In the Supreme Court of Ohio

IN RE E.S.,	:	Case No. 2022-0993
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
	:	Court of Appeals,
	:	Eighth Appellate District
	:	
	:	Court of Appeals
	:	Case No. 110378

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

TIMOTHY B. HACKETT (0093480)
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(t) 614-466-5394
(f) 614-752-5167
timothy.hackett@opd.ohio.gov

Counsel for Appellee
E.S.

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor
DANIEL T. VAN (0084614)
EBEN MCNAIR (0089147)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(t) 216-443-7800
dvan@prosecutor.cuyahogacounty.us

Counsel for Appellant
State of Ohio

DAVE YOST (0056290)
Attorney General of Ohio

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
SAMUEL C. PETERSON (0081432)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

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INTRODUCTION

At a bindover hearing in juvenile court, the State must establish probable cause to believe that a juvenile committed the offenses with which he has been charged. *See* R.C. 2152.12. Establishing probable cause is a low bar; the State carries its burden if it introduces evidence sufficient to raise "more than a mere suspicion of guilt." *In re A.J.S.*, 120 Ohio St. 3d 185, 2008-Ohio-5307 ¶62 (citing *State v. Iacona*, 93 Ohio St. 3d 83, 93 (2001)); *see also State v. Martin*, ___ Ohio St. 3d ___, 2022-Ohio-4175 ¶22 (quoting *A.J.S.*, 120 Ohio St. 3d at ¶62).

The Eighth District, and the juvenile court below, egregiously misapplied this Court's precedent. The Court does not typically engage in error correction when lower courts fail to follow and apply its decisions. *See Anderson v. WBNS-TV, Inc.*, 158 Ohio St. 3d 307, 2019-Ohio-5196 ¶16 (DeWine, J., concurring in judgment only). But sometimes the error is so significant that it has no option but to step in and "remind the lower courts in this state that they are required to follow [this Court's] precedent." *See State v. Fips*, 160 Ohio St. 3d 348, 2020-Ohio-1449 ¶10. This is one of those cases.

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 interest-

ed in proper interpretation of Ohio's laws and in the rehabilitation and punishment of juvenile offenders.

STATEMENT OF THE CASE AND FACTS

1. The relevant facts begin in a Kia. Late one night, E.S. and E.M. drove the Kia to pick up M.W., a mutual female friend, from a party. Tr.26–31, 80–81, 225. E.M. drove, while E.S. sat in the front passenger seat. Tr.80–81. After the pair picked up M.W., a Cuyahoga Heights police officer sought to stop the car for speeding. Tr.44–45, 81. In the process of doing so, the officer discovered that the car had been reported stolen—and that it had been used in the robbery of a nearby gun store. *Id.* The officer activated his lights. But instead of pulling over, E.M. sped away, leading the police on a high-speed chase. Tr.45–46, 267–68. During the chase, E.M. drove on and off the highway, onto the sidewalk, and off road through a field. *Id.* The vehicular portion of the chase ended only when E.M. crashed the car into a ravine. *Id.*

But the pursuit continued on foot. E.S. and M.W. headed in one direction, while E.M. headed in another. Tr.84–87. E.M. did not make it very far. Officers investigating the scene discovered his body, face down, a few feet from the crashed Kia. Tr.54–57, 122–24. He had been shot once in the chest, Tr.100–03, at a range of between one and three feet. Tr.112.

The police recovered a gun from inside the crashed vehicle. Tr.168–72, 226–28, 253. The gun, which they found under the front passenger seat, *id.*, contained one fired

cartridge and six live rounds, Tr.169, 171. On the other side of the car, the police found a single fired bullet, lodged inside of the driver's-side door. Tr.166–68, 226–27. Forensic testing determined that the bullet had been fired from the gun found in the car. Tr.201–03. And the location of the bullet hole, when compared to the bullet wounds on E.M.'s body, were consistent with a shot that passed through E.M.'s chest while he sat in the driver's seat. Tr.229–37, 247–48.

DNA testing tied E.S. to the gun found in the car. It identified five sources of DNA on the gun—E.S. and four others. Tr.138–39. Testing was able to exclude M.W. as a source of DNA, and was inconclusive with respect to E.M. Tr.139, 142. Of the five contributors, it was E.S.'s DNA profile that stood out the most. He was the source of the majority of the DNA found on the gun, Tr.142, which indicated that he had handled it most recently, Tr.142–44, 147. Authorities found E.S.'s DNA on swabs taken from the gun's grip and trigger. Tr.138–39, 144.

M.W. provided little insight into what had happened in the moments surrounding the crash. She stated that she had not seen a gun prior to the crash. Tr.93. But she also stated that when the car crashed she heard a loud bang, followed by a ringing noise. Tr.88–89, 269. M.W. did not identify the source of the bang, *see id.*, and although she clarified that the ringing was not the sound of a phone ringing, the juvenile court prevented the State from seeking further clarification about what type of ringing she had heard, Tr.88.

No evidence presented at the hearing suggested that the gun found in the car (or any other gun) was fired *after* the car had crashed. The only individuals on the scene when E.M.'s body were found were the responding police officers, and none of them fired their weapons. *See* Tr.68–74, 147–50. That fact was confirmed by investigators, who documented that the first officers to arrive on the scene still possessed all of their ammunition. Tr.149–50, 224–25.

2. The State charged E.S., who was 16 at the time of the crash, with five counts in juvenile court: involuntary manslaughter, reckless homicide, having a weapon while under disability, receiving stolen property, and improperly handling a firearm while in a motor vehicle. *In re E.S.*, 2021-Ohio-4606 ¶¶2–3 (8th Dist.) ("App.Op."). The manslaughter, homicide, and receiving-stolen-property charges all carried firearm specifications. *Id.* The juvenile court held a probable cause hearing, which lasted two days. The State presented thirteen witnesses and well over 100 exhibits. *Id.* at ¶4; *see also, generally*, Tr. Following the hearing, the juvenile court found probable cause to believe that E.S. had possessed a weapon while under disability, that he improperly handled that weapon while in a vehicle, and that he received stolen property. App.Op.¶25. It also found probable cause to support the firearm specification attached to the receiving-stolen-property charge. Feb. 19, 2021 Entry; *see also* App.Op.¶25. The only offenses for which the juvenile court *did not* find probable cause were the offenses that would have

required mandatory bindover: involuntary manslaughter and reckless homicide, along with their associated firearm specifications. *See id.*

3. The State appealed the juvenile court's finding of no probable cause with respect the involuntary-manslaughter charge, App.Op.¶26, and a divided panel of the Eighth District affirmed, App.Op.¶¶41–42. Citing the fact that the bullet that was found in the car's door was never tested for E.M.'s DNA, the majority held that the State had "put forth no credible evidence that the fired bullet from the firearm, which was discharged into the front driver-side door, was the bullet that pierced E.M.'s body and caused his death." App.Op.¶38. On that basis, the Eighth District majority concluded that the State had failed to establish probable cause that E.S. had committed involuntary manslaughter. App.Op.¶¶33–34, 39.

Judge Sean Gallagher dissented. He wrote that the state "presented not only sufficient but *overwhelming* evidence to show probable cause that E.S. committed the offenses of involuntary manslaughter and reckless homicide." App.Op.¶44 (Gallagher, J., dissenting) (emphasis added). The juvenile court's contrary conclusion, he wrote, was "disconnect[ed] from the facts presented" and was "inherently inconsistent" with its finding of probable cause for the other offenses with which E.S. had been charged. App.Op.¶46 (Gallagher, J., dissenting). Failing to reverse the juvenile court's misapplication of the probable-cause standard set a "dangerous precedent." App.Op.¶45 (Gallagher, J., dissenting). Judge Gallagher noted that this Court "should not have to en-

gage in error correction" but, given the magnitude of the errors committed by the juvenile court and the Eighth District majority, he called upon the Court to make an exception for this case. App.Op.¶47 (Gallagher, J., dissenting).

4. The State appealed to this Court, raising a single proposition of law. The Court accepted the State's appeal. *Case Announcements*, 2022-Ohio-3752 (Oct. 25, 2022).

5. After this Court granted review, the juvenile court scheduled an amenability hearing. This prompted the State to ask this Court to stay any further juvenile-court proceedings. *See* Motion, *In re E.S.*, No.2022-0993. The juvenile court held the hearing before this Court could rule on the State's motion. At that hearing, the State asked the juvenile court to stay its proceedings. But, despite the fact that a juvenile court "lacks jurisdiction to proceed with an adjudication of a child after a notice of appeal has been filed from an order of that court," *In re S.J.*, 106 Ohio St 3d 11, 2005 Ohio 3215 syl.1, the juvenile court held that the State's request for a stay was "not well taken." Nov. 8, 2022 Journal Entry. The juvenile court then purported to dismiss the State's motion for discretionary bindover on the basis that, at the amenability hearing, the State had not presented any argument or evidence in support of its bindover request. *Id.* It continued the case for further proceedings. *Id.*

ARGUMENT

Amicus Curiae Ohio Attorney General's Proposition of Law 1:

> *The State establishes probable cause to believe that a juvenile committed a charged offense whenever it presents evidence in a bindover proceeding that raises more than a mere suspicion of guilt, regardless of whether that evidence is direct or circumstantial.*

1. When a juvenile commits a criminal offense, the State of Ohio must charge the offender in juvenile court. *See* R.C. 2152.02(C)(1); R.C. 2152.03; *see also Johnson v. Sloan*, 154 Ohio St. 3d 476, 2018-Ohio-2120 ¶5. But cases need not remain in that court. That is because the General Assembly has "enacted a statutory scheme that provides for some juveniles to be removed from the juvenile courts' authority" and transferred to adult criminal court. *State v. D.W.*, 133 Ohio St. 3d 434, 2012-Ohio-4544 ¶9. Certain juveniles who use a gun to commit a serious offense (such as involuntary manslaughter) *must* be transferred to adult court. *See* R.C. 2152.10(A)(2); R.C. 2152.02(BB)(2). This process is known as "mandatory bindover." Other juveniles *may* be transferred, but only if a juvenile court first determines that they are not amenable to rehabilitation in the juvenile justice system. R.C. 2152.12(B). This process is known as "discretionary bindover." Mandatory and discretionary bindovers have at least one thing in common: before a juvenile court may transfer either type of case, it must find probable cause to believe that the juvenile committed the charged offenses. *See* R.C. 2152.12(A)(1)(a)(i)–(ii), (A)(1)(b)(i)–(ii), (B)(2).

Probable cause "is not a high bar" for the State to clear. *See Kaley v. United States*, 571 U.S. 320, 338 (2014). Instead, it is a "flexible, common-sense standard" that "does not demand any showing that … a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality op.). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quotations omitted). A showing of probable cause typically "requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Kaley*, 571 U.S. at 338 (alterations accepted, quotations and citations omitted); *see also Illinois v. Gates*, 462 U.S. 213, 235 (1983). It "does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *State v. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179 ¶73 (quotations omitted); *see also Brinegar*, 338 U.S. at 175.

This flexible standard is familiar to the law. *See Martin*, 2022-Ohio-4175 at ¶16. Warrantless arrests are permissible, for example, if they are supported by probable cause. In such cases, the Court has held, probable cause is "defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *State v. Tibbetts*, 92 Ohio St. 3d 146, 153 (2001) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 111–12 (1975)). Grand juries are likewise tasked with determining whether probable cause exists to believe a crime was committed. *See Kaley*, 571 U.S. at 338–39. There too, a finding of probable cause is an "unde-

manding" standard that requires only a fair probability that a crime was committed. *See id.*

This Court has applied the same flexible standard to probable-cause determinations under R.C. 2152.12. It has held that, at a probable-cause hearing held pursuant to that statute, the State does not need to "'provide evidence proving guilt beyond a reasonable doubt.'" *A.J.S.*, 120 Ohio St. 3d 185 at ¶42 (quoting *Iacona*, 93 Ohio St. 3d at 93). Instead, to carry its burden of showing probable cause, the State must simply present "evidence that raises more than a mere suspicion of guilt." *Id.* If the State carries that burden, it has established probable cause.

On appeal, courts reviewing a probable-cause finding must ask whether "the state presented sufficient evidence to demonstrate probable cause to believe [the juvenile] committed the acts charged." *Id.* ¶51. In conducting this analysis courts must not weigh competing evidence of guilt and innocence. To the contrary, "resolution of the conflicting theories of the evidence … is a matter for the trier of fact at a trial on the merits of the case." *Id*. ¶64. While the State "'must provide credible evidence of every element of an offense to support a finding that probable cause exists,'" *id.* ¶42 (quoting *Iacona*, 93 Ohio St. 3d at 93), reviewing courts must "defer to the trial court's determinations regarding witness credibility," *id.* ¶51.

The State may rely on circumstantial evidence to establish probable cause. "Circumstantial evidence and direct evidence inherently possess the same probative value."

State v. Martin, 151 Ohio St. 3d 470, 2017-Ohio-7556 ¶112 (quoting *State v. Jenks*, 61 Ohio St. 3d 259, syl.1 (1991)). And circumstantial evidence may, in fact, at times be "more certain, satisfying and persuasive than direct evidence." *State v. Lott*, 51 Ohio St. 3d 160, 167 (1990) (quoting *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960)). Convictions, even capital convictions, can be based solely on circumstantial evidence. *State v. Apanovitch*, 33 Ohio St. 3d 19, 27 (1987). If circumstantial evidence is enough to find someone guilty beyond a reasonable doubt, then it is certainly enough to support a finding of probable cause. *See State v. Adkins*, No. 4-89-3, 1990 WL 142008 at *4–5 (3d Dist. Sept. 28, 1990). As with a conviction, direct evidence "is not necessary to ground a probable cause determination where … the import of circumstantial evidence is obvious." *United States v. Gonzalez*, 16 F.4th 37, 45 (1st Cir. 2021) (quoting *United States v. Adams*, 971 F.3d 22, 33 (1st Cir. 2020)); *see also United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002); *United States v. Jeanetta*, 533 F.3d 651, 654 (8th Cir. 2008); *United States v. Diaz*, 491 F.3d 1074, 1078 (9th Cir. 2007).

2. The evidence that the State presented at the probable-cause hearing in juvenile court may have included circumstantial evidence. But, taken together, the evidence was more than sufficient to establish probable cause to believe that E.S. committed involuntary manslaughter. The State presented evidence that: (1) E.S. held the gun that was found in the car, Tr.138–44; (2) the bullet lodged in the door of the stolen car came from the gun that E.S. possessed, Tr.201–03; and (3) that the bullet hole in the car and

the location of E.M.'s wounds were consistent with a shot that was fired from the passenger seat, and passed through E.M.'s body before striking the door, Tr.229–37, 247–48. The State's evidence likely would have been sufficient to prove that E.S. committed involuntary manslaughter beyond a reasonable doubt; the only logical interpretation of the evidence, after all, is that E.S. was holding the gun that fired the shot that killed E.M. The courts below did not need to address that question, however. They were tasked with deciding an easier one: whether the State's evidence raised "more than a mere suspicion of guilt." *A.J.S.*, 120 Ohio St. 3d 185 at ¶42. It quite obviously did.

3. The Eighth District held otherwise only because it misapplied this Court's precedent. Although the Eighth District framed its analysis as involving the question of probable cause, *see* App.Op.¶¶30–31, the appellate court failed to properly apply the probable-cause standard. Like the juvenile court before it, the Eighth District held the State to a much higher standard than the one called for by R.C. 2152.12 and this Court's decisions in *Martin*, *A.J.S.*, and *Iacona*.

The Eighth District held that the State had not established probable cause to believe that E.S. had committed involuntary manslaughter because, in its opinion, the State had not sufficiently proved that the bullet found embedded in the stolen Kia was the bullet that killed E.M. App.Op.¶¶38–39. It reached that conclusion even though forensic evidence conclusively proved that the bullet found in the stolen car had been fired from the gun bearing E.S.'s DNA. App.Op.¶39. In the Eighth District's opinion,

that was not enough to establish probable cause. The State, it wrote, should have *also* presented evidence that the bullet found in the car had E.M.'s DNA on it. *See* App.Op.¶38 (writing that the bullet "should have had E.M.'s DNA if the bullet pierced him in the vehicle").

However helpful the evidence that the Eighth District demanded might have been, it was not needed to establish probable cause. As discussed above, other evidence had already established that E.S. had held the gun that was found in the stolen car, that the gun had fired the bullet found lodged in the car's door, that E.M.'s wounds were consistent with his being shot while sitting in the front seat of the car, and that no other guns had been fired at the scene. *See* 2–4. Taken together, that evidence was sufficient to raise more than a mere suspicion that the gun found in the car fired the shot that killed E.M. The fact that that conclusion required the juvenile court to draw some inferences about what happened inside the car is irrelevant; circumstantial evidence can be just as probative of guilt as direct evidence. *Martin*, 151 Ohio St. 3d 470 at ¶112.

The juvenile court's no-probable-cause finding was just as indefensible as the Eighth District's decision affirming that finding. The juvenile court, recall, found probable cause to believe that E.S. possessed a gun and handled that gun improperly while in the stolen Kia. Feb. 19, 2021 Entry. As the dissent noted below, those were predicate offenses for involuntary manslaughter, and to find that there was probable cause to believe that E.S. committed those offenses, but that there *was not* probable cause to believe

that he also committed involuntary manslaughter, was "inherently inconsistent." App.Op.¶46 (Gallagher, J., dissenting). Indeed, since there was no evidence that any other gun had been fired before E.M. died, the only known person who *could have* killed E.M. was E.S. Who, if not E.S., could have been responsible for firing the fatal shot? The juvenile court did not say, nor did the Eighth District.

Even if there were a plausible alternative theory of how E.M. was killed, however, it would not matter. At a bindover proceeding the State "has no obligation to marshal all of its evidence," *Martin*, 2022-Ohio-4175 at ¶30, it need only "produce evidence that raises more than a mere suspicion of guilt," *A.J.S.*, 120 Ohio St. 3d 185 at ¶62 (citing *Iacona*, 93 Ohio St. 3d at 93). It also "has no burden to disprove alternate theories of the case." *Id.* at ¶61 (citing *Iacona*, 93 Ohio St. 3d at 96). And it certainly has no burden to *offer* alternative theories. But that is effectively what both the juvenile court and the Eighth District demanded the State do. They were wrong.

* * *

Even if this case involved mere error correction, reversal would be necessary. Sometimes the Court must "remind the lower courts in this state that they are required to follow [this Court's] precedent." *Fips*, 160 Ohio St. 3d 348 at ¶10. This case, however, involves more than the correction of a one-off error. In light of the Court's decision in *State v. Smith*, 167 Ohio St. 3d 423, 2022-Ohio-274—and in light of R.C. 2152.022, the

newly-adopted statute that codifies the *Smith* decision—it is more important than ever that lower courts properly apply the probable-cause standard.

The Court in *Smith* held that adult courts may not consider charges that a juvenile court found were unsupported by probable cause. *Smith*, 167 Ohio St. 3d 423 at ¶42. That means that, if juvenile courts do not properly apply probable cause's "flexible, common-sense standard," *Brown*, 460 U.S. at 742 (plurality op.), they will improperly deprive adult courts of the ability to consider charges that should have been bound over. Even if the State can appeal whenever a juvenile court misapplies the probable-cause standard, the necessity of taking such appeals will, at minimum, cause significant delay. And if, as here, the reviewing court *also* fails to apply the proper standard, an appeal will offer little relief.

CONCLUSION

For the foregoing reasons, the Court should reverse the Eighth District's decision.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s Benjamin M. Flowers
BENJAMIN M. FLOWERS * (0095284)
Solicitor General
**Counsel of Record*
SAMUEL C. PETERSON (0081432)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(t) 614-466-8980
(f) 614-466-5087
benjamin.flowers@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant State of Ohio was served this 13th day of January, 2022, by e-mail on the following:

Timothy B. Hackett
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
timothy.hackett@opd.ohio.gov

Daniel T. Van
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
dvan@prosecutor.cuyahogacounty.us

/s Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General