Case No. 2021-0579

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
MAHONING COUNTY COURT OF APPEALS,
CASE NO. 18MA22

STATE OF OHIO,
Respondent-Appellee,

v.

CHAZ BUNCH,
Petitioner-Appellant.

REPLY BRIEF OF APPELLANT CHAZ BUNCH

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STATEMENT OF THE CASE AND THE FACTS

At trial, M.K. testified that she believed Chaz Bunch was on video wearing her earing, but she was not sure. T.p. 921, referring to State's Exhibit 50.[1] Counsel erred by failing to state in Chaz's merit brief that M.K. merely said she believed the earring was hers. Further, given the grainy photograph taken from video, no one could identify more than an approximate shape of the earing:[2]

ARGUMENT

Proposition of Law No. I: 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.

I. This case is about when a trial court must hold a postconviction hearing, not about when a trial court must grant relief.

Much of the state's brief is based on what a trial court might decide after a hearing. But this case is only about when a trial court must hold a hearing; it's not about when a trial court must grant a new trial.

The General Assembly requires a trial court "shall" hold an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the case show the

[1] Unless otherwise stated, all transcript references are to the trial transcript.
[2] The first photograph is all of State's Exhibit 50. The second is a close-up of the portion of the photo with the earring.

petitioner is not entitled to relief[.]" R.C. 2953.21(F). That is different from direct appeal where the appellant must demonstrate "error prejudicial to the appellant."

II. Eyewitness identification issues belong in postconviction proceedings.

This court has held that while eyewitness identification claims will generally fail on direct appeal, similar claims properly belong in postconviction:

> Additionally, resolving this issue in Madrigal's favor would be purely speculative. Nothing in the record indicates what kind of testimony an eyewitness identification expert could have provided. Establishing that would require proof outside the record, such as affidavits demonstrating the probable testimony. *Such a claim is not appropriately considered on a direct appeal*. (Emphasis added.) *See State v. Keith*, 79 Ohio St. 3d 514, 536, 684 N.E.2d 47, 67 (1997); *State v. Scott*, 63 Ohio App. 3d 304, 308, 578 N.E.2d 841, 844 (1989) (claim of failure to present mitigating evidence is *properly considered in a post-conviction proceeding* because evidence in support of claim could not be presented on direct appeal). Accordingly, we find this proposition of law not to be well taken. (Emphasis added.)

State v. Madrigal, 87 Ohio St.3d 378, 390-391, 2000-Ohio-448, 721 N.E.2d 52.

III. M.K.'s belief that she saw her earring in a grainy photograph is an example of confirmation bias that demonstrates the need for a hearing.

M.K.'s assertion that she believed that it was her earing is another example of confirmation bias. Specifically, once she saw a photograph of Chaz in which he was identified as her attacker, she perceived other facts to fit the new narrative. T.p. 921, referring to State's Exhibit 50; *see, e.g.*, Test a Witness's Memory of a Suspect Only Once, Wixted, Wells, Loftus, and Garret, Psychological Science in the Public Interest 2021, Vol. 22(1S) 1S–18S, p. 7S (when a "witness is no longer blind to the suspect's identity[,]" a subsequent identification "is inherently biased against the suspect").[3]

[3] https://journals.sagepub.com/stoken/default+domain/10.1177%2F15291006211026259-FREE/pdf (viewed Dec. 2, 2021).

IV. The record does not demonstrate that trial counsel acted competently.

The State points out that Chaz's counsel had requested and received authorization for $500 to speak with an eyewitness identification issue. Judgment Entry (Jan. 7, 2002). But that was Chaz's first lawyer, Paul Conn. And the record indicates that neither Conn nor Dennis Martino, Chaz's subsequent lawyer, followed up on the request. The record of Attorney Conn's bill includes zero dollars for expenses. Motion, Entry, and Certification of Appointed Counsel Fees (May 2, 2002), R. 557.[4] Substitute counsel, Dennis DiMartino, applied for only $104.40 in expenses for postage, printing, and other petty expenses. Motion, Entry, and Certification of Appointed Counsel Fees (Apr. 18, 2003), R. 470–471. There is no evidence that Chaz's attorneys ever went so far as to consult with an expert about strategy, let alone engage an expert for testimony. This record does not show that Chaz is not entitled to relief.

Attorney Dennis DiMartino tried Chaz's case, and his pattern of discipline from this court demonstrates a pattern of lack of attention and follow through. About seven years before Attorney DiMartino took Chaz's case to trial, this court disciplined him for failing to: "(1) timely respond to his client's inquiries, (2) provide his client with a settlement statement, and (3) promptly forward Lester's portion of the settlement proceeds." *Mahoning Cty. Bar Assn. v. Dimartino*, 71 Ohio St.3d 95, 96, 642 N.E.2d 342 (1994). After Chaz's trial, this court issued a stayed suspension because Mr. DiMartino neglected a criminal matter for which he had been retained. *Mahoning Cty. Bar Assn. v. DiMartino*, 114 Ohio St.3d 174, 2007-Ohio-3605, 870 N.E.2d 1166, ¶ 2. This court lifted the stay when it found that Mr. DiMartino had committed bigamy. *Mahoning Cty. Bar Assn. v. DiMartino*, 124 Ohio St.3d 360, 2010-Ohio-247, 922 N.E.2d 220, ¶ 3. Finally, this court suspended Mr. DiMartino indefinitely for "client neglect,

[4] A significant portion of the trial record is Bates stamped. Where available, counsel provides that reference with "R.__."

failing to account for settlement funds, and dishonesty." *Mahoning Cty. Bar Assn. v. DiMartino*, 145 Ohio St.3d 391, 2016-Ohio-536, 49 N.E.3d 1280, ¶ 3.

V. Failing to hire an eyewitness identification expert in a case where the victim was unacquainted with her assailant should not be equated with strategically deciding to cross-examine the state's expert instead of hiring a defense expert.

The state argues that counsel's reliance on cross-examination is a strategic decision. Appellee's Merit Brief (Nov. 15, 2021), 14. This is sometimes the case. It is plausible that a trial attorney might choose to cross-examine a state's expert instead of hiring its own. But in that situation, the jury still hears expert testimony. In a direct appeal when the state had provided an expert the defense can cross-examine, this court has found that counsel had made a strategic decision. *State v. Thompson*, 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407 (1987) (two state DNA experts); *State v. Nicholas*, 66 Ohio St.3d 431, 432, 613 N.E.2d 225 (1993) (a DNA expert); *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 78, 92, 106 (a fire investigator, fingerprint expert). Further, this court rejected an eyewitness identification expert claim because the eyewitnesses *"were acquainted* with appellant before the shooting, and the *events occurred during daylight rather than at night*." (Emphasis added.) *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 202, citing *People v. Lerma*, 2016 IL 118496, 400 Ill. Dec. 20, 47 N.E.3d 985, ¶ 26 and fn4. In such circumstances, an eyewitness expert would contribute little to jurors' understanding.

By contrast, in this case, M.K. did not previously know Chaz. An eyewitness expert could explain the innate problems with stranger identification procedures. And, because the state had no expert on this point, without his own eyewitness identification expert, Chaz's counsel had no one from whom to elicit testimony about the unreliability of eyewitness identification.

Perhaps more importantly, the state cites this court's resolution of claims made on direct appeal, where the burden is on the defendant to show an entitlement to relief. *Thompson*,

Nicholas, *Wilks*, *State v. Coleman*, 45 Ohio St.3d 298, 544 N.E.2d 622 (1989); *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48; *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988); *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980); App.R. 12(D). But here, in the initial stages of a postconviction proceeding, Chaz is entitled to a hearing unless the record shows he is not entitled to relief). R.C. 2953.21(F) ("Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing….").

VI. Conclusion

Ohio Revised Code Section 2953.21(F) requires a hearing unless the record shows that he cannot prevail. The state cannot meet that burden. Without M.K.'s eyewitness identification, the state is left with the self-serving testimony of co-defendants who received single-digit prison terms for their testimony, and evidence that about half an hour after the assault, Chaz was with the people who admit to committing the crime. The state's DNA testing did not show that Chaz contributed to the crime, and the state has successfully prevented Chaz from testing the remaining samples with more-sensitive, modern tests. *State v. Bunch*, 7th Dist. Mahoning No. 14 MA 168, 2015-Ohio-4151.

This court should reverse the decision of the court of appeals and remand this case for an evidentiary hearing.

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

"The legislative decision to create a juvenile-court system, along with our cases addressing due-process protections for juveniles, have made clear that Ohio juveniles have been given a special status." *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 21 ("*Aalim I*"). As this court explained:

> Given the special status of children, we are unconvinced by the state's argument that the only process due in these circumstances is codified in the mandatory-transfer statutes as a special measure created for certain specified circumstances. The existence of a juvenile-court system and the principles set forth in our previous cases dictate that children are fundamentally different from adults.

Id. at ¶ 26. The discretionary transfer process recognizes that difference and ensures appropriate due process.

I. This issue is properly before this court.

A. The state has waived its waiver, forfeiture, and res judicata arguments.

The state never made a waiver argument in this case at the trial or appellate level. *See* Answer Brief (Nov. 19, 2018) at 23; State of Ohio's Motion for Judgment on the Pleadings (Nov. 22, 2017) at 30. The first time the state raises this argument is in its answer brief in this court. Appellee's Merit Brief (Nov. 15, 2021), 23. This court has repeatedly held that "[t]he appellate rule of forfeiture applies to any party claiming error, including the state." *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169, ¶ 11, citing *State v. Jones*, 7th Dist. Mahoning No. 10 MA 118, 2011-Ohio-3404, ¶ 23; *see also State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.3d 894, ¶ 40, fn.2 ("Initially, we observe that the state did not raise the issue of waiver to the court of appeals in response to D.W.'s appeal. It cannot present that claim here in the first instance.").

B. Chaz raised this issue in the first possible instance—in the trial court in a timely-filed postconviction petition after *Aalim I* was decided.

Even if the state had properly raised its affirmative defenses, their argument fails to acknowledge and contend with the factual and procedural history of this case. Appellee's Merit Brief (Nov. 15, 2021), 28.

In 2001, then 16-year-old Chaz had a mandatory transfer hearing. T.p. 12–13 (Oct. 17, 2001). After the hearing, the juvenile court judge determined that probable cause existed and

transferred Chaz's case to criminal court for prosecution as an adult. *See* Judgment Entry (Oct. 18, 2001), 1. The juvenile court judge was not permitted to decide whether Chaz was amenable to juvenile court rehabilitative efforts. *Id.*

In 2003, Chaz filed a timely, pro-se postconviction petition. At that time, it was legal to execute children in this country. When Chaz was transferred and convicted, the panoply of watershed cases regarding children had not yet been decided by the U.S. Supreme Court.

Over a period of 16 years, there has been a radical shift in the thinking about young people. Since then, the United States Supreme Court has issued six cases to redefine how we assess young people: *Roper*, *Graham*, *Miller*, *J.D.B.*, *Montgomery*, and *Jones*.[5] Each of these cases focuses on the specific and unique characteristics of youthfulness. Not to mention the dozens of cases that have been issued by this court acknowledging and applying those cases. *See, e.g.*, *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.3d 894; *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448.

Aalim I was issued by this court on December 22, 2016. It held that "the mandatory transfer of juveniles to the general division of a common pleas court violates juveniles' right to due process as guaranteed by Article I, Section 16 of the Ohio Constitution." *Aalim I*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, at ¶ 31.

Just two months after the decision, Chaz amended the 2003 petition, to include a challenge to his mandatory transfer from juvenile to adult criminal court. First Amended Postconviction Petition of Defendant Chaz Bunch (Feb. 22, 2017). He was able to do so because the 2003 filing was ignored by the state and the trial court.

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[5] *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *Montgomery v. Louisiana*, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).

The constitutionality of the mandatory transfer system, relying on the arguments raised in *Aalim I*, which deprived then 16-year-old Chaz of an amenability hearing, was raised in and decided by the trial and appellate courts. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 20–21 ("The question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court."). As noted above, the state has never raised waiver, forfeiture, or res judicata as a defense.

"It is the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others." *Reed v. Ross*, 469 U.S. 1, 15, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

It would have been impossible for Chaz to raise this issue 14 years before it was decided by this court. Especially considering the landscape in the pre-*Roper* days compared to the jurisprudence now.

C. A timely-filed postconviction petition was the appropriate vehicle to raise this issue.

The state's reliance on *State v. Szefcyk* for res judicata again doesn't tell the full story of that case or this one. Appellee's Merit Brief (Nov. 15, 2021), 26, 29. It requires further inquiry.

In *Szefcyk*, this court held that "[t]he appellee in this case fully litigated that issue. He cannot now come before this court and relitigate it simply because of a subsequent decision of this court." *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996). In so holding, this court focused on finality and "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.'" *Id.*

Yet, in 2019, a dissenting opinion in this court questioned the reliance on *Szefcyk's* use of res judicata in the postconviction context, and more fully explained the procedural history in the case. *State v. Parker*, 157 Ohio St.3d 460, 2019-Ohio-3848, 137 N.E.3d 1151. The dissent explains:

> Rather, the petition [in *Szefcyk*] sought retroactive application of a new decision interpreting a statute based on this court's view of the General Assembly's intent. But by the time we decided *Szefcyk*, the General Assembly had amended the statute at issue to clarify that our view of its intent was incorrect, superseding the decision the petitioner sought to have applied retroactively. We therefore applied res judicata to the petition, and we did not consider the law on retroactivity. That is a far cry from what occurred here. In any event, because it is simply an alternative holding, the lead opinion's application of res judicata is dictum and should not be viewed as binding.

Id. at ¶ 71 (O'Connor, C.J., dissenting).

Although *Parker* involved a successive postconviction petition, the lead opinion highlights: "In codified language, the General Assembly deemed [the postconviction] statutory remedy to be the 'best method of protecting constitutional rights of individuals and, at that same time, providing a more orderly method of hearing such matters.'" *Id.* at ¶ 14. "The statute permits a petitioner to collaterally attack his or her judgment of conviction on the grounds that 'there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.'" *Id.* at ¶ 15, quoting R.C. 2953.21(A)(1)(a); *see also Reed*, 469 U.S. at 15, 104 S.Ct. 2901, 82 L.Ed.2d 1 (noting that "finality, standing alone" is not the end of the inquiry when there are questions about constitutional rights).

And that is what Chaz did—he litigated the mandatory transfer claim as violating his constitutional rights in 2017 through the timely-filed postconviction petition almost immediately after the *Aalim I* decision was issued.

Relevant here, in reviewing the claim Parker presented, the dissent clarified:

> For res judicata to apply here, Parker would have to be raising a claim that he either did raise or could have raised on direct appeal. The claim Parker raised on direct appeal (that R.C. 2901.08(A) was unconstitutional) is not the same claim as the one he seeks to assert now (that *Hand* applies retroactively). Nor could he have argued before *Hand* was issued that *Hand* applies retroactively. For that reason, the lead opinion's application of res judicata to this case is incorrect.

Parker at ¶ 71 (O'Connor, C.J., dissenting), citing *State v. Perry*, 10 Ohio St. 175, 226 N.E.2d 104 (1967).

Chaz amended his timely-filed postconviction petition as of right to include the *Aalim I* claim, right after the decision was issued. It is not barred by res judicata, because it wasn't raised and litigated in his direct appeal. And, *he couldn't have raised* the *Aalim I* claim in 2002, 14 years before it was decided by this court. *See id.*; *see also Reed*, 469 U.S. at 15, 104 S.Ct. 2901, 82 L.Ed.2d 1 ("[A] failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar. * * * Despite the fact that a constitutional concept may ultimately enjoy general acceptance * * * when the concept is in its embryonic stage, it will by hypothesis, be rejected by most courts. Consequently, a rule requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose.")

D. *Smith v. May* is not applicable here.

The state's reliance on *Smith v. May* is also misplaced. Appellee's Merit Brief (Nov. 15, 2021), 25. The proceeding at issue in that case was a direct appeal from a writ of habeas corpus alleging a jurisdictional violation of a notice provision in the transfer statute. *See Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d. 542, ¶ 1–2. The ultimate question was whether that specific deviation from the bindover procedure creates a cause of action in habeas corpus.

Id. at ¶ 29. These issues are not present here. Instead, this case asks if the mandatory transfer provision is constitutional, and if the *Aalim I* decision should be reinstated.

Additionally, this court has already held that an amenability hearing can be waived. *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.3d 894, at ¶ 34. However, that waiver must be made knowingly, intelligently, and voluntarily on the record. *Id.* at ¶ 34–37. If it's not, then the waiver is invalid and subject to reversal on appeal. *Id.* In this case, neither an amenability hearing nor the chance to waive that hearing was afforded to Chaz because the statute forbids it.

II. This case is about requiring an amenability hearing before transfer; the issue is with the mandatory process, not forbidding transfer as an option.

The state claims that there is no substantive due process right to juvenile court treatment; there is no fundamental right to stay in juvenile court. Appellee's Merit Brief (Nov. 15, 2021), 29. At the same time, the state argues that Chaz should have raised a substantive due process claim.

Yet, as was true in *Aalim I*, the question posed in this case is whether the mandatory transfer procedure is constitutionally sound. It simply asks whether a juvenile court judge must make the determination about whether a youth is amenable to rehabilitative and other treatment efforts. This case is not about ending transfer in total. At no point in *Aalim I* did this court hold that transfer was a forbidden result. Neither does Chaz make this claim.

The prosecutors of this state retain full authority and discretion to seek to transfer to adult criminal court any youth age 14 or over, who they believe has committed a felony-level offense and is not amenable to juvenile court treatment. And, the state seems to concede that in some instances, they will be able to achieve a bindover and will not be stymied. *See* Appellee's Merit Brief (Nov. 15, 2021), 32.

Contrary to the state's claim, the due process requirements of the Ohio Constitution are necessarily implicated here as they were the crux of this court's decision in *Aalim I*. *Aalim I*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 28 ("we hold that the mandatory-transfer statutes violate juveniles' right to due process as guaranteed under the Ohio Constitution"). *See also, id.* at ¶ 26, 31 ("All children are entitled to fundamental fairness in the procedures by which they may be transferred out of juvenile court for criminal prosecution, and an amenability hearing like the one required in the discretionary-transfer provisions of the Revised Code is required to satisfy that fundamental fairness."). This court could use the entirety of that decision, or it could issue a new decision focused more specifically on the balancing test offered in the merit brief relying on *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *See State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 81 (O'Connor, C.J., dissenting) ("*Aalim II*").

Chaz has been clear in the request: he asked the trial court, court of appeals, and this court to apply or reinstate its decision from *Aalim I* which necessarily includes the reasonings for that decision. First Amended Postconviction Petition, Mahoning CP No. 01CR124 (Feb. 22, 2017), 6; Merit Brief of Chaz Bunch, Case No. 18MA22 (Oct. 19, 2018), 12; Memorandum in Support of Jurisdiction of Appellant Chaz Bunch (May 5, 2021), 13.

III. This court should act as a constitutional check on processes established by the legislature.

"Thus, the court remains an important check on the legislature ensuring the rights of children in juvenile proceedings, just as it is on guard for legislative overreach in other areas of the law." *Id.* at ¶ 66 (O'Connor, C.J., dissenting).

If a state creates a liberty interest through statute, the process to remove that interest must be constitutional. *Id.* at ¶ 76 (O'Connor, C.J., dissenting) ("[B]y enacting legislation, states may

create liberty interests that are protected by the federal Due Process Clause."), citing *Sandin v. Conner*, 515 U.S. 472, 483–484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Even if this court agrees that there is no fundamental right "to retaining juvenile status," "once a state provides statutory rights greater than those afforded by the federal Constitution, the Constitution prohibits the state from divesting citizens of those rights without due process." *Id.* at ¶ 78 (O, Connor, C.J., dissenting).

The roots of the Ohio juvenile court system are important to understanding this liberty interest, and those roots are largely ignored by the state and its amicus.

> Since 1937, in Ohio, any child under age 18 who is alleged to have committed a crime has been subject in the first instance to the juvenile court and its attendant procedures. The General Assembly first created a discretionary-transfer scheme, then later created a mandatory-transfer scheme as the procedural mechanisms by which to deprive a child of his or her juvenile status and, as a result, access to the juvenile-justice system.

Aalim II, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 79 (O'Connor, C.J., dissenting). Ohio has created an interest through its statutes.

The next question is how much process is due. *See Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

A. *Mathews v. Eldridge* is the right test.

The appellee's amicus muddies the water with its reliance on *Patterson v. New York*, 432 U.S. 197, 198, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). Brief of Amicus Curiae Ohio Attorney General (Nov. 16, 2021), 23. As explained in *Santosky v. Kramer*, decided after *Patterson*, the question for procedural due process isn't simply whether a claimed right ranks as "fundamental"; rather, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Santosky v. Kramer*, 455 U.S. 745, 758, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

Similarly, the reliance on *Nelson v. Colorado*, __ U.S. __, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017), and *Medina v. California* 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), for the assertion that *Mathews* is the incorrect test for assessing state criminal systems ignores the juvenile court's history. Appellee's Merit Brief (Nov. 15, 2021), 39; Brief of Amicus Curiae Ohio Attorney General (Nov. 16, 2021), 24.

"The juvenile courts were premised on profoundly different assumptions and goals than a criminal court, and eschewed traditional, objective criminal standards and retributive notions of justice." *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.3d 894, at ¶ 7, quoting *In re C.S.*, 115 Ohio St.3d 267, 274, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 66. To avoid "the worst of both worlds," there is a recognition that the juvenile system has some criminal aspects, but has its roots in the civil system, with an eye toward guidance and rehabilitation rather than guilt and punishment. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 25 ("Juvenile delinquency proceedings are civil rather than criminal in nature."); *In re Agler*, 19 Ohio St.2d 70, 74, 249 N.E.2d 808 (1969) ("The infusion of the foregoing due process features into the hybrid juvenile procedure has not resulted in the creation of a parallel system of criminal courts for Ohio children.").

As such, *Patterson* and its progeny are "irrelevant here because [this court has] previously established that '[j]uvenile delinquency proceedings are civil rather than criminal in character[.]'" *Aalim II*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, at ¶ 119, fn.8 (O'Connor, C.J., dissenting) ("Notably, I am aware of no juvenile case in which the United States Supreme Court applied the *Patterson* standard to a due-process challenge."), quoting *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 26; citing *In re A.G.*, 148 Ohio St.3d 118, 2016-Ohio-3306, 69 N.E.3d 646, ¶ 26 (O'Donnell, J., dissenting, joined by French

and Kennedy, JJ.) ("'[A] juvenile court proceeding is a civil action.'"), quoting *State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766, ¶ 10. Therefore, *Mathews* provides the appropriate framework here.

B. Courts have recognized that children have a profound interest in having their youth considered before making a decision about their future liberty.

In the year 2021, after almost two decades of U.S. Supreme Court recognition about the unique nature of youthfulness and this court's application of that recognition in a host of cases, it is mystifying for the state and its amicus to claim that Chaz had zero interest in having his youthfulness considered. Appellee's Merit Brief (Nov. 15, 2021), 41; Brief of Amicus Curiae Ohio Attorney General (Nov. 16, 2021), 30. They are not arguing that the interest is small or that other interests overwhelm it. Despite an entire scheme establishing otherwise, they have drawn a line: children have no interest in juvenile court treatment or consideration of youthfulness characteristics.

Yet, this court has said in no uncertain terms that "given the nature and consequences of the amenability hearing," it is "a critical stage of the juvenile proceedings, the hearing affects whether the juvenile faces a delinquency adjudication, or adult criminal sanctions and the label 'felon.'" *D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.3d 894, at ¶ 12. This court called it a "vital safeguard." *Id.* at ¶ 17. To say that a child has no interest in the amenability hearing ignores this precedent.

C. There is a risk of erroneous deprivation when a juvenile court is forced to ignore characteristics it is required to take into account in every other instance.

The state and its amicus contest the reliance on Eighth Amendment cases. Yet, this court has relied on these cases in other due process cases to demonstrate that children have diminished

culpability and unique characteristics. *See, e.g., D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.3d 894; *Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448.

Mandatory transfer lumps together a host of offenses and ages. It can include a 15-year-old child who has had multiple cases and multiple attempts at remediation before a juvenile court. It can also include a 16-year-old first-time offender who is complicit in a felony murder case. The amount of participation, the community support for the child, and whether that child is remorseful and amenable cannot be taken into consideration. A process that focuses solely on the probable cause threshold of the offense, is not fair or adequate given everything we know about young people.

The erroneous deprivation of juvenile court protections is incredibly high when we force juvenile court judges to ignore the very characteristics that led to the creation of the juvenile system in the first place. *D.W.* at ¶ 7 ("The objectives of the juvenile court 'are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.'"). In every other context—from competency, the reasonable child standard for custody, accepting a child's admission, selecting a disposition to the meet the goals of the juvenile court system, and even in picking a sentence—juvenile court judges are required to consider the unique characteristics of children. Why not here?

D. The state has neglected its parens patriae interest.

The state also has an interest in ensuring safety for young people, not unnecessarily increasing recidivism, and rehabilitating those who are amenable to it. The state and its amicus focus on the structure of the court system and "significant burdens" for additional procedures. Yet, the state and its amicus fail to contend with the body of research presented by Chaz's amicus about what happens when we get transfer wrong. Brief of Amici Curiae Juvenile Law

Center (Sep. 28, 2021), 23–28 (citing increased rates of recidivism and victimization). A discretionary transfer system already exists. It seems doubtful that more amenability hearings would cause significant burdens.

IV. Conclusion.

For the foregoing reasons, this court should overrule its decision in *Aalim II*, and return to its decision in *Aalim I*.

Proposition of Law No. III: 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).

The state is correct that Chaz argues that trial courts must "specifically" state in a sexual predator finding that the court made the determination pursuant to R.C. 2950.09(B), but that is because the statute says that a trial court "shall *specify* that the determination was pursuant to division (B) of this section." (Emphasis added.) R.C. 2950.09(B)(4). Division (B) of R.C. 2950.09 is more than just the factors set forth in R.C. 2950.09(B)(3).

When it comes to whether the state has shown that any error was harmless, the state wants this court to consider parts of the record that support the merits decision but ignore the parts that show that the trial court based its decision on demonstrably false assumptions. The state argues that Chaz's juvenile record included "numerous probation violations," but the state does not cross-reference Chaz's PSI, which described only three probation violations—talking back with vulgarity to a teacher, going to a "drug house," and "receiving a traffic summons." PSI, 12.

Without any reference to the record, the state now claims that it dropped delinquency charges of felonious assault against Chaz because Dejuan Adams, the alleged victim, stopped cooperating. Appellee's Merit Brief (Nov. 15, 2021), 44. But in the trial court, the state claimed that it dropped charges because it could not find Mr. Adams. T.p. 8 (Sep. 6, 2019). And as Chaz

has shown, the state knew exactly where Mr. Adams was because it was prosecuting him for another offense. *See* Appellee's Merit Brief (Nov. 15, 2021), 38–39.

Finally, the state is correct that M.K. suffered a brutal attack (Chaz has never denied that), but the question with a sexual predator hearing is not to punish, but to determine whether registration should be annually for ten years or quarterly for a lifetime.

The General Assembly requires trial courts to make a very specific finding when sentencing a person to a lifetime of registration. The trial court here did not make that finding. This court should vacate the sexual predator finding and remand this case for a new hearing.

Proposition of Law No. IV: 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.

This court should decline the state's invitation to consider the constitutionally cruel and unusual sentences originally imposed on Chaz as the base line. At his sentencing hearing and his initial resentencing hearing, the trial court candidly explained that it was trying to do exactly what the United States Supreme Court subsequently determined to be constitutionally cruel and unusual—sentencing a child to prison for the rest of his life with no chance of parole. T.p. 50 (Oct. 23, 2002) ("I want to make sure that you never get out of the penitentiary, and I'm going to make sure that you never get out of the penitentiary"). T.p. 35 (Jul. 14, 2006). ("I just have to make sure that you don't get out of the penitentiary").

Further, the state has shown no evidence that contradicts Dr. McConnell's unrebutted statement that these offenses occurred when Chaz was a child, and therefore do not show that he will be dangerous as an adult. McConnell Letter (Mar. 7, 2018).

The record clearly and convincingly does not support the findings related to Chaz's risk to re-offend and his youth, those findings are contrary to law, and this court should remand the case for a new sentencing hearing. R.C. 2953.08(G)(2)(a) and (b).

CONCLUSION

This court should reverse the decision of the court of appeals and remand this case for an amenability hearing in juvenile court, a hearing on Chaz's postconviction petition, and, if needed, a new sentencing hearing or sexual predator hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Assistant Mahoning County Prosecuting Attorney Ralph Rivera, rrivera@mahoningcountyoh.gov, on this 6th day of December, 2021. Courtesy copies will be emails to counsel for amici.

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