

No. 17-7213

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

STEVEN LEE,
Petitioner,

-vs-

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(as formulated by Respondent)

Whether Ohio's mandatory-bindover statute, which is narrowly tailored to address the older and most-violent juvenile offenders, violates the Due Process and Equal Protection Clauses of the United States Constitution?

Whether these Due Process and Equal Protection challenges were preserved in the Ohio courts in light of the failure of Petitioner to raise them in the Ohio juvenile and common pleas courts?

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REASONS FOR DENYING THE PETITION

Petitioner Steven Lee presents no compelling reason for this Court to grant his petition for writ of certiorari. At the outset, “non-federal grounds independently and adequately support the judgment” in this case. *Michigan v. Long*, 463 U.S. 1032, 1038, 103 S.Ct. 3469, 3475, 77 L.Ed.2d 1201 (1983). The Tenth District found that Petitioner had not raised his constitutional arguments in the trial court and had, thus, waived them. *State v. Lee*, 10th Dist. Franklin No. 14AP-1009, 2016-Ohio-122, ¶ 24. It recognized, nevertheless, that it could review his claims for plain error. *Id.* However, based on its prior precedent, it found no error occurred. *Id.*, at ¶¶ 25-29. When the Ohio Supreme Court summarily affirmed the judgment of the Tenth District based on the authority of *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, it was affirming the Tenth District’s conclusion that a waiver had occurred and that no plain-error reversal was warranted. *State v. Lee*, 151 Ohio St.3d 123, 2017-Ohio-7826, 86 N.E.3d 322, ¶ 1. Because adequate and independent state grounds support the judgment in this case, further review by this Court is unwarranted.

Petitioner also does not provide any persuasive reason for this Court to expend its scarce judicial resources to review his constitutional claims. While Petitioner relies heavily on Ohio Chief Justice O’Connor’s dissenting opinion in *Aalim*, the fact that some may question the policy supporting the mandatory-bindover statutes does not remove the decision to implement such statutes from the legislature. *State v. Blankenship*, 145 Ohio St.3d 221, 2015-Ohio-4624, 48 N.E.3d 516, ¶ 37 (plurality opinion) (“Questions concerning the wisdom of legislation are for the legislature.”). *Id.* It is “the province and duty of the judicial department to say what the law is[,]” not what it should be. *Marbury*

v. Madison, 5 U.S. 137, 177, 2 L.Ed. 60 (1803); *Blankenship*, ¶ 37. Petitioner’s arguments, while couched in constitutional terms, are really policy arguments that belong in state legislatures, not the judiciary.

The Due Process Clause does not recognize a right to juvenile proceedings, let alone a right to an “amenability” hearing. Juvenile proceedings are neither deeply rooted in this Nation’s history nor are such proceedings implicit in the concept of ordered liberty. It has long been recognized in courts across this country that a person has no constitutional right to be tried as a juvenile at any certain age. *See, e.g., State v. Angel C.*, 715 A.2d 652, 669 (Conn. 1998); *State v. Behl*, 564 N.W.2d 560, 567 (Minn. 1997); *People v. Hana*, 504 N.W.2d 166, 175 (Mich. 1993); *Jahnke v. State*, 692 P.2d 911, 928-29 (Wyo. 1984). The nature of a juvenile proceeding is “purely statutory.” *Prescott v. State*, 19 Ohio St. 184, 188 (1869); *In re Agler*, 19 Ohio St.2d 70, 72, 249 N.E.2d 808 (1969). Additionally, at common law, 16 year olds were actually considered adults.

Petitioner’s argument that an amenability hearing is required under a due-process analysis likewise fails. Procedural due process simply ensures that there are adequate procedural safeguards to allow the litigant the opportunity to be heard on matters material to the proceeding under state law, and “amenability” is not material to a mandatory-*bindover* hearing under Ohio law. And, again, there would be no substantive-due-process right to insist that Ohio consider “amenability” in every case.

Petitioner’s Equal Protection claim fares no better. There is no fundamental right to an amenability hearing. Juveniles are not a suspect class. Rational-basis review applies. If age-based classifications that distinguish between younger and older juveniles are not rational, laws governing driving, mandatory schooling, and the age for consensual

sex are all constitutionally dubious.

Ohio's mandatory-bindover mechanism addresses the older and most-serious violent juvenile offenders and offenses. The Ohio legislature could rationally conclude that for these offenders an individualized "amenability" determination is unwarranted. The Ohio legislature could rationally conclude that, for this group of juvenile offenders who have already "graduated" into committing such violent offenses, often while armed, the odds would be exceedingly small that such offenders would be "amenable" to rehabilitation in the juvenile system by age 21 and therefore would not warrant the time and expense of attempting to find an amenable offender in this sea of major juvenile offenders who are unamenable. And simple justice would allow the Ohio legislature to conclude that a mandatory bindover is appropriate for these most-serious offenses.

Overall, it is constitutionally dubious for Petitioner to contend that an "amenability" determination set forth in an Ohio statute for less-serious juvenile offenders would come to define exactly what would be constitutionally required as a matter of federal Due Process and Equal Protection for the most-serious and older juvenile offenders in the entire Nation. Attempts to constitutionalize a state procedure into mandatory federal constitutional law defy a basic concept of American Civics that a state legislature cannot amend the federal Constitution.

While Petitioner has not presented an Eighth Amendment challenge, the precedent he relies on is largely Eighth Amendment jurisprudence. In his reasons for granting the writ, he argues that the relevant precedent is *Graham v. Florida*, 560 U.S. 48, 50, 130 S.Ct. 2011, 176 L.Ed.2d 1 (2010). He quotes *Graham* for the proposition that "a juvenile's 'twice diminished moral capacity' must inform a court's analysis *when*

imposing a punishment for which adults are also eligible.” Petition, p. 5 (emphasis added). But mandatory-transfer statutes do not impose punishment. These statutes determine which court has jurisdiction over a juvenile’s case. Punishment comes later, only if there is a conviction.

Petitioner’s arguments fall far short of demonstrating any need for review so as to justify the expenditure of this Court’s scarce judicial resources to review his case.

STATEMENT OF THE CASE

Petitioner’s case originated in the Franklin County Court of Common Pleas, Juvenile Division. Pursuant to O.R.C. 2152.12(A), his case was transferred for criminal prosecution as an adult. Subsequently, the Franklin County Grand Jury returned an indictment against Petitioner charging him with aggravated robbery, aggravated murder, and murder. Each charge carried a three-year firearm specification. Prior to the start of the trial, the State dismissed the aggravated-murder charge.

At trial, Derek Howell testified that on April 26, 2013, he went with the victim, Celestin Ganga, to purchase a bag of marijuana. The victim walked with Howell back to Howell’s house but then left to go to the store. He said he would be right back. While Howell was outside waiting for the victim, he heard a “pop.” It “sounded like a firecracker.” Howell “got up, looked around[.]” He saw the victim coming towards his house “like, limping towards me.” The victim Ganga told Howell that “somebody tried to rob him” and he was shot.

The victim lifted up his shirt, and Howell saw the gunshot wound; it was “in his stomach, upper stomach area.” Every time the victim moved “[b]lood would gush out.” The victim “was just panicking” and “scared.”

Howell testified that he saw “three people running” out in the field around this time. He could not identify them. These people were at least the length of a football field away and were running in the opposite direction from him.

Columbus Police Officer Kevin Yankovich was the first officer to respond to the scene. Yankovich asked the victim who shot him, and the victim relayed that “three kids came up and shot him, one shot him.” The victim did not know who they were. Yankovich tried to ask the victim more questions, but the victim “couldn’t breathe.”

The victim died shortly after arriving at the hospital. Dr. John Daniels, with the Franklin County Coroner’s Office, performed the autopsy on the victim and testified that the victim’s cause of death was a “[g]unshot wound of the abdomen.”

Both D.J. and E.T., Petitioner’s co-defendants, testified that Petitioner was the shooter.

Petitioner, D.J. and E.T., used to hang out and smoke weed together. The day of the murder, they ran out of weed and decided to go rob someone. They started walking around looking for someone to rob. Petitioner had a small black gun with him.

While they were walking, they tried to rob a man pushing a lawn mower, but the man ignored them. They kept walking to Monroe Park. At the park, they saw the victim sitting on a bench. They could see that he had “some weed and some money.” Before they approached the victim, Petitioner, D.J. and E.T. stopped and talked about how they were going to rob him and what they were “going to do and stuff.”

D.J. was the first to approach the victim, and he had the gun at that time. However, when the victim refused to hand over his belongings to D.J., Petitioner approached and said something like, “I need that shit.” Petitioner then asked D.J. for

the gun back, and D.J. gave it to him. D.J. heard the victim say something like, “[s]top playing with that gun.” E.T. saw Petitioner point the gun at the victim. The victim “tried to get up and run[,]” and Petitioner shot him. Petitioner, D.J., and E.T. then all ran away.

Columbus Police Detective Melissa Carlson interviewed Petitioner. During this interview, Petitioner first said he was not present during the shooting; he was at home. He later changed his story to him walking around that day with D.J. and a “dark skinned dude.” The “dark skinned dude” said he was going to rob the victim, but Petitioner said he did not believe him. The “dark skinned dude” then pulled out a gun. Petitioner first told Carlson that he left before the victim was shot. Petitioner later changed his story and said he was present when this other boy pulled out the gun and “pulled the trigger.”

Private investigator Robert Britt and another youth named J.C. testified for the defense. J.C. testified that he saw E.T. with a gun after the shooting. J.C. remembered telling the detective that he saw the shooting, and E.T. was the shooter, but he now testified that he does not remember what he saw the day of the shooting. J.C. also testified that he did not see the shooting, and he did not know whether E.T. was holding the gun. J.C. admitted that he “wasn’t cool” with E.T., and he would not mind if E.T. got in trouble. Britt testified that J.C. told him that E.T. actually shot the victim.

Petitioner testified and claimed E.T. was the shooter. Petitioner denied ever smoking marijuana. He testified that he was never involved in an attempted robbery of a man with a lawn mower. He testified that he never agreed to rob the victim, he did not know in advance about robbing the victim, and he “basically” tried to tell E.T. “not to do it, basically like chill out.”

The jury found Petitioner guilty of both aggravated robbery and murder and the

accompanying firearm specifications. At sentencing, defense counsel relayed that she spoke with the jury, and the jury did not believe Petitioner was the shooter. The prosecutor also relayed at sentencing that, although it would not have been admissible at trial, “one of the codefendants did pass a polygraph indicating that Mr. Lee was the person that was the shooter in this case.” Petitioner was subsequently sentenced to a total sentence of 21 years to life imprisonment.

Petitioner appealed to the Ohio Tenth District Court of Appeals and raised two assignments of error. *Lee*, 2016-Ohio-122, ¶ 10. He first contended that the trial court erred by not merging his aggravated-robbery and murder convictions for purposes of sentencing. *Id.* His second assignment of error asserted that the mandatory-bindover procedure was unconstitutional, as it prohibited the juvenile court from making an individualized determination of the appropriateness of the transfer of a defendant’s case to adult court. *Id.* He also contended that the mandatory-transfer process violated his right to due process, his right to equal protection, and his right to be free from cruel and unusual punishment. *Id.*

The Tenth District found that petitioner “failed to raise these constitutional arguments below and has thus waived them.” *Id.*, at ¶ 24. It recognized that it has discretion to consider a forfeited constitutional challenge to a statute, and it may review the trial court’s decision for plain error. *Id.*, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶¶ 15-16. It then noted that it had already rejected all of petitioner’s constitutional arguments in *State v. J.T.S.*, 10th Dist. Franklin No. 14AP-516, 2015-Ohio-1103, and affirmed Petitioner’s convictions and sentence. *Lee*, ¶¶ 25-29.

The Ohio Supreme Court ultimately summarily affirmed the Tenth District’s judgment on the authority of *Aalim*, 83 N.E.3d 883. *Lee*, 86 N.E.3d 322, ¶ 1.

ARGUMENT

EVEN IF THIS COURT HAS JURISDICTION TO REVIEW THESE FORFEITED CONSTITUTIONAL CHALLENGES, PETITIONER MAKES NO SHOWING THAT WARRANTS THE GRANTING OF CERTIORARI REVIEW.

Petitioner contends that his right to Due Process and Equal Protection were violated by Ohio's mandatory-bindover statute. However, adequate and independent state grounds support the judgment in this case. Additionally, Petitioner's constitutional claims are meritless, and Petitioner points to no conflict in the lower courts. For these reasons, further review by this Court is unwarranted.

A. Adequate and Independent State Grounds Support the Judgment

This Court has recognized that it “will not review a question of federal law decided by a state court if the decision rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). “This rule applies whether the state law ground is substantive or procedural.” *Id.*

“In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.” *Id.* “Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.” *Id.*

The fact that “a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: ‘The state court must actually have relied on the procedural bar as an independent basis for its disposition

of the case.” *Harris v. Reed*, 489 U.S. 255, 261-62, 109 S.Ct. 1038, 1042, 103 L.Ed.2d 308 (1989), citing *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985). “If the last state court bases its ruling both on the merits and alternatively on a procedural ground, the procedural ground ruling prevails.” *Brinkley v. Houk*, 866 F.Supp.2d 747, 779 (N.D. Ohio 2011), amended in part, 2012 WL 1537661, and aff’d, 831 F.3d 356 (6th Cir. 2016), citing *Harris*, 489 U.S. at 262-63. In *Harris*, this Court specifically instructed state courts that they “need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court’s judgment even when the state court also relies on federal law.” *Harris*, 489 U.S. at 264 n.10.

To determine whether a state court has relied on a procedural rule to bar review of a claim, the federal court, “examines the latest reasoned opinion of the state courts and presumes that later courts enforced the bar instead of rejecting the claim on the merits.” *Brinkley*, 866 F.Supp.2d at 779, citing *Hinkle v. Randle*, 271 F.3d 239, 244 (10th Cir. 2001); *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). “To qualify as an ‘adequate’ procedural ground, a state rule must be ‘firmly established and regularly followed.’” *Walker v. Martin*, 562 U.S. 307, 316, 131 S.Ct. 1120, 179 L.Ed.2d 62 (2011), quoting *Beard v. Kindler*, 558 U.S. 53, 60, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009).

The failure to comply with a state’s contemporaneous-objection rule constitutes an independent state-law ground adequate to support the judgment below. *Osborne v. Ohio*, 495 U.S. 103, 123, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990); *see also Williams v.*

Bagley, 380 F.3d 932, 968 (6th Cir. 2004) (recognizing that Ohio’s contemporaneous objection rule constitutes an adequate and independent state ground). “Under Ohio law, errors which are not preserved by objection at the trial are considered waived and may not be raised upon appeal.” *Brinkley*, 866 F.Supp.2d at 779, citing *Stores Realty Co. v. Cleveland Bd. Of Bldg. Standards and Bldg. Appeals*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). “[P]lain error review by an appellate court constitutes enforcement of Ohio’s contemporaneous objection rule.” *Brinkley*, citing *Bagley*, 380 F.3d at 968; and *Hinkle*, 271 F.3d at 244. A state appellate court’s review for plain error is viewed as the enforcement of a procedural default. *Hinkle*, 271 F.3d at 244, citing *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000), and *Paprocki v. Foltz*, 869 F.2d 281, 284-85 (6th Cir. 1989).

Here, the Tenth District applied Ohio’s contemporaneous-objection rule and found that Petitioner had waived his constitutional challenges to the mandatory-bindover procedure by not raising them in the trial courts. *Lee*, 2016-Ohio-122, ¶ 24. Nevertheless, it decided to review for plain error. *Id.* As part of such review, it then found that no error occurred based on its prior precedent, and it affirmed Petitioner’s convictions. *Id.*, at ¶¶ 26-28. The Tenth District’s decision was the last reasoned opinion, as the Ohio Supreme Court simply entered a summary affirmance of the Tenth District’s judgment based on the authority of *Aalim*. *Lee*, 86 N.E.3d 322, ¶ 1. The Court’s reference to *Aalim* was entirely consistent with the Tenth District’s reliance on the procedural default and its application of plain-error review, including the Tenth District’s reliance on the *Quarterman* case, which itself was a plain-error-review case from the Ohio Supreme Court. Thus, the judgment in Petitioner’s case rests on adequate

and independent state-law grounds, and this Court lacks jurisdiction to review this case.

Petitioner cannot show that the Tenth District reached an incorrect conclusion under a plain-error analysis. The present case falls far short of justifying reversal on plain-error grounds. Plain error exists in Ohio only if there is an “obvious” defect in the trial proceedings that affected the defendant’s “substantial rights.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). To show plain error, defendant must show that, but for the claimed error, the outcome of the trial clearly would have been different. *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978). Courts may notice plain error “only to prevent a manifest miscarriage of justice.” *Payne*, ¶ 16, quoting *Long*, at paragraph three of the syllabus. Notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 80, 656 N.E.2d 643 (1995).

Here, the Tenth District correctly found that no plain error occurred. It was far from “obvious” that the mandatory-bindover statute is unconstitutional, and Ohio courts had repeatedly rejected that argument before the Tenth District ruled. *See, e.g., State v. McKinney*, 2015-Ohio-4398, 46 N.E.3d 179, ¶¶ 11-29 (1st Dist.); *State v. Anderson*, 2nd Dist. Montgomery No. 25689, 2014-Ohio-4245, ¶¶ 62-76; *State v. Kelly*, 3rd Dist. Union No. 14-98-26, 1998 WL 812238 (Nov. 18, 1998), *8-10; *State v. Mays*, 8th Dist. Cuyahoga No. 100265, 2014-Ohio-3815, ¶¶ 42-45; *State v. Collins*, 9th Dist. Lorain No. 97CA00684, 1998 WL 289390 (June 3, 1998), *2; *J.T.S.*, 2015-Ohio-1103, ¶¶ 39-45; *State v. Lane*, 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶¶ 51-68; *State v. Simon*, 12th Dist. Butler No. CA2014-06-139, 2015-Ohio-970, ¶¶ 15-17. Other states

had also rejected such challenges to mandatory or automatic transfers. *See, e.g., Angel C*, 715 A.2d 652; *Vega v. Bell*, 47 N.Y.2d 543, 550-51, 393 N.E.2d 450 (1979); *People v. Patterson*, 2014 IL 115102, 25 N.E.3d 526, ¶¶ 93-98; *Manduley v. Superior Ct.*, 27 Cal.4th 537, 546, 41 P.3d 3 (2002); *State v. Tyler*, 286 Kan. 1087, 1097, 191 P.3d 306 (2008); *State v. Cain*, 381 So.2d 1361, 1363-65 (Fla. 1980); *Caldwell v. Commonwealth*, 133 S.W.3d 445, 452-53 (Ky. 2004).

Petitioner could not demonstrate an obvious constitutional error in the juvenile court sustaining his mandatory bindover or that the alleged error was plain at the time the juvenile court committed it. *Barnes*, 94 Ohio St.3d at 28.

Petitioner also could not show that any error clearly affected his substantial rights, because he cannot show that, even with an amenability hearing, the juvenile court clearly would not have bound his case over. The Ohio Supreme Court itself has confirmed that the plain-error standard of review requires a showing of *clear* outcome determination. *State v. Cepec*, 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶ 67.

Here, the amenability factors set forth in O.R.C. 2152.12(D) weighing in favor of transfer far outweighed the factors in O.R.C. 2152.12(E) weighing against transfer. The victim suffered physical and psychological harm. O.R.C. 2152.12(D)(1). Petitioner shot and killed the victim. The victim physically suffered before dying; he was bleeding profusely and having problems breathing. The victim suffered psychologically as well. A witness described how the victim was “panicking” and “scared.”

Petitioner also committed this act as part of organized criminal activity. O.R.C. 2152.12(D)(4). The evidence showed that Petitioner and his codefendants got together and planned to go rob people that day. They failed in their first attempt to rob someone,

but kept walking and saw the victim. Before attempting to rob the victim, they stopped and talked about how they were going to do it.

Furthermore, Petitioner committed the aggravated robbery and murder with a firearm. O.R.C. 2152.12(D)(5). He threatened the victim with the firearm, and when the victim tried to flee, Petitioner shot him. The wound proved fatal.

The record also would have supported a finding that Petitioner was mature enough for the transfer. O.R.C. 2152.12(D)(7). Petitioner was the oldest and largest of the three offenders.

Finally, there was insufficient time to rehabilitate Petitioner in the juvenile system. O.R.C. 2152.12(D)(9). Petitioner was already seventeen at the time of trial, and he was facing very serious charges including homicide, making it extremely unlikely that the juvenile-justice system would have sufficient time to rehabilitate a murderer before he would turn 21.

The factors that would weigh against even a discretionary transfer are virtually nonexistent. The victim did not facilitate or induce this offense or provoke Petitioner and his codefendants. O.R.C. 2152.12(E)(1), (2). The victim was sitting on a park bench when Petitioner and his friends approached him. The evidence at trial showed that Petitioner was the principal offender. O.R.C. 2152.12(E)(3). He obtained the gun, and he was the actual shooter. It was disclosed at sentencing that one of the co-defendants even passed a polygraph during which he said that Petitioner was the shooter.

Petitioner also caused physical harm. O.R.C. 2152.12(E)(4). He shot the victim in the abdomen, and the victim died from this wound.

The only factor that might weigh against transfer is that it appears that Petitioner

did not have a prior criminal record. O.R.C. 2152.12(E)(5). But even if Petitioner did not have a prior criminal record, he had not been living a law-abiding life. Just from the events of this day, it is known that Petitioner was skipping school and smoking marijuana and possessing a firearm. Petitioner and his friends also attempted to rob another person before Petitioner shot and killed the victim in this case.

Petitioner could not show under Ohio plain-error review that this is an exceptional case that would result in a manifest miscarriage of justice if the convictions were affirmed. Petitioner was an armed robber and killer. It defies imagination that this murderer would be amenable to rehabilitation in the juvenile system before he would turn 21. If anything, it would have been a manifest miscarriage of justice to reverse the convictions after a full jury trial had been conducted and Petitioner's guilt for these extremely-serious offenses determined. Thus, the record did not clearly show that Petitioner would have avoided discretionary bindover to adult court, and the record confirmed that Petitioner could not establish a manifest miscarriage of justice so as to justify plain-error reversal.

In sum, Petitioner forfeited the constitutional challenges to the mandatory-bindover procedure by not raising them at the trial level. The Tenth District recognized this, and reviewed for plain error and rejected the challenges under plain-error review, which was summarily affirmed by the Ohio Supreme Court. Based on this, an adequate and independent state ground exists to support the judgment. Therefore, this Court is without jurisdiction to further review this case.

B. Ohio's Mandatory-Bindover Statute is Narrowly Tailored

Petitioner fails to acknowledge a critical point: Ohio's mandatory-bindover

procedures are narrowly tailored to the most-serious offenses and most-serious juvenile offenders. The Ohio mandatory-bindover mechanism focuses on the worst of the worst in juvenile offending by focusing on “category one offenses” and “category two offenses.” “Category one offense” is limited to the crimes of aggravated murder, murder, attempted aggravated murder, and attempted murder. O.R.C. 2152.02(BB). “Category two offense” is limited to a small group of the most serious felonies, *i.e.*, voluntary manslaughter, involuntary manslaughter during a felony, kidnapping, rape, aggravated arson, aggravated robbery, and aggravated burglary. O.R.C. 2152.02(CC). These offenses are all first-degree felonies under Ohio law, although one form of aggravated arson can be a second-degree felony, and kidnapping can be a second-degree felony when the victim is released in a safe place unharmed.

The Ohio statutory scheme narrows the group of offenders even further. Even for a “category one offense”, the mandatory-bindover law will apply only if the offender was 16 years of age or older or if the offender, being age 14 or 15, had previously been adjudicated a delinquent for a category one or category two offense and had been committed to the Ohio Department of Youth Services (ODYS) for that offense. O.R.C. 2152.10(A)(1)(a) & (b). Moreover, for a “category two offense”, the mandatory-bindover law will apply only if the category two offense was other than kidnapping, and only if the juvenile offender was 16 years of age or older and the juvenile actively employed a firearm or the juvenile had been previously adjudicated delinquent for a category one or category two offense and been committed to ODYS for that offense.

Another limitation on mandatory bindover arises from the need for the prosecution to prove that probable cause exists that the juvenile committed the category

one offense or category two offense. O.R.C. 2152.12(A)(1)(a) & (b).

The mandatory-bindover mechanism also includes a fail-safe provision that comes into play if the juvenile was bound over under O.R.C. 2152.12(A)(1)(a)(i) or (A)(1)(b)(ii) and the juvenile is ultimately convicted only of offense(s) that would not have allowed a mandatory bindover. O.R.C. 2152.121(B). In that situation, the case returns to the juvenile court for an amenability determination as appropriate to the offense(s) of conviction and for retention of jurisdiction in the juvenile court if a discretionary bindover would not have occurred. *Id.*

As can be seen, Ohio's mandatory-bindover system is tightly controlled. It is limited to a narrow list of the most-serious offenses. It is narrowed further by the need to show probable cause, by the need to satisfy age restrictions, and by the need to show active employment of a firearm, and/or by the need to satisfy prior-adjudication and prior-ODYS elements. And the system provides the aforementioned "bind-back" mechanism as well. There is no constitutional basis to find that a juvenile-division judge should have discretion to veto the legislature's grant of jurisdiction to the general division of the court of common pleas over this limited class of most-serious juvenile offenders.

C. Ohio's Mandatory-Bindover Statute is Constitutional, and Petitioner does not Show that Review is Warranted

Even if this Court were to find that the adequate-and-independent-state-ground doctrine does not apply, further review is still unwarranted in this case. Petitioner does not point to any conflict amongst lower courts on the question of constitutionality of mandatory-bindover statutes. In addition, Petitioner's constitutional challenges are marked by doctrinal and analytical flaws and fail to establish any real basis for finding

that Ohio's mandatory-bindover procedures are unconstitutional.

D. Ohio's Mandatory-Bindover Process does not Violate the Due Process Clause

Petitioner claims that the mandatory-bindover process is unconstitutional because it does not allow for an individualized determination, which he argues violates the Due Process Clause of the United States Constitution. In a bit of doctrinal confusion, Petitioner appears to conflate the separate concepts of substantive and procedural due process. When properly analyzed, these concepts do not support Petitioner's due process challenge.

“The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of ‘life liberty or property’; if protected interests are implicated, we then must decide what procedures constitute ‘due process of law.’” *Ingraham v. Wright*, 430 U.S. 651, 671, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977).

1. Petitioner has no substantive due-process right to be tried as a juvenile or to have an amenability hearing.

Petitioner's arguments start from the false premise that a child has a substantive liberty interest in having his case heard by a juvenile court. No such interest exists.

This Court's “substantive-due-process analysis has two primary features[.]” First, it has “regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation's history and tradition,’” and “implicit in the concept of ordered liberty.” *Washington v.*

Glucksberg, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Second, it has required “‘a careful description’ of the asserted fundamental liberty interest.” *Id.*, at 721.

It is noteworthy that this Court “has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this unchartered area are scarce and open-ended.” *Albright v. Oliver*, 510 U.S. 266, 271-72, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). It has explained that, “[b]y extending constitutional protections to an asserted right or liberty interest, we, to a great extent, place the matter outside the area of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.’” *Glucksberg*, 521 U.S. at 720. “The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” *Albright*, 510 U.S. at 271-72.

Here, a “careful description” of the right Petitioner seeks to recognize is for an amenability determination to weigh his suitability for adult prosecution on an individualized basis. However, there is not even a substantive right to juvenile proceedings, let alone a substantive right to an amenability determination.

As the Ohio Supreme Court recognized, juvenile proceedings are not deeply rooted in our Nation’s history. *Aalim*, 83 N.E.3d 883, ¶ 17. The common-law tradition actually treated 16-year-old offenders as adults. 4 William Blackstone, *Commentaries on the Laws of England* 23-24 (1769). The first juvenile court in the United States was not

even established until 1899. *Aalim*, ¶ 17.

In Ohio, the legislature did not establish juvenile courts throughout the state until 1937. *Id.* Amenability hearings were not added to the juvenile-court system until 1969. *Id.* “Because Ohio’s Due Course of Law Clause and the federal Due Process Clause both predate the creation of juvenile courts in Ohio and throughout the United States, these provisions cannot have created a substantive right to a specific juvenile-court proceeding. Therefore, an amenability hearing cannot be ‘deeply rooted in this Nation’s history and tradition[.]’” *Id.*

A right to juvenile proceedings is not even uniformly recognized today. As of 2016, two states classified the upper age of juvenile-court delinquency at 15, and seven states classified the upper age at 16. Off. of Juv. Just. and Delinq. Prevention, Statistical Briefing Book, www.ojjdp.gov/ojstatbb/structure_process/qa04101.asp. Additionally, in all states, juveniles can be tried as adults in criminal court. Guggenheim, *Graham v. Florida & A Juvenile’s Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L.L. Rev. 457, 493-95 (2012). In the majority of states, some juveniles are automatically transferred by statute to a criminal court for certain specified crimes. *See, e.g.*, ALA. CODE 1975 §12-15-204 (2018); ALASKA STAT. §47.12.030 (2017); ARIZ. REV. STAT. ANN. §13-501 (2018); CONN. GEN. STAT. ANN. §46b-127 (West 2018); DEL. CODE ANN. tit. 11§1447A(f) (2018); FLA. STAT. ANN. §985.56 (West 2017); GA. CODE ANN. §15-11-560 (West 2017); IDAHO CODE ANN. §20-509 (2018); 705 ILL. COMP. STAT. ANN. CS 405/5-130 (West 2018); IND. CODE ANN. §31-30-1-4 (West 2018); IOWA CODE ANN. §232.8 (West 2017) (certain designated offenses committed by a child 16 or older are excluded from the juvenile court’s jurisdiction but there is a reverse-waiver provision

upon motion and for good cause); KY. REV. STAT. ANN. §§635.020, 640.010 (West 2018) (child of a certain age charged with certain crimes must be transferred to circuit court and tried as a “youthful offender”, which in most respects is being proceeded against as an adult); LA. CHILD. CODE ANN. art. 305 (2017); MD. CODE, [CTS. & JUD. PROC.] §§3-8A-03, 4-202 (West 2018); MASS. GEN. LAWS ANN. Ch. 119, §74 (West 2018); MICH. COMP. LAWS ANN. §712A.2 (West 2018); MINN. STAT. ANN. §§260B.007, 260B.101 (West 2017); NEV. REV. STAT. ANN. §62B.330 (West 2017); N.M. STAT. ANN. §§32A-1-8, 32A-2-3(H) (West 2018); N.C. GEN. STAT. §§7B-1604, 7B-2200 (2018); N.D. CENT. CODE §27-20-34(b) (2017); OHIO REV. CODE ANN. §§2152.10, 2152.12 (West 2018); OKLA. STAT. ANN. tit. 10A, §§2-5-101, 2-5-205(B) (2018); OR. REV. STAT. ANN. §137.707 (West 2018); R.I. GEN. LAWS. §14-1-3(1) (2017); S.C. CODE ANN. §§63-19-1210, 63-19-20 (2018); S.D. CODIFIED LAWS §26-11-3.1 (2018) (but there is a reverse-waiver provision that allows the child to request a hearing to determine if it is in the public’s best interest that the child be tried as an adult, and there is a presumption that for children sixteen years of age or older charged with certain felonies be tried as an adult); UTAH CODE ANN. §78A-6-701 (2017); VA. CODE ANN. §16.1-269.1(B) (2018); WASH. REV. CODE §§13.04.030, 13.40.020 (2018); W. VA. CODE ANN. §49-4-710 (2017); WIS. STAT. §§938.183, 938.12 (2018) (but reverse-waiver provision except for children at least fifteen accused of certain crimes), *see* WIS. STAT. §§970.03, 970.032, 970.035, 970.04 (2018).

To find a fundamental right to juvenile proceedings, including finding a requirement for an amenability determination, this Court “would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of

almost every State.” *Glucksberg*, 521 U.S. at 723. Even Petitioner concedes that Ohio, “along with a majority of other states” has “a mandatory transfer scheme.” Petition, at p. 7.

Juvenile proceedings are also not implicit in the concept of ordered liberty, as juvenile proceedings afford fewer procedural protections than adult proceedings. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion) (finding juveniles do not have the right to a jury trial); *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (recognizing that “juvenile offenders constitutionally may be treated differently from adults” and “hearings in juvenile delinquency cases need not necessarily ‘conform with all of the requirements of a criminal trial or even of the usual administrative hearing’”).

In sum, the right to juvenile proceedings is far from deeply rooted, and it is not implicit in the concept of ordered liberty. Substantive due process does not even protect a right to juvenile proceedings, let alone a right for the most-serious juvenile offenders to receive an amenability hearing that mimics Ohio’s statute as applicable to lower-level juvenile offenders. Ohio itself does not apply an amenability-hearing requirement to the most-serious offenders; there would be no basis to foist this limited amenability provision on all of the other states as to all levels of juvenile offenders. Petitioner’s substantive due process claim fails.

2. *Petitioner has no procedural due process right to an amenability hearing.*

Petitioner’s argument also fails when dressed in terms of fundamental fairness. The Ohio Supreme Court has found that while courts have not specifically articulated what fundamental fairness means in a juvenile proceeding, ““a court’s task is to ascertain

what process is due in a given case, while being true to the core concept of due process in a juvenile case – to ensure orderliness and fairness.” *Aalim*, 83 N.E.3d 883, ¶ 23 quoting *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 81, citing *McKeiver*, 403 U.S. at 541.

However, “[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.” *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). “The procedural component of the Due Process Clause does not protect everything that might be described as a ‘benefit’: ‘To have a property interest in a benefit, a person clearly must have more than an abstract need or desire’ and ‘more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Castle Rock v. Gonzales*, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005), quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). “[T]he range of interests protected by procedural due process is not infinite.” *Ingraham*, 430 U.S. at 671.

In Ohio, “[t]he General Assembly determines the jurisdiction of the juvenile court.” Ohio Constitution, Article IV, Section 4(B). The Ohio General Assembly has determined in the limited circumstances set forth in O.R.C. 2152.10(A)(2)(b) and R.C. 2152.12(A)(1)(b) that “juvenile offenders of a certain age charged with aggravated murder, murder, certain serious felonies committed after a prior delinquency adjudication, and certain serious felonies committed with a firearm shall be bound over to adult court.” *Aalim*, 83 N.E.3d 883, ¶ 26.

There is no cognizable procedural due-process interest in having an amenability

determination, because the lone source for that interest would be statutory law, and statutory law makes amenability legally irrelevant to a mandatory bindover. “[W]hen the legislature passes a law of generalized application, the legislative process provides all the process that is due.” *McKinney*, 2015-Ohio-4398, ¶ 15. “[D]ue process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme.” *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 3, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).

Here, the fact that Petitioner seeks to prove, namely that he is amenable to treatment in the juvenile system, is of no consequence under the statutory scheme. As such, there is no procedural-due-process right to an individualized determination in juvenile court. An amenability determination is simply inapplicable to the statutory scheme requiring mandatory bindover.

Nevertheless, Petitioner argues under the test announced in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), that the deprivation of an individualized determination is a due-process violation. “*Eldridge*, propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” *Lassiter v. Durham Cty. Dept. of Social Servs.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). But *Eldridge* does not aid Petitioner here. Petitioner’s argument starts from the false premise that a juvenile has a fundamental liberty interest in his juvenile status. He does not. The Ohio legislature did not vest Petitioner’s class of offenders with an interest in juvenile proceedings. It explicitly removed such offenders from the juvenile-justice system.

Petitioner also relies on this Court’s decision in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), to support his claim that an amenability hearing is constitutionally required. *Kent* stands for the proposition that when a state creates a statutory right for juveniles to be subject to juvenile-court jurisdiction, any deprivation of that right “must measure up to the essentials of due process and fair treatment. *Id.*, at 562; *see also Angel C.*, 715 A.2d at 661 (*Kent* “simply stands for the proposition that if a statute vests a juvenile with the right to juvenile status, then that right constitutes a liberty interest, of which the juvenile may not be deprived without due process, i.e., notice and a hearing.”).

Kent did not address mandatory transfers. Unlike the statutory scheme in *Kent*, Ohio does not vest original and exclusive jurisdiction over juveniles in the juvenile court. Instead, the juvenile court’s jurisdiction is expressly limited by the mandatory-transfer provisions. There is no rule for non-criminal treatment for Petitioner; adult criminal treatment is the rule for these offenses and offenders. The risk of arbitrariness that *Kent* sought to avoid is non-existent under Ohio law.

Here, Petitioner’s mandatory bindover from the juvenile division to the general division of the common pleas court satisfied the requirements of “fundamental fairness” required by the federal Due Process Clause. *Aalim*, 83 N.E.3d 883, ¶ 27. Petitioner had a hearing before a juvenile-division judge to determine his age at the time of the alleged offense and whether there was probable cause to believe that he had committed the conduct alleged in the complaint. *Id.* At this hearing, Petitioner was represented by counsel. *Id.* After the hearing, the juvenile court issued an entry explaining why it no longer had jurisdiction over Petitioner. *Id.* Only after this proceeding was Petitioner’s

case transferred from the juvenile division to the general division of the common pleas court. *Id.* Petitioner fails to show that his bindover violated his due process rights.

3. *The mandatory-bindover statutes do not create an unconstitutional presumption.*

Petitioner also argues that Ohio's mandatory-bindover statutes violate due process because the statutes use "the child's age as an aggravating factor, which arguably stands as a conclusive or irrebuttable presumption[.]" Petition, p. 13. However, the irrebuttable presumption doctrine has essentially been abandoned. *See Weinberger v. Salfi*, 422 U.S. 749, 771-75, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975).

In *Michael H. v. Gerald D.*, 491 U.S. 110, 120, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), this Court recognized that it has "struck down as illegitimate certain 'irrebuttable presumptions.'" However, it found that its holdings did not rest upon procedural due process. *Id.* It noted that "[a] conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate. But the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not." *Id.* As such, this Court found that its "'irrebuttable presumption' cases must ultimately be analyzed as calling into question not the adequacy of the procedures, but – like our cases involving classifications framed in other terms," "the adequacy of the 'fit' between the classification and the policy that the classification serves." *Id.*, at 121.

Here, what Petitioner attacks as an illegal presumption is just a legislative classification. Like thousands of other legislative classifications, the legislative

classification here is rational and constitutional. As already discussed, the classification does not violate the Due Process Clause of the United States Constitution. As will be discussed below, the classification also does not violate the Equal Protection Clause of the United States Constitution. Petitioner's irrebuttable presumption claim is entirely meritless and does not warrant this Court's review.

E. Ohio's Mandatory-Bindover Statutes do not Violate the Equal Protection Clause

“The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, ‘No person shall deny to any person within its jurisdiction the equal protection of the laws.’” *Aalim*, 83 N.E.3d 883, ¶ 29. The Constitution's mandate of equal protection “is essentially a direction that all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Generally, rational-basis review applies unless the statute classifies individuals based on a suspect class or in violation of a fundamental right. *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

“The United States Supreme Court has noted that ‘age is not a suspect classification under the Equal Protection Clause.’” *Aalim*, 83 N.E.3d 883, ¶ 33, citing *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Juveniles are not a suspect class in the context of equal protection law. *Aalim*, 83 N.E.3d 883, ¶ 33.

There also is no fundamental right to be tried as a juvenile, let alone to receive an amenability hearing. As discussed above, such juvenile courts and amenability hearings are not “deeply rooted in this Nation's history and tradition” and are not “implicit in the concept of ordered liberty[.]” *Glucksberg*, 521 U.S. at 720.

Accordingly, Ohio’s mandatory-bindover provisions need only bear a rational relationship to a legitimate government interest. Reviewing courts are to grant “substantial deference” to the legislature’s “predictive judgments.” *Aalim*, 83 N.E.3d 883, ¶ 34; *Turner Broadcasting System, Inc., v. F.C.C.*, 512 U.S. 622, 665, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). “Under rational-basis review, a decision by the state to treat individuals differently is invalidated only when it is ‘based solely on reasons totally unrelated to the pursuit of the State’s goals and only if no grounds can be conceived to justify it.’” *Aalim*, 83 N.E.3d 883, ¶ 35, quoting *State v. Williams*, 88 Ohio St.3d 513, 531, 728 N.E.2d 342 (2000), quoting *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982); and citing *Heller*, 509 U.S. at 320.

The Ohio Supreme Court has found that “[t]he General Assembly enacted the mandatory-bindover procedure to provide special measures for extraordinary cases involving older or violent offenders.” *Aalim*, 83 N.E.3d 883, ¶ 36. It concluded that “[p]rosecuting older juveniles who commit serious crimes in the general division of a common pleas court is rationally related to the legitimate state interest of fighting rising juvenile crime because it allows the most serious offenders to be prosecuted in the general division, where harsher punishments are available.” *Id.* In doing so, it recognized that “harms suffered by victims are not dependent upon the age of the perpetrator.” *Id.* It also found that “there is an explicit mandate in Article IV, Section 4(B) of the Ohio Constitution for the General Assembly to define the jurisdiction of all divisions of the common pleas courts in this state,” and “the General Assembly could rationally achieve the legitimate state interest of decreased juvenile crime by redefining the jurisdiction of the juvenile divisions of the common pleas courts.” *Id.*, at ¶ 37. It

finally concluded that the “mandatory bindover-statutory scheme is rationally related to the legitimate governmental purpose of increased punishments for serious juvenile offenders[.]” *Id.*

The Ohio Supreme Court correctly found that Ohio’s mandatory-bindover mechanism satisfies rational-basis review. Ohio only mandatorily transfers those offenders who commit the most-serious offenses when they are close to adulthood and/or when they have previously committed serious crimes and already went through juvenile rehabilitation efforts at ODYS and obviously failed to be rehabilitated, as shown by their commission of new violent offenses. Such circumstances implicate serious risks to public safety. Older juveniles are more likely to possess the violent capabilities of adults. Furthermore, juveniles with records of serious offenses have likely already demonstrated an inability to be rehabilitated using only the resources of the juvenile court. The state has a legitimate interest in holding juvenile offenders accountable for their crimes, because, again, mandatory bindover only applies to the most serious crimes that juveniles can commit.

The Ohio legislature could reasonably believe that the commission of such crimes under the circumstances set forth in the mandatory-bindover statutes warrant resolution in the adult-criminal system. The need to protect the public from such offenders is at its zenith in these cases that require mandatory bindover. These are violent offenses involving death, great bodily harm, and/or threats of personal violence, often with the use of deadly weapons. The need to protect other *juveniles* in the juvenile system from such violent offenders is also very high. The interest in providing the full panoply of criminal-court procedural protections to the offender is also high, including by providing for a

criminal-court judge to handle the trial or plea and sentencing in such a case, since that judge would be generally experienced in handling such matters for these very serious kinds of offenses.

Thus, for these most-serious violent offenses and offenders, the Ohio legislature could rationally conclude that an individualized “amenability” determination is unwarranted. For this group of juvenile offenders who have already “graduated” into committing such violent offenses, often while armed, the General Assembly could find that the odds would be exceedingly small that such offenders would be “amenable” to rehabilitation in the juvenile system by age 21 and therefore would not warrant the time and expense of attempting to find an amenable offender in this sea of major juvenile offenders who are unamenable. Petitioner’s Equal Protection claim does not warrant this Court’s review.

F. Pseudo-Challenges Using Eighth Amendment Case Law Also Fail

Petitioner broadly claims that “[t]his Court’s juvenile justice jurisprudence has repeatedly recognized the differences between children and adults, and mandated individualized determinations.” Petition, p. 9. However, all but one of the cited cases is an Eighth Amendment case addressing the cruel-and-unusual-punishment clause. *Id.*, citing *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (finding the death penalty for juveniles constitutes cruel and unusual punishment); *Graham*, 560 U.S. 48, (finding a sentence of life without parole for a juvenile offender who did not commit homicide constitutes cruel and unusual punishment); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (finding mandatory-life-without-parole sentences for juvenile offenders violates the Eighth Amendment’s requirement of

individualized sentencing); *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016) (finding that the decision in *Miller v. Alabama* applied retroactively). These cases actually *reinforce* the point that adult prosecution and adult sentencing is appropriate for serious juvenile offenders, tempered by Eighth Amendment concerns only at the very highest end of the sentencing spectrum. Notably, Petitioner makes no Eighth Amendment challenge to the actual sentence he received in this case.

Petitioner's reliance on the Eighth Amendment case law and the treatment of juveniles for sentencing purposes is misplaced. Petitioner equates the mandatory-bindover mechanism to punishment. *See, e.g.*, Petition, p. 12. But, the mandatory-bindover statutes do not compel any particular sentence. Nor does the mandatory-bindover mechanism prevent the sentencing court from considering the defendant's age at the time of the offense. As Ohio's First District stated in *McKinney*, "to implicate the Eighth Amendment's ban on cruel and unusual punishments, there must be a punishment. Mandatory bindover does not constitute punishment: it simply changes the forum where punishment is determined." *McKinney*, 46 N.E.3d 179, ¶ 30.

Even if mandatory bindover were part of "sentencing," it cannot be facially invalidated based on these kinds of "special considerations" arising from Eighth Amendment case law regarding juveniles. If anything, applying an Eighth Amendment analysis should lead to *upholding* this mandatory-bindover system, which is narrowly tailored to the most serious and violent offenses and recidivist serious offenders. A court cannot extract isolated strands of thinking from the specific Eighth Amendment context and then import them into generalized notions of "due process" in order to provide greater protections than the Eighth Amendment itself would provide. *See, e.g., Conn v.*

Gabbert, 526 U.S. 286, 293, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999).

While particular sentences for juveniles could be subject to Eighth Amendment challenges in particular cases, such challenges would be on a case-by-case basis taking into account all matters, including the seriousness of the juvenile’s crime(s) and record, the length of the sentence(s), and the juvenile’s age. “The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid.” *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37. Facial invalidation of every mandatory bindover is extreme overkill in relation to “special considerations” that would come into play for juveniles under the Eighth Amendment only when a court is sentencing a juvenile at the very highest end of the sentencing spectrum.

As a final matter, Petitioner claims that Ohio’s mandatory-bindover procedure “harkens back to a time when children received the worst of both worlds.” Petition, p. 10. This could not be further from the truth. Juveniles transferred under the mandatory-bindover mechanism receive the full due-process protections afforded to adults, including the right to a jury trial. This in no way amounts to the “worst of both worlds.”

G. Complaints about Ohio Supreme Court Developments

There is some irony in Petitioner’s apparent complaints about the Ohio Supreme Court’s decision to reconsider its original and highly flawed decision in the *Aalim* case and in Petitioner’s reliance on Ohio Chief Justice O’Connor’s dissent from granting such reconsideration. Petitioner fails to note that the original decision in *Aalim* did not address the federal constitutional challenges and chose instead to rely solely on state constitutional grounds as a basis to overturn Ohio’s mandatory-bindover statute. *State v.*

Aalim, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 25. The original *Aalim* decision was not a decision on federal law and should not be misunderstood to be some bellwether in that regard. Given the many flaws in the original *Aalim* decision, reconsideration was the only opportunity for the prosecution to obtain a further review of that decision. Seeking review in this Court would not have been proper on such state constitutional matters. As a result, the Ohio Supreme Court's decision to reconsider and reject the state constitutional challenges was not some untoward development that would support review here, but, rather, a righting of the ship on the state constitutional level. The decision to reconsider in *Aalim* hardly warrants this Court's intervention.

This chain of events also serves to provide a different perspective on Chief Justice O'Connor's urging of review by this Court. *Aalim*, 83 N.E.3d 883, ¶¶ 105. The Chief Justice had been part of the original majority that chose to limit its holding to the state constitution, thereby insulating the original decision in *Aalim* from review by this Court. The only reason federal review might be appropriate now is because the Ohio Supreme Court reconsidered and reached the federal challenges in *Aalim*, a move opposed by Chief Justice O'Connor, who would have preferred to maintain the original decision that would avoid this Court's review entirely. At best, her urging of this Court to grant review seems contradictory when she agreed with the original majority's decision to avoid addressing those very same federal constitutional challenges initially.

At bottom, petitioner falls far short of justifying review here. He points to no conflict in the lower courts on these *federal* constitutional issues. The Ohio legislature's decision to create a narrowly-tailored mandatory-bindover statute for the most-serious juvenile offenses and offenders violates no federal constitutional right. Petitioner's

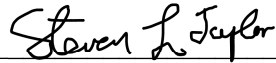
complaints about the Ohio statute represent a mere policy dispute about the best way to address such offenses and offenders, a decision which is properly addressed by state legislatures throughout the Nation. Petitioner's forfeited Due Process and Equal Protection challenges do not warrant review.

CONCLUSION

For the foregoing reasons, respondent State of Ohio respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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