In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2020-1429
	:	
Appellee,	:	On appeal from the Champaign County
	:	Court of Appeals,
v.	:	Second Appellate District
	:	
DONOVAN ASHER NICHOLAS,	:	Court of Appeals
	:	Case No. 2018-CA-25
Appellant.	:	

BRIEF OF AMICUS CURIAE OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

INTRODUCTION

Juvenile courts have considerable discretion when deciding whether to transfer a delinquent juvenile to adult criminal court. *State v. Carmichael*, 35 Ohio St. 2d 1, syl.¶¶1–2 (1973); *State v. Douglas*, 20 Ohio St. 3d 34, 36–37 (1985) (*per curiam*). The General Assembly has specifically vested juvenile courts with "wide latitude to retain or relinquish jurisdiction." *State v. Watson*, 47 Ohio St. 3d 93, 95 (1989). In keeping with the General Assembly's design, this Court has made clear that it will not disturb juvenile courts' transfer decisions absent an abuse of discretion. *Douglas*, 20 Ohio St. 3d at 36. This Court and lower courts have applied that abuse-of-discretion standard for decades, and they have done so without any signs of difficulty. *See, e.g., State v. Reeder*, 2016-Ohio-212 ¶17 (10th Dist.); *State v. West*, 167 Ohio App. 3d 598, 2006-Ohio-3518 ¶10 (4th Dist.).

Those principles require affirmance in this case. In its decision below, the Second District affirmed the juvenile court's decision to transfer Donovan Nicholas's murder case to adult court. The juvenile court considered the relevant factors laid out in R.C. 2152.12(D) and (E) and decided that Nicholas—who brutally murdered the woman he referred to as "mom"—was not amenable to rehabilitation in the juvenile justice system. On that basis, the juvenile court bound Nicholas over to adult criminal court. This, the Second District correctly held, did not constitute an abuse of discretion.

Nicholas, in his appeal to this Court, provides no good reason for concluding otherwise. He raises two primary arguments. *First*, he seeks relief on the ground that the juvenile court made the bindover decision based on "no evidence." The problem with this argument is that it rests on a false premise. As the Second District explained, the juvenile court considered a variety of factors, including "the violent nature of the crime and the significant danger that Nicholas presented to society." *State v. Nicholas*, 2020-Ohio-3478 ¶¶40, 70, 73 (2d Dist.). *Second*, Nicholas claims that the Due Process Clause of the Fourteenth Amendment requires the State to prove non-amenability by clear and convincing evidence. Because the Second District reviewed the juvenile court's decision for abuse of discretion instead of applying this clear-and-convincing-evidence standard, Nicholas says he was denied his right to due process of law. No court has ever accepted that argument, however, and this Court should not be the first. Indeed, it could do so only by overruling long-established precedent subjecting bindover decisions to abuse-of-discretion review. *See Carmichael*, 35 Ohio St. 2d at 6–7; *Douglas*, 20 Ohio St. 3d at 36. Nicholas does not even acknowledge this precedent. And so he stops well short of giving this Court the sort of weighty justification it would need for overruling a longstanding, easily administrable line of cases.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law enforcement 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. He is interested in supporting courts throughout the State as they process juvenile offenders according to state law in an effort to protect the community and rehabilitate youths. The Attorney General also sometimes serves as special counsel in cases of significant importance, including in cases that involve juveniles. In those cases, the Attorney General is directly involved in the application of Ohio's bindover statutes.

STATEMENT OF THE FACTS AND CASE

1. Donovan Nicholas regarded Heidi Taylor, his father's live-in-girlfriend, as his "mom." *State v. Nicholas*, 2020-Ohio-3478 ¶16 (2d Dist.) ("App.Op."). He murdered her anyway. Brutally. Nicholas, then fourteen years old, planned an ambush. He waited for Taylor at the bottom of the stairs in his father's house. *Id*. When she did not come quickly enough, Nicholas called for her. Taylor responded. And when she came to Nicholas, Nicholas attacked her with a knife. App.Op.¶17. Taylor begged Nicholas to stop and pleaded with him to call 911 for help. App.Op.¶18. Nicholas, however, did not stop; he stabbed Taylor over 60 times. App.Op.¶15. Taylor briefly escaped. But Nicholas followed her and took her cellphone to prevent her from calling for help. App.Op.¶18. Taylor eventually collapsed on the bed in the master bedroom. *Id.* Nicholas then took a gun from a nightstand near the bed, loaded it, and shot Taylor once in the head. *Id.*

A while later, Nicholas called 911—to obtain help for himself. App.Op.¶19. At some point during his attack on Taylor, Nicholas had stabbed himself in the leg. *Id.* It was that injury that prompted him to finally make the call. *Id.* During that call, Nicholas told dispatchers that he had killed his mother. App.Op.¶15.

Nicholas eventually told the police that he had multiple personalities. He blamed Taylor's murder on a personality that he referred to as "Jeff the Killer." App.Op.¶¶16, 20. It was "Jeff," Nicholas claimed, who killed Taylor. App.Op.¶20.

2. The State filed a complaint in the Juvenile Division of the Champaign County Court of Common Pleas, charging Nicholas with delinquency. App.Op.¶7. After a court-appointed expert, Dr. Daniel Hrinko, concluded that Nicholas was competent to stand trial, App.Op.¶¶9, 11, Nicholas waived a probable-cause hearing. And, based on the State's complaint, the juvenile court determined that probable cause existed to support charging Nicholas with murder and aggravated murder. App.Op.¶11.

After establishing probable cause, the court turned its attention to determining whether Nicholas would be bound over to adult court. App.Op.¶11. As required by R.C. 2152.12(C), the court ordered an investigation to determine whether Nicholas was amenable to rehabilitation in the juvenile justice system. *Id.* The court ordered Dr. Hrinko to conduct an amenability evaluation as part of that investigation. *Id.*

At the investigation's completion, the court held an amenability hearing. There, Nicholas presented testimony from Dr. Hrinko and Sara Book, the Acting Chief of Be-

havioral Health Services at the Ohio Department of Youth Services. App.Op.¶21. Dr. Hrinko testified that Nicholas likely suffered from Dissociative Identity Disorder and that Nicholas started experiencing significant symptoms of mental illness beginning in the sixth grade. App.Op.¶¶22, 25–30. Dr. Hrinko testified that, while it was possible Nicholas was fabricating or role playing, it was more likely that Nicholas had in fact developed two distinct personalities. App.Op.¶¶29, 31. Although Dr. Hrinko testified that proper treatment would likely allow Nicholas to reintegrate his separate personalities, App.Op.¶¶32–34, Dr. Hrinko acknowledged that "he was unable to cite 'a single article or a single specific case where treatment has been documented to be successful involving homicidal behavior,'" App.Op.¶35. Dr. Hrinko further testified that, if Nicholas is not rehabilitated, "bad things will happen." App.Op.¶34.

Book, for her part, testified about the treatment options that would be available to Nicholas should he remain in the custody and care of the Department of Youth Services. App.Op.¶¶36–41. She testified that juveniles in need of psychiatric or psychological care receive those services. App.Op.¶36. But Book was unable to testify about whether any Department of Youth Services staff had experience dealing with Dissociative Identity Disorder. Nor could she say whether any Department of Youth Services facility resident had been diagnosed with that disorder. App.Op.¶37. Additionally, although Dr. Hrinko had testified that Nicholas could potentially be rehabilitated, App.Op.¶¶34–35, Book was unable to guarantee that Nicholas would have around-the-

clock access to the type of care that Dr. Hrinko testified would be required to fully address Nicholas's disorder, App.Op.¶41.

Following the hearing, the juvenile court determined that Nicholas was not amenable to rehabilitation in the juvenile justice system. It thus granted the State's motion to transfer jurisdiction over the case to adult criminal court. Juv.Ct. Order, Juv.R.81. In reaching this decision, the juvenile court weighed all of the relevant factors. It concluded that many of the factors listed in R.C. 2152.12(D) favored its decision to transfer jurisdiction. *Id.* For example: Nicholas's relationship with Taylor facilitated his crime; Nicholas used a firearm when he murdered Taylor; Nicholas was the principal actor and was not under the influence of another; and Nicholas was highly intelligent and emotionally mature. *Id.* The juvenile court also found that the Department of Youth Services did not have the capability to properly treat Nicholas and that, if not properly treated, it was likely that Nicholas would commit additional offenses and "pose a significant danger to society." *Id.*

3. After a jury convicted Nicholas of aggravated murder, he appealed. App.Op.¶1. Relevant here, Nicholas argued that the juvenile court abused its discretion when it determined that he was not amenable to rehabilitation and bound him over to adult criminal court. App.Op.¶49. The Second District Court of Appeals rejected that argument and affirmed the juvenile court's decision. Its panel decision noted that a juvenile court's bindover decision will not be overturned unless the court abused its dis-

cretion. App.Op.¶¶57, 68, 71–72. And the juvenile court had not abused its discretion in this case, the Second District held, because it had "considered the appropriate statutory factors and" because "there [was] some rational and factual basis in the record to support the court's findings with respect to those factors." App.Op.¶73. In reaching this conclusion, the Second District rejected Nicholas's argument that there was no evidence to support the juvenile court's decision. To the contrary, the juvenile court had "properly considered the violent nature of the crime and the significant danger that Nicholas presented to society." App.Op.¶70. The Second District also rejected Nicholas's argument that the juvenile court should have deferred to Dr. Hrinko's opinion that Nicholas was amenable to rehabilitation. It explained that "the reasoning and underlying bases of Dr. Hrinko's opinions regarding amenability were rife with limitations, variables, and conditions." App.Op.¶68.

Nicholas asked the Second District to reconsider his case and to grant *en banc* review. In support of his motion, Nicholas argued that the panel, by applying an abuse of discretion standard, improperly shifted to Nicholas the burden of proving amenability. *See* Application for Reconsideration and En Banc Consideration, (July 2, 2020). The appellate panel, he claimed, also created a conflict with an earlier Second District decision, *State v. Valentine*, No. 6024, 1979 Ohio App. LEXIS 10143 (2d. Dist., April 11, 1979).

The Second District panel denied Nicholas's reconsideration motion and issued an opinion explaining why. Recon.Op. (Oct. 8, 2020). Reconsideration was not war-

ranted, the Second District held, because Nicholas failed to identify an "obvious error" in the court's decision. The panel rejected Nicholas's claim that the juvenile court had based its decision solely on the inability of the Department of Youth Services to provide the level of care that he required. The juvenile court, the Second District held, had weighed many other relevant factors—including the fact that Nicholas was a danger to society. Recon.Op. at 3–5, 10. The panel also rejected Nicholas's argument that its previous decision had improperly shifted the burden of proof. The panel's decision had not required Nicholas to show that he was amenable to rehabilitation; it had simply reviewed the juvenile court's bindover decision under the controlling abuse-of-discretion standard. Recon.Op. at 6–10. And regardless, Nicholas was wrong to argue that the *State* should have borne the burden of showing by clear and convincing evidence that Nicholas was not amenable to rehabilitation. Nicholas, the panel explained, failed to cite "any Ohio decisions or authority imposing a burden of proof on the State with respect to amenability." Recon.Op. at 8.

The full Second District rejected Nicholas's request for *en banc* review for similar reasons. *En Banc* Op. (Oct. 8, 2020). Incorporating the panel's decision denying reconsideration, the appellate court held that the panel's decision did not create a conflict with the earlier *Valentine* decision. *En Banc* Op. at 18. *Valentine*, it explained, dealt with a different question—the burden of going forward with evidence, not the burden of

proof. *En Banc* Op. at 8. In any event, *Valentine* was unpersuasive; no court had even cited it since 1979, when it was decided. *Id.*

4. Nicholas appealed to this Court, again asserting that the juvenile court had improperly required him to show that he was amenable to rehabilitation. The Court accepted Nicholas's appeal on all propositions of law. *State v. Nicholas*, 161 Ohio St. 3d 1439, 2021-Ohio-375.

ARGUMENT

Although Nicholas presents three Propositions of Law, each of his propositions involves a different version of the same legal claim. Specifically, each argues that the juvenile court's amenability determination was legally flawed. *See* Nicholas Br.27 (stating that his "first proposition subsumes (and answers) the second"). The Attorney General therefore offers a single Proposition of Law in response.

***Amicus Curiae* Ohio Attorney General's Proposition of Law:**

> *A reviewing court may not disturb a juvenile court's amenability determination unless the juvenile court abused its discretion.*

Appellate courts must review juvenile courts' transfer decisions for abuse of discretion. Nicholas never mentions that standard. But his brief silently invites this Court to ditch that standard in favor of a new one—a move that would require this Court to overrule decades of precedent governing amenability determinations. The Court should reject Nicholas's invitation to upend the amenability process. It should affirm the Second District.

A. Appellate courts review amenability determinations for abuse of discretion.

1. Juvenile courts have significant discretion to decide whether a juvenile is amenable to rehabilitation in the juvenile justice system. *State v. Carmichael*, 35 Ohio St. 2d 1, syl.¶1 (1973). The General Assembly has established a variety of factors that juvenile courts should consider when exercising that discretion. Some of those factors, if satisfied, counsel in favor of transferring jurisdiction. *See, e.g.*, R.C. 2152.12(D). Others, if satisfied, counsel against it. *See, e.g.*, R.C. 2152.12(E). Regardless, the enumerated factors are non-exclusive: courts may consider "any other relevant factors" that they believe relevant. R.C. 2152.12(D) & (E). If, after considering all relevant factors, a court determines that a juvenile is *not* amenable to rehabilitation, then the court may transfer the juvenile to adult criminal court. R.C. 2152.12(B). (Provided, of course, that the other transfer conditions are met.) Juvenile courts must state on the record their reasons for transferring a case to adult criminal court, R.C. 2152.12(I), but they are not required to issue a written decision, *State v. Douglas*, 20 Ohio St. 3d 34, 36 (1985) (*per curiam*).

On appeal, juvenile courts' amenability and bindover decisions are reviewed for abuse of discretion. *In re M.P.*, 124 Ohio St. 3d 445, 2010-Ohio-599 ¶14. That standard has governed these appeals for years. Even before the General Assembly adopted R.C. 2152.12—the statute that governs bindover proceedings today—the Court had held that juvenile courts have great discretion when deciding whether to bind a juvenile over to adult criminal court. Interpreting Juvenile Rule 30 and R.C. 2151.26, which were the

predecessors to R.C. 2152.12, this Court held that whether to transfer jurisdiction over a case to criminal court is "within the sound discretion of the court, after an 'investigation' is made." *Carmichael*, 35 Ohio St. 2d 1, syl.¶2. The Court further made clear that the relevant question is not whether a juvenile "*cannot* be rehabilitated," but instead whether "there are reasonable grounds to believe that he cannot be rehabilitated." *Id.* at 6. As long as there is sufficient credible evidence to support a juvenile court's decision, its "bind-over order should not be reversed in the absence of an abuse of discretion." *Douglas*, 20 Ohio St. 3d at 36. A bindover decision can therefore be reversed on appeal only when it is: (1) "unreasonable, arbitrary, or unconscionable," *State v. Easley*, 2016-Ohio-7271 ¶6 (10th Dist.); or (2) contrary to a clear statutory command, *State v. Golphin*, 81 Ohio St. 3d 543, 546 (1998).

Lower courts have had no trouble applying the Court's precedent. Every appellate district in Ohio reviews juvenile courts' amenability determinations for an abuse of discretion. *See, e.g.*, *State v. Reeder*, 2016-Ohio-212 ¶¶17–25 (10th Dist.); *see also State v. Marshall*, 2016-Ohio-3184 ¶¶12–24 (1st Dist.); *State v. Hopfer*, 112 Ohio App. 3d 521, 535–36 (2d. Dist. 1996); *State v. Whiteside*, 6 Ohio App. 3d 30, 34–36 (3d. Dist. 1982); *State v. West*, 167 Ohio App. 3d 598, 2006-Ohio-3518 ¶¶10–32 (4th Dist.); *State v. Blair*, 2017-Ohio-5865 ¶¶25–42 (5th Dist.); *State v. Stasher*, No. L-00-1152, 2001 Ohio App. LEXIS 2139 *3–4, *11 (6th Dist. May 11, 2001); *State v. Hurst*, No. 89-C-34, 1990 Ohio App. LEXIS 3423 *4–5, *8–9 (7th Dist. Aug. 15, 1990); *State v. Johnson*, 2015-Ohio-96 ¶¶35–44 (8th

Dist.); *State v. Lopez*, 112 Ohio App. 3d 659, 662–63 (9th Dist. 1996); *State v LaRosa*, 2020-Ohio-160 ¶¶27–32 (11th Dist.); *In re M.A.*, 2019-Ohio-829 ¶¶26–34 (12th Dist.). And not one of these courts, to the Attorney General's knowledge, has expressed any difficulty in doing so.

2. The Second District correctly applied controlling precedent when it rejected Nicholas's challenge to the juvenile's court's conclusion that he was not amenable to rehabilitation in the juvenile justice system. This Court should affirm. As the Second District recognized, several of the R.C. 2152.12(D) factors supported the juvenile court's decision. Among them: Taylor suffered grievous physical harm; Nicholas's relationship with Taylor facilitated the murder; Nicholas used a firearm when he murdered Taylor; Nicholas was emotionally mature; and there was insufficient time to rehabilitate Nicholas in the juvenile system. Juv.Ct. Order, Juv.R.81; App.Op.¶53. And in addition to these statutory factors, the juvenile court was free to "consider[] the violent nature of [Nicholas's] crime and the significant danger that [Nicholas] present[s] to society." App.Op.¶70. That makes sense: "the greater the culpability of the offense, the less amenable will the juvenile be to rehabilitation." *State v. Watson*, 47 Ohio St. 3d 93, 96 (1989). The brutality with which Nicholas murdered Taylor is unquestioned. And that provided additional support for the juvenile court's amenability and transfer decisions.

So did the testimony suggesting that juvenile facilities may not have the capacity to treat Nicholas's condition. "The evidence concerning [the Department of Youth Ser-

vices'] capability to successfully treat Nicholas was vague, was sometimes conflicting, and was variable." App.Op.¶67. Dr. Hrinko, for example, testified that "24/7 supervision and support would allow [Nicholas] real-world assistance in making better decisions to reintegrate his personalities." App.Op.¶64. But while the Acting Chief of Behavioral Services at the Department of Youth Services testified that the Department connects youth in its care to the mental-health services that they need, App.Op.¶¶36, 65, she was unable to guarantee that Nicholas would have access to the type of around-the-clock treatment that Dr. Hrinko testified was necessary, App.Op.¶¶41, 69. Her testimony was significant: Dr. Hrinko had testified that if Nicholas did not receive the treatment that he required, and if he was unable to reintegrate his multiple personalities, then "bad things will happen." App.Op.¶¶34, 64.

Given the statutory factors, the brutality of Nicholas's crime, and the grounds for doubting the juvenile system's ability to treat Nicholas, the "totality of the evidence support[ed] a finding that [Nicholas was] not amenable to treatment." *Watson*, 47 Ohio St. 3d at 95. The non-amenability finding, in other words, is not "unreasonable, arbitrary, or unconscionable," *Easley*, 2016-Ohio-7271 ¶6, or contrary to a clear statutory command, *Golphin*, 81 Ohio St. 3d at 546. The governing abuse-of-discretion standard does not permit upsetting a bindover decision in these circumstances.

B. Nicholas ignores controlling precedent and raises arguments that the Court has already rejected.

Nicholas's brief all but ignores the well-settled body of precedent dictating the manner in which appellate courts are to review a juvenile court's amenability determination. Nicholas does not cite *Carmichael*, *Douglas*, *Watson*, *In re M.P.*, or any of the countless lower-court decisions applying those precedents. And the rule he asks the Court to adopt is directly contrary to the rule that the Court applied in those cases. Nicholas, in other words, asks the Court to overrule decades of precedent without ever acknowledging that the precedent exists. That alone ought to defeat Nicholas's argument: principles of *stare decisis* generally require that a party *argue* for overruling a precedent before the Court will do so. *See United States v. IBM*, 517 U.S. 843, 856 (1996).

But even if the precedent did not exist, Nicholas's argument would fail. Nicholas contends that the only evidence available to the juvenile court during the amenability hearing showed that he was amenable to rehabilitation. This argument would seem to suggest that the juvenile court *did* abuse its discretion. But Nicholas also argues that abuse of discretion is not the correct standard regardless; according to him, the Due Process Clause of the Fourteenth Amendment requires the State to prove non-amenability by clear and convincing evidence.

Every aspect of Nicholas's argument is wrong. First, Nicholas is simply wrong that the juvenile court's decision is unsupported by evidence of non-amenability. Sec-

ond, Nicholas is wrong that the Due Process Clause of the Fourteenth Amendment dictates who bears what burden of proof in amenability hearings.

1. It is not true that the juvenile court had before it no evidence of Nicholas's non-amenability to rehabilitation. *See* App.Op.¶73. As explained above, quite a bit of evidence supported the non-amenability determination. For example, the undisputed facts of the murder satisfied many of the factors outlined in R.C. 2152.12(D). The brutality of the murder independently suggested non-amenability. And testimony concerning the services Nicholas would receive in the juvenile system further supported a non-amenability finding. *See above* 12–13.

In arguing otherwise, Nicholas stresses Dr. Hrinko's amenability testimony. Dr. Hrinko did indeed testify, equivocally, that Nicholas might be amenable to rehabilitation. *See below* 16. But nothing required the juvenile court to give that expert testimony any more weight than the other evidence before it. Indeed, disputes about how evidence ought to be weighed are *precisely* the kinds of disputes that abuse-of-discretion standards are supposed to take off the table. The First District, for example, has held that a "juvenile court has the discretion to determine how much weight should be accorded to any given factor." *Marshall*, 2016-Ohio-3184 ¶15. "There is no requirement that each, or any, [factor] be resolved against the juvenile so long as the totality of the evidence supports a finding that the juvenile is not amenable to treatment." *Watson*, 47 Ohio St. 3d at 95; *see also Douglas*, 20 Ohio St. 3d at 37 (same). More specifically, a juve-

nile court is not required to defer to the opinions of experts. *Reeder*, 2016-Ohio-212 ¶24. A juvenile court "may assign any weight to expert opinion that it deems appropriate." *Id.* (quotation omitted); *see also Lopez*, 112 Ohio App. 3d at 662; *West*, 167 Ohio App.3d 598, ¶30; *State v. McDaniel*, C.A. No. 13453, 1988 Ohio App. LEXIS 2367 *6–7 (9th Dist. June 15, 1988). Thus, even if Dr. Hrinko's testimony had been unequivocal, the juvenile court would have been free to give his conclusions no weight at all. It could have based its decision exclusively on the severity of the murder Nicholas committed—or on any other factors that it deemed relevant. *See State v. Everhart*, 2018-Ohio1252 ¶43 (3d. Dist.); *State v. Morgan*, 2014-Ohio-5661 ¶37 (10th Dist.).

Dr. Hirnko's testimony was *not* unequivocal, however. As the appellate court noted, Dr. Hrinko's opinion was "subject to many limitations, variables, and conditions that the trial court was allowed to consider in weighing the testimony." App.Op.¶60. Among them was the fact that Dr. Hrinko had no experience treating Dissociative Identity Disorder and that he was unable to recall a single case where a murderer with that disorder had been successfully treated. *Id.* ¶61. Some of Dr. Hrinko's testimony, in fact, *supported* the juvenile court's determination that Nicholas was not amenable to rehabilitation. Dr. Hrinko testified, for example, that Nicholas had intended to harm other students at his school, App.Op.¶63, and that if Nicholas's treatment is not successful then "bad things will happen," App.Op.¶64.

To the extent Nicholas means to suggest that a juvenile court abuses its discretion when it finds a juvenile non-amenable to rehabilitation based on the facts of the crime and the juvenile's own evidence—as opposed to evidence introduced by the State—he is wrong. This Court's decision in *Watson* refutes that argument. In that case, the defendant argued that the only evidence presented at his bindover hearing showed that he was amenable to rehabilitation. *Watson*, 47 Ohio St. 3d at 95. The juvenile court, Watson argued, erred by disregarding the evidence presented at the hearing and by concluding, based solely on the severity of his offense, that he was not amenable to rehabilitation. *Id.* The Court disagreed. The severity of the offense, the Court held, was by itself a sufficient basis on which to conclude that a juvenile was not amenable to rehabilitation; "the greater the culpability of the offense, the less amenable will the juvenile be to rehabilitation." *Watson*, 47 Ohio St. at 96. The Court cannot accept Nicholas's argument without overruling *Watson*.

Consider also this Court's decision in *Carmichael*. In that case, defense counsel presented no evidence related to amenability. Instead, counsel argued that Carmichael could not be bound over to adult court because "the state had failed to go forward with its burden of proof." *Carmichael*, 35 Ohio St. 2d at 3. The Court rejected that argument and held that the State was not required to show that a juvenile cannot be rehabilitated. *Id.* at 6. The State, in other words, had no burden. It was enough, the Court held, that there were reasonable grounds to believe that rehabilitation was not possible. *Id.* As for

what constituted reasonable grounds, the Court held that that question was "within the sound discretion of the [juvenile] court, after an 'investigation' is made." *Id.* at syl.¶2. The Court cannot rule for Nicholas without overruling *Carmichael*.

2. In addition to arguing that no evidence supported the amenability finding, Nicholas argues that the Due Process Clause of the Fourteenth Amendment required the State to prove non-amenability by clear and convincing evidence. That argument is baseless. But before explaining why, it is important to make one thing clear: Nicholas is *not* asserting a claim based on the Ohio Constitution. Although the Court has "more often than not" treated the Due Course of Law Clause found in Article I, Section 16 of the Ohio Constitution as "the functional equivalent of the Due Process Clause of the Fourteenth Amendment," *State v. Ireland*, 155 Ohio St. 3d 287, 2018-Ohio-4494 ¶37, Nicholas does not cite the state-law provision. Nor does he cite any decision applying it. Nicholas's due-process claim is instead grounded exclusively in the Fourteenth Amendment's Due Process Clause. Furthermore, because Nicholas is challenging the *process* by which amenability is determined, he appears to be raising a procedural, as opposed to substantive, due process claim.

Returning to the Fourteenth Amendment, there are two possible tests that could apply to Nicholas's claim. The first is the standard that the U.S. Supreme Court adopted in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The second is the narrower standard that the U.S. Supreme Court discussed a year later in *Patterson v. New York*, 432 U.S. 197

(1977). Nicholas does not identify which one he believes should apply here. And while *Patterson*, not *Mathews*, provides the appropriate test, Nicholas's claim fails under either standard.

Patterson. *Patterson* gives the States significant leeway when designing their criminal justice systems. In that case, the U.S. Supreme Court recognized that "preventing and dealing with crime" is traditionally "much more the business of the States than it is of the Federal Government." And so it held that courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201; *cf. also Bond v. United States*, 572 U.S. 844, 858–59 (2014) (punishment of criminal activity is a traditional area of state responsibility). Because States must be free to regulate the "procedures under which [their] laws are carried out, including the burden of producing evidence and the burden of persuasion," it also held that their decisions regarding the allocations of burdens are not "subject to proscription under the Due Process Clause unless [they] offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 201–02 (quotations omitted).

That test, sometimes referred to as the "fundamental fairness test," is hard to satisfy; "the category of infractions that violate fundamental fairness" is very narrow. *Medina v. California*, 505 U.S. 437, 443 (1992) (quotations omitted). For example, it does not offend principles of fundamental fairness to "require a defendant who alleges incompe-

tence to stand trial to bear the burden of proving so by a preponderance of the evidence," *id.* at 439, or to require a defendant who presents an affirmative defense to bear the burden of establishing that defense, *Patterson*, 432 U.S. at 205.

Patterson's fundamental fairness test applies to juvenile proceedings and adult criminal proceedings alike. While it is true that juvenile proceedings are civil (not criminal) in nature, they nevertheless have "inherently criminal aspects." *In re A.J.S.*, 120 Ohio St. 3d 185, 2008-Ohio-5307 ¶26. So "the 'civil' label traditionally attached to juvenile matters" does not mean that a juvenile offense "was not 'criminal' at the time" it was committed. *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059 ¶25. Just as courts "cannot ignore the criminal aspects inherent in juvenile proceedings for purposes of affording certain constitutional protections, [they] also cannot ignore the criminality inherent in juvenile conduct that violates criminal statutes." *Id.* at ¶26; *see also McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (plurality op.) ("Little … is to be gained by any attempt simplistically to call [] juvenile court proceeding[s] either 'civil' or 'criminal.'"). Regardless of the label that applies to juvenile proceedings, decisions about which offenses and offenders should be prosecuted in adult criminal court, and which should remain in the juvenile justice system, implicate the State's sovereign interest in dictating the structure of its justice system and the "procedures under which [the State's] laws are carried out." *See Patterson*, 432 U.S. at 201. It does not matter "[w]hether the state prosecutes a criminal action or a juvenile delinquency matter." *Walls*, 96 Ohio St. 3d 437

¶26. Either way, "its goal is the same: to vindicate a vital interest in the enforcement of *criminal* laws." *Id*. Even Nicholas admits as much. *See* Nicholas Br.23–24.

Patterson's history confirms that its test applies to juvenile proceedings as well as adult criminal proceedings. The fundamental fairness test that the U.S. Supreme Court applied in *Patterson* originated in *In re Winship*, 397 U.S. 358 (1970), a case involving the juvenile justice system. The Court in *Winship* had been tasked with deciding what standard of proof should apply to the adjudicatory phase of juvenile-court proceedings. *Id.* at 359. Looking to the history and tradition of the criminal justice system, and general principles of fundamental fairness, the Court held that the State must prove every element of a juvenile offense beyond a reasonable doubt. *Winship*, 397 U.S. at 361–64. The Court applied the same standard again in *McKeiver*, which also involved juvenile proceedings. 403 U.S. at 543. *Patterson* did little more than extend *Winship*'s test to adult criminal proceedings. *Patterson*, 432 U.S. at 216; *see also Martin v. Ohio*, 480 U.S. 228, 231–32 (1987). Since then, the U.S. Supreme Court has discussed *Winship* and *Patterson* together without mentioning that one involved a criminal proceeding while the other involved a juvenile proceeding. *See Martin*, 480 U.S. at 231–32. And lower courts have applied the test announced in *Patterson* and *Medina* when confronted with due-process challenges to juvenile-justice procedures. *See In re Manuel L.*, 7 Cal. 4th 229, 237 (1994); *Golden v. State*, 341 Ark. 656, 660–61 (2000); *State ex rel. A.B.*, 936 P.2d 1091, 1100–

01 (Utah Ct. App. 1997); *People v. M.*, 197 Colo. 403, 409 (1979); *In the Interest of J.K.*, 873 N.W.2d 289, 296 n.4 (Iowa Ct. App. 2015).

Applied here, *Patterson* does not support Nicholas's due-process claim. Nicholas has not identified the type of violation of fundamental fairness that *Patterson* and *Medina* require. Although he argues that the Due Process Clause required the State to prove by clear and convincing evidence that he was not amenable to rehabilitation, there is nothing in the country's history or legal tradition that would mandate such a standard. In fact, the opposite is true. While a bindover hearing is a "critically important" proceeding, and while it must "measure up to the essentials of due process and fair treatment," *Kent v. United States*, 383 U.S. 541, 560–62 (1966), the U.S. Supreme Court "has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court," *Breed v. Jones*, 421 U.S. 519, 537 (1975).

Nicholas does not identify a single decision holding that the Due Process Clause requires a specific standard of proof by which the State must prove that a juvenile is not amenable to rehabilitation—let alone a decision that has adopted the clear-and-convincing-evidence standard for which Nicholas now advocates. Every court to have considered the question appears to have *rejected* Nicholas's position. *See, e.g.*, *People v. Taylor*, 76 Ill. 2d 289, 302–04 (1979) (rejecting clear and convincing standard); *State v. Everfield*, 342 So. 2d 648, 654–56 (La. 1977) (declining to adopt a standard of proof); *In re*

Randolph T., 292 Md. 97, 101–12 (1981) (rejecting beyond a reasonable doubt standard); *State v. Jacobson*, 33 Wn. App. 529, 531–32 (Wn. Ct. App. 1982) (rejecting clear and convincing standard); *W.M.F. v State*, 723 P.2d 1298, 1300–01 (Alaska Ct. App. 1986) (rejecting clear and convincing standard); *State v. Riccio*, 130 N.H. 376, 380 (1988) (rejecting clear and convincing standard); *People ex rel. A.D.G.*, 895 P.2d 1067, 1069–72 (Colo. Ct. App. 1994) (rejecting clear and convincing standard); *Stout v. Commonwealth*, 44 S.W.3d 781, 785–89 (Ky. Ct. App. 2000); *see also State v. Rosado*, 669 A.2d 180, 182–83 (Me. 1996) (due process does not require greater than a preponderance of the evidence standard); *In re J.J.C.*, 6 N. Mar. I. 102, 109 (1999) (due process does not require consideration of specific factors).

The consensus in federal court is similarly uniform. *United States v. T.F.F.*, 55 F.3d 1118, 1122 (6th Cir. 1995); *United States v. Doe*, 49 F.3d 859, 868 (2d Cir. 1995); *United States v. I.D.P.*, 102 F.3d 507, 513–14 (11th Cir. 1996); *see also Rosado v. Corrections*, 109 F.3d 62, 63 (1st Cir. 1997) (*per curiam*).

The consistency of these decisions confirms that the standard of proof for which Nicholas advocates is not required by the Due Process Clause. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental." *McKeiver*, 403 U.S. at 548 (quotations omitted).

The two cases on which Nicholas primarily relies—*Addington v. Texas*, 441 U.S. 418 (1979), and *Santosky v. Kramer*, 455 U.S. 745 (1982)—do not provide any reason for the Court to hold otherwise. The proceedings at issue in those two cases were significantly different from the amenability hearing at issue here. Most importantly, both cases involved a *final* deprivation of rights. *Addington*, for example, involved civil commitment proceedings, 441 U.S. at 419, while *Santosky* involved the deprivation of parental rights, 455 U.S. at 747–78. Both held that, in the context of a hearing that leads to a final deprivation of rights, the State must bear the burden of proof. But an amenability hearing "is clearly a preliminary proceeding." *Carmichael*, 35 Ohio St. 2d at 8. It involves no permanent deprivation of rights; any such deprivation occurs only after a delinquency hearing or trial. Courts have for that reason consistently rejected due process challenges to juvenile procedures based on *Addington* and *Santosky*. Courts have declined to apply these cases because they address proceedings that are "not sufficiently analogous" to juvenile bindover proceedings. *See Stout*, 44 S.W.3d at 788–89; *Riccio*, 130 N.H. at 379; *W.M.F.*, 723 P.2d at 1301; *see also In re Randolph T.*, 292 Md. at 112. Nicholas has not cited a single case to the contrary. *Cf. In re Randolph T.*, 292 Md. at 105–06 ("[W]e have been referred to no case nor have we encountered one in which the standard of proof in juvenile waiver proceedings has been changed because of *Addington*.").

Mathews. Some members of the Court have questioned whether *Patterson* should apply to juvenile proceedings. *See State v. Aalim*, 150 Ohio St. 3d 489, 2017-Ohio-2956 ¶81 n.8 (O'Connor, C.J., dissenting). But even if the Court were to apply *Mathews* instead, Nicholas's due-process claim still would not succeed.

Mathews involved a due-process challenge to a civil administrative proceeding, 424 U.S. at 323, and the test it announced was tailored to those circumstances, *see Medina*, 505 U.S. at 444. Under that test, identifying what the Due Process Clause demands requires consideration of three factors:

> 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 the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

Nicholas cannot satisfy *Mathews*'s first or second factors because he has no substantive interest in being tried in juvenile court. Juvenile proceedings are creatures of statute, not constitutional requirements. *Prescott v. State*, 19 Ohio St. 184, 188 (1869); *In re Agler*, 19 Ohio St. 2d 70, 72 (1969). The Fourteenth Amendment predates the creation of the very first juvenile court and therefore does not create "a substantive right to a specific juvenile-court proceeding." *Aalim*, 150 Ohio St. 3d 489 at ¶17. So while juveniles might have a liberty interest in avoiding wrongful adjudications or convictions, *see In re Gault*, 387 U.S. 1, 30–31 (1967), they have no interest in *which* system adjudicates

and convicts. As far as the United States Constitution is concerned, States need not have a juvenile system *at all*—they can, if they wish, adjudicate all criminal cases in adult court.

The absence of any substantive right to juvenile proceedings is one reason why courts have consistently rejected due-process arguments like the one that Nicholas makes here. They have recognized that "states have the authority … to do away with the amenability determination altogether and to prosecute and sentence juveniles as adults." *State v. Rudy B*, 149 N.M. 22, 36 (2010). Because that is the case, courts have held that States are largely free to structure their juvenile proceedings, including the relevant standard of proof, as they see fit. *Id.*; *W.M.F.*, 723 P.2d at 1300 ("A juvenile offender has no constitutional right to be tried in a juvenile court."); *see also Stokes v. Fair*, 581 F.2d 287, 289 (1st Cir. 1978) ("[T]here is no constitutional right to any preferred treatment as a juvenile offender[.]").

The variety of approaches that States take with respect to the prosecution of juvenile offenders reflects this freedom. Some States, including Florida and Massachusetts, allow prosecutors to sometimes file directly in adult court. *See, e.g.*, Fla. Stat. §985.557; Mass. Gen. Laws, Ch. 119, §54. Others, including Ohio, allow some juveniles to be bound over to adult court without any consideration of amenability. *See* R.C. 2152.12(A); *Aalim*, 150 Ohio St. 3d 489 ¶4 (rejecting due process challenge to R.C. 2152.12(A)). And yet others, including Alaska and Illinois, place the burden on juve-

niles, requiring them to prove in at least some instances that they *are* amenable to rehabilitation. *See, e.g.*, Alaska Stat. §47.12.100(c)(2); 705 Ill. Comp. Stat. 405/5-805(2)(a). If Nicholas is right, however—if the Due Process Clause requires the State to prove by clear and convincing evidence that a juvenile is not amenable to rehabilitation—then States throughout the Union are unwittingly violating the Due Process Clause of the Fourteenth Amendment, and have been since the Amendment's ratification. In other words, if Nicholas is right, then those States that do not require a consideration of amenability at all, along with those that "plac[e] the burden of proof on the minor defendant," *W.M.F.*, 723 P.2d at 1301, are depriving their citizens of due process and standing athwart the Constitution. It is unlikely that so serious a violation would have gone unnoticed for so long.

Because Nicholas does not have a protected interest in being tried in juvenile court, and because he therefore cannot satisfy the first two *Mathews* factors, it is unnecessary to discuss *Mathews*'s third factor at any length. It is sufficient to say that the State has the same sovereign interest in the structure of its criminal justice system that justifies *Patterson*'s deferential due-process test. *See Patterson*, 432 U.S. at 201–02. Any additional or alternative process that the Court might require under the guise of due process would significantly intrude on that interest. *See Medina*, 505 U.S. at 445–46.

Nicholas and his *amici* make a variety of policy arguments that, they claim, justify requiring the State to prove by clear and convincing evidence that a juvenile is not

amenable to rehabilitation. They direct their arguments to the wrong branch of government. The General Assembly created the juvenile-court system and its bindover process. If that system is no longer working as intended, the General Assembly can change it. *See Aalim*, 150 Ohio St. 3d 48 ¶3. In Ohio, a court's role "is to apply the statute as it is written—even if [the court] think[s] some other approach might 'accord with good policy.'" *Johnson v. Montgomery*, 151 Ohio St. 3d 75, 2017-Ohio-7445 ¶15 (quoting *Burrage v. United States*, 571 U.S. 204, 218 (2014) (alteration adopted)). Nicholas and his *amici* may or may not be correct that juveniles would be better served by requiring the State to prove by clear and convincing evidence that they are not amenable to rehabilitation. But whether they are right is a question for the legislature.

CONCLUSION

The Court should affirm the Second District's decision below.

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I certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee was served by email this 4th day of June 2021, upon the following counsel:

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