

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO)
)
 Plaintiff-Appellee) Case No. 2022-0106
)
 v.) **ON APPEAL FROM MAHONING COUNTY**
) **COURT OF APPEALS, SEVENTH DISTRICT**
)
 MANNY ZARLENGO) **COURT OF APPEALS**
) Case No. 20 MA 00036
 Defendant-Appellant)

STATE OF OHIO-APPELLEE’S MERIT BRIEF

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There is no doubt that probable cause was established due to the overwhelming evidence presented. Therefore, no matter what this Court decides, as to any proposition of law presented, Appellant’s outcome will not change, and as such this matter should be dismissed as improvidently granted.

I. First Proposition of Law:..... 8
In juvenile bindover cases, guilty pleas in a criminal court do not waive on direct appeal constitutional claims arising out of the underlying bindover hearings in juvenile court.

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A grand jury indictment, and/or a counseled guilty plea each trump a probable cause determination by any previous court thereby precluding a subsequent attack based on the sufficiency of probable cause.

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

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This Court’s decision in *Smith* brought clarity to the law after years of confusion, this Court should not, less than two (2) years later, wade back into muddy waters.

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INTRODUCTION

Let there be no mistake, Appellant is guilty of each and every crime alleged. We know this because he entered a guilty plea. The defense and amici, however, have gone to great lengths in their briefs to suggest that the plea was coerced, or at least that a great deal of pressure was put upon a young defendant to plea, making the same less than pristine. Despite this, the plea was never challenged. Nevertheless, let's take the plea out of the equation.

Appellant is guilty of each and every crime alleged. We know this because, at sentencing, he admitted as much.¹ (Sentencing Transcript at 4). When given a chance to speak at sentencing Appellant did not deny his role in these crimes. Appellant did not assert his innocence. Appellant did not indicate that he took the plea only to avoid a potentially longer sentence if convicted at trial. No. Rather, Appellant conceded his guilt saying, "I just want to say I made a mistake and I'm sorry. I'll learn from this and move on." (Id). Appellant is guilty of each and every crime alleged. He pled guilty because he was guilty. He took the plea because he was guilty. And, the plea did spare him the possibility of what could have amounted to a quasi-life sentence, and replaced it with an agreed upon sentence. The system worked.

The above notwithstanding the defense and amici urge this Court to rewrite well-settled law so that this, admittedly guilty, defendant can challenge probable cause despite his guilty plea. In their zeal to do to this they lose sight of a number of things. First is that this case should never get to the issue of whether their arguments are "jurisdictional." Rather, because of the grand jury indictment Appellant is prevented from launching the challenge he seeks. Second is that Appellant's guilty plea, like the grand jury indictment, causes a break in the chain in this case and prevents Appellant from raising his challenge to probable cause. Third is that the issues

¹ Appellant also wrote a letter to the juvenile court admitting his role in these offenses. That letter was excluded from the preliminary hearing at defense counsel's request.

complained of are simply not jurisdictional. Finally, and perhaps most importantly, Appellant's brief and those of amici show the intent of the writers with no view of the benefit – or lack thereof – to Appellant himself. Appellant has nothing to gain from this appeal. The outcome of this case, as it relates specifically to Appellant, will not be altered by this Court's decision due to the overwhelming evidence of actual guilt, let alone probable cause. To that end, "Appellant's" arguments do nothing to serve Manny Zarlengo.

STATEMENT OF THE CASE, AND FACTS

Appellant was charged in the juvenile court with eleven (11) counts of aggravated robbery, each with a firearm specification, for a series of armed robberies occurring at five (5) Youngstown stores during October 2013.² *State v. Zarlengo*, 7th Dist. Mahoning No. 20 MA 036, 2021-Ohio-4631, at ¶ 2. Because Appellant was sixteen (16) at the time of the offenses he was subject to mandatory bindover. A preliminary hearing was held relative to bindover whereat the state presented testimony and evidence from a detective, some of the store employees, a neighbor to a store, and a juvenile who was one of Appellant's co-defendants.³ *Id.* The juvenile court found probable cause and bound the matter over to the general division.

While Appellant contends the state failed to establish probable cause for bindover, the Seventh District's summary clearly shows that the evidence presented established probable cause sufficient to bind these matters over to the general division. The Seventh District summarized the facts that the juvenile court found to support probable cause as follows:

On October 4, 2013, the police were advised Dollar General on McGuffey Road was robbed by two men with guns while a driver of a gold vehicle waited for them. According to a detective's testimony, the manager opened the safe for the robbers. (Tr. 147-148). The store's video portrayed the two

² Multiple people were robbed during three (3) of the five (5) robberies resulting in the eleven (11) total charges.

³ Appellant's co-defendant, J.M., identified Appellant as being with him as an accomplice in four (4) of the five (5) total robberies accounting for, at least, nine (9) victims. (Bindover Transcript at 109-119). J.M. claimed he was not involved in the fifth robbery.

robbers pointing guns at the manager and filling a black bag. J.M. testified he traveled with Appellant and "Slim" to a location near Dollar General on the east side in Slim's "tannish" colored Chevy (with Slim driving). (Tr. 110-111). They had a plan to rob the Dollar General. (Tr. 111-112). He said Slim and Appellant both had guns, and he was unsure which direction they went when they exited the car. (Tr. 111-113). J.M. drove them away from the scene after they ran back to the car with a black bag. (Tr.111-112). When they returned to his house, he observed money in the bag which he believed came from Dollar General "because that was the plan..." (Tr. 112).

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

On October 12, 2013, the police were advised Taco Bell was robbed by two men with guns who were wearing bandanas on their faces. The detective said the initial report described a gold or tan Chevy. (Tr. 148). A Taco Bell employee testified there were three employees present when two males entered wearing bandanas up to the nose and hats; they appeared to be 16 to 20 years old. (Tr. 54). He saw a gun pointed at his manager and identified Appellant in court as the person who threatened to start shooting if the safe was not opened. (Tr. 55, 57-58). Taco Bell's assistant manager testified the robbery occurred at 2:40 p.m. He pointed out the perpetrators' faces were visible from nose to forehead and one robber was wearing an orange Texas Longhorns hat. He immediately went to open the safe upon hearing the demand and noticed a gun in his peripheral vision. (Tr. 68-69). J.M. confirmed he and Appellant entered Taco Bell with masks on their faces with a joint plan to commit a robbery. (Tr. 114-115). He said Appellant used a .32 caliber revolver and Slim was not with them. (Tr. 115-116).

On October 17, 2013, the police were advised of a robbery at Subway by two men with guns. The detective testified radio traffic reported a gold or tannish Chevy was involved. (Tr. 149). The owner of the store testified he was present with two employees and customers when two young males (aged 15 to 20 years old) entered the store with guns and their faces covered below the nose. (Tr. 30-31, 34, 40). The owner said he hit the silent panic button and then opened the register after a gun was pointed at his head. (Tr. 30-32). The perpetrators put the cash register drawer in a bag they brought with them. When they demanded the money in the safe, the owner informed them it was on a time delay. The perpetrators were upset and threatened to

start shooting people; the owner saw a gun pointed at a female employee and "heard the gun click as if they pulled the trigger but it didn't fire." (Tr. 32). This female employee's testimony confirmed a perpetrator held a gun to her head while another retrieved the register drawer. (Tr. 44). She said threats were made to kill her if the safe was not opened. (Tr. 45). When the perpetrators realized the safe would not open, they robbed the customers at gunpoint. (Tr. 33).

J.M. testified he and Appellant committed the Subway robbery, confirming they took wallets because the safe was taking too long...

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

On October 18, 2013 (the day after the Subway robbery), witnesses reported to police at approximately 4:00 p.m. three individuals robbed McDonald's in a similar manner while another individual waited in a car fitting the description from the other robberies. The clothes and bandanas were also described as similar to the other robberies. (Tr. 150). J.M. testified he was not involved in the McDonald's robbery. (Tr. 118). The manager of McDonald's testified she was in the back room when the robbers entered the store. When she came out, a male came behind the counter, pointed a gun at her face, and demanded she open the safe. (Tr. 77). She kept her head down while waiting for the employee with the combination to open the safe. She noticed this gunman lowered his gun to put the drawers from the safe into a bag while he was yelling to his two accomplices about the other drawers. (Tr. 77-78). She noted customers in the parking lot called the police and employees said there was a fourth accomplice. (Tr. 78-79). She only saw one gun; she started to indicate others were armed but was not permitted to testify as to what she learned about other guns. (Tr. 80).

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

The police recovered hats and sweatshirts matching the clothing used in the robberies; they also discovered the cash drawers from all of the robberies. (Tr. 152). The three males were arrested. The detective testified that J.M. commented "we had gotten the right three guys..." (Tr. 130)

The state presented the surveillance videos from the first four robberies, which the juvenile court agreed to review. (Tr. 20-21); (St. Ex. 2-5). The state also presented as an exhibit a letter Appellant wrote to the court on May 19, 2014, wherein he: accepted responsibility for his actions; said he made bad decisions because he needed money; and acknowledged he never should have had a gun... (St. Ex. 1). At the probable cause hearing, the chief probation officer testified he was asked to retrieve the letter from Appellant at the juvenile justice center for Appellant's probation officer; he briefly observed the letter appeared to be an admission and then stopped reading as he noticed it was addressed to the judge.

Id. at ¶ 3-14; *See also State v. Mascarella*, 7th Dist. Mahoning No. 15 MA 102, 2017-Ohio-8013 (affirming the convictions of Appellant's co-defendant for the same robberies).

The grand jury indicted Appellant on eleven (11) counts of aggravated robbery, each with a firearm specification. *Id.* at ¶ 15.

"Appellant subsequently **pled guilty** as charged. At sentencing, **Appellant apologized for his mistake**. (Sentencing Transcript at 4). The trial court imposed a **jointly recommended sentence**: three (3) years on each count to run concurrent with each other but consecutive to the three-year firearm specifications applicable to each of the five (5) locations robbed, for a total prison term of eighteen (18) years." *Id.* at ¶ 16, emphasis added.

Appellant then filed a delayed appeal. Appellant raised one (1) assignment of error claiming that the juvenile court lacked probable cause to bind him over to the general division.

The Seventh District refused to consider the merits of Appellant's argument holding instead that,

Relying on the explanation in the Supreme Court's 2020 *Smith* case that a waivable item is not jurisdictional and the Fourth District's 2021 position in [*State v.*] *Powell*, [4th Dist. Gallia No. 20CA3, 2021-Ohio-200] we conclude a defendant who pleads guilty in the general division of the

common pleas court waives the ability to contest the sufficiency and weight of the evidence presented at the probable cause hearing in the juvenile court. Accordingly, Appellant's assignment of error is overruled, and the trial court's sentencing judgment is affirmed.

Id. at ¶ 46.

Appellant timely noticed appeal and the matter was accepted by this Court. This brief now follows the briefs of Appellant and amici urging this Court to uphold the Seventh District for the reasons that follow.

LAW AND ARGUMENT

Preamble. There is no doubt that probable cause was established due to the overwhelming evidence presented. Therefore, no matter what this Court decides as to any proposition of law presented, Appellant's outcome will not change, and as such this matter should be dismissed as improvidently granted.

This matter should be dismissed as improvidently granted as there was overwhelming evidence presented against Appellant at the preliminary hearing. It is true that the Seventh District did not specifically address whether probable cause was established as their decision was on the waiver of the challenge as will be discussed in the pages that follow. Nonetheless, a review of the record indicates that even if the Seventh District considered the merits of the challenge Appellant would have lost.

To establish probable cause, the state has the burden to provide “sufficient credible evidence” on the elements to warrant going forward with the charge. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629 at ¶ 46, 52. The state must produce evidence that raises “more than a mere suspicion of guilt” but need not produce evidence proving guilt beyond a reasonable doubt. *Id.* Underlying “all the definitions” of probable cause is “a reasonable ground for belief of guilt.” *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302 (1949). “[A]s the very name implies, we deal with probabilities.” *Id.* at 174–175, 1302. Probable cause is a flexible

concept grounded in fair probabilities which can be gleaned from considering the totality of the circumstances. *See Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535 (1983) (probable cause is a flexible, common-sense standard which does not demand any showing that the belief is correct or more likely true than false).

Whereas the Seventh District did not scrutinize the finding of probable cause, it did include a comprehensive discussion of the overwhelming evidence against Appellant as presented at the preliminary hearing. That discussion is listed in the “Facts” portion of this brief and will not be fully restated here.

That notwithstanding, the state would again point out that Appellant was implicated in these offenses by his co-defendant, J.M. (Bindover Transcript at 109-119). Specifically, J.M. identified Appellant as being with him as a principle and/or accomplice in four (4) of the five (5) total robberies accounting for, at least, nine (9) victims. (Id).

The only robbery that J.M. claimed to not have personally participated in was the McDonalds robbery. As to that robbery, Detective Lambert testified that it had been robbed in the same fashion as the other four (4) robberies, and the same vehicle from the other four (4) was used in that offense. (Id at 150). Further, that publicity surrounding that robbery resulted in a number of tips to “Crime Stoppers” indicating that Appellant was one of the robbers. (Id).

Acting on those tips, the detective obtained a search warrant for the home in which Appellant was staying at the time. (Id at 152). Appellant was at the home at the time of the search. (Id). The search revealed: the car that had been used in all of the robberies; clothing that was seen in surveillance videos from the robberies; and, cash register drawers from all of the robberies. (Id).

The juvenile court wrote that it found the testimony of J.M. and the detective to be “compelling,” and went on to find probable cause. (See Judgment Entry of Mahoning County Juvenile Court filed 6/25/2014).

Even though the Seventh District did not speak specifically as to merits of the probable cause determination, there is overwhelming evidence of probable cause in this record, and noted by the Seventh District. As such, this matter should be dismissed as improvidently granted as, even if this Court was to sustain any of the propositions of law at issue, Appellant would see no benefit in the end.

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

Response to Prop. I: A grand jury indictment, and/or a counseled guilty plea each trump a probable cause determination by any previous court thereby precluding a subsequent attack based on the sufficiency of probable cause.

There are two separate theories upon which Appellant’s first proposition can be defeated, both of which defeat any claim that the challenge here is preserved by way of being “jurisdictional.” First, is that this Court cannot address the challenge because it is trumped by the grand jury indictment. Second, is that a counseled guilty plea waives any challenge to probable cause as determined by any previous court, including a juvenile court.

- A. This Court need not address whether Appellant’s challenges are “jurisdictional” as the grand jury and/or guilty plea prevents a challenge as to the juvenile court’s probable cause determination.**
- i. The grand jury indictment is an independent break in the probable cause determination chain that prevents a juvenile from challenging probable cause as found by the juvenile court.**

“The validity of an accused's conviction is dependent on the jurisdiction of the trial court. The jurisdiction of the court is invoked by the return of a valid indictment and is not based on the process by which an accused is taken into custody or the findings made on the preliminary examination.” *Dowell v. Maxwell*, 174 Ohio St. 289, 290 (1963). “Any defect or irregularity in either the arrest or preliminary examination does not affect the validity of the accused's conviction.” *Id.*, citing *Brown v. Maxwell, Warden*, 174 Ohio St. 29 (1962); *Norton v. Green, Supt.*, 173 Ohio St. 531 (1962); and *Doughty v. Sacks, Warden*, 173 Ohio St. 407 (1962).

Once the grand jury issues an indictment in a case, all preceding determinations as to probable cause are irrelevant. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 129 (1997); *Jaben v. United States*, 381 U.S. 214, 220 (1965). Thus it makes sense that once an indictment is issued, the requirement to hold a preliminary hearing is mooted. *State ex rel. Haynes v. Powers*, 20 Ohio St. 2d 46, 48 (1969). This flows from the well-settled principle that it is solely the grand jury’s duty to determine if probable cause exists as to any crime and any defendant, “...without any review, oversight, or second-guessing...” *Kaley v. United States*, 571 U.S. 320, 328 (2014).

Applying the above to the instant, Appellant was indicted by a grand jury, and that indictment is not subject to review, even by this Court. *Kaley, supra*. As such, even if the juvenile court did not have probable cause to bind Appellant over – which it did – a defendant still cannot challenge that determination once a grand jury indicts because the indictment trumps the juvenile court’s determination. Based on the foregoing, Appellant’s first proposition fails.

ii. Like the issuance of the indictment, the guilty plea also prevents a challenge as to probable cause.

Every trial court is required to inform every defendant of the effect of a guilty plea – that being that a guilty plea is a complete admission of guilt. *Crim.R. 11(B)(1)*; *State v. Stumpf*, (1987) 32 Ohio St.3d 95, 104, 512 N.E.2d 598. This requirement exists because “a valid guilty plea relinquishes any claim that would contradict the ‘admissions necessarily made upon entry of a voluntary plea of guilty.’” *Class v. United States*, 138 S. Ct. 798, 801 (2018), quoting *United States v. Broce*, 488 U.S. 563, 570 (1989).

Because of this, a defendant cannot attack, on direct appeal, a lower court’s probable cause determination at a preliminary hearing if he subsequently enters a guilty plea. This is one of the many challenges a defendant waives by entering a guilty plea. *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 15, citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78; *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 56; and, *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (all standing for the proposition that a defendant who “voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel ‘may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’”).

Indeed, a defendant waives an attack on jurisdiction by entering a guilty plea. *Shie v. Leonard*, (1998) 84 Ohio St. 3d 160; *Leonard v. Russo*, 133 Ohio St.3d 152, 2021-Ohio-4236; *State v. Cobb*, 9th Dist. Summit No. 26847, 2014-Ohio-1923. Each of these cases reasoned that a guilty plea admits all facts necessary for the state to prove its case, among those facts is jurisdiction. *Id.* As such, Appellant’s guilty plea, like the issuance of the indictment, precludes him from raising a probable cause challenge and his first proposition must be dismissed.

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

Response to Prop II: This Court’s decision in *Smith* brought clarity to the law after years of confusion, this Court should not, less than two (2) years later, wade back into muddy waters.

Assuming, arguendo, that neither a grand jury indictment nor a guilty plea prevent Appellant’s challenge to probable cause, the challenge still fails as a result of this Court’s holding in *Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, and the fact that the challenge is not “jurisdictional.”

A. *Smith v. May*, brought “clarity” to the law.

This Court decided *Gaskins I* in 1995. *Gaskins v. Shiplevy*, 74 Ohio St.3d 149, 656 N.E.2d 1282 (1995). In *Gaskins I*, this court had viewed all the requirements of the bindover procedure as jurisdictional (and thus not waivable). *Smith, supra*, at ¶ 25, citing *Gaskins I* at 151. Since that time, this Court has been working to undue that decision.

Just a year later in *Gaskins II*, *Gaskins v. Shiplevy*, 76 Ohio St.3d 380, 667 N.E.2d 1194 (1996), this Court held that the mandates of the juvenile bindover statute were **not jurisdictional**, essentially overruling *Gaskins I*. *Smith, supra*, emphasis added.. That holding was reaffirmed in *Johnson v. Sloan*, 154 Ohio St.3d 476, 2018-Ohio-2120.

As this Court pointed out in *Smith*, other cases have further chipped away at *Gaskins I*. For instance, in *State v. D.W.*, this Court held that a juvenile may waive the right to an amenability hearing, which is central to discretionary bindover. 133 Ohio St.3d 434, 2012-Ohio-4544, at ¶ 21. The Court in *Smith* concluded “[t]his all shows that a bindover procedure is

“proper” even when the juvenile waives R.C. 2152.12’s mandatory requirements. And if the requirements are waivable, they are not jurisdictional.” *Smith v. May, supra*, at ¶ 26. It is this holding that the Seventh and Fourth Districts have lauded as bringing “clarity” to this issue; this clarity should not be disturbed and this Court should therefore deny Appellant’s second proposition.

Appellant contends that there is a split among the districts relative to the waiver of challenges to a juvenile court’s probable cause determination as a prerequisite to bindover. This is simply not true.

Appellant is correct that, in the past, various districts permitted juveniles to attack, on direct appeal, a juvenile court’s probable cause determination after entering a guilty plea. Each of the cases cited by Appellant, however, was either decided prior to this Court’s decision in *Smith*, or do not address the issue of waiver. Since *Smith*, not one district has released an opinion expressing any concern, criticism or confusion as to the state of the law; that being that issues that are waivable are not jurisdictional. *Id.*, at ¶ 26. This includes probable cause hearings. *Id.*

The limited case-law since *Smith* has been consistent with this Court’s opinion. First is *State v. Powell*, 4th Dist Gallia No. 20CA3, 2021-Ohio-200. The *Powell* court held that a probable cause hearing can be waived, or a juvenile can stipulate to probable cause. *Id.* at ¶ 55. The court went on to reason, consistent with *Smith*, because a probable cause hearing is waivable it is not jurisdictional. *Id.* at ¶ 28-29. As the Seventh District pointed out in its decision, the *Powell* Court emphasized the clarity of the law after this Court’s decision in *Smith*. So, what Appellant claims has created a conflict has, instead, provided “clarity” to the Fourth and Seventh Districts, which is the opposite of a conflict.

Consistent with the “clarity” discussed in *Powell*, the Seventh District joined the Fourth District holding that a guilty plea waives the ability of juveniles to subsequently challenge a juvenile court’s probable cause determination. *Zarlengo, supra*, at ¶ 46. In reaching this holding, the Seventh District noted, as is the point here, that all of the cases contrary to its holding were decided prior to the decision in *Smith*.⁴ Appellant also notes that the Second District reached the same conclusion even before this Court’s decision in *Smith*. *See, State v. Starling*, 2nd Dist. Clark No. 2018-CA-34, 2019-Ohio-1478. Moreover, the Fourth District recently reaffirmed its opinion in *Powell* through *State v. Moore*, 4th Dist. Lawrence No. 20CA10, 2022-Ohio-460.

Without this Court’s decision in *Smith* there would be a conflict. Because of this Court’s decision in *Smith* there is clarity. As such, the districts are aligned, since *Smith*, that a guilty plea waives a juvenile’s ability to challenge probable cause determinations by the juvenile court as a prerequisite to bindover. This Court should therefore refuse to entertain this proposition of law.

B. *Smith v. May* applies to this case, whilst *State v. Smith* does not.

Appellant correctly points out that *Smith* involved a direct appeal from the Fifth District’s denial of a writ of habeas corpus. *Smith v. May, supra*, at 106. But, Appellant’s argument that this Court limited its holding in *Smith* to collateral attacks is misplaced. The central issue to *Smith*’s habeas petition was “whether the juvenile court’s noncompliant notice was a defect that deprived the adult court of subject-matter jurisdiction.” *Id.* at 106. Thus, the central issue was the effect of an alleged irregularity in the bindover process on the common pleas’ jurisdiction. Why is jurisdiction the central issue? Because “[i]n general, habeas relief is available when the

⁴ Appellant has cited some cases post-*Smith* wherein courts of appeal have considered probable cause challenges subsequent to a guilty plea by a juvenile. Those cases however, are silent as to whether a guilty plea waives a probable cause challenge by a juvenile.

sentencing court lacked subject-matter jurisdiction.” *Id.* at 109, citing *Ellis v. McMackin*, 65 Ohio St.3d 161, 162, 602 N.E.2d 611 (1992), and R.C. 2725.05.

What is the central issue here? It’s whether an alleged irregularity concerning the preliminary hearing (i.e., a non-mandatory, waiveable requirement) prevented the juvenile court from transferring jurisdiction to an adult court. Accordingly, *Smith* can be applied to *any case*, whether it’s a collateral attack or a direct appeal, which asks whether an alleged defect in juvenile court prevented the juvenile court from transferring jurisdiction to an adult court.

In reaching its conclusion in *Smith*, this Court first recognized that, in more recent years, this Court “held that key parts of the bindover procedure may be waived.” *Smith v. May, supra*, at 159, citing *State v. D.W., supra*, at ¶ 21 (holding that the amenability hearing can be waived pursuant to Juvenile Rule 3); *see also State v. Morgan*, 153 Ohio St.3d 196, 2017 Ohio 7565, 103 N.E.3d 784, ¶ 49 (concluding that errors in juvenile-delinquency proceedings that are not preserved are reviewed for plain error).

In *Smith*, this Court reasoned that *D.W.* and *Morgan* “implicitly provide, contrary to *Gaskins I*, that noncompliance with a statutory bindover requirement does not prevent a juvenile court from transferring its jurisdiction over a case and does not render an adult court’s judgment void.” *Smith v. May, supra*, at 110. “This all shows that a bindover procedure is ‘proper’ even when the juvenile waives R.C. 2152.12’s mandatory requirements. And ***if the requirements are waivable, they are not jurisdictional.***” (Emphasis added.) *Smith v. May, supra*, at 112. This Court further stated that “we did not view an improper bindover procedure as a fundamental defect that prevented the juvenile court from transferring jurisdiction to an adult court.” *Smith v. May, supra*, at 113.

Smith is applicable to this case, because it already answered the central issue before this Court here—an alleged irregularity concerning a waiveable requirement (i.e., a preliminary hearing) does not prevent the juvenile court from transferring jurisdiction to an adult court.

Accordingly, “[d]eviation from a bindover procedure gives rise to a potentially valid habeas claim only if the applicable statute clearly makes the procedure a prerequisite to the transfer of jurisdiction to an adult court. *Smith v. May, supra*, at 113, citing *State v. Pryor*, 148 Ohio St.3d 1, 2016 Ohio 2907, 68 N.E.3d 729, ¶ 14.

Here, a preliminary hearing is a waiveable requirement rather than a prerequisite to the transfer of jurisdiction to an adult court; thus, the preliminary hearing is non-jurisdictional, and the argument subsequently waived by a guilty plea in adult court.

Thus, *Smith* can be applied to *any case*, whether it’s a collateral attack or a direct appeal, which asks whether an alleged defect in juvenile court prevented the juvenile court from transferring jurisdiction to an adult court.

This Court’s recent decision in *State v. Smith*, ___ Ohio St.3d ___, 2022-Ohio-274, did not address the central issue before this Court, because the State failed to argue that the defendant’s indictment and guilty plea in adult court forfeited his challenge to the transfer to adult court.

No one can dispute that this Court did not address the effect of *Smith* on its decision in *State v. Smith*, because neither party argued its application. *See State v. Smith*, Slip Opinion No. 2022 Ohio 274. Thus, *State v. Smith* must likely be revisited after this Court decides this case. In fact, as Appellant pointed out, this Court has several cases pending before it in which the State failed to raise the issue concerning whether the defendant’s guilty plea bars the very issues in

those cases. *See, e.g., State v. Burns*, No. 2020-1126 (argued); *State v. L.A.B.*, No. 2022-0085 (held); *State v. Ramsden*, No. 2021-1299 (held); and *State v. Martin*, No. 2021-0967 (argued).

Based on the above, *Smith* controls this case, whilst *State v. Smith* is inapplicable.

C. Appellant’s reliance on *Menna v. New York* is misplaced as the same dealt with constitutional violations, only.

Appellant is wrong about his analysis of *Menna v. New York*, 423 U.S. 61, 63 (1975), as that case does nothing to aid his side. In fact, *Menna* stands for the proposition that a defendant is permitted to challenge his conviction, even after a guilty plea, if the United States Constitution forbade him from ever being hauled into court. *Id.* at 62.

Menna does not subvert the general rule that a defendant waives constitutional challenges, such as a motion to suppress based on the Fourth Amendment, but instead clarifies that if the action itself was **constitutionally** prohibited, then the law will afford relief. The challenge here is not **constitutionally** based.

Rather, as Appellant points out, juvenile courts were created and are controlled by statute. Juvenile courts are not constitutionally based. Just the same, if the legislature wanted to, juvenile courts could be abolished at any time. As such, *Menna* – which focuses solely on constitutional challenges – has no application to this case, which deals with an admittedly statutory procedure.

D. A preliminary hearing can be waived, and is therefore not jurisdictional.

Appellant claims that a probable cause hearing cannot be “waived,” and therefore the same is jurisdictional. This is wrong.

Juv. R. 30(A) requires that “[i]n any proceeding where the court considers the transfer of a case for criminal prosecution, the court shall hold a **preliminary hearing** to determine if there is probable cause to believe that the child committed the act alleged and that the act would be an offense if committed by an adult.” *Juv.R. 30(A)*, emphasis added.

Crim.R. 5(B)(1), which addresses preliminary hearings, states, “[i]n felony cases a defendant is entitled to a preliminary hearing unless **waived** in writing. If the defendant **waives** preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas.”

The above demonstrates that juvenile courts are required to hold a **preliminary hearing** when dealing with either mandatory or discretionary transfer. However, that such hearings are subject to being waived. As such, Appellant’s position is wrong. Moreover, this Court has indicated that juvenile may **waive** a preliminary hearing. See, *Smith v. Bradshaw*, 109 Ohio St.3d 50, 52, 2006-Ohio-1829.

E. Preliminary hearings and Transfer hearings are separate and were separately created. Because of this, Appellant is seeking to challenge the determination of probable cause, not the transfer of jurisdiction making his argument invalid.

It should be noted that Appellant’s case wrongly relies on the theory that the preliminary hearing is what compels a juvenile court – in mandatory bindover cases – and allows a juvenile court – in discretionary transfer cases – to transfer its jurisdiction to the general division of common pleas court. This misapplies the rules and statute.

Preliminary hearings are required in juvenile transfer cases pursuant to Juv.R. 30. In contrast, R.C. 2152.12 governs transfer of jurisdiction. The Rule does not require transfer of jurisdiction, and the Code does not require a preliminary hearing.

Relevant to this case, R.C. 2152.12 reads, “...at a hearing [the juvenile court] shall transfer the case if the child was sixteen or seventeen years of age at the time of the act charged and...[d]ivision (A)(2)(b) of section 2152.10 of the Revised Code requires the mandatory transfer of the case, and there is probable cause to believe that the child committed the act charged.”

The above requires a transfer hearing. The findings required at such hearing are: 1) the child is sixteen or seventeen years old at the time of the act charged; 2) division (A)(2)(b) of R.C. 2152.10 requires mandatory transfer; and, 3) there is probable cause to believe the child committed the act charged. *R.C. 2152.12(A)(1)(b)(ii)*. What is not required under the code is that the juvenile court make the finding of probable cause at the hearing wherein it transfers jurisdiction. Instead, the code is clear that such a finding can be made at a separately held preliminary hearing as required by the Rule.

Likewise, a probable cause determination is required by Juv.R. 30(A). The Rule specifies that at such a hearing the juvenile court must make a determination as to probable cause. What the Rule does not require is that the juvenile court make a determination as to the defendant's age, or the application – on non-application – of R.C. 2152.10(A)(2)(b). As such, a juvenile court can conduct and complete a probable cause hearing without satisfying all the requirements for transfer, whether mandatory or discretionary. Just the same, a transfer hearing can incorporate a previous finding of probable cause from a preliminary hearing.

The fact that two hearings are required, one for the Rule and one for the Code, shows the fallacy of Appellant's case. The probable cause determination is not an exercise in jurisdiction, instead it is the transfer hearing as required by the Code. Therefore, even if this Court was to allow a challenge as "jurisdictional," that challenge would only encompass: 1) age; 2) application of 2152.10(A)(2)(b); and, 3) whether a finding of probable cause has been made, not the propriety of the probable cause finding.

Stated another way, the preliminary hearing and transfer hearing are separately commanded, and therefore separate. Only the transfer hearing could be, plausibly, considered

“jurisdictional.” Because the preliminary hearing is not “jurisdictional” Appellant’s argument fails on its face.

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

Response to Prop. III: This proposition of law is not properly before this Court, fails on the merits, and would afford Appellant no relief.

A. This proposition should be dismissed as improvidently granted as the same is being argued for the first time in this Court, and an interlocutory appeal was never attempted below.

Appellant urges this Court to overrule Its decision in *In re D.H.*, 152 Ohio St.3d 310, 2018-Ohio-17. Because the sole issue presented in *In re D.H.* was never before the juvenile court, trial court, or court of appeals, this Court should not consider Appellant’s third proposition of law.

Simply put, Appellant did not attempt an interlocutory appeal; thus, this issue was never before any lower court in this matter, and any opinion on the same would be an advisory opinion. *Kincaid v. Erie Ins. Co.*, 128 Ohio St. 3d 322, 326 (2010). This Court has stated that It does not offer such opinions. *State ex rel. White v. Koch*, 96 Ohio St. 3d 395, 2002-Ohio-4848 ¶18. This alone should result in dismissal of Appellant’s third proposition.

In that same vein, a first principle of appellate jurisdiction is that a party ordinarily may not present an argument on appeal that it failed to raise below. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997); *see also State v. Glaros*, 170 Ohio St. 471, 166 N.E.2d 379 (1960), paragraph one of the syllabus (“It is a general rule that an appellate court will not consider any error which counsel * * * 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”); and,

State v. Wintermyer, 158 Ohio St.3d 513, 2019-Ohio-5156 (not allowing the state to raise an alternative theory relative to suppression denial for the first time on appeal even when the alternative theory was based on a constitutional issue). This contemporaneous-objection requirement imposes a duty on trial counsel “to exercise diligence and to aid the court rather than by silence mislead the court into commission of error.’ ” *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364 (1977), *vacated in part on other grounds*, 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1156 (1978).

Appellant did not attempt an interlocutory appeal of the juvenile court’s bindover decision. Likewise, Appellant did not argue to the Seventh District that he should have been able to file an interlocutory appeal on the issue of probable cause. In fact, the first time the issue of an interlocutory appeal is mentioned, along with *In re D.H.*, was when Appellant filed his memorandum in support of jurisdiction with this Court. As an interlocutory appeal was never attempted, and the propriety of the same never addressed by any lower court, this Court should dismiss the third proposition of law as improvidently granted.

B. Assuming arguendo that Proposition III is not dismissed, the same fails on the merits.

i. The Rules bar review of a juvenile court’s probable cause determination.

One does not have to look far to find a sound base upon which to build the *In re D.H.* decision. Rather, one can look to two rules. First is Juvenile Rule 30. That rule requires the juvenile court to hold a “preliminary hearing” when faced with a case that presents the possibility of transfer to adult court. *Juv.R. 30(A)*. The wording of the rule is important, the authors of the rule, this Court, opted for the term “preliminary hearing.”

We then move to Crim.R. 5, which specifically prohibits appeals stemming from a probable cause determination made at a preliminary hearing. *Crim. R. 5(B)(5)*. When these two rules are read together it is clear that this Court was correct in *In re D.H.*, and a juvenile has no right to an interlocutory appeal from a juvenile court's probable cause determination.

ii. Just like the rules, the subsequent issuance of an indictment prevents an interlocutory appeal.

The United States Supreme Court has held that reviews of the evidence and its persuasive value, as presented to a grand jury, will not be heard. *United States v. Williams*, 504 U.S. 36, 54 (1992). An interlocutory appeal, however, would do just that which the *Williams* Court prohibits.

The immediate next step from a transfer from juvenile to adult court is the obtainment of an indictment. That is what happened here, Appellant was indicted by the grand jury. In so doing the grand jury made an independent determination that probable cause existed for the indictment, and that determination cannot be argued on appeal. To allow an interlocutory appeal would subvert the role of the grand jury, and the sanctity of its probable cause determination.

iii. Practically speaking, interlocutory appeals of probable cause determinations by juvenile courts make no sense generally, and even less as applied to this appellant.

Allowing the interlocutory right that Appellant seeks would create a mandatory twelve (12) to eighteen (18) month delay **in every bindover case** while the obligatory interlocutory appeal is filed.

In fact, this Court discussed the perils of allowing such an exception for interlocutory appeals of bindover decisions in *In re D.H.* To that end this Court stated,

Indeed, some of the passage of time about which D.H. complains has been occasioned by his pursuit of interlocutory review. When D.H. was bound over to the adult court, the speedy-trial clock began running. *See State v.*

Bickerstaff, 10 Ohio St.3d 62, 67, 461 N.E.2d 892 (1984), citing *State ex rel. Williams v. Court of Common Pleas*, 42 Ohio St.2d 433, 435, 329 N.E.2d 680 (1975). By filing interlocutory appeals, D.H. has tolled the speedy-trial clock and brought further delay. See R.C. 2945.72(E). This type of delay was at the heart of the call we made in [*In re*] *Becker* to “end * * * endless appeals that perpetuate procrastination,” 39 Ohio St.2d [84,] at 87, 314 N.E.2d 158.

In re D.H., *supra*, at ¶ 20.

This Court’s concerns are still present, and Appellant has done nothing to address them. Instead, Appellant seeks to create the problem that this Court sought to prevent; lengthy delays in the middle of a case that force the courts of appeal to become arbiters of probable cause while prolonging cases by a year, or more, while the juvenile remains in custody. Indeed, should this Court agree with Appellant, then every time a juvenile case is bound over an interlocutory appeal would be initiated. Appellant seeks to obtain justice by delaying the same, we have before been warned of such a course of action.

Turning specifically to this Appellant – even if this Court agrees with him, It can provide him no relief. This Court cannot order this matter returned to the juvenile court just after probable cause was determined and allow him to file an interlocutory appeal that was never before filed. To do so would wipe out the guilty plea for the reason that Appellant could have, but did not file an interlocutory appeal.

Based on the foregoing, Appellant’s third proposition of law should be dismissed as improvidently granted. Further, should this Court opt to decide the matter on the merits, the Court should not disturb Its holding in *In re D.H.* that bindover decisions are not final appealable orders. *In re D.H.*, *supra*, at syllabus.

CONCLUSION

Appellant's attempt to challenge probable cause is barred by the issuance of the indictment, and guilty plea. It is likewise barred as the same is not "jurisdictional." For these reasons, and those stated above, this Court should affirm the Seventh District and reject Appellant's first and second propositions of law.

Finally, this Court should reject Appellant's third proposition of law as the issue presented therein: is not properly before this Court; any opinion on that proposition in this matter would be advisory; and, this Court's opinion in *In re D.H.* was correctly decided.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent via email this 22nd day of August, 2022 to the following:

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