No. 2022-0106

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE MAHONING COUNTY COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
CASE NO. 20 MA 00036

STATE OF OHIO,
Plaintiff-Appellee,

v.

MANNY ZARLENGO
Defendant-Appellant.

MERIT BRIEF OF APPELLANT MANNY ZARLENGO

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INTRODUCTION

Ours is a system of pleas, not a system of trials. Removing any doubt, well over 90% of criminal cases now end in pleas. This case illustrates the myriad pressures and considerations that lead ordinary people to plead guilty every day. It also concerns the supposed preclusive effects of doing so. Given what we now know about pleas and the means by which they're secured, the rationale of the default waiver-by-guilty-plea rule rests less on fact than outmoded fiction—today, people often plead guilty for reasons that have little to do with admitting factual guilt. This is especially true when the defendant is but a high school teenager, threatened with 136 years of adult imprisonment.

Beyond that, the default waiver rule has always been subject to a longtime jurisdictional exception anyways, known as the *Menna-Blackledge* doctrine. This case asks this Court to clarify that claims challenging a juvenile court's transfer of subject matter jurisdiction to adult court fall directly within it. Otherwise, so that real errors in transfer decisions remain subject to meaningful review, this Court must recognize an interlocutory appeal from those decisions. Doing so would be crucial to ensuring reliable transfer decisions, particularly since nearly all cases now end in guilty pleas. Regardless, the legal ruling below should not be permitted to stand. By either existing exception or a new appellate right, juvenile transfers must be reviewable notwithstanding later guilty pleas.

STATEMENT OF THE CASE AND FACTS

Manny Zarlengo was 16 years old when his case began in Mahoning County Juvenile Court. He along with two co-defendants were alleged to have committed 11 armed robberies of six different fast food or discount stores over a five-day period in October

2013. (11.16.13 Complaint). Initially, the court and parties "thought it was going to work out," such that Manny would be kept in juvenile court. (5.22.14 T.p. 3).

As counsel noted: "[t]hroughout the negotiations in this case for quite some time the offer of the state to my client was a statement admitting and identifying his role and other people's role in these offenses and this matter would be handled as a juvenile offense rather than a bindover to the Mahoning County Grand Jury as an adult." (6.10.14 T.p. 7).

That did not happen. The state instead moved for mandatory transfer. This led to Manny's adult prosecution, plea bargaining, and his eventual plea to the indictment; followed by an 18-year adult prison sentence. Manny unsuccessfully moved to withdraw his plea immediately after sentencing, and his convictions were later upheld on appeal.

I. Manny first contests the credibility of the state's identification evidence.

Before that, the matter came on for a contested evidentiary hearing in juvenile court. "[T]he state presented testimony from a detective, some of the store employees, a neighbor to the store, and a juvenile [J.M.] who was one of Appellant's co-defendants." Opinion at ¶ 2. As would later be argued on appeal, the problem was that none of the state's fact witnesses had ever been asked to identify anyone, much less Manny, pre-hearing.

"There was no physical evidence presented at the juvenile hearing. There was no scientific evidence presented either. No guns were recovered. The sole evidence was eyewitness testimony." (Merit Brief at Appellant at 10).

No pre-hearing lineups or photo arrays. All the state's fact witnesses testified that the assailants' faces were covered. (*See* 12.8.14 T.pp. 31, 44-45, 54, 56 69). The first witness, Ted Cougras (Subway), insisted he would not forget their eyes—even though their faces were covered. (12.8.14 T.pp. 31, 33, 40). On cross-examination, he would further

admit that he had been given a name and *Facebook photo of Manny before the hearing*, still without any official pre-hearing lineup. (12.8.14 T.pp. 36-37).

John Goodson (Taco Bell) would likewise offer a first-time identification in court, supposedly based on the assailants' "complexion;" but his in-court description varied from his written statement to police, which said one assailant was "five-eight with a stocky build," and the other was "thin-built five-nine, about 16 to 20 [years old] and light skinned." (*Compare* 12.8.14 T.p. 57 *with* T.pp. 59-60, 62-64).

Manny was five-foot-four. (12.8.14 T.p. 60). Goodson would not be deterred. *Id.*

Meanwhile, Mr. Cougras's employee, Chelsea Caggiano (Subway), wasn't even asked for an identification on the record. (12.8.14 T.pp. 41-50). Nor were Chris Conway (Taco Bell) or Marnie Turner-Humphrey (McDonalds)—again, "masks covering their face[s];" no identifications at all. (12.8.15 T.pp. 69, 81-82).

Finally, regarding supposed eyewitnesses, the state also elicited testimony from Manny's juvenile co-defendant J.M., who inculpated himself and Manny to varying degrees in different incidents. (12.8.14 T.pp. 90-143).

But J.M. presented reliability problems of his own.

He previously gave the police a written statement in which he did not identify any other accomplices. (12.8.14 T.p. 101). According to the state's detective-witness: "what he said in court today is different than what he said that day." (12.8.14 T.p. 158).

And, he was originally charged with "more than one count" of aggravated robbery with gun specifications. (12.8.14 T.p. 102). But then, "the State of Ohio Amended [his] charges in order to keep [him] at the Ohio Department of Youth Services[.]" (12.8.14 T.p.

102). "If the state did not amend the charges [he] would – [he] [was] eligible to be bound over as an adult." (12.8.14 T.p. 102).

STATE: [J.M.] did your attorney ever tell you you would have to do something in exchange for the state amending your charges and keeping you as a juvenile?

J.M.: Yeah, plead guilty [in juvenile court]. They didn't tell me I would have to testify.

STATE: He did not?

J.M. No.

(12.8.14 T.pp. 103-104). J.M. then briefly refused to testify. (12.8.14 T.p. 105).

The state's own witness, detective Lambert, later opined that "I believe [J.M.] and Zarlengo both do not want to talk about Mascarella[,]" who was the adult allegedly involved in the robberies. (12.8.14 T.p. 160). Only after an off-the-record discussion with counsel did J.M. relent. And only after that did his statements inculpating Manny first follow.

Manny wasn't so lucky. Based on the direct and cross-examination testimony from these witnesses, as well as from a detective who introduced inculpatory crime-stopper tips, the juvenile court found probable cause to believe Manny committed each of the offenses charged. (6.25.14 Entry). It transferred the case for adult criminal prosecution.

II. Threatened with 136 years in adult prison, Manny is convicted by plea in criminal court. He immediately moves to withdraw it.

Once in adult court, Manny, now 18, was indicted by a grand jury on the same 11 offenses, enhanced with three-year firearm specifications on each count. (7.24.14 Indictment). He appeared before the trial court still a high school student; he had made it only to the 11th grade; still no high school diploma. (12.8.14 T.p. 3).

Based on that indictment, he was told, he faced a possible 136 years in adult prison, with approximately $220,000 in financial sanctions. (12.8.14 T.p. 6). At the plea hearing, the judge further remarked, incorrectly: "Do you understand that if somebody died as a result of one of those robberies, you would be looking at the death penalty?"[1] (12.8.14 T.p. 13). On December 8, 2014, Manny pleaded guilty to the indictment, as charged.

Two months later, he was sentenced based on the parties' joint recommendation, to an aggregate 18 years in adult prison.[2] (2.20.15 Judgment Entry). Fifteen of those consisted of mandatory firearm specification enhancements: only three stemmed from an underlying offense. In exchange for so pleading, the state "agreed to stand silent whenever the defendant is eligible for judicial release in the future." (12.8.14 T.pp. 2-3).

Five days later, on February 19, 2015, Manny filed a pro se motion to withdraw his plea. (2.19.15 Motion to Withdraw Guilty Plea). The court's sentencing entry still had not been journalized. He also asked to be appointed counsel for an appeal. *Id.* On February 26, 2015, the plea-withdrawal motion was summarily overruled. (2.26.15 Judgment Entry). The court never appointed anyone to prosecute a timely appeal.

III. Adopting the minority view, the Seventh District holds that guilty pleas waive all issues relating to juvenile transfer decisions.

Eventually, Manny was granted leave to file a delayed appeal and appointed counsel. Appellate counsel raised one assignment of error challenging the juvenile court's

[1] Meanwhile, Manny's juvenile co-defendant, J.M., who had agreed to testify against Manny, remained in juvenile court, subject only to juvenile detention until the age of 21.

[2] The criminal court docket and sentencing entry reflect that Manny's sentencing hearing was conducted on February 12, 2015. The sentencing entry is dated by hand "2/19/15," and file stamped for February 20, 2015. But, the *transcript* taken from the sentencing hearing appears to have been mistakenly dated *December* 12, 2015.

mandatory bindover decision. Specifically, counsel asserted that the state had presented insufficient credible evidence to establish Manny's identity in each of the six robberies. He homed in on the testimony presented, noting several witnesses were unable to provide any positive identification at all. (Merit Brief of Appellant at 5-10).

As noted above, "[t]here was no physical evidence presented at the juvenile hearing. There was no scientific evidence presented either. No guns were recovered. The sole evidence was eyewitness testimony. There was absolutely no identification of the defendant in the robberies that occurred [on October 18]." (Merit Brief of Appellant at 10).

And as for those who offered a so-called identification, counsel argued, their reliability and accuracy were questionable at best. (Merit Brief of Appellant at 5-10).

In response, the state argued only that "Defendant's guilty plea waived the purported error in the bindover proceeding, because the juvenile court's determination of probable cause is non-jurisdictional." (Answer Brief of Appellee at 1, 3). In support, the state relied on the Fourth District's 2021 decision in *State v. Powell*, 4th Dist. Gallia No. 20CA3, 2021-Ohio-200, ¶ 53, which in turn relied on this Court's decision in *Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542.

The state and Fourth District read *Smith v. May* to mean that *"probable cause hearings before juvenile courts are not jurisdictional."* (*See* Answer Brief of Appellee at 4, citing *Powell* at ¶ 55, 57.) From there, they've argued, a "defendant's guilty plea waive[s] the purported error in the bindover proceeding, because the juvenile court's probable cause determination is non-jurisdictional." (Answer Brief of Appellee at 4).

Adopting the state and Fourth District's reading of *Smith v. May*, the Seventh District agreed. "We agree with the state's assertion that these probable cause arguments are non-

jurisdictional and are thus waived when a defendant pleads guilty." Opinion at ¶ 1. The decision below thus concludes: "a defendant who pleads guilty in the general division of the common pleas court waives the ability to contest the sufficiency and weight of the evidence presented at the probable cause hearing in the juvenile court." Opinion at ¶ 46.

This timely discretionary appeal follows.

LAW AND ARGUMENT

First Proposition of Law: In juvenile bindover cases, guilty pleas in criminal court do not waive on direct appeal constitutional claims arising out of the underlying bindover hearings in juvenile court.

Second Proposition of Law: This Court's appellate decision in *Smith v. May* is limited to collateral attacks on bindover judgments. It does not apply to claims raised on direct appeal. Alternatively, *Smith v. May* is limited to procedural claim-processing rules only, and does not apply to issues bearing on the validity of the jurisdictional transfer decision itself.

Third Proposition of Law: This Court's decision in *In re D.H.*, declining to recognize an interlocutory appeal from a bindover decision, was wrongly decided and must be overturned in the interests of justice and fundamental fairness.

Because the propositions of law in this case are intertwined, they are argued and presented together. This case presents two grounds for reversal. First, this Court should simply reaffirm the longstanding subject-matter-jurisdiction exception to the default waiver-by-guilty-plea rule, *i.e.*, the *Blackledge-Menna* exception. This flows directly from this Court's 2022 decision in *State v. Nicholas Smith*, *supra ("Smith").* As set forth below, this analysis should entail a statement that the Fourth and Seventh Districts have misread this Court's habeas decision in *Smith v. May, infra ("Smith v. May")*. Alternatively, should this Court decide that transfer-related claims *are* waived by subsequent guilty pleas, fairness requires that *In re D.H.*, *supra,* be revisited. That decision withheld the right to an

interlocutory appeal from a transfer decision, precisely because, in that decision's view, children have an adequate direct-appeal remedy after criminal conviction. But guilty pleas resolve over 95% of criminal cases. And so, if those pleas now foreclose transfer-related claims on direct appeal, the bottom falls out of *D.H.*—in nearly every case, there is no such recourse on appeal. Thus, under at least one of these propositions, reversal is warranted.

I. Jurisdictional challenges have always been excepted from the general waiver rule. By statute, rule, and this Court's precedent, challenges to juvenile transfer decisions fall squarely within that exception.

A. Legal background: Under longstanding precedent, claims challenging subject matter jurisdiction are not waived by guilty pleas.

Early common law recognized that guilty pleas do not waive all claims on appeal. *See Class v. United States*, ___U.S.___, 138 S.Ct. 798, 804, 200 L.Ed.2d 37 (2018) (recounting decisional support dating back to 1869). In fact, as noted in *Class*, the Ohio Supreme Court held as early as 1875 that "notwithstanding the plea of guilty, the defendant may object to the jurisdiction of the court, or the grand jury, over the subject-matter, or that no offense was charged against him[.]" *Carper v. State*, 27 Ohio St. 572, 575 (1875).

That understanding was briefly questioned in the early 1970s when a series of decisions now known as the *Brady*-trilogy sought to shield all guilty pleas from subsequent attack.[3] *See Tollett v. Henderson*, 411 U.S. 258, 262, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (examining *Brady v. United States*, 397 U.S. 742, 750, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), and *Parker v. North Carolina*, 397 U.S. 790, 799, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970)).

[3] It is from these cases that the state and lower courts often claim, mistakenly, that defendants convicted by plea may *only* challenge the entry of their pleas (*i.e.*, whether they were knowing, intelligent, or voluntary). Without more, this is not accurate.

But immediately after *Tollett*, the Court retreated from this short-lived approach. In *Blackledge v. Perry* and *Menna v. New York*, the Court made clear that claims involving "the right not to be haled into court at all" and the state's power to constitutionally prosecute the charge are fundamentally different, and are not waived by a guilty plea. *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (excepting claims going to "the very power of the state to bring a defendant into court to answer the charge brought against him."); *Menna v. New York*, 423 U.S. 61, 63, 96 S. Ct. 241, 46 L.Ed.2d 195 (1975) ("A plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.").

If the state lacks the power to constitutionally prosecute a defendant, the Court soundly reasoned, "the very initiation of the proceedings" against them denies them due process of law. *Blackledge* at 30.

Under the *Menna-Blackledge* doctrine, defendants thus retain their right to claim the government lacked the power to criminally prosecute them because, after all, a guilty plea is invalid if the state was without such power in the first place. *Id.* Claims challenging a juvenile court's transfer of subject matter jurisdiction fall squarely within that category.

B. *State v. Smith* confirms that the *Menna-Blackledge* exception applies.

"Cases involving child[ren] originate in juvenile court." R.C. 2152.03. Juvenile courts have "*exclusive subject matter jurisdiction*" concerning all children alleged to be delinquent. R.C. 2151.23; R.C. 2152.03. And as such, "[n]o person, either before or after reaching eighteen years of age, shall be prosecuted as an adult * * * *unless the person has been transferred as provided in division (A) or (B)* of [R.C. 2152.12] or unless division (J) of this section applies." R.C. 2152.12(H).

To that end, Ohio's transfer statutes, R.C. 2152.12(A)-(B), create "'*a narrow exception* to the general rule that juvenile courts have exclusive subject matter jurisdiction over any case involving a child.'" (Emphasis added.) *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 2, quoting *State v. Wilson*, 73 Ohio St.3d 40, 43, 1995-Ohio-217, 652 N.E.2d 196. Their plain language requires first and foremost a valid finding of probable cause for each act charged. R.C. 2152.12(A), (B).

"A juvenile court's finding of probable cause as to any particular 'act charged' is what triggers a possible transfer to adult court[.]" *State v. Smith*, Slip Opinion No. 2022-Ohio-274, ¶ 2. Accordingly, "*a finding of probable cause is a jurisdictional prerequisite under R.C. 2152.12* to transferring a child to adult court for prosecution of an act charged." (Emphasis added.) *Id.* at ¶ 44.

By contesting the validity of a juvenile court's probable cause finding—a finding that, while *stipulable*, is not itself *waivable*—a juvenile defendant presents a quintessential jurisdictional challenge on appeal: they are asserting in no uncertain terms that the statute's key "jurisdictional prerequisite" has not been met; that the transfer of subject matter jurisdiction from one court to the other was no good; that the state, as a result, had no power to criminally indict and prosecute them in adult court.

Without a valid finding of probable cause per R.C. 2152.12, a child in other words is under the exclusive subject matter jurisdiction of the juvenile court—and by that same token, they have "the right not to be haled" into adult court upon adult felony charges. R.C. 2151.23; 2152.03; *Blackledge*, 417 U.S. at 30, 94 S.Ct. 2098, 40 L.Ed.2d 628; *Smith* at ¶ 39 (permitting prosecutors to "seek criminal charges against a juvenile in adult court for acts

that the court with exclusive, original jurisdiction found to be unsupported by probable cause would be noxious to fundamental fairness [and] would be contrary to law.").

Their adult court indictment, absent a valid transfer of charges from juvenile court, violates their constitutional right to due process of law.

So understood, transfer-related challenges like those presented here fall within the *Menna-Blackledge* exception. Because they question whether the adult court properly acquired jurisdiction over both the child and the charges, they cannot be foreclosed by a non-specific guilty plea. An error in the probable cause (or non-amenability) determination upon which a jurisdictional transfer is based is, necessarily, a jurisdictional error.

C. The decision below is the new minority view. It is wrong under *Menna-Blackledge* and it needlessly breaks with a near statewide consensus.

In wrongly concluding otherwise, the Fourth and Seventh Districts stand alone. "The weight of Ohio appellate authority holds that defects in the juvenile court's bindover proceedings do not relate to a defendant's factual guilt, but to the subject-matter jurisdiction of the common pleas court to try the juvenile as an adult, and such defects may not be waived by a guilty plea." *State v. Amos*, 1st Dist. Hamilton No. C-150265, 2016-Ohio-1319, ¶ 28. Indeed, the First, Second, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Districts have all held that a later guilty plea does *not* waive transfer-related claims.

As summarized by the Tenth District: "because a proper bindover procedure, which includes the determination of the existence of probable cause, is necessary to transfer jurisdiction, it cannot be waived." *State v. E.T.*, 2019-Ohio-1204, 134 N.E.3d 741, ¶ 44 (10th Dist.) (explaining that "because a finding of probable cause based on [assertedly] insufficient evidence [would] contravene the procedures established under R.C. 2152.12

for the transfer of jurisdiction * * * we review whether the [juvenile] court's finding of probable cause was based on sufficient evidence").

As noted there, most "Ohio appellate courts have [thus] reviewed challenges to the probable cause determination of a juvenile court from juveniles who entered guilty pleas in the general division of a common pleas court in assessing whether the jurisdictional requirements of the bindover process were met." *Id.* at ¶ 45, citing *State v. Kitchen*, 5th Dist. Ashland No. 02CA056, 2003-Ohio-5017, ¶ 80; *State v. Mays*, 8th Dist. Cuyahoga No. 100265, 2014-Ohio-3815, 18 N.E.3d 850, ¶ 17; *State v. Legg*, 4th Dist. Pickaway No. 14CA23, 2016-Ohio-801, ¶ 28-31; *see also State v. Lewis*, 9th Dist. Summit No. 27887, 2017-Ohio-167, ¶ 7; *State v. Poole*, 8th Dist. Cuyahoga No. 98153, 2012-Ohio-5739, ¶ 1, citing *State v. Pruitt*, 11th Dist. Trumbull No. 2001-T-0121, 2002-Ohio-7164, ¶ 28; *State v. Lamb*, 6th Dist. Lucas No. L-19-1177, 2021-Ohio-87, ¶ 27. In fact, just recently the Second District *reviewed and sustained* a bindover challenge to a court's non-amenability finding, despite appellant's subsequent guilty plea. *State v. Ellis*, 2d Dist. Clark No. 2020-CA-59, 2022-Ohio-147, ¶ 8, 23.

This Court, too, has weighed important transfer-related questions arising out of cases ending in guilty pleas—including in *State v. Smith, infra*. Others still pending include *State v. Burns*, No. 2020-1126 (argued); *State v. L.A.B.*, No. 2022-0085 (held), *State v. Ramsden*, No. 2021-1299 (held), and *State v. Martin,* No. 2021-0967 (argued).

All of this is consistent with the longstanding exception solidified in *Blackledge-Menna*—that guilty pleas do not waive claims going to "the very power of the state to bring a defendant into court." *Blackledge*, 417 U. S. at 30, 94 S.Ct. 2098, 40 L.Ed.2d 628. And that's been true here since 1875, when this Court first said defendants "may object to the

jurisdiction of the court, or the grand jury, over the subject-matter[.]" *Carper*, 27 Ohio St. at 575.

But now, adopting the Fourth District's outlier decision in *Powell*, the Seventh District has split. *Opinion* at ¶ 37, 46, citing *Powell*, 4th Dist. Gallia No. 20CA3, 2021-Ohio-200, at ¶ 2. It now holds: "Relying on the explanation in [*Smith v. May*] that a waivable item is not jurisdictional and the Fourth District's 2021 position in *Powell*, we conclude a defendant who pleads guilty in the general division of the common pleas court waives the ability to contest the sufficiency and weight of the evidence presented [at the transfer hearing]."*Opinion* at ¶ 46.

Inviting justice-by-geography, this pronouncement needlessly breaks with age-old precedent and the majority of Ohio's appellate districts on this question—and worse still, its legal justification for doing so is provably mistaken.

II. This Court's *habeas* decision in *Smith v. May* has no effect. That is especially true after *Smith*.

Specifically, these decisions do not accurately account for both strands of governing precedent. While citing *Menna-Blackledge*, *Powell* overreads *Smith v. May* and thereby neglects to assess the truly jurisdictional nature of the probable cause requirement, which was confirmed by this Court in *Smith*. The decision below then categorially concludes probable cause is not jurisdictional, but yet fails to mention *Menna-Blackledge* entirely.

A. The decision below misreads *Smith v. May.*

The mistake lies in a drastic overreading of *Smith v. May.* Like *Powell*, the court below reads *Smith v. May* as unconditionally clarifying the *law of waiver* for juvenile *direct*

appeals. *Opinion* at ¶ 39 ("The Fourth District emphasized the clarity in the law after the Supreme Court issued *Smith*."). But *Smith v. May* did no such thing, especially given *Smith*.

1. Smith v. May *does not involve direct appeals.*

First, as a threshold matter, *Smith v. May* was a collateral habeas case issued under this Court's direct appellate jurisdiction under S.Ct.Prac.R. 5.01. The decision below errs in reading *Smith v. May* more broadly because *Smith v. May* explicitly limited its holding to collateral attacks. *Smith v. May* at ¶ 31. This Court said its decision meant only that "a criminal offender may not collaterally attack a final judgment years after the fact." *Id.* Further, even concerning the procedural, three-day notice violation at issue there, this Court confirmed that "*[a] juvenile still may object to noncompliance and, even absent an objection, may raise an issue of noncompliance on direct appeal following conviction*." *Id.* "But it would [just] mean that a criminal offender may not collaterally attack a final judgment years after the fact." *Id.* Thus, *Smith v. May* aimed to close the door on the recent proliferation of collateral habeas attacks, but it specifically said juveniles may still raise a violation on direct appeal following conviction. *Id.*

The decision below wholly disregards that limitation.

2. Smith v. May *only addressed the statute's three-day notice requirement. It said nothing of the other statutory requirements.*

Second, and more to the point, *Smith v. May* in no way issued a sweeping proposition that *every requirement* in the transfer statute is non-jurisdictional. The court below was correct to note that *Smith v. May* did limit *Gaskins v. Shiplevy*, 74 Ohio St. 3d 149, 151, 1995-Ohio-262, 656 N.E.2d 1282 (1995) ("*Gaskins I*"). It said: "we overrule *Gaskins I*'s holding that *any* deviation from the statutory bindover procedure creates a potentially good cause of action in habeas corpus. Deviation from a bindover procedure gives rise to a potentially

valid habeas claim only if the applicable statute clearly makes the procedure a prerequisite to the transfer of subject-matter jurisdiction to an adult court." *Smith v. May*, 2020-Ohio-61, at ¶ 29. But in *Smith v, May*, this Court held only that R.C. 2152.12's *notice provision* was no such pre-requisite. It went no further than that.

3. By contrast, **State v. Smith***, a direct appeal case, clearly held probable cause is a jurisdictional prerequisite.*

Third, and most critical, while *Smith v. May* said nothing of the jurisdictional nature of any other statutory requirement, *Smith* most certainly does—it squarely resolves that question with respect to probable cause finding, which is at issue here. "A finding of probable cause *is* a jurisdictional prerequisite under R.C. 2152.12[.]" *Smith*, Slip Opinion No. 2022-Ohio-274, at ¶ 44. Concluding the exact opposite, the decision below is wrong.

4. Contrary to the decision below, probable cause may only be stipulated to—the requirement itself cannot be "waived."

Lastly, to invoke *Smith v. May's* waiver-equals-non-jurisdictional rationale, the decision below wrongly crafts and rests on the incorrect premise that R.C. 2152.12's probable cause *requirement* may be waived. From there, the court reasons that if it's waivable, it must be non-jurisdictional. But that's not true either.

Rather, whether sufficient probable cause exists may only be *stipulated to* by the parties; and this requires "a voluntary agreement, admission, or concession made by the parties or their attorneys concerning disposition of some relevant point in order to eliminate the need for proof or to narrow the range of issues to be litigated." *Wilson v. Harvey*, 8th Dist. Cuyahoga No. 85829, 164 Ohio App.3d 278, 2005-Ohio-5722, 842 N.E.2d 83, ¶ 12, citing *State v. Small*, 162 Ohio App.3d 375, 2005-Ohio-3813, 833 N.E.2d 774 (10th Dist.). That is, a child may agree there is probable cause and waive their right to a hearing

on that issue; *but there must still be a finding on the record that probable cause exists* (regardless of whether that is the result of evidence or a stipulation). If a juvenile court just neglects to make that finding, then that is absolutely a jurisdictional problem.

The probable cause *requirement* itself cannot be waived. And only upon a valid stipulation on the record in open court can the formal presentation of evidence be waived.

Beyond that, no Ohio decision to date—including those cited in *Powell, on which the decision below relies*—have ever gone so far as holding that R.C. 2152.12's probable cause *requirement* is "waivable." Those cases, instead, dealt only with the amenability *hearing* (also, not the finding itself), or lesser statutory requirements, like, for instance, the three-day notice requirement addressed in *Smith v. May*. *See State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894 (requiring that a waiver of an amenability hearing be knowing, intelligent, and voluntary).

None have addressed the statute's probable cause finding itself, which is, once again, a "jurisdictional prerequisite." *Smith*, Slip Opinion No. 2022-Ohio-274, at ¶ 44.

The bottom line is that this Court's decision in *Smith v. May* is being misapplied to constitutional issues raised on direct appeal. It's causing rifts in Ohio's jurisprudence and it's preventing meaningful review of viable claims before convictions have even become final. That result far exceeds *Smith v. May's* intent—and it warrants intervention.

B. This Court should clarify that *Smith v. May* has no application to direct appeals. It was and remains limited to collateral attacks. At minimum, it has no application here.

In *Smith v. May*, this Court held that it's incorrect holding in *Gaskins I* "has led to significant confusion about when a defendant can challenge a procedural defect in a

juvenile-court bindover proceeding, and it necessitates this court's clarification." *Smith v. May*, 2022-Ohio-61, at ¶ 28. Yet, confusion continues.

Cases relying on *Smith v. May* include appeals from collateral attacks and direct appeals, and its force is wielded in a variety of ways. Of note, in this case, *Powell* and *State v. Moore*, *Smith v. May* is used to prevent children from raising issues regarding the transfer proceedings in direct appeals. *See Powell*, 2021-Ohio-200, at ¶ 37; *State v. Moore*, 4th Dist. Lawrence No. 20CA10, 2022-Ohio-460, ¶ 24. These decisions flatten appellate rights, wholly misread *Smith v. May*, and create a system where potential errors go uncorrected.

The Seventh and Fourth Districts' use of *Smith v. May* as a blanket prohibition in appealing transfer-related errors in a direct appeal following a guilty plea perverts this Court's language in the decision.

As noted, Smith v. May did not involve a direct appeal claim. In fact, this Court held:

> Juveniles facing bindover to an adult court maintain the right to object to a juvenile court's noncompliance with bindover procedures and the right to appeal from any error *in the ordinary course of law*. However, we overrule *Gaskins I*'s holding that *any* deviation from the statutory bindover procedure creates a potentially good cause of action in habeas corpus. Deviation from a bindover procedure gives rise to a potentially valid habeas claim only if the applicable statute clearly makes the procedure a prerequisite to the transfer of subject-matter jurisdiction to an adult court.

(Internal citations omitted.) *Smith v. May* at ¶ 29. It then reiterated:"[a] juvenile still may object to noncompliance and, even absent an objection, may raise an issue of noncompliance on direct appeal * * * But it would mean that a criminal offender may not collaterally attack a final judgment years after the fact." *Id.* at ¶ 31.

Despite this language, appellate courts are abdicating their crucial review function by misapplying *Smith v. May* to direct appeals—and not only that, but in direct appeals that do not even concern the notice-provision error at issue in that case This Court should

clarify that *Smith v. May* has no application to direct appeals and its holding and reasoning are limited to collateral attacks only. This clarification is imperative, especially because this Court has held that children also have no right to an interlocutory appeal.

III. The minority view shields wrongful transfer decisions and leaves children without appellate recourse in almost every case. Neither is warranted.

In denying the right to an interlocutory appeal following a transfer decision, this Court held:

> Here, the harm alleged in D.H.'s appeal—the transfer of his cases to adult court—can be rectified following final judgment. * * * The passage of time alone would not render an appeal following final judgment meaningless or ineffective.

In re D.H., 152 Ohio St.3d 310, 2018-Ohio-17, 95 N.E.3d 389, ¶ 19.

But, if this court adopts the minority view, the holding in *D.H.* is no longer sound. It will mean that errors in the transfer can't be rectified following the criminal conviction unless the child does NOT plead guilty. The tension here is profound.

More than 90% of all cases end in guilty pleas. *See Missouri v. Frye*, 566 U.S. 134, 143, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012).

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas, not a system of trials,' * * * it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. 'To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.'

(Internal citations omitted). *Id.* at 143-144. The criminal justice system would not function without guilty pleas.

Further, the calculation to enter a guilty plea—especially for a child who has not yet even completed high school—is not one centered on voluntariness in the true meaning of the word. Adopting the minority view while also prohibiting interlocutory appeals from the transfer decision means that children are forced to take their chances at a trial (which, overall, leads to longer sentences) or engage in plea negotiations knowing that they will not be able to correct errors that occurred in the transfer stage.

This false choice is inherently coercive given that defendants are more likely to receive harsher punishments and longer sentences if they go to trial. *See* Lindsay Devers, *Plea and Charge Bargaining, Research Summary*, Bureau of Justice Assistance, U.S. Department of Justice (Jan. 24, 2011), available at tinyurl.com/5cn33h45 (accessed June 30, 2022).

> Prosecutorial discretion also has resulted in harsher penalties for those defendants who opt for going to trial, rather than accepting a plea. Many researchers have found that those who go to trial are more likely to receive harsher sentences than those who accept a plea when comparable offenses are considered (Albonetti, 1991; Britt, 2000; Dixon, 1995; Engen and Gainey, 2000; Kurlychek and Johnson, 2004; Steffensmeier and Demuth, 2000, 2001; Steffensmeier and Hebert, 1999; Steffensmeier et al., 1993, 1998). Additionally, several methodologically sound studies have found that those who pled guilty were more likely to receive lighter sentences than those who would have gone to trial (King et al., 2005; Piehl and Bushway, 2007; Ulmer and Bradley, 2006).

Id. at 2.

In this case, at just 18 years old, Manny was facing 136 years in adult prison. The process Manny had just endured did not inspire overwhelming trust in the criminal justice system: his nearly identical age co-defendant, who was charged with similar offenses, was permitted to stay in the juvenile court, in exchange for testimony; and even though most

witnesses couldn't identify Manny as the perpetrator or explain his involvement in purported offenses, he was sent to the adult system.

Threatened with 136 years in adult prison, what young person would not decide to enter a plea? *What Manny did not know, however, was that he would never be able to contest how he ended up in adult court in the first place.* This is so despite having moved to withdraw his plea a mere five days after entering it and even after a delayed appeal.

In short, the decision below creates a "Sophie's Choice" that gives prosecutors *even more* power while removing criminal and appellate judges from the determination of culpability altogether. More than that, it then intentionally bars the presentation of critical errors on appeal. And this in turn perversely incentivizes overcharging from the outset.

In *D.H.*, this Court held that all the requirements for an interlocutory appeal were met in a transfer decision, except for one: (1) transfer decisions are provisional remedies; (2) transfer determines the action with respect to the bindover; *but* (3) juveniles have an effective remedy because "the transfer of cases to adult court can be rectified following final judgment." *D.H.* at ¶ 19, applying R.C. 2505.02(B)(4).

The decision below drops the curtain. The reality is that the criminal justice system as we know it can't function without pleas, and that when young people exercise their rights to a trial, they are more harshly punished. At the same time, the government and court below insist that pleas also waive errors challenging the transfer of subject matter jurisdiction from juvenile to adult court. But the government can't have it both ways.

If *D.H.* is to stand, errors affecting the validity of the juvenile transfer decision must remain reviewable, notwithstanding a guilty plea. If they're not, *D.H.* must be reconsidered

in the interests of justice and fundamental fairness. What this Court considered meaningful and effective can no longer stand given what we now know about how cases are processed.

CONCLUSION

For these reasons, this Court should adopt Manny's first and second propositions of law. Alternatively, it should adopt the third in the interests of justice and fundamental fairness. Either way, the legal ruling below must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

A copy of the foregoing **Merit Brief of Appellant, Manny Zarlengo** was sent by facsimile mail this 11th day of July 2022 to Paul J. Gains, Mahoning County Prosecutor at Mahoning_Prosecutor.330-740-2008@fax2mail.com.

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No. 2022-0106

IN THE SUPREME COURT OF OHIO

ON APPEAL FROM THE MAHONING COUNTY COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
CASE NO. 20 MA 00036

STATE OF OHIO,
Plaintiff-Appellee,

v.

MANNY ZARLENGO
Defendant-Appellant.

APPENDIX TO MERIT BRIEF OF APPELLANT, MANNY ZARLENGO

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

MANNY ZARLENGO,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0036

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 14 CR 637

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Judges. Michael D. Hess, Judge of the Fourth District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Ralph Rivera, Assistant Chief, Criminal Division, Office of the Mahoning County Prosecutor, 21 West. Boardman St., 6th Floor, Youngstown, Ohio 44503, *Atty. Edward A. Czopur,* Assistant Mahoning County Prosecutor, Mahoning County Prosecutor's Office, 21 West Boardman Street, Youngstown, Ohio 44503 for Plaintiff-Appellee and

Atty. James R. Wise, Hartford & Wise, Co., LPA, 91 W. Taggart, PO Box 85, East Palestine, Ohio 44413 for Defendant-Appellant.

Dated: December 15, 2021

Robb, J.

{¶1} Defendant-Appellant Manny Zarlengo appeals after an agreed sentence was imposed in the Mahoning County Common Pleas Court following his guilty plea to multiple counts of aggravated robbery with firearm specifications. Appellant challenges the juvenile court's mandatory bindover decision by arguing the state's probable cause evidence was insufficient to prove his identity as a participant in each of the robberies and lacked credibility. We agree with the state's assertion that these probable cause arguments are non-jurisdictional and are thus waived when a defendant pleads guilty. The trial court's final judgment imposing sentence is therefore affirmed.

STATEMENT OF THE CASE

{¶2} Appellant was charged in the juvenile court with eleven counts of aggravated robbery with firearm specifications for armed robberies occurring at five Youngstown stores in October 2013. To accomplish mandatory bindover for trial as an adult, the preliminary hearing to determine probable cause was held on June 10, 2014. The child stipulated he was sixteen at the time of the alleged acts. The state presented testimony from a detective, some of the store employees, a neighbor to a store, and a juvenile who was one of Appellant's co-defendants (J.M.).

{¶3} On October 4, 2013, the police were advised Dollar General on McGuffey Road was robbed by two men with guns while a driver of a gold vehicle waited for them. According to a detective's testimony, the manager opened the safe for the robbers. (Tr. 147-148). The store's video portrayed the two robbers pointing guns at the manager and filling a black bag. J.M. testified he traveled with Appellant and "Slim" to a location near Dollar General on the east side in Slim's "tannish" colored Chevy (with Slim driving). (Tr. 110-111). They had a plan to rob the Dollar General. (Tr. 111-112). He said Slim and Appellant both had guns, and he was unsure which direction they went when they exited the car. (Tr. 111-113). J.M. drove them away from the scene after they ran back to the car with a black bag. (Tr. 111-112). When they returned to his house, he observed money

in the bag which he believed came from Dollar General "because that was the plan." (Tr. 112). J.M. claimed he did not know Slim's real name. (Tr. 110).

{¶4} On October 8, 2013, the police were advised Family Dollar was robbed by two men with guns and bandanas on their faces. The store's video confirmed there were two men. The detective testified: a shot was fired down an aisle; a bullet was recovered from a cooler; and a neighbor informed the police a gold or tan Chevy had been parked in a lot behind the store. (Tr. 147). J.M. testified Appellant fired a .32 caliber revolver into the air after they entered Family Dollar. (Tr. 119-121). J.M. admitted they took money from the register and the safe. (Tr. 120). He also confirmed they fled to Slim's car which was on a side street but claimed Slim was not waiting in the car.

{¶5} On cross-examination, defense counsel asked J.M. if he told the police there was a third individual waiting in the car and J.M alternatively said: he did not say this; he did not remember so stating; and this portion of his statement was untrue. (Tr. 125-126, 131-133). A neighbor (who was the block watch captain) testified an older goldish car (similar to a Chevy Nova) aroused his suspicions due to where it was parked (at the lot where he mowed). He testified two young and unfamiliar males walked past him while he was going to cut grass and a third male remained in the vehicle. He soon heard sirens and reported the sighting when the police asked if he saw anything suspicious. (Tr. 84-89).

{¶6} On October 12, 2013, the police were advised Taco Bell was robbed by two men with guns who were wearing bandanas on their faces. The detective said the initial report described a gold or tan Chevy. (Tr. 148). A Taco Bell employee testified there were three employees present when two males entered wearing bandanas up to the nose and hats; they appeared to be 16 to 20 years old. (Tr. 54). He saw a gun pointed at his manager and identified Appellant in court as the person who threatened to start shooting if the safe was not opened. (Tr. 55, 57-58). Taco Bell's assistant manager testified the robbery occurred at 2:40 p.m. He pointed out the perpetrators' faces were visible from nose to forehead and one robber was wearing an orange Texas Longhorns hat. He immediately went to open the safe upon hearing the demand and noticed a gun in his peripheral vision. (Tr. 68-69). J.M. confirmed he and Appellant entered Taco Bell with

masks on their faces with a joint plan to commit a robbery. (Tr. 114-115). He said Appellant used a .32 caliber revolver and Slim was not with them. (Tr. 115-116).

{¶7} On October 17, 2013, the police were advised of a robbery at Subway by two men with guns. The detective testified radio traffic reported a gold or tannish Chevy was involved. (Tr. 149). The owner of the store testified he was present with two employees and customers when two young males (aged 15 to 20 years old) entered the store with guns and their faces covered below the nose. (Tr. 30-31, 34, 40). The owner said he hit the silent panic button and then opened the register after a gun was pointed at his head. (Tr. 30-32). The perpetrators put the cash register drawer in a bag they brought with them. When they demanded the money in the safe, the owner informed them it was on a time delay. The perpetrators were upset and threatened to start shooting people; the owner saw a gun pointed at a female employee and "heard the gun click as if they pulled the trigger but it didn't fire." (Tr. 32). This female employee's testimony confirmed a perpetrator held a gun to her head while another retrieved the register drawer. (Tr. 44). She said threats were made to kill her if the safe was not opened. (Tr. 45). When the perpetrators realized the safe would not open, they robbed the customers at gunpoint. (Tr. 33).

{¶8} J.M. testified he and Appellant committed the Subway robbery, confirming they took wallets because the safe was taking too long. J.M. said he had a .32 caliber revolver during the robbery. (Tr. 118). He initially testified Slim was not involved; however, he later acknowledged Slim (who used his own gun for the Dollar General robbery) was involved as the driver for the Subway robbery.

{¶9} After the robbery, the owner of Subway found Appellant's Facebook page and concluded this was the individual who robbed him. (Tr. 37). He identified Appellant at the hearing and said having a gun pointed at his head helped imprint the memory; he said he recognized him by the eyes and nose, noting he could also see his forehead. (Tr. 33-34, 40). The store video confirmed a gun was pointed at the owner's face prior to the gun being pointed at the female employee's head.

{¶10} On October 18, 2013 (the day after the Subway robbery), witnesses reported to police at approximately 4:00 p.m. three individuals robbed McDonald's in a similar manner while another individual waited in a car fitting the description from the

other robberies. The clothes and bandanas were also described as similar to the other robberies. (Tr. 150). J.M. testified he was not involved in the McDonald's robbery. (Tr. 118). The manager of McDonald's testified she was in the back room when the robbers entered the store. When she came out, a male came behind the counter, pointed a gun at her face, and demanded she open the safe. (Tr. 77). She kept her head down while waiting for the employee with the combination to open the safe. She noticed this gunman lowered his gun to put the drawers from the safe into a bag while he was yelling to his two accomplices about the other drawers. (Tr. 77-78). She noted customers in the parking lot called the police and employees said there was a fourth accomplice. (Tr. 78-79). She only saw one gun; she started to indicate others were armed but was not permitted to testify as to what she learned about other guns. (Tr. 80).

{¶11} The detective testified "wanted posters" were produced from the Family Dollar video, which generated tips providing various names, including Appellant's name; one of the other names also led the officers to a woman who identified Appellant. (Tr. 151). She said Appellant was staying with J.M. and directed the officers to a house on Midlothian Boulevard. (Tr. 152). A gold Chevy was parked in the drive of the house. Appellant, J.M., and Joseph Mascarella were in the house. The car was registered to Joseph Mascarella's relative, and J.M's testimony indicated the car belonged to Mascarella.

{¶12} J.M.'s mother gave the police consent to search the house. The police recovered hats and sweatshirts matching the clothing used in the robberies; they also discovered the cash drawers from all of the robberies. (Tr. 152). The three males were arrested. The detective testified that J.M. commented "we had gotten the right three guys." During an interview on October 19, 2013, J.M refused to give a further statement against the other two males while admitting to his own participation in some of the robberies. (Tr. 130, 153).

{¶13} The detective opined Mascarella was the adult involved in the robberies as opposed to J.M.'s attribution of certain roles to Slim. (Tr. 158, 160). At the probable cause hearing, J.M. acknowledged he had been spending a lot of time with Mascarella (and Appellant) during this time period; however, J.M. claimed Mascarella was not the person he called Slim. (Tr. 122). J.M. admitted to using Mascarella's car to retrieve the

Taco Bell register drawers from a vacant house by the store where he and Appellant hid them. (Tr. 123, 128).

{¶14} The state presented the surveillance videos from the first four robberies, which the juvenile court agreed to review. (Tr. 20-21); (St. Ex. 2-5). The state also presented as an exhibit a letter Appellant wrote to the court on May 19, 2014, wherein he: accepted responsibility for his actions; said he made bad decisions because he needed money; and acknowledged he never should have had a gun. (St. Ex. 1). The court had previously provided the letter to both sides. At the probable cause hearing, the chief probation officer testified he was asked to retrieve the letter from Appellant at the juvenile justice center for Appellant's probation officer; he briefly observed the letter appeared to be an admission and then stopped reading as he noticed it was addressed to the judge. Defense counsel argued the letter could not be used as a statement against interest because it was associated with plea negotiations and also suggested it was not trustworthy. The court agreed the letter would not be considered.[1]

{¶15} The juvenile court found probable cause to believe Appellant committed the acts charged and recited the counts in the entry. (6/25/14 J.E.). The case was transferred to the general division where the grand jury indicted Appellant on the eleven counts of aggravated robbery with firearm specifications: Counts 1 and 2 represented two victims from Family Dollar; Count 3 represented a victim at Dollar General; Counts 4, 5, and 6 represented three victims from Taco Bell; Counts 7, 8, 9, and 10 represented four victims from Subway; and Count 11 represented one of the victims from McDonald's. (7/24/14 Ind.). The trial court joined Appellant's case with the case against Mascarella.

{¶16} Appellant subsequently pled guilty as charged. At sentencing, Appellant apologized for his mistake. The trial court imposed a jointly recommended sentence:

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[1] We note the Rules of Evidence do not apply at a juvenile court probable cause hearing. *In the Matter of B.W.*, 2017-Ohio-9220, 103 N.E.3d 266, ¶ 48 (7th Dist.). Regardless, a statement offered against a party is not hearsay if it is his own statement. Evid.R. 801(D)(2)(a). When this exclusion applies, there is no need to analyze the hearsay exception for a declaration against interest in Evid.R. 804(B)(3) (which evaluates trustworthiness). As for the rule on statements during plea negotiations, the current and applicable version does not apply to a letter written to a judge on the defendant's own initiative. *See* Evid.R. 410 (A)(5) (defendant's statement is not admissible if it was made "in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant"); *State v. Frazier*, 73 Ohio St.3d 323, 336, 652 N.E.2d 1000 (1995) (the current version protects "plea bargaining statements involving an attorney in order to promote the disposition of criminal cases by compromise" and statements to detectives would not be excluded unless the prosecutor was present).

three years on each count to run concurrent with each other but consecutive to the three-year firearm specifications applicable to each of the five locations robbed, for a total prison term of eighteen years. A delayed appeal was granted.

ASSIGNMENT OF ERROR: PROBABLE CAUSE

{¶17} Appellant's sole assignment of error provides:

"THE JUVENILE COURT DID NOT HAVE PROBABLE CAUSE IN WHICH TO BIND THE DEFENDANT/APPELLANT OVER TO THE COMMON PLEAS COURT TO BE TRIED AS AN ADULT."

{¶18} "No person, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen years of age, unless the person has been transferred as provided in division (A) or (B) of this section or [the over 21 provision applies]." R.C. 2152.12(H). In pertinent part, the cited division in the mandatory bindover statute requires "probable cause to believe that the child committed the act charged." R.C. 2152.12(A)(1)(b). A corresponding rule provides: "In any proceeding where the court considers the transfer of a case for criminal prosecution, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that the act would be an offense if committed by an adult." Juv.R. 30(A).

{¶19} At this preliminary hearing, the state has the burden to provide "sufficient credible evidence" on the elements to warrant going forward with the charge. *A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629 at ¶ 46, 52. The juvenile court's function is not to determine whether the juvenile is guilty of the charge but is to determine whether there is probable cause to believe he committed the offense. *State v. Iacona*, 93 Ohio St.3d 83, 93, 752 N.E.2d 937 (2001). To satisfy the probable cause standard, the state must produce evidence that raises "more than a mere suspicion of guilt." *A.J.S.*, 120 Ohio St.3d 185 at ¶ 41, quoting *Iacona*, 93 Ohio St.3d at 93. Probable cause is a flexible concept grounded in fair probabilities which can be gleaned from considering the totality of the circumstances. *See Iacona*, 93 Ohio St.3d at 93, 752 N.E.2d 937. *See also Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (probable cause is a flexible, common-sense standard which does not demand any showing that the belief is correct or more likely true than false). Underlying "all the definitions" of

probable cause is "a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). "[A]s the very name implies, we deal with probabilities." *Id.* at 174-175.

{¶20} There is a mixed standard of review applied to a juvenile court's probable cause determination at a mandatory transfer proceeding. *A.J.S.*, 120 Ohio St.3d 185 at ¶ 51. The sufficiency of the evidence presented by the state at the preliminary hearing held prior to a juvenile bindover involves a legal question to be independently reviewed with no deference given to the decision of the juvenile court. *Id.* at ¶ 47, 51, citing, *e.g.*, *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "[W]hether the state has produced sufficient evidence to support a finding of probable cause in a mandatory-bindover proceeding is a question of law, and we review questions of law de novo." *Id.* at ¶ 47.

{¶21} A sufficiency review asks whether *any* rational trier of fact could have found the essential elements of the crime proven by the relevant standard. *See State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). The evidence is viewed in the light most favorable to the state as are reasonable inferences. *State v. Filiaggi*, 86 Ohio St.3d 230, 247, 714 N.E.2d 867 (1999). Circumstantial evidence carries the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 739 N.E.2d 749 (2001). "[W]hen the state relies on circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991), overruling *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974), syllabus.

{¶22} As to credibility and weight, a juvenile court has a limited role and is not to discount testimony presented by the state so as to intrude on the role of a jury at a later trial. *A.J.S.*, 120 Ohio St.3d 185 at ¶ 43-44, 46, 60-61 (finding the juvenile court exceeded the scope of its review when it found probable cause lacking after it weighed conflicting evidence on trajectory). "[T]he resolution of conflicting theories of evidence, both of which are credible, is a matter for the trier of fact at a trial on the merits of the case, not a matter for the exercise of judicial discretion at a bindover hearing in the juvenile court." *Id.* at ¶ 64. "The trier of fact is free to believe all, part, or none of the testimony of any witness."

See generally State v. Chambers, 179 Ohio App.3d 770, 2008-Ohio-6973, 903 N.E.2d 709, ¶ 29 (7th Dist.). A reviewing court defers to a trial court's factual determinations on credibility and in doing so applies an abuse of discretion standard of review. *Id.* at ¶ 1, 51.

{¶23} Appellant contests whether the state demonstrated probable cause as to his identity as a participant in the robberies at all five locations, presenting arguments sounding in sufficiency and weight of the evidence. He challenges the credibility of the witnesses and argues "the lack of identification that the Defendant committed the robberies in question" resulted in the state's failure to establish probable cause. For instance, he argues the state failed to present sufficient evidence to connect him to the McDonald's robbery notwithstanding the similarities with the other robberies,[2] such as: a gold colored Chevy as the get-away car; bandanas as masks and similar clothing; entry behind the counter; cash register drawers deposited into a bag; targeting the safe after the drawers; pointing guns directly at the heads of employees; the discovery of evidence related to all five robbery locations at J.M.'s house where Appellant was staying while J.M. and Appellant were present hours after McDonald's robbery; and the condensed time period.

{¶24} However, before we can analyze the sufficiency and weight of the evidence used to show Appellant's identity as a participant in each robbery, we must address the state's threshold argument. The state contends Appellant's guilty plea waived the alleged issue with the evidence on probable cause because the issue was non-jurisdictional.

GUILTY PLEA WAIVES PROBABLE CAUSE ON APPEAL

{¶25} We begin by acknowledging it has been observed a juvenile cannot immediately appeal a bindover decision but can generally appeal the bindover decision when it becomes final after conviction and sentence. *In re D.H.*, 152 Ohio St.3d 310, 2018-Ohio-17, 95 N.E.3d 389, ¶ 8, 21-22; *In re Becker*, 39 Ohio St.2d 84, 314 N.E.2d 158

[2] In a case where there was accomplice testimony stating the defendant participated in three of the charged robberies but no accomplice testimony regarding his participation in a fourth robbery, the defendant argued there was insufficient evidence of his involvement in the fourth robbery which his accomplices committed without him. The Tenth District found sufficient evidence upon emphasizing the proof the defendant committed three similar robberies and his possession of stolen property from the fourth location. *See State v. Davis*, 10th Dist. Franklin No. 87AP-1112 (Sep. 29, 1988) (evaluating the trial evidence where the state had the burden of proof beyond a reasonable doubt and at a time when there was a stricter test for circumstantial evidence).

(1974). However, we are asked to consider the effect of a guilty plea on the alleged errors in bindover after the Supreme Court's 2020 decision in *Smith v. May,* 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542, which held not all bindover errors are jurisdictional.

{¶26} The standard rule is that a defendant who enters a valid guilty plea while represented by competent counsel waives any *non-jurisdictional* defects in the prior stages of the proceedings. *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78, citing *Ross v. Common Pleas Court of Auglaize Cty.*, 30 Ohio St.2d 323, 323–24, 285 N.E.2d 25 (1972). *See also State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105 ("guilty plea waived any complaint as to claims of constitutional violations not related to the entry of the guilty plea"), citing *State v. Spate*s, 64 Ohio St.3d 269, 595 N.E.2d 351 (1992), paragraph two of the syllabus (a guilty plea waives a defendant's right to challenge the deprivation of counsel at the preliminary hearing stage).[3] Similarly, a juvenile who enters an admission in juvenile court waives earlier non-jurisdictional errors, such as suppression issues. *In the Matter of D.Y.*, 2020-Ohio-3758, 156 N.E.3d 310, ¶ 16-19 (7th Dist.).

{¶27} In stating a proper "plea of guilty waives all non-jurisdictional errors that may have occurred during trial," we pointed out the surviving errors are only jurisdictional errors which would make a conviction void and which could be raised at any time and thus could not be waived. *State v. Parks*, 7th Dist. Carroll No. 11 CA 873, 2012-Ohio-3011, ¶ 21-22. This is distinct from a lack of authority in a particular case due to an erroneous decision made while exercising jurisdiction which would merely make an order voidable. *Id.* at ¶ 22, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 10-12, 21 (suggesting the word jurisdiction is overused).

{¶28} In the past, the waiver via guilty plea principle was not discussed often in the juvenile bindover context because courts proceeded under the theory that any or most defects in the bindover process affected subject matter jurisdiction. This was partly based on broad statements such as: "without a proper bindover procedure under R.C. 2151.26,

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[3] In an adult criminal proceeding, an issue with the preliminary hearing is moot or cured after indictment and is not jurisdictional. *State v. Thomas*, 7th Dist. Mahoning No. 18 MA 0132, 2020-Ohio-3637, ¶ 48-50, citing *Dowell v. Maxwell*, 174 Ohio St. 289, 290, 189 N.E.2d 95 (1963) ("The jurisdiction of the court is invoked by the return of a valid indictment and is not based on * * * the findings made on the preliminary examination. Any defect or irregularity in either the arrest or preliminary examination does not affect the validity of the accused's conviction.").

a juvenile court's jurisdiction is exclusive" and "when a court's judgment is void because it lacked jurisdiction, habeas is still an appropriate remedy despite the availability of appeal." *Gaskins v. Shiplevy*, 74 Ohio St.3d 149, 151, 656 N.E.2d 1282 (1995) (*Gaskins I*) (remanding to allow amendment of habeas petition to add claim of improper bindover where petitioner alleged he was not provided with counsel or a mental and physical examination), citing *State v. Wilson*, 73 Ohio St.3d 40, 652 N.E.2d 196 (1995).

{¶29} However, in the cited *Wilson* case, the juvenile never appeared before the juvenile court and was directly charged in adult court. Moreover, the *Wilson* Court relied on the provision in the bindover statute which specifically said: "Any prosecution that is had in a criminal court on the mistaken belief that the child was eighteen years of age or older at the time of the commission of the offense shall be deemed a nullity." *Wilson*, 73 Ohio St.3d at 44.

{¶30} "The *Gaskins I* court was wrong in adopting the broad rule that any deviation from the statutory bindover procedure renders the adult court's judgment void. The *Gaskins I* court should have examined the statute's text concerning the specific error alleged to determine whether the statute clearly established a barrier to the adult court's obtaining jurisdiction." *Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542, ¶ 28.

{¶31} In *Gaskins II*, the Supreme Court found there was full compliance with the bindover procedure where a juvenile court entry said the juvenile was present with counsel and the statutory bindover requirement of a mental and physical examination had been expressly waived. *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 382, 667 N.E.2d 1194, 1196 (1996) (*Gaskins II*). The Court later held the juvenile may waive the right to an amenability hearing. *State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 21. Those holdings essentially concluded "the mandates of the bindover statute were not jurisdictional after all." *Smith*, 159 Ohio St.3d 106 at ¶ 25-26, 33.

{¶32} In a direct appeal prior to the *Smith* clarifications, a defendant was bound over by the juvenile court and then pled guilty. She argued the juvenile court should have appointed a guardian ad litem under a safe harbor provision meant to assist certain human trafficking victims. The Ninth District held the defendant waived the argument by pleading guilty as the bindover issue did not affect the trial court's jurisdiction. The

Supreme Court affirmed on other grounds, specifically declining to address this waiver holding at issue herein. Instead, the Court applied a different waiver doctrine (failure to object) and concluded the defendant failed to show plain error. *State v. Martin*, 154 Ohio St.3d 513, 2018-Ohio-3226, 116 N.E.3d 127, ¶ 14-17, citing *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 23, 53, 56 (juvenile court violated mandatory duty to appoint a guardian ad litem for a juvenile who appeared at the amenability without parents as they were deceased; however, the juvenile failed to object in juvenile court and failed to show prejudice on appeal to support plain error). The application of the plain error doctrine implicitly meant the issue was not jurisdictional.

{¶33} In the more recent *Smith v. May* case, the Supreme Court expressly overruled the broad statement in *Gaskins I* (and some subsequent cases) which had suggested *any* defect in the "proper bindover procedure" is jurisdictional. *Smith*, 159 Ohio St.3d 106 at ¶ 20-28. It was pointed out the jurisdictional problem in *Wilson* "was that a juvenile-court proceeding had never happened at all" and the state failed to use the only method for transfer. *Id.* at ¶ 22. This was "quite different from *Gaskins I*, in which the subject-matter jurisdiction of a juvenile court was invoked, a bindover proceeding was held, and subject-matter jurisdiction ostensibly was transferred to an adult court." *Id.* The *Gaskins I* case also failed to focus on the statutory language to ascertain if subject matter jurisdiction was affected as in the *Wilson* case where the statute specifically eliminated jurisdiction to convict in adult court. *Id.* at ¶ 23.

{¶34} To be jurisdictional, the statute must make clear the specific requirement at issue is a barrier to the transfer of jurisdiction. *Id.* at ¶ 28, 32, 34. If a requirement is jurisdictional, the conviction could be challenged years in the future (without a delayed appeal). Merely because a certain bindover requirement is mandatory does not mean it is jurisdictional. *Id.* at ¶ 31. *See also Steele v. Harris*, 161 Ohio St.3d 407, 2020-Ohio-5480, 163 N.E.3d 565, ¶ 14-15 (explaining the transferee court's judgment is no longer considered void merely because a juvenile court failed to comply with the mandatory requirements of the bindover statute).

{¶35} For instance, even though an amenability hearing is one of the "key parts" and "central to any discretionary bindover procedure," the juvenile can waive it. *Smith*, 159 Ohio St.3d 106 at ¶ 18, 26. The *Smith* Court then found the bindover statute's

mandate that a written notice shall be provided to the parents three days before a hearing was not jurisdictional and the juvenile could express waiver of a parent's presence after the court violated the provision. *Id.*, applying R.C. 2152.12(G). The Court reasoned, "if the requirements are waivable, they are not jurisdictional" because the juvenile court's exclusive subject matter jurisdiction cannot be waived or forfeited and can be raised at any time. *Id.* at ¶ 26.

{¶36} In an earlier habeas case, the Court said the express waiver of the juvenile court's probable cause hearing could not be raised in a habeas corpus proceeding as it could have been raised in the ordinary course of an appeal and there was no "patent and unambiguous lack of jurisdiction." *Smith v. Bradshaw*, 109 Ohio St.3d 50, 2006-Ohio-1829, 845 N.E.2d 516, ¶ 10. The defendant in that case had been convicted after a trial. Notably: "When a court's judgment is void because the court lacked subject-matter jurisdiction, habeas corpus is generally an appropriate remedy despite the availability of appeal." *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 751 N.E.2d 1051 (2001), quoting *Rash v. Anderson*, 80 Ohio St.3d 349, 350, 686 N.E.2d 505 (1997).

{¶37} The state asks this court to adopt the Fourth District's position in *Powell* which is directly on point. In that case, the defendant argued his due process rights were violated when the juvenile court found probable cause to believe he committed offenses subject to mandatory bindover, and the Fourth District concluded the defendant waived this non-jurisdictional issue by pleading guilty. *State v. Powell*, 4th Dist. Gallia No. 20CA3, 2021-Ohio-200, ¶ 2, 55 (the plea waived other arguments raised on appeal as well).

{¶38} The *Powell* court reviewed the observations in *Smith* such as: not all mandatory bindover procedures are jurisdictional; if the procedure is waivable, it is not jurisdictional as subject matter jurisdiction cannot be waived; and an amenability hearing is waivable even though it is a key component of a discretionary bindover. *Id.* at ¶ 28-29, 55. The court noted just as an amenability hearing can be waived, a probable cause hearing can be waived or a juvenile can stipulate to probable cause. *Id.* at ¶ 55, citing *State v. J.T.S.*, 10th Dist. Franklin No. 14AP-516, 2015-Ohio-1103, ¶ 20.

{¶39} The Fourth District emphasized the clarity in the law after the Supreme Court issued *Smith*. *Powell*, 4th Dist. No. 20CA3 at ¶ 54 (pointing out the district had previously expressed it would await further guidance from the Supreme Court before

finding a challenge to probable cause raised only a non-jurisdictional issue). The court concluded: "Because probable cause hearings are waivable, they are not jurisdictional" which means the guilty plea waived the issue of whether the state presented sufficient credible evidence demonstrating probable cause. *Id.* at ¶ 55.

{¶40} Various courts have reviewed a juvenile court's probable cause determination without addressing the issue of whether a guilty plea after bindover waives the right to challenge the probable cause decision. Where the topic was not raised or addressed, the cases are not particularly persuasive authority on the topic.

{¶41} Some courts have specifically opined a guilty plea does not waive the right to appeal the probable cause determination. The First District concluded a defendant's appellate arguments contesting the juvenile court's probable cause and amenability decisions related to the common pleas court's subject matter jurisdiction and were not waived by the guilty plea. *State v. Amos*, 1st Dist. Hamilton No. C-150265, 2016-Ohio-1319, ¶ 28. Yet, that court relied on *Gaskins I*, which has since been overruled. The court also cited appellate cases in support. *Id.*, citing, *e.g.*, *State v. Riggins*, 68 Ohio App.2d 1, 5, 426 N.E.2d 504 (8th Dist.1980) (stating the plea did not waive arguments on the sufficient and admissibility of evidence at the probable cause hearing but the defendant failed to provide a transcript); *State v. Talbott*, 7th Dist. Mahoning No. 07 MA 225, 2008-Ohio-6300, ¶ 17. Some other cases cited in *Amos* did not involve probable cause or did not specifically address the issue of waiver by a guilty plea.

{¶42} In the cited Seventh District case, this court was conducting a review after a no merit brief was filed by counsel. We observed the review after a guilty plea is normally limited to an examination of the plea and sentencing because a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Talbott*, 7th Dist. No. 07 MA 225, ¶ 17, quoting *State v. Spates*, 64 Ohio St.3d 269, 272,595 N.E.2d 35 (1992). However, we then opined "we may also review the bindover proceedings from juvenile court, as it is a jurisdictional issue which is not waived by the guilty plea." *Talbott*, 7th Dist. No. 07 MA 225, ¶ 17. We then found the defendant properly waived a probable cause hearing and stipulated to probable cause in the juvenile court. *Id.* at ¶ 27.

{¶43} The Tenth District engaged in a discussion of whether an allegation of insufficient probable cause before bindover was a jurisdictional issue or whether it was waived by the guilty plea after bindover. *State v. E.T.*, 2019-Ohio-1204, 134 N.E.3d 741, ¶ 37-44 (10th Dist.). The state argued the allegation "is not a jurisdictional error [but is merely an allegation the juvenile court] committed a legal error by relying on insufficient evidence to find that probable cause existed." *Id.* at ¶ 42. However, the court concluded a *finding* of probable cause cannot be waived as the sufficiency of the probable cause evidence is jurisdictional, relying on the broad statement requiring the juvenile court's use of "proper bindover procedure" to relinquish exclusive jurisdiction. *Id.* at ¶ 38, 43-45 (and then found there was probable cause).

{¶44} As the Fourth District pointed out, the Tenth District's *E.T.* case was issued before the Supreme Court's 2020 clarifications in *Smith*. *Powell*, 4th Dist. No. 20CA3 at ¶ 54. Likewise, our *Talbott* case was issued in 2008 without the benefit of *Smith* or other more recent pronouncements.

{¶45} Lastly, as an out-of-state example, the Iowa Supreme Court found a juvenile court's probable cause decision was waived upon a guilty plea after bindover. *State v. Yodprasit*, 564 N.W.2d 383, 386 (Iowa 1997). Recognizing the difference between subject matter jurisdiction and a court's authority within a case, it was observed, "The insufficiency of the evidence to support the waiver order might be an impediment to the district court's authority, but such an impediment * * * can be obviated by consent, waiver, or estoppel." *Id.* at 386. The court explained: "A juvenile court might enter an erroneous order waiving jurisdiction. For example, there may not exist sufficient evidence to support the juvenile court's fact-findings on the criteria for the waiver. Such an order, however, does not undermine the district court's subject matter jurisdiction to conduct the criminal proceedings, accept a plea of guilty, and sentence the defendant-juvenile. In short, the error is judicial, not jurisdictional." *Id.*

{¶46} Relying on the explanation in the Supreme Court's 2020 *Smith* case that a waivable item is not jurisdictional and the Fourth District's 2021 position in *Powell*, we conclude a defendant who pleads guilty in the general division of the common pleas court waives the ability to contest the sufficiency and weight of the evidence presented at the

probable cause hearing in the juvenile court. Accordingly, Appellant's assignment of error is overruled, and the trial court's sentencing judgment is affirmed.

Waite, J., concurs.

Hess, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

Carol Ann Robb

JUDGE CAROL ANN ROBB

JUDGE CHERYL L. WAITE

JUDGE MICHAEL D. HESS,
JUDGE OF THE FOURTH DISTRICT COURT
OF APPEALS, SITTING BY ASSIGNMENT

NOTICE TO COUNSEL

This document constitutes a final judgment entry.