No.

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.

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT, AUSTIN M. FUELL

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THIS CASE INVOLVES TWO CONSTITUTIONAL QUESTIONS OF GREAT IMPORT

This murder case presents this Court with two constitutional questions of first impression:

1. The first is a pure constitutional question at the heart of adjudicative fairness—*do children have a state or federal due process right to cross-examine out-of-court declarants whose hearsay statements are admitted in support of mandatory transfer to criminal court?*

2. The second flows from this Court's recent decision in *State v. Patrick*—*because* Patrick *says the Eighth Amendment requires consideration of youth as mitigating, and the Eighth Amendment offers the same protection for life with and life-without parole sentences, is R.C. 2929.02(B)'s mandatory 15-years-to-life-sentence unconstitutional as applied to juvenile offenders?*

The cross-examination question is foundational, pervasive, and squarely preserved.

Depriving juveniles of any right to cross-examine witnesses whose allegations result in their transfer to adult court has ballooned into a pervasive, multi-district problem. It's only gotten worse.

This time, the offending evidence consisted of unauthenticated cell-tower records and printouts of third-party text messages, both of which allegedly placed 17-year-old Austin at the scene of a drug-related shootout. Yet, neither the records custodian, nor the cell-tower analysts, nor the third-party phone owner were ever made available for cross-examination at transfer. The state instead relied only on a police detective with no personal knowledge of either document—a tactic this Court squarely condemned in *State v. Hood*, 135 Ohio St.3d 137, 984 N.E.2d 1057 (2012). Despite defense counsel's repeated objections—as well as the juvenile court's express ruling that hearsay is not admissible at transfer hearings—the evidence was admitted. (10.4.19 T.pp.59, 96, 138-139).

On appeal, the Twelfth District rejected Austin's due process claims on the merits, questioning even whether due process includes the right to cross-examination. Opinion at ¶ 35-37. Joining the Sixth District, it announced: "[a]dmitting 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 described in *Kent*." Opinion at ¶ 38. This decision adds to those of the Sixth, which has allowed the use of forensic reports authored by non-testifying analysts, *State v. Garner*, infra; and have even allowed untested accusations from "anonymous tipsters" and un-charged co-conspirators. *State v. Lamb.*

What necessitates this Court's review now is that these decisions rest on deeply flawed legal premises that: (1) cross-examination isn't a core due process right; (2) transfer does *not* implicate a child's liberty interests; and that (3) these hearings are mere perfunctory exercises no different from a "prelim" in adult court. Opinion at ¶ 24, citing *Garner* at ¶ 26 ("appellant's liberty [was] not yet at stake"). From there, the argument goes, "traditional notions of due process guarantee to [juveniles] the right to confront and cross examine" at bindover hearings. *Garner* at ¶ 15; Opinion at ¶ 38.

Only this Court can resolve such a dispute. "A court's 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." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 81. Paying only lip service to the fact that transfer hearings are "critically important" evidentiary proceedings subject to due process, these recent decisions do no such thing.

Despite these decisions below, it remains true that "diversion out of the juvenile justice system, *undeniably* affects the length of confinement." *State v. Iacona*, 93 Ohio St.3d 83, 91, 752 N.E.2d 937 (2001). In fact, so much so that "there should be no debate that an alleged juvenile offender has a substantial liberty interest in retaining juvenile status." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 104 (O'Connor, C.J., dissenting); *see also id.* at ¶ 79 (warning that this mandatory transfer scheme "does not approach the Supreme Court's vision of a critically important proceeding * * * nor does it provide the 'ceremony' required of a decision with such tremendous consequences."). Yet, the trend continues, weakening seminal jurisprudence with each new decision.

This case thus cleanly presents a preserved constitutional error of great public and jurisprudential import. Relatedly, this Court's intervention is urgently needed because its declination to do so thus far has only wrongly been cited as further vindication. Opinion at ¶ 34 ("*Garner* was appealed, but the Ohio Supreme Court recently declined to accept the appeal for review."). Thus, especially since it fits this Court's criteria for review, this issue is worthy of this Court's attention.

After *Patrick*, is R.C. 2929.02(B)'s mandatory life-sentence unconstitutional as applied?

Equally important is the matter of Austin's mandatory lifetime sentence—which, by statute, was imposed without any consideration of his youth. In *State v. Patrick*, this Court concluded: "[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." __ Ohio St.3d __ , 2020-Ohio-6803, ¶ 41. *Patrick* thus held that a trial court must articulate its consideration of youth as mitigating before imposing a life sentence *even if that sentence includes eligibility for parole. Id.* at ¶ 23-24.

As argued below, R.C. 2929.02(B)'s mandatory lifetime sentencing scheme is plainly unconstiutional as applied to juveniles like Austin because it *does not* allow for any individualized consideration of youth—as mitigating or otherwise. It thus violates the Eighth Amendment, because it categorically forecloses what both *Miller v. Alabama*, infra, and *State v. Patrick* say the Eighth Amendment requires. Overruling Austin's Motion to Stay for *Patrick*—which of course did not exist at the time of his sentencing—the Twelfth District effectively deferred judgment:

> [T]here 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 here, where Fuell failed to object to his sentence.

The state never even asserted waiver. Furthermore, it is a "basic principle" that "an appellate court must apply the law in effect at the time it renders its decision." *Henderson v. United States*, 568 U.S. 266, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013). Austin thus moved to stay pending *Patrick* precisely to preserve his rights and the record. Accordingly, this Court should also exercise its discretion to address this novel constitutional question, and to hold that R.C. 2929.02(B)'s mandatory sentencing scheme violates the Eighth Amendment as interpreted in *Miller v. Alabama* and *State v. Patrick*.

Because it poses clear and pressing constitutional issues, this Corut should accept this case.

STATEMENT OF THE CASE AND FACTS

Prosecutor: It was a "theoretical who done it."

Austin was 17 years old when he was charged with aggravated robbery, aggravated burglary, and felony murder in juvenile court. The complaint alleged that "[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 government moved for mandatory transfer. At the transfer hearing—the only hearing in juvenile court standing between Austin and the adult life-tail sentence he would eventually receive—the lead detective, Dan Tobias, testified on both direct and cross-examination that there was, in fact, only one shooter. (10.4.19 T.p.85, 96-97). In the prosecutor's view, therefore, it was "a theoretical who done it." (10.4.19 T.p.142). The government's case thus rested on an accomplice theory of liability:

> PROSECUTOR:I'll highlight * * * participation here because under Ohio law, whether he's the principal act (sic) or accomplice here, it's of no consequence. Whether it was Mr. Michaelis or Mr. Fuell who actually fired the deadly, deadly shot is of no consequence.

The question for the juvenile court then, was how they could ever credibly prove, beyond just a mere suspicion, that Austin was involved.

Out-of-court written statements are admitted over objection.

For that, prosecutors relied on supposed cell-tower records produced by the Bureau of Criminal Investigation ("BCI"). The records showed a phone—**which could not be shown to be Austin's**—pinging in the vicinity of the crime scene around the time of the gun fight. (10.4.19 T.p.64). They also introduced printouts of supposed text messages taken from a third party's phone (who was not called to testify). The government claimed the photos proved Austin knew the address of the victim's girlfriend—who later averred the suspects' faces were covered, but that she deduced it was Austin because of the eyes and a specific demand for money. (10.4.19 T.pp.57, 115).

Notably, though, the government did not call anyone with any personal knowledge of either set of cell-phone records, be it the BCI analyst who produced the report, the records custodian from the cell-phone provider or, for the text messages, the owner of the phone/recipient of the messages.

Instead, the government relied only on the surrogate testimony of Detective Tobias, who thought he found Austin's cell phone number through interviews with unnamed witnesses. Detective Tobias, however, further testified that when he subpoenaed all records from Sprint in relation to that same cell number, Sprint could not identify the owner of the phone. (10.4.19 T.pp.78-79).

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

***

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

Detective Tobias: No, sir.

(10.4.19 T.pp. 78-79).

Nor did the detective ever conduct any investigation as to who purchased the cell phone or who was being billed for it. (10.4.19 T.p.80).

Accordingly, defense counsel objected to the admission of both the cell-tower records collected from BCI, and the text message photographs. (10.4.19 T.pp.59, 138-139). The juvenile court admitted the records into evidence over counsel's objection.

The adult co-defendant's out-of-court admissions are *excluded* at the prosecutor's request—because according to the juvenile court, hearsay is not admissible at transfer hearings.

At the same time, the court prevented defense counsel from asking any questions about the adult-codefendant's recorded statements to police.

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).

Counsel naturally reminded the court that hearsay was admissible within these proceedings—to which the court responded only: "I have not permitted hearsay to be admitted in my bindover proceedings." (10.4.19 T.p.96).

Unusually dubious "toolmark" analyses were admitted without challenge.

In addition to the cell-records, the government also relied on a ballistics report and testimony from a firearms analyst Matthew White, who 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 conducted "toolmark analyses" and concluded that the two bullets and fired cartridge cases were fired from the same firearm. But, none of the firearms themselves were a match—so he "excluded all of the firearms from the fired cartridge cases and fired bullets." (10.4.19 T.p.21). That is, Austin's firearm was excluded as a match.

Then, three months later, a single, detached, 9 mm barrel (unrelated to any gun) was given to White for further testing. (10.4.19 T.pp.22-24). A detective 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). Only after *disassembling the excluded 9 mm firearm taken from Austin's home*, and attaching the new barrel to that gun, White said he "was able to conclude" that the new barrel was responsible for the two fired bullets. (10.4.19 T.p.24-25).What is conspicuously missing from the record was whether White ever tested the barrel on any other guns—*including two other 9 mm firearms found in Bryson Michaelis's home*. (10.4.19 T.pp.80-81). It's also unclear whether the barrel itself was ever tested for *Michaelis'* fingerprints.

Like his adult co-defendant, Austin is sentenced to an automatic mandatory life-tail sentence.

Nonetheless, 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, was convicted by plea of murder and sentenced to a mandatory term of 15-years-to-life. (2.27.20 Entry). No mitigation was considered.

The court of appeals upheld the transfer decision and mandatory lifetime sentence.

On appeal, Austin argued his constitutional rights were violated when the court admitted over counsel's objection unauthenticated cell-tower records and printouts of third-party text messages through the surrogate testimony of a police detective without knowledge.

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, at ¶ 42. Further, Detective Tobias was not a "qualified witness" with any personal knowledge of either the cell record analysis or the text conversation. Austin explained the error was especially egregious here since Tobias himself testified that he even contacted Sprint and Sprint itself couldn't even confirm whose phone it was. And, the state did not subpoena the owner of the phone, Kevin Baird, to verify the texters or the content.

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 argument that Austin asked for and knew the victim's address. Nothing else put Austin there.

Finally, with *State v. Patrick* pending at the time of Austin's appeal, he also challenged under *Miller, Long*, and *Patrick*, the constitutionality of his 15-life sentence and of R.C. 2929.02(B) as applied.

The court rejected each argument. Following the Sixth District, it denied Austin's due process claims, first suggesting that due process doesn't even include a right to cross-examination:

> 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." To the extent that Fuell argues that due process incorporates Confrontation Clause rights, we refer to our discussion [above].

Opinion at ¶ 36. With that, it held that "[a]dmitting 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[.]" Opinion at ¶ 38.

Turning to the *Patrick* question, it bears repeating: the state did not argue the issue was waived or forfeited. Nonetheless, the court purported to review for plain error, concluding only that "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." Opinion at ¶ 72. At the same time, the court waffled, observing that "[t]here is certainly language in Patrick that suggests that *may* be the case[;]" while "there are also strong reasons to doubt that *Patrick* extends [so far]." Opinion, ¶ 72-73.

In the end, the court effectively deferred judgment, concluding that:

> [T]here 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 Clermont 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.').

This discretionary appeal follows.

INTRODUCTION TO ARGUMENT

"The admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." *Kent v. United States*, 383 U.S. 541, 555, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). 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[.]" *In re Gault*, 387 U.S. 1, 21, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The "[f]ailure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." *Id.* This is one such instance. And importantly, these errors cannot simply be "cured" by later adult-court proceedings. *Kent* at 564. Austin now urges this Court to correct course, and to clarify *on the front end* what process is due.

LAW AND BRIEF ARGUMENT IN SUPPORT

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.

Following the Sixth District, the Twelfth District categorically denied any right to cross-examine adverse witnesses at mandatory transfer. This view is based on a confluence of false premises averring that due process doesn't secure cross-examination; and that, in short, transfer hearings are no more than preliminary proceedings having no bearing on a child's liberty interests. None of these are true. And importantly, correcting course does not require this Court to break any new ground.

I. Due process guarantees the right to cross-examine witnesses and transfer hearings must comport with due process.

Contrary to the Twelfth District's suggestion, "Due process, requires that [a defendant] * * * have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 610, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). "[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). This is and always has been a constitutional mainstay.

Relatedly, regardless of probable-cause's lesser threshold, "the bindover hearing is [still] a 'critically important proceeding' [that] '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. In fact, this Court has said that "[j]uvenile courts are under an obligation to see that the procedural *and substantive due-process rights* of juveniles are upheld" at bindover. (Emphasis added). *D.M.* at ¶ 11, 15. If the decisions below stand, what does this mean?

It follows directly then, that juveniles indeed have a due process right to cross-examine witnesses at bindover because (1) bindover hearings must satisfy due process, and (2) due process itself ensures the right to confront and cross-examine witnesses. *Pointer* at 406; *Kent* at 562; *accord State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 12 (setting out the *state's position* that transfer satisfies due process because they provide for "the right to confront and cross-examine witnesses"). Holding otherwise not only flouts this basic logic, but it skirts or outright ignores the central reasoning of *Kent* and its progeny—which this Court has never done.

II. We've been here before: *Kent*, due process, and the role of counsel at transfer.

To illustrate, in *Kent*, where the Court first applied due process, the Court noted:

> If 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. Like here, the dispute in *Kent* stemmed from defense counsel's need to challenge "in a manner akin to cross-examination" records submitted in support of transfer. *Id.* at 560. The lower court rejected defense counsel's claim, holding, exactly like the Sixth and Twelfth Districts have, that "'[t]his is precisely the kind of adversarial tactics which the system is designed to avoid.'" *Id.*

The Supreme Court squarely disagreed. Like here, the lower court still "misconceived the basic issue and the underlying values in the case." *Kent* thus expressly rejected the view espoused by Ohio's lower courts that counsel's role "is limited to presenting to the court anything on behalf of the child which might help the court in arriving at its decision." *Id.* Rather, "*it is precisely the role of counsel to 'denigrate' [any] matter" that is "susceptible to challenge or impeachment*." (Emphasis added.) *Id.*

But how can counsel ever do this if, as here, prosecutors can hide their witnesses; or if kids truly have no right to cross-examine the same? Applying *Kent*, this Court's transfer cases likewise hold that transfer is critically important; that the hearing must be fundamentally fair; and that children must receive the effective assistance of counsel. But, "[t]hese rights are meaningless—an illusion, a mockery—unless counsel is given an opportunity to function." *Id.* at 561.

This Court should therefore accept this case because it is this Court's prerogative to "ascertain what process it 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.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, at ¶ 81; *See State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 66-67 (O'Connor, C.J., dissenting) ("We are required to apply the same constitutional check to the mandatory-transfer procedure established in Ohio, considering whether it comports with the requirements of due process and fairness.").

III. Transfer marks a major bifurcation. Treating it as just another prelim denigrates the important liberty interests at stake there.

The root of the problem is that courts and prosecutors alike have wrongly insisted that transfer is no different from any other adult preliminary hearing—and their analyses mostly start and stop there.[1] But, while longstanding, that assessment is simply not accurate.

[1] This finds its origins in *State v. Whisenant*, which openly declined to follow *Kent* in favor of a "contrary and more persuasive approach" found in a 1989 Connecticut Supreme Court decision, *In re Ralph M.*, 211 Conn. 289, 559 A.2d 179 (1989). *See Whisenant*, 127 Ohio App.3d at 85, 711 N.E.2d 1016, 1022 (noting *Ralph M.* "analogized the probable cause determination in a bindover proceeding to other

Rather, "[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). And as Chief Justice O'Connor noted 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.

150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 83 (O'Connor, C.J., dissenting).

Notwithstanding the current trend, transfer thus plainly affects liberty interests. It contemplates adult punishment; so, their liberty is at stake. *Contra State v. Garner*, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-4939, ¶ 24 ("appellant's liberty is not yet at stake.").

Indeed, unlike, say, arraignments or grand jury probable cause hearings in adult court, the "decision as to waiver of jurisdiction and transfer of the matter to [adult court] is [as] potentially as important * * * as the difference between five years' confinement and a [lifetime] sentence." *Kent*, 383 U.S. at 557, 86 S.Ct. 1045, 16 L.Ed.2d 84. It's a decision that results in a transfer of jurisdiction, which drastically increases the potential punishment. A transfer hearing is thus a major inflection point. Yet, based on a specious analogy, the new jurisprudence accounts for none of this, either.

Accordingly, to correct course, this Court alone must reiterate that transfer is altogether different. As this Court has said time and again, it *is* governed by core due process principles; it *cannot* be likened to adult-court prelims; and while not guilt determinative, it is still an adversarial evidentiary hearing that that must satisfy procedural and substantive due process rights. This Court has stepped in many times to explain that traditional constitutional safeguards apply to juvenile transfer proceedings. After *Aalim*, the question raised here is simply the next iteration.

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probable cause determination in Connecticut, such as grand jury proceedings[.]"). Since then, nearly every Ohio case limiting due process at bindover has relied on the logic and holding of *Whisenant*.

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.

The Twelfth District noted reasons for and against applying *Miller* and *Patrick* to R.C. 2929.02(B). But it stopped short of resolving the substantive constitutional dispute. This Court should thus accept jurisidction and do so now, holding that R.C. 2929.02(B)'s mandatory life-sentencing scheme violates the Eighth Amendment as set forth in *Miller* and *State v. Patrick*.

In short, *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). *Patrick*, __ Ohio St.3d __ , 2020-Ohio-6803, at ¶ 23-24. Because R.C. 2929.02(B) does not allow for any individualized consideration, its mandatory life-tail sentence is unconstitutional as applied to juveniles. Stated succinctly, the issue arises as follows:

- *Miller* and *Long* first declared the Eighth Amendment and the Ohio Constitution require judicial consideration of youth as a mitigating. *Miller,* 567 U.S. at 479-480, 132 S.Ct. 2455, 183 L.Ed.2d 407; *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 19.

- Recently, the Supreme Court just confirmed that what *Miller* actually requires is "a *discretionary sentencing procedure* where youth is considered" because "discretionary sentencing allows the sentencer to consider the defendant's youth" to ensure proportional sentences. *Jones v. Mississippi,* 593 U.S. ___ (2021).

- In *Patrick*, this Court extended *Miller* and *Long* to juvenile life-sentences, even those with the possibility of parole. *Patrick* at ¶ 42 ("we extend our application in Long to Patrick's sentence"). When choosing from various life-sentencing options, with or without parole, the Eighth Amendment (as first held in *Miller*) thus requires trial courts to articulate their consideration of youth as a mitigating factor. *Id.* at ¶ 23-24, 41.

- *Patrick* further decided *there is no difference between life-with and life-without-parole eligibility for Eighth Amendment purposes*: in either instance, youth must be considered as mitigating. *Patrick* at ¶ 28-29 ("A sentence of life imprisonment with parole eligibility triggers the same scope of Eighth Amendment concern and need for consideration of youth").

- R.C. 2929.02(B)'s automatic, mandatory 15-life sentence does not allow for any individualized consideration of youth—as mitigating or otherwise. Therefore, R.C. 2929.02(B) contravenes the Eighth Amendment, because it categorically forecloses what Patrick says the Eighth Amendment requires.

Of course, as noted by the court of appeals, 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 life-time sentence while R.C. 2929.03 requires courts "to choose from a number of life-sentence options, with or without parole." *Patrick* at ¶ 31; *see also* Opinion at ¶ 74 ("[The] 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.").

But, for Eighth Amendment purposes, this too is a distinction without a difference. *Miller, Long,* and *Patrick's* reasoning applies with *even more force here*, where there is *no sentencing discretion whatsoever*. In this way, the problem posed by R.C. 2929.02(B)'s mandatory sentence actually *precedes* that addressed by the Court in *Patrick*. Whereas *Patrick* addressed Eighth Amendment requirements in the exercise of a trial court's existing discretion, this case triggers *Miller's* first principle that 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 Eighth Amendment purposes. Thus, far from distinguishable, *Patrick* bridges the gap between *Miller's* mandatory life-without-parole sentence and Austin's mandatory life-with-parole sentence. Through *Patrick*, *Miller*'s central reasoning controls. *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.").

Even the court of appeals noted "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. More important now, there are countless juveniles in Ohio's prisons, who have been sentenced to a lifetime term in adult prison under R.C. 2929.02(B)—without *any* consideration of their youth and its attendant characteristics.

Patrick brought these youth into *Miller's* fold; and *Miller* requires discretion to consider their youth. This too is an important issue affecting hundreds. It will not be resolved without this Court's guidance.

CONCLUSION

For these reasons, this case presents two exceedingly important constitutional questions in a weighty felony case. This Court should thus accept jurisidction and reverse the decisions below.

Respectfully submitted,

Office of the Ohio Public Defender

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Certificate of Service:

A copy of the foregoing **Memorandum in Support of Jurisdiction** has been sent by facsimile mail this 22nd day of June, 2021, to D. Vincent Faris, Clermont County Prosecutor, at Clermont_County_Prosecutor.513-732-7592@fax2mail.com.

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Counsel for Austin M. Fuell

No.

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 MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT, AUSTIN M. FUELL