No. 2022-0106

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO,
Plaintiff-Appellee,

v.

MANNY ZARLENGO
Defendant-Appellant.

REPLY BRIEF OF APPELLANT MANNY ZARLENGO

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STATEMENT OF THE CASE AND FACTS

Manny was 16 years old when he was bound over for criminal prosecution. Before his sentencing entry was even journalized in adult court, Manny, then freshly 18, asked his trial judge to appoint counsel for an appeal; and he promptly moved to withdraw his plea. (2.19.15 Motion to Withdraw Guilty Plea). His request for appellate counsel was ignored; and within a week, his plea-withdrawal motion was summarily denied. (2.26.15 Judgment Entry). Then came his delayed appeal, which was not decided on the merits because the appellate court held only that Manny's guilty plea waived his bindover challenge. Since he was able, Manny has done everything in his power to contest his juvenile bindover. That aside, Manny relies on the statement of the case and facts set forth in his merit brief.

INTRODUCTION TO REPLY

Overall, the government tries to pull a classic bait and switch. On direct appeal, its *only* argument was that "Defendant's guilty plea waived the purported error in the bindover proceeding, because the juvenile court's determination of probable cause is non-jurisdictional." (Answer Brief of Appellee at 1, 3, 4). Agreeing, the court's holding below was equally limited: "we agree with the state's assertion that these probable arguments are non-jurisdictional and are thus waived when a defendant pleads guilty." Opinion at ¶ 1. But now, the state says that "this case should never get to the issue of whether probable cause determinations are jurisdictional." (State's Brief at 1). Its amicus too claims "[t]his case does not turn on the waiver-by-guilty-plea rule." (Amicus Brief of Ohio Attorney General at 15). They curiously insist that Manny, *the appealing party,* "starts off by asking and answering the wrong question." (*Id.*). The government is flailing. That was the singular argument and holding below. It is *the* central point of the instant appeal—whether guilty

pleas waive challenges to juvenile bindover decisions. And oddly enough, *the state*, not Manny, is the one who introduced the waiver-by-guilty-plea issue in the first place.

The answer to this question lies squarely at the crux of *Menna-Blackledge* (excepting jurisdictional errors from the default waiver rule), and *State v. Smith* (holding that the probable cause determination in juvenile court is a "jurisdictional prerequisite"). The government and court below miss this answer because they have overread *Smith v. May* to mean probable cause findings are "non-jurisdictional." That is flatly wrong after Court's decision in *State v. Smith*, which expressly held the exact opposite. Now faced with *State v. Smith,* the government strains to rewrite the question presented entirely, just to reach its chosen result. This Court should reject the state's preserved waiver-by-guilty-plea arguments, discard its new brand ones about grand jury supremacy, and reverse.

LAW AND ARGUMENT

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

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

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

I. The government's response is riddled with unpreserved arguments.

From the outset, even the government fully acknowledges that neither it nor the court of appeals ever assessed the juvenile court's probable cause determination on the

merits. (State's Brief at 6). In fact, the court declined to do when it adopted the state's position that Manny's merits-challenge was waived by his guilty plea. Yet, the state opens by claiming that "the outcome of this case * * * will not be altered by this Court's decision due to the overwhelming evidence of actual guilt." (State's Brief at 2).

That argument is entirely gratuitous. Prompted by the state's own argument and resulting decision below, there is a specific question about waiver before this Court that, by its very nature, prevents a merits-determination of the argument supposedly waived.

That question must be answered first, and the matter remanded for further proceedings on the merits of Manny's bindover challenge.

Relatedly, the state now substitutes as its primary position a wholly new argument that a grand jury indictment independently prevents a challenge to the juvenile court's transfer decision. Without any regard for the uniqueness of Ohio's juvenile transfer scheme, the state and its amicus claim that grand jury indictments "supersede" any arguments about juvenile court transfer decisions. (State's Briaf at 9; Amicus Brief of Ohio Attorney General at 1, 5). In their view, "grand juries' probable cause determinations are dispositive. Because they are dispositive, courts will not, once a grand jury returns an indictment, consider whether probable cause existed at some earlier stage of the proceeding." (Amicus Brief at Ohio Attorney General at 9).

But this was not argued below either; it factors nowhere explicitly or implicitly in the court of appeal's decision; nor was it even suggested in the state's memorandum opposing jurisdiction.

This Court does not consider arguments raised for the first time at this stage of the proceedings, including those raised by 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."). Nor does it consider issues raised solely by the amicus. *State ex rel. Toledo Blade Co. v. Henry Cnty. Court of Common Pleas*, 125 Ohio St.3d 149, 2010-Ohio-1533, 926 N.E.2d 634, ¶ 19, citing *Wellington v. Mahoning Cty. Bd. of Elections*, 117 Ohio St.3d 143, 2008-Ohio-554, 882 N.E.2d 420, ¶ 53.

As explained more fully below, the government's novel grand jury theory is simply wrong because juvenile bindover prosecutions are inherently different (their linchpin is *the transfer of subject-matter jurisdiction, before an indictment is even possible*); but, just like its unpreserved actual-guilt argument, it's also not properly before this court.

II. Claims disputing subject-matter jurisdiction are not waived by guilty pleas.

And to the extent the government does respond to the actual issue presented, it takes enormous pains to confound clearcut precedent. Its resulting arguments fall short.

A. The government misconstrues *Menna-Blackledge* and its applications.

First—misreading another habeas case, *Shie v. Leonard*—the government broadly claims "a defendant waives an attack on jurisdiction by entering a guilty plea." (State's Brief at 10), citing *Shie v. Leonard*, 84 Ohio St.3d 160, 161, 702 N.E.2d 419 (1998)). What the government's two briefs fail to mention is that *Shie* was a per curiam habeas appeal, decided under this Court's appellate jurisdiction, that simply agreed with the lower court's factual finding that the petitioner was an adult at the time of the alleged offenses. *Id.* As such, the petitioner did not have a jurisdictional claim. *Id.*

Affirming a finding of fact, that decision in no way set forth a broader legal pronouncement that, as a matter of law, guilty pleas waive jurisdictional challenges.

Beyond that, the state and its amicus then shirk the *Menna-Blackledge* doctrine as well. They claim that *Menna v. New York* "dealt with constitutional violations only" and that Manny—who contests the adult court's acquisition of subject-matter jurisdiction—does not state a constitutional claim. (State's Brief at 16). According to them, *Menna* held only that "a guilty plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt." (Amicus Brief of Attorney General at 18). In their view, *Menna-Blackledge* says no more than that.

This reading is at once selective and reductive. As the Supreme Court later explained in *Class v. United States*:

> [A] guilty plea bars appeal of many claims, including some "'antecedent constitutional violations'" related to events (say, grand jury proceedings) that had "'occurred prior to the entry of the guilty plea.'" [*Blackledge v. Perry*, 417 U. S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974)], (quoting *Tollett v. Henderson*, 411 U. S. 258, 266-267, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973)). [But] [w]hile *Tollett* claims were "of constitutional dimension," the [*Blackledge*] Court explained that "the nature of the underlying constitutional infirmity is markedly different" from a claim of vindictive prosecution, *which implicates "the very power of the State" to prosecute the defendant*.

(Emphasis added.) ___U.S.___, 138 S.Ct. 798, 803, 200 L.Ed.2d 37 (2018).

In *Blackledge*, the defendant sought to assert a claim on appeal of prosecutorial vindictiveness after pleading guilty. The Supreme Court held that the guilty plea did not bar this challenge because "*the defendant's right was 'the right not to be haled into court at all upon the felony charge. The very initiation of proceedings against him * * * thus operated to deny him due process of law*." (Emphasis added.) *Blackledge* at 30-31.

Resultantly, "[a] year and a half later, in *Menna v. New York* * * * the[e] Court repeated what it had said in *Blackledge*." *Id.* Under *Menna*, "*a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute*." *Menna v. New York*, 423 U. S. 61, 62, fn.2, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975). The defendant in *Menna* raised a constitutional double jeopardy claim. *Id.* Like that presented in *Blackledge*, this "amount[ed] to a claim that 'the State may not convict' him 'no matter how validly his factual guilt is established.'" *Class* at 804, quoting *Menna* at 62, fn.2. "Menna's 'guilty plea, therefore did not bar the claim." *Id.*

The state and its amicus say nothing of this core holding. Instead they point only to fn.2's immediately-preceding sentence which notes that because "factual guilt is [usually] a sufficient basis for the State's imposition of punishment[,]" "[a] guilty plea * * * simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Menna* at 62, fn.2. But, in the very next sentence, the Court hastened to clarify: "the claim [raised in *Menna*] is that the State may not convict petitioner no matter how validly his factual guilt is established." *Id.* Thus, the guilty plea did not bar it.

At the same time, the Court did later distinguish a different type of double jeopardy claim from that raised in *Menna*. *State v. Broce*, 488 U.S. 563, 575, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Namely, where the indictments in *Menna* were facially duplicative, the respondents in *Broce* "pleaded guilty to indictments that on their face described separate conspiracies." *Id.* at 576. The Court explained that this set the *Broce* respondents apart because unlike Menna, "[t]hey [could] not prove their claim by relying on the indictments

and the existing record." *Id.* at 576. Their claim instead sought "further proceedings at which to expand the record with new evidence." *Id.* at 575.

Contrary to the government's suggestion, *Broce* has been the only refinement of *Menna-Blackledge*. And besides, as explained more fully below, it's neither here nor there.

Manny's jurisdictional challenge, like those in *Blackledge* and *Menna*, goes directly to the state's power to hale him into criminal court. *Convicting someone without proper subject-matter jurisdiction is a violation logically inconsistent with the valid establishment of factual guilt.* Such a claim does not require new evidence; nor does it exceed the existing record. It is, in short, not like the claims asserted in *Broce.*

What's more, at no point has the Supreme Court abandoned the exception set forth in *Menna-Blackledge*—"that a guilty plea does not bar a claim on appeal 'where on the face of the record the court had no power to enter the conviction or impose the sentence.'" *Class*, ___U.S.___, 138 S.Ct. at 805, 200 L.Ed.2d 37, quoting *Menna*, 488 U.S. at 569, 109 S. Ct. 757, 102 L. Ed. 2d 927.

Nor has it ever questioned the basic maxim that if the state lacks the power to constitutionally prosecute a defendant, "the very initiation of the proceedings" against them denies them due process of law. *Blackledge*, 417 U.S. 21 at 30, 94 S.Ct. 2098, 40 L.Ed.2d 628. Under *Menna-Blackledge*, guilty pleas do not waive claims going to "the very power of the state to bring a defendant into court." *Id.* And that remains the law.

By taking them out of context, the government elevates choice observations from *Menna*, at the expense of the *Menna-Blackledge* doctrine itself. The government's interpretation is not accurate.

B. Its position is little more than a refusal to accept *State v. Smith*.

Furthermore, under this Court's juvenile transfer jurisprudence, challenges to juvenile bindover decisions fall squarely within this well-recognized exception. The government's recasting of these claims—a rewriting that itself rests on a perverse reading of basic juvenile procedure—is equally flawed. First principles bear this out.

1. This Court has already held that a valid probable-cause finding is "a jurisdictional prerequisite" to transfer.

When it comes to children facing bindover, the process starts in juvenile court, not at the grand jury stage of proceedings—which happens only after a valid transfer from juvenile court. R.C. 2152.12. By statute, juvenile courts have *exclusive subject-matter jurisdiction* over charges against children. R.C. 2151.23; R.C. 2152.03. "No person, either before or after reaching eighteen years of age, shall be prosecuted as an adult * * * *unless the person has been transferred as provided in division (A) or (B) of [R.C. 2152.12]* or unless division (J) of this section applies." (Emphasis added.) R.C. 2152.12(H).

But, "[b]y giving juvenile courts bindover authority, the General Assembly created an exception to the juvenile courts' exclusive jurisdiction over juvenile offenders." *State v. Smith*, Slip Opinion No. 2022-Ohio-274, ¶ 27, citing R.C. 2152.03. "One of the first and most critical determinations a juvenile court must make in evaluating whether to relinquish jurisdiction to an adult court—in both mandatory-and discretionary-bindover cases—is whether probable cause exists to believe that the child committed the act charged." *Id.*

By statute then, "[a] juvenile court's finding of probable cause as to any particular 'act charged' is what triggers a possible transfer to adult court[.]" *Id*. at ¶ 2. And as such, "*a finding of probable cause is a jurisdictional prerequisite under R.C. 2152.12* to transferring a child to adult court for prosecution of an act charged." (Emphasis added.) *Id.* at ¶ 44.

This is not only a correct statement of Ohio's statutory scheme, but it is also indispensable to this Court's conclusion in *Smith*. That makes it part of the holding. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [courts] are bound." *Seminole Tribe v. Florida*, 517 U.S. 44, 67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), citing *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 613, 109 L. Ed. 2d 631, 110 S.Ct. 2105 (1990) (exclusive basis of a judgment is not dicta); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law").

Thus, the government is wrong to insist that "[a]ll *State v. Smith* held is that a juvenile court cannot transfer counts of a complaint as to which it found no probable cause." (Amicus Brief of Attorney General at 18). Rather, above all, *Smith* makes abundantly clear that a juvenile court's finding of probable cause is a "jurisdictional prerequisite."

To the extent the state, its amicus, and select lower courts continue to resist this—which is precisely what gave rise to this appeal in the first place—their arguments are now foreclosed by *Smith* and are without merit. (*See* State's Brief at 15, 16-18).

2. Judged on their face, claims like Manny's contest subject-matter jurisdiction and thus the state's power to constitutionally prosecute felony charges in adult court.

To that end, it bears repeating that the Fourth and Seventh Districts' sole premise directly contradicts *Smith's* holding that probable cause *is* jurisdictional. But rather than concede that, the government obfuscates. It argues falsely that claims contesting juvenile bindover are just like any other claims concerning grand juries; or that, more perplexing

still, Manny is just "seeking to challenge the determination of probable cause, not the transfer of jurisdiction[.]" (*See* Amicus Brief of Attorney General; State's Brief at 17).

Not so. Manny has already explained that by contesting the validity of a juvenile court's probable cause finding, juvenile bindover defendants are unequivocally asserting that the transfer statute's key "jurisdictional prerequisite" has not been satisfied. This is ultimately true even if the claim turns on the sufficiency or weight of the evidence presented at transfer—the transfer of subject-matter jurisdiction from one court to the other was no good; the adult court did not properly acquire jurisdiction; and the state, as a result, had no power to criminally indict and prosecute them on felony charges in adult court. Absent a valid transfer from juvenile court, the indictment violates due process.

In short, what the state refuses to accept is that Ohio's unique transfer scheme sets the bindover process apart. "[B]ecause a proper bindover procedure, which includes the determination of the existence of probable cause, is necessary to transfer jurisdiction, it cannot be waived." *State v. E.T.*, 2019-Ohio-1204, 134 N.E.3d 741, ¶ 44 (10th Dist.). "[B]ecause a finding of probable cause based on [assertedly] insufficient evidence [would] contravene the procedures established under R.C. 2152.12 for the transfer of jurisdiction * * * we review whether the [probable cause finding] was based on sufficient evidence." *Id.*

The government decidedly fails to show how any of that is untrue.

3. The government gets it exactly backwards: A grand jury indictment cannot "supersede" a juvenile transfer decision if the grand jury did not have jurisdiction to return an indictment in the first place.

In response, it instead insists again and again that grand jury indictments "trump" or "cure" any defects in the juvenile transfer proceedings. The government claims that because both juvenile courts and grand juries decide probable cause, "the grand jury's

indictment dispositively establishes the existence of probable cause, thus superseding any earlier probable-cause determinations. (Amicus Brief of Attorney General at 16). But as noted, this theory is not preserved. And even if it were, it suffers from two glaring issues.

First, juvenile bindover hearings are not analogous to one-sided grand jury proceedings. Doggedly insisting otherwise does not magically make it so. Under this Court's precedent, bindover hearings are two-sided, adversarial evidentiary hearings where prosecutors must satisfy a burden of proof and "the juvenile court has the duty to assess the credibility of the evidence and to determine whether the state has presented credible evidence going to each element." *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 44. Recognizing the critical import of bindover, this Court has held that young people have a right to be present; a right to effective counsel; a right to full *Brady* discovery pre-hearing. *Id.*; *see also Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); *State v. Iacona*, 93 Ohio St.3d 83, 93, 2001-Ohio-1292, 752 N.E.2d 937; *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 11.

None of that is true of a grand jury convening. Grand juries are wholly one-sided; inquisitorial; conducted pre-discovery; without a right to be present, let alone with the assistance of counsel; and in some respects, held entirely in secret. *See* Ohio Prosecuting Attorneys Association, http://www.ohiopa.org/grandjury.html (accessed September 6, 2022) ("Grand jury deliberations and votes, as well as the names of witnesses and questions considered shall not be disclosed."). None of this is debatable.

Further, these differences are important because regardless of whether probable cause is decided in both settings, a later, cursory proceeding affording lesser protections

than the bindover hearing cannot possibly cure alleged errors affecting the validity of the bindover decision.

Second, regardless of all that, the process for juvenile bindover cases does not start at the grand jury. By law, no child may be prosecuted as an adult except as provided by R.C. 2152.12, which lists probable cause as a "jurisdictional prerequisite." *Smith*, Slip Opinion No. 2022-Ohio-274, at ¶ 44. And so, without a valid finding of probable cause in juvenile court, there is no transfer of jurisdiction to the grand jury in adult court.

In the end, this is what the government's response conveniently and persistently ignores: *in bindover cases, a grand jury must have validly acquired subject matter jurisdiction to return an indictment in the first place*. A grand jury indictment cannot "supersede" a juvenile transfer decision if that transfer did not properly occur. And as this Court held long ago: "notwithstanding the plea of guilty, the defendant may object to the jurisdiction of the court, or the grand jury, over the subject-matter, or that no offense was charged against him[.]" *Carper v. State*, 27 Ohio St. 572, 575 (1875). That's what this is all about.

At bottom, the government refuses to accept that children and juvenile cases are different; that the law imposes additional steps before the state may convict them as adults. And worse still, it's amicus openly urges this Court to hold that no pre-transfer errors can ever warrant appellate review in any bindover appeals. (*See* Amicus Brief of Attorney General at 23-24). Under their theory, there can be no deprivation so grave as to justify review of a juvenile bindover decision. Such a rule is not only absurd, but it breaks with decades of jurisprudence, spanning *Iacona* to *State v. Smith*, that have reviewed bind-over decisions after guilty pleas. Under the state's theory, none are safe: an entire body of law has been wrong from its inception. One would think this Court's prior decisions are worth

more than that. The government's grand-jury arguments—already raised and at least implicitly rejected in *State v. Smith*—should be put to rest.

C. By its own terms, the decision below rests on *Smith v. May*. The government misreads that decision, too.

Finally, while the government reads *Menna-Blackledge* and *State v. Smith* too narrowly; it also reads this Court's decision in *Smith v. May* far too broadly.

The state claims that *Smith v. May* generally addressed "whether an alleged defect in juvenile court prevented the juvenile court from transferring jurisdiction to an adult court." (State's Brief at 14). So framed, the state claims that "*Smith* can be applied to *any case*;" and that "*Smith* is applicable to this case because it already answered the central issue before this Court here—an alleged irregularity concerning a waivable requirement (i.e., a preliminary hearing) does not present the juvenile court from transferring jurisdiction." (State's brief at 15).

Again, not so. First, as already explained, *Smith v. May* was plainly (and solely) about the statute's three-day notice requirement found in R.C. 2152.12(G). That decision does not even purport to answer any questions about any of the statute's other requirements. Try as it might, the state cannot simply rewrite this Court's decisions to its liking.

Second, while *Smith v. May* utilized the rationale that waivable-equals-non-jurisdictional, this Court also made clear that "[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 subject-matter jurisdiction to an adult court." *Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542, ¶ 29.

And alas, thirdly, this Court has recently decided, in a comprehensive decision interpreting R.C. 2152.12 and its related provisions, that probable cause is indeed "a jurisdictional prerequisite." *Smith*, Slip Opinion No. 2022-Ohio-274, at ¶ 44.

That alone ought to resolve this entire dispute.

But fourth, even if it doesn't, there is no existing support in the statute or interpreting caselaw that even remotely suggests the statute's central probable cause *requirement* (as opposed to the hearing in which that finding must be issued) can be "waived," as opposed to just stipulated to. It's a "jurisdictional prerequisite."

A decision to that effect here would break entirely new decisional ground; it would upend the statutory scheme; and it would do so on an incidental issue no less. This Court needn't address that; and it shouldn't.

And finally, this Court in *May* also specifically said that "[j]uveniles facing bindover to an adult court maintain the right to object to a juvenile court's noncompliance with bindover procedures and the right to appeal from any error in the ordinary course of law. *May* at 29, citing *In re D.H.*, 152 Ohio St. 3d 310, 2018-Ohio-17, ¶ 19, 95 N.E.3d 389.

In short, especially after *State v. Smith*, nothing in *Smith v. May* supports the conclusion that errors relating to probable cause in the juvenile bindover context are "non-jurisdictional." That was the lower court's central premise; and it is not correct.

* * *

Notwithstanding the government's theories, a straightforward application of *Menna-Blackledge* and *State v. Smith* resolves this important dispute. For these reasons and those set forth in the merit brief, this Court should adopt Manny's first and second propositions and reverse the legal ruling below.

III. Raised only in the alternative, Manny's third proposition arises directly from the decision below. Affirming would undercut *D.H.'s* reasoning.

Without acknowledging that Manny's third proposition has been presented only in the alternative, the government complains that it was not raised or decided below. From there, it invokes the rule against advisory opinions to discourage a decision.

The government is again mistaken. Should it reject one or both of Manny's first two propositions, this Court may in its discretion reach this issue.

This Court has explained that even where forfeiture applies, the forfeiture doctrine is discretionary. *State v. Awan*, 22 Ohio St.3d 120, 22 489 N.E.2d 277 (1986). As such, this Court reserves the right to consider constitutional challenges "where the rights and interests may warrant it." *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988); *see also State v. Barker*, 149 Ohio St.3d 1, 2016-Ohio-2708, 73 N.E.3d 365, ¶ 36 (explaining how an issue crystallized with the appellate decision and addressing the merits where appellant "promptly raised that challenge in his [jurisdictional] memorandum before this court, and we accepted jurisdiction despite the state's assertion of waiver.").

Furthermore, this Court has long said that "'[w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue.'" *State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 67-68, quoting *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993).

Here, the waiver-by-guilty-plea ruling below is what gave rise to this related issue. It did not exist at the time of briefing below because under *In re D.H.*, juvenile bindover defendants supposedly had an ample right to appeal their bindovers *after* a criminal conviction. *In re D.H.*, 152 Ohio St.3d 310, 2018-Ohio-17, 95 N.E.3d 389, ¶ 19. This Court

regarded that prospect as an effective remedy under R.C. 2505.02(B)(2). *Id.* But the ruling below pulls the rug out from that holding—if the state's view is adopted, there is no appellate review of juvenile transfer decisions in virtually every single case.

Finally, the state's newfangled advisory-opinion argument is also unpersuasive. The cases upon which it relies were disposed of on standing or mootness grounds, only then did this Court decline to proceed further because doing so would result in an advisory opinion. *See Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 1 (standing); *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002 Ohio 4848, 775 N.E.2d 508, ¶ 18 (mootness); *Egan v. Natl. Distillers & Chem. Corp.*, 25 Ohio St.3d 176, 495 N.E.2d 904, syllabus (1986) (no injury). In those cases, this Court "properly refused to entertain the question presented because the question need not be answered to give proper resolution to the case. *Allen v. Totes/Isotoner Corp.*, 123 Ohio St.3d 216, 2009-Ohio-4231, 915 N.E.2d 622, ¶ 16 (O'Connor, C.J., concurring).

But here, the issue of *D.H.'s* continued viability is a live one because if the decision below stands, this controversy will most certainly reoccur. And soon.

Accordingly, the government's forfeiture argument falls short and so does its warning against advisory opinions. This Court can and should resolve this question if Manny's first and second propositions are rejected.

IV. The government's vision is profoundly unfair. Under it, only prosecutors may contest transfer decisions and incur delays. There is little protection and no recourse for young people at all.

On the whole, the governments' briefs paint a worrisome picture. In *D.H.*, they argued just as they do here against any right to an interlocutory appeal. There, the government claimed that direct appeal after final judgment was an effective remedy.

Taking those assurances at face value, this Court agreed. In the same breadth, they now insist there should be no right to appeal errors relating to the bindover decision after virtually *any conviction*. (Amicus Brief of Attorney General at 24). Because even though for juveniles the entire point of a bindover hearing is to *avoid* the adult criminal prosecution, the very initiation of the criminal prosecution (by grand jury indictment) somehow "cures" all errors in juvenile court. No right to appellate review. If a young person pleads guilty like more than 90% of defendants now do? Again, no right to appeal the bindover decision, which, notwithstanding *State v. Smith*, the state insists is "non-jurisdictional."

Remarkably, the government goes even one step further now, claiming that even if a child goes to trial, he *still* cannot appeal the bindover decision because the grand indictment cures all, and, from where they sit, that'd be pointless. (*Id*.).

All the while, the state casually points out that *prosecutors* retain *their* right to appeal directly from those same bindover decisions. Where that happens, the state figures, its rights are unduly affected, and any additional delays are suddenly justified. One side gets an immediate interlocutory appeal from a bindover decision, the other gets none at all.

In no uncertain terms, the state has laid its cards on the table. It asks this Court to pay no mind to basic principles of fair play—or even to the mere appearance of it. The deck is stacked, and the government now insists on yet another trump card.

* * *

Historically, this Court has not just heeded *Kent* but has built upon it to ensure fundamental fairness for Ohio's young people. Hewing carefully to basic principles of decency, it has built a body of law explaining that juvenile bindover is the rare exception, not the rule. This Court's decisions confirm that bindovers are critically important

proceedings that severely affect a child's liberty interests. But without a meaningful right to appellate review, none of that means much at all. Having painstakingly set out rights, affirming here will rescind the only real remedy for their violation. That result is untenable.

CONCLUSION

For all these reasons and those set forth in the merit brief, this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

A copy of the foregoing **Reply Brief of Appellant, Manny Zarlengo** was sent by facsimile mail this 12th day of September 2022 to Paul J. Gains, Mahoning County Prosecutor at Mahoning_Prosecutor.330-740-2008@fax2mail.com.

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