

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : **CASE NO. 2015-0652**
 :
 Plaintiff-Appellee, : On Appeal From The
 : Montgomery County Court
 : Of Appeals, Second
 vs. : Appellate District
 :
 ADRIAN HAND : **Court of Appeals Case No. 25840**
 :
 Defendant-Appellant,

**MEMORANDUM IN RESPONSE
OF APPELLEE, THE STATE OF OHIO**

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Why Leave to Appeal Should Not Be Granted

This case involves a decision by the Court of Appeals for Montgomery County that is premised upon well-reasoned law and logic, and for which further review is not needed. Specifically, Defendant-Appellant Adrian Hand appeals from the Second District Court of Appeals' decision denying his application to reopen his direct appeal under App.R. 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). In his application, Hand argued that his appellate counsel was ineffective for not arguing on direct appeal that using his prior juvenile adjudication to enhance his adult sentence here from discretionary to mandatory incarceration violated his right against the imposition of cruel and unusual punishment.

The court of appeals denied Hand's application, however, because he offered no valid authority for his proposition that using a prior juvenile adjudication to enhance a sentence imposed upon the offender after he commits another high-level felony as an adult constitutes cruel and unusual punishment. To the contrary, the court of appeals explicitly found that it does not. To that end, the court of appeals denied Hand's application to reopen his direct appeal because there was no genuine issue as to whether Hand was denied the effective assistance of counsel on appeal when counsel failed to make a baseless argument.

Here, Hand offers nothing persuasive to suggest that the court of appeals was wrong in its decision, or to counter the court of appeals' conclusion that the legal arguments and authority he cites deal with the constitutionality of mandatory sentences imposed on *juveniles*, despite the fact that Hand was unquestionably an adult when he was sentenced below to a mandatory prison term. For these reasons, the decision of the Court of Appeals for Montgomery County should stand, and this Court should decline Hand's appeal.

STATEMENT OF THE CASE AND FACTS

Adrian Hand was convicted, following a no-contest plea, of aggravated burglary, aggravated robbery, felonious assault, and a firearm specification. He was 20 years old at the time of his crimes. The trial court sentenced Hand to three-years in prison for the firearm specification, consecutive to three years for the underlying felonies. And because Hand had previously been adjudicated a delinquent child for having committed aggravated robbery when he was 17 years old, the trial court concluded that Hand's three-year sentence for the underlying felonies was mandatory, pursuant to R.C. 2929.13(F)(6) and R.C. 2901.08(A).¹

Hand appealed his sentence to the Second District Court of Appeals for Montgomery County, arguing that the use of his prior juvenile adjudication to enhance his sentence from a non-mandatory to a mandatory prison term violated his due process rights. On September 5, 2014, the court of appeals found Hand's arguments unpersuasive and affirmed his sentence. *State v. Hand*, 2nd Dist. Montgomery No. 25840, 2014-Ohio-3838. Hand appealed the court of appeals' decision and, on March 25, 2015, this Court accepted jurisdiction and agreed to hear Hand's appeal. *State v. Hand*, Ohio Supreme Court Case No. 2014-1814.

On December 4, 2014, Hand filed an application to reopen his direct appeal with the court of appeals, alleging that his appellate counsel was ineffective for not arguing that using his prior juvenile adjudication to render his sentence here mandatory violates the constitutional

¹ R.C. 2929.13(F)(6) mandates the imposition of a mandatory prison sentence for "[a]ny offense that is a first or second degree felony * * * if the offender previously was convicted of or pleaded guilty to * * * any first or second degree felony."

R.C. 2901.08(A) provides, in relevant part: "If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child * * * for a violation of a law or ordinance, * * * the adjudication as a delinquent child * * * is a conviction for a violation of the law or ordinance for purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person relative to the conviction or guilty plea."

prohibition against cruel and unusual punishment. The court of appeals denied Hand's application for reopening on March 9, 2015. It is the denial of his application for reopening that Hand now seeks jurisdiction to further appeal.

ARGUMENT

Appellee's Proposition of Law:

Using a prior juvenile adjudication to enhance a sentence imposed upon an adult does not constitute cruel and unusual punishment.

1. **Cruel and Unusual Punishment:** The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *See also* Ohio Constitution, Article I, Section 9. "[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person." *State v. Weitbrecht*, 86 Ohio St.3d 368, 371, 715 N.E.2d 167 (1999), quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 70, 203 N.E.2d 334 (1964). This Court has recognized, therefore, that "cases involving cruel and unusual punishments are rare, 'limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.'" *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 60, quoting *McDougle*. *See also State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 21, quoting *McDougle* ("[A]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment.")

Here, the trial court imposed a mandatory sentence on Hand pursuant to the terms of R.C. 2901.08(A) and R.C. 2929.13(F)(6) – statutes that have never been found invalid in their application singularly or together. Instead, in the only case (prior to the Second District here) in

which an appellate court has passed judgment on the constitutionality of using juvenile adjudications to render a later adult sentence mandatory, the Seventh District Court of Appeals found that using R.C. 2901.08(A) to enhance a subsequent sentence does not violate the Eighth Amendment. *State v. Rolland*, 7th Dist. Mahoning No. 12 MA 68, 2013-Ohio-2950, ¶ 16. The same rationale relied upon in *Rolland* applies here.

To begin, nothing that Hand argued in his application for reopening, and nothing that he argues here, addresses the constitutionality of using a prior juvenile adjudication to enhance the sentence imposed upon *adults*. Instead, Hand's entire argument focuses on the constitutionality of punishments imposed upon *juveniles*. But Hand was not a juvenile when he was sentenced here to a mandatory prison term - he was an adult being sentenced for a crime that he committed when he was twenty years old. And sentencing-enhancement statutes, like R.C. 2929.13(F)(6), do not change the penalty imposed for the earlier conviction or adjudication, but rather apply solely to assessing the applicable sentence following a subsequent conviction. Accordingly, all of the cases cited to in Hand's Memorandum in Support of Jurisdiction dealing with the inappropriateness of harsh sentences imposed upon juveniles are irrelevant to assessing the appropriateness - let alone the constitutionality - of sentences imposed upon adults.

Moreover, this Court has recognized that an offense committed by a juvenile may have adverse consequences on the offender as an adult, including the use of the prior juvenile adjudication to enhance the charge or penalty for subsequent offenses committed by the offender as an adult. *See State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766 (finding that a juvenile adjudication for driving under the influence of alcohol can be relied upon to enhance a subsequent driving-under-the-influence offense from a misdemeanor to a felony). And while this Court has never specifically addressed the question of whether using a prior

juvenile adjudication to enhance the sentence for a subsequent offense committed by an adult constitutes cruel and unusual punishment, nothing that this Court has ever said on the subject of how R.C. 2901.08(A) impacts R.C. 2929.13(F)(6) would suggest that the Eighth Amendment is implicated - let alone violated - in such cases.

Because the use of a prior juvenile adjudication to enhance a subsequent sentence imposed upon an adult does not constitute cruel and unusual punishment, and because Hand's arguments to the contrary are without merit, leave to appeal on this issue should not be granted.

2. Appellate Counsel's Performance: Turning to the specific claim made in Hand's application to reopen his direct appeal and which the court of appeals rejected – that his appellate counsel was ineffective for not arguing that his mandatory prison term amounted to cruel and unusual punishment – an attorney is not ineffective for failing to raise a meritless claim. Here, there is no basis to Hand's argument that his attorney was deficient for failing to make an argument that has never before been recognized by any court and which, if made, would have been contrary to the reasonable interpretation of all existing case law. In addition, since the arguments Hand advanced in his application to reopen do not substantiate his claim that using his prior adjudication to enhance his subsequent sentence amounted to cruel and unusual punishment, it cannot be said that, but for appellate counsel failure to make the argument on direct appeal, the court of appeals would have reversed his sentence. His claim of ineffective assistance of appellate counsel, therefore, had no merit and was properly rejected by the Second District Court of Appeals. Leave to appeal this issue, therefore, should not be granted.

CONCLUSION

For the reasons set forth above, the State of Ohio, Plaintiff-Appellee herein, respectfully requests that this Court find Hand's proposition of law meritless and deny him jurisdiction to appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response was served by first class mail, postage pre-paid, to counsel for Defendant-Appellant: Sheryl Trzaska, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215, on May 14, 2015.



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