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 M. FUELL	*	
	*	
Defendant-Appellant	*	

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ANSWER BRIEF ON BEHALF OF PLAINTIFF/APPELLEE

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I. INTRODUCTION

This case is about a common sense approach to protecting a juvenile's constitutional rights. Austin Fuell, the defendant in this case, advocates for a full right to confrontation and cross-examination in a mandatory bindover hearing and suggests that the sentence of fifteen years to life for murder is unconstitutional as applied to juveniles. Should Fuell's confrontation argument prevail, it could result in full trials being held prior to a juvenile being bound over, placing both the State and the defendant in a position to fully litigate the issues twice with less time to prepare for the initial proceeding. Nothing in the history of Ohio's Juvenile Courts or the United States Supreme Court's jurisprudence on juvenile transfers or probable cause hearings gives any indication that a juvenile has a constitutional right to confront and cross-examine witnesses at a bindover hearing or that affording these rights to a juvenile at this juncture is advisable. While this Court or the General Assembly could propose or enact a rule or law affording a juvenile the right to confront and cross-examine witnesses, as a few states have done, the absence of such rule or law should not invite an unsupported extension of the Due Process Clause.

As to sentencing, Fuell's argument that the fifteen years to life sanction for murder is unconstitutional as applied to a juvenile is an improper elevation of form over function. The function of the Eighth Amendment is to ensure that a sanction is not grossly disproportionate to the crime. While there can be categorical prohibitions on certain sentences for certain offenders, this is not such a case. By focusing on the fact that a court has no discretion to impose any sentence on an offender for murder other than fifteen years to life and therefore cannot substantively consider a juvenile's age as a mitigating factor in such a circumstance, Fuell misses the question of whether a sentence of fifteen years to life is categorically grossly disproportionate

when applied to a juvenile. Here, because the term of fifteen years to life affords a juvenile a meaningful opportunity for release based on demonstrated maturity and rehabilitation, the fact a court has no other choice in sentencing for a murder, should not itself render the sanction unconstitutional.

II. 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.

The court held that Fuell had no right under either the Confrontation Clause or the Due Process Clause to confront and cross-examine witnesses at the mandatory bindover hearing. *Id.* at ¶¶ 35-38. It noted that even if the court erred in admitting the cell tower analysis and photographs of the text messages, the error was harmless since the remaining evidence the State submitted was sufficient to find probable cause. *Id.* at ¶¶ 39-46. As to Fuell's Eighth Amendment argument, the court held that there were at least plausible arguments that this Court's decision in *State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, would not require a court to find the sentencing scheme in section 2929.02(B)(1) unconstitutional and therefore, Fuell could not demonstrate plain error. *Fuell*, 2021-Ohio-1627, at ¶ 76. Fuell timely appealed and this Court granted jurisdiction.

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). After the State presented its evidence, Fuell was given the opportunity to call witnesses or present his own evidence, but declined. (Tp. 141:8-10).

III. ARGUMENT

Juveniles have no Due Process right to confrontation at a mandatory bindover hearing and the fifteen years to life sentence for murder under section 2929.02(B)(1) does not violate the Eighth Amendment; therefore, this Court should affirm.

First Proposition of Law

> **Juveniles have no Due Process right to confrontation in a mandatory bindover hearing.**

A. Juveniles have no established Due Process right to confrontation in a mandatory bindover hearing since such a right has never been recognized, since such a hearing is not adjudicatory, and since such a right is not required to protect their interests.

Nothing in the history of Ohio's juvenile court or the United States Supreme Court's juvenile jurisprudence and nothing the history of the right to confront and cross-examine witnesses or in this or the United States Supreme Court's confrontation jurisprudence shows that a juvenile has a Due Process right of confrontation in a mandatory bindover hearing.

1. A brief history of Juvenile Courts in Ohio.

As has been documented by this Court, the first juvenile court was established in Illinois in 1899. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 17. Ohio, for its part, had been using the parens patriae doctrine since 1869 "to justify commitment of delinquents," Wiley, Robert J., *Ohio's Post-Gault Juvenile Court Law*, Akron Law Review: Vol. 3: Iss. 2, Article 2, 152 (available at http://ideaexchange.uakron.edu/akronlawreview/vol3/iss2/2) (citing *Prescott v. State*, 19 Ohio St. 184 (1869)); however, it did not develop its first official juvenile court until 1902 in Cuyahoga County. *Aalim*, 2017-Ohio-2956, at ¶ 17. In 1937, Ohio adopted the Standard Juvenile Court Act and established juvenile courts across the state. *Id.*; Wiley at 152. In 1969, in response to the United States Supreme Court decisions in *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045 (1966) and *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Ohio General Assembly adopted a new discretionary bindover procedure. *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 46 (citing Wiley). In 1986, the General Assembly established the mandatory bindover procedure for juveniles who commit offenses such as aggravated murder or murder. *Aalim*, 2017-Ohio-2956, at ¶ 68 (O'Connor, C.J., dissenting).

Prior to 1969, in order to bind a child over to the adult court system, the child had to first be adjudicated delinquent. *In re Jackson*, 21 Ohio St.2d 215, 257 N.E.2d 74, syllabus para. 1 (1970). Once the child had been adjudicated as such, then the Juvenile Court would make a determination as to whether the child was amenable to rehabilitation in the juvenile court system. *Id.*[1] In 1966, the United States Supreme Court held in *Kent* that before a juvenile court could waive jurisdiction over a child, the child's right to due process must be met. *Kent*, 383 U.S. at 553-554. This required effective assistance of counsel for the juvenile, a hearing that comported with the basic requirements of due process and fair treatment, and a statement of reasons if the child is bound over. *Id.* at 554, 562. However, the Court made clear that this hearing could be informal and did not necessitate the requirements of a criminal trial or even an administrative hearing. *Id.* at 561-562. The Court also noted that while the juvenile court could not rely on secret information, it could rely on ex parte analyses and recommendations from its staff. *Id.* at 563. In contrast, in *In re Gault* in 1967, the Court held that a juvenile at an adjudicatory hearing must be afforded notice, the right to counsel, the right against self-incrimination, and the right of confrontation and cross-examination. 387 U.S. at 31-57. Taking the two together, the Court held that Due Process required a more formal hearing with additional rights provided—such as the right to confrontation—when a juvenile is adjudicated delinquent, but required a less formal hearing with fewer rights afforded to the juvenile when the hearing was a preliminary bindover determination.

2. *Carmichael* and the 1969 changes to R.C. 2151.26.

[1] This Court did note that the adjudication for delinquency could be for acts other than those underlying the bindover proceeding and could be a prior adjudication. *Jackson*, 21 Ohio St.2d at 218-219.

It was against this backdrop that the General Assembly amended the bindover statute, R.C. 2151.26, and this Court decided *State v. Carmichael*, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973). As detailed *supra*, prior to 1969, in order to bind a child over to the adult court system, they had to first be adjudicated delinquent before any amenability hearing could be held. This meant they were provided all the rights listed by *Gault*, including the right of confrontation, before they could be bound over. After 1969, in response to *Gault* and *Kent*, the General Assembly removed the delinquency requirement, meaning that the more limited, informal procedure in *Kent* would apply to a bindover, rather than the additional rights and more formal procedure required by *Gault*. What determined the bounds of the more informal *Kent* procedure was an issue placed before this Court in *Carmichael*.

In *Carmichael*, the defendant, then seventeen, shot and killed Donald Reed and was charged with first-degree murder. 35 Ohio St.2d at 2. The State filed a motion in juvenile court to relinquish jurisdiction under section 2151.26 and the defendant was committed to the Ohio Youth Commission for investigation, which included a mental and physical examination at the Juvenile Diagnostic Center. *Id.* At the Center, he was examined by two psychiatrists, two psychologists, one physician, and one social worker. *Id.* Each wrote a report, which was made available to defense counsel two months before the bindover hearing. *Id.* At the hearing, an eyewitness, a pathologist, and a social worker testified. *Id.* During the social worker's testimony, the State offered for admission an exhibit that contained the reports of all of the professionals that analyzed the defendant at the Diagnostic Center. *Id.* The defendant objected, "stating that the entire document was hearsay and that he had 'the right to cross-examine every examining psychologist and psychiatrist whose summary or whose opinion or conclusions [were] contained in this report.' " *Id.* at 2-3. Defense counsel did not cross-examine the social worker and instead,

relied on the argument the State's evidence was insufficient and was based on hearsay. *Id.* at 3. The trial court did not consider the summary of the social workers, but concluded the defendant was not amenable to rehabilitation in the juvenile court. *Id.* The defendant appealed, the appellate court affirmed, and this Court accepted jurisdiction. *Id.*

On appeal to this Court, counsel for the defendant "direct[ed] the full thrust of his argument at the alleged use of hearsay evidence in the report from the Ohio Youth Commission Juvenile Diagnostic Center." *Id.* The defendant argued that the juvenile court deprived him of the rights enunciated in *Kent* and *Pointer v. Texas*, 380 U.S. 400, 8 S.Ct. 1065, 13 L.Ed.2d 923 (1965). *Id.* at 6-7. This Court disagreed, first noting that the defendant could have called the authors of the reports and could have called his own witnesses that supported his position he remained amenable to rehabilitation in the juvenile system. *Id.* at 3-4, 8. It then noted that the defendant was not deprived of any right enunciated in *Kent* since he had counsel, had a hearing, and had access to all records and reports concerning the accused. *Id.* at 6. This Court found *Pointer* inapplicable since that case dealt with the use of a transcript at trial from the preliminary hearing where the defendant had no counsel and there was no cross-examination of the witness. *Id.* at 6-7. This Court recognized that *Gault* had recently expanded the rights afforded to a juvenile, but distinguished that case from the instant case in that, *Gault* involved a case at the adjudicatory level. *Id.* at 7. It held, "[s]uch is not the stage of the proceedings on review here. We are in complete agreement that at the adjudicatory stage the use of clearly incompetent evidence to prove a youth's involvement is not justifiable." *Id.* This Court recognized that this bindover hearing was "clearly a preliminary proceeding." *Id.* at 8.

The takeaway from this case is that in a bindover hearing, the use of evidence that may otherwise be inadmissible at trial or an adjudicatory hearing, does not violate a juvenile's rights

under *Kent* or *Pointer*. Specifically, the use of hearsay evidence where the declarant is not present to testify and therefore not subject to cross-examination, does not violate a juvenile's rights. Therefore, as of 1973, the General Assembly had made clear its intention to treat bindover hearings different from the more formal adjudicatory hearings where a juvenile has the right to confront and cross-examine witnesses and this Court had recognized that it is not a violation of *Kent* to rely on hearsay evidence where the declarant is not present to testify at a bindover hearing.

3. Post-*Carmichael* cases

Nothing in the law subsequent to *Carmichael* and the 1969 changes to the juvenile bindover statute indicate a recognition from either the legislature or the courts that juveniles have a due process right to confrontation at a mandatory bindover hearing. In fact, courts that have addressed this or similar questions, have all determined that there is no constitutionally prescribed confrontation right at these types of hearings. *In the Matter of: B.W.*, 2017-Ohio-9220, 103 N.E.3d 266, ¶¶ 37-41 (7th Dist.); *State v. Garner*, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-4939, ¶ 27 (citing *B.W.*); *see State v. Burns*, 8th Dist. Cuyahoga No. 108468, 2020-Ohio-3966, ¶¶ 74-75 (otherwise inadmissible evidence admissible at mandatory bindover hearing) (quoting *State v. Starling*, 2d Dist. Clark No. 2018-CA34, 2019-Ohio-1478); *State v. Whisenant*, 127 Ohio App.3d 75, 85, 711 N.E.2d 1016 (11th Dist. 1998) (otherwise inadmissible evidence admissible at mandatory bindover hearing); *State v. LaRosa*, 11th Dist. Trumbull No. 2018-T-0097, 2020-Ohio-160, ¶ 38 (citing *Whisenant*). This is because the right to confront and cross-examine witnesses is a trial right. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *Henderson v. Maxwell*, 176 Ohio St. 187, 188, 198 N.E.2d 456 (1964); *B.W.*, 2017-Ohio-9220, at ¶ 37. Typically, a constitutional violation only arises "when

the prior testimony or statement of an unavailable witness is used at a subsequent trial as substantive evidence of guilt of a defendant." *State v. Diehl*, 67 Ohio St.2d 389, 394, 423 N.E.2d 1112 (1981).

A mandatory bindover hearing in juvenile court is certainly not a trial, as it does not require a finding of guilt beyond a reasonable doubt, *State v. Iacona*, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001), and, as a number of courts have recognized, is not an adjudicatory hearing either. *B.W.*, 2017-Ohio-9220, at ¶ 18; *Burns*, 2020-Ohio-3966, at ¶ 74 (quoting *Starling*); *State v. Iacona*, 9th Dist. Medina No. CA 2891-M, 2000 WL 277911, *5 (Mar. 15, 2000) (citing *Gault*); *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, the United States Supreme Court has specifically held that a juvenile bindover hearing is not be treated as an adjudicatory hearing, stating, "[w]e require that * * * a State determine whether it wants to treat a juvenile within the juvenile-court system before entering upon a proceeding that may result in an adjudication * * * and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings." *Breed v. Jones* 421 U.S. 519, 537-538, 95 S.Ct. 1779, 44 L.Ed2d 346 (1975). Since mandatory bindover proceedings are fundamentally different from adjudicatory hearings and intentionally more informal, it stands to reason that *Carmichael* remains good law. *See Hannah v. Larche*, 363 U.S. 420, 441-442, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960) (right to cross-examine "normally associated only with adjudicatory proceedings").

Moreover, the very nature of a mandatory bindover hearing as a gatekeeping proceeding based on probable cause shows that the full panoply of adversarial procedures are not available to the juvenile. The United States Supreme Court has "repeatedly declined to require the use of

adversarial procedures to make probable cause determinations." *Kaley v. United States*, 571 U.S. 320, 338, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014). This is, in part, because probable cause determinations "do not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt." *Gerstein v. Pugh*, 420 U.S.103, 121, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) (cross-examination generally not necessary at preliminary hearing since "[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial"). This is especially true where the finding of probable cause functions merely as a gateway. *Kaley*, 571 U.S. at 338-339. Because of this, an informal procedure is justified. *Gerstein*, 420 U.S. at 121; *see Kent*, 383 U.S. at 561 (noting that juvenile transfer hearings "may be informal"); *In re A.J.S.*, 2008-Ohio-5307, ¶ 46 (juvenile court's role in mandatory bindover hearing is that of a gatekeeper). Since a mandatory bindover hearing is a gatekeeping proceeding based on probable cause, the right to confront and cross-examine is not required.[2]

Fuell appears to argue that the State's cases discussing the right to confrontation as a trial right are inapplicable since they are based on the Sixth Amendment's Confrontation Clause and not the Due Process Clause. The problem with Fuell's distinction is that the right to confrontation, whether under the Confrontation Clause or the Due Process Clause, is derived from the same common law principles. While the right to confront witnesses and cross-

[2] This is not to say cross-examination and confrontation could not be helpful; however, they are not required. *Gerstein*, 420 U.S. at 121-122.

examination can arguably be traced back to Roman times, it did not take hold until the development of the modern adversarial system. Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L.Rev. 427, 429 (2009); Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 Colum. L.Rev. 1168, 1194, 1198-1199 (1996). This shift began in earnest in the late seventeenth century in England, *Epstein*, at 429, and affected both civil and criminal law. Langbein, at 1201. In fact, Professor Langbein opined that it may have been the development of the adversarial system in criminal law that influenced the rise of cross-examination in civil law. *Id.* at 1201-1202. While an opportunity to cross-examine a witness existed in a civil pretrial context, it was in the context of a deposition and only applied to prohibit the use of the deposition at trial. Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 Brook. L.Rev. 493, 543 (2007).

Regardless of whether confrontation in the criminal law context influenced confrontation in the civil law context or vice versa, the examples from history discussing the right to confront and cross-examine witnesses focus squarely on the use of ex parte depositions against a defendant at trial. *Crawford v. Washington*, 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Maddox v. United States*, 156 U.S. 237, 259, 15 S.Ct. 337, 39 L.Ed.409 (1895); Kry, at 543-544, 554-555. Moreover, while there is evidence that an ex parte deposition could not be used in a civil trial, there is also evidence that in the mid-eighteenth century, the use of out of court statements at a civil trial was common. Kry, at 543; Langbein, at 1186-1190; *see also Crawford*, 541 U.S. at 43 ("The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."). As Edmund Burke related to the House of Commons in 1794, "the rules of 'the law of evidence * *

* [were] very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes.' " Langbein, at 1188 (citing 12 William Holdsworth, *A History of English Law* (1938)). What the history shows then is that whether in a civil or criminal proceeding, the right to confront and cross-examine was ultimately a trial right. The Sixth Amendment's Confrontation Clause was the nation's initial enshrinement of the right. There is simply no functional distinction between the Sixth Amendment right to confrontation and the Due Process right to confrontation. Therefore, the cases analyzing the Sixth Amendment right to confrontation are equally applicable to an analysis involving the right to confrontation under the Due Process Clause.

Fuell uses the distinction between the Confrontation Clause and the Due Process Clause to support his contention that it is only under the Confrontation Cause that confrontation or cross-examination is a trial right. Aside from the fact that the right to confront and cross-examine witnesses stems from the same common law principles, the right which Fuell claims he was deprived of was unquestionably a trial right. Fuell's complaints are that he should have been allowed to confront and cross-examine someone from Sprint regarding the cell tower data and should have been allowed to cross-examine Baird regarding the photographs of the message exchanges. In other words, Fuell is arguing that his right to confrontation was violated by the admission of testimonial evidence. However, as the United States Supreme Court has made clear, a statement is testimonial where the "primary purpose" was to create "an out-of-court substitute for trial testimony." *Ohio v. Clark*, 576 U.S. 237, 245, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015) (citing *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) "Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." *State v. White*, 12th Dist. Warren No. CA2018-

09-107, 2019-Ohio-4312, ¶ 25 (quoting *Bryant*). Here, while the State certainly gathered the records for the eventual purpose of trial, the probable cause hearing was not a trial. Moreover, as noted *supra*, normally, a constitutional violation only arises "when the prior testimony or statement of an unavailable witness is used at a subsequent trial as substantive evidence of guilt of a defendant." *Diehl*, 67 Ohio St.2d at 394. Therefore, since Fuell's complaint is that he faced testimonial evidence with no chance to cross-examine the declarant, since testimonial evidence generally only violates a defendant's constitutional rights when it is used at trial, and since the mandatory bindover is not a trial, Fuell's attempt to distinguish between the Due Process right to confrontation and the Confrontation Clause right to confrontation should fail.

4. Due Process under *Mathews*.

Fuell also argues that courts have routinely held that the right to due process includes the right to confront and cross-examine witnesses. The problem with Fuell's argument is that what process is due is dependent upon the nature of the proceeding and the interest at stake. *Wilkinson v. Austin*, 545 U.S. 209, 224, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2004) (citing *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Due process contains two components: substantive due process and procedural due process. Procedural due process protects against arbitrary governmental action. *City of Sacramento v. Lewis*, 523 U.S. 833, 845-846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). It is "meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (quoting *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)). The Court developed a framework for analyzing whether the process offered was sufficient to protect the interest at stake from arbitrary governmental action. *Wilkinson*, 545 U.S. at 224 (citing *Mathews v. Eldridge*, 424 U.S.

319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Under this framework, three factors are considered:

> First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 224-225 (citing *Mathews*).

Applying the test from *Mathews* confirms that affording the right to confrontation to mandatory bindover hearings is unnecessary. As to the private interest involved, though a liberty interest may be at stake in the mandatory bindover hearing, it does not automatically mean that the private interest affected is of such a magnitude that the right to confrontation is required. *See Wilkinson*, 545 U.S. at 225 (finding that a liberty interest exists is a different question from what weight to afford the private interest). While a juvenile certainly faces an exponential increase in a potential penalty by being transferred to the adult court system, so too does an adult facing an indictment, yet there is no right to confrontation at a grand jury proceeding. *Kaley*, 571 U.S. at 338 (citing *Gerstein*). Prior to the indictment being returned, the offender faced no time. While a juvenile certainly faces potential greater restraint on their liberty, a defendant at a preliminary hearing faces an actual restraint on his liberty, yet there is no recognized right to confront witnesses. *Henderson*, 176 Ohio St. at 188. Though *Kent* discussed the transfer of a juvenile as having "tremendous consequences," it not only failed to list the right to confrontation as one of the rights that must be afforded a juvenile in this situation (as it did in *Gault*), but it also dealt with a different scenario. 383 U.S. at 553-554. In *Kent*, the juvenile court had "a substantial degree of discretion" in deciding whether it should retain jurisdiction over the juvenile based on the facts presented and the weight it gave them. *Id.* Here, the juvenile court had no such discretion. Much like in a preliminary hearing or a grand jury proceeding, the only question was,

did probable cause exist?

Additionally, a juvenile will have ample opportunity to exercise his or her right to confrontation at a trial. While it is true that a child will generally face more time in adult court than in juvenile court, if their cross-examination is so effective that it creates reasonable doubt in the mind of the finder of fact, then the juvenile faces no time in prison. If the cross-examination is not so effective and could not create even reasonable doubt, there is certainly no reason to believe it would cause a juvenile court judge to find no probable cause existed.

Even assuming this first factor is satisfied, there is no reason to believe there is a risk of erroneous deprivation without the right of confrontation. As the Court has recognized "a grand jury's finding of probable cause to think that a person committed a crime 'can be [made] reliably without an adversary hearing,' " and therefore, the right to confront and cross-examine witnesses is not necessary. *Kaley*, 571 U.S. at 338. If a finding of probable cause can reliably be made by a Grand Jury without the benefit of confrontation or cross-examination, it stands to reason that a judge in a juvenile court could reliably make the same determination sans confrontation and cross-examination. Moreover, in cases where the juvenile faces charges in addition to those subject to mandatory bindover, should those supporting a mandatory bindover be dropped or should the juvenile be found not guilty of them, he would be subject to a reverse bindover, placing him back in the jurisdiction of the juvenile court. R.C. 2152.121(B).

As to the government's interest (which is addressed more fully in the Ohio Prosecuting Attorneys Association's (OPAA) amicus brief), allowing for full confrontation and cross-examination rights could have serious implications on the juvenile court system. Justice Brennan, dissenting from the Court's opinion in *California v. Green*, documented some of the ways cross-examination in a preliminary hearing is, itself, constitutionally deficient. 399 U.S. 149, 196-200,

90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (Brennan, J., dissenting). He summarized by quoting the California Supreme Court, stating:

> Were we to equate preliminary and trial testimony one practical result might be that the preliminary hearing, designed to afford an efficient and speedy means of determining the narrow question of probable cause, would tend to develop into a full-scale trial. This would invite thorough and lengthy cross-examination, with the consequent necessity of delays and continuances to bring in rebuttal and impeachment witnesses, to gather all available evidence, and to assure generally that nothing remained for later challenge. In time this result would prostitute the accepted purpose of preliminary hearings and might place an intolerable burden on the time and resources of the courts in the first instance.

Id. at 199-200. It is precisely due to this desire to avoid a full relitigation of the same issues that the Court held in *Breed* that a bindover hearing and adjudication hearing must be treated differently. 421 U.S. at 537-538. While *Breed* and Justice Brennan's dissent in *Green* focused on the rights of the defendant, it is clear that the same arguments would be applicable to the State, forcing the government to turn the mandatory bindover hearing into a full-fledged trial. This would require full discovery and preparation for each hearing in a fraction of the amount of time it would generally take to hold a trial.

5. Implication of Affording Right to Confrontation and Right to Confrontation as Applied in Other States.

As addressed more fully in the OPAA's amicus brief, there are good reasons for not requiring juvenile courts to afford a juvenile the right to confrontation at a mandatory bindover hearing. First is the fact that such a decision would "prostitute the accepted purpose of preliminary hearings and might place an intolerable burden on the time and resources of the courts in the first instance." *Green*, 199-200 (Brennan, J., dissenting). Second, as Justice Brennan pointed out in *Green*, neither defense counsel nor the State want to disclose their case or tactics through extensive examination at a preliminary hearing. *Id.* at 197 (Brennan, J., dissenting). Third, the schedules of the courts and counsel generally cannot "easily accommodate lengthy

preliminary hearings." *Id.* Fourth, defense counsel and the State generally will not have enough time to prepare for extensive litigation. *Id.* As could be seen in this case, Fuell wanted to challenge the cell phone records and the ballistics. Preparing to challenge these types of expert reports certainly takes time and hiring an expert to rebut the evidence presented would undoubtedly take even more time. While these are critically important proceedings, they are not trials. Fuell would have his opportunity to thoroughly cross-examine the State's witnesses and call his own experts to counter the State's evidence at trial. A mandatory bindover hearing, where the State only has to demonstrate probable cause, where its evidence does not have to be unassailable, and where the court does not consider competing prosecution and defense theories, *A.J.S.*, 2008-Ohio-5307, at ¶¶ 43, 46, is an inappropriate venue for complex, protracted hearings where a juvenile is equipped with all rights he would otherwise be due at trial. *See Breed*, 421 U.S. at 537 ("[C]ourts should be reluctant to impose on the juvenile-court system any additional requirements which could so strain its resources as to endanger its unique functions.").

This is not to say the State could not adopt a rule or statute requiring a juvenile be afforded the right to confront witnesses; in fact, some states do require as much. *Gerstein*, 420 U.S. at 124-125; *State v. Hall*, 350 So.2d 141, 145 (La. 1977) (right to cross-examine witnesses provided for by statute); *In re R.A.*, 2011 ND 119, 799 N.W.2d 332 (2011) (no constitutional right to confrontation, but statutory right to cross-examine); *State v. Damien R.*, 214 W.Va. 610, 618, 591 S.E.2d 168 (2003) (right to confront and cross-examine protected by statute); *M.M. v. State*, 629 So.2d 734, 735-737 (Ala. Crim. App. 1993) (right to confront witnesses protected in part by Juvenile Rule). However, most of the states to address the issue of the right of confrontation or the admissibility of hearsay evidence at a juvenile bindover or transfer hearing have held that such a right is inapplicable at this stage of the proceedings and that hearsay is

admissible. *Matter of Pima County, Juvenile Action No. J-47735-1*, 26 Ariz. App. 46, 48, 548 P.2d 23 (1976) (hearsay allowable in probable cause portion of transfer hearing); *In re Ralph*, 211 Conn. 289, 309, 559 A.2d 179 (1989) (recognizing that allowing consideration of reliable hearsay at transfer hearing does not violate the juvenile's right of fundamental fairness or confrontation); *In re D.C.*, 303 Ga. App. 395, 400, 693 S.E.2d 596 (2010) (hearsay is admissible at transfer hearing and right to confrontation does not apply); *In re W.J.*, 284 Ill.App.3d 203, 208-209, 672 N.E.2d 778 (1996) (right to confront witnesses not a required due process right at transfer hearing); *Barth v. Commonwealth*, 80 S.W.3d 390, 397-398 (Ky. 2001) (allowing the use of hearsay evidence in juvenile transfer hearings); *State in Int. of B.T.*, 145 N.J. Super 268, 273, 367 A.2d 887 (App. Div. 1976) (hearsay allowable in transfer hearing since probable cause portion similar to Grand Jury determination of probable cause to indict); *In re F.D.*, 245 S.W.3d 110, 113 (Tex. App. 2008) (no right to confrontation at juvenile transfer hearing); *In re Hegney*, 138 Wash. App. 511, 533, 158 P.3d 1193 (2007) (no right to confrontation at juvenile transfer hearing); *see also United States v. Juv. Male*, 554 F.3d 456, 467 (4th Cir. 2009) (no error in not allowing juvenile to cross-examine agent since "the trial itself functions as a corrective for any reliance on inaccurate allegations made at the transfer stage" (quoting *In re Sealed Case*, 893 F.2d 363 (D.C. Cir. 1990))). Moreover, even some jurisdictions that do have laws protecting the right to cross-examine at bindover hearings have recognized that the right to confront witnesses at these hearings comes from their enacted law, not the Constitution. *In re R.A.*, 2011 ND 119, at ¶¶ 30-31 (statutory, but no constitutional right to confrontation at juvenile transfer hearing); *Sam v. State*, 2017 WY 98, ¶¶ 13-14, 401 P.3d 834 (2017) (statutory, but no constitutional right to confrontation at juvenile transfer hearing); *cf M.M.*, 629 So.2d at 735-737 (indicating both a constitutional and statutory right to confrontation exists); *Summers v. State*, 248 Ind. 551, 560,

230 N.E.2d 320 (1967) (indicating *Kent* requires right to confront witnesses).

6. Fuell's Arguments

Fuell argues that a juvenile's right to counsel and discovery prior to the mandatory bindover hearing cannot be for nothing; however, defense counsel's job is not limited to cross-examination. As in *Carmichael*, counsel could have called witnesses or presented evidence based on the discovery. Moreover, counsel took the opportunity to cross-examine the witnesses that testified in court for the State.[3]

Fuell also advocates for the right to confrontation to exist where the hearing is adversarial, a person's private interest is at stake, and where the ultimate decision in the proceeding is based on a finding of fact. Therefore, Fuell advocates for a full right to confrontation at bond hearings, probation revocation hearings, community control sanction hearings, and in decisions regarding the admissibility of evidence.[4] Under Rule of Evidence 101(C), the Rules of Evidence do not apply at these proceedings. Evid.R. 101(C). The adoption of Fuell's argument would seemingly create a bizarre legal landscape where hearsay is admissible at the aforementioned hearings, but testimonial evidence is not. Moreover, this would create numerous mini-trials throughout the criminal proceedings—certainly an untenable result. To support his argument regarding adversarial proceedings, Fuell cites *Herring v. New York*, where the court stated, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty

[3] As Fuell had the ability to cross-examine the witnesses that testified, his confrontation argument is focused primarily on the admissibility of evidence that would otherwise be considered testimonial at trial, thereby violating his right to confrontation.

[4] Fuell also argues that even in regulatory and administrative actions, the Court has required the right to confront witnesses; however, the Court in *Kent* stated that, "[w]e do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing * * * ." 383 U.S. at 562.

be convicted and the innocent go free." 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). But a bindover hearing is not a trial and does not result in a verdict of guilty or not guilty. While the juvenile court assesses the credibility of the evidence and makes a determination as to whether the State has put forward sufficient credible evidence to show probable cause, "it is not permitted to exceed the limited scope of the bindover hearing or to assume the role of the fact-finder at trial." *In re A.J.S.*, 2008-Ohio-5307, at ¶ 44.

7. Harmless Error

Even if this Court could find that Fuell was due a right to confront and cross-examine witnesses, as the Twelfth District found, any error was harmless. Removing the phone messages and the cell tower data from consideration, the State still put forward sufficient evidence to support a finding of probable cause. *State v. Price*, 10th Dist. Franklin No. 97AP02-151, 1997 WL 606875, *2-3 (Sept. 30, 1997). An eyewitness to the shooting testified she was 99.9% sure that Fuell was the masked shooter based on comments he made during the encounter and based on her recognition of his eyes and his voice. The State also presented evidence of a gun barrel found in the car in which Fuell was riding. Markings on bullets fired from this barrel matched the markings found on the bullet that killed the victim. *See In re A.J.S.*, 2008-Ohio-5307, at ¶¶ 54-55 (eyewitness to the shooting and discovery of shell casings at the scene sufficient to establish probable cause to believe the defendant committed attempted murder). Therefore, even if the cell tower data and the messages had been excluded as testimonial, the State still put forward sufficient evidence to establish probable cause.

Second Proposition of Law

> **Where a trial court considers a juvenile's age as a mitigating factor at sentencing, or where the sentence itself affords a juvenile a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, the sentence does not violate the Eighth Amendment.**

A. The Eighth Amendment does not categorically reject mandatory life-tail sentences.

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*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, 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.

1. Eighth Amendment under *Patrick* and *Moore*.

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 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*). In other words, a life sentence that offers a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," satisfies the Eighth Amendment's requirement to consider the offender's youth as a mitigating factor when sentencing a juvenile to a life sentence. 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.

2. Recognition of R.C. 2929.02(B)(1)'s constitutionality.

As the Office of the Ohio Public Defender has recognized, a prison term of fifteen years to life does provide a juvenile with a meaningful opportunity to obtain release. In its amicus brief filed in *Patrick*, under the heading, "For juvenile offenders, a 'meaningful opportunity' should include an opportunity to go before the parole board after 15 years of incarceration," the Public Defender argued:

> In fact, following *Graham*, Ohio's Criminal Sentencing Commission, chaired by Supreme Court of Ohio Chief Justice, Maureen O'Connor, recommended changes to Ohio's sentencing scheme in a 2015 proposal to the Ohio General Assembly. The commission proposed that the legislature craft a sentencing scheme for juvenile

> offenders that would give them the opportunity to spend a substantial portion of their lives outside prison, which meant that juvenile offenders needed to be given a first opportunity for parole after serving 15 years. Ohio Criminal Sentencing Commission, Memorandum of Jo E. Cline to Sara Andrews (Nov. 23, 2015), available at https://perma.cc/6J7N-62GT.(Accessed February 27, 2019). And, for youth who were eligible for life-without-parole sentences, the commission recommended parole at age 40. *Id.* The proposed language recommended that the parole board, in considering whether to grant parole to juvenile offenders, be required to consider "specific factors related to juveniles, including the diminished culpability of youth and the prisoner's subsequent growth and maturity." *Id.* In addition, the commission recommended that the board be required to review juvenile offenders' sentences at least every ten years following their initial review. *Id.*

State v. Patrick, 2019-065, Brief of Amicus Curiae, Office of the Ohio Public Defender, Juvenile Law Center, et. al., pp. 23-25 (filed Oct. 7, 2019) (available at http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2019/0655). Therefore, according to the Office of the Ohio Public Defender, a term of fifteen years to life is sufficient to give a juvenile a meaningful opportunity to obtain release and would not violate the Eighth Amendment. The State of Ohio would agree.

The Ohio General Assembly also 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*); *see Jones v. Mississippi*, --U.S. --, 141 S.Ct. 1307, 1322, 209 L.E.2d 390 (2021) ("[A] homicide committed by an individual under 18[] is a horrific tragedy for all involved and for all affected. Determining the proper sentence in such a case raises profound questions of morality and social policy. The States * * * make those broad moral and policy judgments in the first instance when enacting their sentencing laws.").

3. Eighth Amendment and Mandatory Sentences

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) ("A hard 20 life sentence does not irrevocably adjudge a juvenile offender unfit for society. Rather, in line with the concerns expressed in *Graham*, it gives the offender a ' "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" ' by permitting parole after the mandatory 20–year minimum prison term is served") * * * ; *Ouk v. Minnesota*, 847 N.W.2d 698, 701 (Minn.2014) ("a mandatory sentence of life imprisonment with the possibility of release after 30 years is not encompassed within the rule in *Miller* * * * because it does not require the imposition of the harshest term of imprisonment: life without the possibility of release"); *Commonwealth v. Okoro*, 471 Mass. 51, 59, 26 N.E.3d 1092 (2015) ("we do not read *Miller* as a whole to indicate that the proportionality principle at the core of the Eighth Amendment would bar a mandatory sentence of life with parole eligibility after fifteen years for a juvenile convicted of murder in the second degree"). 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.

4. *Graham* analysis.

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. *Anderson*, 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 have been eligible for his first parole hearing, Fuell 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.[5] 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 without parole. As to the severity of the punishment, as Chief Justice O'Connor noted, the

[5] 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.

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 of which the State is aware 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.

5. Fuell's Arguments.

The problem with framing the analysis as Fuell does is that it elevates form over function. Fuell's contention is that because the legislature did not give a court the option to sentence a defendant to anything but fifteen years to life for murder, the court could not consider the juvenile's youth as a mitigating factor in any meaningful way. Presumably, however, if section

2929.02(B)(1) allowed for a sentence of fifteen years to life or fourteen years to life for murder, it would satisfy Fuell's argument, since the court would then have some discretion. Yet, there is little functional difference between a sentence of fourteen years to life and fifteen years to life. Put differently, if the statute allowed for a sentence of fifteen years to life or sixteen years to life, presumably, it would not violate the Eighth Amendment because the court would have the option to sentence the juvenile to the lesser prison term. If the court then sentenced the juvenile to fifteen years to life after considering his age, the sentence would not be cruel and unusual. However, if the juvenile was sentenced to the exact same term, but the only option for sentencing was fifteen years to life, according to Fuell's argument, that exact same sentence would now be unconstitutional. If the Eighth Amendment's requirement to consider youth as a mitigating factor is to have any effect, form cannot reign over function. Taken to the extreme, if the sentence for murder was six months to life in prison, under Fuell's analysis, this too would violate the Eighth Amendment, but it could hardly be stated with any seriousness that a juvenile who has an opportunity for parole after six months does not have a meaningful opportunity for release.

Fuell's argument also appears to be at odds with itself. Fuell argues that the minimum sentence in a life tail prison term is irrelevant for purposes of determining if the Eighth Amendment has been violated. In *Patrick*, the defendant faced potential prison terms of twenty years to life, twenty-five years to life, thirty years to life, or life without parole. 2020-Ohio-6803, at ¶¶ 29-32. Had the court considered his age when imposing one of those terms, it appears the decision would not have violated the Eighth Amendment. In other words, the fact that the court had no option but to sentence the defendant to a term in prison with a life tail was not problematic under the Eighth Amendment. The trial court had no ability to consider the juvenile's age and its attendant mitigating characteristics and sentence the child to anything but a

term of life in prison, yet this lack of discretion did not appear to violate the Eighth Amendment. The only component that could then present a problem is the minimum term coupled with the life tail. Therefore, the minimum term of the life tail is extremely relevant and the greater the minimum term, the greater need for considering the juvenile's age at the time of sentencing.

IV. CONCLUSION

Since a juvenile has no due process right to confrontation at a mandatory bindover hearing and since the fifteen years to life sentence in section 2929.02(B)(1) is not unconstitutional, the State respectfully requests this Court affirm.

Respectfully submitted,
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