In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2022-0106
	:	
Appellee,	:	On Appeal from the
	:	Mahoning County
v.	:	Court of Appeals,
	:	Seventh Appellate District
MANNY ZARLENGO,	:	
	:	Court of Appeals
Appellant.	:	Case No. 20 MA 00036

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

No one would consult the previous night's weather forecast to decide how much snow fell overnight. Nor would anyone look to the handicapper's Friday-night picks for the results of Saturday's games. At some point, reality supersedes predictions.

So it is with the law. When a grand jury returns an indictment, it establishes the existence of probable cause. Indictments thus supersede—they establish the correctness of—probable-cause determinations made earlier in the proceedings. *See, e.g.*, *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997); *Sopko v. Maxwell*, 3 Ohio St. 2d 123, 124 (1965). The same can be said of convictions. A conviction requires proof of guilt beyond a reasonable doubt. When a jury finds that high standard is met, or when a defendant pleads guilty instead of going to trial, the defendant's guilt is established. And actual guilt resolves the question whether there is a "reasonable ground" to suspect the defendant's guilt. *State v. Moore*, 90 Ohio St. 3d 47, 49 (2000) (quotation omitted).

These insights resolve Zarlengo's case. He challenges the probable-cause determination that the juvenile court made in support of its decision binding him over to adult court. But a grand jury subsequently indicted Zarlengo, and he pleaded guilty. The indictment and the guilty plea superseded the earlier probable-cause determination. Accordingly, Zarlengo can no longer challenge that determination. The Seventh District correctly rejected Zarlengo's argument. This Court should too. And the Court should refuse to even consider Zarlengo's third proposition of law, in which Zarlengo

seeks an advisory opinion on the question whether bound-over defendants may immediately appeal a juvenile court's probable-cause determination. That question is entirely academic—it will have no impact on this case—because Zarlengo did not immediately appeal the probable-cause determination in his case. As a result, any opinion addressing this proposition of law would violate the prohibition on advisory opinions. *State ex rel. White v. Koch*, 96 Ohio St. 3d 395, 2002-Ohio-4848 ¶18.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. He is interested in supporting courts throughout the State as they process juvenile offenders according to state law in an effort to protect the community and rehabilitate youths. The Attorney General also sometimes serves as special counsel in cases of significant importance, including in cases that involve juveniles. In those cases, the Attorney General is directly involved in the application of the bindover statutes at issue here.

STATEMENT

1. Over the course of two weeks, Manny Zarlengo, then 16, robbed five separate Youngstown-area businesses at gunpoint. *State v. Zarlengo*, 2021-Ohio-4631 (7th Dist.) ¶¶3–7 (App. Op.). Because Zarlengo was a minor, the State charged him in juvenile court. But the General Assembly has decided that 16-year-olds who use guns to commit

felonies like aggravated robbery should be prosecuted in common-pleas courts, not in the juvenile system. *See* R.C. 2152.10(A)(2), 2152.02(BB), 2911.01. Thus, Ohio law *requires* that juvenile courts transfer cases like Zarlengo's to adult court, provided there is "probable cause to believe" that the juvenile committed the crime charged. R.C. 2152.12(A)(1)(a)(ii), 2152.10(A)(2)(b); Ohio R. Juv. Pro. 30(A). The probable-cause standard is the same one taught to every first-year law student: the evidence must be sufficient to create "a reasonable ground for belief of guilt." *Moore*, 90 Ohio St. 3d at 49 (quotation omitted). Put differently, the evidence must create more than "mere suspicion of guilt." *State v. Smith*, ___ Ohio St. 3d ___, 2022-Ohio-274 ¶39 (citation omitted). But probable cause does not require evidence that makes guilt more likely than not. *See, e.g.*, *State v. Hawkins*, 158 Ohio St. 3d 94, 2019-Ohio-4210 ¶20.

The juvenile-court judge determined that the evidence established probable cause of Zarlengo's guilt. And that is hardly surprising. Zarlengo had written a letter to the court accepting responsibility for his acts; he told the judge he made a bad decision, and he "acknowledged he never should have had a gun." App.Op. ¶14. The juvenile judge mistakenly excluded this letter, see *id*. at ¶14 n.1, but still determined that other evidence satisfied the probable-cause threshold. It thus bound Zarlengo over to adult court.

2. In Ohio, a juvenile court's bindover decision effectively requires the prosecutor to start the prosecution over again in adult court. Relevant here, that means the

prosecutor must present the case to a grand jury and secure an indictment before proceeding. *See State v. Adams*, 69 Ohio St. 2d 120, syl. ¶¶1–2 (1982); *superseded on other grounds by* Am. Sub. H.B. No. 1, Section 3(B), 146 Ohio Laws, Part I, 1, 96. To obtain the indictment, the prosecutor must persuade the grand jury that there is probable cause to believe the defendant committed the crime charged. *See State v. Sanders*, 92 Ohio St. 3d 245, 271 (2001). In other words, the grand jury, in deciding whether to indict a defendant, reviews the evidence under the same standard that the juvenile court applied in deciding whether to bind the defendant over to adult court. This means, in effect, that the State must prove probable cause twice: once to a juvenile court, and a second time to the grand jury. If the State convinces the juvenile court but fails to convince the grand jury, the prosecution cannot go forward.

The State convinced the grand jury in this case, which returned an indictment against Zarlengo. Zarlengo pleaded guilty.

3. Despite pleading guilty, Zarlengo appealed. He argued that the juvenile court incorrectly found probable cause to believe he committed the charged offenses. Therefore, Zarlengo argued, he never should have been bound over to adult court. App.Op. ¶17.

The Seventh District rejected that argument and affirmed the trial court. It concluded that Zarlengo, by pleading guilty, waived any challenge to the probable-cause determination. App.Op. ¶1.

4. Zarlengo appealed to this Court, which agreed to hear his case. *See 04/27/2022 Case Announcements*, 2022-Ohio-1284.

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law I:</u>

The grand-jury true bill and the guilty plea superseded the juvenile court's probable-cause finding.

I. Because the grand jury indicted Zarlengo, and because Zarlengo pleaded guilty, he cannot challenge the juvenile court's probable-cause determination.

Zarlengo brought this appeal in hopes of challenging the juvenile court's probable-cause determination. But for two independent reasons, he can no longer challenge that determination. *First*, the grand jury's indictment, which rests on a finding of probable cause, supersedes any earlier probable-cause determination. *Second*, Zarlengo's guilty plea renders harmless or moot any dispute about the juvenile court's probable-cause determination.

A. The grand jury's true bill supersedes any arguments about the juvenile court's probable-cause finding.

The grand jury is a check on prosecutions. Only a grand jury's probable-cause finding empowers a prosecutor to move forward with felony charges against an accused. But once a grand jury finds probable cause, earlier forecasts about probable cause—for example, probable-cause determinations made at the time of arrest or at a preliminary hearing—are moot. *See, e.g.*, *Kalina*, 522 U.S. at 129; *Jaben v. United States*,

381 U.S. 214, 220 (1965). Zarlengo's challenge to the preliminary probable-cause finding in juvenile court is no longer relevant because later events overtook it.

1. The Fifth Amendment to the United States Constitution guarantees a right to a grand jury. Even though that provision does not give criminal defendants any rights against the States, *Hurtado v. California*, 110 U.S. 516 (1884), Ohio long ago adopted a parallel guarantee, *see* Ohio Const. art. I, §10.

"The grand jury is an integral part of our constitutional heritage." *United States v. Mandujano*, 425 U.S. 564, 571 (1976). It ensures "that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath." *Id*. For that reason, it "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

The grand-jury guarantee assures "an accused that the essential facts constituting the offense for which he is tried will be found in the indictment." *State v. Pepka*, 125 Ohio St. 3d 124, 2010-Ohio-1045 ¶14. The guarantee further "requires a grand jury to consider every element of a charged offense before issuing an indictment." *State v. Buehner*, 110 Ohio St. 3d 403, 2006-Ohio-4707 ¶14 (Moyer, C.J., dissenting). The grand

jury can return an indictment only if it finds "probable cause to believe" that the accused committed the crimes charged. *State ex rel. Askew v. Goldhart*, 75 Ohio St. 3d 608, 609 (1996); *see State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059 ¶39.

The power of the grand jury is that it constitutes a citizen-driven check on the power of prosecutors. Consistent with the citizen-driven, liberty-protecting nature of the institution, courts must not second-guess a grand jury's determinations. Thus, "no authority" permits "looking into and revising the judgment of the grand jury upon the evidence" in order to determine whether the indictment "was founded upon sufficient proof." *Kaley v. United States*, 571 U.S. 320, 328 (2014) (internal quotation marks omitted). Instead, "a challenge to the reliability or competence of the evidence" supporting a grand jury's probable-cause finding "will not be heard." *Id*. (quotation omitted). The "grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime." *Id.*

The judicial acquiescence in grand-jury findings has another consequence. It moots prior probable-cause findings. For example, an arrest must be supported by probable cause. *State v. Jordan*, 166 Ohio St. 3d 339, 2021-Ohio-3922 ¶19. But an illegal arrest, unsupported by probable cause, does not taint a conviction secured after an intervening grand-jury indictment. This Court long ago concluded that, "[e]ven if an arrest is illegal, it does not affect the validity of a subsequent criminal proceeding based

on a valid indictment." *Sopko*, 3 Ohio St. 2d at 124; *see also State v. Henderson*, 51 Ohio St. 3d 54, 56 (1990) (collecting cases).

The same logic applies to preliminary hearings in criminal cases. During those hearings, courts assess probable cause before binding over the defendant to face grand-jury proceedings. *See, e.g.*, *Freeman v. Maxwell*, 177 Ohio St. 93, 94 (1964). But once a grand jury returns a true bill, there is no reason to hold a preliminary hearing. *State ex rel. Haynes v. Powers*, 20 Ohio St. 2d 46, 48 (1969). Indeed, once the grand jury finds probable cause, "the preliminary hearing [is] superfluous," *State v. Azcuy*, No. 88AP-529, 1994 WL 232321, at *2 (10th Dist. May 26, 1994), "because the defendant has been afforded an independent determination that a prima facie case exists." *State v. Gott*, No. 2-88-19, 1990 WL 88799, at *9 (3d Dist. June 28, 1990) (citation omitted) (juvenile bindover). Federal courts have reached the same conclusion; once "the grand jury returns a true bill prior to the time a preliminary hearing is held, the whole purpose and justification of the preliminary hearing has been satisfied." *United States v. Mulligan*, 520 F.2d 1327, 1329 (6th Cir. 1975) (*per curiam*); *see also, e.g.*, *In re Approval of Jud. Emergency Declared in Dist. of Arizona*, 639 F.3d 970, Appendix 2(d) (9th Cir. 2011); *United States v. Soriano-Jarquin*, 492 F.3d 495, 502 (4th Cir. 2007); *United States v. DeRosa*, 670 F.2d 889, 897 n.8 (9th Cir. 1982).

The rule that a grand jury's true bill supersedes earlier findings related to probable cause flows from this principle: "The jurisdiction of the court is invoked by the re-

turn 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). That is, the indictment—not the preliminary steps that precede it—is the trigger for a criminal prosecution. *See, e.g.*, *Foston v. Maxwell*, 177 Ohio St. 74, 76 (1964). So "[a]ny defect or irregularity in either the arrest or preliminary examination does not affect the validity of the accused's conviction." *Dowell*, 174 Ohio St. at 290; *see also, e.g.*, *United States v. Mechanik*, 475 U.S. 66, 72–73 (1986) ("[T]he petit jury's verdict rendered harmless any conceivable error in the charging decision.").

In sum, grand juries' probable-cause determinations are dispositive. Because they are dispositive, courts will not, once a grand jury returns an indictment, consider the question whether probable cause existed at some earlier stage of the proceeding.

This rule reflects a pattern that one sees in law quite often: courts will not reconsider preliminary decisions that later events overtake. Consider an analogy from civil law. Every day in courtrooms across the country, judges deny requests for summary judgment. Those cases often head to trial, and often result in appeals. But on appeal, parties may not seek reversal of the now-superseded summary-judgment ruling. Instead, "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011). "Any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in

the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made." *Cont'l Ins. Co. v. Whittington*, 71 Ohio St. 3d 150, syl. ¶1 (1994); *accord, e.g.*, *Green v. Gen. Acc. Ins. Co. of Am.*, 106 N.M. 523, 527 (1987); *Harris v. Walden*, 314 N.C. 284, 286 (1985); *Manuel v. Fort Collins Newspapers, Inc.*, 631 P.2d 1114, 1116–17 (Colo. 1981); *Bigney v. Blanchard*, 430 A.2d 839, 842–43 (Me. 1981). Courts across the country follow this rule for the same reason that, after an indictment's return, they refuse to consider probable-cause findings made at an earlier stage: the trial (in the summary-judgment context) or indictment (in the grand-jury context) supersedes earlier proceedings addressing identical or subsumed theories.

2. These bedrock principles resolve this appeal. Zarlengo concedes that a grand jury indicted him. Zarlengo Br.4. The grand jury's probable-cause finding is not subject to review. *Kaley*, 571 U.S. at 328; *see also, e.g.*, *State v. Hill*, 2015-Ohio-2389 ¶27 (8th Dist.), *summarily aff'd on other grounds*, 150 Ohio St. 3d 24, 2016-Ohio-7561. And the grand jury's indictment supersedes the juvenile court's earlier probable-cause determination.

B. Zarlengo's guilty plea also supersedes any inquiry into the preliminary probable-cause finding at bindover.

Zarlengo's attack on his conviction fails for a second, independent, reason: his guilty plea. By pleading guilty, Zarlengo admitted *as fact* that he robbed five Youngstown-area businesses at gunpoint. That admission supersedes the probable-cause hearing, which is nothing more than a preliminary test of whether the prosecution can offer

enough evidence to believe that Zarlengo *might* have committed the crimes. Having confessed guilt, Zarlengo cannot now argue that the evidence failed to support a reasonable suspicion of guilt.

1. "A guilty plea is a complete admission of guilt." *State v. Beasley*, 152 Ohio St. 3d 470, 2018-Ohio-16 ¶11. "By entering his guilty plea," a defendant "admit[s] that he" committed the charged crimes. *State v. Stumpf*, 32 Ohio St. 3d 95, 104 (1987); *see also State v. Griggs*, 103 Ohio St. 3d 85, 2004-Ohio-4415 ¶14; Ohio R. Crim Pro. 11(B)(1).

Because guilty pleas constitute admissions, they carry serious consequences. And Ohio law sets up numerous procedural and substantive safeguards to ensure that defendants are prepared to accept those consequences. For example, Ohio's Criminal Rule 11 empowers courts to reject involuntary guilty pleas, and they also may reject pleas unsupported by the facts. *See, e.g.*, *State v. Rice*, 2016-Ohio-7185 ¶15 (12th Dist.); *State v. Jackson*, 68 Ohio App. 2d 35, 37 (8th Dist. 1980); Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 Ohio St. J. Crim L. 423, 434–35 (2020). This reflects the fact that courts need not accept every guilty plea. Ohio R. Crim Pro. 11(G); *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970). And it ensures, in cases where courts accept guilty pleas, that there is "a sufficient basis for the State's imposition of punishment." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975).

One of the many consequences of a guilty plea is that it can supersede or moot disputes from earlier proceedings. Because a "guilty plea represents a break in the chain of events which has preceded it," a defendant's admission "in open court that he is in fact guilty" blocks "claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). "By pleading guilty," this Court has said, a defendant gives up "his right to raise any allegations of constitutional violations flowing from" previous steps in the criminal-justice process. *State v. Obermiller*, 147 Ohio St. 3d 175, 2016-Ohio-1594 ¶56. The rule is not about "waiver," but instead rests on the logical consequences of admitting factual guilt. A "counseled plea of guilty is an admission of factual guilt so reliable that … it quite validly removes the issue of factual guilt from the case." *Menna*, 423 U.S. at 62 n.2. The upshot is that a guilty plea "simply renders irrelevant those constitutional violations … which do not stand in the way of conviction if factual guilt is validly established." *Id*. Stated differently, "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, 805 (2018) (quoting *United States v. Broce*, 488 U.S. 563, 573–74 (1989)).

One issue that a guilty plea extinguishes relates to jurisdiction. Specifically, a defendant who pleads guilty cannot later dispute facts needed to create subject-matter jurisdiction over his case. This Court said as much in 1998. In *Shie v. Leonard*, a defendant

who pleaded guilty to rape appealed, claiming "that any rape he committed occurred when he was less than eighteen years old and that his trial court thus lacked jurisdiction to convict and sentence him for that crime." 84 Ohio St. 3d 160, 160 (1998). The Court made short work of the argument. It concluded that "the trial court had jurisdiction" because the "plea of guilty constituted a complete admission of the charges for which [the defendant] was convicted and sentenced." *Id*. at 160–61.

It is true that, a few years before *Shie*, the Court upheld a decision vacating an adult sentence because the defendant was under eighteen when he pleaded no contest to theft. *See State v. Wilson*, 73 Ohio St. 3d 40 (1995). But that case does not contradict *Shie*, because the Court never considered whether a plea establishes facts relevant to jurisdiction. Instead, it treated as undisputed the fact that the defendant was under eighteen at the time of the crime—a fact that deprived the common pleas court of jurisdiction. *Id*. at 44. Thus, it implicitly (and apparently unknowingly) assumed that it could consider this fact, notwithstanding the no-contest plea. But unexamined assumptions are not binding. *See State v. Payne*, 114 Ohio St. 3d 502, 2007-Ohio-4642 ¶¶11–12; *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, syl. ¶1 (1952). Since *Shie* specifically addressed whether guilty pleas concede facts needed to establish jurisdiction, it provides the governing law on that issue. (Even if *Wilson* had reached the issue, it is distinguishable from this case: no later proceeding in *Wilson* addressed his age; here, later proceedings specifically addressed probable cause. If *Wilson* is read as deciding the issue pre-

sented here, it would be wrongly decided and would deserve to be either overruled or cabined to the context of no-contest pleas.)

Shie's holding—that guilty pleas concede the facts necessary to establish jurisdiction—accords with the settled rule that "parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission." *Pittsburgh, C. & St. L.R. Co. v. Ramsey*, 22 Wall. 322, 327 (1874); *accord Beatrice Foods Co. v. Porterfield,* 30 Ohio St. 2d 50, syl. ¶2 (1972); *see, e.g.*, *United States v. Valverde*, No. 817-CV-2475T23-AEP, 2020 WL 7054553, at *3 (M.D. Fla. Dec. 2, 2020) (applying the rule to a guilty plea).

To be sure, a guilty plea does not wipe out every possible constitutional challenge to a conviction and sentence. For example, a guilty plea does not foreclose the argument that the "statute of conviction" is itself unconstitutional. *Class*, 138 S. Ct. at 801. But the exceptions are few and far between. A guilty plea extinguishes all claims about "government conduct that takes place before the plea," and all claims "that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty." *Id*. at 805 (internal quotation marks omitted). A guilty plea wipes out the vast majority of claims, including all claims that challenge the facts surrounding the crime.

2. The just-discussed principles require affirmance. Zarlengo concedes that he admitted factual guilt. Zarlengo Br.5. Zarlengo's guilty plea thus conclusively establishes that he committed the crimes for which the grand jury indicted him. *See, e.g.*,

Stumpf, 32 Ohio St. 3d at 104; Ohio R. Crim Pro. 11(B)(1). By pleading guilty, Zarlengo admitted "all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *Broce*, 488 U.S. at 569. Zarlengo was free to appeal the guilty plea, arguing that it was somehow improper. But he did not do so. He cannot, at this point, challenge the preliminary determination whether there was probable cause in the first place.

II. Zarlengo makes no persuasive argument for reversal.

Zarlengo's appeal does not challenge the trial court's decision to accept his guilty plea. Instead, he impugns the process that led to his guilty plea. *See* Zarlengo Br.5. But to accept his arguments, the Court would have to tear down decades of precedent concerning grand juries, guilty pleas, and their effects on earlier probable-cause determinations. Because Zarlengo offers no sound justification for making so sweeping a change, the Court should reject his arguments and affirm.

A. This case does not turn on the waiver-by-guilty-plea rule.

Zarlengo starts off by asking and answering the wrong question. He goes on for pages about an "exception" to a "waiver-by-guilty-plea" rule. Zarlengo Br.7. Specifically, he argues that, even after pleading guilty, defendants may appeal on the ground that the trial court lacked subject-matter jurisdiction. *Carper v. State*, 27 Ohio St. 572, 575 (1875). Zarlengo says that is all he is doing; he contends that, because the juvenile court

failed to properly find probable cause, the common pleas court never obtained jurisdiction over his case.

That framing suffers from two problems. One, it ignores the consequences of the grand jury's indictment. Two, it misunderstands the consequences of guilty pleas.

1. As detailed above, grand juries must determine if there is probable cause to believe the defendant committed the crimes with which he is charged. That is the same question that juvenile courts ask during bindover hearings. *See respectively State ex rel. Lipschutz v. Shoemaker*, 49 Ohio St. 3d 88, 90 (1990); R.C. 2152.12(A)(1)(b)(ii). But the grand jury's indictment *dispositively establishes* the existence of probable cause, thus superseding any earlier probable-cause determinations. As a result, the grand jury's indictment in this case blocks Zarlengo from challenging the juvenile court's probable-cause determination.

As this discussion shows, the grand jury's indictment resolves this case *without regard* to Zarlengo's guilty plea. Even if Zarlengo had gone to trial instead of pleading guilty, he would not be able to challenge the juvenile court's now-superseded probable-cause determination. Put differently, the guilty plea and the grand jury's indictment constitute independent bases for affirmance. The waiver-by-guilty-plea rule applies only to guilty pleas. It has no bearing whatsoever on the grand jury's indictment or the consequences of that indictment. Yet Zarlengo never challenges the grand jury's finding. (His *amici* are conspicuously silent about it as well). Indeed, he mentions the grand

jury's indictment only in his statement of facts. Because the grand jury's indictment provides an independent basis for affirmance, and because the waiver-by-guilty-plea rule has no relevance to this independent basis for affirmance, Zarlengo would lose even if he were right about that rule's relevance to his case.

2. Regardless, Zarlengo's argument regarding exceptions to the waiver-by-guilty-plea rule fails on its own terms. Citing *Carper*, Zarlengo frames the question as whether his guilty plea "waives" an argument about jurisdiction. *See* Zarlengo Br.8, 12–13. His framing is wrong because he misreads that decision. *Carper* indeed allowed a defendant who had pleaded guilty to challenge the trial court's jurisdiction. But that was only because the defendant in that case argued that the facts, as alleged in the indictment and admitted as part of the guilty plea, did not constitute a criminal offense *at all*. *See Carper*, 27 Ohio St. at 575–78. *Carper* held simply that defendants who plead guilty may appeal the purely legal question whether the conceded facts constitute an offense over which the trial court had jurisdiction. It *did not* hold that they may challenge the conceded facts themselves. Thus, *Carper* did not disrupt the rule that a guilty plea concedes the facts of an indictment—including the factual bases for the trial court's subject-matter jurisdiction. *See Beatrice Foods*, 30 Ohio St. 2d 50, syl. ¶2; *Shie*, 84 Ohio St. 3d at 160.

The cases Zarlengo cites are consistent with all this. One explains that a "guilty plea … renders irrelevant those constitutional violations not logically inconsistent with

the valid establishment of factual guilt." *Menna*, 423 U.S. at 62 n.2. In other words, a guilty plea concedes away claims that are "inconsistent with the facts that the defendant necessarily admitted." *Class*, 138 S. Ct. at 812 (Alito, J., dissenting). *Menna* is a centerpiece of Zarlengo's argument. *See* Zarlengo Br.7, 9, 11, 12. Yet Zarlengo never mentions this key explanation for the holding. And that explanation is critical, as it refutes Zarlengo's entire theory of the case. Any attempt to refute the probable-cause finding would be "inconsistent with" the facts Zarlengo admitted in his guilty plea—an admission of guilt necessarily establishes reasonable suspicion of guilt, as the former subsumes the latter. *Menna*, 423 U.S. at 62 n.2.

Compounding his oversight in applying *Menna*, Zarlengo spends pages explaining how *State v. Smith*, 2022-Ohio-274, and various lower-court decisions treat "defects" in a bindover as distinct from "factual guilt." Zarlengo Br.11; *id.* at 12–13. That principle is irrelevant to this case. It has nothing to do with the consequences of a grand jury's true-bill finding, or with the principle that a guilty plea concedes every fact needed to establish jurisdiction. All *State v. Smith* held is that a juvenile court cannot transfer counts of a complaint as to which it found no probable cause. *Id*. at ¶¶26, 39. In *Smith*'s words, "when a juvenile court determines that there is no probable cause for an act charged, the adult court has no jurisdiction over that charge." *Id.* at ¶2. Nothing about that holding bears on a defendant's conceding facts that establish jurisdiction.

Zarlengo's case is not similar. No court found probable cause lacking, as in *Smith.* Instead, the later developments of the grand jury's true bill and Zarlengo's admission of guilt *confirmed* the juvenile court's probable-cause finding.

Zarlengo moves to another beside-the-point issue when he tries to distinguish waivers of a probable-cause hearing (which he says are permitted) from waivers of a probable-cause finding (which he says are not). Zarlengo Br.15–16. The argument gets him nowhere. For one thing, Zarlengo has not "waived" anything, properly understood. Instead, the grand jury's indictment and the guilty plea have simply superseded the earlier probable-cause finding. More fundamentally, Zarlengo concedes that parties may stipulate that the evidence will show probable cause. Zarlengo Br.15; *see Smith v. May*, 159 Ohio St. 3d 106, 2020-Ohio-61 ¶9. That is precisely what his guilty plea does.

The balance of Zarlengo's argument about reviewing the probable-cause finding is an attack on the Seventh District's rationale. Zarlengo Br.15–16. But whatever one makes of the Seventh District's *opinion*, its judgment affirming Zarlengo's sentence was correct. And the judgment is all that matters; this Court "review[s] judgments, not reasons." *State v. Weber*, 163 Ohio St. 3d 125, 2020-Ohio-6832 ¶49; *see also Harman v. Kelley*, 14 Ohio 502, 507 (1846); *McClung v. Silliman*, 19 U.S. 598, 603 (1821). This Court cannot "reverse a correct judgment on the basis that some or all of the lower court's reasons are erroneous." *State ex rel. McGrath v. Ohio Adult Parole Auth.*, 100 Ohio St. 3d 72, 2003-Ohio-5062 ¶8; *State ex rel. Sands v. Culotta*, 157 Ohio St. 3d 387, 2019-Ohio-4129 ¶14; *Ag-*

ricultural Ins. Co. v. Constantine, 144 Ohio St. 275, 284 (1944). So the Seventh District's rationale is irrelevant if its judgment is correct. And its judgment is plainly correct in light of the grand jury's true bill and Zarlengo's open-court confession to factual guilt.

B. The Seventh District's holding comports with *State v. Iacona*.

It is important to pause for a word about a case that Zarlengo failed to discuss. In *State v. Iacona*, this Court reviewed a *Brady* question that arose in a juvenile-court probable-cause hearing. 93 Ohio St. 3d 83 (2001). And it did so notwithstanding the fact that the juvenile was indicted and convicted after being bound over. The grand jury's indictment, along with the conviction, should have superseded any argument about errors in the earlier probable-cause hearing. Yet the Court reviewed the alleged errors anyway.

While *Iacona* erred in reaching these issues, its error is non-binding. That is because the decision never considered the question whether the later proceedings superseded the earlier ones. Understandably so, as no party in *Iacona* even mentioned the grand jury's indictment in the argument portion of a brief, let alone pointed out how that indictment mooted out any later review of the probable-cause finding. *See* Briefs in No. 00-0495, *State v. Iacona* (Sept. 22, Oct. 23, Nov. 27, 2000) (available at, 2000 WL 34335417, 2000 WL 34335421, 2000 WL 34335424). Instead, the parties and the Court merely assumed that the probable-cause issue could be reviewed.

"[A]ssumptions … are not holdings." *United States v. Rodriguez-Rodriguez*, 453 F.3d 458, 460 (7th Cir. 2006); *see, e.g.*, *Payne*, 114 Ohio St. 3d 502, ¶¶11–12; *Gordon*, 158 Ohio St. 129, at syl. ¶1; *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Courts "risk error" when they rely on "assumptions that have gone unstated and unexamined." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 145 (2011). Because *Iacona* "passed sub silentio" on the question presented here, the Court should "not consider itself as bound by that case." *United States v. More*, 3 Cranch 159, 172 (1805) (statement at argument of Marshall, C.J.) (emphasis omitted).

C. Many of Zarlengo's arguments fault the trial court for failing to make determinations it had no power to make.

One final, somewhat-tangential point deserves emphasis. At bottom, Zarlengo wants the court to accept a different view of the evidence presented at the probable-cause hearing. *See* Zarlengo Br.3–4. That entire project clashes with the purpose of those hearings. In this Court's words, a "bindover hearing in the juvenile court" is not the place to resolve "conflicting theories of the evidence." *In re A.J.S.*, 120 Ohio St. 3d 185, 2008-Ohio-5307 ¶64. Yet Zarlengo's arguments focus on conflicting theories and the manner in which the juvenile court resolved them. For example, he argues that witnesses made statements at the bindover hearing that "varied" from statements they made elsewhere. Zarlengo Br.3. Thus, in addition to disputing matters that subsequent events overtook, Zarlengo is challenging the juvenile court's probable-cause determination based on that court's failure to consider matters it had no power to consider.

***Amicus Curiae* Ohio Attorney General's Proposition of Law II:**

A defendant may not immediately appeal a juvenile court's probable-cause finding.

In his third proposition of law, Zarlengo claims that a defendant bound over by a juvenile court should be able to appeal that decision immediately, before the adult-court proceedings begin. Zarlengo Br.18–21. The contention suffers from both procedural and substantive flaws.

Procedural problems. Zarlengo's third proposition of law improperly seeks an advisory opinion. Zarlengo did not appeal directly from the juvenile court's probable-cause determination. Had he done so, the courts would have either addressed his appeals on the merits or determined that he had no right to appeal. *Cf. In re D.H.*, 152 Ohio St. 3d 310, 2018-Ohio-17 ¶4. But instead of pursuing his appellate rights, Zarlengo proceeded to adult court. Because Zarlengo did not file a timely appeal of the juvenile court's decision, any decision addressing the right to appeal will have no effect on Zarlengo himself; it will simply advise future litigants whether and how they may appeal probable-cause determinations. Because the answer to the third proposition of law will not affect the outcome of this litigation, an opinion addressing it would be advisory. *Kincaid v. Erie Ins. Co.*, 128 Ohio St. 3d 322, 2010-Ohio-6036 ¶20. This Court does not "indulge in advisory opinions." *White*, 96 Ohio St. 3d 395 ¶18.

Substantive flaws. In any event, Zarlengo's arguments fail substantively, too. Whether parties can immediately appeal juvenile-court rulings finding probable cause

turns on the meaning of a statute that Zarlengo never mentions: R.C. 2505.02. That law defines appealable orders. And the statute creates two glaring problems for Zarlengo.

First, under 2505.02(A) and the logic of the Court's holding in *A.J.S.*, a probable-cause finding is not final. In *A.J.S.*, the Court called a no-probable-cause finding "the functional equivalent of the dismissal of an indictment." 120 Ohio St. 3d 185 ¶33. If that is right, then a probable-cause finding is the functional equivalent of an order *denying* a motion to dismiss a criminal complaint. Orders denying motions to dismiss criminal complaints are not appealable final orders. *See, e.g.*, *State ex rel. Bandarapalli v. Gallagher*, 128 Ohio St. 3d 314, 2011-Ohio-230 ¶1; *State ex rel. Johnson v. Talikka*, 71 Ohio St. 3d 109, 111 (1994). Neither, then, are probable-cause determinations in bindover orders.

The second problem relates to R.C. 2505.02(B)(4), which addresses appeals from orders granting or denying "a provisional remedy." Assuming bindover rulings are not final, this is the only provision that even arguably allows for an appeal. This statute, however, allows appeals only of orders that "determine[] the action with respect to the provisional remedy." R.C. 2505.02(B)(4)(a). Bindover does not qualify, because the adult court may return the case to juvenile court. *See, e.g.*, *State v. D.B.*, 150 Ohio St. 3d 452, 2017-Ohio-6952 ¶13 (describing process). Thus, bindover does not conclusively "determine" the question whether the case will proceed in adult court.

Add to these arguments the common-sense point that any error related to probable cause is superseded by the grand-jury finding and then by either a guilty plea or a

jury verdict. If those proceedings end in a conviction or guilty plea, the defendant cannot be heard to complain about an earlier probable-cause finding. If the defendant is acquitted, any error is harmless. This should lay to rest Zarlengo's concern that "errors in the transfer [decision] can't be rectified." Zarlengo Br.18. Any errors are rectified when they are superseded by the grand-jury process and then a guilty plea or trial. Appeals courts do not sit to correct errors that have no consequence. *See* Ohio R. Crim. Pro. 52(A); Ohio R. Civ. Pro. 61.

The superseding effects of indictments and guilty verdicts distinguish the probable-cause context from the amenability context. At an amenability hearing, juvenile courts must ask whether the defendant is "amenable to care or rehabilitation within the juvenile system." *In re M.P.*, 124 Ohio St. 3d 445, 2010-Ohio-599 ¶12 (quotation omitted). In *D.H.*, this Court held that bound-over defendants may, following final judgments in adult courts, appeal amenability findings. But the holding in that case does not help Zarlengo, for two reasons. *First*, the amenability question—unlike the probable-cause question—is not superseded by any other stage of the proceeding. *See, e.g.*, *D.H.*, 152 Ohio St. 3d 310 ¶¶3, 19. *D.H.* had no reason to address, and so never did address, whether defendants may appeal juvenile-court decisions superseded by later events. *Second*, and more relevant for present purposes, *D.H.* does not allow defendants to appeal amenability decisions on an *interlocutory* basis. Instead, it held that, because flawed amenability determinations can be appealed after a final judgment, those deter-

minations are non-final and not subject to immediate appeal. *See id.* at ¶1. Thus, *D.H.* cannot be read to allow defendants immediately to appeal probable-cause determinations made in the course of bindover hearings.

Nor is there any tension in denying interlocutory appeals to juvenile defendants despite the *State's* power to appeal no-probable-cause rulings. *See A.J.S.,* 120 Ohio St. 3d 185. That asymmetry arises because of the Double Jeopardy Clause. As *A.J.S.* explained, the State cannot later challenge a no-probable-cause finding—if not immediately appealed, the Double Jeopardy Clause will prohibit further proceedings. *Id*. at ¶28. For that reason, a no-probable-cause finding is final and may be immediately appealed. The same logic does not apply to decisions *finding* probable cause, which do not end the proceedings or otherwise bar either party from ultimately prevailing. Indeed, if the defendant is correct that the evidence is insufficient to support even probable cause, he will be neither indicted nor convicted.

Finally, Zarlengo's arguments for an immediate appeal run counter to the rule that a defendant may not appeal a probable-cause finding made at a preliminary hearing or by a grand jury. The bar on appeals from preliminary hearings is found in a rule this Court wrote. Criminal Rule 5(B)(5) says that no "appeal shall lie from" a probable-cause finding at a preliminary hearing. The bar on appealing a grand jury's probable-cause finding arises from precedent. *See, e.g.*, *State v. Wilks*, 154 Ohio St. 3d 359, 2018-Ohio-1562 ¶37; *Costello v. United States*, 350 U.S. 359, 362–63 (1956). According to the

U.S. Supreme Court, "a challenge to the reliability or competence of the evidence presented to the grand jury will not be heard." *United States v. Williams*, 504 U.S. 36, 54 (1992) (internal quotation marks omitted). If courts cannot review a grand jury's probable-cause finding, it "make[s] little sense" to permit review of earlier probable-cause findings superseded by the grand jury's indictment. *Id*.

* * *

At the end, it is worth a step back to consider the remedy. If this Court reverses, what should the juvenile court do? It cannot time travel to a point when the plea and the grand jury's findings do not exist. It cannot erase those findings. And what would a return to juvenile court gain Zarlengo? Adult court comes with more process, not less. For example, the *Apprendi* right to jury factfinding does not apply in juvenile court. *State v. D.H.*, 120 Ohio St. 3d 540, 2009-Ohio-9 ¶42. Neither does the jury right more generally, or the right to an indictment. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971); *In re Agler*, 19 Ohio St. 2d 70, 77–78 (1969). Given the greater procedural protection in adult court, Zarlengo's concern seems to be with the punishment he might face at the end of the adult-court process. If that is so, he should challenge the punishment he faces, not the process that confirmed, over and over, that the evidence created probable cause to believe that Zarlengo committed several serious crimes.

CONCLUSION

For these reasons, the Court should affirm the Seventh District's judgment.

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 22nd day of August, 2022, by e-mail on the following:

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