

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2022-0106
Plaintiff-Appellee,	:	
	:	On Appeal from the Seventh
vs.	:	District Court of Appeals
	:	Case No. 20 MA 0036
MANNY ZARLENGO,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF *AMICUS CURIAE* CHILDREN’S LAW CENTER AND THE CUYAHOGA, FRANKLIN, HAMILTON, AND MONTGOMERY COUNTY PUBLIC DEFENDERS IN SUPPORT OF APPELLANT MANNY ZARLENGO

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INTEREST OF AMICI CURIAE

The **Children’s Law Center, Inc.** (CLC) is a non-profit legal service center committed to protecting and enhancing the rights of children and youth in Ohio and Kentucky and improving the systems that serve them, ensuring youth successfully transition into adulthood. CLC provides individual legal advocacy to young people and public policy work, including training and education, impact litigation, and juvenile defender support services. For the past decade, CLC has worked on issues facing Ohio youth prosecuted in adult court, placed in adult facilities, and working towards systemic change to reduce the number of children in the adult system through various means including data collection, interviewing youth in adult court and their families as well as stakeholders, and issuing reports and publications on this topic. The issues involved in and implications of this case are of particular concern to CLC, given CLC’s efforts to protect the rights of youth and improve the systems that serve them.

The **Cuyahoga, Franklin, Hamilton, and Montgomery County Public Defender’s Offices** provide legal services to indigent adults and children charged with violations of the criminal code. These offices represent a large number of children accused of criminal offenses in the State of Ohio, both at bindover proceedings in juvenile court and in adult court once the children have been transferred. Accordingly, a large number of the Public Defenders’ present and future clients will be directly impacted by the outcome of the present litigation.

STATEMENT OF THE CASE AND FACTS

Amici defer to the Statement of the Case and Facts contained in Appellant’s brief.

ARGUMENT

Introduction

In *State v. Smith*, 2022 Ohio 274, ¶ 44 (Slip Opinion), this Court held that under R.C. 2152.12, a finding of probable cause is a jurisdictional prerequisite before a child may be transferred for prosecution in the adult criminal system. That conclusion was founded on the understanding that the General Assembly placed jurisdiction of all criminal cases involving minors in the first instance under the auspices of the juvenile court. Under R.C. 2152.12(H), the child's treatment as an adult may only occur through a proper bindover proceeding, which includes a probable cause determination.

Accordingly, relinquishing juvenile court jurisdiction must be preceded by a finding that there was probable cause to believe the accused child committed the act charged. R.C. 2152.12(A) and (B)(2). As a jurisdictional predicate to a child's prosecution in the adult court, it should go without saying that the juvenile court transfer proceedings must adhere to state and federal Constitutional principles. But those Constitutions mean nothing if the child has no vehicle through which he may enforce those rights. That vehicle is a right to direct appeal.

With that said, and as demonstrated further herein, virtually all juvenile cases that are bound over for adult criminal prosecution are resolved through guilty pleas rather than trial. And, in adult prosecutions at least, guilty pleas are often deemed to waive issues that transpired in the trial court. But transferred children are different. The proceedings they undergo in juvenile court before transfer to adult jurisdiction dictate the validity of that transfer. When those proceedings are constitutionally deficient or compromised, everything that happens to the young person thereafter could be as well.

Children prosecuted as adults face profound, life-lasting consequences within the adult criminal system. These harms include lengthy, and even extreme, sentences in adult prisons where

they're exposed to brutal victimization and violence; numerous collateral consequences associated with a criminal conviction that hinder their ability to successfully reintegrate into society; deprivation of age- and developmentally appropriate education and programming; and the stigmatization of being a "convicted felon." Indeed, this Court has recognized these well-documented harms, "including increased recidivism, a higher likelihood of physical and sexual abuse throughout their stay in prison, a significantly increased risk of suicide, inability to access appropriate education, and being subjected to harmful isolation," and has recommended that a juvenile's transfer to adult court should only occur "rarely." Ohio Supreme Court Benchcards, *Youth in Adult Court*, available at <https://www.supremecourt.ohio.gov/JCS/CFC/resources/juvenileBenchCards/youthAdultCourt.pdf> (accessed July 1, 2022).

Whether a child remains in juvenile court to access appropriate treatment, or endures prosecution and punishment in the adult criminal system, will profoundly impact the child. Because of the transfer proceeding's significance, the state and federal Constitutions afford the child strong due process safeguards. Children have the right to counsel, full discovery at probable cause, and an adversarial probable cause hearing where the child must be allowed to present any evidence that tends to disprove probable cause. *See 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, 752 N.E.2d 937 (2001); *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404.

For the same reasons that children receive such protections prior to transfer, children must likewise have the opportunity to raise constitutional claims arising from the bindover hearings where this critically important decision is made. Without the ability to challenge constitutional deficiencies through an appeal, the young person has no way to safeguard the proceedings' fairness,

potentially permitting the unbridled violation of those rights. Such a result is untenable and unsupportable under *Kent* and its progeny.

The instant appeal illustrates the dilemma confronted by young people when they are subjected to transfer and prosecution as an adult. Manny Zarlengo was charged with 11 armed robberies that allegedly took place over five days in October, 2013. Complaints were filed against Manny in juvenile court on or about October 21, 2013, and November 26, 2013. Manny was detained while his case took nearly 16 months to process.¹ When Manny was transferred to the adult division, he was looking at a potential prison sentence of 136 years. The mandatory specification time, alone, could have amounted to 33 years. After nearly 500 days in detention, facing decades of time in adult prison, it is no wonder that he agreed to a sentence of 18 years. But, in doing so, Manny should not have to forgo an appeal challenging the constitutionality of the bindover proceeding that exposed him to prosecution and an extreme prison sentence in the adult criminal system.

A fair justice system does not do this to children, even those pushed into an adult criminal system. It is patently unfair and unjust to force a child who contests the basis of transfer to wait for months in detention, make them proceed to trial on the adult criminal case, lose, and receive a lengthy sentence in adult prison, just to have an opportunity for meaningful appellate review. The decision in Manny's case underscores the impact of the lower court's ruling, which limits needed appellate review. Such a decision wastes resources and guarantees that Ohio's youth, as a class, are relegated to a second-tier justice system that effectively renders lower courts' transfer decisions and deficiencies immune from meaningful appellate review.

¹ Seven months to the probable cause hearing (June 10, 2014); followed by transfer to, and indictment in, adult court (July 24, 2014); thirteen months to his guilty plea in adult court (December 8, 2014); and finally sentencing on February 20, 2015.

APPELLANT’S PROPOSITIONS OF LAW

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.

AMICUS CURIAE’S PROPOSITION OF LAW

Children transferred to and prosecuted in the Adult Criminal Division must be permitted to appeal where they identify constitutional deficiencies in their juvenile bindover proceedings whether they resolve their case by entering a guilty plea or by going to trial.

As the United States Supreme Court held more than fifty years ago in *Kent*, 383 U.S. at 553-554, 86 S.Ct. 1045, 16 L.Ed.2d 84, the liberty interests at stake in the transfer of a youth from juvenile to adult criminal court are “critically important,” and they call for heightened procedural protections. In *Kent*, the Supreme Court recognizes that the transfer of a youth from juvenile court to adult criminal court imposes a significant deprivation of liberty and, therefore, warrants substantial due process protection. *Id.* at 554.

This Court has adopted *Kent* to Ohio’s mandatory bindover proceedings. *See In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404, ¶ 11 (“the Supreme Court of the United States has held that the bindover hearing is a ‘critically important proceeding’ and that the hearing ‘must measure up to the essentials of due process and fair treatment.’”); *Iacona*, 93 Ohio St.3d at 92, 752 N.E.2d 937 (2001) (relying on *Kent* in finding that *Brady* material and other basic discovery is required even in mandatory bindover proceedings). In *Iacona*, this Court observed that when a child is adjudicated delinquent, any institutionalization, confinement, or other accountability

measure may not “exceed the child’s attainment of twenty-one years of age,” including for the most serious crime of aggravated murder, while “the same minor bound over to the court of common pleas to face trial as an adult on a charge of murder faces a potential life term of incarceration.” *Id.*, citing R.C. 2151.355(A)(4) and (6); R.C. 2929.02(B).

It is through this lens that your amici provide the arguments set forth herein, lending practical context underpinning the need for true constitutional protections for bindover youth. Accordingly, we urge this Court to adopt Appellant’s propositions of law.

I. Plea Agreements are Deeply Ingrained Within America’s Criminal Justice System.

It has long been the case that most criminal prosecutions resolve by way of guilty plea agreements. Indeed, around 95 percent of state and 97 percent of federal criminal cases resolve by pleas. Justice Michael P. Donnelly, *Sentencing by Ambush: An Insider’s Perspective on Plea Bargaining Reform*, 54 Akron L.Rev. 225 (2021). In the early twentieth century, the rise in criminal prosecutions caused the criminal justice system to bend under its weight. Thus, plea bargaining became the overwhelming norm for resolving criminal cases. Rick Jones, Gerald B. Lefcourt et. al., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, Natl. Assn. of Crim. Def. Law., 19 (2018) available at: www.nacdl.org/trialpenaltyreport (accessed July 6, 2022). While plea bargaining was initially regarded with deep suspicion, over the years the practice became seen as “permissible” and even “inevitable,” eventually serving as the critical mechanism in maintaining an efficient justice system. *Id.* at 19, 22.

Alarming, research finds that those who exercise the right to a trial are more likely to receive a harsher sentence. *Id.* at 17; *see also* Lindsey Devers, Ph.D., *Research Summary: Plea and Charge Bargaining*, U.S. Dept. of Just., Bur. of Just. Assistance, 2 (Jan. 24, 2011) available at

<https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> (accessed July 1, 2022). Studies looking at what’s known as the trial tax find ““the average post-trial sentence was more than triple the average post-plea sentence.’ * * * This phenomenon means that even innocent people will plead guilty because they decide that going to trial is too much of a risk.” Nilam A. Sanghvi, Elizabeth A. DeLosa, *The "Innocence Penalty": Is It More Pronounced for Juveniles?*, 125 Dick.L.Rev. 727, 729 (2021) (arguing children, especially those facing transfer, may encounter the “innocence penalty” at even more critical case processing points than adult counterparts). Disparities within the plea bargain system are also troubling. Research finds disparate treatment of persons being prosecuted, and that the discrepancies are primarily due to prosecutorial discretion. Devers, *Research Summary* at 2 (findings include prosecutorial bias in reducing charging and using threats to coerce a guilty plea when evidence is insubstantial). Furthermore, studies consistently find that those who are black are less likely to receive reduced plea charges than those who are white. *Id.* at 3.

II. Pressures to Plead Guilty Often Trump Factual Innocence and for Young People These Pressures are Exacerbated.

A significant body of research over decades makes clear that the hallmark characteristics of adolescence impact the decision-making of young people in the legal context. Adolescents’ cognitive and social immaturities, tendency to obey authority, and relative lack of legal expertise may explain why plea rates are higher among youth than adults. Allison D. Redlich et. al., *Understanding Guilty Pleas Through the Lens of Social Science*, 23 Psychol. Pub. Pol’y & L. 458, 460 (2017). Youth are more likely to plead guilty – even when innocent – and are less likely than adults to grasp long-term consequences of their decisions. Tina M. Zottoli, Tarika Daftary-Kapur, *Guilty Pleas of Youths & Adults: Differences in Legal Knowledge & Decision Making*, 43 L. &

Hum. Behav. 166, 167 (2019) (finding youth were overly influenced by plea offers that allowed them to go home right away). This phenomenon is wholly consistent with adolescent development and findings in other legal contexts. Redlich at 460.

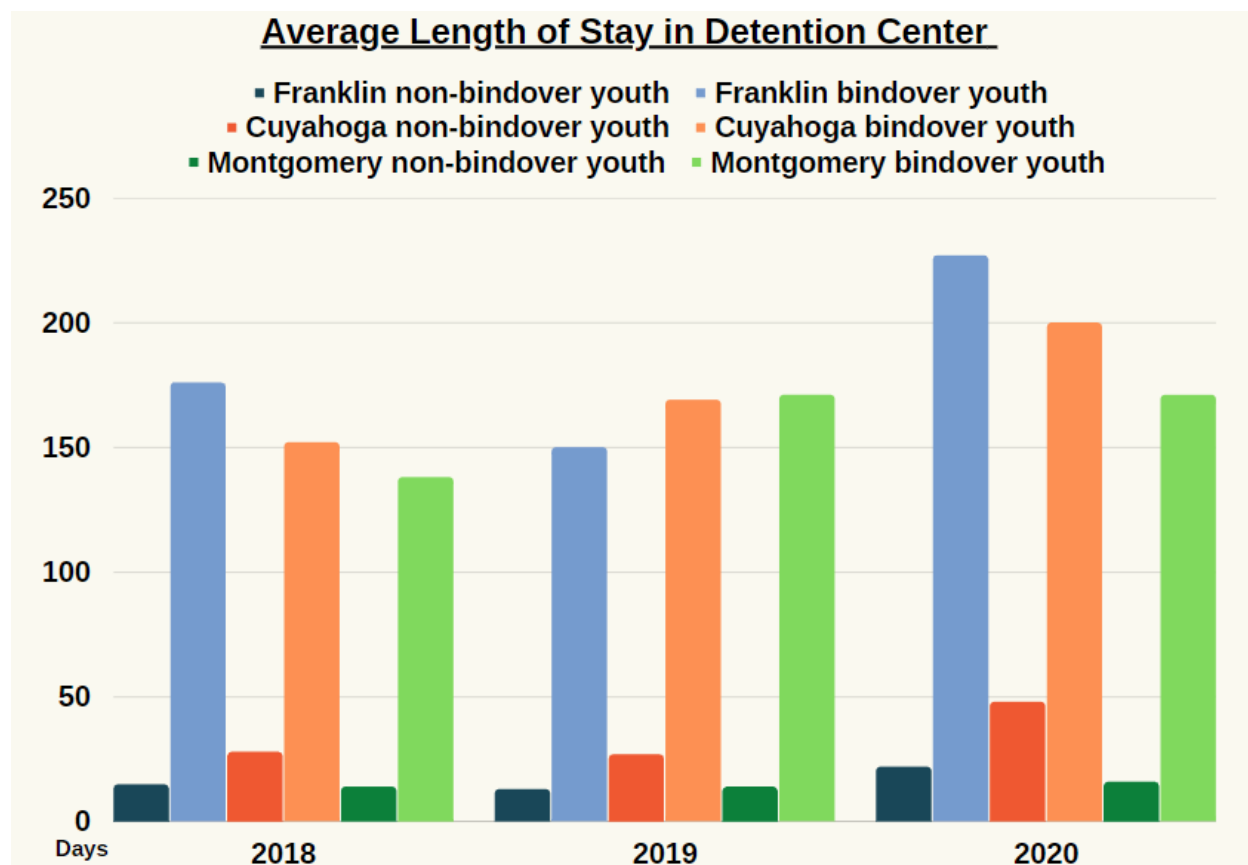
Youth in detention face the emotional and psychological consequences of being removed from their family and community, which further contributes to the increased likelihood of pleading guilty. Research finds this is true even in cases where the charges would have otherwise been dismissed or resulted in an acquittal. Haney-Caron, Fountain, *Young, Black, & Wrongfully Charged: A Cumulative Disadvantage Framework*, 125 Dick.L.Rev. 653, 694 (2021). Young people explicitly admitted to accepting a guilty plea to get out of lockup quickly or to avoid being detained while pending trial. *Id.* This should surprise no one, given the oppressive and inhumane nature of the conditions to which youth are exposed while detained. Youth who face bindover and prosecution in adult court are particularly vulnerable under these circumstances and research confirms they are also more susceptible to pleading guilty as a result.

a) Harmful Pretrial Detention Disproportionately Impacts Bindover Youth.

It is widely accepted that detaining a child for *any* amount of time can cause negative impacts that last far beyond the child's release. *See* Ohio Supreme Court Benchcards *Detained Youth*, <https://www.supremecourt.ohio.gov/JCS/CFC/resources/juvenileBenchCards/detainedYouth.pdf> (accessed July 5, 2022). Unlike adults, children facing criminal charges in juvenile court have no option of bail for conditional release. In Ohio, juvenile courts can order a youth's pretrial detention for no more than 90 days. R.C. 2151.31(C)(2) and R.C. 2152.04. There are, however, no such limits on youth detained pending bindover. Additionally, children have no right to a speedy trial in Ohio's juvenile court. According to this Court, "[i]f confined, the child must be held in detention until after

amenability hearing (discretionary bindover) or probable cause hearing (mandatory bindover). After these hearings, a youth must be held in juvenile detention until a guilty plea or conviction in adult court, unless the juvenile court transfers the youth to an adult jail * * *.” *Detained Youth, supra*.

Youth facing bindover proceedings are detained for extraordinarily lengthy periods of time compared to peers not facing bindover and to adults. Detention center data from Cuyahoga, Franklin, and Montgomery counties demonstrates that bindover youth spend a significant amount of time in pretrial detention. As the chart that follows illustrates, youth whose cases remain in juvenile court are detained for far less time than youth whose cases are being processed for transfer.²



² Data provided by Franklin County (on June 21, 2022), Cuyahoga County (on July 7, 2022), and Montgomery County (on July 7, 2022) juvenile courts in response to a Children’s Law Center public records request issued June 21, 2022.

Once transferred to the adult division, the right to speedy trial applies but, by that point, youth have already been incarcerated for a significant amount of time. Youth are typically appointed a different attorney in the adult court. Not only does the child's case start over after a lengthy detention, but the child must acclimate to, and develop trust in, a new attorney, who must come up to speed on discovery and any potential mitigation or defenses, delaying the process even further. These circumstances are unique to youth prosecuted in adult court.

While Ohio requires juvenile detention centers to maintain policies that align with state standards – for minimum conditions including use of isolation, physical force and discipline, basic rights and access to family and attorney communication – these facilities are typically operated in a regimented (prison-like) fashion. Several jurisdictions in Ohio have joined a network of system stakeholders through Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), recognizing the need to reduce reliance on – and improve conditions in – local detention centers, where youth pending trials are held. Indeed, JDAI's broader goals to reform juvenile detention stems from the fact that “[r]eports of pervasive violence and abuse have been regularly emerging from these facilities for as long as anyone can remember.” Richard A. Mendel, The Annie E. Casey Found., *No Place for Kids: The Case for Reducing Juvenile Incarceration*, 3 (2011) available at <https://assets.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf> (accessed July 5, 2022). Three decades produced “an avalanche of research” on youth incarceration which highlighted “intolerable levels of violence, abuse, and other forms of maltreatment” children experience within these secure juvenile facilities. *Id.* at 3-5.

Ohio's youth are not exempt from this maltreatment. Take Cuyahoga County for example. A team of national detention experts who visited in 1997 called the old detention center “one of the most adult-oriented, bleak, depressing, unsafe and psychologically harmful facilities” they had ever

seen. Rachel Dissell, *Hostile culture, education shortfalls, understaffing hinder 'safe and humane' detention of Cuyahoga County youth, report says*, (Oct. 15, 2018) available at: <https://www.cleveland.com/news/erry-2018/10/4e9c83626d7675/hostile-culture-education-shor.html> (accessed July 5, 2022). More than 20 years later, even with the county's new detention center, the atmosphere remains unchanged. Another team of national experts who visited in 2018 documented that the facility failed to provide safe or humane conditions and placed the constitutional rights of the youth at risk. *Id.* citing The Ctr. for Childs. L. and Pol'y, *Cuyahoga County Juvenile Justice Center: Conditions Assessment Narrative Report*, (Sept. 2018) available at <https://s3.documentcloud.org/documents/5218923/Cuyahoga-County-Jail-Facility-Review-Report.pdf> (accessed July 5, 2022). These problems continue to plague Cuyahoga's Juvenile Detention Center. Reports document that detained youth are denied regular access to education, bathrooms, sanitary living spaces, recreation, and programming and are forced to engage in fight-clubs and endure prolonged isolation and degrading treatment.³

³ Media coverage documents consistent patterns of maltreatment within the facility. Facility video shows girls wearing hazmat suits, reportedly "to clean up an area disgusting and dangerous with trash, food, bodily fluids and more." Ed Gallek, Peggy Galek, *Teens forced to clean up hazardous, 'nasty' areas of detention center: Complaints*, (June 29, 2022) <https://fox8.com/news/teens-forced-to-clean-up-hazardous-nasty-areas-of-detention-center-complaints/> accessed July 7, 2022). "Brutal beatings, insufficient access to bathrooms and missed schooling" along with severe understaffing is said to put residents and staff at risk. 19 News Investigative Team, *Advocates say juvenile justice center is one of the most dangerous places in Cleveland* (June 7, 2022), <https://www.cleveland19.com/2022/06/07/advocates-say-juvenile-justice-center-is-one-most-dangerous-places-cleveland/> (accessed July 8, 2022). A Detention Center Manager wrapped "handcuffs around his hand as makeshift brass knuckles" and punched a child repeatedly. Ed Gallek, *Video shows incident that placed Cuyahoga County Juvenile Detention Center manager on leave*, (Sept. 8, 2021), <https://fox8.com/news/i-team/video-shows-incident-that-placed-cuyahoga-county-juvenile-detention-center-manager-on-leave/> (accessed July 8, 2022). Reports that a Manager in the Detention Center was fired while being investigated for conveying "explicit photos" of an underage female into the facility comes just a week after reports another worker was fired following an accusation that they forced multiple youth to engage in staged fights. Ed Gallek, Peggy Galek, *Investigation ongoing after detention center manager fired: I-Team*, (April 2, 2022),

Youth held in Cuyahoga’s adult county jail, as permitted under R.C. 2152.26(F), fare even worse. An exhaustive 2018 U.S. Marshal’s Service Report pointed to “safety concerns as well as inhumane conditions of confinement, which violate safe, secure, humane conditions and/or violate detainee/inmate Constitutional Rights” in the Cuyahoga County Jail. Dept. of Just., U.S. Marshal, *Cuyahoga County Correctional Center: Facility Review, Oct. 30-Nov.1, 2018*, 2 (2018) available at <https://s3.documentcloud.org/documents/5218923/Cuyahoga-County-Jail-Facility-Review-Report.pdf> (accessed July 5, 2022). Children detained in the jail were not held in sight and sound separation from adults – as required by local policy and state and federal law – and were deprived of developmentally required nutrition, education, and programming. *Id.* at 4. Children housed in the jail were subjected to harsh “Red Zone” restrictive housing conditions, same as the adults, where they were locked down inside a cell for 27 hours or more at a time without access to exercise or basic hygiene (i.e., toothbrushes, toothpaste, or toilet paper). *Id.*

b) Pretrial Detention Increases the Likelihood of Pleading Guilty.

The ongoing threat to a child’s sense of safety and wellbeing certainly creates added pressure to quickly resolve their case, no matter the consequence. Study after study has shown that pretrial detention increases chances of convictions, in no small part due to a greater number of plea deals. Tracey Meares, Arthur Rizer, *The “Radical” Notion of the Presumption of Innocence*, 20 (May 2020) available at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf> (accessed July 6, 2022). “The evidence demonstrates that pretrial detention is one of the clearest examples of a violation of the presumption of innocence.” *Id.* at 19. The mental anguish

<https://fox8.com/news/i-team/investigation-ongoing-after-detention-center-manager-fired-i-team/> (accessed July 8, 2022).

cause by the child's separation from family may manifest in higher levels of anxiety and depression while awaiting trial behind bars. There is uncertainty about timeline and outcome, something a plea deal can short-cut. Accordingly, detention itself creates extraordinary pressures to accept a plea bargain, regardless of guilt. *Id.* at 20.

Findings from a multi-country study revealed that “most prison systems in practice frequently deny to the remand population access to many of the facilities, rights and privileges granted to convicted inmates... in some cases, such deprivations amount to an inducement to plead guilty in order to obtain better conditions of confinement.’ A Canadian study found that the detention of accused persons is an ‘important resource that the prosecution uses to encourage (or coerce) guilty pleas from accused persons.’” Open Soc. Just. Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, 60 (2014) available at <https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf> (accessed July 6, 2022). These findings are similar to the French and Hungarian justice systems as well. *Id.* “More ominously, in numerous jurisdictions police officers seek to exploit the poor conditions of detention common to lockups as an inducement for defendants to plead guilty. A guilty plea and conviction gets detainees transferred to a prison with generally better conditions.” *Id.* at 61.

These studies show that pretrial detention places an almost inexorable burden on detainees to plead guilty, even if they are innocent. Given that reality, the 95-97 percent plea resolution rate is hardly noteworthy. Yet, as high as that rate is, it is even higher for bindover youth. Also weighing on the child is the fact that the charges bound over frequently include multiple firearm specifications. Unlike juvenile court, where the punishment related to those specifications are far

less onerous,⁴ in adult cases the firearm specifications carry one-, three-, five-, six-, and seven-year mandatory prison terms that must be served prior and consecutive to any other prison term imposed. R.C. 2941.141; R.C. 2941.144–146; and R.C. 2941.1412. The court may impose, and the state often demands, that all specification sentences require mandatory and consecutive service. Accordingly, facing literally decades in adult prison, the youth is pressed to resolve the case to control the potential damage.

The pressure placed on these young people to resolve their case short of a trial following transfer to adult court is colossal. And while plea agreements should be “governed by well-established principles, guidelines, and standards that promote uniformity, proportionality, and meaningful appellate review,” Justice Donnelly reminds us: “They aren’t.” *See* Justice Michael P. Donnelly, *Sentencing by Ambush: An Insider’s Perspective on Plea Bargaining Reform*, 54 Akron L.Rev., 228-229 (2021).

c) Bindover Youth Lack Brain Development and Supports Needed to Make Reasoned Decisions Once in Adult Court.

The decision to plead guilty or go to trial is a monumental one, and decades of adolescent development research make clear that boundover youth are ill-equipped to make this decision. Children have fewer tools and skills at their disposal, compared to adults, to make sound, strategic decisions about navigating the legal system. Because the juvenile justice system recognizes the heightened vulnerabilities of children, it mandates protections for them that adult courts lack. Consider, R.C. 2151.281, which requires the court to appoint a guardian ad litem (GAL) to protect a

⁴ House Bill 86 (effective Sept. 30, 2011) changed how gun specifications apply to children in juvenile court. *See* Children’s Law Center, *HB86 Juvenile Provisions, Gun Specifications: Fact Sheet*, available at <https://static1.squarespace.com/static/571f750f4c2f858e510aa661/t/57d97c9de6f2e1860f3762c7/1473871006326/HB-86-Gun-Specs-Fact-Sheet-and-Case-Examples-9-6-11.pdf> (accessed July 7, 2022).

child in delinquency and other juvenile court proceedings when the child does not have a parent, guardian, or legal custodian or there is a conflict between the child and the child's parent, guardian, or custodian. R.C. 2151.281(A). The juvenile procedural rules also mandate that the court appoint a GAL. Juv.R. 4(B). The GAL serves one specific role: "to protect the interests of a child." R.C. 2152.281(A); Juv.R. 4(B). "The Generally Assembly has, in enacting R.C. 2151.281, specifically recognized that children do not assume the burden of representing their own best interest." *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 69 (O'Connor, C.J., dissenting).

Children who are bound over to adult court are without the protection of having a parent, guardian, custodian, or GAL to look out for what is in their best interest. Children as young as 14 are left on their own to navigate the adult criminal justice system and engage in complex plea discussions without a trusted adult. And yet, in the adult system, those children face demonstrably more punitive outcomes.

Research indicates children ensnared in the criminal justice system have far greater difficulties with basic vocabulary. On average, juvenile justice system youths understood just 14 percent of the words used in a plea colloquy, compared to youth in the at-large community who understood 36 percent. Amanda NeMoyer, Sharon Kelley et. al., *Atty. Perspectives on Juvenile & Adult Clients' Competence to Plead Guilty*, 24 Psychol. Pub. Pol'y & L. 171, 173 (2018). The lack of protections geared toward children in the criminal justice system is reflected in many practical ways. For example, young people are far more likely to give a false confession than their adult counterparts. In the last 25 years, of those exonerated for a crime allegedly committed when they were a child, 38 percent of the exonerations involved false confessions, compared to 11 percent for adults. The Innocence Project, *False Confessions More Prevalent Among Teens*, (Sept. 9, 2013) available at <https://innocenceproject.org/false-confessions-more-prevalent-among-teens/> (accessed

July 1, 2022). Adolescents also waive their *Miranda* rights at rates far exceeding adults. In some jurisdictions as many as 80-90 percent of youth waive their right to an attorney. Judith B. Jones, *Access to Counsel, Juvenile Justice Bulletin*, U.S. Dept. of Just., Off. of Juv. Just. & Delinq. Prevention, at 2 (June 2004) available at <https://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf> (accessed July 6, 2022). These discrepancies can be explained by the developmental differences between children and adults, which contributes to the heightened pressure kids feel to enter a plea, regardless of factual guilt or innocence.

One study examined how children differ from adults as they navigate guilt versus innocence, plea comprehension, and their rationale for pleading guilty. Allison Redlich, Reveka Shteynberg, *Youthful Status a Risk Factor for False Guilty Pleas, To Plead or Not to Plead: A comparison of Juvenile and Adult True and False Plea Decisions*, <https://concept.paloalto.edu/resources/translating-research-into-practice-blog/youthful-status-risk-factor-false-guilty-pleas> (accessed July 5, 2022). The study found: in scenarios that asked participants to assume innocence, youth were 2.47 times more likely than adults to plead guilty; youth were significantly less likely to consider consequences of the decision than adults; and youth were significantly less likely to understand and appreciate plea-related information. *Id.* Surveys conducted in more than half the country⁵ over the last 20 years identified common issues in the plea process across various states:

[S]uch as high rates of pleas, pleas occurring early in the process (leaving no time for investigation, trust-building, or education), unknowledgeable pleas, developmentally inappropriate, incomplete, and even inaccurate plea colloquies, and systemic setting problems around culture and judge- attorney interactions. Both youth and probation officers commonly reported intense pressure to plead, which they attributed to

⁵ State assessments conducted by the National Juvenile Defender Center provide comprehensive examinations into systemic and institutional barriers related to children receiving high-quality legal representation. The assessments can be found at: <https://njdc.info/our-work/juvenile-indigent-defense-assessments/> (accessed July 6, 2022).

insufficient time attorneys spent with youth, attorneys' failure to explore and/or understand the youths' wishes, and lack of investigation into the case. * * * Findings from the present research indicate that youthful status may also be a risk factor for false admissions in the form of false guilty pleas.

Id. The survey conducted in Ohio, in 2003, reported that most of the attorneys that were observed failed to help the child make anything close to an informed decision about whether to plead guilty or go to trial. Kim Brooks, Darlene Kamine et. al., *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio*, 36 (Mar. 2003) available at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/ohio-justice-cut-short-assessment-access-counsel-and-quality> (accessed July 7, 2022). Another study found that among children prosecuted in adult court, only a quarter of them could identify any consequences of accepting a plea (i.e., having a criminal record). Amanda NeMoyer, Sharon Kelley et. al., *Atty. Perspectives on Juvenile & Adult Clients' Competence to Plead Guilty*, 24 Psychol. Pub. Pol'y & L. 171, 173 (2018).

Another explanation is simply that children rely on verbatim processing more than adults, meaning they “make (hypothetical) plea decisions that tend not to be influenced by key factors, such as guilt-innocence and charge severity (particularly when the probability of conviction is low) * * * [and] are less likely to take the probability of conviction (evidence strength) and the short-and long-term consequences into account when evaluating plea offers.” Allison D. Redlich et. al., *Understanding Guilty Pleas Through the Lens of Social Science*, 23 Psychol. Pub. Pol'y & L. 458, 460 (2017). A study that delved into the psychology of guilty plea decision-making found that while a typical adult processes information in a more precise manner, children process information in a fuzzy and impressionistic way, thus, are susceptible to admitting guilt even when innocent. David M. Reutter, *Study: Innocent Children Likely to Plead Guilty*, (Sept. 15, 2021) available at <https://www.criminallegalnews.org/news/2021/sep/15/study-innocent-children-likely-plead-guilty/> (accessed July 5, 2022).

The study explained children's decision-making by looking at four factors. "First, children have trouble coding and retrieving accurate information. Most likely, this is due to misunderstanding deficits in communication," which leads children to answer simply "yes" or "no," rather than admitting they don't know or they need clarification. *Id.* Second, children's cognitive processing is more superficial than adults so they are less able to retrieve information and apply it appropriately to decisions. *Id.* When the possibility of a reduced sentence is involved, children are more enticed to enter a guilty plea. Third, children show "low levels of inhibition and high levels of reward sensitivity. In practice, children rely on short-term benefits." *Id.* Finally, children are particularly susceptible to pressure that, in the plea context, means they're likely to comply with recommendations to plead guilty, whether that advice be from a lawyer, parent, or even a peer. *Id.*

Indeed – from the court, the prosecutor, his attorney, his fellow detainees, and even his own family – the youth is surrounded by people who admonish him to plead guilty "for his own good." See Allison D. Redlich et. al., *Understanding Guilty Pleas Through the Lens of Social Science*, 23 Psychol. Pub. Pol'y & L. 458, 461 (2017) (several surveys found the recommendation of attorneys, friends, peers, and family had a reported influence on the decision to accept or reject a plea offer). The numbers really do bear out that reality. The County Public Defender Offices with which your amici work represent the vast majority of youth whose cases are transferred. Data from 2018 and 2019 reflect that in Cuyahoga County, of the 56 youth the office represented whose cases were transferred from the juvenile to the adult division, only *one* of those cases went to trial. Likewise, in Hamilton County, from the cases initiated in 2018 and 2019, there were 36 children boundover and, again, only *one* of them went to trial. Thirty-three entered guilty pleas. Two were ignored.

III. Both the United States Supreme Court and this Court have Made Clear that Children are Different from Adults in Constitutionally Relevant Ways.

The United States Supreme Court has expounded at length on the differences between adults and children, and ultimately concluded that children are categorically less deserving of our harshest punishments. A youth's age, the Court has observed, "is far 'more than a chronological fact;'" it creates commonsense conclusions about youthful perceptions and behavior that are "self-evident to anyone who was a child once himself." *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). That observation is thoroughly grounded on developmental research and neuroscience illustrating that there are psychological and physiological differences between youth and adults. *See, e.g., Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2011).

The High Court reinforced the primacy of this principle in a series of decisions addressing the culpability of youth and the legal processes they are due. *See Roper v. Simmons*, 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that imposition of the death penalty on minors violates the Eighth Amendment); *Graham*, at 74-75 (ruling that imposition of life without possibility of parole for non-homicide crimes violates the Eighth Amendment); *J.D.B.* at 271-272 (holding that age is a significant factor in determining whether a youth is "in custody" for *Miranda* purposes); *Miller v. Alabama*, 567 U.S. 460, 481, 132 S.Ct. 2455, 183 L.Ed.2d. 407 (2012) (holding that mandatory sentence of life without possibility of parole for minors violates the Eighth Amendment). *See also Montgomery v. Louisiana*, 577 U.S. 190, 211-213, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) (holding that Miller's prohibition on mandatory life without parole for young people should be applied retroactively because it established a new substantive constitutional rule); *Jones v. Mississippi*, ___ U.S. ___, 141 S.Ct. 1307, 1321, 209 L.Ed.2d 390 (2021) (upholding the central holdings of *Miller* and *Montgomery* but determining that no specific finding of permanent

incorrigibility is necessary before a life without parole sentence is imposed).

This Court, as well, has agreed that youth are less culpable for their misdeeds than adult offenders. That understanding has informed decisions by this Court to shield young people from the harsher punishments reserved for adult offenders. For example, in *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, this Court highlighted that, with “regard to the culpability of the offenders * * * Ohio has developed a system for juveniles that assumes that children are not as culpable for their acts as adults.” 131 Ohio St. 3d at 523, 2012-Ohio-1446, 967 N.E.2d 729. When it decided that a sentence of life without the possibility of parole was largely inappropriate for juveniles in *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, 8 N.E.3d 890, this Court stressed that “minors are less mature and responsible than adults * * * lacking in experience, perspective, and judgment, and * * * are more vulnerable and susceptible to the pressures of peers than are adults.” *Id.* at 488-89 (O’Connor, C.J. concurring). This Court noted those same concerns in *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, when it prohibited the imposition of a term-of-years prison sentence for a nonhomicide that would exceed the juvenile offender’s life expectancy.

Both high courts have acknowledged the “critically important” nature of the bindover proceeding because it can operate to strip from the child the special consideration he is supposed to receive – because he is a child – necessarily casting him in a more culpable light, and placing him in jeopardy of receiving a much longer sentence. *See Kent v. United States*, 383 U.S. 541, 556, 562, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); *In re D.M.*, 140 Ohio St.3d 309, 2014-Ohio-3628, 18 N.E.3d 404 at ¶ 11. These cases recognize that the fairness of the transfer proceeding must be zealously guarded, but the only way for the transferred child to vitiate that fairness is through a direct appeal.

A rule like the one embraced by the Seventh District, requiring the child to waive the right to challenge constitutional infirmities in the bindover process unless he tries his case in the adult

division, will deprive nearly all bindover youth an opportunity to raise such challenges. Such a rule hurts, not only the individual child, but the fairness and integrity of all transfer proceedings generally. Children are supposed to receive special consideration in our justice system. Such a waiver rule turns that sentiment on its head and consigns juveniles as a class to a reduced quality of justice.

CONCLUSION

In light of the foregoing, undersigned amici ask this Court to reverse the judgment below and fully adopt Appellant's Propositions of Law.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2022, a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE CHILDREN’S LAW CENTER AND CUYAHOGA, FRANKLIN, HAMILTON, AND MONTGOMERY COUNTY PUBLIC DEFENDERS IN SUPPORT OF APPELLANT was served by email to Timothy Hackett, counsel for Appellant, Manny Zarlengo and by U.S. mail proper postage prepaid to Edward Czopur, Counsel of Record, Assistant Prosecuting Attorney at the Mahoning County Courthouse, 21 West Boardman Street, Youngstown, Ohio 44503, who represents Appellee, the State of Ohio in this matter.

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