

NO. 2021-0794

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CLERMONT COUNTY, OHIO
NO. CA2020-02-008

STATE OF OHIO,
Plaintiff-Appellee

-vs-

AUSTIN M. FUELL,
Defendant-Appellant

**BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN
SUPPORT OF APPELLEE, THE STATE OF OHIO**

Counsel for Defendant-Appellant

TIMOTHY B. HACKETT (0093480)
Assistant State Public Defender
LAUREN HAMMERSMITH (0096671)
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Phone: 614-466-5394
Fax: 614-752-5167
Timothy.hackett@opd.ohio.gov

Counsel for Plaintiff-Appellee

MARK J. TEKULVE (0038545)
Clermont County Prosecutor
NICK HORTON (0091191)
Assistant Prosecuting Attorney
76 South Riverside Drive
Batavia, Ohio 45103
Phone: 513-732-7313
Fax: 513-732-7592
nhorton@clermontcountyohio.gov

Ohio Prosecuting Attorneys Association

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor
KATHERINE MULLIN (0084122)
ANTHONY T. MIRANDA (0090759)
Assistant Prosecuting Attorney
The Justice Center, 1200 Ontario Street
Cleveland, Ohio 44113
Phone: 216-443-7800

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICUS CURIAE OF THE OHIO PROSECUTING ATTORNEYS ASSOCIATION1

STATEMENT OF THE CASE AND FACTS2

LAW AND ARGUMENT2

Appellant’s Proposition of Law 1: Juvenile offenders have a state and federal due process right to cross-examine witnesses whose hearsay statements are presented to provide probable cause for mandatory transfer to adult court2

Appellant’s Proposition of Law 2: Under Miller v. Alabama, State v. Long, and State v. Patrick, R.C. 2929.02(B)’s mandatory fifteen-years-to-life sentence for murder is unconstitutional as applied to juvenile offenders because it does not permit judicial consideration of youth at sentencing.....6

CONCLUSION.....9

CERTIFICATE OF SERVICE10

TABLE OF AUTHORITIES

Cases

Geiger v. Geiger, 117 Ohio St. 451, 160 N.E. 28 (1927)8

In re A.J.S., 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 6292, 3

In re B.W., 7th Dist. Mahoning No. 17 MA 0071, 2017-Ohio-9220.....3

In re J.R., 8th Dist. Cuyahoga No. 110241, 2021-Ohio-22723

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455 (2012).....6, 7

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005).....7

State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.....8

State v. Fuell, 12th Dist. Clermont No. CA2020-02-008, 2021-Ohio-1627.....3

State v. Garner, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-49393

<i>State v. Henderson</i> , 144 So.3d 1262 (Ala.2013).....	7
<i>State v. Leigh</i> , 31 Ohio St.2d 97, 285 N.E.2d 333 (1972)	7
<i>State v. McGuire</i> , 80 Ohio St.3d 390, 686 N.E.2d 1112 (1997).....	7
<i>State v. Powell</i> , 4th Dist. Gallia No. 20CA3, 2021-Ohio-200.....	3
<i>State v. Romage</i> , 138 Ohio St.3d 390, 2014-Ohio-783, 7 N.E.3d 1156	8
<i>United States v. Ventresca</i> , 380 US 102, 85 S.Ct. 741 (1965).....	3

Rules

Juv.R. 30	2
-----------------	---

Statutes

Ala.Code 13A-5-45 (1975)	7
R.C. 2901.01 (1972).....	7
R.C. 2929.02	<i>passim</i>
R.C. 2929.14	8
R.C. 2967.132	8

**STATEMENT OF INTEREST OF AMICUS CURIAE OF THE OHIO PROSECUTING
ATTORNEYS ASSOCIATION**

The Cuyahoga County Prosecutor’s Office regularly prosecutes delinquency cases. In serious and appropriate cases, it requests that juveniles be moved from juvenile court to adult court. According to the Ohio Department of Rehabilitation and Correction, 104 juveniles in Cuyahoga County were transferred to adult court in 2019 and 78 were transferred in 2020. *See* ODRC, Youth Transferred to Adult Court, (August 24, 2021), available at <https://data.ohio.gov/wps/portal/gov/data/view/youth-transferred-to-adult-court> (accessed November 23, 2021). Other counties litigate transfer requests as well, resulting in a total of 209 juveniles transferred in Ohio in 2019 and 192 transferred in 2020. *Id.*

Defendant-Appellant Austin Fuell asks this Court to adopt a proposition of law that radically changes the nature and duration of transfer hearings. Application of the Rules of Evidence and the Confrontation Clause at that stage would require the State to produce most if not all of the witnesses it would produce at trial, significantly increasing the length of the proceedings. The first proposition of law would convert a preliminary hearing, focused merely on determining if sufficient evidence exists for transfer, into a bench trial with a lower standard of proof.

Fuell’s second proposition of law is equally ambitious. He argues that the trial court’s imposition of a sentence of fifteen years to life in prison was unconstitutional because the trial court failed to consider Fuell’s youth and alternative prison sentences. However, the trial court imposed the only permissible statutory sentence and Fuell’s ability to seek parole after serving fifteen years in prison does not offend the federal and state constitutions. Adopting the second proposition of law would likely require this Court to invent a sentencing alternative that was never enacted by the General Assembly.

These concerns are shared by the Ohio Prosecuting Attorneys Association (“OPAA”). For these reasons, OPAA supports the State’s position in the underlying case and asks this Court to affirm the decision of the lower court.

STATEMENT OF THE CASE AND THE FACTS

OPAA adopts and incorporates by reference the Statement of the Case and Statement of the Facts as set forth by Appellee, the State of Ohio, in its merit brief.

LAW AND ARGUMENT

Appellant-Defendant Austin Fuell asks this Court to rewrite Ohio law in significant ways in this appeal. Juv.R. 30 entitles a juvenile subject to transfer to adult court to a “preliminary hearing to determine if there is probable cause to believe that the child committed the act.” Fuell asks this Court to hold for the first time that the trial rights of confrontation and the Rules of Evidence are applicable at this preliminary hearing. Additionally, R.C. 2929.02(B)(1) provides only one permissible sentence for a murder where there is no sexual motivation specification: “an indefinite term of fifteen years to life.” Fuell asks this Court to hold that sentence is unconstitutional and to permit trial courts to impose some other unknown sentence. Both policy proposals are inappropriate and would have serious adverse impacts to the prosecution of juvenile offenders.

Appellant’s Proposition of Law 1: Juvenile offenders have a state and federal due process right to cross-examine witnesses whose hearsay statements are presented to provide probable cause for mandatory transfer to adult court.

OPAA agrees with the State of Ohio that the underlying hearing did not implicate the Confrontation Clause or the Rules of Evidence. A probable cause hearing with respect to a transfer motion is explicitly defined as a “preliminary hearing.” Juv.R. 30(A). This Court has said that the State “must present credible evidence of every element of an offense to support a finding of

probable cause, but that evidence does not have to be unassailable.” *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 46. The purpose of the hearing is to decide whether there is sufficient evidence that warrants “going forward with a prosecution on a charge that the legislature has determined triggers a mandatory transfer of jurisdiction to adult court.” *In re A.J.S.*, 2008-Ohio-5307, ¶ 46.

Ohio courts have uniformly held that hearsay is admissible at probable cause hearings. *State v. Fuell*, 12th Dist. Clermont No. CA2020-02-008, 2021-Ohio-1627, ¶ 35 (holding that the confrontation clauses are inapplicable at transfer hearings); *In re J.R.*, 8th Dist. Cuyahoga No. 110241, 2021-Ohio-2272, ¶¶ 36-37; *State v. Garner*, 6th Dist. Lucas No. L-18-1269, 2020-Ohio-4939, ¶ 26; *In re B.W.*, 7th Dist. Mahoning No. 17 MA 0071, 2017-Ohio-9220, ¶ 41; *see also State v. Powell*, 4th Dist. Gallia No. 20CA3, 2021-Ohio-200, ¶ 23. These holdings are consistent with the well-settled principle that hearsay can be used by police officers to establish probable cause in support of search warrants. *See United States v. Ventresca*, 380 US 102, 108, 85 S.Ct. 741 (1965).

OPAA writes today to emphasize the consequences that follow from a decision to adopt *Fuell*’s first proposition of law. The Rules of Evidence contain specific prohibitions against the use of hearsay or unauthenticated evidence. Application of those rules to a probable cause hearing would require the State to marshal the same resources, and to present the same witnesses, that it would at a trial. The requirement to call every police officer, every detective, every forensic agent, and every lay witness at the transfer hearing radically changes the length of the hearing. The requirement is also redundant as each witness would still need to testify at trial.

In this case, the State presented four witnesses in support of its motion to transfer. First, Bruce Redd, who owned the coin shop where *Fuell*’s grandmother bought a firearm. Second, Matthew White from the Bureau of Criminal Investigation who testified that a barrel was linked

to the recovered suspect bullets. Third, Detective Dan Tobias of the Miami Township Police Department, who testified about the various evidence revealed in the investigation including physical evidence at the crime scene, surveillance video, cell phone records, and the barrel of a firearm recovered from Fuell's vehicle during a traffic stop. Finally, Payge Lacey, the victim's girlfriend, who testified that the victim previously stole from Fuell and that she was present when two masked men shot and killed the victim.

At the transfer hearing, the State authenticated the Hamilton County Coroner's report, State's Ex. 1, through the testimony of Detective Tobias. Tr. at 36. That report is important in murder prosecutions because it contains the victim's cause of death and relevant details of his injuries. Applying the Rules of Evidence or the Confrontation Clause at the hearing would have required the State to call the pathologist that performed the autopsy and authored the report.

Numerous spent bullet casings were recovered at the crime scene as well as photographs of suspected bullet holes. Tr. at 39-40. The scene was processed by Detective DeVilla who did not testify at the hearing. Tr. at 40. Detective Tobias also recovered several firearms after executing search warrants. Tr. at 41. A lieutenant with the Miami Township Police Department obtained surveillance video from multiple stores. Tr. at 45-53, 94. Other police officers recovered evidence from a vehicle during a traffic stop. Tr. at 71-72. Text messages were retrieved from a witness's physical cell phone. Tr. at 57. While the record does not identify who obtained the text messages, it is not uncommon for phones to be searched by forensic examiners instead of the investigating detective. Application of the Rules of Evidence at the transfer hearing would have required the State to call each of these law enforcement officers.

Carrier records relating to Fuell's cell phone were obtained and admitted at the hearing as

State's Ex. 11. Tr. at 65-66. Fuell objected to admission of those records on the basis that the "proper person" was not at the hearing to identify the document. Tr. at 137. Additionally, the record shows that witnesses at the crime scene were interviewed by Detective Tobias and "two other detectives." Tr. at 38, 42. It was through those interviews that Austin Fuell became a suspect. Tr. at 42-43. Those interviews also revealed Fuell's telephone number. Tr. at 79. Application of the Rules of Evidence at the transfer hearing would have required the State to call a representative of the cell phone carrier and multiple lay witnesses who provided information to police.

The facts of this case illustrate the consequences of adopting Fuell's first proposition of law. Application of the Rules of Evidence and the Confrontation Clause will transform the preliminary hearing into a multi-day bench trial. While the State's burden of proof in a transfer hearing is less than at trial, the State must still produce evidence with respect to every element of the crime. In serious cases, that may require calling dozens of witnesses. If the transfer hearing is deemed to have the same evidentiary rules as a trial, it follows that the transfer hearing will mirror the trial in length.

Fuell's first proposition of law also has strategic implications. If the Confrontation Clause and Rules of Evidence apply at transfer hearings, defense counsel will have the opportunity to cross-examine all of the State's witnesses under oath *before trial*. The defense can then impeach the State's witnesses at trial over any inconsistencies in their testimony. Juveniles do not present evidence at transfer hearings, so the State has no reciprocal opportunity. Besides creating lengthy hearings, Fuell's first proposition of law would also create a strategic advantage to juvenile defendants.

OPAA does not suggest that the Confrontation Clause or the Rules of Evidence are unimportant. Both create trial procedures that are critical to discovery of the truth, which in a criminal case means guilt of the accused. But the purpose of a transfer hearing is not to determine if the juvenile committed the crime but whether there is *probable cause* to believe he committed the crime. And juveniles who are transferred to adult court have same rights under the Confrontation Clause or the Rules of Evidence as adults. In fact, transferred juveniles can invoke the Confrontation Clause and Rules of Evidence at trial *in adult court*. Fuell's complaints about hearsay and unauthenticated evidence in this case ring hollow given his decision to plead guilty instead of invoking these rights.

Appellant's Proposition of Law 2: Under Miller v. Alabama, State v. Long, and State v. Patrick, R.C. 2929.02(B)'s mandatory fifteen-years-to-life sentence for murder is unconstitutional as applied to juvenile offenders because it does not permit judicial consideration of youth at sentencing.

OPAA agrees with the State that R.C. 2929.02(B) is constitutional and provides a meaningful possibility of parole after a juvenile offender serves a relatively short fifteen years in prison. OPAA writes separately, however, to identify the potential policy implications of Fuell's second proposition of law.

R.C. 2929.02(B)(1) provides that "whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life." Fifteen years to life in prison is the only prison term available for a murder committed without a sexual motivation specification. In this case, Fuell was sentenced to fifteen years to life in prison. He now argues that the mandatory nature of the sentence was unconstitutional and that the trial court should have considered imposing another sentence. But Fuell never identifies an alternative sentencing option.

In *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455 (2012), the Supreme Court of the United States reversed a prison sentence of life without parole because it was imposed on a juvenile and left the trial court no discretion to impose another sentence. Alabama law provided only two options for an offender convicted of capital murder: “life imprisonment without parole or . . . death.” *State v. Henderson*, 144 So.3d 1262, 1279 (Ala.2013) (quoting Ala.Code 13A-5-45(A) (1975)). Death was already invalidated for murders committed by juveniles in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005). After *Miller* invalidated mandatory sentences of life without parole, juveniles convicted of capital murder moved to dismiss their indictments, arguing that “there are no provisions in Alabama’s capital-offense statutory scheme that allow a trial court to impose a sentence less than life imprisonment without parole.” *Henderson*, at 1280.

A juvenile could make the same argument in Ohio since a conviction “consists of verdict and sentence.” *State v. McGuire*, 80 Ohio St.3d 390, 399, 686 N.E.2d 1112 (1997). Ohio law only provides for a sentence of fifteen years to life in prison. A juvenile could argue that a decision invalidating the mandatory nature of the fifteen years to life in prison sentence would require dismissal of his indictment because there exists no other applicable statutory punishment.

When the Supreme Court of the United States held that the death penalty was cruel and unusual in 1972, this Court modified existing death sentences to life imprisonment. *See State v. Leigh*, 31 Ohio St.2d 97, 99, 285 N.E.2d 333 (1972). It relied upon R.C. 2901.01 (1972), which stated that murder in the first degree “shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.” But the Ohio statute punishing murder today contains no similar ‘fallback’ sentencing alternative. *See R.C. 2929.02*.

This Court has recognized that when it “holds that a statute is unconstitutional, severance may be appropriate. R.C. 1.50.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 94. There are three pertinent questions to determining whether severance is appropriate:

(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Geiger v. Geiger, 117 Ohio St. 451, 466, 160 N.E. 28 (1927). “Severance is appropriate only when the answer to the first question is yes and the answers to the second and third questions are no.” *State v. Romage*, 138 Ohio St.3d 390, 2014-Ohio-783, 7 N.E.3d 1156, ¶ 15.

Fuell may argue that this Court should only sever the portion of the statute that imposes a life sentence: “shall be imprisoned for ~~an indefinite term of fifteen years to life~~.” Such a holding would allow a trial court to impose a definite prison term of fifteen years. But the life portion of the sentence is so connected with the general scope of the provision that to strike it is to deny the General Assembly’s clear intention. The General Assembly clearly intends juvenile offenders convicted of murder to serve life sentences. Even its recent enactment of S.B. 256 in April 2021, which expanded juvenile offenders’ parole eligibility, left in place life sentences. *See* R.C. 2967.132. The earliest a juvenile is entitled to parole under that bill is “after serving eighteen years in prison.” R.C. 2967.132(C)(1).

Fuell may argue that if this Court adopts his proposition of law, the Court can decide that trial courts can impose a sentence that corresponds to a different statutory crime, perhaps corresponding to first-degree felonies. That decision would result in shockingly low potential sentences. *See* R.C. 2929.14(A)(1)(b). Additionally, murder is not a first-degree felony and the

General Assembly enacted R.C. 2929.02 to specifically govern what punishments apply to persons convicted of murder. To permit a different sentence would require the Court to insert words into the statute, in violation of the severance doctrine.

CONCLUSION

Changes to the Ohio Rules of Juvenile Procedure and to the Ohio Revised Code are properly considered by the Commission of the Rules of Practice and Procedure and by the General Assembly. Policy proposals like Fuell's are not appropriately considered in the first instance in a pending appeal of a criminal sentence. OPAA respectfully submits that this Court should reaffirm settled law that the Rules of Evidence and the Confrontation Clause do not apply at preliminary hearings and that a sentence of fifteen years to life in prison does not offend the state or federal constitutions.

Respectfully submitted,

Ohio Prosecuting Attorneys Association

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor

/s Anthony T. Miranda

KATHERINE MULLIN (0084122)
ANTHONY T. MIRANDA (0090759)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Phone: 216-443-7800
amiranda@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae Ohio Prosecutors Attorneys Association was provided by electronic mail on December 28, 2021 to Appellant-Defendant, Assistant State Public Defender Timothy B. Hackett at timothy.hackett@opd.ohio.gov, to Appellee-Plaintiff, Assistant Prosecuting Attorney Nick Horton at nhorton@clermontcountyohio.gov, and to counsel for Amicus Curiae in support of Appellant-Defendant Marsha L. Levick, Esq., at mlevick@jlc.org Leah R. Winsberg, Esq., at lwinsberg@childrenslawky.org, to Timothy E. Pierce, Esq., at tepierce@franklincountyohio.gov, to Assistant Public Defender Erika Cunliffe at ecunliffe@cuyahogacounty.us, to Assistant Public Defender Jessica Moss at jmoss@hamiltoncountypd.org, to Assistant Public Defender Kay Lock at LockeK@mcoho.org, and to Kristina Kersey, Esq., at kkersey@njdc.info.

/s Anthony T. Miranda

ANTHONY T. MIRANDA (0090759)
Assistant Prosecuting Attorney