No. 2020-1429

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE CHAMPAIGN COUNTY COURT OF APPEALS
SECOND APPELLATE DISTRICT
CASE NO. 2018 CA 00025

STATE OF OHIO,
Plaintiff-Appellee,

v.

DONOVAN NICHOLAS
Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT, DONOVAN NICHOLAS

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INTRODUCTION

The government confounds the proper framework and tries to read *Addington* and *Santosky* right out of this case. Both are just iterations of *Mathews* balancing. They teach that standards of proof are needed to mark the importance of a decision, while also allocating the risk or error. Standards protect against chance decisions. Those cases also resolve any doubt that these are *procedural due process questions for the judiciary*, not just state legislatures. The government wrongly insists that statutory mechanisms alone satisfy due process. But even the *dissent* in *Santosky* properly conceded that the adequacy of statutory mechanisms is to be judged by constitutional standards. *Addington* and *Santosky* thus control. Under them, Donovan proposes that interest-balancing requires a clear burden and standard, given the interests at stake. Bypassing these decisions entirely, the government curiously paints Donovan's constitutional arguments as "asking the Court to ignore" the constitution. Far from—he asks only that this Court re-align Ohio's transfer statute with it, using the right analysis. The state's portrayals should be met with scrutiny.

STATEMENT OF THE CASE AND FACTS

Its response also calls for several important clarifications. First, the severity of Donovan's mental illness is well-documented in four separate expert reports filed throughout this case. Yet, while the government avers Donovan overlooks the offense, it says remarkably little (if anything) about the mental health issues leading to it.

Second, Donovan contested transfer in both the juvenile court and on appeal. Juvenile defense counsel first argued in writing that "[t]he state does not have any evidence that Donovan is not amenable to rehabilitation. Contrary evidence is abundant." (10.26.17 Memo in Opposition State's Motion to Transfer, p.1). Counsel thus told the court that

"Rehabilitation is available [and] *[t]he cost of treatment is miniscule compared to a life prison sentence which could last 70 years*." He argued the court "should retain Donovan in the juvenile system with a serious youthful offender adjudication." (*Id.*).

On direct appeal, Donovan specifically argued ""[b]ecause the amenability hearing must measure up to the essentials of due process and fair treatment, children are not only presumed amenable, but the State is also required to present sufficient evidence to the contrary." (Merit Brief at 14-15). Alleging abuse of discretion and due process violations, he informed the court the standard of proof is not settled in Ohio; and he argued courts must "ensure that amenability proceedings satisfy governing evidentiary standards and due process." (*Id.* at 23). His opening brief also says the decisions below fail *under any standard*.

Third, Dr. Hrinko was called as Donovan's witness—not the court's. (10.31.17 T.p.76 ("Dr. Daniel Hrinko, called as witness on behalf of the juvenile"); *see also* (11.17.17 Amenability Entry, p.2 ("The juvenile presented the testimony of Dr. Daniel Hrinko.")). So too was Ms. Book. No one but the prosecutor opined that DYS could not treat Donovan.

Fourth, the government's insistence that it *did* provide evidence on Donovan's amenability lacks critical context. It elicited testimony about the severity of the offense. But, none of those facts were ever in dispute—counsel stipulated. Beyond *that*, prosecutors presented no evidence of their own concerning *Donovan's* mental illness, its prognosis, or his responsiveness to treatment—in other words, on the ultimate amenability question.

Finally, beyond conclusory recitals of the statutory factors, the juvenile court's decision expressly hinged on one specific finding that ODYS could not treat Donovan. (11.17.17 Amenability Entry, p.3). Even the appellate court acknowledged: "[t]he dispute, as noted, related to the finding that ODYS did not have the resources or capability of

treating DID." Opinion at ¶ 59. But, the juvenile court assuredly did not issue any findings regarding the credibility of either Dr. Hrinko's evaluation or testimony, or that of Ms. Book. (*Id.*). While the appellate court reached its own post hoc conclusions about Dr. Hrinko's testimony (calling it "vague" and "variable"), none of that came from the juvenile court itself. Any contrary contention is easily disproven by the transcript and amenability entry.

Those corrections aside, Donovan relies on the fact statement in his brief.

REPLY ARGUMENT

First Proposition of Law:

Because standards of review are functions of due process, non-amenability decisions for discretionary transfer must be supported by clear and convincing evidence.

I. This Court accepted this case to resolve important constitutional questions. They can and should be decided.

This case was not decided on waiver principles below, as waiver was never asserted by the state before now. But, given the prosecutor's response, it is necessary to explain at the outset the propriety of this Court's reaching the merits of Donovan's claims.

A. The issues were raised with enough clarity and passed upon below.

First, juvenile defense counsel objected to transfer, asserting the state had no evidence that Donovan was not amenable, and that there was abundant evidence to the contrary. (10.26.17 Memo in Opposition State's Motion to Transfer, p.1). He argued, as Donovan does now, that costs of treatment are "miniscule compared to" the deprivation. (*Id.*). On appeal, Donovan argued "Ohio law presumes children are amenable and the state must prove they are not." (Merit Brief at 14). He explained that "*[b]ecause the amenability hearing must measure up to the essentials of due process and fair treatment, children are not only presumed amenable, but the State is also required to present sufficient evidence to the*

contrary." (*Id.* at 14-15). He said evidentiary standards must satisfy due process. (Id. at 23). And, he even noted the precise standard of proof is not settled, but varies by jurisdiction.

On reconsideration, Donovan asked the court to resolve that question or order additional briefing, which the court declined to do. The court instead held the state has no burden to prove non-amenability, and that statutory factors obviate the need for any clear standard of proof—which is exactly what the government argues here. The court concluded: "there is no 'standard of proof issue' to be resolved." (10.8.20 Decision and Entry Denying Reconsideration, p.14). The appellate court's decision thus gave rise to the narrower issues presented in Donovan's jurisdictional memorandum, which this Court accepted for review. That these questions were pressed and passed upon justifies this Court's review. *State v. Barker*, 149 Ohio St.3d 1, 2016-Ohio-2708, 73 N.E.3d 365, ¶ 36 (explaining how the question presented crystallized with the appellate court's decision).

B. The waiver doctrine is discretionary for this Court; and the due process rights raised are critically important.

Second, even if waiver applied, the waiver doctrine in *State v. Awan*, 22 Ohio St.3d 120, 22 489 N.E.2d 277 (1986), is discretionary. Thus, even where waiver is clear, this Court has said that it reserves the right to consider constitutional challenges to the application of statutes "where the rights and interests involved may warrant it." *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988) (explaining that while the constitutional challenge was presented in more general terms below, "the due process considerations of appellant's arguments are apparent, and sufficient to avoid the waiver issue").

Notably, the state cites to this Court's decision in *State v. Barker,* infra, to argue otherwise. But, its reading of *Barker* stops fatally short. What this Court actually said in *Barker* was this:

> [W]e reject the state's invitation to sidestep the due-process issue in this case. Even were we to agree with the state that Barker waived his due-process challenge to the application of R.C. 2933.81(B) to juveniles, review is appropriate here. In the criminal context, this court has considered constitutional challenges to the application of statutes despite clear waiver "in specific cases of plain error or where the rights and interests involved may warrant it." The constitutional rights at issue here and the importance of those rights to juveniles would justify our review even if Barker had waived a due-process challenge. Thus, contrary to the dissent's imputation, review of Barker's due-process challenge is consistent with the law of this state.

Barker at ¶ 37 ("Barker promptly raised that challenge in his [jurisdictional] memorandum before this court, and we accepted jurisdiction despite the state's assertion of waiver.").

This same justification applies with equal force here since, as discussed below, a child's liberty interest in retaining their status as a juvenile is significant. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 87 (O'Connor, C.J., dissenting).

C. These questions are also logically necessary for properly resolving the central amenability dispute.

Finally, if nothing else, this Court has long said that "'[w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue.'" *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 67-68, quoting *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993). The narrow legal questions now are implicit in the amenability dispute, which asked whether the state presented sufficient evidence of non-amenability. They are not settled in Ohio, and they are logically necessary for meaningful appellate review of such decisions. Indeed, courts and litigants must know from the outset what the sufficiency-threshold is.

Adding to the above, therefore, this Court can and should resolve the questions presented, given their close nexus to each other, and to the ultimate amenability question.

II. This is a procedural due process issue. The *Addington-Santosky* due process framework controls.

The government tries to shoehorn this matter into what it regards as the more "deferential due process test" from *Patterson*, infra. (Attorney General Amicus Brief at 27). But, those attempts notwithstanding, "[t]he Court has engaged in a straight-forward consideration of the factors identified in *[Mathews v.] Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process."[1] *Santosky* v. *Kramer*, 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Relatedly, constitutional procedural safeguards for juveniles "find their genesis in the Due Process Clause of the Fourteenth Amendment," which is equivalent to Ohio's due course of law provision. *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 44; *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶ 11, citing *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941). And this Court regards Supreme Court decisions as "giving the true meaning" of due process guaranties. *Dayton Plumbing* at 545. As such, *Addington* and *Santosky's* balancing framework governs this constitutional analysis.

A. *Addington* and *Santosky* are just specific applications of *Mathews*, tailored to the standard-of-proof context.

To that end, "[w]hether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss." *Santosky* at 758. "In any given proceeding, the minimum standard of proof tolerated

[1] Much of what the Attorney General portrays as doctrinal confusion stems from its own overreliance on *Patterson*, from which the Court retreated in *Addington* and *Santosky*. The state's amicus, in short, tries to transform *Patterson* into controlling law—even though *Patterson's* hands-off, strict-federalist approach eventually lost out. *See* Section III(C)(1).

by the due process requirement" thus turns on "a straightforward consideration of the [*Mathews*] factors." *Id.* at 755. These include: (1) the private interests affected; (2) the risk of error created by the existing procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure.[2] *Id.* at 754-755. *Addington* further imparts that this weighting should reflect "a societal judgment about how the risk of error should be distributed[.]" *Id.*

B. *Within the framework:* By statute and court decision, Ohio uniquely recognizes the important liberty interests at stake.

1. A state-created interest. On the private-interest factor, the government claims Donovan loses because kids have "no substantive interest in being tried in juvenile court." (Attorney General Amicus Brief at 25-27). Regarding transfer as no more than a "forum" decision, it reasons children have no substantive right to specific juvenile court proceeding.

But, this conflates substantive and procedural due process. Moreover, it ignores that "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies[.]" (Emphasis added). *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 2393, 162 L.Ed.2d 174 (2005). "By enacting legislation, states may create liberty interests that are protected by the federal Due Process Clause." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 76 (O'Connor, dissenting), citing *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Ohio did when it enacted R.C. 2152.12.

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[2] Rather than constituting a separate test, as the government suggests, these factors were adopted *precisely to ensure fundamental fairness* in the standard of proof. *See generally Santosky* at 754-757(retracing the Court's standard-of-proof-cases decided under *Mathews* and referring "the level of certainty necessary to preserve fundamental fairness.").

Thus, as explained in *Santosky*, the question for procedural due process isn't simply whether a claimed right ranks as "fundamental," as once articulated in *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Rather, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Santosky* at 758.

2. The interest is significant. To that end, this Court has already said, and rightly so, that transfer abridges a child's liberty interests. "Diversion out of the juvenile justice system, undeniably affects the length of confinement to which an accused minor is exposed." *State v. Iacona*, 93 Ohio St.3d 83, 91, 752 N.E.2d 937, 946 (2001). The decision made there is thus "material to punishment." *Id.* And so, contrary to the government's claims, "the transfer hearing implicates far more significant issues than venue or forum of trial; it serves as a vehicle by which a child offender is deprived of the rehabilitation and treatment potential of the juvenile-justice system. *Aalim* at ¶ 73 (O'Connor, C.J., dissenting). Even *counsel for the state* in *Aalim* admitted "the crux of the issue is punishment. That's what it's all about. It's not really about process * * * It's about [punishment]." *Id.* at 74.

And they were right: "[j]uveniles who are transferred to adult court for a criminal trial are more likely to be incarcerated, more likely to receive longer periods of incarceration, and have significantly higher rates of recidivism and reoffend more quickly." *Id.* at ¶ 87. "Not only do many child offenders receive harsher sentences in adult court, but all child offenders with adult convictions face the collateral consequences of those convictions * * * in a manner far greater than they would in juvenile court." *Id.*

Importantly, time spent in adult prisons ill-suited to the needs of children is time for juvenile-rehabilitation those children will never get back. Brushing aside these

consequences makes them no less real. Nor does it diminish them. Ohio created a liberty interest when it enacted R.C. 2152.12(B). And given the stakes, that interest is substantial.

C. *Within the framework*: *Santosky* imparts that standardless schemes create too great a risk for bad decisions. While guiding discretion, a clear standard does not overly burden the state's interests.

Notably, the government hardly speaks to the last two *Mathews*' factors Indeed, its amicus even says: "it is unnecessary to discuss *Mathews'* third factor at length." In its view, "[i]t is sufficient to say the State has the same interest in the structure of its criminal justice system that justifies *Patterson's* deferential due process test." (Attorney General Amicus Brief at 27). But, saying little of the fact that *Patterson* does not supplant *Santosky* (if anything, the opposite is true), *Santosky* itself squarely rejected this very position.

1. Santosky *rejected the claim that standards of proof are only matters for State legislatures. Rather, the adequacy of state-provided process is judged by constitutional standards.*

Invoking *Patterson,* the government wrongly insists this Court has no role, claiming: "[a]ny additional or alternative due process would significantly intrude on that interest." (Attorney General Amicus Brief at 27). But, *Santosky* rejected this "deferential" view, saying procedural due process requirements "'are not diminished by the fact that the State may have specified its own procedures that it may [have] deem[ed] adequate for determining the preconditions of adverse action.'" *Santosky*, 455 U.S. at 755, 102 S.Ct. 1388, 1396, 71 L.Ed.2d 599, quoting *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). Rather, in a retreat from the strict-federalist view espoused in *Patterson*, the Court concluded "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" *Id.*, quoting *Woodby v. INS*, 385 U.S. 276, 284, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966) (deciding the proper

standard of proof under a silent federal statute precisely because "Congress ha[d] not addressed itself to the question of what degree of proof [was] required"). In short, this very claim was a source of contention in *Santosky*, and the government's view lost out.[3] As such, the government's reliance on *Patterson* is wrong—if it were right, an entire line of Supreme Court jurisprudence deciding standards of proof under state statutes would not exist.

2. Addington and Santosky *explain that case-by-case appellate review does not cure an inadequate procedure.*

Furthermore, the prosecutor's insistence that no standard is needed simply because courts *so far* have applied abuse of discretion reviews (without any lower-court standard of proof in place) also fails muster. "[L]itigants and factfinders must know at the outset of a given proceeding how the risk of error will be allocated." *Santosky*, 455 U.S. 757, 102 S.Ct. 1388, 1397, 71 L.Ed.2d 599. Accordingly, "the standard of proof necessarily must be calibrated in advance." *Id.* As discussed at length, the practical realities of amenability hearings show that factors alone and aimless balancing do not suffice.

As this case proves, R.C. 2152.12's factors have come to be confused with the ultimate question—which turns not on one factor, or on a mechanistic tallying of them, but rather on *that child's* needs and responsiveness to individualized treatment. Making matters worse, appellate courts have widely come to accept conclusory recitals, untethered from the weight or sufficiency of the actual evidence presented. In this way, the factors, while well-intentioned, have only obscured the very abuses they were meant to prevent.

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[3] Only the *dissent* in *Santosky* took the view urged by the government here, claiming courts "simply have no role in establishing the standard of proof states must follow." *Santosky* at 772, fn.2 (Rehnquist, J., dissenting). The majority disagreed, and in its own footnote reminded us: courts must of course examine a chosen standard to "determine whether it satisfies the constitutional minimum of fundamental fairness." *Id.* at 756, fn.8.

By contrast, a standard of proof "*serves to allocate the risk of error between the litigants* and to indicate the relative importance attached to the ultimate decision." (Emphasis added.) *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). "The function of a standard of proof * * * is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Id.* at 423.

Accordingly, "[r]etrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." *Santosky* at 757. Nor can the mere prospect of appellate review. *Santosky* at 757, fn.9 ("the Court [has never] treated appellate review as a curative for an inadequate burden of proof"), citing *Woodby*, 385 U.S. at 282, 87 S.Ct. 483, 486, 17 L.Ed.2d 362. This is because "*judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment*." *Woodby* at 282. Of course, that cannot be done here without an actual standard—especially considering the lower court's erroneous view that "juvenile courts are not required to make written findings about the factors; they need only consider [them]." (10.8.20 Decision and Entry Denying Reconsideration, p.13). Without any guidance as to how evidence ought to be viewed—let alone a standard of proof—no one knows what degree of confidence courts must have in non-amenability decisions.

3. The government does not explain how a clear standard would overly burden its interests.

Returning to the third factor, "the relevant question when considering the third *Mathews* factor is *not* whether the process will burden the state *at all* but, rather, whether the burden of additional procedural safeguards *outweighs* the child's liberty interest in

retaining juvenile status and the risk of erroneously depriving the child of that status." *Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 92 (O'Connor, C.J., dissenting). Beyond the circular argument that courts *so far* have applied abuse of discretion reviews, the government does not explain how, exactly, it'd be overly burdened by having to prove its allegations that adult prosecution is necessary. Even with a standard, these hearings must still be held, evaluations must still be conducted; and, factors must still be considered. The only difference is that a standard ensures that decisions reflect the evidence. On this factor, Donovan otherwise relies on the arguments in his brief.

D. *Santosky* itself says the applicable standard-of-proof jurisprudence is not limited to "final deprivations."

Finally, to the extent the government *does* acknowledge *Addington* and *Santosky*, it misreads them. Failing to acknowledge that they are just iterations of *Mathews*, the government avers this only applies "in the context of a hearing that leads to a final deprivation of rights." (Attorney General Amicus Brief, p. 24). Not so. As noted, the private right is only relevant insofar as it's *part of* the *Mathews* analysis.

Further, *Mathews* has nothing to do with the *type* of hearing—once it is determined that due process applies, the question is how much process is due. And regardless, *Santosky* itself explains that every standard-of-proof case before it addressed deprivations that were "to a degree, all reversible official actions." (Emphasis added.) *Santosky* at 758. In short, *Santosky* didn't refer to finality as a pre-condition to due process—it did so only in comparison, saying the logic used in earlier cases applied with even more force there. The government's attempt to categorically avoid *Santosky* is thus unavailing. *Santosky* confirms that *Mathews* balancing is used to ensure fundamental fairness in the standard of proof for in any given proceeding. The right standard depends on the balancing of interests.

III. At the same time, neither this Court nor the Supreme Court has ever been asked to discern the proper burden and standard. The state wrongly says "controlling precedent" precludes review.

Accordingly, the standard-of-proof question falls squarely under *Addington* and *Santosky*: whatever it may be, the right standard of proof depends on the balancing of interests. Neither this Court's decisions nor any out-of-state cases require otherwise.

A. *Carmichael*, *Douglas*, and *Watson* recite then-existing standards, crafted under a different statute. A ruling here softens their reasoning but does not disturb their core holdings.

Simply put, the fact that Ohio's courts have thus far applied abuse of discretion review does little to resolve this appeal—which deliberately asks this Court to reconsider the status quo as unfair and unworkable. That said, a ruling here also does not require this Court to *overturn* any of its prior *holdings*. To illustrate:

- *State v. Carmichael* dealt with the use of hearsay statements from an amenability report. Addressing the statutory language in effect at that time, the Court concluded in passing that "the investigation is not required to show that the child cannot be rehabilitated as a juvenile but only that there are "reasonable grounds to believe" that he cannot be. *State v. Carmichael*, 35 Ohio St.2d 1, 6, 298 N.E.2d 568 (1973). Allowing hearsay, the Court concluded there was sufficient evidence. *Carmichael* is now cited for the idea that courts enjoy wide discretion.

- *State v. Douglas* was a 1985 per curium decision relying on *Carmichael*. The issue was whether the juvenile courts properly considered the five factors, even if it didn't issue written findings. The Court rightly held the statute *then* did not require juvenile courts to make written findings. The Court also said "as long as sufficient, credible evidence pertaining to each factor exists in the record before the court, the bind-over order should not be reversed in the absence of an abuse of discretion." *State v. Douglas*, 20 Ohio St.3d 34, 36, 485 N.E.2d 711, 712 (1985).

- *State v. Watson* then held that "a juvenile court may consider the seriousness of the alleged offense when determining [amenability]," even though it was not listed in the rule or statute in 1989. *State v. Watson*, 47 Ohio St.3d 93, 96, 547 N.E.2d 1181(1989). *Watson* is cited for its *reasoning* stating that Rule 30 calls for a "broad assessment" and that, to protect judicial discretion, "[m]echanical application of a rigidly defined test would not serve the purposes of the public or the juvenile." *Id.*

Needless to say, each of these cases are thirty-fifty years old, decided under a differently-worded statute. They were even decided before *Santosky*. At any rate, none of them asked this Court to consider what standard is required by procedural due process. That is not how those cases arose. And finally, each of their *holdings* will remain unaffected.

To illustrate, regarding *Carmichael*, juvenile courts would still retain wide discretion under a standard, which merely guides its weighing of the factors as evidence. A standard merely provides a benchmark. For *Douglas*, holding vis-à-vis "consideration," was abrogated by the current statute anyway, which requires that "[t]he record shall indicate the specific factors that were applicable and that the court weighed." R.C. 2152.12(B)(3). And as for *Watson*, it's holding is now incorporated in the current statute which calls for consideration of the safety of the community and "any other relevant factor." R.C. 2152.12.

At most, portions of *Watson's* reasoning are softened by a clear standard. But even then, the two are easily reconciled. *Addington* and *Santosky* explain that a standard does not *eliminate* discretion but rather *guides* it. It does so by impressing upon the factfinder the importance of the decision. It tells courts how certain they must be. Pertinent examples proving this point are serious youthful offender or sex offender classification hearings, where courts must weigh statutory factors in their sound discretion, but the determination must still be supported by clear and convincing evidence*. In this way, a ruling here would merely clarify* Watson, *under the right analysis.*

Finally, a standard of proof doesn't necessarily change the standard of *appellate review* in every case, either. Appellants may still allege abuses of discretion in the weighing of factors—which would call for abuse of discretion review. What a standard does do, however, is allow for cleaner sufficiency and manifest-weight reviews.

B. The government oversimplifies non-binding caselaw.

Similarly misplaced is the government's reliance on out-of-state decisions based on rationales now inapplicable in Ohio. In a string of parentheticals, the state and its amici point to selected out-of-state decisions rejecting a clear and convincing evidence standard. What the government fails to disclose, however, is that most of these cases simply held due process didn't require *more than the existing standard of proof already provided*. In others, like the federal cases cited, courts rejected one standard, only to fall back to a lesser one—which is just as much of an option for this Court here. And in still others, courts rejected heightened standards, but did so based on their own flawed understandings that transfer does not implicate liberty interests; or that transfer is merely about venue or forum.

Importantly, a growing legal and scientific consensus recognizes the harmful effects of adult incarceration on growing children. And, decades after these decisions, it is no longer reasonable to contend that transfer is just a matter of venue or forum—it is strictly and admittedly about punishment. Thus, not only are these decisions non-binding, but the idea that no court has ever adopted a standard (or that doing so is impossible) is not true.[4]

IV. Given *Addington* and *Santosky*, the constitutional avoidance doctrine also counsels in favor of a clear burden and standard, which will protect against future facial attacks.

At its core, the state's position is that the statute only calls for factor-balancing and fact-balancing is enough. But, a "statute or other rule of law 'must be construed, if fairly

[4] Research further discloses that as of 2014, nearly half of the states in the nation *do* now employ a burden and standard of proof, ranging from a mere preponderance to clear and convincing. *See Hill v. United States*, Inter-American Commission on Human Rights Case No. 12.866 Human Rights Watch Amicus Brief Appendix of State Transfer Laws (March 19, 2014), available at https://www.aclu.org/legal-document/hill-v-united-states-america-human-rights-watch-amicus-brief-appendix-state-transfer (last accessed July 2, 2021).

possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *In re Stormer*, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317, ¶ 20. "If one [interpretation] would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 381, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005). *Stormer* shows this Court has taken that doctrine seriously. *Stormer* at ¶ 17-20 (construing a judicial conduct rule with no means rea as requiring knowing conduct, because the rule would pose potential constiutional implications for future candidates).

Donovan asks no more of this Court here. A burden and minimal standard are already suggested by the statute's use of the term "outweigh," which must be given effect. A higher standard only gives greater credence to the seriousness of the liberty interests at stake, as required by due process. Either way, the state's factor-only analysis raises grave constiutional concerns given the applicable due process framework and the analogous interests protected by standards in *Addington* and *Santosky* (and far lesser ones protected elsewhere). Adopting a standard would only harmonize the statute's purpose and text with due process, while also protecting the statute from future facial attack.

For all these reasons, this Court should reject the government's non-constitutional readings, apply the correct framework, and adopt Donovan's propositions of law.

Second Proposition of Law:

> **As the party moving for discretionary transfer under R.C. 2152.12(B), prosecutors typically bear the burden of proving the child is not amenable to juvenile court treatment. A transfer decision without any affirmative proof of non-amenability must be reversed.**

The state does not squarely or fairly respond to Donovan's arguments on this issue either. As fully explained in his reply brief below, Donovan has relied on *Kent* not for the

proposition that children are presumed amenable (although, the letter and spirit of *Kent* surely imply they are), but for its landmark declaration that transfer hearings are "critically important proceedings" that must measure up to the essentials of due process and fair treatment. (See Merit Brief at 14).

Instead, the presumption in favor of retention *is a product of the statute's language, structure, and this Court's understanding of transfer as the limited exception*. If, as the government insists, we need look no further than the statutory factors, then we cannot also ignore the context in which those factors are situated. Nor can we look past the surrounding language, which says reasons for transfer should "outweigh" those in favor of retention. R.C. 1.42, 1.47, 1.49. No part of a statute should be treated as superfluous. *State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655, 48 N.E.3d 553, ¶ 12. If the starting assumption *isn't* retention, then "outweigh" becomes just that.

In addition, denying that a presumption exists is to transform the "narrow exception" into the rule—which has the secondary effect of collapsing the legislative distinction between mandatory and discretionary transfer. Conversely, stating that juveniles are presumptively juveniles (in a system requiring that juvenile cases begin in juvenile court) is not unreasonable.

And finally, as noted in the merit brief and below, requiring prosecutors to prove the allegations triggering the transfer process is a sensible rule, comporting with current policy and litigation norms. *Schaffer v. Weast*, 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (where statutes are "silent on the allocation of the burden of persuasion, the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims."). The government provides no enduring justification to depart from the general rule here.

Third Proposition of Law:

> **To meaningfully decide whether juvenile offenders are not amenable to juvenile court treatment, juvenile judges must first weigh all the available dispositional options, especially, where provided by statute, a serious youthful offender disposition.**

Lastly, the state wrongly asserts that "any potential availability of a stayed 'adult portion' in a possible SYO adjudication * * * is not 'care or rehabilitation within the juvenile system' as contemplated by R.C. 2152.12(B)(3)." (State's Brief at 41). Thus, it argues, this dispositional option "can not and should not be a required factor for a juvenile court to consider." (Id). This is fundamentally incorrect.

"[T]he nature of an SYO disposition requires that the juvenile *remain under the continuing jurisdiction of a juvenile judge*[.]" *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 14, citing *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 18 (making clear "the case remains in the juvenile court"). The entire point is that "the threat of the imposition of an adult sentence encourages a juvenile's cooperation in his own rehabilitation, functioning as both carrot and stick." *Id.*

Adding to that, R.C. 2152.12(C) already requires that juvenile courts "shall" consider "*any other relevant factor* bearing on whether the child is amenable to juvenile rehabilitation." R.C. 2152.12 (E) says "the juvenile court *shall consider* the following relevant factors, and any other relevant factors, against a transfer." And, (B) says "[t]he record *shall indicate* the *specific factors* that were applicable and that the court weighed."

The only question, then, is whether this is carrot-and-stick approach is *relevant* to an amenability determination. And of course it is. Blended sentencing "gives the court time to learn if the child simply needs guidance under the juvenile system and the tools to deal with a juvenile who poses an ongoing threat." Ohio Criminal Sentencing Commission, A

Plan for Juvenile Sentencing in Ohio (1999), p.28. Here, Donovan was eligible for at least 6 more years of intensive court services, plus whatever adult-court sentence the court deemed fit. And contrary to the state's assertions, nothing on this record even implies the juvenile court actually considered SYO. This is why the dissent noted:

> The juvenile judge had this blended sentencing tool in her arsenal if she denied transfer. *At a minimum, she should have considered it as requested in a motion filed by Nicholas's counsel.* * * * With blended sentencing, the court could have taken advantage of lock-down facilities and therapeutic and rehabilitation services which are uniquely available for a child. *The court could have observed how Nicholas performed until the age of 21. Upon his majority, the court would then have had a record of treatment and performance upon which to base a more informed, predictive decision about the possibility for success versus risk to society. Blended sentencing affords an opportunity for redemption while retaining institutional control over the juvenile for the protection of society, which can be a win-win proposition*.

Opinion at ¶ 213 (Donovan, J. dissenting).

The state's separation-of-powers claims are thus baseless, since this is all already in the statute—Donovan is merely asking this Court to confirm that a blended SYO sentence is a relevant other factor juvenile courts *shall consider* under R.C. 2152.12(C) and (E).

Such a holding would be consistent with this Court's prior guidance, which instructs juvenile courts "should be open to innovation that may help the system reach its important objectives." *D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, at ¶ 55. It also comports with the well-founded understanding that "society should make every effort to avoid [children] being attainted as criminal before growing to the full measure of adult responsibility." *In re Agler*, 19 Ohio St.2d 70, 71–72, 249 N.E.2d 808 (1969).

In stark contrast, the government here urges unbridled judicial discretion where it favors transfer, but then denies any discretion exists where it would aid in retention. Such a view does not even pretend to appreciate the origins and purpose of the SYO scheme. Or, for that matter, that transfer is the narrow exception and not the rule.

CONCLUSION

In sum, *Addington* and *Santosky* govern the constitutional analysis. Those cases resolve any doubt that these are questions for this Court, not the legislature. They also require interest balancing, and none of this Court's prior decisions (addressing related but different issues) compel a different analysis. Donovan's other two propositions comport with ordinary default rules, as well as Ohio's overall transfer scheme and jurisprudence. For these reasons, the government's contentions fall short. This Court should adopt Donovan's propositions and reverse the decisions below.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

A copy of the foregoing **Reply Brief of Defendant-Appellant, Donovan Nicholas** was sent by facsimile mail this 9th day of July 2020, to Kevin Talebi, Champaign County Prosecutor, at Champaign_County_Prosecutor.937-484-1901@fax2mail.com.

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