BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO PLAINTIFF-APPELLEE **-vs-** **CHAZ BUNCH** DEFENDANT-APPELLANT	CASE NO.: **2021-0579** ON APPEAL FROM **MAHONING COUNTY** COURT OF APPEALS, **SEVENTH APPELLATE DISTRICT** COURT OF APPEALS Case No. **18 MA 22**

STATE OF OHIO-APPELLEE'S ANSWER BRIEF

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Statement of Case, Facts, and Introduction

Defendant **Chaz Bunch** was originally sentenced to a 115-year stated prison term following "the horrific robbery, kidnapping, and repeated rape of M.K., a 22-year-old female Youngstown State University student[,]" shortly after she arrived to work the midnight shift at a group home for mentally-handicapped women. *See Bunch v. Smith*, 685 F.3d 546, 547 (6th Cir., 2012), *cert. denied, Bunch v. Bobby*, 133 S.Ct. 1996, 185 L.Ed.2d 865 (2013).

Defendant Chaz Bunch and his co-defendant Brandon Moore "brutally gang raped M.K. They each took turns orally raping her as the other one pointed a gun at her. Additionally, one would vaginally rape her while the other one orally raped her. This is easily considered the worst form of the offense." *State v. Bunch*, 7th Dist. Mahoning No. 02 CA 196, 2005 Ohio 3309, ¶ 171.

To provide a more specific factual background, the evening of August 21, 2001, started when co-defendant Brandon Moore robbed at gunpoint Jason Cosa, Christine Hammond, and Jason's grandfather. Moore then fled in an awaiting vehicle. (Trial Tr., at 809-813, 826-830.)

Later that night, at approximately 10:20 p.m., M.K., a twenty-two year-old Youngstown State University student, arrived for work at a group home for mentally handicapped women in Youngstown, Ohio. (Trial Tr., at 850, 854-855.) Upon arriving, she exited her vehicle and went to get her belongings from the trunk. On her way to the trunk, M.K. noticed an older, black vehicle coming up the street and stopping a few houses away. At this point, she also saw a tall, masked man running through the grass. M.K. later identified this individual as Brandon Moore. (Trial Tr., at 855, 862-863.)

Moore pointed a gun at her and instructed her to give him all her money and belongings. (Trial Tr., at 864.) When the porch light to the group home came on, Moore instructed her to get into the passenger seat of her vehicle. Moore climbed over M.K., and drove away with her inside. (Trial Tr., at 864.)

Upon leaving the driveway, Moore began following the black vehicle. Shortly thereafter, Moore stopped the vehicle and a second gunman exited the black vehicle and entered the victim's vehicle. (Trial Tr., at 870.) The second gunman, later identified as Defendant Chaz Bunch, put a gun to her head and demanded her money and belongings. Both Bunch and Moore had their guns to her head. (Trial Tr., at 874.) Moore began to compliment M.K. on her beauty, and then inserted his fingers into her vagina. M.K. memorized the black vehicle's license plate number as "CTJ6423," as her vehicle followed closely behind the suspects' black vehicle. (Trial Tr., at 872, 876-877.)

Eventually, Moore and the other vehicle drove down a dead-end street near Pyatt Street in Youngstown. (Trial Tr., at 879-881, 1038-1039.) Bunch ordered M.K. out of the vehicle, and then Moore and Bunch took turns orally raping her; one of them would have his penis in her mouth, while the other would force her head down. (Trial Tr., at 884-888.) Both continued to point their guns at her while this was occurring. (Trial Tr., at 888.) After Moore and Bunch orally raped her, they forced her at gunpoint to the trunk of the vehicle where they both anally raped her. (Trial Tr., at 889-893.) While this was occurring, co-defendant Jamar Callier went through her belongings in the trunk and took some of the items. Co-defendant Andre Bundy, remained in the black vehicle and watched this occur. (Trial Tr., at 890.) After they anally raped M.K., Bunch threw her to the ground, and Moore and Bunch then vaginally and orally raped her; while one

vaginally raped her, the other orally raped her. Both remained armed as this occurred. (Trial Tr., at 895-896.)

At some point, Bundy told Callier to stop them, and Callier pushed Bunch off M.K., helped her to her feet, and put her in her vehicle. (Trial Tr., at 897, 1265-1266.) This caused an altercation between Bunch and Callier, because Bunch wanted to kill M.K. Callier told Bunch not to kill a pregnant woman; during the rapes, M.K. pleaded for her life and told them that she was pregnant. (Trial Tr., at 893, 899.) Prior to letting her leave, Moore and Bunch threatened her to not tell anyone what happened. (Trial Tr., at 900.)

Once in her vehicle, M.K. drove straight to her boyfriend's parents' house; while driving, she kept repeating the license plate number of the suspects' vehicle. (Trial Tr., at 902.) Upon arriving at the house, M.K. screamed out the license plate number, which someone wrote down. Her boyfriend's parents then immediately took her to the hospital. (Trial Tr., at 902, 1029-1030.)

At the hospital, her boyfriend's father told Youngstown Officer Lynch that M.K. had been raped by individuals in an older black vehicle with the license plate number "CTJ6423." (Trial Tr., at 1028.) Officer Lynch was at the hospital for an unrelated matter, but broadcasted the information over the police radio at approximately 11:13 p.m. Officer Lynch then began obtaining further information from the victim, including a detailed description of the suspects, and he later broadcasted their descriptions over the police radio. (Trial Tr., at 910, 1027-1030.)

At approximately 11:30 p.m., Youngstown Officer Anthony Vitullo, who was on patrol and had heard Officer Lynch's broadcast, stopped at the Dairy Mart at the

intersection of Mahoning Avenue and Bella Vista. There, he noticed a black vehicle with the license plate number "CTJ6243." (Trial Tr., at 1061.) The plate number was not the exact number, but the numbers were very close. The number broadcasted over the radio was "CTJ6423." Given that the vehicle matched the description and the license plate number was very similar, Officer Vitullo followed the vehicle. (Trial Tr., at 1061.)

The black vehicle headed eastbound onto Mahoning Avenue toward downtown, and then merged onto I-680 southbound and exited at Glenwood Avenue. (Trial Tr., at 1062-1063.) The vehicle then ran the stop sign, turned southbound on Edwards Street, and pulled into the first driveway on the west side of the street. (Trial Tr., at 1063-1065.) Upon arriving, Officer Vitullo remained at his vehicle and waited for backup at arrive. (Trial Tr., at 1066-1067.) Once backup arrived, including Officer Schiffhauer from the YPD K-9 unit, the officers proceeded to the vehicle. The officers noticed that the driver of the vehicle, later identified as Defendant Chaz Bunch, had fled on foot. The passengers Brandon Moore, Andre Bundy, and Jamar Callier remained in the vehicle and were arrested. The passengers told the Youngstown officers that the driver's name was "Shorty Mack." Officer Schiffhauer and his K-90 determined that the driver headed west, but were unable to locate him. (Trial Tr., at 1111.)

At 11:50 p.m., Youngstown Officer Ronnie Jones heard the broadcast that the driver had fled on foot, and set up a perimeter on Glenwood Avenue near Bernard Street in the Volney Rogers parking lot. (Trial Tr., at 1152-1155.) Approximately five minutes later, Officer Jones noticed an individual, later identified as Defendant Chaz Bunch, "trotting" by on Glenwood Avenue. Bunch proceeded to the side door of 349 Glenwood Avenue and began knocking. (Trial Tr., at 1157-1159.)

Lamont Hollingshead lived at 349 Glenwood Avenue. Hollingshead opened the door, but he would not let Bunch in because he did not know him. Hollingshead testified that Bunch claimed that he was being chased by the police for a curfew violation. (Trial Tr., at 1184-1185.) Bunch asked Hollingshead to tell the police he was Bunch's uncle. Hollingshead complied with Bunch's request, because he believed that the police were after Bunch for a curfew violation. (Trial Tr., at 1184-1185.) Officer Jones questioned both Hollingshead and Bunch; Bunch told Officer Jones that he was 16 years old, that his name was Chaz Bunch, and that he was on his way from his uncle's house to his cousin's house. (Trial Tr., at 1159-1161.)

Given the explanation, and the fact that Bunch did not match the description of the driver that was broadcasted over the police radio, Officer Jones let Bunch go. The description broadcasted over the radio was that the driver was wearing gray sweats and went by the name of "Shorty Mack." (Trial Tr., at 1159-1162, 1167-1169.) Bunch was wearing navy blue pants, and a navy blue top with a white T-shirt underneath it. Moore was wearing gray sweatpants, thus, the wrong description was broadcasted over the radio. (Trial Tr., at 1162-1164.) After Officer Jones left, Bunch paid Hollingshead to make a telephone call from his house. Bunch called Brandy Miller; Brandy Miller's testimony and telephone records confirmed this. (Trial Tr., at 1195-1198, 1572-1573.)

Three days later, while at roll call, Officer Jones was informed that the rape suspect that fled that night was Chaz Bunch. Officer Jones informed his superiors about his encounter with Bunch that night. Officer Jones identified Bunch as the individual he saw on the night of the rape. Bunch was subsequently arrested.

During its investigation, Youngstown police inventoried the suspects' vehicle, and recovered M.K.'s belongings, vehicle registration and a credit union card belonging to Jason Cosa, a .38 caliber handgun, one blue wave cap, and one black wave cap. (Trial Tr., at 1071-1073, 1097, 1206-1208, 1211.) Additionally, M.K. identified Bundy as the driver of the dark vehicle. She identified Callier as the person who went through her trunk, and as the person who stopped the rape. She identified Moore as the first gunman who abducted, robbed, and raped her. (Trial Tr., at 910-913, 1425, 1433, 1451-1452, 1446-1451.)

As for Defendant Chaz Bunch's identification, M.K. was shown a photographic lineup and was drawn to Bunch's photograph as being the second gunman, but she told the detectives that she wanted to see a full body picture. The police were unable to put together a full body array that day. About one week later, M.K. saw a local newspaper that showed a picture of Bunch from mid-chest up. Upon seeing this picture, M.K. *immediately* knew that Bunch was the second gunman and called her victim-witness advocate to inform her. (Trial Tr., at 1450.)

The semen sample collected from the vaginal swab, rectal swab, and the victim's shorts were not consistent with Bunch's DNA. It was determined that Moore could not be excluded. No fingerprints were found on the .38 caliber gun.

During its investigation, Youngstown police obtained the video surveillance from the Dairy Mart on Mahoning Avenue where Youngstown Officer Anthony Vitullo encountered the suspects' vehicle. Still photographs made from the video surveillance showed Callier and Bunch at the gas station. In fact, the video surveillance showed Bunch wearing M.K.'s earning that he stole from her earlier that night.

Andre Bundy admitted to being the driver of the black vehicle, and told police that Callier stop the rape. (Trial Tr., at 1419-1421.)

Brandon Moore admitted that he robbed Cosa and Hammond, and admitted that he was the individual who first approached M.K. and forced her into her vehicle at gunpoint. Moore also admitted to raping her. (Trial Tr., at 1431.)

Callier testified at trial that both Bunch and Moore raped M.K. (Trial Tr., at 1264.) He stated that Bunch was the driver of the black vehicle when it left Dairy Mart, and Bunch then fled on foot once he pulled into the driveway on Edwards Street. Bunch told them to tell the police that his name was "Shorty Mack." (Trial Tr., at 1274.) Callier also identified Bunch in pictures that were captured by the surveillance cameras at Dairy Mart. (Trial Tr., at 1276.)

Defendant Chaz Bunch was convicted of three counts of rape, three counts of complicity to rape, aggravated robbery, conspiracy to aggravated robbery, kidnapping, menacing, and all related firearm specifications; Defendant was found not guilty on the two counts of aggravated robbery that were related to Cosa and Hammond. *See State v. Bunch*, 7th Dist. Mahoning No. 02 CA 196, 2005 Ohio 3309, ¶ 34.

Defendant was originally sentenced to a 115-year sentence. *See id*. at ¶ 35.

The Seventh District affirmed in-part, reversed in-part, and vacated in-part Defendant's convictions and sentence, and remanded for resentencing. *See id*. at ¶ 233. The Seventh District vacated Defendant's conspiracy conviction, and limited the imposition of firearm specifications to three. *See id*. at ¶ 233; *rev'd in-part by*, *In re Ohio Crim. Sentencing Statutes Cases*, 109 Ohio St. 3d 313, 2006 Ohio 2109, 847 N.E.2d 1174.

On June 12, 2003, Defendant filed a pro se Post-Conviction Petition.

On July 13, 2006, the trial court resentenced Defendant to an 89-year sentence. *See State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106, 2007 Ohio 7211, *appeal not accepted*, *State v. Bunch*, 118 Ohio St.3d 1410, 2008 Ohio 2340, 886 N.E.2d 872.

Defendant's convictions and 89-year sentence were affirmed. *See id*. at ¶ 51.

On April 30, 2013, Defendant filed a Delayed Application for Reconsideration pursuant to Appellate Rules 14(B) and 26(A)(1), in which he contended that his sentence was unconstitutional pursuant to *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). *See State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106 (J.E., August 8, 2013); *accord State v. Moore*, 7th Dist. Mahoning No. 08 MA 20, 2013 Ohio 5868.

The Seventh District denied Defendant's Application for Reconsideration, because his application did not justify such a delay, and the trial court's sentence did not violate the Eighth Amendment as stated in *Graham* and *Miller*. *See State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106 (J.E., August 8, 2013), *appeal not accepted*, *State v. Bunch*, 137 Ohio St.3d 1425, 2013 Ohio 5285, 998 N.E.2d 1179, *cert. denied*, *Bunch v. Ohio*, 574 U.S. 859, 135 S. Ct. 152, 190 L.Ed2d 111 (2014).

On August 14, 2014, Defendant filed an application for DNA Testing. The trial court denied Defendant's request, and the Seventh District affirmed the denial. *See State v. Bunch*, 7th Dist. Mahoning No. 14 MA 168, 2015 Ohio 4151.

Thereafter on December 22, 2016, this Court concluded that co-defendant Brandon Moore's 112-year sentence was unconstitutional, because "*Graham's* categorical prohibition of sentences of life imprisonment without the possibility of parole

for juveniles who commit nonhomicide crimes applies to juvenile nonhomicide offenders who are sentenced to term-of-years sentences that exceed their life expectancies." *State v. Moore*, 149 Ohio St.3d 557, 2016 Ohio 8288, 76 N.E.3d 1127, ¶ 100, *cert. denied*, *Ohio v. Moore*, 138 S. Ct. 62, 199 L.Ed.2d 183 (2017).

On February 22, 2017, Defendant filed a First Amended Post-Conviction Petition, and on November 22, 2017, the State filed a Motion for Judgment on the Pleadings. On January 29, 2018, the trial court denied in-part and granted in-part Defendant's First Amended Post-Conviction Petition.

The trial court denied Defendant's claims regarding trial court's decision not to employ an eyewitness identification expert, and also denied Defendant's challenge to Ohio's mandatory bindover statutes. The trial court, however, vacated Defendant's 89-year sentence pursuant to *Moore*, 149 Ohio St.3d at 557.

On September 6, 2019, the trial court re-sentenced Defendant Chaz Bunch to a 49-year stated prison term, and designated him as a Sexual Predator.

Defendant appealed. The Seventh District combined Defendant's appeal regarding his post-conviction petition and the September 6, 2019 Re-Sentencing Hearing. The Seventh District affirmed the trial court's denial of his post-conviction petition, and also affirmed Defendant's 49-year sentence and the trial court's designation of being a Sexual Predator. *See State v. Bunch*, 7th Dist. Mahoning No. 18 MA 22, 2021 Ohio 1244.

Defendant timely appealed, and this Honorable Court accepted jurisdiction. The State of Ohio now responds with its Answer Brief and requests this Honorable Court to Overrule Defendant-Appellant **Chaz Bunch's** Propositions of Law and Deny his request for relief.

Law and Argument

I. **Proposition of Law No. 1:** Trial courts should not deny a hearing on a postconviction petition based on a blanket rule that it is automatically a reasonable strategic decision to rely on cross-examination alone instead of consulting with and calling an expert witness.

State's Response to Proposition of Law No. 1: Trial Counsel was Not Constitutionally Ineffective for Not Presenting Expert Testimony to Challenge the Victim's Eyewitness Identification of Defendant, Because the Record Demonstrates Counsel's Decision was Strategic.

As for Defendant's first proposition of law, he contends that trial counsel was constitutionally ineffective because he failed to present an eyewitness-identification expert to challenge M.K.'s identification. Specifically, Defendant argues "nothing in the record demonstrates that trial counsel made a choice not to rely on an expert or that such a strategy was reasonable." (Defendant's Brief, at 18). To the contrary, the record indicates that trial counsel did consider this course of action, and decided against it. Moreover, trial counsel is not ineffective merely because counsel chose to rely on cross examination rather than an expert to challenge a witness at trial. Finally, trial counsel did opt to challenge M.K.'s identification via a motion to suppress (pretrial), and through cross-examination (at trial). Therefore, trial counsel was constitutionally effective.

A. A POSTCONVICTION PETITION MUST BE SUPPORTED WITH EVIDENTIARY DOCUMENTS THAT CONTAIN SUBSTANTIVE GROUNDS THAT DEMONSTRATE A CONSTITUTIONAL VIOLATION.

"Ohio's Post-Conviction Remedy Act, was enacted in 1965 in response to the United States Supreme Court order that states must provide their prisoners with some 'clearly defined method by which they may raise claims of denial of federal rights.'" *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999 Ohio 102, 714 N.E.2d 905, quoting *Young v. Ragen*, 337 U.S. 235, 239, 69 S. Ct. 1073, 93 L. Ed. 1333 (1949).

This Court has previously recognized that "[s]tate collateral review itself is not a constitutional right." *Calhoun*, 86 Ohio St.3d at 281, citing *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994), citing *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1. (1989). "Further, a postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *Calhoun*, 86 Ohio St.3d at 281, citing *Steffen*, 70 Ohio St.3d at 410, citing *State v. Crowder*, 60 Ohio St.3d 151, 573 N.E.2d 652 (1991).

In *Calhoun*, this Court noted "that cases of postconviction relief pose difficult problems for courts, petitioners, defense counsel and prosecuting attorneys alike. Cases long considered to be fully adjudicated are reopened, although memories may be dim and proof difficult. The courts justifiably fear frivolous and interminable appeals from prisoners who have their freedom to gain and comparatively little to lose." *Calhoun*, 86 Ohio St.3d at 281, quoting *State v. Milanovich*, 42 Ohio St.2d 46, 51, 325 N.E.2d 540, 543 (1975); *accord State v. Gondor*, 112 Ohio St. 3d 377, 2006 Ohio 6679, 860 N.E.2d 77, ¶ 57.

1. A TRIAL COURT'S DENIAL OF A POSTCONVICTION PETITION IS REVIEWED FOR AN ABUSE OF DISCRETION.

This Court has previously held that "a trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Gondor*, 112 Ohio St. 3d at 390; *accord State v. Peyatt*, 7th Dist. Monroe No. 21 MO 1, 2021 Ohio 3310, ¶ 9; *State v. Jackson*, 2nd Dist. Montgomery No. 29001, 2021 Ohio 3115, ¶ 10; *State v. Prater*, 10th Dist. Franklin No. 18AP-818, 2019 Ohio 2535, ¶ 29.

This Court previously recognized that an abuse-of-discretion standard of review is highly deferential, and accordingly, "will not lightly substitute our interpretation for that of the issuing court." *State ex rel. Cincinnati Enquirer v. Hunter*, 138 Ohio St. 3d 51, 2013 Ohio 5614, 3 N.E.3d 179, ¶ 29.

"The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St. 2d 151, 157-158, 404 N.E.2d 144 (1980), citing *Steiner v. Custer*, 137 Ohio St. 448, 31 N.E.2d 855 (1940); *Conner v. Conner*, 170 Ohio St. 85, 162 N.E.2d 852 (1959); *Chester Township v. Geauga Co. Budget Comm.*, 48 Ohio St.2d 372, 358 N.E.2d 610 (1976).

B. TO REVERSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST ESTABLISH BOTH DEFICIENT PERFORMANCE, *AND* HE MUST HAVE SUFFERED ACTUAL PREJUDICE AS A RESULT.

The U.S. Supreme Court "has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052 (1984). Thereby, according to the Court, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). But, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.*

"To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000 Ohio 448, 721 N.E.2d 52, citing *Strickland*, 466 U.S. at 687-688. And "[a] defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other." *Madrigal*, 87 Ohio St.3d at 389, citing *Strickland*, 466 U.S. at 697.

Because of the difficulties inherent in making the evaluation, a court must indulge a ***strong presumption*** that counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See Strickland*, 466 U.S. at 689; *State v. Vlahopoulos*, 8th Dist. App. No. 82035, 2005 Ohio

4287, at ¶ 3, citing *Jones v. Barnes*, 463 U.S. 745, 750-753, 103 S.Ct. 3308 (1983); *see also State v. Spivey*, 7th Dist. App. No. 89 C.A. 172, 1998 WL 78656, *6 (Feb. 11, 1998).

Further, "[a] reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel." *State v. Layne*, 12th Dist. Clermont No. CA2009-07-043, 2010 Ohio 2308, ¶ 47, citing *State v. Gleckler*, 12th Dist. Clermont No. CA2009-03-021, 2010 Ohio 496, ¶ 10. This Court "ordinarily refrains from second-guessing strategic decisions counsel makes at trial, even when counsel's trial strategy was questionable." *State v. Jackson*, 107 Ohio St.3d 300, 317, 2006 Ohio 1, 839 N.E.2d 362, citing *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980).

1. THE DECISION TO RELY ON CROSS-EXAMINATION INSTEAD OF PRESENTING AN EXPERT AT TRIAL WAS A STRATEGIC DECISION, AND SUCH TESTIMONY WOULD NOT HAVE ALTERED THE TRIAL'S OUTCOME.

The decision regarding which defense to pursue at trial is a matter of trial strategy "within the exclusive province of defense counsel to make after consultation with his client." *State v. Murphy*, 91 Ohio St.3d 516, 524, 2001 Ohio 112, 747 N.E.2d 765. A reviewing court can only find that counsel's performance regarding matters of trial strategy is deficient if counsel's strategy was so "outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff.'" *State v. Woullard*, 158 Ohio App.3d 31, 813 N.E.2d 964, 2004 Ohio 3395, ¶ 39 (2nd Dist.), quoting *State v. Yarber*, 102 Ohio App.3d 185, 188, 656 N.E.2d 1322 (12th Dist. 1995).

Specific to the failure to call an expert at trial, this Court recognized that "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d

225 (1993), citing *State v. Thompson*, 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407, 417 (1987); *accord State v. Wilks*, 154 Ohio St.3d 359, 2018 Ohio 1562, 114 N.E.3d 1092, citing *State v. Coleman*, 45 Ohio St.3d 298, 307-308, 544 N.E.2d 622 (1989).

Accordingly, "[a] postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial." *State v. Smith*, 4th Dist. Ross No. 09 CA 3128, 2011 Ohio 664, ¶ 29, quoting *State v. Combs*, 100 Ohio App.3d 90, 103, 652 N.E.2d 205 (1st Dist. 1994). "[T]o the extent that appellant may now wish to expand upon the point, it is settled that a postconviction petition does not demonstrate ineffective assistance of counsel even when it presents a new expert opinion that is different from the theory used at trial." *Smith*, supra at ¶ 29, quoting *State v. Cornwell*, 7th Dist. Mahoning No. 00 CA 217, 2002 Ohio 5177, ¶ 46, and citing *State v. Roseborough*, 5th Dist. Ashland Nos. 09 COA 003, 09 COA 004, 2010 Ohio 1832, ¶ 17, *State v. Tenace*, 6th Dist. Lucas No. L-05-1041, 2006 Ohio 1226, ¶ 26, *State v. Turner*, 10th Dist. Franklin No. 04AP-1143, 2006 Ohio 761, ¶ 35, and *State v. White*, 5th Dist. Ashland No. 97COA01229, 1998 Ohio App. LEXIS 4049, at *9 (Aug. 7, 1998).

Further, this Court has recognized that if counsel, for strategic reasons, decides not to pursue every possible trial strategy, defendant is not denied effective assistance of counsel. *State v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988). When there is no demonstration that counsel failed to research the facts or the law, or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980), citing *People v.*

Miller, 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089 (1972); *State v. Wiley*, 10th Dist. No. 03AP-340, 2004 Ohio 1008, ¶ 21.

"Debatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner*, 102 Ohio St.3d 358, 365, 2004 Ohio 3430, 811 N.E.2d 48, ¶ 45. Trial counsel's decision not to request an expert is a "debatable trial tactic," and does not amount to ineffective assistance of counsel. *See Thompson*, 33 Ohio St.3d at 9 (trial counsel's failure to obtain a forensic pathologist to "rebut" issue of rape was not ineffective assistance of counsel); *State v. Foust*, 105 Ohio St.3d 137, 153-154, 2004 Ohio 7006, 823 N.E.2d 836, ¶¶ 97-99 (trial counsel's failure to request funds for a DNA expert, an alcohol and substance-abuse expert, a fingerprint expert, and an arson expert did not amount to ineffective assistance of counsel because appellant's need for experts was "highly speculative" and counsel's choice "to rely on cross-examination" of prosecution's expert was a "legitimate tactical decision"); *State v. Yarger*, 6th Dist. No. H-97-014, 1998 WL 230648 (May 1, 1998) (trial counsel's failure to hire an expert medical doctor to rebut state's expert witness was not ineffective assistance of trial counsel); *State v. Rutter*, 4th Dist. Hocking No. 02CA17, 2003 Ohio 373, ¶¶ 19, 28 (trial counsel's failure to hire an accident reconstructionist did not amount to ineffective assistance of counsel).

"A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel." *Layne*, supra at ¶ 47, citing *Gleckler*, supra at ¶ 10. This Court "ordinarily refrains from second-guessing strategic decisions counsel makes at trial, even when counsel's trial strategy was questionable." *Jackson*, 107 Ohio St.3d at 317, citing *Clayton*, 62 Ohio St.2d at 49.

With the above in mind, the record demonstrates that trial counsel considered, but declined to use, an eyewitness-identification expert. Second, the use of such an expert would not have impacted the outcome of this trial. As such, Defendant's claim fails under either of the *Strickland* prongs, and the lower courts were correct in refusing to hold a hearing on the postconviction petition, and their decisions to deny the same.

a.) <u>The Record Demonstrates that Trial Counsel Considered Using an Eyewitness-Identification Expert, But He Ultimately Declined that Option.</u>

Here, Defendant contends that trial counsel was constitutionally ineffective because he failed to present an eyewitness-identification expert to challenge M.K.'s identification. Defendant specifically alleges that trial counsel never considered the option of calling an eyewitness-identification expert. (Defendant's Brief at 18). This allegation is incorrect, and the record demonstrates why.

The trial docket reveals that trial counsel requested an allocation of expert funds, specifically for the employment of an eyewitness-identification expert, on January 2, 2002, eight (8) plus months prior to trial. The trial court granted the request on January 7, 2002, and funds were made available for an eyewitness-identification expert.

From that point, the record would be (and is) devoid of any outlay of funds for an expert as such matters are handled by the Auditor's Office, and would therefore not appear on the trial court's docket. What this means is that: 1) trial counsel contemplated the use of an eye-witness expert; 2) trial counsel went so far as to obtain funds for an expert; 3) trial counsel may have consulted/retained an eye-witness expert[1]; and, 4) trial

[1] If trial counsel did consult/retain an eyewitness expert the record would not reveal this short of that expert being called at trial and/or disclosed to the state. Because neither of

counsel made a strategic decision after considering the same not to call an eyewitness-identification expert. Simply put, the record demonstrates that trial counsel's decision not to call an eyewitness-identification expert was a conscious and considered decision. Accordingly, Defendant's claim that the same was not "strategic," or even considered is wrong, and cannot form the basis of his claim of ineffective assistance of counsel. Finally, because the decision not to call an eyewitness-identification expert was, demonstrably, "strategic," this Court need not consider whether the same caused prejudice to Defendant based on the case law above.

b.) Defendant Failed to Establish that an Eyewitness-Identification Expert Would Have Altered the Trial's Outcome.

Assuming, arguendo, that this Court does entertain the prejudice prong, Defendant's claims still fail. The victim in this matter identified Defendant at multiple hearings, each time giving a consistent and compelling identification.

Most notably at trial, M.K. testified that she was robbed and kidnapped at gunpoint by Brandon Moore on the evening of August 21, 2001. (Trial Tr., at 863.) Moore instructed her to get into the passenger seat of her vehicle, and he drove the two away. (Trial Tr., at 864.) Thereafter, Moore stopped the vehicle and a second gunman, Defendant Chaz Bunch entered the vehicle. (Trial Tr., at 873.) Bunch put a gun to her head and also demanded her money. (Trial Tr., at 873-874.)

Eventually, Moore drove the three to a dead-end street near Pyatt Street in Youngstown. (Trial Tr., at 879, 881, 1038-1039.) There, Moore and Bunch took turns orally raping her at gunpoint; one of them would have his penis in her mouth, while the

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these circumstances appear on the record, this Court can only presume what happened after the funds were allotted.

other would force her head down. (Trial Tr., at 885, 887-888.) Moore and Bunch then forced her at gunpoint behind the vehicle and anally raped her. (Trial Tr., at 889, 893.) After this occurred, Bunch threw the victim to the ground and he and Moore vaginally and orally raped her. (Trial Tr., at 895.) While one of them vaginally raped her, the other would orally rape her, and then they would switch places. (Trial Tr., at 895-896.)

At some point while this was occurring, Andre Bundy (the driver of the black vehicle) told Jamar Callier (a passenger in the black vehicle) to stop what was going on. Callier pushed Bunch off the victim, which allowed her to leave in her vehicle. (Trial Tr., at 897, 1265-1266.)

During the rapes, they threatened to kill her, as she was pleading for her life and claimed to be pregnant in an attempt to get them to stop. (Trial Tr., at 893.) Prior to her leaving, Moore and Bunch threatened to harm her and her family if she ever told what happened. (Trial Tr., at 900.)

On August 22, 2001, M.K. was shown several photographic line-ups. (Trial Tr., at 910-911, 1425, 1433.) At trial, M.K. explained her identification of Defendant Chaz Bunch:

> I was so drawn to number 5, and because of the eyes and the mean -- the eyes are so cold, and I was telling Detective Shuster the cheeks and the -- like the hair was short, * * * I told Detective Shuster if I had to sign this one, I would, but I wanted a body shot. I needed a body shot because he was in the back seat of the vehicle, and he was shorter, and he was like rounder, and I need to see like his hands and roundness of his body.
>
> * * *
>
> Because form this photo, you can only see like this much, and you needed -- when he was on top of me and when I could see him, I needed to be able to see like his body, like how short he was and

> how and like the roundness of his stomach and his hands and the roundness of him.

(Trial Tr., at 914-915.) Thereafter, on September 7, 2001, M.K. observed Defendant Chaz Bunch's photograph in a Vindicator article. (Trial Tr., at 916.) Upon seeing the photograph, M.K. "***immediately just dropped the picture, and I knew***. And I said, 'I got to call Ellen [Taylor].' And it was like 11:30 at night, and I called Ellen. And I said, ***'It's him. It's him. I know it's him.'*** And I was so mad at myself for not signing, * * *." (Trial Tr., at 915-916.)

M.K. stated, "***you never forget a body when it's on top of you and you are forced***." (Trial Tr., at 917.) She then described Bunch's body: "when I was being raped, this part of him face to face, this was over top of me. His shoulders, his broadness, and I just remember how big he was and how wide and how little I was compared to this, and I just saw it, and it just -- ***I knew***." (Trial Tr., at 918.)

M.K. identified Defendant Chaz Bunch in the courtroom. (Trial Tr., at 921.)

This was not the first time that M.K. identified Defendant. Rather, at the bind-over hearing in this matter she gave a consistent account of the events, and of her identification of Defendant Chaz Bunch. (See Bind-over Tr., generally.)

She also gave a consistent account of the events, and of her identification of Defendant at a hearing which sought to challenge her pre-trial eyewitness identification. (*See generally* Hearing on Motion to Suppress, March 20, 2002, before the Honorable R. Scott Krichbaum.)

This reveals a number of things that play both to the "strategic" nature of trial counsel's decisions, and to the believability of her identification. First, trial counsel had thrice (including trial) had an opportunity to hear M.K.'s retelling of the events of the

crimes, and her subsequent identification of Defendant. Second, M.K. was consistent in her testimony at the various hearings. Finally, trial counsel did attempt to suppress her pre-trial eyewitness identification prior to trial to no avail. Based on the foregoing, Defendant did not suffer prejudice in trial counsel opting not to call an eyewitness-identification expert.

Finally, as to this proposition, there was ample other evidence to convict Defendant even without the identification by M.K..

During its investigation, Youngstown police obtained the video surveillance from the Dairy Mart on Mahoning Avenue where Youngstown Officer Anthony Vitullo encountered the suspects' vehicle. (Trial Tr., at 1061-1062.) Still photographs made from the video surveillance showed Callier and Bunch (wearing M.K.'s earning that he stole from her earlier that night) at the gas station. (Trial Tr., at 1399.)

Jamar Callier, who was a passenger in the black vehicle, identified Defendant Chaz Bunch in the still photographs taken from Dairy Mart's video surveillance. (Trial Tr., at 1276-1277, 1399-1400.) Callier testified at trial that both Bunch and Moore raped M.K. (Trial Tr., 1264.) Callier stated that Bunch was the driver of the black automobile when it left the Dairy Mart, and once Bunch pulled the vehicle into the house on Edwards Street, Bunch told them to tell the police that he was "Shorty Mack." (Trial Tr., at 1274.)

Like M.K., Jamar Callier identified Defendant Chaz Bunch in courtroom. (Trial Tr., at 1283-1284.)

Here, while Scott Gronlund's statement challenges M.K.'s identification, he fails to even mention the relevance of Jamar Callier's testimony and identification of Defendant Chaz Bunch, a person that Callier was is familiar with at the time.

Thus, an eyewitness identification expert would not have altered the trial outcome, because M.K.'s identification was corroborated by Jamar Callier's testimony and identification of Defendant of Chaz Bunch.

Therefore, trial counsel was constitutionally effective, because trial counsel's decision to rely on cross examination rather than an expert to challenge M.K. and Jamar Callier's identifications was a matter of trial strategy.

Defendant's first proposition of law is meritless and review must be denied.

II. **Proposition of Law No. 2:** A child cannot be transferred to adult court without a finding that they are not amendable to treatment in juvenile court.

State's Response to Proposition of Law No. 2: Defendant's Argument Regarding Ohio's Mandatory Bindover Statutes is Barred by Res Judicata, But Nevertheless, Ohio's Mandatory Transfer of Certain Violent Juvenile Offenders to Adult Court Complies with Due Process under the United States Constitution.

As to Defendant's second proposition of law, he contends that Ohio's mandatory bindover statutes are unconstitutional, and this Court should overrule its decision in *State v. Aalim*, 150 Ohio St.3d 489, 2017 Ohio 2956, 83 N.E.3d 883 ("*Aalim II*"), and return to its decision in *State v. Aalim*, 150 Ohio St.3d 463, 2016 Ohio 8278, 83 N.E.3d 862, paragraph one of the syllabus ("*Aalim I*").

First, Defendant failed to raise the constitutionality of Ohio's mandatory bindover statutes before the juvenile court or the trial court, and further failed to raise the issue of the statutes' constitutionality in any of his previous direct appeals. Thus, Defendant forfeited his challenge to these statutes, and res judicata further bars Defendant's challenge to Ohio's mandatory bindover statutes.

Second, even assuming this Court finds that Defendant's challenge was not forfeited, this Court previously concluded that Ohio's mandatory bindover statutes were constitutional, because "the General Assembly could rationally achieve the legitimate state interest of decreased juvenile crime by redefining the jurisdiction of the juvenile divisions of the common pleas courts[,]" and the statutes are "rationally related to the legitimate governmental purpose of increased punishments for serious juvenile offenders[.]" *Aalim*, 150 Ohio St.3d at 501-502; *see State v. Bunch*, 7th Dist. Mahoning No. 18 MA 22, 2021 Ohio 1244, ¶ 30.

A. DEFENDANT FORFEITED HIS CHALLENGE TO OHIO'S MANDATORY BINDOVER STATUTES, AND THIS CASE SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

To begin, Defendant failed to raise the constitutionality of Ohio's mandatory bindover statutes before the juvenile court or the trial court, and Defendant further failed to raise the issue of the statutes' constitutionality in *any* of his previous direct appeals. Thus, Defendant forfeited his challenge to these statutes, and res judicata further bars Defendant's challenge to Ohio's mandatory bindover statutes.

This Court should dismiss Defendant's appeal as improvidently granted.

1. DEFENDANT FORFEITED HIS CHALLENGE TO OHIO'S MANDATORY BINDOVER LAW BECAUSE HE FAILED TO OBJECT IN EITHER JUVENILE COURT OR THE GENERAL DIVISION.

Defendant failed to challenge the constitutionality of Ohio's mandatory bindover statutes before either the juvenile court, or the general division of the common pleas court.

This Court has long recognized that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545, paragraph three of the syllabus (1968).

Specific to Defendant's argument here, this Court concluded in *Quarterman* that the defendant failed to preserve the same issue regarding the constitutionality of Ohio's mandatory bindover statutes after he failed to challenge the statutes' constitutionality

before the juvenile court or the general division of the common pleas court. *See State v. Quarterman*, 140 Ohio St.3d 464, 469, 2014 Ohio 4034, 19 N.E.3d 900.

Thus, in accordance with *Quarterman*, Defendant likewise failed to preserve the issue of whether Ohio's mandatory bindover statutes are constitutional. *See id*.

Furthermore, any alleged error in the bindover must be raised on direct appeal, because "a voidable judgment may be set aside only if successfully challenged on direct appeal." *State v. Harper*, 160 Ohio St. 3d 480, 487, 2020 Ohio 2913, 159 N.E.3d 248, *citing State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, 873 N.E.2d 306, ¶ 28.

Here, at best, Defendant's argument involves a voidable judgment, because any defect in the bindover process is non-jurisdictional. *See Smith v. May*, 159 Ohio St.3d 106, 112-114, 2020 Ohio 61, 148 N.E.3d 542 (recognizing that both probable cause and amenability hearings are waivable, and "if the requirements are waivable, they are not jurisdictional."); *accord State v. Powell*, 4th Dist. Gallia No. 20CA3, 2021 Ohio 200.

2. RES JUDICATA BARS DEFENDANT'S CHALLENGE TO OHIO'S MANDATORY BINDOVER LAW BECAUSE HE FAILED TO RAISE IT IN ANY OF HIS PREVIOUS DIRECT APPEALS.

Second, Defendant asserted in his *postconviction petition*, filed pursuant to R.C. 2953.21, that Ohio's mandatory bindover statutes are unconstitutional. But Defendant's argument here is barred by res judicata because he failed to raise the issue in *any* of his previous direct appeals. *See State v. Bunch*, 7th Dist. Mahoning No. 14 MA 168, 2015 Ohio 4151 (affirming the denial of Defendant's application for DNA testing pursuant to R.C. 2953.71, et seq.); *State v. Bunch*, 7th Dist. Mahoning No. 06 MA 106, 2007 Ohio 7211 (affirming Defendant's 89-year prison term); *State v. Bunch*, 7th Dist. Mahoning

No. 02 CA 196, 2005 Ohio 3309, *rev'd in part sub nom., In re Ohio Crim. Sent'g Statutes Cases*, 109 Ohio St.3d 313, 2006 Ohio 2109, 847 N.E.2d 1174 (affirming Defendant's conviction, but reversing for re-sentencing pursuant to *Foster*).

It is well-settled law in Ohio that the doctrine of res judicata applies to all postconviction proceedings. *See State v. Szefcyk*, 77 Ohio St. 3d 93, 95, 1996 Ohio 337, 671 N.E.2d 233; *accord State v. Perry*, 10 Ohio St. 2d 175, 180, 226 N.E.2d 104 (1967). In *Szefcyk*, this Court underscored the importance of finality of judgments of conviction:

> "[P]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts.

(Internal citations omitted.) *Szefcyk*, 77 Ohio St. 3d at 95, quoting *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

Res judicata bars any claim or defense that was raised or could have been raised in an earlier proceeding:

> Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

Perry, at paragraph nine of the syllabus.

Thus, "[c]onstitutional issues cannot be considered in postconviction proceedings under Section 2953.21 et seq., Revised Code, where they have already been or could have

been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him." *Perry*, at paragraph seven of the syllabus.

Ohio laws "do not contemplate relitigation of those claims in post conviction proceedings where there are no allegations to show that they could not have been fully adjudicated by the judgment of conviction and an appeal therefrom." *State v. Quinn*, 2017 Ohio 8107, 98 N.E.3d 1184, 1199 (2nd Dist.), quoting *Perry*, 10 Ohio St.2d at 180.

"To overcome the res judicata bar, the petitioner must produce new evidence that renders the judgment void or voidable and show that he could not have appealed the claim based upon information contained in the original record." *State v. Aldridge*, 120 Ohio App.3d 122, 151, 697 N.E.2d 228 (2nd Dist. 1997). Further, "[t]o overcome the *res judicata* bar, evidence offered *dehors* the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record." *State v. Clark*, 7th Dist. Mahoning No. 06 MA 26, 207 Ohio 2707, ¶ 14, quoting *State v. Lawson*, 103 Ohio App.3d 307, 315, 659 N.E.2d 362 (12th Dist. 1995).

In *Clark*, the Seventh District upheld the dismissal of the defendant's postconviction petition after he "failed to submit any evidence from outside the original trial court record in support of these allegations." *Clark*, supra at ¶ 16; *see also State v. Shaw*, 7th Dist. Mahoning No. 13 MA 137, 2014 Ohio 5633, ¶ 25 (stating, "[w]ithout evidence *dehors* the record, it is apparent that Appellant is simply making an argument that could have been made on direct appeal and was not, and therefore, the alleged error is *res judicata*."); *State v. Smith*, 4th Dist. Scioto No. 16CA3774, 2017 Ohio 7659, ¶ 12

(stating "a petition for postconviction relief is not the proper vehicle to raise issues that were or could have been determined on direct appeal.").

Accordingly, for Defendant to avoid dismissal of his petition, "the evidence supporting the claims in the petition must be competent, relevant, and material evidence outside the trial court's record, and it must not be evidence that existed or was available for use at the time of trial. * * *" (Emphasis sic.) *State v. Holnapy*, 11th Dist. Lake No. 2013-L-002, 2013 Ohio 4307, ¶ 26 quoting *State v. Adams*, 11th Dist. Trumbull No. 2003-T-0064, 2005 Ohio 348, ¶ 39, and citing *State v. Braden*, 10th Dist. Franklin No. 02AP-954, 2003 Ohio 2949, ¶ 27; *see State v. Monroe*, 10th Dist. Franklin No. 04AP-658, 2005 Ohio 5242.

Here, Defendant raised the issue regarding the constitutionality of Ohio's mandatory bindover statutes through a postconviction petition—***14 years after*** he was convicted and first sentenced. Defendant then failed to raise this issue in *any* of his subsequent appeals. *See Bunch*, 2015 Ohio 4151 (affirming the denial of Defendant's application for DNA testing pursuant to R.C. 2953.71, et seq.); *Bunch*, 2007 Ohio 7211 (affirming Defendant's 89-year prison term); *Bunch*, 2005 Ohio 3309, *rev'd in part sub nom., In re Ohio Crim. Sent'g Statutes Cases*, 109 Ohio St.3d at 313 (affirming Defendant's conviction, but reversing for re-sentencing pursuant to *Foster*).

Defendant's argument regarding the constitutionality of Ohio's mandatory bindover statutes is a purely legal argument that does not require any facts or evidence found outside the record. It is clear that Defendant raised an argument in his postconviction petition that could have, and should have, been made on direct appeal.

Here, Defendant did not overcome the res judicata bar, because he failed to offer *any* evidence dehors the record to demonstrate that he could not made his argument with information already in the original trial record. *See State v. Slagle*, 4th Dist. Highland No. 11CA22, 2012 Ohio 1936, ¶ 16; *see e.g.*, *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982) (concluding that the defendant failed to overcome the bar of res judicata because the evidence he submitted with his postconviction petition was not credible); *see also State v. Smith*, 125 Ohio App.3d 342, 708 N.E.2d 739 (12th Dist. 1997); *State v. Combs*, 100 Ohio App.3d 90, 97, 652 N.E.2d 205 (1st Dist. 1994).

Therefore, res judicata bars Defendant's argument regarding the constitutionality of Ohio's mandatory bindover statutes that he raised in his postconviction petition ***14 years after*** he was convicted and first sentenced. *See Szefcyk*, 77 Ohio St. 3d at 95 (rejecting the defendant's "claim that *res ju*dicata has no application where there is a change in the law due to a judicial decision of this court.").

B. OHIO'S MANDATORY BINDOVER STATUTES—THAT APPLY ONLY TO CERTAIN VIOLENT OFFENDERS—DO NOT VIOLATE A JUVENILE'S RIGHT TO DUE PROCESS.

Assuming, arguendo, that this proposition is not barred by res judicata, the same still fails on its merits, or lack thereof. Here, Defendant contends that Ohio's mandatory bindover statutes violate juvenile offenders' due process rights, because they fail to afford offenders an individualized assessment through an amenability hearing. Defendant further relies on the procedural-due-process component of the Due Process Clause when in fact he should have argued it under the substantive-due-process component. Defendant, however, cannot establish either a procedural-due-process or substantive-due-process claim to an amenability hearing.

Thus, assuming this Court considers Defendant's forfeited constitutional challenge to Ohio's mandatory bindover statutes, this Court must re-affirm its holding in *Aalim II* that Ohio's mandatory bindover statutes comply with the due process protections guaranteed by the United States Constitutions,[2] because the decision to transfer certain violent juvenile offenders to adult court was rationally related to a legitimate government purpose. *See Aalim*, 150 Ohio St.3d at 501-502; *accord State v. Bunch*, 7th Dist. Mahoning No. 18 MA 22, 2021 Ohio 1244, ¶ 30.

And, because Defendant failed to preserve the issue of whether Ohio's mandatory bindover statutes are constitutional, this Court must proceed under a plain error analysis. *See Quarterman*, 140 Ohio St.3d at 468; *accord State v. Buttery*, 162 Ohio St.3d 10, 12-13, 2020 Ohio 2998, 164 N.E.3d 294, *cert. denied*, 141 S. Ct. 1435, 209 L. Ed. 2d 155 (2021).

"To establish that plain error occurred, we require a showing that there was an error, that the error was plain or obvious, that but for the error the outcome of the proceeding would have been otherwise, and that reversal must be necessary to correct a manifest miscarriage of justice." *Buttery*, 162 Ohio St.3d at 13. "'[T]here can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving' the issue." *United States v. Gilcrest*, 792 Fed.Appx. 734 (11th Cir., 2019), quoting *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir., 2003).

[2] Defendant has not made or preserved any argument based on the Ohio Constitution.

1. ARTICLE IV, SECTION 4(B) OF THE OHIO CONSTITUTION GRANTS EXCLUSIVE AUTHORITY TO THE GENERAL ASSEMBLY TO DEFINE EACH OHIO COURT'S JURISDICTION.

"Article IV, Section 4(B) of the Ohio Constitution grants exclusive authority to the General Assembly to allocate certain subject matters to the exclusive original jurisdiction of specified divisions of the courts of common pleas." *State v. Aalim*, 150 Ohio St. 3d 489, 489, 2017 Ohio 2956, 83 N.E.3d 883; *accord Smith*, 159 Ohio St.3d at 116 (Kennedy, J., concurring).

The General Assembly first exercised that power by vesting jurisdiction of all felonies with the court of common pleas. *See* R.C. 2931.03. The General Assembly, under its exclusive authority provided by Article IV, Section 4(B) of the Ohio Constitution, then allocated to "juvenile courts exclusive subject-matter jurisdiction over children alleged to be delinquent for committing acts that would constitute a crime if committed by an adult." *Smith*, 159 Ohio St.3d at 116.

The General Assembly provided two exceptions to the general rule that juvenile offenders be subjected to the exclusive jurisdiction of the juvenile court. One authorizing the juvenile court to relinquish its jurisdiction in certain, limited cases pursuant to R.C. 2152.12, and the second being that the juvenile court is divested of its jurisdiction all together if the juvenile offender is apprehended after he attains the age of 21 pursuant to R.C. 2152.12(J) and R.C. 2151.23(I).

At issue here is the first exception; under R.C. 2152.10 and R.C. 2152.12, a juvenile offender who commits a certain qualifying violent offense, and is of a certain age, is automatically removed from the juvenile court's jurisdiction and transferred to the general division of the common on pleas court.

Defendant Chaz Bunch was subject to a mandatory transfer to adult court, because he was 16 when he committed this "horrific robbery, kidnapping, and repeated rape [at gunpoint] of M.K., a 22-year-old female Youngstown State University student[,]" shortly after she arrived to work the midnight shift at a group home for mentally-handicapped women. *See Bunch*, 685 F.3d at 547; *see also* R.C. 2152.10; R.C. 2152.12. As such, regardless of whether an amenability hearing was held, the transfer to adult court would have resulted.

2. OHIO'S MANDATORY BINDOVER STATUTES ARE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT PURPOSE.

The Due Process Clause of the Fourteenth Amendment prohibits the state of Ohio from depriving "any person of life, liberty, or property without due process of law[.]" Fourteenth Amendment to the U.S. Constitution, Section 1. And "[s]ince 1887, this court has equated the Due Course of Law Clause in Article I, Section 16 of the Ohio Constitution with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Aalim*, 150 Ohio St.3d at 494, citing *Adler v. Whitbeck*, 44 Ohio St. 539, 569, 9 N.E. 672 (1887); *accord State v. Hand*, 149 Ohio St.3d 94, 2016 Ohio 5504, 73 N.E.3d 448, ¶ 11.

"While the clause on its face would seem to concern itself with only the adequacy of procedures employed when one is deprived of life, liberty, or property, the United States Supreme Court has read it to include a substantive component that forbids some government actions 'regardless of the fairness of the procedures used to implement them.'" *Aalim*, 150 Ohio St.3d at 503 (DeWine, J., concurring), quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Thus, there is a clear

distinction between the two concepts; "[w]hile procedural due process assesses the adequacy of procedures employed, substantive due process reviews legislative enactments." *Aalim*, 150 Ohio St.3d at 503 (DeWine, J., concurring); *accord Ferguson v. State*, 151 Ohio St. 3d 265, 275, 2017 Ohio 7844, 87 N.E.3d 1250 (recognizing, "[b]ecause this is a challenge to a generalized legislative determination, it is best characterized as a substantive-due-process claim."); *see also State v. McKinney*, 2015 Ohio 4398, 46 N.E.3d 179, ¶ 19 (1st Dist.).

Here, Defendant contends that Ohio's mandatory bindover statues violates a juvenile offender's due process rights, and focuses on the procedural-due-process component to the Fourteenth Amendment. Defendant, however, failed to raise an argument regarding *substantive* due process before either the trial court or the Seventh District. The State will address the *substantive*-due-process component first.

a.) <u>Substantive Due Process.</u>

Because Defendant's challenge is to the General Assembly's determination to automatically remove certain violent juvenile offenders from the juvenile court, Defendant's challenge should have been made under the *substantive component* of the Due Process Clause. *See Aalim*, 150 Ohio St.3d at 503 (DeWine, J., concurring).

The U.S. Supreme Court remains "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), quoting *Collins v. Harker Hts.*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

The U.S. Supreme Court established two primary features for substantive-due-process analysis. *See Glucksberg,* 521 U.S. at 720; *Aalim,* 150 Ohio St.3d at 494.

First, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' * * * and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Aalim,* 150 Ohio St.3d at 494, quoting *Glucksberg,* 521 U.S. at 720-721, quoting *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 1937-1938, 52 L.Ed.2d 531 (1977), and *Palko v. Connecticut*, 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937); *see Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); *Shirokey v. Marth,* 63 Ohio St. 3d 113, 117, 585 N.E.2d 407 (1992).

Second, the Court requires "a 'careful description' of the asserted fundamental liberty interest[,]" which "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' * * * that direct and restrain our exposition of the Due Process Clause." *Glucksberg,* 521 U.S. at 721, citing *Collins,* 503 U.S. at 125, 112 S.Ct. at 1068.

In *Glucksberg,* the Court explained that by limiting an expansion of substantive due process rights to only those fundamental rights "deeply rooted in our legal tradition," * * * "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Glucksberg,* 521 U.S. at 722. Thus, "by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action,

it avoids the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722; *accord Aalim*, 150 Ohio St.3d at 495.

The Fourteenth Amendment to the United States Constitution was ratified in 1868, whereas the first juvenile court in the United States was not established until 1899 in Cook County, Illinois. *See Aalim*, 150 Ohio St.3d at 495. The Ohio legislature did not establish juvenile courts until 1937, and it was not until 1969 that the Ohio legislature established amenability hearings. *See Aalim*, 150 Ohio St.3d at 495. Thus, the Due Process Clause could not have created a substantive right to any particular juvenile-court procedure, because the clause predates the creation of juvenile courts in both Ohio and throughout the United States. *See Aalim*, 150 Ohio St.3d at 495.

Accordingly, an individualized assessment through "an amenability hearing cannot be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty[.]'" *Aalim*, 150 Ohio St.3d at 495, quoting *Moore*, 431 U.S. at 503, quoting *Palko*, 302 U.S. at 326.

Furthermore, this Court recognized in *Aalim* that a comparison of U.S. Supreme Court cases "demonstrates that the court has confined its broad interpretation of substantive due process to cases in which government actions prohibited private conduct and infringed on personal autonomy." *Aalim*, 150 Ohio St.3d at 496.

Thus, Defendant's asserted right to an individual assessment through an amenability hearing is not a fundamental right, because it is not grounded in history and tradition, and does not involve a government intrusion into any private conduct. *See Aalim*, 150 Ohio St.3d at 496-497. Accordingly, Ohio's mandatory bindover statutes at issue here must only survive rational-basis review. *See McKinney*, supra at ¶ 22.

Article IV, Section 4(B) of the Ohio Constitution grants exclusive authority to the General Assembly to define the jurisdiction of Ohio juvenile courts. *See Aalim*, 150 Ohio St.3d at 489; *accord Smith*, 159 Ohio St.3d at 116 (Kennedy, J., concurring). In its exclusive authority, the General Assembly chose to subject only those juvenile offenders that commit the most violent criminal offenses to a mandatory bindover to adult court.

In Ohio, there are ***more than 200*** criminal offenses contained in Chapter 29 of the Revised Code that a person can be charged with. But the General Assembly chose ***only 12*** criminal offenses that would subject a juvenile offender to a mandatory bindover to adult court. *See* R.C. 2152.02(A)(A);[3] R.C. 2152.02(B)(B).[4] Further, the juvenile offender must be ***at least 14 years of age***, regardless of the charged offense, to be subjected to a mandatory bindover. *See* R.C. 2152.10; R.C. 2152.12. Thus, the General Assembly limited mandatory bindovers to only the most violent juvenile offenders.

In *Synder*, the U.S. Supreme Court long ago recognized that the states are "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Com. of Mass.*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

Because Defendant's asserted right to an individual assessment through an amenability hearing is not a fundamental right, the State of Ohio is free to vest the

[3] Category One offenses include: Murder, Aggravated Murder, Attempted Aggravated Murder, and Attempted Murder. *See* R.C. 2152.02(A)(A).

[4] Category Two offenses include: Voluntary Manslaughter, Kidnapping, Rape, Felony Involuntary Manslaughter, Aggravated Arson, Aggravated Robbery, Aggravated Burglary, and Felonious Sexual Penetration. *See* R.C. 2152.02(B)(B).

General Assembly with the exclusive authority to define the jurisdiction of Ohio juvenile courts.

Therefore, "the General Assembly could rationally achieve the legitimate state interest of decreased juvenile crime by redefining the jurisdiction of the juvenile divisions of the common pleas courts[,]" and the statutes are "rationally related to the legitimate governmental purpose of increased punishments for serious juvenile offenders[.]" *Aalim*, 150 Ohio St.3d at 501-502; *accord McKinney*, supra at ¶ 23.

b.) Procedural Due Process.

Here, as stated above, Defendant ignored the substantive-due-process argument, and instead relied on *Kent v. United States* and *Mathews v. Eldridge* to establish that the lack of an individual assessment through an amenability hearing violated his right to due process. To the contrary, Defendant's reliance on *Kent* and *Mathews* is misplaced because both cases addressed *procedural* due process. And Because Defendant's challenge is to a legislative enactment (i.e., Ohio's mandatory bindover statutes), Defendant's challenge should have been made under the *substantive component* of the Due Process Clause. *See Aalim*, 150 Ohio St.3d at 503 (DeWine, J., concurring).

Defendant further contends that Ohio's mandatory bindover statutes are "fundamentally unfair." But fundamental fairness is not an independent due-process provision; fundamental fairness is rather an overriding objective of the Due Process Clause.

"Due process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to *infringe a protected liberty or property*

interest." (Emphasis added.) *State v. Hochhausler*, 76 Ohio St. 3d 455, 459, 1996 Ohio 374, 668 N.E.2d 457, citing *Greene v. Lindsey*, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982), *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971), and *Williams v. Dollison*, 62 Ohio St.2d 297, 299, 405 N.E.2d 714, 716 (1980).

i.) Fundamental Fairness.

Regarding Defendant's fundamental fairness argument, this Court properly recognized in *Aalim II* that Ohio's mandatory bindover procedure from the juvenile court to the general division of the common pleas court satisfied the requirements of "fundamental fairness," as required by the Due Process Clause. *See Aalim*, 150 Ohio St.3d at 499.

Further, Defendant's reliance on *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), is misplaced. In *Kent*, the Court considered what is necessary to satisfy due process when a juvenile court decides to transfer a case to the adult court. *See Aalim*, 150 Ohio St.3d at 498, citing *Kent*, 383 U.S. at 556. The Court concluded "that due process is satisfied when a juvenile court issues a decision stating its reasons for the transfer after conducting a hearing at which the juvenile is represented by counsel." *Aalim*, 150 Ohio St.3d at 498, citing *Kent*, 383 U.S. at 554.

This Court recognized in *Aalim II* that *Kent* did not conclude that the Juvenile Court Act *required* a "full investigation" before a case could be transferred from the juvenile court to the adult court. *See Aalim*, 150 Ohio St.3d at 498. *Kent* addressed a specific federal statute rather than the general proposition here that an individual assessment through an amenability hearing is required before *any* juvenile offender is transferred to the adult court. *See id*.; *see also McKinney*, supra at ¶¶ 16-17.

Here, Defendant had a hearing before the juvenile court to determine his age at the time of the alleged offense, and whether probable cause existed to believe that he had committed a criminal offense that was subject to the mandatory transfer to adult court. At his hearing, Defendant was represented by counsel, and after the hearing, the juvenile court issued an entry explaining why it was transferring the case to the general division of the common pleas court. Only after this proceeding, required by the Due Process Clause, was Defendant transferred from the juvenile court to the general division of the common pleas court.

Therefore, like in *Aalim II*, Defendant here "failed to show that his bindover violated his due-process rights, let alone that the mandatory-bindover statutes facially violate the constitutional due-process guarantees." *Aalim*, 150 Ohio St.3d at 499.

ii.) *Mathews v. Eldridge*.

Besides Defendant's contention that Ohio's mandatory bindover statutes are "fundamentally unfair," he contends that the lack of an individual assessment through an amenability hearing violates his right to due process pursuant to *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

But, the Court recently recognized that because "*Mathews* has subsequently been used more widely in civil cases, * * * we should pause before applying its balancing test in matters of state criminal procedure." *Nelson v. Colorado*, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017) (Gorsuch, J., concurring).

Under *Mathews*, a court must consider three factors when considering whether a legislative action is adverse to an individual's liberty interest: "(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of that

interest through the procedures used and the probable value of additional or different procedural safeguards, and (3) the government's interest, including the fiscal or administrative burdens of providing additional or substitute procedural requirements." *Liming v. Damos*, 133 Ohio St. 3d 509, 2012 Ohio 4783, 979 N.E.2d 297, citing *Mathews*, 424 U.S. at 335; *see Aalim*, 150 Ohio St.3d at 515 (O'Connor, C.J., dissenting).

First, Defendant does not have a protected interest in being tried in the juvenile court.

"There is nothing in the United States or Ohio Constitutions that guarantees a juvenile the right to be tried in juvenile court. Certainly, neither the framers of the Ohio Constitution in 1851, nor the ratifiers of the Fourteenth Amendment in 1868, contemplated that the clauses would have any application to juvenile-bindover hearings." *McKinney*, supra at ¶ 16; *see State v. Angel C.*, 245 Conn. 93, 110, 715 A.2d 652 (1998) (recognizing that "[a] review of state and federal decisions reveals that statutes providing, under stated circumstances, for mandatory adult adjudication of offenders of otherwise juvenile age, routinely have been upheld against due process challenges based on *Kent*.").

Likewise, the Fifth Circuit properly concluded "that treatment as a juvenile is *not an inherent right* but one *granted by the state legislature*, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved." (Emphasis added.) *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir., 1977).

Article IV, Section 4(B) of the Ohio Constitution grants exclusive authority to the General Assembly to define the jurisdiction of Ohio juvenile courts. *See Aalim*, 150 Ohio

St.3d at 489; *accord Smith*, 159 Ohio St.3d at 116 (Kennedy, J., concurring). In its exclusive authority, the General Assembly has limited the mandatory transfer from juvenile court to adult court to the most violent juvenile offenders, like Defendant here, who are killers, rapists, and violent thieves. *See* R.C. 2152.10; R.C. 2152.12. Thus, Defendant does not have a protected interest in being tried in the juvenile court.

Second, because Defendant does not have a protected interest in being tried in the juvenile court, there cannot be an erroneous deprivation of a right that does not exist. *See Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (holding that adequate procedural protections are required only when the plaintiff has been deprived of a liberty or property interest); *Busy Bee Nursery & Preschool, Inc. v. Ohio Dep't of Job & Fam. Servs.*, 2018 Ohio 1158, 99 N.E.3d 467, ¶ 11 (10th Dist.) (stating that "[o]nly after finding the deprivation of a protected interest do we look to see if the state's procedures comport with due process.").

Third, the State has an enormous interest in structuring its courts system, because Article IV, Section 4(B) of the Ohio Constitution grants that exclusive authority to the General Assembly. *See* Article IV, Section 4(B) of the Ohio Constitution; *Aalim*, 150 Ohio St.3d at 489. Requiring additional procedures above those already in place would impose significant burdens on the State.

Again, the U.S. Supreme Court long recognized that the states are "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U.S. at 105; *see Medina v. California*, 505 U.S. 437, 445-446, 112 S. Ct. 2572, 120 L. Ed. 2d 353

(1992) (holding that "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area.")

Prior to *Aalim*, every other Ohio appellate district that has previously considered the constitutionality of the mandatory bindover statutes have concluded that they do not violate a juvenile offender's right to due process. *See McKinney*, supra at ¶ 25, citing *State v. Ponyard*, 8th Dist. Cuyahoga No. 101266, 2015 Ohio 311, ¶ 17, *State v. J.T.S.*, 10th Dist. Franklin No. 14AP-516, 2015 Ohio 1103; *State v. Mays*, 2014 Ohio 3815, 18 N.E.3d 850 (8th Dist.); *State v. Kelly*, 3rd Dist. Union No. 14-98-26, 1998 WL 812238 (Nov. 18, 1998); *State v. Lee*, 11th Dist. Lake No. 97-L-091, 1998 WL 637583 (Sept. 11, 1998); *State v. Collins*, 9th Dist. Lorain No. 97CA006845, 1998 WL 289390 (June 3, 1998); *State v. Ramey*, 2nd Dist. Montgomery No. 16442, 1998 WL 310741 (May 22, 1998). Defendant has asserted nothing here that should cause this Court to hold otherwise.

Therefore, Ohio's mandatory bindover statutes satisfy a juvenile offender's right to due process, because "the General Assembly could rationally achieve the legitimate state interest of decreased juvenile crime by redefining the jurisdiction of the juvenile divisions of the common pleas courts[,]" and the statutes are "rationally related to the legitimate governmental purpose of increased punishments for serious juvenile offenders[.]" *Aalim*, 150 Ohio St.3d at 501-502; *accord McKinney*, supra at ¶ 23.

Defendant's second proposition of law is barred by res judicata, and otherwise meritless.

III. **Proposition of Law No. 3:** When making a sexual predator finding, it is reversible error for the trial court to fail to state that it is holding the hearing pursuant to R.C. 2950.09(B).

State's Response to Proposition of Law No. 3: The Trial Court's Classification of Defendant as a Sexual Predator was Supported by Clear and Convincing Evidence; Thus, Any Failure to Designate its Classification Pursuant to R.C. 2950.09(B)(4) is Harmless.

As for Defendant's third proposition of law, he contends that the trial court failed to *specifically* state whether its sexual predator classification was made pursuant to R.C. 2950.09(B). To the contrary, any failure by the trial court to state its designation pursuant to R.C. 2950.09(B) was harmless, because there was competent, credible evidence to support the trial court's designation. Therefore, the trial court properly classified Defendant as a sexual predator pursuant to R.C. 2950.09(B).

On appeal, Defendant raised three issues regarding the trial court's designation as a sexual predator: (1) the sexual predator hearing held was beyond the scope of the Seventh District's remand; (2) the evidence was insufficient to support the trial court's finding that Defendant is a sexual predator; and (3) the trial court erred by failing to specify whether its sexual predator determination was made pursuant to R.C. 2950.09(B)(2). *See Bunch*, 2021 Ohio 1244, at ¶¶ 61-82.

Here, Defendant only contends that the trial court failed to state whether its sexual predator classification was *specifically* made pursuant to R.C. 2950.09(B).

Sexual predator classification proceedings "require the prosecution to prove by clear and convincing evidence that an offender is a sexual predator." *State v. Parker*, 7th Dist. Mahoning No. 03 MA 190, 2005 Ohio 4888, ¶ 31, citing *State v. Hardie*, 141 Ohio App.3d 1, 4, 749 N.E.2d 792 (4th Dist. 2001), and former R.C. 2950.09(B)(4).

"A sexual predator is a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." *Parker*, supra at ¶ 31, citing former R.C. 2950.01(E)(1). To determine whether an offender is a sexual predator, the trial court must consider several relevant factors. *See Parker*, supra at ¶¶ 32-42, citing former R.C. 2950.09(B)(3). But, "the factors need not be weighed or balanced, nor does the determination of sexual predator status demand that a majority of the factors listed weigh against the defendant." *State v. Clark*, 9th Dist. Summit No. 21167, 2003 Ohio 94, ¶ 20.

Here, the record affirmatively established Defendant's designation as a sexual predator: Defendant had an extensive juvenile record, which included numerous probation violations; M.K.'s trial testimony and multiple victim-impact statements highlight the brutality of the sexual conduct that occurred; and Defendant threatened to kill M.K., as he held a gun to her several times throughout the encounter.

At the hearing, M.K. stated that "***Chaz Bunch wanted me dead***, * * * Jamar Callier and Brandon Moore stopped him from pulling the trigger. ***Chaz's gun was actually in my mouth when Jamar pushed him away***." (Sentencing Hearing, September 6, 2019, before the Honorable Maureen A. Sweeney, at 15.)

Furthermore, Defendant's contention that his PSI was inaccurate regarding the *reason* why his prior felonious assault was dismissed is the subject of Defendant's subsequent postconviction petition appeal that is currently pending before the Seventh District. That appeal will establish that the felonious assault was dismissed because DuJuan Adams failed to cooperate, rather than a failure to locate Mr. Adams. *See State v. Bunch*, 7th Dist. Mahoning No. 21 MA 67. Thus, the issue is controlled by R.C. 2951.03.

At the hearing, the record establishes that the trial court carefully weighed the relevant factors before it classified Defendant as a sexual predator. (Sent. Hrg., at 85-86.)

Thus, the trial court's classification of Defendant as a sexual predator was supported by competent and credible evidence, because the State established by clear and convincing evidence the likelihood of Defendant committing a future sexually oriented offense. *See Bunch*, 2021 Ohio 1244, at ¶ 76, citing *State v. Ingels*, 1st Dist. Hamilton No. C-180469, 2020 Ohio 4367, ¶ 21.

Nevertheless, former R.C. 2950.09(B)(4) states "[a]fter reviewing all testimony and evidence presented at the hearing conducted under division (B)(1) of this section and the factors specified in division (B)(3) of this section, * * * If the court determines by clear and convincing evidence that the subject offender or delinquent child is a sexual predator, * * * shall specify that the determination was pursuant to division (B) of this section." R.C. 2950.09(B)(4).

Here, the trial court stated on the record that its designation "as a sexual predator [was made] pursuant to Ohio Revised Code 2950.04." (Sent. Hrg., at 86.) The trial court further included its consideration in its judgment entry: "The court has considered the factors listed in ORC 2950.09(B)." (Judgment Entry, September 17, 2019.)

Therefore, the trial court properly classified Defendant as a sexual predator, because there was overwhelming evidence to establish that Defendant was a sexual predator pursuant to R.C. 2950.09(B), and any failure by the trial court to *specifically* state its designation pursuant to R.C. 2950.09(B) was clearly harmless. *See Bunch*, supra at ¶ 81; *see also State v. Willan*, 144 Ohio St.3d 94, 2015 Ohio 1475, 41 N.E.3d 366.

Defendant's third proposition of law is meritless and review must be denied.

IV. **Proposition of Law No. 4:** The trial court erred when it sentenced Chaz Bunch because the findings supporting consecutive sentences are clearly and convincingly not supported by the record and the sentence is contrary to law. T.p. 76-81; R.C. 2953.08(G), 2929.11(A); Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

State's Response to Proposition of Law No. 4: The Trial Court Properly Sentenced Defendant to Consecutive Terms of Incarceration, Because the Record Supported the Trial Court's Findings Made Pursuant to R.C. 2929.14(C)(4).

As for Defendant's fourth proposition of law, he contends that the trial court's findings pursuant to R.C. 2929.14(C)(4) were not supported by the record. More specifically, defendant claims that his youth should have prevented the imposition of consecutive terms. To the contrary, the trial court's findings were supported by the record, therefore, the trial court properly sentenced Defendant to consecutive terms of incarceration. Moreover, the trial court complied with its obligations relative to the imposition of consecutive sentences. Finally, Defendant's youth at the time of these offenses has already resulted in a shorter term of incarceration.

"On appeals involving the imposition of consecutive sentences, R.C. 2953.08(G)(2)(a) directs the appellate court 'to review the record, including the findings underlying the sentence' and to modify or vacate the sentence 'if it clearly and convincingly finds * * * [t]hat the record does not support the sentencing court's findings under division * * * (C)(4) of section 2929.14 * * * of the Revised Code.'" *State v. Bonnell*, 140 Ohio St.3d 209, 2014 Ohio 3177, 16 N.E.3d 659, ¶ 28.

As the Eighth District has aptly noted, the "clear and convincing standard" used in R.C. 2953.08(G)(2) is written in the negative. *See State v. Venes*, 2013 Ohio 1891, 992 N.E.2d 453, ¶ 21 (8th Dist.). It does not say that the trial court must have clear and

convincing evidence to support its findings. *See Venes*, supra at ¶ 21. Instead, it is a reviewing court that must clearly and convincingly find that the record does not support the trial court's findings. *See id*. In other words, the restriction is on the reviewing court, not the trial court. *See id*.

Prior to imposing consecutive sentences, the trial court must state the required findings, enumerated in R.C. 2929.14(C)(4), on the record at the sentencing hearing. *See id*. at ¶ 29. The statute requires the trial court find that (1) "the consecutive service is necessary to protect the public from future crime or to punish the offender" and (2) "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public," and any of the following:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

Despite the above, a trial court is not required to recite the statutory language verbatim as long as the necessary findings can be found in the record, and are incorporated in the sentencing entry. *See State v. Smith*, 8th Dist. Cuyahoga No. 108674, 2020 Ohio 1503, ¶ 15, citing *State v. Sheline*, 8th Dist. Cuyahoga No. 106649, 2019 Ohio

528. In addition, "as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Bonnell*, supra, at ¶ 29. Put simply, the trial court complied with its obligations, and the record supports consecutive terms.

"The facts of this case do not engender a sense of sympathy for [either Defendant or Brandon Moore. They] embarked on a criminal rampage of escalating depravity on the evening of August 21, 2001, in Youngstown." *Moore*, 149 Ohio St.3d at 557. The facts speak for themselves; Defendant Chaz Bunch and his co-defendant Brandon Moore "brutally gang raped M.K. They each took turns orally raping her as the other one pointed a gun at her. Additionally, one would vaginally rape her while the other one orally raped her. This is easily considered the ***worst form*** of the offense." (Emphasis added.) *Bunch*, 2005 Ohio 3309, at ¶ 171.

M.K. summarized the pain that Defendant's actions caused her; the dreams that she once had, "[a]nd then in the blink of a single hour, it was all taken away from [her]." (Sent. Hrg., at 14.) Therefore, the record supported the trial court's findings made pursuant to R.C. 2929.14(C)(4). (Sent. Hrg., at 75-81.) *See State v. Gwynne*, 158 Ohio St.3d 279, 2019 Ohio 4761, 141 N.E.3d 169, ¶ 19.

Moreover, and specifically as to Defendant's youth argument, his age at the time of these offenses has already resulted in a shorter term of incarceration. Defendant was originally sentenced to 115 years. As a result of this Court's reversal of his co-defendant's sentence in *Moore*, supra, Defendant was re-sentenced to a total term of 49 years. The reason for this is that this Court in *Moore* held that the sentence was unconstitutional because the defendant would not be eligible for judicial release until he

was 92 years old. Simply put, this Court concluded that a juvenile's sentence cannot be that long for a non-homicide offense without affording the juvenile an opportunity for release.

When Defendant was re-sentenced in this matter, it was a direct result of his age/youth at the time of the offenses. Because Defendant was re-sentenced prior to the enactment of R.C. 2967.132 (establishing parole eligibly for juvenile offenders), the trial court had to fashion a sentence that complied with this Court's mandate in *Moore*, supra. That resulted in a downward variation from his original sentence of 66 years directly because he was 16 at the time of the offense—the difference between his original 115-year sentence and his current 49-year sentence.

Thus, Defendant's age has already resulted in a 57% reduction from his original sentence simply because R.C. 2967.132 was not yet in effect when he was re-sentenced. The trial court clearly considered Defendant's age/youth at the time of sentencing, and this Court should not give Defendant any further discount or relief from an already drastically reduced sentence. Finally, the trial court specifically mentioned Defendant's sentencing memorandum, the PSI, and the reports submitted to it, which included the expert report noted in Defendant's brief. As such, it is easy to see in this record that the trial court considered Defendant's age/youth, and this case is therefore not at all like *State v. Patrick*, 164 Ohio St.3d 309, 2020 Ohio 6803, 172 N.E.3d 952.

Therefore, the trial court properly sentenced Defendant to consecutive terms of incarceration, because the record supported the trial court's findings made pursuant to R.C. 2929.14(C)(4). *See Gwynne*, supra at ¶ 19.

Defendant's fourth proposition of law is meritless and review must be denied.

Conclusion

WHEREFORE, State of Ohio-Appellee hereby requests this Honorable Court to Overrule Defendant-Appellant **Chaz Bunch's** Propositions of Law and Deny his request for relief, allowing his convictions and 49-year sentence to stand.

Respectfully Submitted,

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