

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, : Case No. 2019-1813  
 :  
 vs. : On Appeal from the Eighth  
 : District Court of Appeals  
 : Case No. 107899  
 NICHOLAS SMITH, :  
 :  
 Defendant-Appellant. :

**BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY  
PUBLIC DEFENDER IN SUPPORT OF APPELLANT**

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**TABLE OF CONTENTS**

	<b>Page Number</b>
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS .....	4
ARGUMENT .....	5
Proposition of Law: <i>The State may not indict a juvenile on charges for which a juvenile court previously found no probable cause, regardless of whether the juvenile was properly bound over on other charges.</i> .....	5
CONCLUSION .....	19
CERTIFICATE OF SERVICE .....	19

## TABLE OF AUTHORITIES

### Cases

<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010).....	16
<i>In re A.J.S.</i> , 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629 .....	8
<i>In re C.P.</i> , 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729.....	15
<i>Johnson v. Sloan</i> , 154 Ohio St.3d 476, 2018-Ohio-2120, 116 N.E.3d 91.....	7
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407.....	16
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005) .....	16
<i>State ex rel. Schwarts v. Haines</i> , 172 Ohio St. 572,179 N.E.2d 46 (1962).....	7
<i>State v. Long</i> , 138 Ohio St. 3d 478, 2014-Ohio-849, 8 N.E.3d 890.....	16
<i>State v. Moore</i> , 149 Ohio St.3d 557, 2016-Ohio-8288.....	16
<i>State v. Wilson</i> , 73 Ohio St.3d 40, 652 N.E.2d 196 (1995) .....	7

### Statutes

R.C. 2151.23.....	7
R.C. 2152.12.....	7
R.C. 2152.17.....	9
R.C. 2929.14.....	9
R.C. 2945.141 .....	9

### Other Authorities

Briana Morris, <i>A Child is a Child, Except under Ohio Law: A Discretionary Review of Mandatory Bindovers</i> , 47 Cap. U.L. Rev. 639, 668 (2019).....	6
FRANKLIN E. ZIMRING, <i>AMERICAN YOUTH VIOLENCE</i> 29 (1998) .....	18
Kenneth J. King, <i>Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights</i> , 2006 WIS. L. REV. 431, 434-35 (2006).....	17
<i>States Raising Age for Adult Prosecution Back to 18</i> , ABA Journal (Feb. 2017) .....	6
Steinberg & Scott, <i>Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty</i> , 58 Am. Psychologist 1009, 1014 (2003) .....	18

## INTEREST OF AMICI CURIAE

The Office of the Cuyahoga County Public Defender (hereinafter "your amicus") was created in 1977 to provide legal services to indigent adults and children charged with violations of the criminal code in Cuyahoga County. In total, the office handles over 20,000 cases annually, including misdemeanor cases in Cleveland Municipal Court, felony cases in the General Division of the Cuyahoga County Court of Common Pleas, juvenile cases in the Juvenile Division, as well as appeals from all of the foregoing courts and surrounding municipal courts. The Office's Juvenile Division represents a substantial number of children both at bindover proceedings in juvenile court and in adult court once the children have been transferred. Accordingly, a large number of the Public Defender's present and future clients will be directly impacted by the outcome of the present litigation.

## INTRODUCTION

Juvenile courts exist because we understand that kids are different from adults. According to this Court, "juvenile courts are unique and are tied to the goal of rehabilitation." *State v. D.H.*, 120 Ohio St.3d 540, 549, 2009-Ohio-9, 901 N.E.2d 209. In fact, the mandate underpinning juvenile dispositions requires that the juvenile system, "provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." *Id.*, quoting R.C. 2152.01(A). On the other hand, "[t]he purposes of felony

sentencing . . . ‘are to protect the public from future crime by the offender and others and to punish the offender.’ R.C. 2929.11(A).” *Id.*

Both this Court and the US Supreme Court have fully embraced the idea that children are different from adults. The General Assembly has done likewise, establishing a presumption that, unless subject to mandatory transfer, children should remain under juvenile court jurisdiction— a place best suited to meet their unique needs. In practice, however, and certainly in Cuyahoga County, it has become far too easy to simply send kids to the adult system. The prosecutor already has exclusive discretion to choose which children it seeks to transfer. In recent years the prosecutor’s office has augmented that discretion by routinely overcharging offenses and liberally employing joinder and complicity theories to bootstrap otherwise unsupported allegations into indicted charges.<sup>1</sup> Further, as in this case, by seeking to indict offenses even though the juvenile court found no probable cause as to that particular charge, the prosecutor’s office is now circumventing the juvenile court’s authority in the discretionary bindover context.

These practices have caused “[t]he number of Cuyahoga County teenagers charged each year as adults [to] double[ ] since \* \* \* January 2017.”<sup>2</sup> In fact,

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<sup>1</sup> See, e.g., *State v. Eddie Burns*, 8<sup>th</sup> Dist. Cuyahoga No. 108468, 2020 Ohio 3966, where the prosecutor joined 58 counts involving different times, locations, and distinct sets of witnesses. When the case was transferred to adult court, many of those counts were deemed to have been joined improperly.

<sup>2</sup> Corey Shaffer, *Cuyahoga County Prosecutor Michael O’Malley charges more teens as adults than any other prosecutor in Ohio* (Oct.26, 2019), available at <https://tinyurl.com/qtrnfo6>.

Cuyahoga County consistently leads the state in the number of children boundover each year. Although Franklin County's population is roughly equivalent to Cuyahoga County, in 2018, Cuyahoga sent over four times more youth to adult court than Franklin County. Between 2016 and 2018, despite a decrease in overall delinquency case filings in Cuyahoga County – including those for violent offenses – bindovers were sought for nearly twice as many children and cases.

The 2018 numbers were the highest in the preceding decade.<sup>3</sup> And, while the number of bindovers sought in 2019 were lower, they still well exceeded those of any other county. The prosecutor's office has charged more juveniles as adults in the current County Prosecutor's last three years in office than his predecessors did in the previous five years. More troubling, well over 90 percent of those teenagers charged as adults in Cuyahoga County were black, according to court records as well as those from the Department of Youth Services (ODYS).<sup>4</sup>

What is happening is alarming. It reflects a dramatic overreach by the executive branch, which strips the juvenile court of its essential role as gatekeeper, and sidesteps the presumption, in the discretionary bindover context, that children

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<sup>3</sup> [https://www.acluohio.org/wp-content/uploads/2019/10/ACLUofOhioChildrensLawCenter-JuvenileJusticeCoalition%E2%80%93Factsheet2019-CuyahogaCountysTreatmentOfChildren\\_2019-1022.pdf](https://www.acluohio.org/wp-content/uploads/2019/10/ACLUofOhioChildrensLawCenter-JuvenileJusticeCoalition%E2%80%93Factsheet2019-CuyahogaCountysTreatmentOfChildren_2019-1022.pdf)

<sup>4</sup> <https://www.cleveland.com/court-justice/2020/01/cuyahoga-county-prosecutor-defends-prosecuting-juveniles-as-adults-amid-aclu-criticism.html>; and [https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac\\_FY2019\\_02.pdf](https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac_FY2019_02.pdf)

should remain in juvenile court. The practice has and will continue to ruin the lives of young black males and makes us all less safe in the process.<sup>5</sup> It also defies the letter and spirit of the law as established by this Court and the General Assembly.

This Court should put a stop to this practice by writing that, under R.C. 2152.12, a finding of probable cause is an essential requirement that must be found by the juvenile court before any charge can be bound over to, and indicted, in adult court.

### STATEMENT OF THE CASE AND FACTS

Amici defers to the Statement of the Case and Facts contained in Appellant's brief.

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<sup>5</sup> For example, according to the National Council of Juvenile and Family Court Judges, "recidivism rates are higher among juveniles transferred to criminal court than among those retained in the juvenile system, and that transferred juveniles are more likely to reoffend, to reoffend more quickly, and to reoffend at a higher rate." [https://www.ncjfcj.org/sites/default/files/NCJFCJ\\_Enhanced\\_Juvenile\\_Justice\\_Guidelines\\_Final.pdf](https://www.ncjfcj.org/sites/default/files/NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf) at p. 4, citing Mulvey, E.P., & Schubert, C.A., *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court* (U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention); see also *Ohio Supreme Court, Youth in Adult Court*, <https://www.supremecourt.ohio.gov/JCS/CFC/resources/juvenileBenchCards/8youthAdultCourt.pdf> (accessed June 7, 2019), citing *Children's Law Center, Falling Through the Cracks: A New Look at Ohio Youth in the Adult Criminal Justice System* (2012), available from <https://www.childrenslawky.org/juvenile-justice> (accessed August 30, 2020) (concluding that children whose cases are transferred to adult court are 34% more likely to recidivate than youth with similar offenses whose cases were retained in juvenile court).

## ARGUMENT

Proposition of Law: *The State may not indict a juvenile on charges for which a juvenile court previously found no probable cause, regardless of whether the juvenile was properly bound over on other charges.*

Discretionary bindover proceedings presume the youthful offender should remain in juvenile court.

Juvenile courts were established to keep youthful offenders from the destructive punishments of criminal courts, while fostering rehabilitation based on each child's needs.<sup>6</sup> There are few decisions more life altering than the one that causes the child to be treated as an adult. For the child, he or she is deprived of the restorative orientation of the juvenile courts and then must spend months on end in detention awaiting the case's resolution.<sup>7</sup> Once the case is transferred, there is no continuity of counsel, the child's attorney from juvenile court is usually replaced by new counsel at arraignment. The child faces a new process with the prospect of an adult prison sentence at the end.

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<sup>6</sup> <https://www.nap.edu/read/9747/chapter/7>

<sup>7</sup> Youth who have bindover involvement (pending, granted, or denied) make up the majority of those held in the Cuyahoga Juvenile Detention Center, and they are held for extensive periods of time when compared to their peers who are not bindover involved. According to a check of the Cuyahoga Juvenile Court database, run on August 5, 2020, bindover-involved youth comprised 64% of the total detention population—they account for 84% of youth held in detention for 200 days or more, compared to 51% of youth held in detention for 200 days or less. Two children have spent nearly 800 days in the detention center going through the bindover process and are awaiting a resolution of their cases in the adult court. Detention is only intended for 90 days or less and no substantive programming or services are available for youth detained awaiting a case's resolution. *See* Loc.R. 50(D).

For society, the decision to transfer the child also has serious consequences. The child is now treated and viewed as a criminal. He is more likely to recidivate and drain criminal justice resources rather than become a productive member of society. Briana Morris, *A Child is a Child, Except under Ohio Law: A Discretionary Review of Mandatory Bindovers*, 47 Cap. U.L. Rev. 639, 668 (2019) (“Imprisoning juveniles increases rather than decreases the amount of subsequent offending.”).

The Center for Disease Control’s Task Force on Community Preventive Services, for example, reviewed studies that compared outcomes experienced by youths transferred to adult criminal court with those who remained in the juvenile justice system. Morris at id. The conclusion: “youths tried as adults had higher and faster recidivism rates, especially for violent crimes, than their delinquent counterparts.” Morris at id. Further, “teens under eighteen being held in adult jails are nineteen times more likely to commit suicide than teens in general and thirty-six times more likely than those held in juvenile facilities.” Morris at 669, quoting Laird, *States Raising Age for Adult Prosecution Back to 18*, ABA Journal (Feb. 2017).

Accordingly, children should be tried as adults only rarely, and only after a thoroughly considered process. *In re Agler*, 19 Ohio St.2d 70, 71-72, 249 N.E.2d 808 (1969) (“[S]ociety should make every effort to avoid their being attainted as criminal before growing to the full measure of adult responsibility.”). Recognizing this, the General Assembly has baked into the discretionary bindover statute a presumption that youth should remain under juvenile jurisdiction.

The general criminal division has no authority over allegations against a juvenile where the juvenile court found no probable cause.

Before transferring a child to adult court, the discretionary bindover statute requires the juvenile court to find 1) that there is probable cause to believe the child committed the alleged misconduct; and 2) that the child is not amenable to juvenile court jurisdiction. R.C. 2152.12(B). Both steps require a hearing. Even in mandatory bindover proceedings, the court must find probable cause that the child committed the alleged misconduct before transferring the case. R.C. 2152.12(A)

This Court has held that “a juvenile court must comply with the requirements of the bindover statute in order to transfer a juvenile to adult court.” *Johnson v. Sloan*, 154 Ohio St.3d 476, 2018-Ohio-2120, 116 N.E.3d 91, ¶ 23; see also, *State v. Wilson*, 73 Ohio St.3d 40, 43-44, 652 N.E.2d 196 (1995). Whatever determination the juvenile court reaches with respect to amenability, the charged offenses where probable cause was not found may not be transferred.

Juvenile courts have “exclusive original jurisdiction over delinquent, minors.” *State ex rel. Schwarts v. Haines*, 172 Ohio St. 572, 573, 179 N.E.2d 46 (1962); R.C. 2151.23. Under R.C. 2152.12(H) the child’s treatment as an adult may only occur by way of a proper mandatory or discretionary bindover proceeding. Absent a proper transfer, the juvenile court maintains exclusive subject-matter jurisdiction over any case concerning a child who is alleged to be delinquent. *Wilson* 73 Ohio St.3d at 44, 652 N.E.2d 196

Nick Smith’s case initially involved a mandatory bindover. Following the probable cause hearing, the State of Ohio *conceded* there was no evidence that Nick

had a gun during the incident alleged. (PC Hearing, Tr. 87) The juvenile court thereafter issued an order finding no probable cause on the firearm specifications attached to Counts 1-4; no probable cause on the Counts 6 and 7, alleging failure to comply; and no probable cause on Count 8, charging having a weapon under disability. Because of the no probable cause finding on the firearm specifications, the case became a discretionary bindover and an amenability hearing was held on the remaining counts.

The juvenile court thereafter entered an order transferring the matter to adult criminal court. Notwithstanding the court's no probable cause finding with respect to any offenses or specifications relating to Nick's use of a firearm in the alleged misconduct, however, the prosecution sought and obtained an indictment on all of the counts originally alleged in the juvenile complaint. By doing so, the prosecution dramatically expanded Nick's sentencing exposure – and on counts and specifications the prosecution previously admitted it lacked evidence.

Once the juvenile court issued its no probable cause finding on some of the charges in the prosecution's complaint, the state had a number of options. It could have appealed the no probable cause finding. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 51. It could have urged its officers to investigate the case further and unearth new evidence. It could also have abandoned those counts and pursued the ones on which they had sufficient evidence. What the prosecution should not have been able to do was seek an indictment on charges the juvenile court had found they lacked probable cause, so that this 16-year-old child would be

facing a potential prison term of 50-years in an adult prison unless he took a plea deal.

The impact of transferring Nick's case to adult court was devastating.

The juvenile court treats firearm specifications differently from the adult criminal court. A juvenile adjudicated on a one-year specification does not require mandatory time in ODYS. For the three-year specification, only one year of it is mandatory. See, R.C. 2152.17. Juveniles who are only complicit in offenses involving firearms may receive no gun specification time or the juvenile court judge may increase their sentence by a maximum of one year for the gun specification.<sup>8</sup> Finally, a juvenile may not be subject to a mandatory bindover on a three-year firearm specification unless he is the principal actor who displayed, brandished, indicated possession, or used the firearm to facilitate the offense. On this record, it is clear Nick did not do any of these things.

In adult court, on the other hand, firearm specifications carry one-and-three-year mandatory prison terms that must be served prior and consecutive to any other prison term imposed. R.C. 2945.141, 2945.145. That mandatory prison term applies to both the principal and any accomplices. As applied to Nick, in the juvenile court he could receive no time on a gun specification, because the juvenile court had found no probable cause on that element. After his indictment in the General

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<sup>8</sup> The General Assembly enacted this change under HB 86. The law recognized that juveniles who were only complicit in offenses involving firearms were less culpable. The changes thereunder were intended to reduce the minimum sentence of youth who are only accomplices in certain gun related offenses.

Division, however, Nick faced a mandatory three-year prison term on the gun-specification unless he took a plea deal. Further, on this record, given that there were two complainants, the prosecution could argue that at least two of those specifications term had to be imposed consecutively to each other. See, R.C. 2929.14(B)(1)(g).

Once in adult court, facing substantially enhanced sentencing exposure, Nick had little choice but to enter a guilty plea. Yet the absurdity of this situation is astonishing: The juvenile court found no probable cause on the firearm specifications (among other complaint counts). But the state went on to indict on those specifications and counts anyway. To be clear, the state indicted Nick on gun specifications and related offenses after the juvenile court specifically found there was no credible evidence to support those allegations. This is an outcome the General Assembly never could have intended.

#### Treatment of juvenile offenders in Cuyahoga County

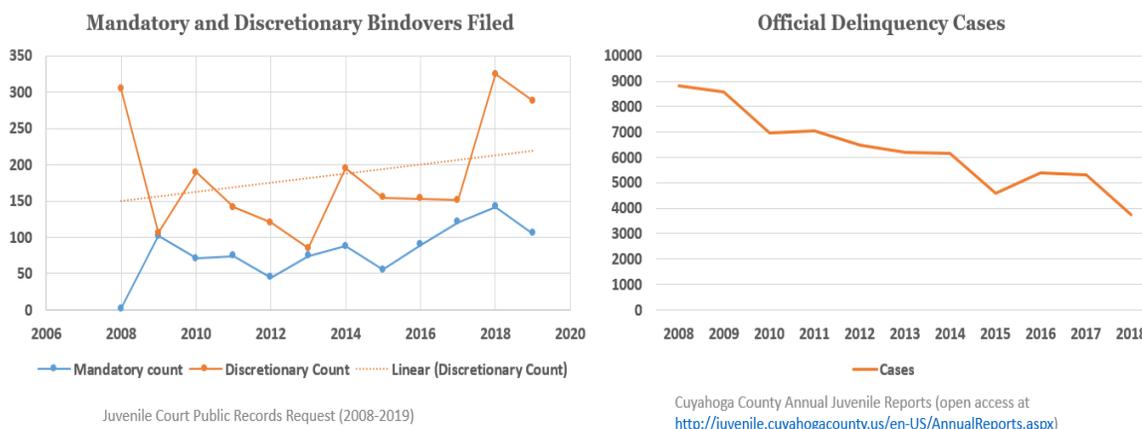
What happened to this juvenile is not unusual in Cuyahoga County. To the contrary, it reflects a pattern by this prosecutor's office in the way it treats such youthful offenders. Ostensibly intended to combat what this prosecutor's office has characterized as a wave of youth gun violence,<sup>9</sup> the current County Prosecutor began aggressively seeking to treat and punish juvenile offenders as adults when he took

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<sup>9</sup>News 5 Cleveland, Cuyahoga County prosecutor: 'Our community is under siege by juvenile violence' <https://www.news5cleveland.com/news/local-news/oh-cuyahoga-right-nowour-community-is-under-seige-by-juvenile-violence-said-cuyahoga-county-prosecutor>.

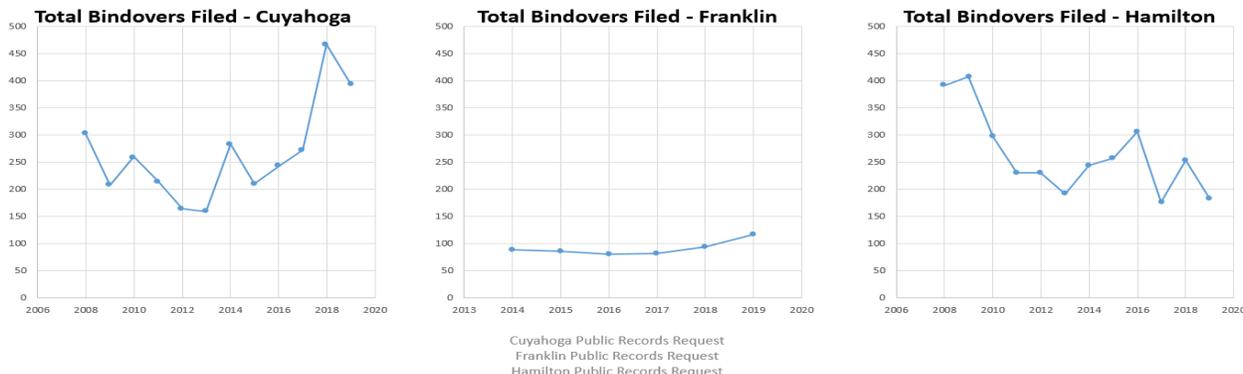
office. This happened even though overall delinquency case filings in Cuyahoga County were down. Indeed, as the graphic that follows depicts, delinquency filings have been consistently dropping for the last decade.

## Cuyahoga County Bindover Filings v. Delinquency Filings



This graph also reflects that, while delinquency filings have been down, bindover filings (both mandatory and discretionary) have been trending upward over the last decade. Cuyahoga County leads the state in bindover requests. And it's not because of the size of its population. Compared to Hamilton and Franklin Counties, which are of similar size and demographics, Cuyahoga's bindover rate is dramatically higher. Prosecutors enjoy unfettered discretion in how these cases are charged and, therefore, largely control whether the bindover will be mandated. The decision to seek discretionary bindovers, likewise, rests exclusively with the prosecutor's office.

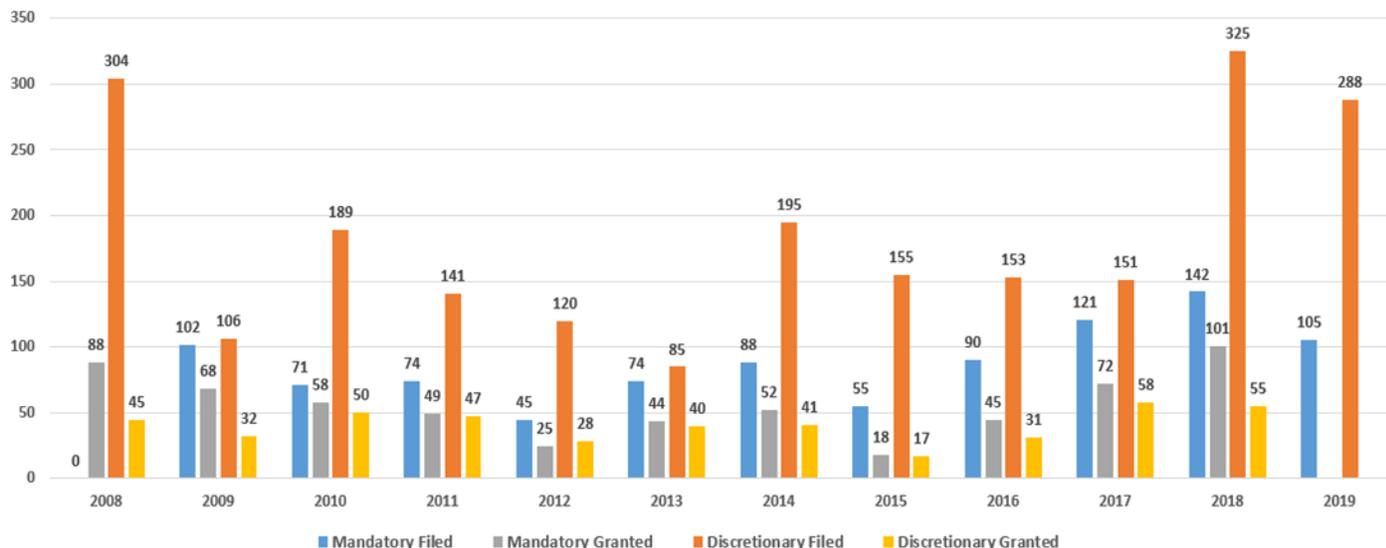
## Total Cases Boundover by County



Perhaps most troubling is the fact that the Cuyahoga County prosecutor’s office has far outpaced Franklin and Hamilton Counties in discretionary bindover requests. The three graphs below are illustrative.

## Cuyahoga County 2008-2019

Bindovers Filed v. Granted By Case



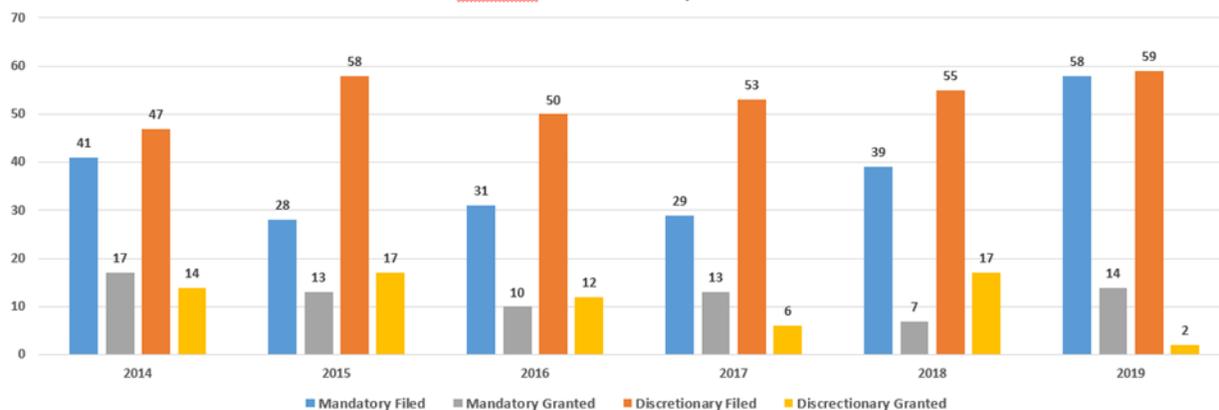
Cuyahoga Juvenile Court Public Records Request 2008-2019

Time Frames	Average % Mandatory Granted
2008-2018	60.20%
2014-2018	54.49%
2017-2018	65.32%

Time Frames	Average % Discretionary Granted
2008-2018	25.71%
2014-2018	21.52%
2017-2018	27.67%

## Franklin County 2014-2019

Bindovers Filed v. Granted By Case



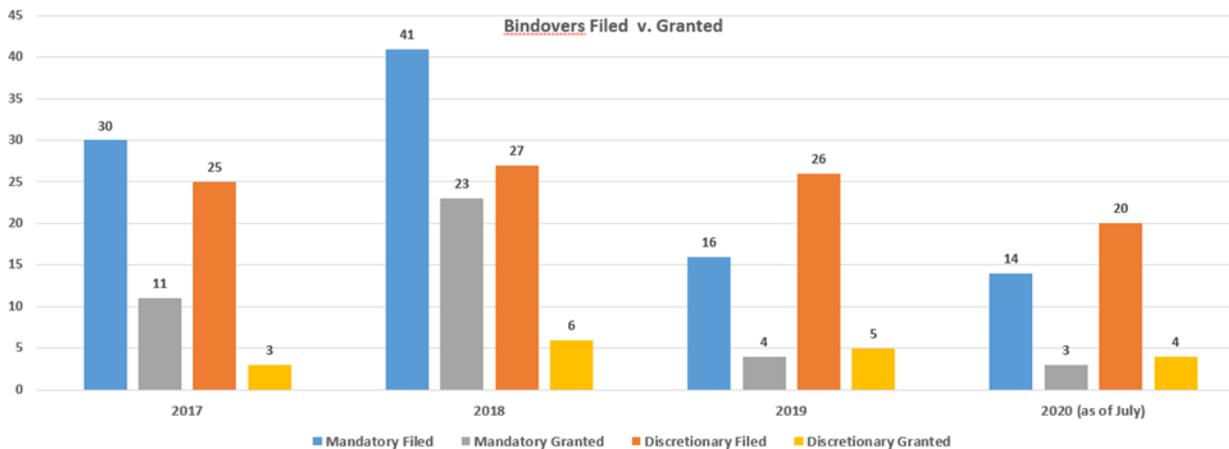
Franklin Juvenile Court  
Public Records Request  
2014-2019

Time Frames	Average % Mandatory Granted
2014-2019	34.51%
2017-2018	31.39%

Time Frame	Average % Discretionary Granted
2014-2019	21.45%
2017-2018	21.11%

## Hamilton County 2017-2020

Bindovers Filed v. Granted



Hamilton Public  
Defenders Office  
Request 2017-2020

Time Frames	Average % Mandatory Granted
2017-2020	34.80%
2017-2018	46.38%

Time Frames	Average % Discretionary Granted
2017-2020	18.36%
2017-2018	17.11%

That the Cuyahoga County prosecutor’s office is seeking bindovers more often than the prosecutors in its sister counties has led to an overall increase in the number of children treated as adults. As the next table makes clear, since 2010, Cuyahoga County has led the State in its treatment of children as adults. In 2019, nearly half of

all children boundover for adult criminal prosecution came from Cuyahoga County.

### Kids Boundover in Ohio by Fiscal Year

County	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19
Cuyahoga	66	86	46	46	50	52	47	64	89	104
Franklin	34	33	34	23	21	24	20	16	19	15
Hamilton	60	51	34	24	25	16	38	35	27	21
Montgomery	22	19	16	13	10	13	9	19	10	19
Summit	17	23	19	15	10	9	6	11	7	12
Clark	24	12	4	3	1	3	1	3	3	1
<b>Total</b>	<b>303</b>	<b>283</b>	<b>205</b>	<b>163</b>	<b>158</b>	<b>159</b>	<b>168</b>	<b>199</b>	<b>205</b>	<b>209</b>
<b>% from Cuyahoga</b>	<b>21.78%</b>	<b>30.39%</b>	<b>22.44%</b>	<b>28.22%</b>	<b>31.65%</b>	<b>32.70%</b>	<b>27.98%</b>	<b>32.16%</b>	<b>43.41%</b>	<b>49.76%</b>

ODYS Profile of Youth Transferred to Adult Court Fiscal Year 2019 report  
[https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac\\_FY2019\\_02.pdf](https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac_FY2019_02.pdf)

And these bindovers are not just for violent criminal offenses or those involving firearms. Cuyahoga County treats more low-level child offenders as adults. Statewide – half of all F3 offenders; 75% of all F4 offenders; and all of the F5 offenders treated as adults – were from Cuyahoga County.<sup>10</sup>

Most concerning is that, not only are most of the kids boundover to adult court in Cuyahoga County are black, but that Cuyahoga County leads the state in the number and overall percentage of black childhood offenders treated as adult criminals. The next table, derived from ODYS statistics compiled in fiscal year 2019 makes this problem apparent.

<sup>10</sup> ODYS Profile of Youth Transferred to Adult Court Fiscal Year 2019 report  
[https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac\\_FY2019\\_02.pdf](https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac_FY2019_02.pdf)

## Distribution by Race – FY19 Ohio vs Cuyahoga County

Cuyahoga (# Black Kids Transferred)	Value
Cuyahoga # Black Kids Transferred	94 (most in Ohio)
Hamilton # Black Kids Transferred	18 (2 <sup>nd</sup> most in Ohio)
Franklin # Black Kids Transferred	13 (3 <sup>rd</sup> most in Ohio)
Ohio # Black Kids Transferred	170
Cuyahoga % Black Kids Transferred	90.4% (most in Ohio)
Hamilton % Black Kids Transferred	85.7% (3 <sup>rd</sup> most in Ohio)
Franklin % Black Kids Transferred	86.7% (2 <sup>nd</sup> most in Ohio)
Ohio % Black Kids Transferred	81.3%
Ohio % Black Kids Transferred from Cuyahoga	55.3%

ODYS Profile of Youth Transferred to Adult Court Fiscal Year 2019 report  
[https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac\\_FY2019\\_02.pdf](https://www.dys.ohio.gov/static/About+DYS/Communications/Reports/Statewide+Reports+Maintained+by+DYS/Ytac_FY2019_02.pdf)

The takeaway from this data is that there is something terribly wrong in Cuyahoga County’s juvenile justice system and Nick Smith’s case is emblematic of the problem.

What is happening in Cuyahoga County runs afoul of everything we know about youthful offenders.

Both this Court and the US Supreme Court have expounded at length on the differences between adults and children, before ultimately concluding that children are categorically less deserving of our harshest punishments. This Court has repeatedly shielded juveniles from many sentences applicable to adults. 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. 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). Accord, *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288 (Prohibiting the imposition of a term-of-years prison sentence that exceeds offender’s life expectancy on a nonhomicide juvenile offender).

There is no doubt that the US Supreme Court is of a similar mindset, and has identified three essential characteristics which distinguish youth from adults for culpability purposes: 1) juveniles have a “lack of maturity and an underdeveloped sense of responsibility”; 2) they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and 3) their characters are “not as well formed.” *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005)).

In *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407, the High Court emphasized that “those findings—of transient rashness, proclivity for risk, and inability to assess consequences—lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’” 567 U.S. at 472 (quoting *Graham*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570).

These observations are grounded in an increasingly settled body of scientific research establishing that “developments in psychology and brain science continue to

show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham*, 560 U.S. at 68. These scientific studies have helped to “explain salient features of adolescent development, and point[] to the conclusion that children do not think and reason like adults because they cannot.” Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 434-35 (2006).

The discretionary bindover requirements reflect this understanding and, likewise, seek to discourage the juvenile court from treating children under 17 as adults. It is telling that Nick’s conduct in the underlying offense was so typical of juvenile offenders. The conduct was rash and peer driven. Smith was not the primary actor and whatever happened had clearly not been thought through. Science has established that the juvenile’s prefrontal cortex – which regulates and governs “higher-order cognitive functions... [like] planning ahead, weighing risks and rewards, and making complicated decisions” is not fully developed until well into adulthood. Steinberg, *The Science of Adolescent Brain Development*, supra, at 64. These are things that functioning adults do.

Similarly, juveniles are also more likely to be subject to peer pressure. When adolescents are pressured by their peers to participate in a criminal act, they may do so out of a misplaced concern about fitting in, even if they do not condone or want to participate in the criminal activity. *Id.* (citing DAVID MATZA, DELINQUENCY AND

DRIFT 57 (1964)). This concern about ‘fitting in’ is one of the main reasons juveniles are far more likely to participate in group crimes than adults are. FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 29 (1998)). One study found that over half of all violent crimes committed by individuals under 17 involve multiple offenders. *Id.*

As a fundamental matter, Nick Smith is immature, but like many of his juvenile counterparts, capable of maturing. As the US Supreme Court noted in *Roper*,

For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood[.]

*Id.* at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence*:

*Developmental Immaturity, Diminished Responsibility, and the Juvenile Death*

*Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003)). This Court, the US Supreme Court, and just about anyone else who has studied children and their development, agrees.

## CONCLUSION

Prosecutors in juvenile court – through their charging and bindover decisionmaking – already possess exclusive authority to determine the children they seek to bindover. In the discretionary bindover statute, the General Assembly has placed a small check on that power. That check should remain. For the foregoing reasons, Amicus asks this Court to reverse the judgment below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of September, 2020, a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER IN SUPPORT OF APPELLANT was served by email to Lauren Hammersmith, counsel for Appellant, Nicholas Smith and by email to Gregory OChocki, Assistant County Prosecutor who represents Appellee, the State of Ohio in this matter.

*Erika B. Cunliffe*

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ERIKA CUNLIFFE