IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	Case No.: 2021-0794
	*	
Plaintiff-Appellee	*	On Appeal from the Twelfth
	*	District Court of Appeals Case
vs.	*	No. CA2020-02-008
	*	
AUSTIN FUELL	*	
	*	
Defendant-Appellant	*	

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MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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II. THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This case does not involve a substantial constitutional question and therefore, this Court need not accept jurisdiction. Austin Fuell presents two issues for this Court's consideration: 1) whether due process affords a juvenile the right to confrontation at a mandatory bindover hearing; and 2) whether the mandatory fifteen years to life sentence for murder prescribed by section 2929.02(B)(1) violates the Eighth Amendment as applied to a juvenile. While these issues deal with constitutional rights, they do not raise substantial constitutional questions.

Ohio Courts are unified in the belief that the Confrontation Clause is not applicable at a mandatory bindover hearing. *State v. Fuell*, 12th Dist. Clermont No. CA2020-02-008, 2021-Ohio-1627, ¶ 35; *In re J.R.*, 8th Dist. Cuyahoga No. 110241, 2021-Ohio-2272, ¶ 37; *State v. Powell*, 4th Dist. Gallia No. 20CA3, 2021-Ohio-200, ¶ 23; *State v. Garner*, 6th Dist. L-18-1269, 2020-Ohio-4939, ¶ 27. This belief is buttressed by this Court's clear statement that the constitutional right to confront witnesses is a trial right and has no applicability to preliminary hearings. *Henderson v. Maxwell*, 176 Ohio St. 187, 188, 198 N.E.2d 456 (1964). Since a mandatory bindover hearing is a preliminary hearing, Juv.R. 30, there is no recognized constitutional right to cross examine accusers at a mandatory bindover. Additionally, in *Kent*, the Court held that the process due a juvenile facing a mandatory bindover is a hearing, effective assistance of counsel, and reasons for the bindover. *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045 (1966). The Court specifically rejected the notion that these hearings should be conducted with all of the rights due to a defendant at a trial. *Id.* at 562. Since the Confrontation Clause does not apply at a preliminary hearing, since a mandatory bindover hearing is a preliminary hearing, and since the Supreme Court has declined to include the right to confront witnesses as part of the process due juveniles facing a mandatory bindover, there is nothing in

the law that requires application of the Confrontation Clause at a mandatory bindover hearing.

Fuell argues that the United States Supreme Court has held that the right to confrontation is a fundamental right of an accused and is protected by the Due Process clause of the Fourteenth Amendment. He claims that because a juvenile is entitled to due process at a mandatory bindover hearing and since the right to confront witnesses is a fundamental due process right, a juvenile therefore has a substantive due process right to confrontation at a mandatory bindover hearing.

Fuell's argument, however, disregards the distinction between trials and preliminary hearings and between procedural and substantive due process. The right to confrontation comes from the Sixth Amendment's Confrontation Clause, which is considered a fundamental due process right. *Pointer v. Texas*, 380 U.S. 400, 400-401, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Specht v. Patterson*, 386 U.S. 605, 610-611, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). However, the Confrontation Clause is a trial right and therefore, the fundamental due process right to confront witnesses, recognized by the Court, is the fundamental right to be able to confront accusers at trial. While there is a substantive due process right to confrontation at trial, there is no recognized fundamental due process right to confront witnesses at a preliminary hearing. Since the mandatory bindover hearing is a preliminary hearing and since there is no fundamental right to confront witnesses at a preliminary hearing, unlike at a trial, there is no substantive due process right to confrontation at a mandatory bindover hearing. This leaves only procedural due process. As the Court in *Kent* stated, the process that is due to a juvenile with regard to a mandatory bindover is a hearing, effective assistance of counsel, and reasons for the bindover. 383 U.S. at 554. Notably absent from this list is the right to confrontation, indicating such a right is not necessary to afford a juvenile all the process they are due at a mandatory bindover hearing.

As to Fuell's sentencing issue, the mandatory life tail sentence in section 2929.02(B)(1)

does not offend the Eighth Amendment, as the sentence is proportionate and grants the juvenile a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Fuell argues that in *State v. Patrick*, Slip Opinion No. 2020-Ohio-6803, this Court held that before sentencing a defendant who committed their offense as a juvenile to a term of life in prison (with or without the possibility of parole) the court must consider the juvenile's age as a mitigating factor, otherwise, the court offends the Eighth Amendment. He states that the mandatory fifteen years to life sentence set out in section 2929.02(B)(1) prevents the trial court from engaging in such consideration since the court has no discretion to impose any prison term but the life sentence prescribed. The problem with Fuell's argument is that it reads this Court's decision in *Patrick* too broadly. Where a juvenile has a meaningful opportunity to have their age considered as a mitigating factor and has a meaningful opportunity for release based on demonstrated maturity and rehabilitation, the Eighth Amendment is not offended. No court in Ohio has seemed to struggle with this issue and therefore, further clarification from this Court does not appear necessary.

III. STATEMENT OF THE CASE

A. Procedural Posture

On June 12, 2019, Officer Rees, from the Miami Township Police Department (MTPD) filed a complaint in the Clermont County Juvenile Court, alleging that Austin Fuell had committed acts that if committed by an adult, would have constituted aggravated robbery, aggravated burglary, and felony murder. Td. 1J. The complaint also specified that the offenses were committed with a firearm. Td. 1J. Based on the nature of the offenses and Fuell's age, the State filed a motion to relinquish jurisdiction to the adult division of the common pleas court. Td. 5J. The juvenile court held a mandatory bindover hearing and ultimately determined the State

had shown probable cause and that Fuell was sixteen or older at the time. Td. 27J.

On October 10, 2019, a Clermont County Grand Jury indicted Fuell on the following: Count 1, Aggravated Murder in violation of section 2903.01(B), Counts 2 and 3, Murder under sections 2903.02.(A) and 2903.02(B), Count 4, Kidnapping under section 2905.01(A)(2), and Count 5, Tampering with Evidence under section 2921.12(A)(1). Td. 8. Counts 1 through 4 carried a three-year firearm specification. Td. 8. Fuell ultimately pleaded guilty to one count of murder under section 2903.02(A), in exchange for the State requesting the court dismiss the remaining charges and all firearm specifications. Td. 52. The court sentenced Fuell to a prison term of fifteen years to life. Td. 55. Fuell timely appealed and the Twelfth District affirmed. *State v. Fuell*, 12th Dist. Clermont No. CA2020-02-008, 2021-Ohio-1627, ¶ 78.

B. Statement of the Facts

At the mandatory bindover hearing, the State called Bruce Redd, the manager of a pawn shop in Cheviot, Ohio, Matthew White, a ballistics expert from the Bureau of Criminal Investigations (BCI), Detective Tobias, the lead investigator from MTPD, and Payge Lacey, one of the victims in this case. Tp. (7/29/19) 35:20-36:19; Tp. 12:21-16:24; 34:17-35:6; 99:23-101:13; 113:16-115:2. At the October 4th hearing, Lacey testified that in June of that year, she was dating Jordan Ketring—the deceased victim in this case—and had been residing with him in her grandparents' house at 822 Wards Corner Road in Clermont County, Ohio. Tp. 35:15-18; 99:25-101:16. Sometime prior to June 8, 2019, she had been introduced to Fuell through a mutual friend, Kevin Baird, in order to sell Fuell Xanax. Tp. 101:24-105:15. Apparently wanting more, Fuell requested another buy. Tp. 105 11-22; State's Ex. 7.

Ketring coordinated with Fuell and set up the buy for June 8, 2019 at the Planet Fitness on Fields Ertel Road. Tp. 105:23-106:24. Unbeknownst to Fuell, Ketring had no plans to sell him

any Xanax; instead, he planned to rob him. Tp. 106:20-107:1; 135:1-18. This is precisely what happened. The buy got moved to the Comfort Inn on Fields Ertel, where Ketring robbed Fuell and drove off with Lacey and his friend Aaron. Tp. 45:24-46:1; 106:6-19; 107:17-110:20; 135:1-18. Fuell, who had been carrying a gun, pulled it out and fired three shots at the fleeing vehicle. Tp. 110:4-8; 134:3-11. Lacey, a witness to the whole thing, testified that Ketring had stolen $375 from Fuell. Tp. 110:10-20; 116:23-25. Det. Tobias testified he was able to obtain security camera footage from the relevant businesses in the area that corroborated much of Lacey's testimony regarding this incident. Tp. 44:19-52:21.

In the early morning hours of June 11, 2019, two people, armed and dressed in black with their faces covered, broke into Lacey's grandparent's house and demanded a safe from Lacey and Ketring. Tp. 54:5-11; 111:15-115:9; 119:3-9. Lacey testified that while one of the intruders ran off to find the safe they had demanded, the other remained, holding her and Ketring at gunpoint. Tp. 115:9-12; 122:1-18. The intruder, whose eyes and voice Lacey seemed to recognize as Fuell's, asked Ketring, "where is my $375?" Tp. 116:21-25; 125:7-126:14. Ketring asked if shooting him over $375 and spending twenty-five to life in prison was worth it. Tp. 117:3-8. Recalling Ketring had stolen $375 off of Fuell just a few days prior, Lacey testified she was 99.9% sure that the intruder that stood before her was Fuell. Tp. 126:16-127:22. She testified that she was not sure who shot first, but she stated that Fuell and Ketring (who had been carrying a revolver) began shooting at one another. Tp. 116:12-20; 117:7-21. She heard Ketring get shot and saw Fuell and the other intruder flee out of the house with the safe. Tp. 117:22-119:12. Ketring eventually succumbed to his injuries. Tp. 36:2-25.

Det. Tobias responded to the scene shortly after 3 am and after speaking with witnesses, began to suspect Fuell's involvement. Tp. 35:7-39:10; 42:15-43:5. The detective spoke with

Baird, who showed him Facebook messages he stated were from Fuell. Tp. 56:7-58:5. The messages bore Fuell's name and his picture appeared to be connected to the account. Tp. 62:7-14; State's Ex. 7. At 12:30 am on June 11, 2019, two hours before the murder, Fuell messaged Baird, asking, "What's paige's addy?" State's Ex.7. Baird responded at 12:50 with a screenshot of an address that turned out to be Lacey's parent's house, which was right behind her grandparent's house. Tp. 113:8-15; State's Ex.7. Baird's phone then shows missed calls from Fuell at 3:38, 3:39, 3:40, 3:41, and 5:21 am that morning. State's Ex.7.

The detective stated he was able to obtain footage from a UDF near Fuell's residence that showed sometime around 4:45 or 5:00 am, Fuell pulled up in a car with Tyler Chandler and Caitlyn Oswald. Tp. 68:6-69:24; State's Ex.11. A search of the car, which belonged to Oswald, revealed a receipt from a Plato's Closet from the day prior to the murder, which bore Fuell's name and phone number. Tp. 53:5-55:6; 79:7-16. After confirming Fuell's phone number through interviews with other witnesses, Det. Tobias sent a search warrant and subpoena to Sprint for phone records. Tp. 78:15-80:16. These records, which included cell tower location data, were analyzed by BCI and the report was sent to Det. Tobias. Tp. 64:18-66:4; State's Ex.11. 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. Tp. 67:11-68:10; State's Ex.11.

Det. Tobias testified that officers began to surveil Fuell's movements and decided to make a traffic stop on a vehicle driven by Fuell's grandmother, in which Fuell was a passenger. Tp. 71:16-72:10. A consent search of the vehicle revealed a gun barrel in the glove box. Tp. 72:7-10. Hours later (but still on June 11, 2019), Det. Tobias obtained a search warrant for Fuell's grandmother's residence and discovered a Sky Industries 9 mm Lugar. Tp. 72:14-74:2. It

was later discovered that the pistol had been purchased by Fuell's grandmother that day—June 11, 2019. Tp. 72:20-73:4; 934:1-4; State's Exs.10A-D. The 9mm Lugar, the barrel found in the car in which Fuell was riding as a passenger hours after the murder, and three other firearms were sent to BCI for comparison testing. Tp. 22:9-21; 40:17-42:3; 72:2-16; 75:8-21. Since officers recovered a number of bullets and casings, including the bullet that killed Ketring, BCI examiner Matthew White was able to compare test fires from the firearms and barrel he had been given to those bullets and casings found at the scene. Tp. 22:9-21; 40:1-7; 75:8-25; 77:4-78:7.

White stated that a microscopic comparison of the test fires and the evidence collected at the scene excluded all four firearms he was provided, but showed a match between the collected evidence—including the bullet that killed Ketring—and the test fires from the barrel found in the glove box. Tp. 18:3-21:22; 24:4-14. White testified that the barrel fit the Sky Industries pistol that was found at Fuell's residence. Tp. 23:4-24:10. As Bruce Redd had testified, when Fuell's grandmother came into the store June 11, 2019 with Fuell, she specifically requested a Sky Industries 9mm Lugar. Tp. (7/29/19) 38:6-44:19.

IV. ARGUMENT

First Proposition of Law

> The Confrontation Clause does not apply at a mandatory bindover hearing and a juvenile has no specific due process right to cross-examine declarants whose out-of-court statements are presented in support of probable cause.

A mandatory bindover hearing in juvenile court is not a trial and is not an adjudicatory hearing; as such, no constitutional right to confrontation exists. A defendant's right to confront witnesses stems from the Sixth Amendment and Article 1, Section 10 of the Ohio Constitution. However, "[t]he right to confrontation, which includes the right to physically face and cross-examine witnesses, is not a constitutionally compelled rule of pretrial proceedings." *State v.*

Fridley, 2017-Ohio-4368, 93 N.E.3d 10, ¶ 25 (12th Dist.) (quoting *State v. McKenzie*, 10th Dist. Franklin No. 11AP-250, 2011-Ohio-5851 and *State v. Saunders*, 2d Dist. Montgomery No. 22621, 2009-Ohio-1273). Instead, it is a trial right. *In the Matter of: B.W.*, 2017-Ohio-9220, 103 N.E.3d 266, ¶ 37 (7th Dist.); *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) ("As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."). A mandatory bindover hearing in juvenile court is certainly not a trial and, as a number of courts have recognized, is not an adjudicatory hearing either. *B.W.*, 2017-Ohio-9220, at ¶ 18; *State v. Burns*, 8th Dist. Cuyahoga No. 108468, 2020-Ohio-3966, ¶ 74 (quoting *State v. Starling*, 2d Dist. Clark No. 2018-CA34, 2019-Ohio-1478); *State v. Iacona*, 9th Dist. Medina No. CA 2891-M, 2000 WL 277911, *5 (Mar. 15, 2000) (citing *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)); *In re D.M.*, 2013-Ohio-668, 989 N.E.2d 123, ¶ 9 (1st Dist.) (citing *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629; *In re A.M.*, 139 Ohio App.3d 303, 743 N.E.2d 937 (8th Dist. 2000)). Indeed, "[t]he United States Supreme Court 'has repeatedly declined to require the use of adversarial procedures to make probable cause determinations.' " *B.W.* 2017-Ohio-9220, at ¶ 38 (quoting *Kaley v. United States*, 571 U.S. 320, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014)).

Since mandatory bindover hearings in juvenile court are not trials or adjudicatory hearings, to be admissible, evidence does not need to meet the same statutory or constitutional standards required for admissibility at trial. *Burns*, 2020-Ohio-3966, at ¶ 74 (quoting *Starling*); *State v. Whisenant*, 127 Ohio App.3d 75, 85, 711 N.E.2d 1016 (11th Dist. 1998); *B.W.*, 2017-Ohio-9220, at ¶¶ 41, 48; *State v. LaRosa*, 11th Dist. Trumbull No. 2018-T-0097, 2020-Ohio-160,

¶ 38 (citing *Whisenant*). This extends to the right to confront witnesses. *B.W.*, 2017-Ohio-9220, at ¶¶ 37-41; *State v. Garner*, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-4939, at ¶ 27 (citing *B.W.*). As this Court has held, "the constitutional provision according an accused the right to confront his accusers and the witnesses used against him * * * relates to the actual trial for the commission of the offense and not to the preliminary examination * * * ." *Henderson v. Maxwell*, 176 Ohio St. 187, 188, 198 N.E.2d 456 (1964). Therefore, if a bindover is more like a preliminary or pretrial hearing, rather than trial, then the Confrontation Clause does not apply.

The mandatory bindover hearing is a preliminary hearing. As noted *supra*, bindover hearings are not adjudicatory, as they do not determine if a child is delinquent, *B.W.*, 2017-Ohio-9220, at ¶ 18, and they are not trials, as they require only a finding of probable cause, not guilt. *State v. Iacona*, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001). Juvenile Rule 30, which governs transfer hearings, specifically states, "[i]n 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." Juv.R. 30(A). Therefore, according to the Rules, a mandatory bindover hearing used to determine probable cause is a preliminary hearing. Since the Confrontation Clause applies to evidence presented at trial or an adjudicatory hearing and since a mandatory bindover in juvenile court is neither, the Confrontation Clause was inapplicable to the evidence presented by the State in the mandatory bindover hearing in this case.

Fuell argues that because the Supreme Court has held due process requires a defendant have the opportunity to cross examine witnesses and since a juvenile has a right to due process at a mandatory bindover hearing, depriving a juvenile of the right to confront witnesses violates the Fourteenth Amendment. The problem with Fuell's argument is that it conflates constitutional

rights due at a trial and constitutional rights due at a mandatory bindover hearing and conflates substantive and procedural due process. As the United States Supreme Court has recognized, the right to confront witnesses stems from the Sixth Amendment's Confrontation Clause and is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 400-401, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Specht v. Patterson*, 386 U.S. 605, 610-611, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). Since the Confrontation Clause protects a trial right and since the fundamental due process right to confront witnesses stems from the Confrontation Clause, the fundamental due process right to confrontation is a trial right. In other words, defendants have a substantive due process right to confrontation at trial. There is no case, of which the State is aware, that has found a similar substantive due process right as applied to preliminary hearings.

While Fuell could argue there is a procedural due process right to confrontation in a mandatory bindover hearing, the Court in *Kent* indicated otherwise, finding that the process due a juvenile facing a mandatory bindover is a hearing, effective assistance of counsel, and a statement of reasons for the bindover. *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045 (1966). The Court specifically declined to require application of the same constitutional rights afforded to a defendant at trial to a juvenile at a mandatory bindover hearing. *Id.* at 562.

Second Proposition of Law

> A sentence of fifteen years to life in prison under section 2929.02(B)(1) affords a juvenile a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation and therefore, it does not violate the Eighth Amendment.

The fifteen years to life sentence mandated by section 2929.02(B)(1) for murder gives a juvenile defendant a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation; therefore, it does not violate the Eighth Amendment. While this Court's

decision in *State v. Patrick*, Slip Opinion No. 2020-Ohio-6803, appears to suggest that anytime a court sentences a juvenile to prison for life with the possibility of parole and does not consider the juvenile's age as a mitigating factor, the court violates the Eighth Amendment, its decision was not so broad. As shown *infra*, where a juvenile is sentenced for a homicide offense to life in prison with the possibility of parole and is given a mandatory minimum term that affords them a meaningful opportunity to obtain release, the need for the trial court to consider the juvenile's age as a mitigating factor is diminished and the failure of the court to consider such a factor does not offend the Eighth Amendment.

With regard to sentences of life with the possibility of parole, this Court has given relevant guidance in two cases: *Patrick* and *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127. In *Patrick*, the defendant was sentenced to a prison term of thirty-three years to life in prison. 2020-Ohio-6803, at ¶ 7. This Court held 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 [*State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890] as instructed in [*Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)]." *Id.* at ¶ 36. As instructed in *Miller*, when a juvenile is sentenced to life in prison, their age is a mitigating factor that must provide for "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 U.S. at 479 (quoting *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)). In *Moore*, the defendant had been sentenced to an aggregate term of one hundred twelve years in prison on non-homicide offenses and would not be eligible for judicial release for seventy-seven years. 2016-Ohio-8288, at ¶¶ 12-13, 17, 30. This

Court held that since this was functionally a life sentence and because the offenses were non-homicide, in order to satisfy the Eighth Amendment, the juvenile must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at ¶ 47 (citing *Graham*). What these two cases show is that where a juvenile is sentenced to prison for life, they must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," either through consideration of the juvenile's age at the trial court level or through a meaningful chance at release.

The Ohio General Assembly appears to agree that fifteen years to life would give a juvenile a meaningful opportunity to obtain release, especially where the parole board is required to specifically consider the offender's age and its attendant diminished culpability. With Senate Bill 256, the General Assembly has enacted new sentencing reforms that specifically take a juvenile's age into consideration. Effective April 12, 2021, under section 2967.132, if the juvenile is serving a sentence for two or more homicide offenses that are not aggravated homicides and the juvenile was the principle offender in two or more of those offenses, they are eligible for parole after thirty years. R.C. 2967.132(C)(3). If the juvenile is serving a sentence for one or more homicide offenses, none of which are aggravated homicides, the juvenile is eligible for parole after twenty-five years. R.C. 2967.132(C)(2). In all other cases, the juvenile is eligible for parole after serving eighteen years. R.C. 2967.132(C)(1). However, if the juvenile's sentence permits parole prior to the eligibility date in section 2967.132(C), they are eligible for parole as of the date specified in their sentence. R.C. 2967.132(C)(4). Notably, the General Assembly did not change the sentence of fifteen years to life for murder under section 2903.02. R.C. 2929.02(B)(1). Moreover, when the parole board considers release for an offender who committed his offenses as a juvenile, it is specifically required to consider the age related factors

listed in section 2967.132(E). Therefore, the General Assembly, specifically considering a juvenile's age, has deemed that fifteen years to life in prison affords a juvenile "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," especially since the parole board must consider the juvenile's age and attendant mitigating characteristics. While this Court has held legislative enactments are not "determinative of whether a punishment is cruel and unusual," it noted such enactments are afforded "great weight" since they are "the clearest and most reliable objective evidence of contemporary values * * * ." *State v. Anderson*, 151 Ohio St.3d 212, 2017-Ohio-5656, 87 N.E.3d 1203, ¶ 29 (quoting *Graham*).

Fuell argues that by mandating a term of fifteen years to life, section 2929.02(B)(1) deprives a trial court of its ability to consider his age as a mitigating factor, thereby running afoul of *Patrick*; however, as this Court has held, a mandatory minimum prison term does not violate the Eighth Amendment per se. In *Anderson*, in rejecting a claim that mandatory minimum sentences violate a juvenile's Eighth Amendment rights per se, this Court cited a number of jurisdictions where life terms with a mandatory minimum sentence have been upheld as not violative of the Eighth Amendment. 2017-Ohio-5656, at ¶ 42 (citing *State v. Brown,* 300 Kan. 542, 564, 331 P.3d 781 (2014) (20 to life); *Ouk v. Minnesota,* 847 N.W.2d 698, 701 (Minn.2014) (mandatory 30 to life); *Commonwealth v. Okoro,* 471 Mass. 51, 59, 26 N.E.3d 1092 (2015) (15 to life). While this Court did not explicitly adopt the findings of these courts, by citing them as support, this Court appeared to signal that certain life sentences with mandatory minimums do not violate the Eighth Amendment.

This Court, citing *Graham*, stated there were two factors at play when deciding whether to adopt a categorical rule under the Eighth Amendment: "national consensus against the sentencing practice at issue" and an independent review as to whether the punishment violates

the Constitution. 2017-Ohio-5656, at ¶ 28 (citing *Graham*). As part of the independent review, courts look to the culpability of the offenders in light of their crimes, as well as the severity of the punishment at issue, and whether that punishment satisfies "legitimate penological goals." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 38 (citing *Graham*). Those penological goals recognized as legitimate are retribution, deterrence, incapacitation, and rehabilitation. *Id.* at ¶ 50 (citing *Graham*).

Applying the two part inquiry as set out in *Anderson*, demonstrates that a mandatory fifteen years to life sentence for a juvenile who commits murder, does not violate the Eighth Amendment. There are, in reality, two parts to a life sentence under section 2929.02(B)(1): the mandatory minimum term of fifteen years and the life tail. As to a national consensus, this Court noted that these types of mandatory sentences with life tails are routinely upheld nationally. *Anderson*, 2017-Ohio-5656, at ¶ 42. As to an independent review, a fifteen year prison term is much less than the terms in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (death penalty), *Graham* (life without parole), and *Miller* (mandatory life without parole), and is even less than the term imposed in *Patrick* (33 to life). Indeed, by the time the defendant in *Patrick* would be eligible for his first parole hearing, Fuell here would be preparing for his third, assuming he did not make parole at his first two hearings and assuming the parole board set the time for the subsequent hearings as far out as possible.[1] Therefore, while juveniles are recognized as being less culpable than adults, this case does not deal with the most severe form of punishment—death penalty—or even the second most severe form of punishment—life

[1] The defendant in *Patrick* received 33 years to life, whereas Appellant here received 15 to life. If the Parole Board denies parole, it must set another hearing date no more than 10 years later. Ohio Adm.Code 5120:1-1-10(B)(2). Therefore, if Appellant was denied at 15 years, he would be eligible again by 25 at the latest, and if denied again, 35 at the latest.

without parole. As to the severity of the punishment, as Chief Justice O'Connor noted, the United States Supreme Court "has recognized that it is 'beyond question' that a youth who commits a murder deserves severe punishment." *Long*, 2014-Ohio-849, ¶ 34 (O'Connor, C.J., concurring). A minimum sentence of fifteen years certainly appears proportional to a homicide offense. As noted *supra*, even considering a juvenile's age, the General Assembly agrees.

What is left then is the life tail. As the *Anderson* Court found, there is no national consensus against a life tail for a homicide offense. 2017-Ohio-5656, at ¶ 42. Moreover, no court has held that a life tail for a juvenile is disproportionate to a murder. The issue with the sentence in *Patrick* was not the life tail; it was the fact that a minimum term of thirty-three years in prison before the first parole hearing and before the juvenile had his age considered as a mitigating factor did not give the juvenile a meaningful opportunity to obtain release. 2020-Ohio-6803, at ¶¶ 32-35. Because of this, the trial court had to consider the juvenile's youth as a mitigating factor when determining what minimum sentence was most appropriate: twenty-three years, twenty-eight years, or thirty-three years. *Id.* at ¶¶ 35-36, 46. The issue was never that a mandatory life tail itself was unconstitutional. If that lifetime in prison is a possibility, then either the court needs to show on the record that it considered the juvenile's age before imposing a sentence, or the minimum term of the life tail must afford the juvenile a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, where the juvenile's age is considered as a mitigating factor.

V. CONCLUSION

This case does not contain a substantial constitutional question or a question of public or great general interest. As such, the State respectfully requests this Court decline jurisdiction.

Respectfully submitted,
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VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Memorandum in Response was served upon Timothy B. Hackett, Esq., Assistant State Public Defender, counsel for Defendant-Appellant, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, by ordinary mail on this 12th day of July, 2021.

Nick Horton (#0091191)
Assistant Prosecuting Attorney