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IN THE SUPREME COURT OF OHIO
2016

STATE OF OHIO,	Case No. 2016-0317
Plaintiffs-Appellee,	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
-vs-	
RICKYM ANDERSON,	
Defendant-Appellant.	Court of Appeals Case No. 26525

BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTING ATTORNEY RON O'BRIEN IN SUPPORT OF APPELLEE STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor prosecutes thousands of felony cases every year. Accordingly, Franklin County Prosecutor Ron O'Brien has a strong interest in assuring that courts consider all the relevant factors in imposing an appropriate sentence and that appellate courts review felony sentences under appropriate legal standards. The Franklin County Prosecutor's Office also prosecutes juvenile delinquency cases, many of which are bound over to the general division of common pleas court. The Franklin County Prosecutor therefore has a strong interest in assuring that juveniles found guilty of criminal offenses are sentenced within the appropriate range determined by the General Assembly.

STATEMENT OF THE CASE AND FACTS

I. After rejecting a plea agreement containing a joint sentence recommendation of nine years, Anderson is convicted and sentenced to 28 years.

This amicus adopts the following description of the facts set forth in *State v. Anderson*, 2nd Dist. No. 25689, 2014-Ohio-4245 (*Anderson I*):

> {¶ 7} This case arises from two separate incidents that occurred on April 20, 2012. On the morning of that day, Rickym Anderson and two high school friends, Dylan Boyd and M.H., met at the RTA hub in downtown Dayton. At the time, Anderson was sixteen years old. Because the three teenagers had smoked marijuana, they were late for school. Instead of going to school, they began walking, and walked around most of the day.
>
> {¶ 8} At around 3:00 p.m., the three teens went down an alley next to 615 Yale Avenue in Dayton, Ohio, and passed a garage with an overhead door that was partially up. At the time, Boyd was carrying a 38 caliber Smith and Wesson revolver that was black in color, with a wooden handle grip.
>
> {¶ 9} Brian Williams and his girlfriend, Tiesha Preston, were in the garage, smoking marijuana and talking. Almost immediately after Williams saw the three people walk by the door, Boyd came

back. Boyd said, "Don't move," and when Williams tried to run out the back door of the garage, Boyd opened fire. Boyd fired one bullet, which hit Williams in the back and exited through his abdomen.

{¶ 10} Williams ran across the street to a neighbor's house. When he got to the porch, he could see Boyd gesturing for Preston to get into the trunk of a gray Impala automobile that was parked in the driveway at 615 Yale. The keys to the Impala had been left on the trunk of another car that was sitting in the garage. However, the trunk of the Impala could be opened by using a release button located inside the Impala.

{¶ 11} The first neighbors that Williams approached shut the door and refused to help him, but Williams was eventually able to get help from a neighbor up the street. That neighbor took Williams to the hospital, where surgeons removed major parts of his small and large intestines. At the time of the trial, which was held nearly a year after the incident, Williams was still wearing a colostomy bag.

{¶ 12} After shooting Williams, Boyd first asked Preston where the keys to the Impala were. When she said she did not know, he told M.H. to search the Impala. When M.H. could not find the keys, Boyd told Anderson to search. Boyd also told Anderson and M.H. to get whatever they could find. Boyd then said to Preston, "Bitch, come on. Get in the trunk." Transcript of Proceedings, Volume II, p. 288. After Preston got into the trunk, she could hear the teenagers rummaging around in the car, and also heard Boyd tell the others to grab her purse. After about 25 to 30 minutes, Preston heard neighbors talking, and began beating on the trunk. She was then released from the trunk.

{¶ 13} Following the robbery at 615 Yale, Boyd, Anderson, and M.H. went to an abandoned house on Windsor Avenue, which was about a block and a half away from where Williams had been shot. There was no money in Preston's purse; instead, the purse contained only credit cards, identification, a food stamp card, and some cigarettes.

{¶ 14} After smoking the cigarettes, they left the purse in the abandoned house. M.H. then went home, and Boyd

and Anderson continued walking. After meeting another high school student, the three teenagers saw a young woman (Star MacGowan) at an apartment building taking out her trash. At that point, Anderson was carrying the gun. Anderson asked MacGowan if she had any money, and threatened her. He told her he was going to "pop her." Transcript of Proceedings, Volume II, p. 351. MacGowan handed over her purse, which contained a lime-green cell phone.

{¶ 15} Just then, another resident of the apartment building came by and heard MacGowan yelling that her purse had been taken. Anderson took the phone out of the purse, dropped the purse, and ran off. The three teenagers ran in different directions.

{¶ 16} The police were called, and were given a description of the three suspects, including their race, type of clothing, weight, and height. Shortly thereafter, Dayton Police Officer, Jeff Hieber, saw Boyd and Anderson walking in the vicinity, wearing clothing that matched the descriptions he had been given. After slowing down to get a better look, Hieber turned his car around and made a left onto Yale Avenue, where the suspects had been heading. When Hieber caught up to Boyd and Anderson, he detained them and ultimately patted them down. Hieber found a lime-green cell phone in Anderson's pocket, and the police subsequently located a gun about 30 to 40 feet away from where Boyd and Anderson were apprehended. None of the witnesses were able to identify Anderson from a photo spread, but they all later identified him at trial.

{¶ 17} Both Boyd and Anderson were detained and were questioned that night by the police. After waiving his *Miranda* rights, Anderson admitted to his involvement in both robberies, and led police to the abandoned house where Preston's purse had been hidden.

{¶ 18} Anderson was initially charged in juvenile court, but he was subsequently bound over to the general division of the common pleas court for trial as an adult. Anderson was indicted on three counts of aggravated robbery, one count of kidnapping, and one count of felonious assault, with gun specifications for each charge. Following a jury trial, he was found guilty of all charges,

> other than the felonious assault charge, which pertained to the shooting of Williams. As was noted, the court sentenced Anderson to a total of 28 years in prison. [Anderson's] co-defendant, Boyd, had previously pled guilty, and had received a nine-year prison sentence.

Id. at ¶¶ 7-18 (internal footnote omitted).

Prior to trial, the State offered Anderson a plea bargain with an agreed sentence of nine years—"essentially the same plea bargain agreed to" by Boyd—but Anderson rejected this offer. Attorney Statement (attached to Presentence Investigation Report).

II. The Second District vacates Anderson's sentence, and on remand the trial court resentences Anderson to 19 years.

On direct appeal, the Second District affirmed Anderson's convictions but remanded for resentencing because the trial court failed to make consecutive-sentence findings and failed to award him the proper amount of jail time credit. *Id*. at ¶¶ 45-51, 55-60.

On remand, the defense argued that, because Boyd was "more culpable" and received a nine-year prison term, the trial court should sentence Anderson to nine years, consisting of three-year concurrent prison terms on all the underlying offenses, consecutive to six years on the two firearm specifications. Resentencing Tr., 8. Alternatively, the defense requested that the trial court "merge" the two firearm specifications into one specification, which—when imposed consecutively to the prison terms on the underlying offenses—would result in a total sentence of six years. *Id*., 8-10. The State responded that Boyd pleaded guilty and agreed to testify against Anderson. *Id*., 12-13. By pleading guilty, Boyd took "full responsibility for what he did." *Id*., 13. The State asked the trial court to again sentence Anderson to 28 years. *Id*.

The trial court sentenced Anderson to 11 years on the three aggravated-robbery counts, concurrent to each other and consecutive to five years on the kidnapping count. The trial court "merged" the firearm specifications attached to all four counts into one specification, to be

served consecutively to the 16 years imposed on the underlying offenses. Thus, the total sentence is 19 years. *Id.*, 14-15; 11-21-14 Amended Termination Entry. The trial court stayed the sentences imposed on the counts relating to the Williams-Preston aggravated-robberies and kidnapping, and remanded those counts back to the juvenile court for an amenability hearing. Resentencing Tr., 15.

Addressing the defense's disparate-sentence argument, the trial court observed that Boyd was sentenced after pleading guilty and pursuant to joint recommendation. *Id.*, 15. The trial court explained that an agreed sentence is "a little bit different" from going to trial. *Id.*, 15-16. There is no "penalty" associated with going to trial; "[t]hat has nothing to do with it." *Id.*, 16. When there is a negotiated plea and an agreed sentence, the trial court's role is to "make sure that all the elements of the offenses are there so there are legitimate offenses that are properly pled to" and to "independently review[] the sentence[] recommended to determine if it appears to be an appropriately negotiated plea appropriate under the [] facts of that case." *Id.* The trial court stated that that is what it did in Boyd's case. *Id.*

The trial court rejected the defense's argument that Boyd was "more culpable" than Anderson, stating that the two were "equally culpable." *Id.* The trial court further stated that Anderson "pretty much denied culpability" when he spoke to police. *Id.* The trial court also emphasized that, during the presentence investigation interview, Anderson did not take "full responsibility," but rather "reported he was with some people who decided to rob some people." *Id.* When asked during the PSI interview why he committed the offense, Anderson responded that "he personally did not [commit] any offense but was hanging around with people who did and that he was not under the control of himself as the drugs had taken over his mind * * *." *Id.*

at 18. The trial court summarized Anderson's comments as follows: "Yeah, I was there but I didn't do anything, you know, they did it, I was just with them." *Id.*, 19.

The trial court also recounted Anderson's criminal history. Anderson has a prior robbery case from 2010; he was placed on probation but violated his supervision twice. *Id.*, 18. Anderson also has adjudications for theft and disorderly conduct. *Id.*

III. The Second District affirms the 19-year sentence.

Anderson appealed his sentence to the Second District, arguing *inter alia* that his sentence was disproportionate to Boyd's, and that the Eighth Amendment prohibits any mandatory minimum sentence on a juvenile offender. On the disproportionality argument, the Second District acknowledged the trial court's statement that Anderson and Boyd were "equally culpable," but the court stated that "[i]t does not follow, however, that equally culpable defendants necessarily must receive the same or similar sentences." *State v. Anderson*, 2nd Dist. No. 26525, 2016-Ohio-135, ¶ 9 (*Anderson II*). "Although Anderson and Boyd may have had a shared level of criminal culpability for their activity in this case, the record supports a finding that they were not similarly situated in all relevant aspects for purposes of sentencing." *Id.* Boyd agreed to plead guilty and testify against Anderson, if requested, and his plea deal included an agreed sentence of nine years. *Id.* at ¶ 10. The trial court dispelled any inference that Anderson's 19-year sentence was a "trial tax." *Id.* at ¶ 11. "Among other things," Boyd's plea agreement "distinguishes the two cases and provides a valid reason for the different sentences imposed." *Id.* "It is permissible to reward a defendant by mitigating his sentence when he chooses to waive a constitutional right and cooperate with authorities." *Id.*, citing *State v. Smith*, 2nd Dist. No. 08-CA-37, 2009-Ohio-1014, ¶¶ 15-16.

On the Eighth Amendment argument, the Second District held that "not all 'mandatory' punishment imposed on juveniles in adult court is cruel and unusual." *Anderson II* at ¶ 37. The court refused to adopt the Iowa Supreme Court's split decision in *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014). *Id*. at ¶¶ 39-40. Addressing Article I, Section 9 of the Ohio Constitution, the court found "nothing conscience-shocking about subjecting a juvenile tried in adult court to a mandatory consecutive three-year prison term when a firearm is used in the commission of his offense" or about "such a defendant being subjected to a minimum three-year prison term when he commits a first-degree felony such as aggravated robbery or kidnapping." *Id*. at ¶ 41.

In a 4-3 vote, this Court granted discretionary view over Anderson's two propositions of law. *05/18/2016 Case Announcements*, 2016-Ohio-3028.

ARGUMENT

<u>Response to First Proposition of Law:</u> A defendant is not punished for exercising his right to trial when he is sentenced to a longer prison term than that of a co-defendant who pleads guilty.

Anderson's first proposition of law claims that the trial court imposed an impermissible "trial tax" by sentencing him to a longer prison term than Boyd. Anderson argues that the trial court improperly characterized the disparity between the two sentences as a "reduction" for Boyd pleading guilty rather than as punishment for Anderson exercising his right to a trial. According to Anderson, he and Boyd are "similarly situated" and should have received the same sentence.

It is of course true that "'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.'" *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969), quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968). "[A] defendant is guaranteed the right to a trial and should never be punished for exercising that right." *State v. O'Dell,* 45 Ohio St.3d 140 (1989), paragraph two of the syllabus. But the mere fact that a defendant who exercises his right to trial is sentenced more harshly than an "equally culpable" co-defendant

who pleads guilty is not enough to prove a constitutional violation. In such a scenario, the defendant must point to affirmative evidence in the record establishing that the trial court "punished" him for going to trial, which Anderson failed to do.

I. Trial courts and prosecutors may provide leniency to a defendant for pleading guilty.

The United States Supreme Court has held that trial courts and prosecutors may treat a defendant who pleads guilty more favorably than if he or she were to go to trial.

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the prosecutor offered to recommend a sentence of five years if the defendant pleaded guilty to the indictment, but informed the defendant that if he turned down the offer the State would seek an indictment under its recidivism statute that would expose the defendant to life in prison. *Id.* at 358-359. The defendant declined the offer, and he was eventually sentenced to life. *Id.* at 359. The defendant claimed that he was punished for exercising his right to trial, but the Court disagreed.

The Court began its analysis observing that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Id.* at 361-362, quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Punishing a defendant for exercising a legal right to attack his conviction is "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Bordenkircher*, 434 U.S. at 362, quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970). The very nature of plea bargaining means that a guilty plea "may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial." *Bordenkircher*, 434 U.S. at 363.

While plea bargaining inherently requires defendants to make difficult choices regarding whether to assert their trial rights, this is a permissible "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Id*. at 364, quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973). "It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." *Bordenkircher*, 434 U.S. at 364. Absent some impermissible discrimination, prosecutors may seek to induce defendants to plead guilty. *Id*. at 364-365.

The following term, in *Corbitt v. New Jersey*, 439 U.S. 212 (1978), the Court addressed the role of plea bargaining in sentencing. Under a New Jersey statute, a murder defendant who goes to trial and is found guilty of first-degree murder is subject to a mandatory life prison term, while a murder defendant who pleads *non vult* or *nolo contendere* may be sentenced to either life or to a lesser term. *Id*. at 214-216. The defendant went to trial, was found guilty, and was sentenced to life. *Id*. at 216.

The Court rejected the defendant's argument that the statute was unconstitutional. "[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *Id*. at 218. Accordingly, "a State may encourage a guilty plea by offering substantial benefits in return for the plea." *Id*. at 219. Like in *Bordenkircher*, "the defendant gave up the possibility of leniency if he went to trial and was convicted on the count carrying the mandatory penalty." *Id*. at 221. The "probability or certainty of leniency in return for a plea" does not invalidate a sentence. *Id*.

The Court echoed its sentiment from *Bordenkircher*, that the State has a "legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining, a process

mutually beneficial to both the defendant and the State." *Id*. at 222. Had the defendant entered a plea and been sentenced to a term less than life, "this would simply have recognized the fact that there had been a plea and that in sentencing it is constitutionally permissible to take that fact into account." *Id*. at 223. "[I]t is not forbidden to extend a proper degree of leniency in return for guilty pleas." *Id*.

Moreover, the New Jersey statute does not create any "retaliation or vindictiveness" for going to trial. *Id*. The defendant was not being "punished for exercising a constitutional right." *Id*. The Court recognized that withholding leniency is not the same as punishment:

> There is no doubt that those homicide defendants who are willing to plead *non vult* may be treated more leniently than those who go to trial, but withholding the possibility of leniency from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed. Those cases, as we have said, unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributed on which leniency is based. *Id*.

In a similar vein, the Court continued:

> It cannot be said that defendants found guilty by a jury are "penalized" for exercising the right to a jury trial any more than defendants who plead guilty are penalized because they give up the chance of acquittal at trial. In each instance, the defendant faces a multitude of possible outcomes and freely makes his choice. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision. *Id*. at 226.

The Court again addressed the effect of plea bargaining in sentencing in *United States v. Goodwin*, 457 U.S. 368 (1982). In that case, the defendant was initially charged with several misdemeanors. *Id*. at 370. After plea discussions failed, the defendant advised the prosecutor that he wished to exercise his right to a trial; the government then obtained a felony indictment, and the defendant was ultimately found guilty of one felony and one misdemeanor. *Id*. at 370-

371. The Court rejected the defendant's argument that the indictment was the result of prosecutorial vindictiveness.

The Court refused to presume a vindictive motive when a prosecutor pursues additional charges after plea negotiations fail, because there can be valid reasons for a prosecutor's decision in this regard. *Id*. at 380-382. Plus, requiring the government to prove the defendant's guilt—either to a judge or jury—is insufficient to warrant a presumption that changes in the charging decision are unjustified. *Id*. at 382-383. When a defendant demands a trial, the prosecutor is not asked "to do over what it thought it had already done correctly." *Id*., citing *Colten v. Kentucky*, 407 U.S. 104, 107 (1972). A "mere opportunity for vindictiveness" is not enough to justify a presumption of vindictiveness. *Goodwin*, 457 U.S. at 383.

Finally, in *Alabama v. Smith*, 490 U.S. 794 (1989), the defendant pleaded guilty to two offenses in exchange for the dismissal of a third offense and was sentenced to 30 years. *Id*. at 795-796. The defendant later had his plea vacated, and after a trial he was convicted of all three offenses and sentenced to life, consecutive to 150 years. *Id*. at 796. The Court refused to apply a presumption of vindictiveness to the increased sentence, because "[w]hen a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Id*. at 801. "Even when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial." *Id*. "[T]he judge may gather a fuller appreciation of the nature and extent of the crimes charged." *Id*. Additionally, "after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Id*., citing *Brady v. United States*, 397 U.S. 742, 752 (1970).

The Court explained that, under *Pearce*, a presumption of vindictiveness applies when a defendant successfully appeals from a trial and is again convicted and sentenced to a longer prison term, because "the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first[.]" *Id.* at 802. But when a defendant receives a longer sentence after a trial than he did after a guilty plea, "there are enough justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness." *Id.* This conclusion follows from the Court's post-*Pearce* case law—including *Bordenkircher* and *Corbitt*—recognizing that a prosecutor may treat a defendant more favorably if he pleads guilty than if he goes to trial. *Id.* After all, "[a] guilty plea may justify leniency." *Id.*, citing *Brady*, 397 U.S. 742.

Several principles emerge from these cases. First, plea bargaining is an essential component to our criminal justice system that benefits both defendants and the government alike. Second, plea bargaining inherently involves offering leniency to a defendant in exchange for the defendant's waiver of various rights. Third, whether viewed as offering leniency for pleading guilty or withholding leniency for going to trial, the fact that a defendant is sentenced more harshly after a trial than he would have been after a guilty plea is not enough to show that he was punished for exercising his right to trial. And fourth, there is no presumption of vindictiveness when a defendant receives a longer sentence after trial than what he would or could have received after a guilty plea.

II. A trial court may sentence a defendant who pleads guilty more leniently than an "equally culpable" co-defendant who goes to trial.

In the above cases, the disparate treatment between pleading guilty and going to trial all involve a *single* defendant—i.e., the sentence after going to trial is less favorable for the

defendant than the sentence would have been had that same individual pleaded guilty. The Court's decisions confirm that leniency for pleading guilty is constitutional. The present case, of course, involves *two* defendants: Boyd, who pleaded guilty and was sentenced to nine years; and Anderson who went to trial and was sentenced to 19 years. The Court's analysis, however, applies equally—if not more so—to the two-defendant scenario.

But first, there is a glaring flaw in Anderson's argument that he should have received the same nine-year sentence as Boyd. Prior to trial, the State offered Anderson "essentially the same plea bargain agreed to" by Boyd, including an agreed sentence of nine years, which Anderson declined. Anderson thus had the same opportunity for leniency as Boyd, but he chose to go to trial. By doing so, Anderson took the risk of a longer sentence, but he also could have been acquitted. That the risk ultimately did not pan out for Anderson does not mean that he was "punished" for going to trial. This is exactly what the Court had in mind when it stated that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher*, 434 U.S. at 363.

Although Anderson compares his sentence to Boyd's, the fact that Anderson was offered the same deal as Boyd makes this case no different than the one-defendant scenario presented in *Bordenkircher*, whereby a defendant receives a longer sentence after trial than what he or she could have received had he pleaded guilty. *Id.* at 360-361 ("this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.").

To be clear, this is not to say that the prosecutor was *required* to offer Anderson the same plea bargain as was extended to Boyd—or any plea bargain at all, for that matter. A defendant

has no right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). But having received an offer for an agreed nine-year sentence, and having turned down that offer, Anderson cannot complain that he was not sentenced to nine years.

Putting aside that Anderson turned down the State's offer for an agreed nine-year sentence, the fact that Anderson was ultimately sentenced to a longer prison term than Boyd does not violate the constitution. For the same reasons that a defendant may receive a longer sentence after going to trial than what he or she could have received after pleading guilty, nothing requires that a defendant who goes to trial receive the same sentence as a co-defendant who pleads guilty, even if the two are "equally culpable."

When a defendant who goes to trial receives a longer sentence than a co-defendant who pleads guilty, it is not because the defendant who went to trial is being "punished" for exercising a legal right. Rather, it is the result of the "give-and-take negotiation" between the co-defendant and the prosecution. *Bordenkircher*, 434 U.S. at 362. The prosecution was able to "persuade the [co-]defendant to forgo his right to plead not guilty." *Id*. at 364. The fact that a defendant could have received leniency had he or she pleaded guilty does not invalidate a longer sentence imposed after a trial. *Corbitt*, 439 U.S. at 221. Equally so, the fact that a co-defendant who pleads guilty received leniency does not invalidate the sentence of a defendant who goes to trial. It is "constitutionally permissible" to take into account the fact that the co-defendant pleaded guilty, and "it is not forbidden to extend a proper degree of leniency" in return for a co-defendant's guilty plea. *Id*. at 223.

Anderson argues that extending leniency to a co-defendant who pleads guilty amounts to a "trial tax" for the defendant who elects to go to trial. Not so. The Supreme Court in *Corbitt* refused to characterize as "punishment" the fact that a defendant receives a longer sentence after

trial than what he could have received had he pleaded guilty. "[W]ithholding the possibility of leniency from [a defendant who goes to trial] cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed." *Id*. at 223. Just as a defendant is not punished for going to trial merely because he *could have* received leniency had he pleaded guilty, nor is a defendant punished for going to trial merely because a co-defendant pleaded guilty and *actually did* receive leniency.

There are additional reasons why the "punishment" label is inappropriate when a defendant who goes to trial is sentenced longer than a co-defendant who pleads guilty. In the one-defendant scenario, the defendant's sentence after trial is compared against what the sentence could have been had that same defendant pleaded guilty. Because the same individual is used in both sides of the comparison, typically the only variable between the two sentences is the manner in which the conviction is obtained. Yet, even in the one-defendant scenario, the Supreme Court's cases establish that the difference in treatment between pleading guilty and going to trial is constitutional. But when the sentence of a defendant who went to trial is compared against the sentence of a co-defendant who pleaded guilty, the manner of conviction is one of many variables that can affect the trial court's sentencing decision. Even when the defendant and co-defendant are "equally culpable" in that they had similar roles in the crimes, the existence of these variables makes it impossible to conclude that the defendant and co-defendant are "similarly situated."

The most obvious variable is the simple fact that a co-defendant pleaded guilty and the defendant did not do so. The guilty plea—all by itself—sufficiently distinguishes the defendant and the co-defendant for sentencing purposes. A guilty plea is seen as strong evidence of remorse, and the presence or absence of genuine remorse can factor into a trial court's sentencing

decision. R.C. 2929.12(D)(5) & (E)(5). A defendant "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a short period of time than might otherwise be necessary." *Brady*, 397 U.S. at 753. Indeed, the federal sentencing guidelines consider a guilty plea "significant evidence of acceptance of responsibility." U.S.S.G. § 3E1.1(a) cmt. n.3. "A guilty plea may justify leniency." *Smith*, 490 U.S. at 802.

The present case highlights this point perfectly. Boyd pleaded guilty, thereby fully admitting his guilt. Anderson, on the other hand, did not plead guilty and indeed continued to minimize his role in the crimes even after the trial. In the PSI interview, Anderson maintained that he "personally did not [commit] any offense but was hanging around with people who did." While Anderson purported to acknowledge his guilt during his allocution at the resentencing hearing, the trial court could easily conclude that these comments were insincere and that Anderson's comments during the PSI interview were proof that he has failed to accept responsibility for his crimes. The record does not contain Boyd's statements during his plea hearing and sentencing, but the trial court could conclude that Boyd expressed genuine remorse whereas Anderson had not.

Another obvious variable is the fact that a co-defendant who pleads guilty will often be convicted of different and/or fewer offenses than a defendant who goes to trial. This is the very nature of the "give-and-take negotiation common in plea bargaining between the prosecutor and defense, which arguably possess relatively equal bargaining power." *Bordenkircher*, 434 U.S. at 362. Indeed, defendants most often plead guilty precisely because the State has agreed to drop or reduce charges. Similarly, a plea agreement often involves a joint sentence recommendation, *id*. at 363, and a trial court is entitled to give substantial weight to such an agreement.

Again, the present case is a prime example. Although the record does not reveal exactly what charges Boyd pleaded guilty to, presumably he pleaded to something less than the four first-degree felonies and firearm specifications that Anderson was convicted of. Also, the trial court explained that in sentencing Boyd it was heavily influenced by the nine-year agreed sentence, whereas in sentencing Anderson the trial court did not have the benefit of any sentencing agreement.

A third variable distinguishing a defendant who goes to trial from a co-defendant who pleads guilty is that many plea bargains contain an agreement to cooperate with authorities, which is a relevant sentencing factor. The federal sentencing guidelines allow for a sentence reduction if the government files a motion "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S.S.G. § 5K1.1. Accordingly, federal courts have held that a defendant may receive a longer sentence than a co-defendant who provides substantial assistance. *United States v. Lipsey*, 509 F.App'x 714, 720 (10th Cir.2013) (defendant and co-defendant "do not stand in similar positions given the aspect of cooperation" of the co-defendant); *United States v. Compaz*, 208 F.App'x 690, 693 (11th Cir.2006) (no "unwarranted sentence disparity" when defendant received greater sentence than equally culpable co-defendant, because the co-defendant received a § 5K1.1 departure); *United States v. Gallegos*, 480 F.3d 856, 858-859 (8th Cir.2007) (defendant and co-defendant were not similarly situated because, among other reasons, the co-defendant "received motions for a downward departure based on substantial assistance").

Yet again, this case serves as a prime example. Boyd agreed to testify against Anderson as part of his plea agreement. Although the State chose not to use Boyd as a witness, the mere

fact that Boyd was willing to do so is a relevant sentencing factor distinguishing him from Anderson.

Another variable is the personal characteristics of the defendant and the co-defendant. Even when a defendant and co-defendant are "equally culpable"—that is, even when they played similar roles in the crime—there can be differences in their personal and criminal histories that justify imposing different sentences. Imposing sentence is not about just looking at the offense; it is also about looking at the offender. A sentencing court must consider "'the fullest information possible concerning the defendant's life and characteristics'" because "such a breadth of information ensures that the punishment will suit not merely the offense but the individual defendant." *Wasman v. United States*, 468 U.S. 559, 564 (1984), quoting *Williams v. New York*, 337 U.S. 241, 247 (1949).

Take the present case: while Boyd's criminal history is not in the record, the trial court found significant that Anderson has prior adjudications for robbery, theft, and disorderly conduct. Even if Boyd and Anderson are "equally culpable," they are different individuals with different characteristics—and thus may legitimately receive different sentences.

Finally, a trial court will naturally have more information about the offender and the offense after a trial than after a guilty plea. *Smith*, 490 U.S. at 801; see also, *Texas v. McCullough*, 475 U.S. 134, 140 (1986) (no error when trial court vacated defendant's sentence and after retrial sentenced him to longer prison term, because the initial sentence was "unduly lenient in light of significant evidence not before the sentencing jury in the first trial"). Along these lines, "[t]he defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation." *Smith*, 490 U.S. at 801. *Smith* and *McCullough* involved a single defendant who was sentenced to a longer prison term after a trial. But even

when there are multiple defendants—one who goes to trial and another who pleads guilty—it is no less true that the trial will likely reveal more sentencing information than the guilty plea. Accordingly, the trial court was likely far more familiar with Anderson and his criminal conduct than it was with Boyd's.

These are just some of the many variables that go into sentencing. It is a vast oversimplification to say that, when a defendant goes to trial, the trial court must calibrate the sentence to match that of a co-defendant who earlier pleaded guilty. That two offenders had similar roles in the crimes does not alone make them "similarly situated." There are multiple reasons why a trial court may sentence a co-defendant who pleads guilty more leniently than a defendant who goes to trial, even when the two are "equally culpable."

III. When a defendant receives a longer sentence than a co-defendant who pleads guilty, it is the defendant's burden to affirmatively show vindictiveness.

For all these reasons, the mere fact that a defendant who went to trial received a longer sentence than a co-defendant who pleaded guilty is not enough to presume vindictiveness. The Supreme Court has adopted a presumption of vindictiveness when a defendant is convicted after trial, successfully appeals, and then receives a higher sentence after retrial. *Pearce*, 395 U.S. at 725. The only other instance in which a presumption of vindictiveness applies is when a prosecutor re-indicts a defendant on a felony after the defendant invokes his right to a de novo trial from a misdemeanor conviction. *Blackledge v. Perry*, 417 U.S. 21, 23 (1974). But the Court has since "been chary about extending the *Pearce* presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as in *Pearce* and *Blackledge*." *Wasman*, 468 U.S. at 566.

A presumption of vindictiveness does not apply if "the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Smith*, 490

U.S. at 801. When the sentencing disparity involves the *same defendant*, there are multiple legitimate reasons why a longer sentence may be imposed after trial—including more information and the absence of leniency. *Id*. *A fortiori*, when the sentence disparity involves *two defendants*, there is even less reason to believe that the difference in sentence is attributable to vindictiveness. Given the multitude of reasons why one defendant may receive a longer sentence than a co-defendant, there is no "reasonable likelihood * * * that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Id*. at 799 (internal quotation marks and citation omitted).

Moreover, both *Pearce* and *Blackledge* involved retrial and resentencing after a defendant exercised his right to appeal. Both cases thus implicated the court's "institutional bias inherent in the judicial system against the retrial of issues that have already been decided." *Goodwin*, 457 U.S. at 376. A trial court has no desire "to do over what it thought it had already done correctly," *Colten*, 407 U.S. at 117, and may act "in self-vindication," *Chaffin*, 412 U.S. at 27. This institutional bias does not come into play when a trial court sentences a defendant differently than a co-defendant.

Accordingly, a defendant seeking to prove vindictiveness must point to more than just the fact that he received a longer sentence after trial than what an "equally culpable" co-defendant received after pleading guilty. The defendant must prove with affirmative evidence that the trial court "punished" him for exercising his right to trial. And here, Anderson failed to satisfy this burden. In fact, not only does the record fail to affirmatively show vindictiveness, the record affirmatively shows that the trial court was *not* vindictive. The trial court explained that Anderson was not being punished for going to trial and that it was influenced heavily by the fact

that Boyd and the State had agreed to the nine-year sentence. The trial court further explained that Anderson failed to show any remorse and that he has a history of criminal adjudications.

Anderson's first proposition of law should be overruled.

> **<u>Response to Second Proposition of Law:</u>** The Eighth Amendment does not prohibit a trial court from imposing a mandatory sentence on a juvenile offender.

Relying heavily on the Iowa Supreme Court's decision in *Lyle*, 854 N.W.2d 378, Anderson's second proposition of law claims that imposing any mandatory sentence on a juvenile offender is unconstitutional under the Eighth Amendment and Article I, Section 9 of the Ohio Constitution. According to Anderson, mandatory sentences prevent the trial court from taking into account the juvenile's age and other mitigating factors of youth. Anderson further argues that due process requires that a trial court have discretion to sentence a juvenile offender under either the juvenile or adult code.

True, juveniles may not be sentenced to a mandatory sentence of life without parole (LWOP). *Miller v. Alabama*, 132 S.Ct. 2455 (2012). It does not follow, however, that the Eighth Amendment prohibits *all* mandatory sentences for juvenile offenders. Multiple courts have refused to follow *Lyle*. *State v. Barbeau*, 370 Wis.2d 736, 883 N.W.2d 520, ¶¶ 40-44 (2016); *State v. Wilson*, ___ N.E.3d ___, 2016 IL (1st) 141500, ¶ 44; *People v. Rigmaden*, 3rd Dist. CO71533 (Cal.Ct.App. 2015). This Court should do the same.

I. This case is a poor vehicle to address whether juvenile offenders are subject to mandatory minimum sentences.

But first, for at least three reasons, the present case is ill-suited to address Anderson's argument that any mandatory sentence on a juvenile offender is cruel and unusual punishment.

First, while Anderson claims that mandatory sentences are unconstitutional for juvenile offenders, the trial court here actually *failed* to impose a statutorily-required prison term.

Anderson was found guilty of three counts of aggravated robbery and one count of kidnapping, all with firearm specifications under R.C. 2941.145. Because Anderson was found guilty of aggravated robbery, the trial court was required to impose consecutive three-year prison terms on *at least two* of the firearm specifications. R.C. 2929.14(B)(1)(g); R.C. 2929.14(C)(1)(a). This requirement applies regardless of whether the offenses are part of the "same act or transaction." But even applying a "same act or transaction" test, the trial court still was required to impose sentence on two of the specifications because this case involves two transactions involving separate times, locations, and victims. R.C. 2929.14(B)(1)(b). The trial court, however, "merged" the firearm specifications and imposed only one three-year prison term on the specifications. Thus, Anderson did not receive the mandatory six years on the firearm specifications.

To be sure, the trial court more than made up for the absence of an additional three-year prison term for the firearm specifications by sentencing Anderson to a total of 19 years—well exceeding the total mandatory minimum prison term.. But this only highlights the second reason why this case is a poor vehicle to address Anderson's argument. While Anderson claims that the trial court should have discretion to impose something less than the mandatory sentence, the trial court *did* have discretion in choosing what sentence to impose on the underlying first-degree felonies and whether to order those sentences be served concurrently or consecutively. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. The trial court sentenced Anderson to maximum 11-year sentences on the aggravated-robbery counts, concurrent to each other but consecutive to five years on the kidnapping count.

Given how the trial court sentenced Anderson on the underlying felonies, there is no reason to believe that—even if it had the option of doing so—the trial court would have opted

against imposing the mandatory sentences on the firearm specifications. The mandatory minimum sentences on the firearm specifications "did not play any role in [Anderson's] sentence." *Barbeau*, 370 Wis.2d 736, ¶ 34 (juvenile offender had no standing to contest mandatory minimum sentence because he was sentenced "far in excess" of the mandatory minimum). Contrast this with *Lyle*. There, the defendant was convicted a single count of robbery and the trial court sentenced him to a mandatory sentence of ten years (making him eligible for parole after seven). *Lyle*, 854 N.W.2d at 381. The trial court in *Lyle* did not exercise any discretion in sentencing the defendant, so the defendant could legitimately claim that the trial court might have sentenced him to something less than the mandatory sentence if given the option to do so. Not so for Anderson.

Third, the sentences on the counts relating to the Williams-Preston aggravated-robberies and kidnapping are not yet final. The trial court stayed the sentences on those counts and transferred them back to the juvenile court, as required by R.C. 2152.121(B)(3). The juvenile court will be required to impose a serious-youthful-offender (SYO) sentence under R.C. 2952.13(D)(1), and in imposing the adult portion of this sentence the juvenile court shall "give preference" to the sentence imposed by the trial court. R.C. 2952.121(B)(3)(a). The State may object to the SYO sentence and request that the sentence imposed by the trial court be invoked. R.C. 2152.121(B)(3)(b). If the State objects, the juvenile court shall hold an amenability hearing: If the juvenile court finds Anderson not amenable, then it must grant the prosecutor's motion and transfer the case back to adult court and the original sentence must be invoked; if the juvenile court finds Anderson to be amenable, then it must deny the State's motion and it impose an SYO sentence under R.C. 2152.121(B)(3)(a). *Id.*

The record does not disclose the status of the sentences relating to the Williams-Preston aggravated-robberies and kidnapping. Assuming the State objects to an SYO sentence in the juvenile court, Anderson will have ample opportunity at the amenability hearing to present evidence regarding his age and other mitigating factors of youth. If the juvenile court ultimately imposes an SYO sentence on those counts, the sentence will include an adult portion—which only has to "give preference" to the sentences imposed by the trial court—and a traditional juvenile disposition. R.C. 2152.13(D)(1)(a), (b). At that point, Anderson can challenge the constitutionality of the adult portion of the sentence. No matter what adult sentence the juvenile court selects, the sentence will be stayed "pending the successful completion of the traditional juvenile dispositions imposed." R.C. 2152.13(D)(1)(c). In short, depending on the outcome of the juvenile-court proceedings, Anderson may or may not ultimately serve the adult sentences imposed by the trial court on the Williams-Preston counts.

For these reasons, this case is a poor vehicle to address Anderson's argument that imposing a mandatory sentence on a juvenile offender is cruel and unusual punishment. Anderson's arguments in this regard would be better addressed in a case—like *Lyle*—where (1) the trial court actually imposes all mandatory sentences, (2) the trial court has not already exercised discretion to impose non-minimum sentences, and (3) all the sentences are final and not subject to reduction in later proceedings.

II. It is not cruel and unusual punishment to sentence a juvenile offender to a mandatory non-LWOP sentence.

Anderson's second proposition of law also fails on the merits. At the outset, Anderson's arguments are far-reaching. Anderson claims that it is unconstitutional to impose a mandatory sentence on a juvenile offender, but *every* offense contains a mandatory minimum sentence. Even if a prison term is not required, a trial court must at the very least impose community

control. *State v. Anderson*, 143 Ohio St.3d 173, 2015-Ohio-2089, ¶ 23 ("[C]urrent felony sentencing statutes, contained primarily in R.C. 2929.11 to R.C. 2929.19, require trial courts to impose either a prison term or community control sanctions on each count."). Community-control sanctions, in turn, have certain minimum requirements. R.C. 2929.15(A)(1) (requiring "one or more community control sanctions"); *id*. (nonresidential sanctions must include a condition that the offender abide by the law and not leave the state without permission). Consequently, unless no sentence is imposed due to merger under R.C. 2941.25, every offense requires the imposition of some sentence of one form or another. Taken to its logical conclusion, Anderson's argument would mean that trial courts must have discretion to impose *no adult sentence at all* on juvenile offenders.

This is not the law. Of course, juvenile offenders benefit from several categorical bars on punishment. A juvenile offender may not be sentenced to death, *Roper v. Simmons*, 543 U.S. 551 (2005); may not be sentenced to LWOP for a non-homicide offense, *Graham v. Florida*, 560 U.S. 48 (2010); may not be sentenced to a mandatory LWOP sentence for a homicide offense, *Miller*, 132 S.Ct. 2455; and may not be sentenced to a discretionary LWOP sentence for a homicide offense unless the crime reflects "permanent incorrigibility." *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016). The reasoning behind these categorical rules is that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 132 S.Ct. at 2464.

But there is no categorical constitutional prohibition against sentencing a juvenile offender to a non-LWOP mandatory sentence. To start, the state of the law reflects a national consensus favoring non-LWOP mandatory minimum sentences for juvenile offenders. *State v. Barbeau*, 370 Wis.2d 736, ¶ 39 (citing cases). Even *Lyle* acknowledged that "no other court in

the nation has held that its constitution or the Federal Constitution prohibits a statutory schema that prescribes a mandatory minimum sentence for a juvenile offender." *Lyle*, 854 N.W.2d at 386. *Lyle* also acknowledged that "most states permit or require some or all juvenile offenders to be given mandatory minimum sentences." *Id.* Although not dispositive, the existence of this national consensus favoring non-LWOP mandatory minimum sentences is significant.

Moreover, in prohibiting mandatory LWOP for juvenile offenders, *Miller* repeatedly emphasized that its holding was based on the unique nature of an LWOP sentence and its status as the most severe sentence available for juvenile offenders. For example, the Court observed that juveniles' diminished capacity and greater prospects for reform make them "less deserving of the most *severe* punishments." *Id.* at 2464, quoting *Graham*, 560 U.S. at 68 (emphasis added); see, also, *Miller*, 132 S.Ct. at 2466 ("imposition of the State's most severe penalties on juvenile offenders cannot proceed as though they were not children."). Central to the Court's holding was that LWOP sentences "share some characteristics with death sentences that are shared by no other sentences." *Miller*, 132 S.Ct. at 2466, quoting *Graham*, 560 U.S. at 69. An LWOP sentence is "irrevocable" and is especially harsh on juveniles because they serve more years and a greater percentage of their lives in prison than an adult offender sentenced to LWOP. *Miller*, 132 S.Ct. at 2466. "All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment." *Id.* Individualized sentencing is required to impose an LWOP sentence on a juvenile offender precisely because LWOP is analogous to the death penalty for juvenile offenders. *Id.* at 2467-2468.

Discussing the unique features of an LWOP sentence, the Court stated that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*. at 2465. For example, incapacitation generally does not justify an LWOP sentence on a juvenile offender, because an LWOP sentence "would require mak[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth." *Id*., quoting *Graham*, 560 U.S. at 73 (internal quotation marks omitted). Nor does rehabilitation support an LWOP sentence, because LWOP "'reflects an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." *Miller*, 132 S.Ct. at 2465, quoting *Graham*, 560 U.S. at 74; see also, *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, ¶¶ 44-45 (equating lifetime sexual-offender registration with LWOP).

These concerns are not present when a trial court imposes a non-LWOP mandatory sentence. Individualized sentencing is required to impose LWOP on a juvenile offender because (1) the death penalty requires individualized sentencing, and (2) LWOP is analogous to the death penalty for juvenile offenders. But for sentences that are not analogous to the death penalty—i.e., all other sentences—no individualized sentencing is required. *Harmelin v. Michigan*, 501 U.S. 957, 994-995 (1991) (non-death penalty mandatory minimum sentences do not violate Eighth Amendment; no individualized sentencing required to impose LWOP on adult offender).

Moreover, the rationales for exempting juvenile offenders from the most severe punishments (the death penalty and mandatory LWOP) have no force when applied to *minimum* punishments. Plus, unlike LWOP, other mandatory sentences are not "irrevocable" and are not harsher on juveniles than on adults. And unlike LWOP, other mandatory sentences do not reflect any permanent judgment on a juvenile offender's corrigibility or capacity for change.

Accordingly, it is not cruel and unusual punishment to subject juvenile offenders to the same mandatory non-LWOP sentences as adult offenders. This is especially true when an offense carries a sentencing range that contains a mandatory minimum and maximum sentence. In such a case, although both juvenile and adult offenders are subject to the same range of punishment, the sentencing court may still consider the juvenile offender's youth and other mitigating characteristics in deciding what sentence to impose within the range. But even when there is no range and the trial court has no discretion but to impose a specified sentence for an offense (or specification), the imposition of that sentence on a juvenile offender is not unconstitutional. Put simply, a non-LWOP mandatory sentence is not subject to the "distinctive set of rules" that apply to a mandatory LWOP sentence. *Miller*, 132 S.Ct. at 2467.

This Court should reject Anderson's invitation to follow *Lyle*. For the reasons stated above, the *Lyle* majority's reading of *Miller* as requiring individualized sentencing for all offenses on juvenile offenders is flawed. But beyond misapplying *Miller*, the *Lyle* majority's opinion is based on "circumstances unique to Iowa." *Rigmaden*, supra. Not only is the *Lyle* decision is based solely on the Iowa Constitution, but it builds on "a line of Iowa cases addressing sentencing of juveniles." *Id*. Also, in downplaying the national consensus authorizing mandatory non-LWOP sentences for juvenile offenders, the *Lyle* majority relied heavily on "recent state legislative action." *Id*. Specifically, the Iowa legislature had recently amended a sentencing statute to remove mandatory sentencing for juveniles in most cases. *Lyle*, 854 N.W.2d at 387-388. This statutory amendment, the court held, "helps illustrate a building consensus *in this state* to treat juveniles in our courts differently than adults." *Id*. at 388 (emphasis added).

There is no such consensus in Ohio. Anderson points to the "reverse waiver" provision in R.C. 2152.121, but that statute does not evince any legislative intent to exempt juvenile offenders from mandatory sentences. As explained above, when an adult sentence is stayed and the juvenile court finds the juvenile offender to be not amenable, then the juvenile court must transfer the case back to adult court and the original sentence is invoked. But even if the juvenile offender is found amenable, the juvenile court imposes a blended SYO sentence consisting of an adult sentence and a traditional juvenile disposition. R.C. 2152.121, therefore, creates a procedure to determine which division of the common pleas court will have jurisdiction over the disposition of the case—i.e., whether the juvenile offender will ultimately be subject to an adult sentence or a juvenile disposition. In other words, R.C. 2152.121 is a jurisdictional statute, not a sentencing statute. Unlike the Iowa statute discussed in *Lyle*, R.C. 2152.121 does not create any *new* authority for a court to suspend or refuse to impose a sentence required by the General Assembly.

III. Requiring that a bound-over juvenile offender receive a minimum adult sentence does not offend due process.

Finally, there is no merit to Anderson's argument that due process requires individualized sentencing or that trial courts have discretion to impose either a juvenile or adult sentence. First, it bears repeating that, on the Williams-Preston counts, it is still possible that the juvenile court will find Anderson amenable and impose an SYO sentence, which would consist of an adult sentence and a traditional juvenile disposition. Only if Anderson fails to complete the juvenile disposition would he ever serve the adult sentence on these counts.

In any event, Anderson's due-process argument fails. To start, insofar as Anderson invokes due process as a back-up to his argument that the sentence is cruel and unusual, the Due Process Clause cannot perform this work. Whether a sentence is unconstitutionally harsh is

governed by the Eighth Amendment and its parallel provision in Article I, Section 9 of the Ohio Constitution. "[I]t is a general rule of constitutional interpretation that when a specific constitutional provision applies, it controls over more general notions of substantive due process." *State v. Anderson*, ___ Ohio St.3d ___, 2016-Ohio-5791, ¶ 26. Anderson cannot dress up a "cruel and unusual punishment" argument in due-process clothing. *Id*. at ¶ 28, citing *Sattazahn v. Pennsylvania*, 537 U.S. 101, 116 (2003). Neither the Eighth Amendment nor Article I, Section 9 requires individualized sentencing for non-LWOP mandatory sentences on juvenile offenders, and so neither does the Due Process Clause.

Anderson fares no better by labeling a minimum sentence as an "irrebutable presumption." Again, *every* offense carries a minimum sentence of some sort. In this sense, every offense contains an "irrebutable presumption" that a certain punishment is appropriate. Indeed, a trial court's failure to impose a statutorily required minimum sentence renders the sentence "void." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 8. It is the General Assembly's prerogative to define crimes and to prescribe punishment. *State v. Morris*, 55 Ohio St.2d 101 (1978), syllabus. Accordingly, requiring a certain minimum punishment for a criminal offense is not unconstitutional, as long as the punishment is rationally related to the State's police powers. *State v. Thompkins*, 75 Ohio St.3d 558, 560-562 (1996) (mandatory driver's license suspension for drug offenses does not violate due process or equal protection).

To the extent Anderson argues that due process requires that a trial court have discretion to impose a juvenile disposition, this argument is really just an argument against the bind-over process. In discretionary bind-over cases, the juvenile court *does* have discretion in determining whether the juvenile offender will be subject to adult or juvenile sanctions. Even in mandatory bind-over cases, if the juvenile offender is ultimately convicted of an offense that would

otherwise subject him or her to a discretionary bind-over, then the case is transferred back to juvenile court to determine whether the juvenile offender should be subject to adult sentence or a blended SYO sentence. In any event, once jurisdiction is established in the general division of the common pleas court, a juvenile offender is subject to the same sentencing scheme as an adult offender (with the exception, of course, of the Eighth Amendment's categorical bans on the death penalty and certain LWOP sentences).

Anderson's second proposition of law should be overruled.

CONCLUSION

For the foregoing reasons, amicus Franklin County Prosecutor Ron O'Brien respectfully requests that this Court affirm the Second District.

Respectfully submitted,

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This is to certify that a copy of the foregoing was served by electronic mail this day, September 23, 2016, to:

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