

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL from the
V.	:	Montgomery County Court of Appeals,
	:	2d Appellate District,
ADRIAN L. HAND, JR.,	:	Case No. 25840
	:	
DEFENDANT-APPELLANT.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT ADRIAN L. HAND, JR.**

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Table of Contents

Page No.

Explanation of Why This Is a Case of Public or Great General Interest and Involves a Substantial Constitutional Question1

Statement of the Case and Facts2

Argument in Support of Propositions of Law.....4

First Proposition of Law: The use of a prior juvenile adjudication to enhance an adult sentence with a mandatory prison term violates the constitutional prohibition against cruel and unusual punishment. Eighth Amendment to the U.S. Constitution and Article I, Section 9, Ohio Constitution; R.C. 2929.13(F)(6)4

Second Proposition of Law: Appellate counsel provides ineffective assistance by failing to properly raise constitutional error to the court of appeals. Fourteenth Amendment to the U.S. Constitution and Section 16, Article I of the Ohio Constitution9

Conclusion10

Certificate of Service11

Appendix:

State v. Hand, 2d Dist. Montgomery No. 25840, Decision and Entry (March 9, 2015) A-1

**Explanation of Why this Case is of Public or Great General Interest
and Involves a Substantial Constitutional Question**

This Court has accepted Mr. Hand's direct appeal for review, and is considering the following proposition of law on the merits:

The use of a prior juvenile adjudication to enhance an adult sentence violates a defendant's right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16 of the Ohio Constitution, and the right to trial by jury as guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, Section 5 of the Ohio Constitution.

State v. Hand, Case No. 2014-1814, 3/25/2015 *Case Announcements*, 2015-Ohio-1099.

The instant appeal is taken from the denial of Mr. Hand's Application for Reopening under App. R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), in which Mr. Hand asked the Second District to consider an additional constitutional claim regarding the use of a prior juvenile adjudication to enhance an adult sentence with mandatory prison time. Specifically, the application for reopening argued that the prohibitions against cruel and unusual punishment as guaranteed by the U.S. Constitution and the Ohio Constitution are violated when an act committed by the defendant as a child is used as an enhancement for an adult sentence, and requires mandatory prison time. *State v. Hand*, 2d Dist. Montgomery No. 25840, March 9, 2015 Decision and Entry (Donovan, J., dissenting).

Recent jurisprudence from this Court, and the Supreme Court of the United States, have recognized that the constitutional prohibitions against cruel and unusual punishment may be implicated when mandatory criminal punishment is imposed for an act committed by a child. *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729 (holding that R.C. 2152.86, which subjects some juvenile offenders to mandatory, lifetime sex-offender registration requirements violates both federal and state constitutional prohibitions against cruel and unusual

punishment); *Miller v. Alabama*, __U.S.__, 132 S.Ct. 2455, 2475, 183 L.Ed.2d 407 (2012) (holding that automatically triggered sentences of life without parole cannot be applied to juveniles); *see also State v. Lyle*, 854 N.W.2d 378, 2014 Iowa Sup. LEXIS 84 (holding that mandatory minimum sentences for youth violates Iowa's constitutional prohibition against cruel and unusual punishment). In this case, while appellate counsel raised Mr. Hand's constitutional claim as a violation of due process, counsel failed to argue the sentence enhancement as a violation of cruel and unusual punishment. This Court should accept this appeal so that it may consider the full breadth of Mr. Hand's constitutional claims, and conduct the Eighth Amendment analysis that this case requires.

Statement of the Case and Facts

Adrian L. Hand was convicted of aggravated burglary, aggravated robbery, felonious assault, and a firearm specification. He was sentenced to six years in prison. He did not dispute that three years of that sentence resulting from the firearm specification were mandatory. However, on the basis of R.C. 2929.13(F)(6), the trial court ordered that the rest of Mr. Hand's sentence would be mandatory prison time as well. R.C. 2929.13(F)(6) mandates that a first- or second-degree felony sentence must be mandatory if the defendant had a prior conviction for another first- or second-degree felony, or any other equivalent offense.

Mr. Hand was adjudicated delinquent for aggravated robbery when he was a juvenile. Because this would have been a felony of the first degree if committed by an adult, the court found that it satisfied R.C. 2929.13(F)(6). On the basis of that prior civil proceeding and resulting juvenile adjudication, the trial court ordered that the entirety of Mr. Hand's sentence would be mandatory time, irreducible even in the face of rehabilitative efforts.

Mr. Hand appealed his sentence to the Second District Court of Appeals. That court affirmed. However, the dissent noted that juvenile proceedings are fundamentally different in process and in purpose, and a resulting adjudication is not a criminal conviction that can be used for sentence enhancement. *State v. Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838, ¶9-29 (Donovan, J., dissenting). Mr. Hand appealed to this Court, and this Court accepted his appeal. *State v. Hand*, Case No. 2014-1814, 3/25/2015 *Case Announcements*, 2015-Ohio-1099.

Mr. Hand also filed an Application for Reopening in the Second District, under App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992), arguing that appellate counsel rendered ineffective assistance by failing to raise Mr. Hand's claim as a violation of the constitutional protections against cruel and unusual punishment, and for failing to raise trial counsel's ineffectiveness in that regard. The Second District declined to reopen Mr. Hand's appeal. *State v. Hand*, 2d Dist. Montgomery No. 25840, March 9, 2015 Decision and Entry. However, the dissent concluded that there is a genuine issue as to whether Mr. Hand was deprived of the effective assistance of counsel on appeal, and would have allowed for the reopening so that Mr. Hand could assert the argument that the use of a juvenile adjudication as an enhancement to require mandatory prison time is a violation of the constitutional prohibition against cruel and unusual punishment. *Id.* at 4. This appeal timely follows.

Argument in Support of Propositions of Law

First Proposition of Law

The use of a prior juvenile adjudication to enhance an adult sentence with a mandatory prison term violates the constitutional prohibition against cruel and unusual punishment. Eighth Amendment to the U.S. Constitution and Article I, Section 9, Ohio Constitution; R.C. 2929.13(F)(6).

A. Introduction

Revised Code Section 2929.13(F)(6) requires that a first- or second-degree felony sentence is mandatory if the defendant had a prior conviction for another first- or second-degree felony, or any other equivalent offense, including a juvenile adjudication. Thus, the statute imputes the same consequences of a prior criminal conviction to a juvenile adjudication for an offense committed when the defendant was a child. However, adult criminal cases and juvenile proceedings are fundamentally different, because children are fundamentally different than adults. For example, while the overriding purposes of criminal sentencing are to punish the offender and protect the public, the overriding purposes of juvenile dispositions are to provide for the care, protection, and mental and physical development of the child, rehabilitate the child, as well as hold the child accountable. *Compare* R.C. 2929.11(A) and R.C. 2152.01(A). As such, a juvenile adjudication is traditionally not a criminal proceeding, but a civil proceeding. *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *In re Anderson*, 92 Ohio St.3d 63, 748 N.E.2d 67 (2001), syllabus.

The fundamental differences between adult and juvenile offenders beg for greater protections when it comes to the penalties associated with a child's actions. *Thompson v. Oklahoma*, 487 U.S. 815, 835, 108 S.Ct. 2687, 101 L.Ed. 2d 702 (1988). The reasons why children are not trusted with the privileges and responsibilities of adults also reinforces the belief that their irresponsible conduct is not as morally reprehensible as that of an adult. *Roper v.*

Simmons, 543 U.S. 551, 561-562, 125 S.Ct.1183, 161 L.Ed.2d 1 (2005), citing *Thompson* at 835. The fact that juvenile conduct can automatically lead to a mandatory prison sentence diverges from the Supreme Court's finding that the Eighth Amendment is implicated when an automatically triggered sentence is applied to a juvenile. *Miller v. Alabama*, __U.S.__, 132 S.Ct. 2455, 2475, 183 L.Ed.2d 407 (2012).

B. The roadmap for considering claims of cruel and unusual punishment for acts committed by a child, as set forth by the Supreme Court of the United States, applies here.

The federal prohibition against cruel and unusual punishment flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.* at 2458, citing *Roper* at 560. Ohio's constitution guarantees a similar protection. Article I, Section 9, Ohio Constitution. To evaluate whether a criminal punishment is unconstitutional, a reviewing court must look "beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Miller* at 2463. This Court must first consider whether there is a community consensus against a practice, and then conduct an independent review to determine whether the punishment in question violates the constitution. *Graham v. Florida*, 560 U.S. 48, 61, 130 S.Ct.2011, 176 L.Ed.2d 825; *In re C.P.*, 131 Ohio St.3d 513, 520, 2012-Ohio-1446, 967 N.E.2d 729.

The Supreme Court has recognized that a growing community consensus that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller* at 2458. These findings are grounded in children's developmental and experiential limitations, reduced culpability, as well as the Court's understanding that state laws have traditionally recognized the fundamental differences between children and adults. "The law has historically reflected the * * * assumption that children characteristically lack the capacity to

exercise mature judgment and possess only an incomplete ability to understanding the world around them.” *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2403, 180 L.Ed.2d 310 (2010). “[T]he legal disqualifications placed on children as a class—e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibited the settled understanding that the differentiating characteristics of youth are universal.” *Id.* at 2404.

This Court has applied the Court’s reasoning in that regard when it conducted an Eighth Amendment analysis and held that the mandatory, lifetime sex offender classification required for some juvenile offenders by R.C. 2152.86 violates the constitutional protections against cruel and unusual punishment. *C.P.* at 523-527, quoting *Roper* at 571 and *Graham* at 2028-2029. More recently, the State of Iowa relied on this reasoning, and found that a community consensus is building in that state to eliminate any mandatory minimum sentencing for youth. *State v. Lyle*, 854 N.W.2d 378, 389, 2014 Iowa Sup. LEXIS 84, quoting *J.D.B.* at 2403-2404. In *Lyle*, the Supreme Court of Iowa extended the Court’s precedent from *Roper*, *Graham*, *J.D.B.*, and *Miller*, and held that Iowa’s sentencing scheme violates constitutes cruel and unusual punishment, by depriving the trial court of “the discretion to consider youth and its attendant circumstances as a mitigating factor and to impose a lighter punishment by eliminating the minimum period of incarceration without parole.” *Lyle* at 404.

The Supreme Court has also stated that “[c]ommunity consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual.” *Graham* at 67, quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434, 128 S.Ct. 2641, 171 L.Ed.2d 525. “The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the

punishment in question.” *Graham* at 67, quoting *Roper*, 543 U.S. 551, 575, 125 S.Ct.1183, 161 L.Ed.2d 1 (2005). In this inquiry this Court must also consider whether the challenged practice serves legitimate penological goals. *Id.*

C. The Supreme Court of the United States and this Court have both recognized that mandatory criminal punishment imposed for offenses committed by a child may implicate the Eighth Amendment, because of the child’s reduced culpability and the special characteristics of youth.

There is compelling scientific and medical research that shows fundamental differences between adolescents and adults. Since the landmark decision in *Roper*, the Supreme Court of the United States has consistently relied upon this research, and recognized that special care must be taken with an adolescent charged with a grave offense, because the adolescent’s culpability is limited by both biological and experiential factors. *Miller* at 2458; *Graham* at 67-69; *J.D.B.* at 2403.

The Supreme Court relied upon scientific research regarding adolescent development to support its decision prohibiting the death penalty for juveniles in *Roper*, and to support its holding that prison terms of life without parole for non-homicide offenses constitute cruel and unusual punishment in *Graham*. *Roper* at 569-570; *Graham* at 67-69. Most recently, in *Miller*, the Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders. *Miller* at syllabus. And, in *Miller*, the Court was persuaded that the mandatory, life prison terms required under both Arkansas and Alabama law violated the “basic precept” that punishment must be proportioned to the offender and the offense. *Id.* In relying on this research, the Court in *Miller* held that the Eighth Amendment does not permit a mandatory life sentence to be imposed on an adolescent defendant with lesser culpability and more capacity to change, than an adult counterpart. *Miller* at syllabus.

Here, R.C. 2929.13(F)(6) allows no opportunity for a sentencing court to consider the mitigating factors of a defendant's youth at the time of the juvenile adjudication, and automatically requires the trial court to impose a mandatory prison term. In light of *Roper*, *Graham*, and *Miller*, this provision cannot pass constitutional muster. The fact that juvenile conduct can automatically lead to a mandatory sentence diverges from *Miller*'s clear mandate that automatically triggered sentences cannot be applied to juveniles. *Miller* at 2475. See generally Rebecca J. Gannon, Note, *Apprendi after Miller and Graham: How the Supreme Court's Recent Jurisprudence on Juveniles Prohibits the Use of Juvenile Adjudications as Mandatory "Sentencing Enhancements,"* 79 Brook. L.Rev. 347 (2013).

In its decision declining to reopen Mr. Hand's direct appeal, the Second District reasoned that the Supreme Court's jurisprudence deals with mandatory sentences imposed on "juveniles," and does not apply to Mr. Hand because he was sentenced as an adult for crimes committed as an adult. *State v. Hand*, 2d Dist. Montgomery No. 25840, March 9, 2015 Decision and Entry, p. 3. Mr. Hand does not dispute that he committed his current offenses after he turned 18 and was legally an adult. But, R.C. 2929.13(F)(6) subjects him to an enhanced, mandatory prison term only because of an offense he committed as a juvenile. This Court should recognize that the use of juvenile conduct to require mandatory adult punishment implicates the same constitutional protections addressed by the Supreme Court in *Roper*, *Graham*, *Miller*, and by this Court in *C.P.* Accordingly, this Court should accept this case to consider the constitutional implications of R.C. 2929.13(F)(6) as a violation of the prohibition against cruel and unusual punishment, as guaranteed by the Ohio Constitution and the U.S. Constitution.

Second Proposition of Law

Appellate counsel provides ineffective assistance by failing to properly raise constitutional error to the court of appeals. Fourteenth Amendment to the U.S. Constitution and Section 16, Article I of the Ohio Constitution.

Due process requires the effective assistance of counsel on a first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Fourteenth Amendment, U.S. Constitution; Section 16, Article I, Ohio Constitution. And in Ohio, the right to a first appeal is guaranteed. Section 3, Article IV, Ohio Constitution; R.C. 2953.02. Appellate counsel does not need to raise every nonfrivolous argument on appeal, but counsel must exercise reasonable professional judgment. *Jones v. Barnes*, 463 U.S. 745, 753-754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Counsel renders ineffective assistance if the representation is constitutionally deficient, and the deficiency prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996). The failure to raise a constitutional claim that has a reasonable probability of success constitutes ineffective assistance of appellate counsel. *Reed* at 535-536. Additionally, it is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in state court. *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), at syllabus.

As described in the foregoing Proposition of Law, Mr. Hand's mandatory sentencing enhancement, which is based only on his prior juvenile adjudication, violates the constitutional prohibitions against cruel and unusual punishment. In light of this Court's Eighth Amendment analysis in *C.P.*, and the Supreme Court's jurisprudence regarding the Eighth Amendment implications of mandatory adult punishment for children as set forth in *Miller*, Mr. Hand's constitutional challenge to his mandatory sentence as a violation of cruel and unusual

punishment had a reasonable probability of success. *Miller v. Alabama*, __U.S.__, 132 S.Ct. 2455, 2475, 183 L.Ed.2d 407 (2012). Further, had appellate counsel challenged Mr. Hand's mandatory sentence enhancement as a violation of cruel and unusual punishment, the claim would have been appropriately preserved for further review. *Pinholster* at 1398. This Court should recognize appellate counsel's deficiency for failing to properly raise Mr. Hand's claim as a violation of cruel and unusual punishment, and accept this appeal for review on the merits.

Conclusion

This Court has already acknowledged the substantial constitutional question presented by this case, and accepted the due process claim raised in Mr. Hand's direct appeal for review. However, because of appellate counsel's failure to fully present the extent of the constitutional implications of Mr. Hand's mandatory sentence, his claim regarding the violation of cruel and unusual punishment has not yet been presented to this Court. Upon consideration, this Court should accept this appeal so that it may consider the full breadth of Mr. Hand's constitutional claims, and conduct the Eighth Amendment analysis that this case requires.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Defendant-Appellant Adrian L. Hand** was forwarded by regular U.S. Mail to Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, 301 W. Third Street, 5th Floor Courts Building, Dayton, Ohio 45402, this 23rd day of April, 2015.

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