serves a practical and symbolic function. And it is all the more important where, like here, the evidence comes in the form of unauthenticated hearsay contained in documentary evidence and so-called forensic reports, like, say, cell-tower analyses.

As explained in *Melendez-Diaz*:

> "[B]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.

Melendez-Diaz, 557 U.S. at 318, 129 S.Ct. 2527, 174 L.Ed.2d 314, quoting National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward at 44–48, 183 (discussing documented cases of fraud and error involving the use of forensic evidence); *Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, at ¶ 42 (concluding that the admission of cell-records only through the surrogate testimony of a detective was constitutional error).

"Confrontation is one means of ensuring forensic analysis * * * Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well * * * Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Melendez-Diaz* at 318-320. Thus, if there were any real chance of discrediting the state's location evidence in this case, it was imperative that counsel question the analyst who attributed the pinging phone to Austin, *despite Sprint not being unable to confirm the owner*. To verify the state's accusations, it was equally crucial that he confront and question the third-party declarant, Kevin Baird, whose alleged text conversation supposedly placed Austin at the scene.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed. 2d 593 (1975). So why then prohibit confrontation and probing questions at transfer? Why so artificially limit the factual bases upon which decisions of such tremendous consequence are made? Where materially-important facts are contested, why insist on knowing *less* about the veracity of one side's allegations?

Absent resounding answers to these questions—especially answers offered by the Legislature itself—the singular response from this Court must be "we shouldn't." *In re Stormer*, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317, ¶ 20 ("[A] statute or rule of law 'must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."). Notwithstanding the ruling below, "traditional forms of fair procedure [should] not be restricted by implication and without the most explicit action [of] lawmakers." *Greene*, 360 U.S. at 508, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (imparting that courts should presume "congress intended to afford those affected by [an] action traditional safeguards of due process").

Accordingly, the state's position must be rejected, and the decision below reversed. Applying the functional due process analysis set forth above, this Court should hold that where there is no overriding governmental interest shown, children have a due process right to confront and cross-examine adverse witnesses whose hearsay statements are used in support of mandatory transfer. Categorically withholding that opportunity creates far too great a risk of untrustworthy decisions, and deprives children of the fundamental fairness guaranteed by the state and federal constitutions.

Second Proposition of Law:

Under *Miller v. Alabama*, *State v. Long*, and *State v. Patrick*, R.C. 2929.02(B)'s mandatory fifteen-years-to-life sentence for murder is unconstitutional as applied to juvenile offenders because it does not permit judicial consideration of youth at sentencing.

In *State v. Patrick*, this Court concluded forcefully: "[c]ertainly, before imposing a life sentence on a juvenile offender, there is room in our justice system for a trial court to make an individualized sentencing determination that articulates its consideration of the offender's youth, and all that comes with it, before an old man is all that is left." *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, ¶ 41. As such, *Patrick* held that "a trial court must articulate its consideration of the youth of a juvenile offender as a mitigating factor before imposing a life sentence under R.C. 2929.03, *even if that sentence includes eligibility for parole*." (Emphasis added). *Id.* at ¶ 23-24. Because R.C. 2929.02(B) does not allow for *any* individualized consideration, much less meaningful consideration of youth, its automatic life-tail sentence is unconstitutional as applied to juveniles.

I. *Patrick* is based on Eighth Amendment precedent and announces a constitutional rule: The constitution requires consideration of youth before imposing any life sentence, even those offering parole.

Of special pertinence here, *Patrick*'s holding is rooted first in the U.S. Supreme Court's decision in *Miller v. Alabama*, *supra*, and then in this Court's adoption of that ruling in *State v. Long, supra*. As such, this appeal requires a careful examination not only of *Patrick*, but also of *Miller* and *Long*—the precedent upon which *Patrick* stands.

A. First, *Miller*. In *Miller*, the U.S. Supreme Court first held that for juveniles, mandatory life-without-parole sentences violate the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 479-480, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The Court there explained in no uncertain terms that the problem with *mandatory* life-without-parole sentences was

not the length of the sentence per se, but that sentencing judges must be able to consider a defendant's youth in order to issue fair and proportionate sentencing determinations. *See id.* at 470-474. Where life is mandatory, they can't.

Recounting the various scientific ways in which "children are constitutionally different from adults for purposes of sentencing[,]" the Court made plain:

> But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. *By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender*. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

Miller at 474; *see also id.* at 471-472 (explaining that children are less culpable and more likely to be reformed because "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" such as "transient rashness, proclivity for risk, and inability to assess consequences").

In this way, *Miller* thus established that the Eighth Amendment requires a sentencer to "take into account how children are different." *Id.* at 480. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest [available] prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Id.; see also Jones v. Mississippi,* 593 U.S. ___, 141 S.Ct. 1307, 1317-1318 (2021) (confirming that *Miller* "requires a discretionary sentencing procedure where youth is considered" because "discretionary sentencing allows the sentencer to consider the defendant's youth" to ensure proportional sentences).

B. Then, *Long*. Applying *Miller* to Ohio's sentencing scheme, this Court in *Long* then held that "youth is a mitigating factor for a court to consider when [deciding

whether to] sentence[e] a juvenile" to life without the possibility of parole. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 19 ("because a life-without-parole sentence implies that rehabilitation is impossible, when the court selects this most serious sanction, its reasoning for the choice ought to be clear on the record"). *Long* was based entirely on *Miller*. *See Long* at ¶ 10-16. In *Long*, this Court made clear that youth is "undoubtedly" a relevant sentencing factor precisely because the defining features of youth set children apart from their more mature, developed (and thus more culpable) adult counterparts. *Long* at ¶ 27-28.

C. And now, *Patrick*. In December 2020, *Patrick* expressly extended *Long* to juvenile life-sentences, even those with the possibility of parole. *Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, at ¶ 42 ("we extend our application in *Long* to *Patrick's* sentence"). Relying on *Long*, this Court reaffirmed that because "'minors are less mature and responsible than adults, * * * youth is a mitigating factor for a court to consider when sentencing a juvenile.'" *Patrick* at ¶ 27, quoting *Long* at ¶ 19, 33. When choosing from various life-sentencing options, with or without parole, the constitution therefore requires trial courts to articulate their consideration of youth *as a mitigating factor*. *Id*. at ¶ 23-24, 41. This is a constitutional rule, and it is based on constitutional precedent.

Properly read, *Patrick* renders R.C. 2929.02(B) unconstitutional—under the statute, judges cannot consider youth in order to determine the right sentence; and, in any event, youth can never be truly mitigating. Contrary to the low court's analysis, there is no real constitutional daylight between the central reasoning of cases, and the problem posed by R.C. 2929.02(B).

II. Extending *Long, Patrick* says there is no difference between life-with and life-without-parole-eligibility sentences for constitutional purposes: In either instance, judges must consider youth as mitigating at sentencing.

A. Life with parole eligibility triggers the same scope of constitutional protection.

More specifically, *Patrick*'s central constitutional premise is that "the difference between a sentence of life in prison with parole eligibility after a term of years and a sentence of life without the possibility of parole is not material for purposes of an Eighth Amendment challenge by an offender who was a juvenile when he or she committed the offense." *Patrick* at ¶ 33. Rather, the Court announced that "[a] sentence of life imprisonment with parole eligibility *triggers the same scope of Eighth Amendment concern and need for consideration of youth*" as the life-without-parole sentences addressed in *Long* and *Miller*. (Emphasis added.) *Id*. at ¶ 28-29.

As it is indispensable to the Court's conclusion, this proposition is binding. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound."), citing *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 613, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (exclusive basis of a judgment is not dicta), and *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting).

As such, *Miller's* Eighth Amendment bar on mandatory life-without-parole now applies in equal measure to mandatory life-with-the-possibility-of-parole sentences—both are unconstitutional because they prevent the sentencing judge from accounting for youth

and its defining characteristics. Both are unconstitutional because they subject children to the same harshest available punishment as more-culpable adults. Neither mandatory scheme allows for consideration of youth. And, regardless, *with only one available life sentence, youth can never be truly mitigating*. Now offering the same scope of protection post-*Patrick*, the constitution forbids such one-life-size-fits-all sentencing. *Miller*, 567 U.S. at 474, 132 S.Ct. 2455, 2466, 183 L.Ed.2d 407 ("imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children").

B. The sentencing statutes for aggravated murder and murder *are* different. The difference is that the latter allows for no discretion or potential-for-mitigation, *at all*.

Of course, there are facial differences between Ohio's sentencing statutes for murder (at issue here), versus aggravated murder (addressed in *Patrick*). Namely, R.C. 2929.02(B) mandates a single lifetime sentence while R.C. 2929.03 requires courts "to choose from a number of life-sentence options, with or without parole." *Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803 at ¶ 31. But, for present purposes, and given that discretion is the linchpin and youth is always mitigating, this too is a distinction without a difference.

In fact, *Miller, Long*, and *Patrick's* reasoning applies with *even more force here*, where there is *no sentencing discretion or potential-for-mitigation whatsoever*. In this way, the problem posed by R.C. 2929.02(B)'s mandatory sentence actually precedes that addressed by this Court in *Patrick*. Whereas *Patrick* addressed constitutional requirements in the exercise of a trial court's existing discretion, this case triggers the first principles that (1) kids are different; and so (2) discretion is constitutionally required in the first place.

And, *Patrick* now confirms there is no difference between life-with and life-without parole sentences for constitutional purposes. Thus, far from distinguishable, *Patrick*

bridges the gap between mandatory life-without-parole schemes and R.C. 2929.02's mandatory life-with-parole sentence. *Seminole Tribe of Florida,* 517 U.S. at 67, 116 S.Ct. 1114, 134 L.Ed.2d 252 ("[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

C. This is not a flat 15-year-sentence. Where life imprisonment is possible, there is no material difference between life with parole eligibility after 15, 20, 25, or 30 years.

In response to this problem, the court below opined that the *chance* of being paroled after 15 years does not run a risk of disproportionality. *Opinion* at ¶ 75 ("A juvenile defendant who commits murder and is sentenced at age 17 could be eligible for release from prison at age 32 - hardly the type of lifetime scenario that so concerned the Ohio Supreme Court in *Patrick*."). There are two glaring problems with this line of reasoning.

First, R.C. 2929.02(B) does not impose a flat 15-year sentence. It is *life* with the possibility of parole after 15 years. The incarceration could last 15 years; it could be 30; it could drag on for life or its functional equivalent. And it would be wrong to even assume that the first of those is the more likely outcome. As *Patrick* carefully explained:

> *Parole eligibility does not guarantee a defendant's release from prison.* As noted in the brief of amici curiae Office of the Ohio Public Defender et al., *Ohio's parole-release rate was only 10.2 percent* between 2011 and 2018. Bischoff, Ohio Parole Board Under Fire from Victims, Inmates, and Lawmakers, Dayton Daily News (Apr. 7, 2019) (internal citation omitted). *In this way, Patrick's [life-tail] sentence varies little from the state's harshest punishment for a juvenile offender who is tried as an adult.*

Patrick, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, at ¶ 33. With a lifetime looming, there is a drastic difference between a flat 15-year sentence and life with the meagre possibility of parole after 15 years.

And at any rate, the legal argument is not that 15-to-life can *never* be imposed—or, more saliently, that it is or is not categorically (dis)proportionate. Indeed, that is the entire constitutional concern here—that such categorical sentencing determinations *cannot be made when it comes to children*, who are generally less culpable than adults. In other words, that "age is a relevant sentencing factor:"

> 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.' *Long* at ¶ 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). And in *Long*, we expressly held that 'youth is a mitigating factor for a court to consider when sentencing a juvenile.' *Id.* at ¶ 19. The fact that these statements about youth and its attendant characteristics were made in cases addressing constitutional questions does not mean those characteristics are present only in such cases. They are characteristics inherent to juveniles in all cases. *See Miller v. Alabama*, [*supra*] ("[N]one of what [*Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)] said about children—about their distinctive and (transitory) mental traits and environmental vulnerabilities—is crime specific. Those features are evident in the same way, and to the same degree, when * * * a botched robbery turns into a killing"). Thus, * * * age is undoubtedly a relevant factor that should be considered when a trial court sentences an offender who was a juvenile when he or she committed the offense, and therefore, youth is a relevant sentencing consideration under R.C. 2929.12(C) and (E).
>
> Of course, consideration of an offender's youth and its attendant characteristics does not demand a certain result. *See Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶ 37 (O'Connor, C.J., concurring) ("I caution that our law requires only that youth be considered as a factor. It does not mandate any particular result from that consideration"). And the scope of a trial court's consideration of youth must depend on the constitutional concerns present. 'The constitutional question, then, is how much to consider an offender's youth, and how much to consider his crime.' *Id.* at ¶ 35 (O'Connor, C.J., concurring).

Patrick, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, at ¶ 27-28.

Judges must assess each child individually to determine what sentence reflects that child's individual culpability. For one child, 15-to-life might well be proportional; for

another, say, one who acted impulsively as an accomplice to an older principal, arguably less so. In either case, though, the judge should not be forced to punish either child just as harshly as the more culpable adult. Because youth is a mitigating factor (and one that is mandated by the proportionality principle) it is no answer that '15 sounds less than 30.'

D. This Court squarely rejected the state's parole arguments in *Patrick.*

Finally, neither is Austin's distant parole reviews, whenever those may occur. This Court already rejected the state's parole-board argument in *Patrick*, too, saying:

> *A decision whether to grant or deny parole lies with the parole board, which is a part of the executive branch of our government. It is the judiciary, however, that is primarily charged with safeguarding the constitutional guarantees of the Eighth Amendment to the United States Constitution*. For that reason, we should not lightly draw distinctions among life sentences for purposes of determining whether a life sentence violates constitutional protections. And it is contrary to this court's juvenile-sentencing decisions to suggest that there is no constitutional remedy when a sentencing court fails to consider a juvenile offender's youth when imposing a life sentence. *Therefore, we conclude that the severity of a sentence of life in prison on a juvenile offender, even if parole eligibility is part of the life sentence, is analogous to a sentence of life in prison without the possibility of parole for the purposes of the Eighth Amendment. Accordingly, such a sentence should be treated consistently with that imposed in Long, as instructed by Miller*. Given the high likelihood of the juvenile offender spending his or her life in prison, the need for an individualized sentencing decision that considers the offender's youth and its attendant characteristics is critical when life without parole is a potential sentence.

(Emphasis added). *Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, at ¶ 33, 36.

As noted there, a life sentence, even with the possibility of receiving a future discretionary parole that will itself carry ongoing penal supervision, is one of the harshest penalties the criminal justice system imposes. Contrary to the state's contention, the future possibility of discretionary parole is not an adequate substitute for individualized sentencing. *Patrick* makes clear that this consideration must be made, by a judge, at sentencing. Parole eligibility is no longer a dispositive distinction.

III. R.C. 2929.02(B) is unconstitutional as applied to juveniles like Austin because it does not allow judges to do what *Patrick* says the constitution's proportionality principle requires.

Therefore, Ohio's mandatory life-sentencing scheme fails muster as applied to juveniles. *Patrick* makes abundantly clear that the Eighth Amendment requires courts to consider youth as a mitigating factor even before sentencing a child to a sentence of life *with* the possibility of parole. But, mandating an automatic 15-life sentence, R.C. 2929.02(B) forecloses that consideration. It is therefore no different from the mandatory life-without-parole schemes struck down in *Miller*. And what's more, according to *Patrick*, there are no material differences between life-with and life-without parole sentences "for purposes of an Eighth Amendment challenges by an offender who was a juvenile[.]" *Patrick*, at ¶ 33. The constitution requires judicial consideration of youth before imposing life-with and life-without-parole sentences; and R.C. 2929.02(B) simply does not allow it. This court should therefore hold that the statute is unconstitutional as applied to juvenile offenders.

CONCLUSION

For all of these reasons, the decision below must be reversed, and this matter remanded for further proceedings no inconsistent with this Court's opinion.

Respectfully submitted,

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Certificate of Service:

A copy of the foregoing **Merit Brief of Defendant-Appellant, Austin M. Fuell** has been sent by electronic mail this 8th day of November, 2021, to Nick Horton, Assistant Clermont County Prosecutor, at nhorton@clermontcountyohio.gov.

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No. 2021-0794

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE CLERMONT COUNTY COURT OF APPEALS
TWELFTH APPELLATE DISTRICT
CASE NO. CA2020-02-008

STATE OF OHIO,
Plaintiff-Appellee,

v.

AUSTIN M. FUELL
Defendant-Appellant.

APPENDIX TO MERIT BRIEF OF DEFENDANT-APPELLANT, AUSTIN M. FUELL

[Cite as *State v. Fuell*, 2021-Ohio-1627.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Appellee,	:	CASE NO. CA2020-02-008
	:	O P I N I O N
- vs -		5/10/2021
	:	
AUSTIN M. FUELL,	:	
Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case Nos. 2019 CR 0992 and 2019 JA 55668

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BYRNE, J.

{¶1} Austin Fuell appeals from the Clermont County Common Pleas Court. The juvenile division transferred Fuell to the adult division to face murder charges after conducting a mandatory transfer hearing, also known as a bindover hearing. After Fuell pleaded guilty to murder, the adult division imposed a mandatory sentence of life in prison with the possibility of parole after 15 years. Fuell appeals his transfer to adult court and his sentence. For the reasons discussed below, we affirm.

I. Proceedings and Testimony in the Juvenile Division

{¶2} Police filed a complaint in the Clermont County Court of Common Pleas, Juvenile Division, alleging that Fuell – then seventeen years old – was a delinquent child for having committed acts that if committed by an adult would have constituted murder, aggravated robbery, and aggravated burglary. The complaint alleged that Fuell and an accomplice were suspects in a home invasion and robbery that occurred on June 11, 2019. During the robbery, one of the suspects shot and killed Jordan Ketring, who was staying at the home.

{¶3} The state moved for Fuell's mandatory transfer to the adult division of the common pleas court for criminal prosecution. To determine whether transfer was mandatory, on July 29 and October 4, 2019, the juvenile court held a probable cause hearing pursuant to R.C. 2152.12(A) and Rule 30 of the Ohio Rules of Juvenile Procedure. The state presented the testimony of several witnesses. We have summarized those witnesses' testimony below.

A. Testimony of Payge Lacey

{¶4} Payge Lacey was Ketring's girlfriend. During the relevant time period, the two lived at Lacey's grandparents' home located at 822 Wards Corner Road in Clermont County.

{¶5} Lacey and Ketring met Fuell on three occasions over several days leading up to Ketring's death on June 11. These encounters were all drug exchanges – that is, Ketring sold Xanax to Fuell during each meeting, with the exception of the last meeting. The first encounter was at Lacey's grandparents' home. The second was near a car dealership. The third encounter was on June 8, 2019. The parties met at a Planet Fitness location on Fields-Ertel Road in Warren County. However, once all the parties arrived at Planet Fitness, the meetup was moved to a nearby Comfort Inn. In the parking lot of the Comfort Inn, Ketring and Fuell got into a physical altercation and Ketring robbed Fuell of $375. Ketring

retreated to his vehicle and he, Lacey, and another individual who was with them fled the scene. Fuell fired gunshots in their direction as they were leaving.

{¶6} Three days later, in the early morning hours of June 11, 2019, Lacey was with Ketring at her grandparents' home. They were settling down to sleep when two people wearing all black clothing and masks came into the home. The intruders told Lacey and Ketring to get down on the ground. The intruders had guns and demanded to know the location of a safe.

{¶7} Though the intruders were wearing masks, Lacey could see the intruders' eyes. She believed that one of the intruders was Fuell, as she recognized his eyes, which she described as "further back" or "indented" in his skull. She also recognized this intruder's voice as Fuell's voice. Lacey said that the other intruder walked off and came back later with a safe. Then, the person she believed was Fuell said to Ketring, "Where is my $375?" Lacey testified that when she heard this comment, she became 99.9% certain the intruder was Fuell because $375 was the exact amount that Ketring had stolen from Fuell at the Comfort Inn a few days before.

{¶8} Ketring, who was armed with a revolver, began arguing with Fuell and asking whether $375 was worth his life or the risk of going to prison for life. At some point, shooting began between Ketring and the intruders. Ketring was shot and fell over. The two intruders fled.

B. Testimony of Detective Dan Tobias

{¶9} Dan Tobias, a detective with the Miami Township Police Department, testified that he investigated the shooting. Ketring, who had been shot in the torso, died from his injuries. Detective Tobias quickly developed Fuell as a suspect based on interviews with various witnesses. He was also able to corroborate Lacey's claims concerning the June 8 robbery through surveillance videos depicting vehicles and people at Planet Fitness and

Comfort Inn.

{¶10} Detective Tobias identified Fuell's cell phone number by speaking with multiple witnesses who provided him the number. He also located a receipt in a vehicle associated with an acquaintance of Fuell. Fuell's name and phone number had been written on the receipt.

{¶11} Detective Tobias testified concerning an exhibit entitled "Cell Tower Analysis." This document had been produced by an analyst at the Bureau of Criminal Investigation (BCI) based on cell phone location data records that Detective Tobias had obtained from Sprint. The exhibit contained a map which depicted the cell phone towers being used by the cell phone associated with Fuell's phone number between the hours of 12:00 a.m. and 5:00 a.m. on June 11, 2019. The map showed the phone being located on the west side of Cincinnati, where Fuell lived, at approximately 2:00 a.m. The phone then tracked towers heading east and ending in the vicinity of 822 Wards Corner Road near or around the time of the home invasion at 3:15 a.m. Afterwards, the phone location appeared to move back to the west side of Cincinnati and pinged the original tower on the west side of Cincinnati at 4:10 a.m.

{¶12} As part of his investigation, Detective Tobias interviewed Kevin Baird, a mutual friend of Lacey and Fuell. Detective Tobias' contact with Baird produced another exhibit he discussed during his testimony, which consisted of multiple photographs that Detective Tobias took of the screen of Baird's cell phone. These photographs depicted a series of text messages and missed calls between Baird and a contact on Baird's phone who appeared to be Fuell. That is, Fuell's photograph was depicted alongside the text messages as the sender, and the contact name in the phone was listed as "Austin." Detective Tobias' photos of the text messages are referred to herein as the "Text Message Photographs."

{¶13} The screen photographs showed the person assumed to be Fuell asking Baird for Lacey's address at approximately 12:30 a.m. on June 11, 2019, less than three hours before the home invasion. The screen photos further show that, shortly thereafter, Baird responded with the address of 818 Wards Corner Road, which was the residence directly behind 822 Wards Corner Road.[1]

{¶14} Detective Tobias testified that after Fuell became a potential suspect, police began surveilling his residence, which was Fuell's grandmother's home. During that time, Fuell and his grandmother left the residence in a vehicle. Police pulled the vehicle over and, after a consensual search, recovered a gun barrel in the glove box. Later that day, detectives executed a search warrant at Fuell's residence and recovered an intact Sky Industries 9mm Luger pistol. Both the recovered gun barrel and the pistol were sent to BCI for comparison testing against cartridges and a bullet recovered from the scene of the home invasion, and a bullet recovered from Ketring's body.

C. Testimony of Matthew White

{¶15} Matthew White, a BCI forensic firearms examiner, testified that he had approximately 20 years of experience as a forensic firearm and tool mark examiner and was a member of the Association of Firearm and Tool Mark Examiners. The court recognized White, without objection, as an expert witness in the field of ballistics.

{¶16} White testified that he had examined the recovered bullets and cartridges as well as the submitted gun barrel and pistol. White testified that microscopic comparison testing of the submitted items revealed that the gun barrel recovered from the glove box matched the recovered bullets, including the bullet that killed Ketring. White further noted that the glove box gun barrel was chambered in a 9mm Luger and was a compatible barrel

1. As stated above, Fuell had visited Lacey's grandparents' home a few days before, so he presumably recognized the correct address when he arrived.

with the Sky Industries pistol recovered from Fuell's residence. However, the gun barrel inside the 9mm Luger pistol recovered from Fuell's home was not a match to the bullets recovered by police.

D. Testimony of Bruce Redd

{¶17} Bruce Redd testified that he was the manager of the American Trading Company, a store that sells firearms on the west side of Cincinnati. On June 11, 2019, Fuell and his grandmother entered the store. Fuell's grandmother told Redd that she wanted a firearm for security purposes. Redd suggested she consider a shotgun. Instead, although there were approximately 100 firearms from which to choose, Fuell's grandmother specifically pointed at a Sky Industries 9mm in the gun case and said, "that's the one I want." The federal firearms transfer paperwork indicated that Fuell's grandmother purchased the pistol at 4:26 p.m. on June 11, 2019.

E. Juvenile Court's Transfer Decision

{¶18} In October 2019, the juvenile court issued a judgment entry finding that Fuell was 17 years old at the time of the alleged offenses and finding probable cause to conclude that Fuell committed the alleged offenses. Accordingly, the juvenile court ordered that Fuell be transferred to the adult division of the common pleas court pursuant to R.C. 2152.12(A) for further criminal proceedings.

II. Proceedings in the General Division

{¶19} After Fuell's transfer to adult court – that is, the Clermont County Court of Common Pleas, General Division – a grand jury indicted Fuell on one count of aggravated murder, two counts of murder, and one count of kidnapping, all with firearm specifications, as well as one count of tampering with evidence. Fuell later pleaded guilty to one count of murder and the state agreed to dismiss the firearm specification as well as the remaining counts. The court sentenced Fuell to life in prison with the possibility of parole after fifteen

years, a mandatory sentence for a defendant convicted of murder as set forth in R.C. 2929.02(B)(1): "whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life."[2]

III. Assignments of Error and Analysis

{¶20} Fuell appealed and assigned five errors for our review. We will address the first two assignments of error collectively.

{¶21} Assignment of Error No. 1:

{¶22} THE CLERMONT COUNTY JUVENILE COURT VIOLATED AUSTIN FUELL'S CONSTITUTIONAL RIGHTS WHEN IT ADMITTED LOCATION DATA BASED ON UNAUTHENTICATED CELL-TOWER RECORDS, IN VIOLATION OF ITS OWN BAR AGAINST HEARSAY EVIDENCE, AS WELL AS THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 10 AND 16 OF THE OHIO CONSTITUTION.

{¶23} Assignment of Error No. 2:

{¶24} THE JUVENILE COURT ABUSED ITS DISCRETION AND VIOLATED AUSTIN'S DUE PROCESS RIGHTS WHEN IT ADMITTED PHOTOS OF UNAUTHENTICATED TEXT MESSAGES ALLEGEDLY TAKEN FROM A NON-TESTIFYING WITNESS' CELLPHONE, IN VIOLATION OF EVID.R. 101; EVID.R. 802; EVID.R 901; FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶25} Assignments of Error Nos. 1 and 2 both concern the mandatory transfer hearing conducted by the juvenile court. Fuell argues the juvenile court violated multiple constitutional provisions and rules of evidence by admitting the Cell Tower Analysis and the Text Message Photographs. We will address these purported violations separately.

{¶26} But first, we must briefly explain Ohio's mandatory transfer statute, R.C. 2152.12(A). That statute provides that after a complaint has been filed alleging that a child

2. R.C. 2929.02 and R.C. 2929.03 were amended effective April 12, 2021. All references to R.C. 2929.02 and R.C. 2929.03 in this opinion are to the versions of those statutes that were effective prior to April 12, 2021.

is delinquent for having committed an act that would be aggravated murder or murder if committed by an adult, the court "shall" transfer the case to adult court if (1) the child was 16 or 17 years of age at the time of the act charged, and (2) there is probable cause to believe that the child committed the act charged. R.C. 2152.12 (A)(1)(a)(i). The statute does not prescribe any procedures or rules applicable to the transfer hearing. Rule 30 of the Ohio Rules of Juvenile Procedure, which governs the juvenile court's relinquishment of jurisdiction for criminal prosecution in adult court, also does not provide specific guidance on the procedures to be used or the applicability of specific constitutional guaranties or the Rules of Evidence.

A. Purported Constitutional Violations

{¶27} Fuell's first two assignments of error refer to multiple purported constitutional violations. Assignment of Error No. 1 states that the juvenile court's admission of the Cell Tower Analysis violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16 of Article I of the Ohio Constitution. Specifically, Fuell argues that the admission of the Cell Tower Analysis violated his Confrontation Clause rights because he did not have the opportunity to confront the individual who prepared the Cell Tower Analysis. He also alleges that the admission of the Cell Tower Analysis violated his due process rights, though he grounds his due process argument in the contention that due process includes the right to confront witnesses.

{¶28} The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." Article I, Section 10 of the Ohio Constitution also includes a Confrontation Clause: "In any trial, in any court, the party accused shall be allowed * * * to meet the

witnesses face to face * * *."[3] The Ohio Supreme Court has held that the Confrontation Clause in Article I, Section 10 "provides no greater right of confrontation than the Sixth Amendment * * *." *State v. Self*, 56 Ohio St.3d 73, 79 (1990).

{¶29} The United States Supreme Court has explained that "[t]he right to confrontation is basically a trial right." *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318 (1968). A juvenile transfer hearing "is not a trial as it does not 'find as a fact that the accused minor is guilty of the offense charged. It simply finds the existence of probable cause to so believe.'" *State v. Garner*, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-4939, ¶ 19, quoting *State v. Iacona*, 93 Ohio St.3d 83, 93 (2001).

{¶30} The United States Supreme Court "has repeatedly declined to require the use of adversarial procedures to make probable cause determinations." *Kaley v. United States*, 571 U.S. 320, 338, 134 S.Ct. 1090 (2014). The federal courts have repeatedly held that the Sixth Amendment's Confrontation Clause does not apply to preliminary hearings.[4] Likewise, the Ohio Supreme Court has held that the constitutional right to confront one's accusers "relates to the *actual trial* for the commission of the offense and not to the preliminary examination * * *." (Emphasis added.) *Henderson v. Maxwell*, 176 Ohio St. 187, 188 (1964).

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3. Fuell refers to the Fourteenth Amendment in Assignment of Error No. 1 but otherwise makes no reference to it at all in his briefs. It is unclear whether Fuell referred to the Fourteenth Amendment's due process clause or referred to the Fourteenth Amendment's incorporation of the Fifth and Sixth Amendments with respect to the states. See *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (Sixth Amendment Confrontation Clause rights apply to the states via the Fourteenth Amendment); *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, ¶ 19 (Fifth Amendment applies to states via the Fourteenth Amendment). Regardless of Fuell's intent in referencing the Fourteenth Amendment, our analysis herein applies in the same manner to the Fourteenth Amendment.

4. See *United States v. Colasuonno*, 697 F.3d 164, 177 (2d Cir.2012) ("[T]he full protections of the Confrontation Clause do not apply to preliminary hearings."); *Peterson v. California*, 604 F.3d 1166, 1169-70 (9th Cir.2010) (defendant not constitutionally entitled to confront witnesses at preliminary hearing); *United States v. Andrus*, 775 F.2d 825, 836 (7th Cir.1985) ("The right to confrontation applies when the ability to confront witnesses is most important—when the trier of fact determines the ultimate issue of fact. Consequently, the sixth amendment does not provide a confrontation right at a preliminary hearing."); *United States v. Harris*, 458 F.2d 670, 677 (5th Cir. 1972) ("There is no Sixth Amendment requirement that [defendants] also be allowed to confront [witnesses] at a preliminary hearing prior to trial.").

{¶31} Fuell acknowledges that the United States Supreme Court and the Ohio Supreme Court have never held that the federal or state Confrontation Clauses apply at juvenile mandatory transfer hearings. But Fuell argues that the United States Supreme Court and the Ohio Supreme Court have *implied* that the federal Confrontation Clause does apply at such hearings, citing *Kent v. United States*, 383 U.S. 541, 563, 86 S.Ct. 1045 (1966), *Iacona* at 93, and *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, ¶ 12.

{¶32} Fuell's reliance on these three cases is misplaced. In *Kent*, the United States Supreme Court, after noting that a number of courts had held that juveniles at transfer hearings are not owed certain fundamental due process rights that pertain to criminal proceedings, specifically *declined* "to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings * * *." *Kent* at 556. *Kent* specifically referenced the right to confront one's accusers as one of these constitutional guaranties that it declined to analyze. *Id.* at 555. Likewise, the paragraph of *Aalim* to which Fuell cites only summarizes an argument made by a county prosecuting attorney regarding whether juvenile transfer hearings satisfy due process. *Aalim* at ¶ 12. In *Aalim*, the Ohio Supreme Court did not, itself, state or imply that juvenile transfer hearings must include the right to confront one's accusers. *See id.* Nor does *Iacona* support Fuell's argument, as that case includes no reference at all to the federal or state Confrontation Clauses. Fuell has not cited to even a single case implying that the Confrontation Clauses apply at juvenile transfer hearings, let alone holding this to be the case.

{¶33} But that does not mean that Ohio courts have been silent on the question of whether the federal or state Confrontation Clauses apply at juvenile transfer hearings. At least two of our sister districts have held that the Confrontation Clause *does not* apply at juvenile transfer hearings. The Seventh District Court of Appeals explained that "[t]he right

to confrontation through the presentation of a certain quality of evidence is generally considered a 'trial right.'" *In re B.W.*, 7th Dist. Mahoning No. 17 MA 0071, 2017-Ohio-9220, ¶ 37 (noting that Article I, Section 10 of the Ohio Constitution specifically refers to a trial: "[i]n any *trial*, in any court, the party accused shall be allowed * * * to meet the witnesses face to face * * *." [Emphasis added.] *Id*.). The court observed that a transfer hearing "is a preliminary, non-adjudicatory proceeding as it does not determine whether the juvenile was delinquent." *Id.* at ¶ 18. "At this preliminary hearing, the juvenile court's function is not to determine whether the juvenile is guilty of the charge but is to determine whether there is *probable cause to believe* the juvenile is guilty." (Emphasis sic.) *Id.* Based upon this analysis, the Seventh District determined that the juvenile court was not bound by Confrontation Clause standards for the admissibility of evidence at the transfer hearing. *Id*. at ¶ 41.

{¶34} Similarly, the Sixth District Court of Appeals examined this issue and concluded that a juvenile does not have Confrontation Clause rights at a transfer hearing because the hearing is not a fact-finding trial and the juvenile's liberty is not yet at stake. *State v. Garner*, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-4939, ¶ 26. *Garner* was appealed, but the Ohio Supreme Court recently declined to accept the appeal for review. *State v. Garner*, 161 Ohio St.3d 1479, 2021-Ohio-802.

{¶35} We agree with the reasoning set forth by our colleagues in the Seventh and Sixth districts. Fuell's juvenile transfer hearing was non-adjudicatory, as it did not result in any conclusive factual findings that could be used against him at a subsequent trial. The purpose instead was to determine Fuell's age at the time of the alleged incident and the existence of probable cause. R.C. 2152.12(A)(1)(a)(i). Based upon the foregoing analysis, we hold that the federal and state Confrontation Clauses were inapplicable at Fuell's transfer hearing.

{¶36} But Fuell does not limit his constitutional arguments to the Sixth Amendment and Article I, Section 10 of the Ohio Constitution. Fuell also argues that in admitting the Cell Tower Analysis and the Text Message Photographs the juvenile court also violated Fuell's due process rights under the Fifth Amendment and Article I, Section 16 of the Ohio Constitution. Fuell's argument regarding due process, as set forth in his brief, appears to be entirely based on the idea that confrontation rights are included within the requirements of due process, i.e., "it is settled that children do have a right to confront and cross-examine witnesses as a matter of *due process*." (Emphasis sic.) To the extent that Fuell argues that due process incorporates Confrontation Clause rights, we refer to our discussion of confrontation rights above.

{¶37} To the extent that Fuell makes a broader due process argument, we note that it is well-settled law that juveniles are entitled to due process of law in a hearing to relinquish jurisdiction to adult court. *Kent*, 383 U.S. at 562. In *Kent*, the United States Supreme Court held that due process is satisfied when a juvenile court issues a decision stating its reasons for the transfer after conducting a hearing at which the juvenile is represented by counsel. *Id.* at 554. The United States Supreme Court admonished that a transfer of a juvenile to adult court should not occur "without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id*. Citing *Kent*, the Ohio Supreme Court has characterized a transfer hearing as a "'critically important'" proceeding and held that such a proceeding "'must measure up to the essentials of due process and fair treatment.'" *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, ¶ 11, quoting *Kent* at 562.

{¶38} But none of the requirements of due process that apply at a juvenile court proceeding were omitted here. The juvenile court conducted a hearing, Fuell was represented by counsel at that hearing, and the juvenile court issued an opinion explaining its reasons for transferring Fuell to adult court. *See Kent* at 554 (describing due process

requirements in a juvenile transfer hearing). Admitting hearsay or other evidence that could raise Confrontation Clause issues at such a hearing is not inconsistent with fundamental fairness and due process of law as described in *Kent*. *Id.* To the extent that Fuell argues that the transfer hearing violated his Fifth Amendment due process rights in some manner, we find no such violation.

B. Rules of Evidence

{¶39} Assignment of Error No. 1 alleges that the trial court erred when it admitted the Cell Tower Analysis in violation of the court's practice – referenced by the juvenile judge during the October 4, 2019 hearing – of not permitting hearsay at juvenile transfer hearings. Assignment of Error No. 2 alleges that the juvenile court erred when it admitted the Text Message Photographs in violation of the rule against hearsay, Evid.R. 802. Assignment of Error No. 2 also alleges that the trial court erred when it admitted the Text Message Photographs in violation of the evidence rule regarding authentication of evidence, Evid.R 901. Assignment of Error No. 2 also refers to violation of Evid.R. 101, but Fuell provides no argument whatsoever regarding Evid.R. 101.

{¶40} The state argues that the Rules of Evidence do not apply in juvenile mandatory transfer hearings. In fact, at least two of our sister districts have held that the Rules of Evidence do not apply in juvenile transfer proceedings. *In re B.W.*, 2017-Ohio-9220 at ¶ 48; *State v. Grays*, 1st Dist. Hamilton No. C-790914, 1981 WL 9566, *1 (Jan. 14, 1981).

{¶41} It is unnecessary for us to resolve the question of whether the Rules of Evidence applied at Fuell's mandatory transfer hearing and whether the Cell Tower Analysis and the Text Message Photographs were improperly admitted. This is because the purpose of the hearing was to determine probable cause only, the hearing did not result in any conclusive factual findings, and the state presented other evidence, exclusive of the

challenged evidence, sufficient to meet the probable cause standard.

{¶42} A juvenile court's probable cause determination in a transfer hearing involves questions of both fact and law. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, at ¶ 51. An appellate court will defer to the juvenile court's "determinations regarding witness credibility, but [will] review de novo the legal conclusion whether the state presented sufficient evidence to demonstrate probable cause to believe that the juvenile committed the acts charged." *Id.* The "probable" component of the probable cause determination means that the state must produce evidence that "raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt." *Iacona*, 93 Ohio St.3d at 93.

{¶43} Lacey testified that she had encountered Fuell on several occasions in the days leading up to Ketring's death. She recognized him as one of the assailants at her grandparents' home. She recognized him both by his eyes, which she described as being "further back" or "indented" in his skull, and by his voice. Lacey further testified that the intruder she recognized as Fuell asked Ketring about "my $375," which was the exact amount she testified that Ketring had robbed Fuell of just a few days prior. Given that the intruder knew the exact amount taken in the earlier robbery, Lacey was nearly certain that the intruder was Fuell. Moreover, that robbery would have provided Fuell with the motive for the home invasion and murder, and Lacey's description of the robbery in the Comfort Inn parking lot was corroborated through Detective Tobias' review of various security camera videos.

{¶44} In other words, Lacey provided eyewitness testimony specifically identifying Fuell as one of the intruders and providing specific, credible reasons why she was able to identify Fuell, even with a mask. Lacey's testimony, if believed, would raise more than a mere suspicion of doubt concerning Fuell's involvement in the murder, and thus was

sufficient, by itself, to establish probable cause. *See State v. E.T.*, 10th Dist. Franklin No. 17AP-828, 2019-Ohio-1204, ¶ 68 (affirming probable cause finding at juvenile transfer hearing based on single eyewitness testimony, despite witness being only "50 percent" certain regarding identity based upon a photo array); *In re A.J.S.* at ¶ 42.

{¶45} But the state presented additional evidence that a gun barrel that matched the bullet that killed Ketring was positively matched to a gun barrel recovered from a vehicle in which Fuell was travelling. And the day of the shooting, Fuell and his grandmother purchased a firearm with a barrel chambered in the same caliber as the barrel found in the vehicle. Both barrels were believed to be interchangeable and could be swapped into the newly purchase firearm. Thus, evidence was presented indicating that Fuell had, just hours after the murder, attempted to secure a firearm that would not link him to the murder.

{¶46} Through the foregoing, the state set forth evidence establishing probable cause that Fuell may have committed the offenses for which he was charged as a delinquent child. *See In re A.J.S.*, 2008-Ohio-5307 at ¶ 54-55 (testimony of witness and police officer's testimony regarding recovered shell casings was "sufficient evidence to demonstrate probable cause to believe that A.J.S. fired six bullets in the parking lot"). Accordingly, the court did not err in granting the mandatory transfer. Even if Fuell is correct that the Cell Tower Analysis and the Text Message Photographs were admitted in violation of the Rules of Evidence – a question we do not reach – the juvenile court's errors in admitting this evidence would have been harmless error. *See State v. Price*, 10th Dist. Franklin No. 97APA02-151, 1997 WL 606875, *2-3 (Sept. 30, 1997) (holding that even if a trial court erred in denying the defendant's request to bring an additional witness at a

juvenile probable cause hearing, such error was harmless error).[5]

{¶47} Fuell's first and second assignments of error are overruled.

{¶48} Assignment of Error No. 3:

{¶49} AUSTIN WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL: (1) FAILED TO MOVE TO EXCLUDE OR LIMIT CONCLUSIVE EXPERT OPINION TESTIMONY BASED ON TOOLMARK ANALYSIS EXCLUDING ALL OTHER POTENTIAL FIREARMS; AND (2) WHEN COUNSEL FAILED TO CONSULT WITH OR RETAIN HIS OWN FIREARMS EXPERT TO CONTEST THE STATE'S EXPERT TOOLMARK ANALYSIS. FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTION 10 AND 16 OF THE OHIO CONSTITUTION.

{¶50} Fuell contends he received constitutionally defective assistance of counsel when his attorney failed to introduce evidence, or expert testimony, that would challenge the science behind the forensic tool mark analysis performed by White, the state's firearms examiner. Fuell further argues that his counsel should have objected to White's testimony and specifically should have objected to White's opinion that the gun barrel recovered from Fuell's grandmother's vehicle was the same barrel from which the fatal bullet was fired.

{¶51} To prevail on an ineffective assistance of counsel claim, Fuell must establish (1) deficient performance by trial counsel, that is, performance falling below an objective standard of reasonable representation, and (2) prejudice, that is, a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *State v. Taylor*, 12th Dist. Fayette No. CA2018-11-021, 2019-Ohio-3437, ¶ 16, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052 (1984) and *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 62. The failure to demonstrate either prong is fatal to an ineffective assistance of counsel claim. *State v. Kaufhold*, 12th Dist. Butler No. CA2019-

5. While Fuell refers specifically to Evid.R. 802 in Assignment of Error No. 2, and in Assignment of Error No. 1 Fuell only refers to a violation of a practice of not permitting hearsay at juvenile transfer hearings that was referenced by the judge during the October 4, 2019 hearing, the harmless error analysis above is the same in both cases.

09-148, 2020-Ohio-3835, ¶ 54. In considering an ineffective assistance claim, an "appellate court must give wide deference to the strategic and tactical choices made by trial counsel in determining whether counsel's performance was constitutionally ineffective." *State v. McLaughlin*, 12th Dist. Clinton No. CA2019-02-002, 2020-Ohio-969, ¶ 54.

{¶52} Fuell contends that there is a consensus developing within and without the judiciary challenging the science behind ballistic tool mark analysis and imposing limitations on expert opinion testimony in this realm of science in order to ensure compliance with Evid.R. 702. However, there is nothing in the record of this case to substantiate the claim that the methodology used by White was less than reliable. And a consideration of the case law of this state indicates instead that forensic ballistic comparison is a generally accepted method of expert analysis and opinion. *State v. Quiller*, 10th Dist. Franklin No. 15AP-934, 2016-Ohio-8163, ¶ 30 (noting that Ohio courts have generally found tool mark and ballistics analysis to be reliable and finding that the trial court did not err in allowing testimony of expert witness on tool mark and ballistics analysis); *State v. Langlois*, 6th Dist. Lucas No. L-11-1313, 2013-Ohio-5177, ¶ 40 (finding that "Such microscopic comparison testing is a generally accepted method of forensic analysis"); *State v. Johnson*, 10th Dist. Franklin No. 05AP-12, 2006-Ohio-209, ¶ 15 ("Given [the ballistics and tool mark expert's] explanation of his methodology, the trial court did not abuse its discretion by admitting his testimony, as his opinion was based on reliable, commonly accepted scientific principles"); *State v. Armstrong*, 11th Dist. Trumbull Nos. 2001-T-0120 and 2002-T-0071, 2004-Ohio-5635, at ¶ 66 ("The testimony given by [the expert] confirms that the tool-mark analysis technique is sufficiently reliable to aid the jury in reaching accurate results"). Accordingly, we do not find that Fuell has demonstrated any deficiency in his counsel's alleged failure to challenge the science underpinning forensic tool mark analysis.

{¶53} Fuell further argues that his counsel was ineffective for failing to retain an

expert to challenge White's methodology and conclusions. However, "'the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel.'" *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 66, quoting *State v. Nicholas*, 66 Ohio St.3d 431, 436 (1993). Fuell's argument that an expert could have challenged White's testimony and was needed to prevail at this hearing is purely speculative. Fuell fails to identify any expert witnesses who could have been called or what the expert would have said. Counsel's decision to rely on cross-examination appears to be a legitimate "tactical decision," to which deference is owed. *Id.*

{¶54} Additionally, we note that even if White's methodology had been found objectionable under Evid.R. 702 or had been undercut by competing expert testimony, Fuell would not be able to meet his burden under *Strickland* to demonstrate that the result of the proceedings would be different. Fuell's arguments concerning White's testimony go to the weight of the evidence. But this was a probable cause hearing and, as described previously, Lacey's testimony alone would present sufficient, reasonable grounds to conclude that Fuell may have committed the alleged offenses. Accordingly, we do not find that the outcome would have changed even in the absence of White's testimony. Fuell's third assignment of error is overruled.

{¶55} Assignment of Error No. 4:

{¶56} THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED AUSTIN OF HIS RIGHT TO A FAIR TRANSFER HEARING BECAUSE ABSENT THE IMPROPER CELL-PHONE AND TOOLMARK EVIDENCE, THE PROSECUTOR FAILED TO PROVIDE RELIABLE, CREDIBLE EVIDENCE PROVING AUSTIN'S INVOLVEMENT BEYOND JUST A MERE SUSPICION FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶57} Fuell argues that the cumulative effect of errors that occurred during the transfer hearing denied him due process of law. In line with his first three assignments of error, Fuell contends that his inability to confront witnesses, the alleged erroneous

admission of certain evidence, and his attorney's failure to challenge the state's expert evidence, when considered collectively, denied him a fair hearing.

{¶58} Under the doctrine of cumulative errors, a reviewing court "will reverse a conviction when the cumulative effect of errors deprives a defendant of a fair trial even though each of the instances of trial-court error does not individually constitute cause for reversal." *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, ¶ 140.

{¶59} Fuell cites no authority for the proposition that the cumulative error doctrine applies to juvenile transfer proceedings. Assuming that the doctrine is applicable, we have already overruled all of Fuell's assignments of error concerning the transfer hearing. Consequently, Fuell was not deprived of a fair hearing and the cumulative error doctrine is inapplicable. Fuell's fourth assignment of error is overruled.

{¶60} Assignment of Error No. 5:

{¶61} AUSTIN'S MANDATORY LIFE-TAIL SENTENCE IS UNCONSTITUTIONAL BECAUSE THE IMPOSITION OF ANY LIFE IMPRISONMENT SENTENCE UPON A JUVENILE OFFENDER WITHOUT TAKING INTO CONSIDERATION FACTORS COMMANDED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND ARTICLE I SECTIONS 9, 10, AND 16 OF THE OHIO CONSTITUTION, VIOLATES THOSE PROVISIONS.

{¶62} Fuell was 17 years old at the time of the home invasion and Ketring's death. Fuell argues that R.C. 2929.02(B)(1)'s mandatory sentence of life imprisonment with the possibility of parole after 15 years constituted cruel and unusual punishment prohibited by the federal and Ohio constitutions because a mandatory sentence does not allow a court to consider a juvenile defendant's youth.

{¶63} The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article I, Section 9 of the Ohio Constitution includes identical language.

{¶64} "Central to the [United States] Constitution's prohibition against cruel and

unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, ¶ 25, quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544 (1910). In 2005, the United States Supreme Court held that the Eighth Amendment prohibits the death penalty with respect to juveniles. *Roper v. Simmons*, 543 U.S. 551, 570-571, 125 S.Ct. 1183 (2005). In 2010, the Court held that the Eighth Amendment prohibits life imprisonment without the possibility of parole for nonhomicide offenses with respect to juveniles. *Graham v. Florida*, 560 U.S. 48, 74, 130 S.Ct. 2011 (2010). In 2012, the Court went a step further, holding that the Eighth Amendment requires that a court consider the youth of a juvenile convicted of homicide before imposing a sentence of life imprisonment without the possibility of parole. *Miller v. Alabama*, 567 U.S. 460, 489, 132 S.Ct. 2455 (2012). Ohio's chief justice has characterized the United States Supreme Court as noting in these decisions 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. Long*, 138 Ohio St.3d 478, 2014-Ohio-849 at ¶ 33 (O'Connor, C.J., concurring). "Generally stated, the rationale for the disparate treatment is that 'juveniles have diminished culpability and greater prospects for reform' and '"are less deserving of the most severe punishments."'" *Long*, *Id.* quoting *Miller* at 2464, in turn quoting *Graham* at 68.

{¶65} The Ohio Supreme Court has twice applied *Miller* in cases where a juvenile defendant was sentenced under R.C. 2929.03, the aggravated murder penalty statute. Under R.C. 2929.03(A), a court may impose any of the following four sentences on a defendant convicted of aggravated murder: (1) life imprisonment without the possibility of parole, (2) life imprisonment with the possibility of parole after 20 years, (3) life imprisonment with the possibility of parole after 25 years, or (4) life imprisonment with the

possibility of parole after 30 years. R.C. 2929.03(A)(1)(a)-(d).

{¶66} The Ohio Supreme Court addressed the first of these potential sentences – life imprisonment without the possibility of parole – in *Long*. The court held that a trial court, "in exercising its discretion under R.C. 2929.03(A), must separately consider the youth of a juvenile offender as a mitigating factor before imposing a sentence of life without parole in light of *Miller v. Alabama* * * *." *Long* at ¶ 1. The failure to consider a juvenile offender's youth in this situation was a violation of the Eighth Amendment. *Id.* at ¶ 33, 36-37 (O'Connor, C.J., concurring).

{¶67} *Long* did not address the question of whether the youth of a juvenile defendant convicted of aggravated murder must be considered before imposing one of the other three sentences of life imprisonment with the possibility of parole after 20, 25, or 30 years available under R.C. 2929.03(A). The Ohio Supreme Court addressed precisely this issue in *State v. Patrick*, Slip Opinion No. 2020-Ohio-6803. Patrick was sentenced to life imprisonment with the possibility of parole after 30 years under R.C. 2929.03(A) for aggravated murder, plus a consecutive, mandatory 3-year prison term for a firearm specification, and a 3-year prison term for tampering with evidence, to run concurrently with the other sentences. *Id.* at ¶ 7. This was effectively a sentence of life imprisonment with parole eligibility after 33 years. *Id*. Patrick argued that the trial court unconstitutionally failed to consider his youth during sentencing. The Ohio Supreme Court held that, "consistent with our decision in [*Long*], a trial court must separately consider the youth of a juvenile offender as a mitigating factor before imposing a life sentence under R.C. 2929.03, even if that sentence includes eligibility for parole." *Id.* at ¶ 2. While acknowledging that the state did not recommend that Patrick receive life imprisonment for aggravated murder, the Ohio Supreme Court noted that life without parole was still "a potential sentence for Patrick[,]" as "the trial court's discretionary-sentencing task [under R.C. 2929.03] required it to choose

from a number of life-sentencing options, with or without parole." *Id.* at ¶ 31.

{¶68} While *Long* and *Patrick* analyzed R.C. 2929.03, Fuell was sentenced under a different statute, R.C. 2929.02, as he was convicted of murder, not aggravated murder. Nevertheless, Fuell argues that *Patrick* is controlling and requires that we find that R.C. 2929.02(B)(1)'s mandatory sentence for murder is unconstitutional as applied to juveniles – including of course Fuell – because the statute does not permit a trial court to consider a juvenile's age. The state argues that R.C. 2929.02(B)(1) is not unconstitutional under *Patrick* because it provides a juvenile with a meaningful possibility of parole after a relatively short 15 years, and that the parole board is specifically required to consider age in its parole decisions.

{¶69} Before considering these arguments, we must note that Fuell failed to object to his sentence upon constitutional or any other grounds before the trial court. It is well established that "the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *State v. Awan*, 22 Ohio St.3d 120, 122 (1986). Therefore, an appellant's "'[f]ailure to raise the issue of the constitutionality of a statute or its application at the trial court level generally constitutes waiver of that issue and need not be heard for the first time on appeal.'" *State v. Myers*, 12th Dist. Madison No. CA2012-12-027, 2014-Ohio-3384, ¶ 12, quoting *State v. Golden*, 10th Dist. Franklin No. 13AP-927, 2014-Ohio-2148, ¶ 11; *accord Awan* at 122.

{¶70} The waiver doctrine stated in *Awan* is discretionary, and an appellate court may review claims of defects affecting substantial rights for plain error, despite an appellant's failure to bring such claims to the attention of the trial court. *In re M.D.*, 38 Ohio St.3d 149, 151 (1988); Crim.R. 52(B). "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Crim.R. 52(B) places three limitations on a reviewing court's decision to correct an error not

raised before the trial court. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). First, an error, "i.e., a deviation from a legal rule," must have occurred. *Id.*, citing *State v. Hill*, 92 Ohio St.3d 191, 200 (2001), in turn citing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993). Second, the error complained of must be plain, i.e., it must be "an 'obvious' defect in the * * * proceedings." *Id.*, quoting *State v. Sanders*, 92 Ohio St.3d 245, 257 (2001), in turn citing *State v. Keith*, 79 Ohio St.3d 514, 518 (1997). Third, the error must have affected "substantial rights." *State v. Martin*,154 Ohio St.3d 513, 2018-Ohio-3226, ¶ 28.

{¶71} As just stated, plain error must be "plain." *Barnes* at 28 ("The lack of a definitive pronouncement from this court and the disagreement among the lower courts preclude us from finding plain error"). "[I]f a forfeited error is not plain, a reviewing court need not examine whether the defect affects a defendant's substantial rights; the lack of a 'plain' error within the meaning of Crim.R. 52(B) ends the inquiry and prevents recognition of the defect." *Id.* In *Barnes*, the Ohio Supreme Court held that a court of appeals erred when it applied plain error analysis when the putative error was not actually "plain." *Id.*

{¶72} Here it is not "plain" that *Patrick* requires consideration of age when a trial court imposes R.C. 2929.02(B)(1)'s mandatory sentence on a juvenile defendant convicted of murder. Stated another way, it is not "plain" that R.C. 2929.02(B)(1)'s mandatory sentence of life imprisonment with the possibility of parole after 15 years is unconstitutional under the reasoning of *Patrick*. There is certainly language in *Patrick* that suggests that *may* be the case. For example, *Patrick* states, "we conclude that the difference between a sentence of life in prison with parole eligibility after a term of years and a sentence of life without the possibility of parole is not material for purposes of an Eighth Amendment challenge by an offender who was a juvenile when he or she committed the offense." 2020-Ohio-6803 at ¶ 33. *Patrick* further stated that "the severity of a sentence of life in prison on

a juvenile offender, even if parole eligibility is part of the life sentence, is analogous to a sentence of life in prison without the possibility of parole for the purposes of the Eighth Amendment." *Id.* at ¶ 36.

{¶73} But there are also strong reasons to doubt that *Patrick* extends as far as Fuell would have us find. First, there is the simple fact that *Patrick* concerns R.C. 2929.03 but Fuell was sentenced pursuant to a *different* statute, R.C. 2929.02. *Patrick* did not involve the statute at issue in this case, and therefore *Patrick* is not necessarily controlling. *See State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642 at ¶ 11 ("'[a] reported decision, although a case where the question might have been raised, is entitled to no consideration whatever as settling * * * a question not passed upon or raised at the time of the adjudication'").

{¶74} Second, a close reading of *Patrick* reveals that the Ohio Supreme Court was focused on the need to consider a juvenile defendant's youth when a sentencing court is presented with sentencing *options* that included the possibility of life imprisonment. *Patrick* emphasizes that R.C. 2929.03 involved a "range" of "life-term options," and that even when the state did not recommend a life sentence without the possibility of parole, that sentence remained an "option." 2020-Ohio-6803 at ¶ 32. The Ohio Supreme Court stated that if age must be considered when a court considers the "harshest penalties" – here the Ohio Supreme Court cited to *Miller*'s discussion of life imprisonment without the possibility of parole – "then youth is also a necessary consideration when a sentencing court determines *at what point* parole eligibility should be available during a life sentence." (Emphasis added.) *Id*. And immediately after making a statement suggesting that life sentences with and without parole are analogous, *Patrick* states that "the need for an individualized sentencing decision that considers the offender's youth and its attendant characteristics is critical *when life without parole is a potential sentence*," suggesting that youth need only be

considered when a court considers multiple sentencing options that involve the potential of a life sentence without the possibility of parole. (Emphasis added.) *Id.* at ¶ 36. The Ohio Supreme Court's emphasis in *Patrick* was on considering youth when deciding *between* the four optional sentences authorized in R.C. 2929.03, one of which was life without the possibility of parole. *Id.* at ¶ 32-36. A sentence of life imprisonment without the possibility of parole was not an option available to the court in this case, where Fuell pleaded guilty to murder and the trial court was required to apply the mandatory sentence of life imprisonment with the possibility of parole after 15 years as provided in R.C. 2929.02(B)(1).

{¶75} Third, *Patrick* did not hold that the least of R.C. 2929.03's four possible sentences – that is, life imprisonment with the possibility of parole after 20 years – was unconstitutional when applied to a juvenile. Far from it. We are unaware of any decision by the Ohio Supreme Court or any other court holding that a life sentence with the possibility of parole after 15 years is unconstitutional when applied to a juvenile offender. The absence of any such decision is unsurprising, as a sentence of life in prison with the possibility of parole after 15 years provides a juvenile with a meaningful possibility of release. A juvenile defendant who commits murder and is sentenced at age 17 could be eligible for release from prison at age 32 – hardly the type of lifetime scenario that so concerned the Ohio Supreme Court in *Patrick*. *Id.* at ¶ 35, 39-41. If the Ohio Supreme Court in *Patrick* did not hold that a 20-to-life sentence is unconstitutional there is certainly an argument that a 15-to-life sentence cannot be unconstitutional.

{¶76} In other words, there are plausible arguments as to why the reasoning applied in *Patrick* may or may not require a court to hold that R.C. 2929.02(B)(1)'s mandatory sentence is unconstitutional as applied to juveniles, including Fuell. The Ohio Supreme Court has not held that the mandatory sentence available under R.C. 2929.02(B)(1) is unconstitutional as applied to juveniles. In this situation we therefore do not find that the

trial court committed "plain" error, and we decline to exercise our discretion to apply plain error analysis here, where Fuell failed to object to his sentence. *Barnes*, 94 Ohio St. 3d at 28 ("[I]f a forfeited error is not plain, a reviewing court need not examine whether the defect affects a defendant's substantial rights; the lack of a 'plain' error within the meaning of Crim.R. 52(B) ends the inquiry and prevents recognition of the defect."). Fuell's fifth assignment of error is overruled.

IV. Conclusion

{¶77} For the reasons stated above, we overrule all of Fuell's assignments of error.

{¶78} Judgment affirmed.

M. POWELL, P.J., and HENDRICKSON, J., concur.