IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff- Appellee, v. AUSTIN M. FUELL, Defendant-Appellant.	: : : : : : : :	Case No. 2021-0794 On Appeal from the Clermont County Court Appeals, Twelfth Appellate District Case. No. CA2020-02-008

BRIEF OF *AMICUS CURIAE* NATIONAL JUVENILE DEFENDER CENTER IN SUPPORT OF APPELLANT AUSTIN M. FUELL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The **National Juvenile Defender Center** (NJDC) was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC has participated as Amicus Curiae before the United States Supreme Court, as well as federal and state courts across the country.

STATEMENT OF CASE AND FACTS

Amicus adopts the Statement of the Case and Facts as articulated in Appellant's brief.

ARGUMENT

Introduction

Adolescents prosecuted in the adult criminal legal system confront profound and potentially life-altering harms. These include, among others, lengthy periods of incarceration in adult jails and prisons, with the attendant threat of victimization and violence, and the significant barriers to re-entry posed by the public nature of an adult criminal charge. Many of these consequences of adult prosecution occur, regardless of whether a young person is ultimately convicted. For these reasons, both the United States Supreme Court and Ohio courts have long accorded youth threatened with waiver robust due process protections before such transfer of jurisdiction may occur, including, among others, the right to counsel, full discovery, and an adversarial probable cause hearing.

In keeping with this well-established precedent, young Ohioans facing a Juv. R. 30(A) preliminary hearing must have full right of cross-examination of witnesses—including those whose hearsay statements are presented—and to have the hearing "conducted under the rules of evidence prevailing in criminal trials generally" as in Crim.R. 5(B)(2). This will ensure that young people will have the opportunity to test the state's probable cause evidence for each element of the charge subject to mandatory transfer at this critically important decision point.

In this case, the trial court erred in allowing witnesses to testify on unchallengeable hearsay, depriving Austin of the opportunity to cross examine the true witness and preventing him from challenging the offered evidence. In so doing, it deprived him of the right to due process in the transfer decision. Amicus urges this Court to reverse and remand the lower court's decision.

Further, Amicus asks this Court to extend this Court's decisions in *State v. Long* and *State v. Patrick* to young people like Austin facing sentencing in adult court under R.C. 2929.02(B)(1).

"The most important attribute of the juvenile offender is the potential for change." *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶ 42. The mitigating factors of youthfulness have been the bedrock upon which this Court and the United States Supreme Court have prohibited certain punishments for children. *See Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (abolishing the death penalty for juvenile offenders), *Graham v. Florida,* 560 U.S. 48, 74-75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011) (finding life-without-parole sentences for non-homicide juvenile offenders unconstitutional); *Miller v. Alabama*, 567 U.S. 460, 481, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (finding mandatory life-without-parole sentences for juvenile homicide offenders unconstitutional). The decision in *Miller* requires an opportunity for the sentencing court to consider a child's age and age-attendant circumstances. Thereafter, this Court held that when sentencing a youth offender, the court must

consider youth as a mitigating factor. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 27, 29. More recently, this Court extended *Long* to life sentences for young people, requiring an individualized sentencing determination that articulates the court's consideration of the mitigating effects of youth for a child convicted as an adult in criminal court. *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, ¶ 41.

Amicus urges this Court to extend *Patrick* to sentencing hearings under 2929.02(B) and require judges to consider youth as a mitigating factor before imposing a life-tail sentence on a young person.

Appellant Austin M. Fuell's 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. The transfer decision carries profound consequences for young people and is one of the weightiest functions of the juvenile court.

Juvenile courts function as the gatekeeper in transfer proceedings and must ensure that a young person is not removed from the rehabilitative cocoon of the juvenile court until all procedural requirements are met. "[a] transfer to adult court almost always is intended to allow for a harsher sentence than a juvenile court could impose," therefore the preliminary hearing that precedes "mandatory transfer implicates the punitive aspect of sentencing and deprives the juvenile of access to the

rehabilitative hallmarks of the juvenile-justice system." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 68, (O'Connor, C.J., dissenting).

The juvenile court has exclusive jurisdiction in all actions involving children. R.C. 2151.23 It does not abandon its responsibility to uphold the many purposes of the Juvenile Code – including "to provide for the care, protection, and mental and physical development of children" –simply because a prosecutor decides to file a waiver motion. R.C. 2152.01

The lower court's decision suggests that due process does not include a young person's right to cross-examination during the Juv. R. 30 preliminary hearing and declares that such proceedings "are not a fact-finding trial" and that the young person's "liberty is not at stake." *Opinion* at ¶ 34-35. This decision stands in direct contradiction to the juvenile court's obligation to accord "primacy" to the care, protection, and development of children and, if permitted to stand, would increase the likelihood of waiver.

"Mandatory bindover, and diversion out of the juvenile justice system, undeniably affects the length of confinement to which an accused minor is exposed." *State v. Iacona*, 93 Ohio St.3d 83, 90, 2001-Ohio-1292, 752 N.E.2d 93. In passing Ohio's transfer provisions, "[s]tate legislators were keenly aware of the ramifications of a juvenile's transfer from juvenile court and its therapeutic milieu to adult court, in which punishment and deterrence are integral." *Aalim* at ¶ 71 (O'Connor, C.J., dissenting).

Children tried in the adult system are more likely to experience psychological harms when detained or incarcerated in adult facilities, where they experience pervasive fear and anxiety without any semblance of rehabilitative services. Natl. Juvenile Defender Ctr., *Natl. Juvenile Defense Standards*, Std. 8.6 cmt. (2012) njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf. "Youth incarcerated in adult prisons are extraordinarily vulnerable. As the youngest and often most inexperienced members of the prison population, they face physical and sexual abuse, and even death." *Id.* Youth in the adult carceral system also face "harsher disciplinary policies, including prolonged periods of isolation." U.S. Dep't of Justice Civil Rights Div., *Investigation of the St. Louis County Family Court St. Louis, Missouri* 28 (2015), available at https://njdc.info/wp-content/uploads/2015/07/St.-Louis-County-Family-Court-Findings-Report-7.31.15.pdf (accessed Nov. 7, 2021).

Transferred children also face significant risks of emotional and physical injury. *See id. at 27*; *NJDC Standards* at Std. 8.6 cmt. If a young person is ultimately convicted in adult court, that conviction carries additional consequences that do not flow from a delinquency adjudication. *See Investigation of the St. Louis County Family Court* at 28. An adult conviction can pose overwhelming barriers to the young person's ability to work, vote, and obtain housing and government benefits. *See, e.g., NJDC Standards* at Std. 1.1 cmt. *See also* Neelum Arya, Campaign for Youth Justice, *State Trends: Legislative Changes*

from 2005 to 2010 Removing Youth from the Adult Criminal Justice System 18 (2011), campaignforyouthjustice.org/images/nationalreports/statetrendslegislativevictories.pdf.

Furthermore, youth in the adult system are less likely to benefit from statutory provisions allowing for sealing and expungement of youth records, meaning their convictions and the resulting collateral consequences persist with them throughout adulthood. *Compare* R.C. 2953.36 (which prohibits the sealing of serious-offense records), *with* R.C. 2151.356 and 2151.358 (which permit the sealing and possible expungement of some, but not all serious delinquency offenses).

Studies have also shown that youth prosecuted in the criminal system have longer sentences and a greater tendency to reoffend than those adjudicated in juvenile court. *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Juvenile Delinquency?, Office of Juvenile Justice and Delinquency Prevention* 4 (June 2010), ojp.gov/pdffiles1/ojjdp/220595.pdf (accessed Nov. 7, 2021) (citing study in which youth adjudicated in juvenile court had a twenty-nine percent lower risk of rearrest than youth tried in criminal court); Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future Child. 100 (Fall 2008), available at pubmed.ncbi.nlm.nih.gov/21337999/ (accessed Nov. 7, 2021). Underlying these higher recidivism rates is the lack of access to educational, vocational, and rehabilitative services that would adequately prepare youth in the adult system for reentry into the

community, as well as the long-term negative effects of an adult criminal record. *See* Redding, *Juvenile Transfer Laws* at 6.

In addition, the profound racial disparities that riddle Ohio's transfer scheme pose a significant and unacceptable harm to youth of color and demand more robust procedural protections before waiver may occur. *See* Ohio Department of Youth Services, *Statewide Reports Maintained by DYS* (May 18, 2020), dys.ohio.gov/wps/portal/gov/dys/about-us/communications/reports/statewide-reports-maintained-by-dys (accessed Nov. 7, 2021). (showing that while there was a general downward trend in the total number of Black youth being transferred between 2009 and 2016, the overrepresentation of Black youth versus total youth transferred trended upwards).

The potential for harm associated with transfer—increased punishment, racially biased treatment, and crushing collateral consequences—compels robust due process protections for youth in transfer proceedings before the damage is done. *Kent v. United States*, 383 U.S. 541, 553, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) ("latitude [accorded to the juvenile court in transfer proceedings] is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness").

II. Transfer hearings must measure up to the essentials of due process and fundamental fairness

A. *Kent's* due process mandate underlies children's constitutional rights in mandatory transfer hearings

In *Kent*, the Court set the floor on protections afforded to a child who faces transfer from the *sui generis* jurisdiction of the juvenile court. *Kent* at 541, (holding that courts are required to provide sufficient procedural regularity under the circumstances to satisfy the basic requirements of due process and fairness, in addition to meeting the statutory requirements).

Indeed, while courts are given latitude and discretion into factual determinations, procedure is sacrosanct: The juvenile court may not "determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act." *Kent* at 553.

It is the import of the transfer decision that underlies the Court's reasoning—demanding strict adherence to the mechanism for transfer established by the state consistent with due process and fundamental fairness. The Court held that 16-year-old Kent was entitled to the statutorily mandated provision of "full investigation" in the District of Columbia's transfer provision, "read in the context of constitutional principles relating to due process and the assistance of counsel." *Kent* at 557.

Although most state statutes do not explicitly give children the right to present evidence of their own at the transfer hearing, such a right is based in the Constitution. In jurisdictions in which the hearing itself is constitutionally necessary, like Ohio, young people have a constitutional right to present relevant evidence that the prosecutor or probation department may have elected to withhold, because "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914). The right to be heard entails not only the right to confront and cross-examine witnesses and evidence presented by others but also the right to present evidence deemed important to the defense. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Vitek v. Jones*, 445 U.S. 480, 495-96, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980); *Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Rock v. Arkansas*, 483 U.S. 44, 49-53, fn.9, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

When counsel contests any fact made relevant by the criteria for transfer, the law strongly supports that the child has a due process right to present all material evidence bearing upon that fact. "Ordinarily, the right to present evidence is basic to a fair hearing." *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 785-87, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (when an issue is disputed, the factfinder must listen to the facts on both sides). The "minimum assurance [that a factfinder's determination is] truly informed . . . requires respect for

the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Ford v. Wainwright*, 477 U.S. 399, 414, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (plurality opinion), quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23, 70 S.Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., dissenting).

The United States Supreme Court has required a hearing at which the defendant has the rights to be present with counsel, to be heard, to be confronted with and cross-examine witnesses, and to offer evidence of their own, any time a sentencing judge can enhance the maximum sentence by making a specified finding. *Specht v. Patterson*, 386 U.S. 605, 607, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). In transfer hearings, because an adverse finding for the child plainly subjects them to a greater maximum sentence than would be permissible if retained in juvenile court, all of the hearing rights enumerated in *Specht* are constitutionally required.

Cross-examination is generally recognized as a basic safeguard for assuring reliable factual determinations. *See, e.g., In re Gault*, 387 U.S. 1, 56-57, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967); *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"). Challenging the allegations in the complaint requires full cross-examination to enhance the reliability of the findings to ensure the adequacy of the hearing and its comportment with due process; therefore, restrictions upon cross-examination constitute an effective

denial of the right to counsel. *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Ohio has plainly recognized that "diversion out of the juvenile justice system, undeniably affects the length of confinement." *Iacona*, 93 Ohio St.3d at 91, 2001-Ohio-1292, 752 N.E.2d 937. Therefore, a young person facing transfer is subject to a deprivation of liberty. *See Aalim*, 150 Ohio St.3d 489, 2017-Ohio2956, 83 N.E.3d 883, at ¶ 104 (O'Connor, C.J., dissenting) ("there should be no debate that an alleged juvenile offender has a substantial liberty interest in retaining juvenile status.").

To be sure, the state has interests that bear on the question of how much process is due in transfer hearings. *Mathews v. Eldridge*, 424 U.S. 319, 335, 6 S.Ct. 893, 47 L.Ed.2d 18. The state's interest in economy of resources, for example, may be realized by limiting expenditures for experts. Randy Hertz, Martin Guggenheim, and Anthony G. Amsterdam, *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases* 390 (2021), available at njdc.info/trial-manual-for-defense-attorneys-in-juvenile-delinquency-cases-by-randy-hertz-martin-guggenheim-anthony-g-amsterdam/ (accessed Nov. 7, 2021). But this comes at the expense of their interest in ensuring that decisions regarding transfer are accurate and reliable. *Id.* The State would be ill-served by short-cutting steps that could increase the reliability of the transfer decision if the upshot is an increased risk of erroneous transfer and needlessly imprisoning young people. *Id.*

Like the juvenile court, the state also has an interest under the purpose clause in R.C. 2152.01 in protecting Ohio's children and in providing them with the least restrictive care and discipline consistent with the young person's needs and interests. This interest, too, is undermined when the state needlessly or erroneously transfers youth out of the juvenile court system.

Further, the assistance of counsel for youth at a transfer hearing is an essential component of the proper administration of the proceeding, given the critical nature of waiver to adult court. *Kent* at 558. *Kent* concretized the importance of not just counsel, but effective counsel. *Id.* at 554. Specifically, the Court reasoned "the child is entitled to counsel in connection with a waiver proceeding" and that the right to counsel "is meaningless—an illusion, a mockery—unless counsel is given an opportunity to function." *Kent* at 561.

Counsel cannot be expected to sit silently as a child is wrested from the protections of the juvenile court. Indeed, this is expressly provided in *Kent*: "if the [transfer allegations] are susceptible to challenge or impeachment, it is precisely the role of counsel to 'denigrate' such matter. *Id.* at 563.

A young person's right to counsel at the transfer hearing "is not a formality" or a "grudging gesture to a ritualistic requirement." *Id.* at 562. "It is of the essence of justice," and the "[a]ppointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel." *Kent* at 561-62. And in

Ohio, the right to counsel at transfer hearings is mandatory and non-waivable. Juv. R. 3(A)(1).

The rights from *Kent* spring not from the right to confrontation but from what the constitutional mandates of due process and fundamental fairness mean in relation to particular statutory requirements. *Kent* at 553, 556 (finding it "clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile," and thus it must "satisfy the basic requirements of due process and fairness"). In *Kent*, the D.C. statute mandated "full investigation," and Ohio mandates a "preliminary hearing." *Kent* at 547; Juv. R. 30(A).

Gault long ago recognized that a vital responsibility of a youth defender is to ensure proper procedure is followed throughout a youth's involvement with the court. *Gault*, 387 U.S. at 18, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967). Youth defenders must hold the legal system accountable and ensure that young clients are afforded the full protections of the Constitution when they are brought before the court. *NJDC Standards* at Std. 1.1.

Due process protections are in place to prevent erroneous deprivation of liberty. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Counsel's role and their actions intended to denigrate the state's case necessarily function to protect the young person from the risk of erroneous deprivation of liberty at the Rule 30 preliminary probable cause hearing.

B. The preliminary hearing under Juvenile Rule 30(A) provides robust due process protections to youth at transfer hearings, including the full right to cross-examination.

Court rules are interpreted under the general principles of statutory construction. *State ex rel. Law Office of Montgomery Cty. Pub. Defender v. Rosencrans,* 111 Ohio St.3d 338, 2006-Ohio-5793, 856 N.E.2d 250, ¶ 23. If words are not defined, they are read in context and construed according to the rules of grammar and their common usage. *Id.* If a court rule is unambiguous, it must be applied as written. *State ex rel. Potts v. Comm. on Continuing Legal Edn.*, 93 Ohio St.3d 452, 456, 2001-Ohio-1586, 755 N.E.2d 886. When language is plain, unambiguous, and conveys a clear meaning, a court need not apply the rules of statutory interpretation. *State v. Muncie*, 91 Ohio St. 3d 440, 447, 2001-Ohio-93, 746 N.E.2d 1092.

There is nothing ambiguous about the use of the words "preliminary hearing" in Juvenile Rule 30(A):

> **Preliminary hearing.** In any proceeding where the court considers the transfer of a case for criminal prosecution, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that the act would be an offense if committed by an adult. The hearing may be upon motion of the court, the prosecuting attorney, or the child.

The term "preliminary hearing" exists nowhere else in Ohio's Juvenile Rules and relates only to the finding of probable cause in a transfer proceeding. Juv. R. 30(A); (C). There is no description of what a "preliminary hearing" means in the rule, and no limiting or clarifying language to indicate any kind of special meaning is included.

Therefore, the common usage of the term that must be employed is the procedure for a preliminary hearing to determine probable cause for an adult facing a felony outlined in Crim. R. 5(B)(2):

> At the preliminary hearing the prosecuting attorney may state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state. The defendant and the judge or magistrate have full right of cross-examination, and the defendant has the right of inspection of exhibits prior to their introduction. The hearing shall be conducted under the rules of evidence prevailing in criminal trials generally.

Further, a close examination of the history Juv. R. 30 supports that what was intended by the use of "preliminary hearing," was the description provided in Crim. R. 5(B)(2).

Criminal Rule 5(B)(2) has stayed substantially the same since 1973, providing a defendant "the full right of cross-examination" and advance inspection of exhibits, and that "[t]he hearing shall be conducted under the rules of evidence prevailing in criminal trials generally." Crim. R. 5(B)(2), eff. July 1, 1973.

Juvenile Rule 30, however has changed over time. In 1975, Juv. R. 30 did not contain the term "preliminary hearing." Juv. R. 30, eff. July 1, 1972, amended eff. To Jan. 1, 1975. In the 1976 version, however, Juv. R. 30(A) was amended as follows:

> **(A) Preliminary hearing**. In any proceeding where the court may transfer a child fifteen or more years of age for prosecution as an adult, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that such act would be a felony if committed by an adult.

Then, as now, the rule provided no additional language about the specifics of the preliminary hearing, and then, as now, the common usage for the term "preliminary hearing" exists only in Crim. R. 5(B)(2).

Further, under the versions of Crim. R. 1 (C) in effect in 1976 and now, *all* of Ohio's Criminal Rules apply to proceedings in juvenile court except "to the extent that specific procedure is provided by other rules of the Supreme Court or to the extent that they would by their nature be clearly inapplicable." *Compare* Crim. R. 1 eff. July 1, 1975, amended to July 1, 1976 *with* Crim. R. 1, eff. July 1, 1996. There has never been language in Juv. R. 30(A) that suggests that the "preliminary hearing" to show probable cause that a person committed a felony-level offense contained in Crim. R. 5(B)(2) is clearly inapplicable. Accordingly, this Court must interpret the preliminary hearing in Juv. R. 30(A) as being identical to the preliminary hearing in Criminal Rule 5(B)(2), such that a child facing mandatory bindover or adult facing felony prosecution has "the full right of cross-examination" and advance inspection of exhibits, and that "[t]he hearing shall be conducted under the rules of evidence prevailing in criminal trials generally." Crim. R. 5(B)(2).

The use of preliminary hearings has diminished greatly over time, given that the right to a preliminary hearing exists only when a criminal defendant is not indicted. Crim. R. 5(A)(4). And early decisions often skirted exactly what was meant by "[t]he hearing shall be conducted under the rules of evidence prevailing in criminal trials

generally." Crim. R. 5(B)(2). For example, the Second District passed on resolving whether hearsay evidence may be introduced at a preliminary hearing, reasoning that because "the case could only be remanded for a new trial, not a second preliminary hearing [, s]uch a remand would be an absurd exercise in futility." *State v. Garland*, 1976 2nd Dist. Darke No. 933, WL 190412 (Jan. 20, 1976). Similarly, the United States Supreme Court's decision in *Kaley* turns on its reasoning that probable cause determinations are fundamentally and historically entrusted to grand juries, therefore giving a criminal defendant a full adversarial hearing to challenge probable cause would provide little benefit. *Kaley v. U.S.*, 571 U.S. 320, 328, 134 S.Ct. 1090, 188 L.Ed2d 46 (2014); *In re B.W.*, 2017-Ohio-9220, 103 N.E.3d 266, ¶ 38; *Opinion* at ¶ 30, citing *Kaley* at 338.

A remand on the probable-cause determination in a juvenile transfer preliminary hearing is far from "futile," however, and provides a young person tremendous benefit—the chance to remain under the jurisdiction of the juvenile court and thus in the protective and rehabilitative cocoon of juvenile court treatment.

The question is not what protections Austin Fuell would have been afforded if he were an adult, but rather what additional protections are promised because he is a child.

C. Ohio, like many states, provides additional due process protections for youth at transfer proceedings.

Ohio is not alone in demanding expanded protections for youth at stages which would not be provided to an adult. *See, e.g.*, Juv. R. 3(A)(1) (providing a mandatory and non-waivable right to counsel at transfer.).

States have created different statutory mechanisms for transfer that adjust the protections afforded to young people to ensure due process and fundamental fairness that exceeds those provided to adults. *See In the Interest of C.R.M.*, 552 N.W.2d 324, 328, (N.D. 1996) (Highlighting that a probable cause finding in a transfer hearing has a very different purpose that a probable cause finding at a juvenile detention hearing, which is designed to afford a child treatment or rehabilitation; therefore, a probable cause finding at a transfer hearing grants an additional opportunity for a juvenile to show, with the assistance of counsel, that probable cause does not exist.); VA Code Ann § 16.1-269.2, (which prevents the statements of youth at a transfer hearing from admission in any criminal proceedings following transfer, except for impeachment purposes); *Matter of Stephfon W.*, 191 W.Va. 20, 23-24, 442 S.E.2d 717 (W.Va. 1994) (Holding that "the transfer of a juvenile to adult criminal jurisdiction…is a matter of substantially more gravity" than a preliminary hearing because "[i]f the transfer is made, the juvenile loses the beneficial protection of our juvenile laws and is treated the same as an adult criminal" therefore certain "substantial due process rights" including a right to be heard in person, to present witnesses and evidence, to confront and cross-examine adverse

witnesses, and a right to court appointed counsel); *State v. J.M.*, 182 N.J. 402, 416-18, 866 A.2d 178 (N.J. 2005) (exercising the court's inherent authority over court rules in transfer hearings that "permit a juvenile to testify and present evidence at the probable cause portion of the waiver hearing" because of "considerations of fairness" and "that the probable cause portion of the waiver hearing . . . is such a meaningful and critical stage of the proceedings[;]" therefore, there is "no need to reach the question whether due process requires providing juveniles the right to testify and present evidence at a probable cause hearing.").

The error in the opinion below lies in its attempt to limit youth rights to the Confrontation Clause and in its consideration of whether a transfer hearing is adjudicatory or dispositional as a threshold determination for the application of the rules of evidence. *Opinion* at ¶ 34-35. While these comparisons arguably inure to the benefit of the child, youth rights originate from the solemn and enduring right to due process.

As this Court has reasoned, "because the juvenile's right to counsel is predicated on due process, it is malleable rather than rigid." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 80. "For all its consequence, `due process' has never been, and perhaps can never be, precisely defined. . .' and `is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Id.*, citing *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, et al. v. McElroy*, 367 U.S. 886, 895, 81 S.Ct.

1743, 6 L.Ed.2d 1230 (1961). "Rather, the phrase expresses the requirement of `fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty"; therefore, applying the Due Process Clause is "an uncertain enterprise which must discover what `fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.*, citing *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).

Appellant Austin M. Fuell's 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.

I. The Supreme Court of the United States mandates that sentencing judges consider youth as a mitigating factor, and the Supreme Court of Ohio further requires judges to articulate their consideration on the record.

After *Patrick*, there is not only room in Ohio's justice system for a sentencing judge to articulate their consideration of a young person's age as a mitigating factor, it is required. *Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, at ¶ 41, 48. "[I]t is not enough to assume that the trial court must have considered youth in determining the sentence," the judge must articulate such consideration on the record. *Id.*

There is no room in an R.C. 2929.02(B)(1) sentencing hearing for a trial judge to consider age as a mitigating factor because the life-tail-sentence is

mandatory; thus, any consideration of any mitigating factors is prohibited. Amicus joins Amici and Austin in asking this Court to correct this constitutional deficiency by extending its rationale from *Patrick* and *Long* to all to youth sentencing hearings under R.C. 2929.02(B)(1).

II. A young person's due process right to counsel is impinged when they are prohibited from presenting youth as a mitigating factor at sentencing.

A child "requires the guiding hand of counsel at every step in the proceedings against [them]," whether in juvenile court, in transfer hearings, or in hearings after transfer. *Gault*, 387 U.S. at 38, 87 S.Ct. 1428, 18 L.Ed.2d 527, citing *Kent*, 383 U.S. at 561-62, 86 S.Ct. 1045, 16 L.Ed.2d 84. In *Gault*, the need for counsel was underscored by the "awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21." *Gault* at 36-37.

States have an obligation to ensure that children are afforded the due process protections enshrined in the Constitution and enumerated in *Gault*, including the vital role of qualified defense counsel. Merely having counsel present for children in these proceedings is inadequate. Both access to counsel and quality of representation are essential elements of protecting due process rights. *See Statement of Interest of the United States, N.P. et al. v. Georgia*, No. 2014-CV-241025 8 (Ga. Super. Ct. 2015), available at justice.gov/file/377911/download (accessed Nov. 7, 2021), citing *NJDC Standards*; *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases*. The DOJ also recognize that the "unique qualities of youth demand special training, experience, and skill for their

advocates", that "developing the necessary trust-based relationship differs when the client is a child", and "attorneys representing children must receive the training necessary to communicate effectively with their young client and build a trust-based attorney-client relationship." *Press Release, Dep't of Justice, Department of Justice Statement of Interest Supports Meaningful Right to Counsel in Juvenile Prosecutions* 11-12 (Mar. 13, 2015), justice.gov/opa/pr/department-justice-statement-interest-supports-meaningful-right-counsel-juvenile-prosecutions (accessed Nov. 7, 2021).

Just as 2929.02(B)(1) prohibits the court from considering the mitigating effects of youth, it prohibits the youth's defender from presenting mitigating evidence of youth to the sentencing court. For a young person, that prohibition violates their due process right to counsel established in *Kent and Gault*. Accordingly, Amicus asks this Court to find that 2929.02(B)(1) violates the due process right to counsel afforded to youth.

A. The role of counsel for young people is unique.

The right to effective counsel throughout the entirety of a youth's system involvement is critical. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (stating that "the right to counsel is the right to the effective assistance of counsel"). A young person's attorney must insist upon fairness of the proceedings, ensure the child's voice is heard at every stage of the process, safeguard the due process and equal protection rights of the child, and has a duty to advocate for a client's expressed interests. *See Gault*, 387 U.S. at 37. *See generally* American Bar Assn.,

Model Rules of Professional Conduct R. 1.2, 1.3, 1.4, 1.8, 1.14 (2020), americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (accessed Nov. 7, 2021).

Even youth who are transferred to adult court are still developing their cognitive and socio-emotional capacities, which means defenders must be knowledgeable about and understand adolescent developmental principles. *See* Natl. Juvenile Defender Ctr. & Natl. Legal Aid & Defender Assn., *Ten Core Principles For Providing Quality Delinquency Representation Through Public Defense Delivery Systems* (2d Ed. 2008) available at njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf (accessed Nov. 7, 2021). Youth defenders must also ensure a client-centered model of advocacy and empower and advise their young client using developmentally appropriate communication. *NJDC Standards* at Std. 2.6; American Bar Assn., *Model Rules of Professional Conduct*, at R. 1.4 (requiring a lawyer to explain the matter to the extent reasonably necessary to allow the client to make informed decisions). These elements of youth defense advocacy are critical to equipping youth to understand and make informed decisions about their case, including accepting or rejecting a plea offer or going to trial, testifying or remaining silent, developing components of a defense driven disposition plan, and considering alternatives to juvenile court involvement and treatment. *See* Natl. Juvenile Defender Ctr., *Role of Juvenile Defense Counsel in Delinquency*

Court 9 (2009) https://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf (accessed Nov. 7, 2021).

B. The unique characteristics of youth require specialized youth defense counsel at every stage of the proceedings, including transfer hearings and any subsequent adult criminal court proceedings.

Effective defense of young people not only requires specialized practice—wherein the attorney must meet all the obligations due to an adult client—but also necessitates expertise in juvenile-specific law and policy, the science of adolescent development and how it impacts a young person's case, skills and techniques for effectively communicating with youth, collateral consequences specific to juvenile court, and various child-specific systems affecting delinquency cases, such as schools and adolescent health services. *NJDC Standards* at Std. 1.3. Children "cannot be viewed simply as miniature adults" and should not be treated as such. *J.D.B. v. North Carolina*, 564 U.S. 261, 274, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Rather, "[a] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception." *J.D.B.* at 272. (Citations omitted.)

Children are different from adults, no matter the context. *Miller*, 567 U.S. at 481, 132 S.Ct. 2455, 183 L.Ed.2d. 407. Transferring a child into adult court does not obviate the need for specialized representation that incorporates an understanding of

adolescent development and the presentation of a child's youthfulness as part of sentencing mitigation.

Paramount to sentencing advocacy is the full participation of youth clients to formulate a sentencing plan based on the client's expressed interests. Inst. for Judicial Admin. & American Bar Assn., *Juvenile Justice Standards Annotated: A Balanced Approach* 179 (Robert E. Shepherd, Jr., ed. 1996) ojp.gov/pdffiles1/ojjdp/166773.pdf (accessed Nov. 7, 2021). *See also NJDC Standards* at Std. 1.1, 6.1. As part of sentencing planning, defense counsel should investigate and obtain as much information about the client as possible, including family background and any relevant educational, social, psychological, and psychiatric evaluations or reports, and should challenge the reports and recommendations, as warranted. *Id.* at Std. 4.2 cmt., 4.4 cmt., 6.1-6.7. For child clients, this often entails gathering school records, interviewing family members, and gathering all mitigation materials to present to the court. No matter a client's age, defense counsel has an obligation to present all evidence and arguments, including employing experts when appropriate, to reach the best possible outcome for a client. The American Bar Assn., *Criminal Justice Standards* Std. 4-8.3 (a),(c),(d) (2017), americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (accessed Nov. 7, 2021).

Counsel must fully understand sentencing laws and guidelines and be able to articulate possible outcomes, including collateral consequences, to clients. *Id.* at Std. 4-8.3 (a), (b).

Defense counsel must work with youth clients to guide them through presentence investigations and potential allocutions to the court, including advising them of the impact their statements may have on sentencing. *Id.* at Std. 4-8.3(c),(f).

C. Counsel is ineffective when they fail or are not permitted to investigate and present the mitigating effects of youth at adult court sentencing.

Without question, young people have the right to counsel at sentencing hearings in adult court. Crim. R. 44(A). Concomitant to that right is the right to effective assistance of counsel. *McMann*, 397 U.S. at 771, fn.14.

In *Jones*, the United States Supreme Court recently recognized that a young person would have an IAC claim when their counsel did not raise youth as a mitigating factor in a sentencing hearing. *Jones* at fn. 6, citing *Williams v. Taylor*, 529 U.S. 362, 395-99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (finding that poor preparation for the sentencing phase constituted ineffective assistance of counsel); *Wiggins v. Smith*, 539 U.S. 510, 528, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (finding counsel who failed to investigate mitigating evidence for sentencing ineffective).

It makes sense that the Court in *Jones* would highlight the potential for such a claim, as recent decisions have intensified the focus on the fundamental differences

between adult and youth and the heightened protections and special treatment afforded to children.

Given the highly specialized nature of defending youth and those facing death, it also makes sense that the Court would invoke a capital-equivalent claim for potential IAC. While at first blush, capital cases and cases involving young defendants may not seem to have much in common, the Court's recent focus on youth evolved from cases involving the death penalty.

The two lines of cases intersected in *Thompson*, in which the U.S. Supreme Court prohibited sentences of death for children under 16. *Thompson v. Oklahoma*, 487 U.S. 815, 837, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988). One year later, age and death were considered together again when the Court declined to extend *Thompson* to children 16 and older in *Stanford v. Kentucky*, 492 U.S. 361, 379, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). On the same day as *Stanford*, the Court upheld a sentence of death for a person with what was then called "mental retardation" in *Penry v. Lynaugh*, 492 U.S. 302, 340, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). But, in just 13 years, *Penry* was abrogated by *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and three years after that, *Stanford* was abrogated by *Roper*, 543 U.S. 551, 577, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In *Roper*, the Court drew the line for the mitigating factors of youth at age 18, holding that a sentence of death for offenses committed by youth violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 577.

After *Roper*, the progression of cases involving youth, death, and intellectual disability laid the foundation for four additional seminal cases emphasizing the mitigating factors of youth. *Graham*, 560 U.S. at 109, 130 S.Ct. 2011, 176 L.Ed.2d 825; *J.D.B*, 564 U.S. 261, 274, 131 S.Ct. 2394, 180 L.Ed.2d 310; *Miller,* 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d. 407; *Montgomery v. Louisiana*, 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

In *Graham*, the Court recognized the "twice diminished moral culpability" of a youth who does not kill or intend to kill and prohibited the sentence of life without the possibility of parole for children who commit non-homicide offenses. *Graham* at 48, 69, 80. One year later, in *J.D.B.*, the Court extended its rationale to juvenile court proceedings generally: "'Our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults" and enacted a reasonable juvenile standard as an overlay, requiring youth to be considered under the totality of the circumstances in the custody analysis under *Miranda*. *J.D.B.* at 274-275, 279-281, quoting Eddings, 455 U.S. at 115–116, 102 S.Ct. 869, 71 L.Ed.2d 1. *See also In re S.C.W.*, 9th Dist. App. No. 25421, 2011 WL 2565623, at *4-*5 (June 29, 2011) (extending *J.D.B.*'s requirement that age be considered under the totality of the circumstances in custody to the determination of *mens rea* in a child's case.). *See generally* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth* Amendment, 67 Am. U. L. Rev. 1513 (2018); Christopher M. Northrop & Kristina R. Rozan, *Kids Will be Kids: Time for a*

"Reasonable Child" Standard for Proof of Objective Mens Rea Elements, 69 Me. L.Rev. 109 (2017).

Miller soon followed, holding that mandatory life-without-parole sentences violate the Eighth Amendment. *Miller* at 489. The Court explained that a trial court must consider both a child's age and "the wealth of characteristics and circumstances attendant to it" prior to sentencing. *Id.* at 476. Most recently, when deciding the retroactive effect of *Miller*, the Court refined the definition of the members of this class as: "juvenile offenders whose crimes reflect the transient immaturity of youth," opposed to "the rarest of children, those whose crimes reflect 'irreparable corruption.'" *Montgomery*, 577 U.S. 190, at syl., 194, 136 S.Ct. 718, 193 L.Ed.2d 599. (Citations omitted.)

Without question, the mitigating factors of youth affect every aspect of cases involving young people. And as noted in *Jones*, *Williams* and *Wiggins* provide an apt frame.

First, in *Williams v. Taylor*, the Court found that defense counsels' performance was deficient when they failed to introduce mitigating evidence, including evidence of intellectual disability, juvenile and social service records, evidence about Williams's childhood, and a key character witness. *Williams*, 529 U.S. 362, 363-64, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), citing the ABA Standards for Criminal Justice, the Court determined that "trial counsel did not fulfill their obligation to conduct a thorough investigation of [Williams's] background. *Id.* at 396, citing Std. 4–4.1 cmt, p. 4–55 (2d

ed.1980)). And, rather than emphasizing the outcome in the prejudice analysis under *Strickland*, the Court considered the totality of the available mitigation evidence and reversed and remanded the matter. *Williams* at 397, 375.

In *Wiggins v. Smith*, the Court reversed based on IAC where counsel did not conduct reasonable investigation in accordance with the ABA's Capital Defense Standards and put on a "halfhearted" mitigation case. *Wiggins,* 539 U.S. at 511-12, 123 S.Ct. 2527, 156 L.Ed.2d 471. Importantly, the Court reasoned that the incomplete investigation was caused by counsel's inattention, not any reasoned strategic judgment. *Id.* at 534.

Counsel provides deficient representation when they fail to fulfill their duty to conduct a thorough investigation of all mitigating factors, including youth and when they fail to present such mitigation to the court.

Revised Code section 2929.02(B)(1) allows counsel no opportunity to provide young clients with the specialized representation that the prevailing standards of practice and *Jones* require.

This Court's decisions in *Patrick* and *Long* mandate sentencing courts to consider the mitigating effects of youth that can be deftly presented to the court by a skilled defender. Amicus therefore asks this Court to find 2929.02 unconstitutional as applied to youth.

CONCLUSION

For the foregoing reasons *Amicus* asks this Court to reverse this matter and remand for further proceedings.

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CERTIFICATE OF SERVICE

I certify that on this 8th day of November 2021, the foregoing Brief of *Amicus Curiae* National Juvenile Defender Center in Support of Appellant Austin M. Fuell was served by email to Timothy B. Hackett, Counsel for Appellant Austin M. Fuell; Nick Horton, Counsel for Appellee; and all other listed *Amici* in this matter.

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