In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2019-0655
	:	
Appellee,	:	On Appeal from the
	:	Mahoning County
v.	:	Court of Appeals,
	:	Seventh Appellate District
KYLE PATRICK,	:	
	:	Court of Appeals
Appellant.	:	Case No. 2017 MA 0091

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO ON ISSUE OF JURISDICTION

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INTRODUCTION

The proposition of law that this Court accepted for review pertains to Patrick's challenge to his sentence under the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution. But to reach the merits, the Court must first assure itself that it has jurisdiction to decide the case. *See State v. Wilson*, 73 Ohio St. 3d 40, 46 (1995). This Court asked the parties to address whether R.C. 2953.08(D)(3) bars Ohio courts from hearing Patrick's appeal of his sentence of life with the possibility of parole after thirty years—a sentence the trial court imposed for Patrick's aggravated-murder conviction. The Attorney General submits this *amicus* brief to provide his view on the matter: R.C. 2953.08(D)(3) barred Patrick from appealing his sentence; the Court of Appeals lacked jurisdiction to hear his appeal; and this Court lacks jurisdiction to review the decision that the Court of Appeals had no jurisdiction to issue.

Some (indeed, most) appellate districts have held that life sentences for aggravated murder are not appealable under Ohio law. *State v. Campbell*, 8th Dist. Cuyahoga No. 103982, 2016-Ohio-7613, ¶16 (per Stewart, J.) (quoting *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, ¶17); *State v. Weaver*, 5th Dist. Muskingum No. CT2016-0033, 2017-Ohio-4374, ¶¶17–20; *State v. Hawkins*, 4th Dist. Gallia No. 13CA3, 2014-Ohio-1224, ¶¶13–15; *State v. Burke*, 2d Montgomery No. 26812, 2016-Ohio-8185, ¶28; *State v. Jones*, 2d Dist. Clark No. 2012 CA 61, 2013-Ohio-4820, ¶¶22–26; *State v. Kinney*, 7th Dist. Bel-

mont No. 18 BE 0011, 2019-Ohio-2704, ¶¶134–38, *discretionary appeal pending*, Case. No. 2019-1103; *see also State v. Roark*, 3d Dist. Mercer No. 10-14-11, 2015-Ohio-3811, ¶13. Those cases are correct, for reasons laid out in greater detail below. And, as a result, Patrick's life-with-the-possibility-of-parole sentence is not reviewable.

In his supplemental brief, Patrick proposes additional statutory and constitutional bases for entertaining this appeal. None of his arguments is correct. The Court should hold that the court of appeals lacked jurisdiction to hear Patrick's challenge to his sentence on appeal and that this Court therefore lacks jurisdiction to entertain an appeal of the court of appeals' decision.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in ensuring that Ohio's juvenile and felony sentencing structure, including appeals, is properly construed and applied.

ARGUMENT

<u>*Amicus*</u> <u>Attorney General's Proposition of Law on Appellate Jurisdiction:</u>

> *R.C. 2953.08(D)(3) precludes review of a life-with-the-possibility-of-parole sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code, unless another more-specific statute expressly grants a right of appeal.*

The threshold question in this case is whether R.C. 2953.08(D)(3) prevents the court of appeals, and this Court, from reviewing Patrick's challenge to his life-with-the-

possibility-of-parole sentence imposed for aggravated murder. The answer is yes. As explained below, R.C. 2953.08(D)(3) does not permit defendants convicted of aggravated murder to appeal their sentences of life with the possibility of parole. (Of course, defendants remain free to appeal their *convictions*.) Though other statutes and the Ohio Constitution, *see, e.g.*, Article IV, Sec. 2 (a)(ii) and (c), permit appeals of *death* sentences, no statute specifically permits an appeal from a non-capital sentence for aggravated murder or murder. As a result, nothing empowered Ohio courts to hear Patrick's appeal. This Court should so hold, dismiss the case, and vacate that portion of the Court of Appeals' opinion reaching the merits of Patrick's sentencing appeal.

A note for the reader: the Attorney General made an almost-identical argument in a merits brief filed in a case that arose in a similar posture. *See State v. Kinney*, 2019-1103, *discretionary appeal pending*. Much of the following argument is similar (and at times identical) to the argument made in that brief.

A. Patrick had no right to appeal his sentence.

1. Begin with the question whether the Court of Appeals had subject-matter jurisdiction over Patrick's appeal. The Ohio Constitution gives the appeals courts "jurisdiction *as may be provided by law* to review and affirm, modify, or reverse judgments or final orders." Art. IV, §3(b)(2) (emphasis added). As the "as may be provided by law" language suggests, the General Assembly may grant, withhold, and limit the jurisdiction of appeals courts. And with respect to felony sentence appeals, the General As-

sembly *has* limited the court of appeals' jurisdiction through the "Felony Appeal Law." R.C. 2953.08. Prior to the Felony Appeal Law's enactment, Ohio law provided limited avenues for appealing one's sentence. *See State v. Hill*, 70 Ohio St.3d 25, 29 (1994). The Felony Appeal Law expanded the right to appeal one's sentence, but with important caveats.

The Felony Appeal Law contains two subsections relevant here. First, subsection (A) provides: "In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds." (emphasis added). Subsection (A) thus "grants a court of appeals subject-matter jurisdiction to hear a defendant's appeal of a felony sentence as a matter of right." *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, ¶9. But as this language suggests, division (D) qualifies this broad grant. And that is the second relevant subsection. It provides, in relevant part: "A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section." R.C. 2953.08(D)(3).

Patrick was convicted of aggravated murder. So, absent some other statute that gives Patrick a right to appeal his aggravated-murder sentence, R.C. 2953.08(D)(3) bars him from doing so—and thus bars the courts from exercising jurisdiction to review his sentencing appeal. Is there another statute that permits such an appeal? No, there is

not. The best candidate for such a statute would be R.C. 2953.02, which this brief calls the General Appeal Law. That law broadly provides:

> In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, *and in any other criminal case*, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. … A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to … felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals.

R.C. 2953.02 (emphasis added). The question thus becomes whether, because Patrick is appealing from a "criminal case," he can appeal his sentence notwithstanding the provision in the Felony Appeal Law that forbids him from doing so. If the General Appeal Laws permits such appeals to state appellate courts, then it also permits defendants to appeal the appellate courts' constitutional rulings "to the supreme court." *Id*.

The General Appeal Law does not permit such appeals. This follows, first and foremost, from the rule that no part of a statute "should be treated as superfluous unless that is manifestly required." *State ex rel. Carna v. Teays Valley Local Sch. Dist. Bd. of Educ.*, 131 Ohio St. 3d 478, 2012-Ohio-1484, ¶19 (quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373 (1917)). If the General Appeal Law permitted felons (including aggravated murderers, like Patrick) to appeal their sentences, the Felony Appeal Law would be superfluous. After all, if the General Ap-

peal Law's broad language permitting an appeal of "any" criminal "judgment or final order" permitted felons to appeal their sentences, then the Felony Appeal Law, which specifies in exacting detail the circumstances in which defendants may appeal a felony sentence, would serve no purpose whatsoever. The Court should not adopt a reading of the General Appeal Law that makes another section of the Revised Code—namely, the Felony Appeal Law—completely superfluous.

Of course, the presumption against surplusage is just that—a presumption. Courts may accept a bit of superfluity if "that is manifestly required." *Carna*, 2012-Ohio-1484 ¶19. But it is *not* required here; the statutes can be harmonized. This harmonization begins with a recognition that the Felony Appeal Law, when it says the statute applies "[i]n addition to any other right to appeal," R.C. 2953.08(A), means only that defendants retain their ability to appeal issues *not covered by* the Felony Appeal Law. But if an issue *is* covered by the Felony Appeal Law, the issue can be appealed only under that law. This reading is consistent with the interpretive principle that a more-specific statute should trump a more-general one when the two conflict. R.C. 1.51; *accord* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 183–86 (2012). Here, the Felony Appeal Law is the more-specific statute because it regulates *only* appeals of felony sentences, while the General Appeal Law regulates criminal appeals generally. It is thus possible to read the Felony Appeal Law and the General Appeal Law in a way that gives effect to both statutes, avoiding the superfluity problem. Un-

der this reading, the Felony Appeal Law delineates the only circumstances in which "a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed," *unless* some even-more-specific statute (like a statute governing the appeal of a particular felony, or a particular type of sentence) confers a right to appeal. R.C. 2953.08(A). *See, e.g.*, R.C. 2929.05 (providing for appeals in cases in which a sentence of death is imposed).

The Court has embraced this specific-controls-the-general canon once before, to reconcile the Felony Appeal Law and R.C. 2505.03(A). The second of these statutes broadly provides that courts of appeals have jurisdiction to review "final orders." *See also* R.C. 2501.02 (courts of appeals "shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders"); R.C. 2505.02(B) (defining "final order"). A valid judgment of conviction, even in a felony case, is a "final order." *See State v. Craig*, ___ Ohio St.3d ___, 2020-Ohio-455, ¶11. And so, one might argue, R.C. 2505.03 permits *felons* to appeal their sentences without regard to the Felony Appeal Law.

This Court rejected that argument in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶19. The defendant in that case argued that R.C. 2505.03(A) empowered courts to review felony sentences under an abuse-of-discretion standard. *Id*. ¶¶19, 17. And the defendant argued this was so notwithstanding subsection (G)(2) of the Felony Appeal Law, which provides: "The appellate court's standard for review *is not* whether

the sentencing court abused its discretion," but rather whether the sentencing court "clearly and convincingly" committed certain errors. (emphasis added). *Marcum* rejected that argument, holding that "R.C. 2953.08 specifically and comprehensively defines the parameters and standards—including the standard of review—for felony-sentencing appeals." 2016-Ohio-1002, ¶21.

One could apply the same logic to Patrick's case: Subsection (D)(3) of the Felony Appeal Law, which specifically limits the right to appellate review of a sentence for felony murder or aggravated murder, trumps the more general statutory language in the General Appeal Law (or, for that matter, R.C. 2505.03—the statute at issue in *Marcum*). *See* R.C. 1.51; *accord* Scalia & Garner, at 183–86.

2. While this Court has never squarely addressed the question whether the Felony Appeal Law is the exclusive option for appealing a felony sentence, it has come close a couple of times. In one case, it said that subsection (D) of the Felony Appeal Law "clearly means what it says: such a sentence [for aggravated murder or murder] cannot be reviewed." *State v. Porterfield*, 106 Ohio St.3d, 2005-Ohio-3095 ¶17. And in *Marcum*, as just noted, the Court said that the Felony Appeal Law "specifically and comprehensively defines the parameters" of appellate review for felony sentences. *Marcum*, 2016-Ohio-1002, ¶21. Finally, several other times, this Court has characterized another subdivision of R.C. 2953.08(D), subdivision (D)(1), as "'a statutory limit on a court of appeals' jurisdiction to hear an appeal.'" *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-

4761, ¶9, n.1 (quoting *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, ¶22; *see also State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, ¶¶1, 43 (pursuant to R.C. 2953.08(D)(1), jointly-recommended sentence that is authorized by law is not reviewable).

True, these cases did not consider the General Appeal Law (R.C. 2953.02), and thus cannot be fairly described as resolving the question of whether that law permits the appeals that R.C. 2953.08(D)(3) does not. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (*en banc*) ("opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration"). Still, both suggest that the Felony Appeal Law has been consistently understood as providing the only route to appeal a felony sentence (other than a death sentence).

Consistent with what this Court has already said about R.C. 2953.08 in *Marcum* (and *Gwynne*), this Court should hold that R.C. 2953.08(D)(3) limits the courts of appeals' jurisdiction to review a sentence for aggravated murder or murder. Because subsection (D)(3) of the Felony Appeal Law explicitly precludes appellate review of life sentences for aggravated murder or murder, Patrick had no right to appeal his sentence. As some of the Courts of Appeals have held, the Felony Appeal Law "means what it says": life sentences for murder or aggravated murder "cannot be reviewed." *State v. Campbell*, 8th Dist. Cuyahoga No. 103982, 2016-Ohio-7613, ¶16 (per Stewart, J.) (quoting *Porterfield*, 2005-Ohio-3095, ¶17); *see also State v. Weaver*, 5th Dist. Muskingum No.

CT2016-0033, 2017-Ohio-4374, ¶¶17–20; *State v. Hawkins*, 4th Dist. Gallia No. 13CA3, 2014-Ohio-1224, ¶15; *State v. Burke*, 2d Montgomery No. 26812, 2016-Ohio-8185, ¶¶13–28; *State v. Jones*, 2d Dist. Clark No. 2012 CA 61, 2013-Ohio-4820, ¶¶22–26; *State v. Kinney*, 7th Dist. Belmont No. 18 BE 0011, 2019-Ohio-2704, ¶¶134–38, *discretionary appeal pending*, Case. No. 2019-1103; *State v. McCarley*, 9th Dist. Summit No. 28657, 2018-Ohio-4685, ¶¶37–38; *State v. Johnson*, 1st Dist. Hamilton No. C-160242, 2017-Ohio-1148, ¶¶12–15 (citing *Marcum*, 2016-Ohio-1002, ¶21); *State v. Geran*, 12th Dist. Butler No. CA 2019-01-016, 2019-Ohio-3421, ¶¶6–7; *State v. Brown*, 6th Dist. Wood No. WD-00-033, 2001 Ohio App. LEXIS 447, at *10–11 (Feb. 9, 2001); *State v. McDowell*, 10th Dist. Franklin No. 03AP-1187, 2005-Ohio-6959, ¶73, *vacated and remanded on different grounds by In re Ohio Crim. Sentencing Statutes Cases*, 109 Ohio St.3d 411, 2006-Ohio-2394; *cf. State v. Roark*, 3d Dist. Mercer No. 10-14-11, 2015-Ohio-3811, ¶13 (juvenile's life without parole sentence is not subject to appeal under R.C. 2953.08(D)(3), but noting that "courts … do sometimes address these sentences regardless of the statute").

3. The Ohio Constitution gives this Court appellate jurisdiction in a variety of circumstances, two of which are relevant here. *First*, this Court "shall" have jurisdiction "[i]n appeals from the courts of appeals as a matter of right in … [c]ases involving questions arising under the constitution of the United States or of this state." Art. IV, §2(B)(2)(a)(iii). *Second*, this Court may exercise jurisdiction over questions "of public or

great general interest" by directing "a court of appeals to certify its record to the Supreme Court." §2(B)(2)(e); *see also* R.C. 2953.02.

As far as the Attorney General has discovered, neither of these provisions has been interpreted to give this Court jurisdiction to reach the merits of cases that lower courts had no jurisdiction to decide. And that is hardly surprising. Both of these provisions relate to the Court's *appellate* jurisdiction, and "the essential criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted." *Ortiz v. United States*, 138 S. Ct. 2165, 2173 (2018) (quoting *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803) (alteration omitted). When the lower court acted without proper jurisdiction—when the cause was not properly instituted—the only proper response is to vacate that portion of the lower court's judgment that was entered without jurisdiction.

* * *

Because the Seventh District had no jurisdiction over Patrick's appeal challenging his sentence, this Court should vacate the portion of the lower court's judgment addressing the merits of Patrick's sentencing appeal.

B. Patrick's counterarguments all fail.

Patrick responds by pointing to numerous statutory and constitutional provisions that gave him the right to appeal. None did.

1. R.C. 2953.02 (The General Appeal Law). Patrick "concedes that" subsection (D)(3) of the Felony Appeal Law "precludes review of a sentence for aggravated murder when an Appellant asks, *pursuant to R.C. 2953.08*, to have that sentence reviewed under that section." Patrick Jur. Br.18–19 (emphasis added). But, Patrick says, the Felony Appeal Law does not apply here, because he is not actually challenging his sentence. Patrick says that he "did not file a separate appeal under R.C. 2953.08"; he insists that "[n]o jurisdiction to review Patrick's sentence was invoked"; and he claims that he is "not before this Court because he received a" life-with-the-possibility-of-parole "sentence." Patrick Jur. Br.3, 11, 20–21.

This is a puzzling position for Patrick to take. If he has no issue with his sentence, then he has not been "aggrieved by the final order appealed from" and therefore lacks "appellate standing." *Goodman v. Hanseman*, 132 Ohio St.3d 23, 2012-Ohio-1587, ¶1 (citations omitted). Patrick's explanation is that he is "not appealing the sentence per se, but the process by which the sentence was determined." Patrick Jur. Br.3. These are word games: Patrick's argument is that his sentence is improper because it was (allegedly) imposed without adequate consideration of Patrick's youth. Indeed, Patrick's lone proposition of law is: "Imposition of any life imprisonment sentence upon a juvenile offender without taking into consideration factors commanded by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Constitution of Ohio violates those provisions." Patrick Br.8. That is the appeal of a

sentence. And the Felony Appeal Statute does not allow aggravated murderers in Patrick's shoes to appeal such a sentence.

True enough, in some cases preceding the Felony Appeal Statute's enactment, this Court entertained arguments that a sentence was unconstitutional. See, e.g., *State v. McMullen*, 6 Ohio St.3d 244 (1983); *Madjorous v. State*, 113 Ohio St. 427 (1925); *State v. Wilson*, 58 Ohio St.2d 52 (1979). And the Court has entertained such challenges in at least two cases since the statute's enactment. *See State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011; *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849. These cases could perhaps be used to suggest that the Court has jurisdiction to entertain such appeals under the General Appeals Law. In fact, however, none of these decisions addressed the Court's jurisdiction, and so each amounts to, at most, a "drive-by jurisdictional ruling[]" that has "no precedential effect" on the jurisdictional question. *Ohio High Sch. Ath. Ass'n v. Ruehlman*, 157 Ohio St. 3d 296, 300, 2019-Ohio-2845, ¶13 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

2. Due Process. Patrick also argues that Ohio violates his due-process rights under the federal and Ohio constitutions if it fails to provide for an appeal. He is wrong.

The due-process guarantees of the federal and state constitutions do not give a right to appeal criminal convictions or sentences *at all*. As cases from this Court and the Supreme Court of the United States recognize, "there is no constitutional right to an appellate review of a criminal sentence." *State v. Smith*, 80 Ohio St.3d 89, 97, 1997-Ohio-

355; *see also Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974); *Abney v. United States*, 431 U.S. 651, 656 (1977). Indeed, before 1996 statutory amendments in Ohio, the usual rule in sentencing felony offenders was that "an appellate court [would] not review a trial court's exercise of discretion in sentencing when the sentence is authorized by statute and is within statutory limits." *State v. Hill*, 70 Ohio St.3d 25, 29 (1994); *City of Toledo v. Reasonover*, 5 Ohio St.2d 22, syl. ¶1 (1965). Consequently, the Felony Appeal Law does not violate the Due Process Clauses of the United States and Ohio constitutions by barring aggravated murderers in Patrick's position from appealing.

Patrick's argument resting on *Ohio*'s due-process clause, Art. I, §16, fails for another reason: Patrick waived it. Patrick's supplemental brief does not develop a separate argument under Article I, Section 16—he simply slaps the relevant provision of the Ohio Constitution under an argument geared toward the *federal* Due Process Clause. Thus, even if there were a relevant distinction between the two provisions, Patrick waived his ability to argue for that distinction.

None of this analysis is changed by the fact that Justice Sotomayor recently concurred in the denial of *certiorari* to suggest that Ohio may be violating *the Eighth Amendment* by denying murderers sentenced to life without the possibility of parole a chance to appeal their sentences. *Campbell v. Ohio*, 138 S.Ct. 1059 (2018). For four reasons, that concurring opinion has no bearing on this case.

First, statements respecting the denial of *certiorari* are not binding, and no other Justice joined this particular statement. Indeed, Justice Sotomayor's opinion runs contrary to the modern trend in Eighth Amendment jurisprudence, which is to either return to, or at least stray no farther from, the Eighth Amendment's original meaning. *See, e.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122–26 (2019). There is no plausible argument that, as originally understood, the Eighth Amendment's ban on cruel and unusual *punishments*—a prohibition of certain *methods* of punishment, *see id*., at 1123–24—somehow guarantees a procedural right to appeal.

Second, Justice Sotomayor raised concerns about failing to provide an appeal right in cases where a defendant is sentenced to life *without* the possibility of parole. As she noted, a life-without-parole sentence, like a death sentence, "alters the remainder of" the prisoner's "life 'by a forfeiture that is *irrevocable*.'" *Campbell*, 138 S. Ct. at 1059 (quoting *Miller v. Alabama*, 567 U. S. 460, 474–75 (2012)) (emphasis added). That concern is simply not implicated by a sentence of life *with* the possibility of parole—there, the forfeiture is revocable, not irrevocable. (And as the State explained in its merits brief in *State v. Kinney*, Justice Sotomayor's analysis is flawed even as applied to murderers sentenced to life *without* the possibility of parole. *See* Appellee's Br.25–27, *State v. Kinney*, No. 2019-1103.)

Third, Justice Sotomayor's separate writing suggested Ohio's failure to allow an appeal may violate *the Eighth Amendment's* bar on cruel and unusual punishments, not the Due Process Clause. It thus has no bearing on Patrick's due-process argument.

Finally, the concurrence appears to rest on a faulty premise While aggravated murderers cannot appeal *in state court* a sentence that they deem unconstitutionally excessive, they may petition the Supreme Court of the United States to review their sentences via a writ of *certiorari*. 28 U.S.C. §1257.

3. Equal Protection. Finally, Patrick argues that the Felony Appeal Law, if it prohibits aggravated murderers from appealing their sentences, would violate the Equal Protection Clause of the Fourteenth Amendment. (He also mentions the analogous Section 2 of Article I in Ohio's Constitution. But this Court has held that the two provisions are "functionally equivalent." *Desenco, Inc. v. City of Akron*, 84 Ohio St. 3d 535, 544 (1999); *accord Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 2010-Ohio-4908, ¶17, 127 Ohio St. 3d 104, 109; *State v. Ferris*, 53 Ohio St. 314, 341 (1895). And regardless, Patrick develops no independent argument based on the state provision, thereby waiving his ability to do so.)

According to Patrick, the State has no rational basis for allowing *some* felons to appeal their sentences while denying that right to aggravated murderers. Patrick is incorrect. The General Assembly could rationally decide that convicted murderers, while they may appeal their guilt, may not tie up the state courts with arguments that they

should be eligible for parole a bit sooner. To understand why, it is important to recognize that those convicted of murder or aggravated murder are eligible for only a very-narrow range of sentences. All murderers are automatically sentenced to an indefinite term of 15 years to life. *See* R.C. 2929.02(B)(1). And aggravated murderers, if they are not sentenced to death, may be sentenced to: (1) life without parole; (2) life with the possibility of parole in twenty, twenty-five, or thirty years; or (3) if the victim is under age 13 and the conviction includes a sexual-motivation specification, an indefinite term of thirty years to life. R.C. 2929.03(A)(1)(a)–(e), (2). The General Assembly could rationally have concluded that all possible sentences were so *per se* reasonable when imposed upon a murderer that it did not make sense to give a right to appeal. Put differently, the crime of aggravated murder is so heinous that no offender can plausibly claim to have been wronged by receiving a life sentence with the possibility of parole after thirty years rather than twenty years. When a crime ends someone's life, bickering about ten years' difference in parole eligibility is a waste of time. The General Assembly might reasonably have concluded that other crimes, even serious felonies, present factual complications that make the sentencing decision more worthy of review.

In sum, the State has "a legitimate interest in treating the worst offenders differently than other felony offenders and the challenged statute provides a rational means to achieve that interest." *State v. Grevious*, 12th Dist. Butler No. CA2018-05-093, 2019-Ohio-1932, ¶69, *citing State v. Wilson*, 4th Dist. Lawrence No. 16CA12, 2018-Ohio-2700;

State v. Weaver, 5th Dist. Muskingum No. CT2016-0033, 2017-Ohio-4374; and *State v. Burke*, 2d Dist. Montgomery No. 26812, 2016-Ohio-8185, 90 Ohio App. 3d 27, 69 N.E.3d 774. Accordingly, Patrick has fallen short of meeting his heavy burden to prove that the Felony Appeal Law, at least in its application to juvenile offenders (like him) who are sentenced to life *with* the possibility of parole, is unconstitutional beyond a reasonable doubt. *See, e.g.*, *State v. Weitbrecht*, 86 Ohio St.3d 368, 1999-Ohio-113, (citing *State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996-Ohio-264).

State v. Noling, 149 Ohio St.3d 327, 2016-Ohio-8252, ¶31, does not change the analysis. In *Noling*, this Court found that R.C. 2953.73(E) violated the right to equal protection under the United States and Ohio Constitutions. That statute gave *noncapital* offenders an appeal as of right following the denial of a DNA test in connection with their crimes of conviction, but it gave *capital* defendants only a discretionary appeal. The Court held that no state interest justified this disparate treatment. And indeed, it is hard to fathom why the State would deny an automatic appeal only to the one class of prisoners whose lives might be saved by exonerating DNA. But that logic simply has no bearing on this case.

CONCLUSION

The Court should dismiss this case for lack of appellate jurisdiction, or, if it reaches the merits, affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant State of Ohio on the Issue of Jurisdiction was served this 4th day of June, 2020, by e-mail on the following:

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