In the Supreme Court of Ohio

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

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

Appellant Rickym Anderson's arguments read the U.S. and Ohio Constitutions as broad grants of authority permitting the judiciary to act like legislators. Anderson's two general claims seek rulings of limitless scope. The right to trial by jury does not demand equal sentences for codefendants when one pleads guilty and a jury convicts the other. Yet Anderson seeks such a rule, which would invalidate thousands of plea agreements. The right to be free from cruel and unusual punishment guards against rare and severe sanctions. Yet Anderson argues that *all* mandatory minimum sentences for juveniles tried as adults are such sanctions (and that they violate due process to boot).

Anderson robbed three victims when he was sixteen. His juvenile codefendant, Dylan Boyd, shot one victim; they locked a second victim in the trunk of a car; and Anderson threatened to shoot a third, handicapped victim, and stole her purse. The juvenile court bound over both defendants to the court of common pleas, where Boyd pleaded guilty to most of the offenses in exchange for an agreed 9-year prison sentence. Anderson stood trial and a jury convicted him. After resentencing on remand, the trial court sentenced Anderson to 19 years in prison.

Anderson challenges his sentence, asserting that it functions as a tax on the jury-trial right because it exceeds his codefendant's shorter sentence. He also argues that mandatory-sentencing statutes applied to juveniles are cruel and unusual and violate procedural due process. Because a mountain of authority undermines Anderson's constitutional challenges, he must rely primarily on policy arguments that are suited for the General Assembly, not this Court.

STATEMENT OF AMICUS INTEREST

The Attorney General has several interests in this case. *First*, as "the chief law officer for the state and all of its departments," the Attorney General has an interest in defending Ohio law

against constitutional challenges. R.C. 109.02. *Second*, the Attorney General has an interest in supporting courts throughout the State that process juvenile offenders according to state law in an effort to protect the community and rehabilitate youth. *Third*, the Attorney General sometimes serves as special counsel in cases that involve juveniles. In that context, the Attorney General is directly involved in the application of Ohio's sentencing laws that apply after the transfer of juveniles to courts of common pleas.

STATEMENT OF THE CASE AND FACTS

A. Anderson was transferred to common pleas court pursuant to Ohio's mandatory transfer provisions, convicted, and sentenced to 28 years in prison.

In 2012, Anderson, along with others, robbed three victims at gunpoint. *State v. Anderson*, 2014-Ohio-4245 ¶¶ 9, 12, 14 (2d Dist.). They robbed two of the victims in a residential parking garage. *Id.* ¶ 9. Anderson's codefendant, Dylan Boyd, shot the first victim as he attempted to escape. *Id.* Boyd ordered the second victim into the trunk of a car at the scene while Anderson and a third person searched the victim's car and purse for items to steal. *Id.* ¶ 12. Later, at a separate location, Anderson threatened and pointed a gun at a third victim, who was handicapped, so that she would hand over her purse. *Id.* ¶ 14; Resentencing Tr., Doc. No. 7 at 17:7-10 ("Resent. Tr.")

The State indicted Anderson in juvenile court and later moved to transfer the case to common pleas court. *Id.* ¶ 18. The juvenile court, after finding probable cause that Anderson committed the offenses, transferred him to the court of common pleas to be tried as an adult under R.C. 2152.10(A)(2)(b). *See id.* ¶¶ 18, 66. The State charged Anderson with "three counts of aggravated robbery, one count of kidnapping, and one count of felonious assault, with gun specifications for each charge." *Id.* ¶ 18. A jury convicted Anderson of all but the felonious assault count, and the trial court sentenced Anderson to a combined prison term of 28 years. *Id.*

Anderson's codefendant, Boyd, entered a guilty plea to one aggravated assault charge and its firearm specification, the felonious assault charge, and the kidnapping charge in exchange for a 9-year sentence. *Id.*; *see State v. Boyd*, Case No. 12-CR-1911 (Montgomery C.C.P.) (docket available at http://www.clerk.co.montgomery.oh.us/pro).

B. After an appeal and remand, the trial court resentenced Anderson to 19 years in prison, and Anderson appealed again.

Anderson appealed, and the Second District sustained two assignments of error. *Id.* ¶ 87. It held that the trial court failed to enter the necessary findings to support Anderson's consecutive sentences and to credit 67 days of jail time. *Id.* ¶¶ 49-51, 60. As a result, the lower court vacated the sentence and remanded for resentencing. *Id.* ¶ 87.

At Anderson's resentencing, the trial court reduced the 28-year sentence to 19 years. *State v. Anderson*, 2016-Ohio-135 ¶ 5 (2d Dist.) ("App. Op."). The trial court found that Anderson, Boyd, and the third juvenile were at least "equally culpable" in the string of robberies. Resent. Tr. at 16:16-17. But the trial court specifically addressed Anderson's prior criminal history and his failure to show remorse for his actions. *Id.* at 18:9-21, 19:1-8. The trial court also examined the difference between Boyd's agreed sentence of 9 years and Anderson's sentence of 19 years after his jury conviction. *See id.* at 15:22-25, 16:1-12. The court explained that Anderson's sentence after trial was "not a penalty." *Id.* at 16:3-4. In fact, the court continued, "people go to trial and get on community control. That has nothing to do with it." *Id.* at 16:2-5; *see* App. Op. ¶ 10.

Anderson appealed, and the Second District affirmed. App. Op. ¶ 45. As to the claim that the 19-year sentence was an unconstitutional tax on choosing a jury trial, the Second District held that the trial court may "reward a defendant [in this case, the codefendant] by mitigating his sentence when he chooses to waive a constitutional right and cooperate with authorities." *Id.*

¶ 11. Anderson, in contrast, never bargained down his charges or assisted the State. *Id.* As for the cruel-and-unusual-punishment challenges to the mandatory sentence, the Second District distinguished Anderson's U.S. Supreme Court authorities by noting that they only required case-by-case analysis before sentencing a juvenile to death or life without parole—not a minimum term of years. *Id.* ¶¶ 35-36 (citing *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)). The Second District declined to adopt *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014), noting that the case ignored the national consensus in favor of mandatory sentences for juveniles; that *Miller*, *Graham*, and *Roper* "cannot reasonably be extended to prohibit any and all mandatory sentence for juveniles tried in adult court"; and that no other court in the nation had adopted *Lyle*'s approach. *Id.* ¶¶ 38-40. The Second District also held that Anderson's sentence complied with Article I, Section 9's cruel-and-unusual-punishment prohibition because it was not "conscience-shocking." *Id.* ¶ 41.

Anderson appealed to this Court, reasserting that his 19-year aggregate sentence was a trial tax in violation of his right to trial by jury and that mandatory minimum sentencing statutes, as applied to juvenile offenders, are cruel and unusual punishment.

ARGUMENT

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

> *A defendant convicted by a jury does not have a constitutional right to receive the same punishment as a codefendant who pleaded guilty.*

No authority supports the idea that two similarly situated codefendants must have the same sentences when one stands trial and the other negotiates a plea. The plea bargain may result in a lower sentence than a sentence after trial. Otherwise, it would not be a bargain. This everyday occurrence presents no due-process problems. Rather, the Constitution prohibits trial courts from vindictively sentencing anyone for exercising the right to a trial by jury. That

includes situations where the trial court chastises a defendant for standing trial or ties the length of the sentence to the decision to stand trial. Nothing like that happened here.

Furthermore, Anderson was not similarly situated to his codefendant: they played different roles in the crimes they committed together, faced different charges, and had, as far as the record discloses, dissimilar criminal histories. Even the most expansively imagined "trial tax" claim would not include this case. With neither the law nor the facts on his side, Anderson offers no reason to reverse his sentence.

A. A sentencing difference between a defendant who stood trial and one who pleaded guilty raises no presumption of a penalty for standing trial.

Anderson's sole argument is that his sentence must be equivalent to his codefendant's because they were involved in the same three crimes. But courts everywhere have rejected the claim that disparate sentences are unconstitutional. The amicus is not aware of any court anywhere that has accepted the argument Anderson advances—an argument that would effectively prohibit plea bargaining and bar courts from considering different circumstances of different defendants.

U.S. Supreme Court. The U.S. Supreme Court recognizes that plea bargains are "central to the administration of the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Indeed, the "'horse trading'" in plea negotiations that "'determines who goes to jail and for how long . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.'" *Id.* (citation omitted). As a result, "'individuals who accept a plea bargain'" often "'receiv[e] shorter sentences than other individuals who are *less* morally culpable but take a chance and go to trial.'" *Id.* (emphasis added) (citation omitted).

The Court has applied this logic to cases where the decision to stand trial is the only difference between otherwise similarly situated defendants. For example, *Corbitt v. New Jersey*,

439 U.S. 212 (1978), upheld a law permitting those who pleaded non vult or nolo contendre to first-degree murder to receive sentences below the mandatory minimum. *Id.* at 226. Obviously, those who do not plead under that system will receive a higher sentence. The Court held that a State "may encourage a guilty plea by offering substantial benefits in return for the plea." *Id.* at 219. Thus, reasoned the Court, "the standard of punishment is necessarily different for those who plead and for those who go to trial. For those who plead, that fact *itself* is a consideration in sentencing, a consideration that is not present when one is found guilty by a jury." *Id.* at 224 n.14 (emphasis added). This makes sense. If defendants could not receive a different sentence for pleading, they would reject all plea offers, proceed to trial, and invalidate any resultant sentence above that in the plea offer. This, in turn, would destroy the State's incentive to offer plea deals. In other words, plea bargaining would cease, to the detriment of both defendants and the State. *Cf. id.* at 222 n.12.

Federal Appellate Courts. The Sixth Circuit has applied the Supreme Court's rationale to claims identical to Anderson's. In *United States v. Frost*, 914 F.2d 756 (6th Cir. 1990), a trial court imposed greater sentences on defendants convicted of crimes than on a codefendant who pleaded guilty, noting that it had given the codefendant "'credit for his cooperation.'" *Id.* at 773 & n.7 (quoting trial court). The Sixth Circuit rejected the non-pleading defendants' trial-tax claim, reasoning that "[m]ere disparity in sentences is insufficient to show that the sentencing court penalized [the other defendants] for going to trial." *Id.* at 774. That is, even if "codefendants receive[] substantially lower sentences" than the defendant who stood trial, no problem arises without something "other than the disparity in sentences." *United States v. Medvecky*, No. 91-1029, 1993 WL 15133, at *6 (6th Cir. Jan. 22, 1993); *see also United States v. Fry*, 831 F.2d 664, 667 (6th Cir. 1987) ("A defendant relying upon the argument that he has

received a disproportionate sentence must establish more than the mere fact that other defendants have received less harsh sentences for similar crimes.").

Other circuits have reached the same conclusion. The Fifth Circuit turned away a trial-tax claim even though "codefendants, who entered guilty pleas and cooperated with the government, received lesser sentences" because a "codefendant's sentence is immaterial to the propriety of a sentence imposed on a defendant." *United States v. Chase*, 838 F.2d 743, 751 (5th Cir. 1988). The Second Circuit rejected the suggestion that a defendant "was penalized for exercising his right to a trial" merely because of a "disparity in sentences" between him and his codefendants. *United States v. Sanchez Solis*, 882 F.2d 693, 699 (2d Cir. 1989). The list of similar holdings could go on for pages. *See, e.g.*, *United States v. Rodriguez*, 162 F.3d 135, 152 (1st Cir. 1998) ("The fact that those who plead generally receive more lenient treatment . . . than codefendants who go to trial, does not in and of itself constitute an unconstitutional burden on one's right to go to trial."); *United States v. Whitecotton*, 142 F.3d 1194, 1200 (9th Cir. 1998) ("Disparity in sentences between codefendants is not sufficient ground to attack a proper guidelines sentence."); *United States v. Granados*, 962 F.2d 767, 774 (8th Cir. 1992) ("A defendant cannot rely upon his codefendant's sentence as a yardstick for his own; a sentence is not disproportionate just because it exceeds a codefendant's sentence."); *United States v. Jackson*, 950 F.2d 633, 637-38 (10th Cir. 1991) (rejecting claim "based solely on the lesser sentence imposed on [a] codefendant"); *United States v. Guerrero*, 894 F.2d 261, 267 (7th Cir. 1990) ("A mere showing of disparity in sentences among codefendants d[oes] not, alone, demonstrate any abuse of discretion.").

State Supreme Courts. State high courts have also uniformly rejected claims like Anderson's. Most recently, the Mississippi Supreme Court addressed the claim that, because a

codefendant "received a lesser sentence after pleading guilty to armed robbery, conspiracy, and manslaughter, [the defendant] was punished for exercising his right to a jury trial." *Cowart v. State*, 178 So. 3d 651, 670 (Miss. 2015) (op. of equally divided court). "This is not enough," reasoned the court, because the defendant's claim "demonstrates only that [the codefendant] likely received some discretionary leniency from the trial court . . . for taking responsibility for his actions and cooperating with the State . . . . [B]oth this Court and the Supreme Court repeatedly have upheld this system as constitutionally valid and necessary." *Id.*

Other courts have reached similar conclusions. For example, the Illinois Supreme Court has explained that a "sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial." *People v. Caballero*, 688 N.E.2d 658, 664 (Ill. 1997). And the North Carolina Supreme Court has reasoned that "[d]isparity in the sentences imposed upon codefendants . . . is not unconstitutional." *State v. Gregory*, 459 S.E.2d 638, 672 (N.C. 1995).

Ohio Appellate Courts. Finally, every intermediate appellate court in Ohio to consider the issue, including the Second District in this case, has rejected sentencing challenges based solely on codefendant disparities. *See* App. Op. ¶ 11; *State v. Watson*, 2015-Ohio-2321 ¶ 47 (12th Dist.) ("Although . . . [a] codefendant . . . received a shorter possible prison term than appellant, that fact alone does not require a finding that the trial court erred in its sentencing decision."); *State v. Phillips*, 2014-Ohio-3670 ¶ 101 (3d Dist.) ("we . . . reject [the] contention that [defendant] was 'trial taxed' merely because he received a harsher sentence than his accomplices"); *State v. Hoskinson*, 2012-Ohio-3138 ¶ 46 (5th Dist.) (finding no "merit" in claim that defendant "suffered a 'trial tax' based on her decision not to enter a plea"); *State v. Ramey*, No. 79AP-96, 1979 WL 209454, at *6 (10th Dist. Nov. 23, 1979) (declining to presume

"irresponsible action on the part of the court below" when defendant attacked sentence "solely by reason of the disparity of sentence of the two persons indicted for the offenses").

As far as amicus is aware, *no court* has accepted the argument that the sentence of a defendant who stood trial is suspect merely because a codefendant accepted a plea offer for a lower sentence. To be sure, a sentencing judge can run afoul of the Constitution by penalizing the defendant by imposing a higher sentence because he elected to go to trial. *State v. Noble*, 2015-Ohio-652 ¶ 12 (12th Dist.) (collecting cases); *see also United States v. Derrick*, 519 F.2d 1, 4 (6th Cir. 1975). Indications of such impropriety can include incredulous or vindictive comments about the defendant's choice to plead not guilty, the strength of the defendant's case, the defendant's intelligence, or the cost and length of trials. *See, e.g.*, *Derrick*, 519 F.2d at 2; *Noble*, 2015-Ohio-652 ¶ 6. In such cases, the sentence must be vacated unless the court "unequivocally dispels" the inference that it penalized the defendant for going to trial. *Noble*, 2015-Ohio-652 ¶ 12. But those *case-specific* flaws in individual sentences are a far cry from a *per se* ban on disparately sentencing one who pleads and one who does not.

B. Anderson's sentence complies with the Constitution.

Anderson's sentence is not per-se problematic because no authority supports the idea that a sentence is suspect if a codefendant who struck a plea winds up with a lower sentence. Nor has Anderson even *alleged* that the judge here vindictively sentenced him *because* he elected to stand trial. But even if a sentencing disparity alone raised a presumption of improper sentencing, the presumption would be dispelled here for two reasons. First, Anderson and his codefendant differed as to the charges they faced, remorse, and (likely) their criminal histories. And second, the resentencing transcript rebuts any presumed impropriety.

Anderson and his codefendant were sentenced for different crimes. A jury convicted Anderson of one count of kidnapping and three counts of aggravated robbery, whereas his

codefendant pleaded guilty to one count of kidnapping, one count of felonious assault, and one count of aggravated robbery. *See* App. Op. ¶¶ 2, 10-11; *State v. Boyd*, No. 12-CR-1911 (Montgomery C.C.P.) (docket available at http://www.clerk.co.montgomery.oh.us/pro). Anderson and his codefendant were not equally positioned for sentencing.

Further, Anderson, unlike Boyd, did not show remorse for his actions after his conviction. In contrast, Anderson's codefendant agreed to cooperate and testify against Anderson. Lack of remorse is specified in the sentencing statute as a reason for a judge to increase a sentence. *See* R.C. 2929.12(D)(5). That factor did not apply to Anderson's codefendant.

Finally, Anderson had an extensive criminal record before he committed the crimes in this appeal, a factor he concedes warrants different sentences. Anderson Br. at 7. That history included juvenile delinquencies for robbery, theft, various probation violations, and disorderly conduct. Resent. Tr. at 18:9-21. Anderson makes no effort to show that his codefendant had a similarly long rap sheet.

In addition to these differences justifying different sentences, the sentencing transcript rebuts the claim that the sentence was a penalty for standing trial. The trial court made no vindictive remarks about Anderson's decision to go to trial. At sentencing, the court was silent as to the prospect of a guilty plea and how it would affect Anderson's sentence. *See* Sentencing Tr., Doc. 15, at 580-86. Nor did the court imply that it would augment Anderson's sentence for standing on his jury-trial rights at resentencing. *See* Resent. Tr., at 15:20-25, 16:1-12. The court never expressed incredulity or malice about Anderson's decision to stand trial. When comparing Boyd's agreed sentence of 9 years to Anderson's 19-year sentence, the court explicitly stated that the latter was "not a penalty." *Id.* at 16:3-4. "In fact," added the court, "people go to trial and

get on community control. That has nothing to do with it." *Id.* at 16:4-5; App. Op. ¶ 10. Rather than focus on Anderson's decision to stand trial, the court focused on Anderson's criminal history, including juvenile delinquencies for robbery, theft, various probation violations, and disorderly conduct, *id.* at 18:9-21, and his refusal to show remorse for his crimes after his conviction, *id.* at 17:17-25, 18:1-9, 19:1-8. That discussion would erase any presumption of a trial penalty, even if it arose here. *See, e.g., State v. Blanton*, No. 18923, 2002 WL 538869, at *3 (2d Dist. April 12, 2002).

The trial judge's sentencing here contrasts with cases where a judge actually did punish defendants for standing trial. In *Noble*, for example, the trial court derided the defendant for "wast[ing] this jury's time" with "nonsensical arguments" even though he had "committed every one of these crimes as clearly as could be." 2015-Ohio-652 ¶ 6. In *State v. Fritz*, 2008-Ohio-4389 ¶¶ 19-28 (2d Dist.), the court mused that jury trials were "not designed to protect the guilty" and that the defendant had "wasted [the jurors'] days" in order "to try and figure out how [he could] get out of something [he was] guilty of." Other examples are similar. *See, e.g.*, *Derrick*, 519 F.2d at 2; *State v. Morris*, 2005-Ohio-962 ¶ 14 (4th Dist.).

C. Anderson musters no counterargument.

Anderson has no response to the unanimous case law or the factual distinctions between him and his codefendant. He defines his claim as a per-se violation arising from the different sentences he and his codefendant received. As he explains, evidence about the sentencing judge's motivation is "unnecessary" in light of that disparity. Anderson Br. at 6.

Anderson begins with case law, but none of the cases supports his claim. *Id.* at 5-7. *State v. Beverly*, 2013-Ohio-1365 ¶ 59 (2d Dist.), mentioned a possible trial tax, but ultimately held that the court abused its discretion by imposing a sentence unsupported by the record, not that the sentence was imposed for the choice to stand trial. Regardless, this Court overruled that

decision, *State v. Beverly*, 143 Ohio St. 3d 258, 2015-Ohio-219, and the Second District subsequently clarified—in this very case—that disparate sentences do not constitute a trial tax, App. Op. ¶ 11. *State v. Henry*, 2015-Ohio-5095 ¶ 20 (9th Dist.), rejected a trial-tax claim and, regardless, did not involve disparate sentences. *Noble* found a trial tax based on vindictive statements rather than disparate sentences. 2015-Ohio-652 ¶ 6. Anderson explicitly *disclaims* that this is a case about vindictive sentencing, arguing instead for a per-se violation arising from the comparison to his codefendant. *See* Anderson Br. at 5-6. In sum, Anderson asserts a constitutional right to receive the same sentence as a codefendant who pleaded guilty, but that claim is at odds with precedent and the plea-bargaining system itself.

Anderson next places unwarranted emphasis on a single phrase the trial court uttered. Anderson highlights the statement that he and codefendant Boyd were "equally culpable." Anderson Br. at 6. Anderson then reasons that, because he received a greater sentence than Boyd, the statement must have revealed the court's intent to penalize him for going to trial. Not so. As discussed above, disparate sentences are unremarkable, not unconstitutional. Thus, a court's recognition that a codefendant received a lower sentence as part of a negotiated plea and received "'credit for his cooperation'" in no way indicates intent to punish a non-pleading defendant. *Frost*, 914 F.2d at 773 & n.7.

Finally, Anderson says that "no . . . evidence" supports the different sentences, but he does not address the differences in charged offenses, remorse, or criminal history. Anderson Br. at 6. That ignores the Second District's own words: "[a]lthough 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 respects for purposes of sentencing." App. Op. ¶ 9.

* * *

In sum, Anderson asks of the Court first clairvoyance, then ignorance. He would have the Court divine the trial court's unexpressed malice, then ignore its expressed propriety. The Court should do neither. "Reviewing courts are not mind readers." *Martin v. Sizemore*, 78 S.W.3d 249, 271 (Tenn. Ct. App. 2001). When the record is silent, reviewing courts presume that trial courts applied the law correctly and without bias after considering only the appropriate criteria. *See State v. Baston*, 85 Ohio St. 3d 418, 428 (1999) ("We will not presume that the trial court acted with bias. To the contrary, even without an affirmative declaration, this court presumes the regularity of the proceedings."); *State v. O'Dell*, 45 Ohio St. 3d 140, 147 (1989) ("A silent record raises the presumption that the trial court correctly considered the appropriate sentencing criteria."); *State v. Sowell*, 39 Ohio St. 3d 322, 334-35 (1988) ("A reviewing court must presume that the trial court applied the law correctly."); *City of Columbus v. Guthmann*, 175 Ohio St. 282, 284 (1963) ("there is a presumption that the trial judge performed his duty and did not rely upon anything in reaching his decision that he should not have relied upon"). And when a court *does* express its intent, "[i]t would be inappropriate for [a reviewing court] to do anything other than take the trial court at its word." *Casper v. Nationwide Children's Hosp.*, 2016-Ohio-4556 ¶ 14 (10th Dist.). Thus, this Court should presume that the trial court did not penalize Anderson for exercising his trial rights. A sentencing disparity deemed unremarkable by dozens of courts cannot rebut that presumption. Even if it could, the trial court explicitly stated that it did not penalize Anderson for going to trial, and it should be taken at its word.

***Amicus Curiae* Ohio Attorney General's Proposition of Law II:**

The State's decision to impose mandatory minimum punishments except life-without-parole and death sentences upon juveniles transferred to courts of common pleas does not constitute cruel and unusual punishment or violate the Due Process Clause.

Mandatory sentencing for juveniles is constitutional. This Court presumes the constitutionality of statutes. *Haight v. Minchak*, ___ Ohio St. 3d ___, 2016-Ohio-1053 ¶ 11. To succeed on a constitutional claim, the challenger must show "beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.'" *Id.* (citation omitted).

Anderson cannot meet this standard. His claim that mandatory sentences violate due process is in fact an Eighth Amendment claim. Regardless, it is incompatible with this Court's precedent under either doctrine. Additionally, Anderson's 19-year sentence is not cruel and unusual because it is proportional to his offenses and would not "shock the conscience" of a reasonable person. Anderson's claims have no foundation in precedent and rely heavily on policy considerations reserved for the General Assembly. This Court should affirm the Second District's decision.

A. Juveniles tried as adults have no due process right to discretionary sentencing.

1. Due Process is not the appropriate framework for claims about punishment.

As a threshold matter, due process is not the appropriate basis for Anderson's claim about mandatory sentences. This Court and the U.S. Supreme Court have repeatedly held that, when specific constitutional provisions address an issue, courts should avoid open-ended due-process concepts. *See State v. Anderson*, ___ Ohio St. 3d ___, 2015-Ohio-5791 ¶¶ 24-30 (Kennedy, J., op.) (collecting cases); *see also Conn v. Gabbert*, 526 U.S. 286, 293 (1999); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)*; cf. State ex rel. King v. Sherman*, 104 Ohio St. 317, 322-23 (1922). In this case, the precedent addressing mandatory sentences shows that Anderson's claim is about punishment. As a result, the Eighth Amendment is the right yardstick here.

No court has held that a mandatory sentence violates due process alone. Indeed, all of the U.S. Supreme Court's cases addressing claims about punishment have done so under the Eighth Amendment. *See Miller*, 132 S. Ct. 2455; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551. Anderson appears to concede as much. He uses the Eighth Amendment and due process claims to support the same proposition of law, Anderson Br. at 8; views due process as the "second part" of the Eighth Amendment analysis, *id.* at 12-13; and relies largely on Eighth Amendment cases to support his due process claim, *id.* at 14-16. This makes sense, because the claim that imposing certain sentences on certain juveniles is excessive is inherently one about punishment falling directly within the provenance of the Eighth Amendment. *See, e.g.*, *Roper*, 543 U.S. at 560 (Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions"). Thus, because Anderson's claim is plainly about punishment, this Court should eschew the "uncertain enterprise" of applying "opaque" notions of "'fundamental fairness'" in this case. *State v. Warren*, 118 Ohio St. 3d 200, 2008-Ohio-2011 ¶ 28 (O'Connor, J., op.).

2. Anderson's due process claim is incompatible with precedent.

If the Court addresses Anderson's claim under the due process framework, it should reject the claim based on its decisions in *State v. Walls* and *State v. Warren*. *Walls* rejected retroactivity and ex-post-facto challenges to mandatory bindover laws. It reasoned, in part, that juveniles were on notice that they could receive adult sentences and that eliminating juvenile-court discretion did not affect substantive rights. *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059 ¶ 17. Relying on this logic, *Warren* rejected a claim that a statute imposing a mandatory life sentence violated due process because it prevented the trial court from "consider[ing the defendant's] age at the time of the offenses in sentencing him for rape." 2008-Ohio-2011 ¶ 51 (O'Connor, J., op.). Those cases should resolve this one. If a mandatory life sentence does not violate due process, then a mandatory three-year sentence does not.

U.S. Supreme Court precedent confirms this conclusion. Every time the Court has held that the due process rights of juveniles and adults diverge, it has held that juveniles enjoy *less robust* due process rights. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 607-08, 620-21 (1979) (no notice or hearing required prior to juvenile's involuntary commitment to mental hospital by parents); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (no notice or hearing required prior to teachers' use of corporal punishment); *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (jury trials in juvenile proceedings not required by due process). If an adult has no due-process objection to a mandatory three-year sentence, a juvenile certainly does not.

B. The mandatory sentencing statute applied to Anderson does not violate the Eighth Amendment.

The mandatory sentencing framework used in Anderson's case does not violate the Eighth Amendment's prohibition on excessive punishment. In assessing a categorical sentencing statute, courts first consider "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61 (citation omitted). While not dispositive, this factor deserves "'great weight.'" *Id.* at 67 (citation omitted). Next, courts determine, based on "controlling precedents" and "the Eighth Amendment's text, history, meaning, and purpose," "whether the punishment in question violates the Constitution." *Id.* at 61. This step requires courts to consider "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 67-68. In other words, the punishment must fit the crime and the criminal. *See id.* at 59 ("The concept of proportionality is central to the Eighth Amendment.").

In this case, both factors undermine Anderson's claim. The national consensus affirms the propriety of applying mandatory sentences to juveniles, as Anderson concedes. Moreover, the sentencing scheme applied to Anderson satisfies the proportionality requirement because it adequately balances the sentence with the offenses and offender and falls well within the limits set by existing precedent. The U.S. Supreme Court has struck down only "the harshest sentences," *Miller*, 132 S. Ct. at 2465, and this Court has struck down only a post-confinement *lifetime* penalty that it deemed an "especially harsh punishment[] for a juvenile." *In re C.P.*, 131 Ohio St. 3d 513, 2012-Ohio-1446 ¶ 44. In contrast, courts have widely upheld mandatory non-lifetime penalties *exceeding* that imposed on Anderson. Those cases undermine Anderson's sweeping assertions.

1. The national consensus confirms that mandatory minimum sentencing for juveniles is not cruel and unusual.

Courts and scholars have widely recognized the national consensus permitting mandatory sentences for juveniles. *Lyle*, Anderson's central authority, noted that "no other court" had struck down mandatory sentencing for juveniles and that "most states permit or require some or all juvenile offenders to be given mandatory minimum sentences. . . . This state of the law arguably projects a consensus in society in favor of permitting juveniles to be given mandatory minimum statutory sentences." 854 N.W.2d at 386-87. This conclusion comports with that of scholars who have canvassed state statutes. *See* Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing Miller's Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 Temp. Pol. & Civ. Rts. L. Rev. 173, 195 (2013) ("no . . . national consensus exists against the imposition of mandatory sentences on juvenile offenders; the practice is common across jurisdictions"); Martin Guggenheim, *Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L.L. Rev. 457, 494 & n.267

(2012) ("in a substantial majority of states, juveniles tried as adults are eligible for adult mandatory minimum sentences") (collecting statutes). Thus, the national consensus supports mandatory minimum sentencing for juveniles, and that consensus deserves "'great weight.'" *Graham*, 560 U.S. at 67 (citation omitted).

2. The mandatory sentencing statute applied to Anderson satisfies the proportionality requirement.

Anderson's sentence corresponds to his offense and his status as a juvenile offender. The Supreme Court has held that, when analyzing proportionality, courts must weigh the punishment against both the offense and offender. *See Miller*, 132 S. Ct. at 2462-66; *Graham*, 560 U.S. at 54-55, 68-71; *Roper*, 543 U.S. at 556-57, 569-70, 573. Anderson's sentence easily passes this test, as his punishment is far milder than the extreme penalties at issue in *Roper*, *Graham*, or *Miller* and is lighter than the sentences that courts around the country have upheld against Eighth Amendment challenges by juveniles. For similar reasons, there is no support for Anderson's sweeping claim that all mandatory sentences for juveniles are unconstitutional.

Anderson's Sentence is Proportional. Only one portion of Anderson's sentence actually involved the imposition of a mandatory minimum sentence. The trial court sentenced Anderson to 11 years for aggravated robbery and five years for kidnapping after considering the circumstances of the case. *See* Resent. Tr. at 14:12-19, 15:5-11, 18:9-25, 19:1-18. The minimum sentence for each of those crimes was three years. *See* R.C. 2905.01(A)(2), (C)(1); R.C. 2911.01(A)(1), (C); R.C. 2929.14(A)(1); Resent. Tr. at 8:19-21. Accordingly, the three-year sentence for the gun specification is the focus here, as the Second District recognized. *See* R.C. 2929.14(B)(1)(a)(ii), (b); App. Op. ¶ 36.

This three-year sentence for Anderson's use of a gun to commit dangerous felonies was not excessive. Anderson and his co-perpetrators robbed three victims. App. Op. ¶¶ 2, 14.

During the first series of crimes, one shot a victim and they locked a second victim in a car trunk. *Id.* Later, Anderson wielded a firearm and threatened to shoot a third victim, who had developmental disabilities, unless she gave Anderson her purse. *Id.* "As a result of the incident, the victim 'felt compelled to relocate for her safety' and 'is now fearful and paranoid when she takes out the trash.'" *Id.* ¶ 14. Anderson's sentence fits the crime. Imposing a three-year sentence on a juvenile for using a gun to rob a disabled victim and cause her lasting psychological problems is not cruel and unusual.

Case law reinforces this conclusion. The Supreme Court has struck down only three types of punishments for juveniles: (1) death, *Roper*, 543 U.S. at 578; (2) life without parole for non-homicide offenses, *Graham*, 560 U.S. at 82; and (3) mandatory life without parole, *Miller*, 132 S. Ct. at 2469. In other words, the Court limited its holdings to "the harshest sentences." *Miller*, 132 S. Ct. at 2465. Indeed, it declined to consider whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles," 132 S. Ct. at 2469, let alone a categorical ban on other penalties, mandatory or not. Moreover, the Court clarified that, while a State "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,'" it "'is not required to guarantee eventual freedom.'" *Id.* at 2469.

Drawing on these cases, this Court struck down post-confinement lifetime sex-offender registration, an "especially harsh punishment[] for a juvenile." *C.P.*, 2012-Ohio-1446 ¶ 44. Three aspects of the decision are notable. *First*, the Court limited its holding to juveniles "who remain[] under the authority of the juvenile court and ha[ve] thus been adjudged redeemable." *Id.* ¶ 45; *see id.* ¶ 28 ("It is important to note that in both *Roper* and *Graham*, the court addressed the cases of juveniles who had been tried as adults. Here, we address the imposition of a sentence upon a child who remains under the jurisdiction of the juvenile court."). The Court

noted that "[t]hey are in a category of offenders that does not include the worst of those who commit crimes as juveniles." *Id.* ¶ 41.

Second, the Court emphasized that the law involved "a lifetime penalty" that was only "open to review after 25 years." *Id.* ¶ 41. The Court noted that "the length of the punishment is extraordinary" and that, in juvenile court, "[w]ith no other offense is the juvenile's wrongdoing announced to the world." *Id.* ¶ 45.

Finally, the Court held that the State lacked adequate penological justifications because registration applied after the juvenile had already served his confinement time and thereby repaid his debt to society. *Cf. id.* ¶¶ 53-56. Moreover, said the Court, registration would not aid in rehabilitation or deterrence because its "significance" was "less likely to be understood by the juvenile than the threat of time in a jail cell." *Id.* ¶ 52.

Anderson's gun-specification sentence falls well within this precedent. It spans three years rather than a lifetime. It is not devoid of rehabilitative or deterrence value due to juveniles' inability to understand its significance. *See id.* It is not a penalty that applies *after* Anderson has served his debt to society but rather one necessary to ensure that he pays his debt in the first place. Finally, this is not a case "dealing with juveniles who remain in the juvenile system." *Id.* ¶ 84. In other words, this case is not at all like those striking down extreme lifetime punishments.

Precedents from Ohio appellate courts and other state courts demonstrate the propriety of Anderson's sentence. In addition to the Second District in this case, the Eighth and Tenth Districts have both held that mandatory minimum sentences for juveniles satisfied the proportionality requirement. *See State v. Watkins*, 2013-Ohio-5544 ¶ 19 (10th Dist.) (67-year

sentence for aggravated robberies); *State v. Flagg*, 2011-Ohio-5386 ¶¶ 15-17 (8th Dist.) (39-years-to-life sentence for aggravated murder and aggravated robbery).

Likewise, courts around the country regularly uphold mandatory penalties far more severe than the one at issue here. *See, e.g.*, *Vasquez v. Com.*, 781 S.E.2d 920, 925 (Va. 2016) ("we decline the invitation to" "expand *Graham*'s prohibition of life-without-parole sentences to non-life sentences that, when aggregated, exceed the normal life spans of juvenile offenders"); *Commonwealth v. Okoro*, 26 N.E.3d 1092, 1099 (Mass. 2015) ("we do not read *Miller* as a whole to indicate that the proportionality principle at the core of the Eighth Amendment would bar a mandatory sentence of life with parole eligibility after fifteen years for a juvenile convicted of murder in the second degree"); *State v. Taylor G.*, 110 A.3d 338, 345-46 (Conn. 2015) ("ten and five year mandatory minimum sentences" for sexual assault and risking injury of a child "were far less severe than the sentences at issue in *Roper*, *Graham* and *Miller*, but were consistent with the principle of proportionality at the heart of the eighth amendment protection"); *Ouk v. Minnesota*, 847 N.W.2d 698, 701 (Minn. 2014) (statute "mandat[ing] a sentence of life imprisonment *with* the possibility of release after 30 years . . . does not violate the rule announced in *Miller* because it does not require the imposition of . . . life imprisonment without the possibility of release"); *State v. Brown*, 331 P.3d 781, 797 (Kan. 2014) ("in line with the concerns expressed in *Graham*, [the sentence] gives the offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' by permitting parole after the mandatory 20–year minimum prison term is served"); *State v. Springer*, 856 N.W.2d 460, 466 (S.D. 2014) (defendant "did not receive a sentence of life in prison without the possibility for parole, so even if we were to apply *Graham* and *Miller* retroactively, it does not appear that these cases would affect" his "261–year term-of-years sentence with the possibility for parole after he

serves 33 years"); *Johnson v. State*, 573 S.E.2d 362, 367 (Ga. 2002) ("application of the mandatory minimum sentencing . . . [does] not violate the constitutional prohibition against the imposition of cruel and unusual punishment"). This Court should follow the consensus view.

Mandatory Sentencing is Not Categorically Unconstitutional. Anderson does not explain why the gun specification (or any other part of his sentence) is cruel and unusual. Instead, he advances a much grander claim. He asserts, without explanation, that "[t]he *Roper-Graham-Miller* line of reasoning . . . applies to *all instances* in which a court must ignore a child's youthfulness when determining a sentence." Anderson Br. at 15 (emphasis added). In other words, *all* mandatory minimum sentences are unconstitutional as applied to juveniles. In fact, we learn, limiting the cases to "the harshest sentences," *Miller*, 132 S. Ct. at 2465, as the Supreme Court did, would somehow render them "meaningless," Anderson Br. at 12.

Consider the implications of this claim. Under Anderson's theory, it is cruel and unusual to require even a single day of imprisonment for a juvenile convicted of aggravated murder or a single day of sex-offender registration for a juvenile convicted of aggravated rape without first allowing the court to consider youth as a sentencing factor. In other words, all sentences must have no minimum when the defendant is a juvenile, no matter the crime. Anything else would shock the conscience.

To state the claim is to refute it. A mandatory one-day sentence for a juvenile murderer is not conscience-shocking (at least, not in the way that Anderson's rationale suggests). Regardless, no "controlling precedents," let alone "the Eighth Amendment's text, history, meaning, and purpose," support Anderson's claim. *Graham*, 560 U.S. at 61. He relies on *Roper*, *Graham*, and *Miller*, but those cases were limited to the harshest sentences: life without parole and the death penalty. They simply cannot bear the weight Anderson assigns them. Scores of

courts have recognized as much, and Anderson has no answer for those cases. Ruling for Anderson would mean redefining the very notion of cruel and unusual punishment.

* * *

Anderson's cruel-and-unusual-punishment challenge fails under the Supreme Court's two-part test. The national consensus supports mandatory minimum sentences for juveniles tried as adults, and Anderson's sentence is proportional to his offenses despite his relative youth. Accordingly, Ohio's statutes imposing mandatory minimum sentences upon any offender, adult or juvenile, are constitutional.

C. Anderson has not preserved a claim under the Ohio Constitution but, regardless, the mandatory sentencing applied to Anderson does not violate Ohio's prohibition against cruel and unusual punishment.

Anderson has not preserved a claim under Article I, Section 9 of the Ohio Constitution, which prohibits cruel and unusual punishment. He frames his claim as an Eighth Amendment challenge in both the section headers and body of his brief; includes only one citation to Article I, Section 9, which he places after a citation to a U.S. Supreme Court case to support a statement about the Eighth Amendment; and never discusses the Ohio Constitution. *See* Anderson Br. at 10. Thus, this Court should deem any claim about Article I, Section 9 waived. *See, e.g., E. Liverpool v. Columbiana Cnty. Budget Comm'n*, 116 Ohio St. 3d 1201, 2007-Ohio-5505 ¶ 3 (arguments "abandoned" in Supreme Court where litigant "never pressed [them] . . . in its briefs to the Court).

If the Court decides to address this claim, however, it should conclude that Anderson's sentence does not violate the Ohio Constitution. With regard to Ohio's prohibition on cruel and unusual punishment, "this court has recognized 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.'" *C.P.*, 2012-Ohio-1446 ¶ 60 (citation

omitted). Like the analysis under the federal Constitution, "[l]ack of proportionality is key." *Id.* To violate the Ohio Constitution, a punishment must be "'so greatly disproportionate to the offense as to shock the sense of justice of the community.'" *Id.* (citation omitted).

In light of these similarities, *C.P.*'s analysis under the Ohio Constitution resembled its analysis under the Eighth Amendment. For example, the Court again stressed that the case was about "juveniles who remain in the juvenile system." *Id.* ¶ 61. It was this fact that allowed the Court to conclude that, "[c]ompared to punishments for other juvenile offenders, whose cases are reevaluated when their juvenile disposition ends and at regularly scheduled intervals thereafter, this punishment is disproportionate." *Id.* Additionally, the Court again emphasized that the statute at issue imposed a "lifetime punishment . . . with no chance for reconsideration of its appropriateness for 25 years" and that this punishment, unlike all other juvenile punishments, violated the juvenile's confidentiality, a value which "has always been at the heart of the juvenile justice system." *Id.* ¶¶ 61-62.

For reasons similar to those discussed above, Anderson's case does not run afoul of *C.P.* For one, Anderson was bound over to common pleas court. As a result, the unique aims of juvenile court, such as maintaining confidentiality, are inapplicable here. Moreover, Anderson does not face a lifelong penalty, but rather a three-year minimum sentence for using a firearm to rob a disabled victim at gunpoint. Such a result is not "'shocking to any reasonable person.'" *Id.* ¶ 60 (citation omitted). Indeed, as discussed above, scores of courts have upheld far more severe mandatory sentences for juveniles. Finally, unlike the penalty at issue in *C.P.*, the sentence here is not devoid of rehabilitative or deterrence value due to juveniles' lack of appreciation of its significance, nor will it be imposed *after* Anderson has served his debt to society. Thus, this Court should hold that Anderson's sentence comports with the Ohio Constitution.

Anderson's request that this Court invalidate *all* mandatory sentences for juveniles also fails under the Ohio Constitution. Under Anderson's logic, the Ohio Constitution frowns on even a one-day sentence for a juvenile who commits aggravated murder. *See* Anderson Br. at 15. This Court should reject that outcome and follow the overwhelming majority of courts that have upheld mandatory sentencing for juveniles. Indeed, it would shock the sense of justice of the community *not* to permit mandatory sentencing for a juvenile murderer or rapist, which is the result Anderson seeks.

D. Anderson's arguments fail to convince.

Anderson advances various flawed arguments in support of his claims. In support of his due process claim he cites *C.P.*, which is easily distinguished, and overlooks *Warren*, which is on point. He also invokes the irrebuttable presumption doctrine, a near dead-letter that, in any event, is inapplicable. On the Eighth Amendment, Anderson concedes that the national consensus undercuts his position but then, curiously, argues that a "shift" is occurring in Ohio's treatment of juveniles based on a statute that did not affect mandatory sentencing. And, in addition to misapplying *Miller* and *C.P.*, as discussed at length above, Anderson relies heavily on *Lyle*, an outlier case from the Iowa Supreme Court whose rationale is deeply flawed. Finally, Anderson hints throughout his brief that this Court should rule in his favor because doing so would be good policy. This Court should reject these unsound arguments.

1. *C.P.* provides no support for Anderson's due process claim.

Although *C.P.* concluded that the law at issue violated procedural due process *in addition to* the prohibitions against cruel and unusual punishment, 2012-Ohio-1446 ¶ 85, that conclusion is not relevant, for several reasons.

For one, as discussed above, *C.P.* limited its holding to juveniles "who remain[] under the authority of the juvenile court and ha[ve] thus been adjudged redeemable." *Id.* ¶ 45. These

juveniles, said the Court, "are in a category of offenders that does not include the worst of those who commit crimes as juveniles." *Id.* ¶ 41. Because these individuals are differently situated than juveniles bound over to adult court, and because the "special nature of the juvenile process," is "fundamentally different from an adult criminal trial," the Court conducted its due process analysis in light of these differences. *See id.* ¶¶ 72-73.

In contrast, this case, like *Warren*, addresses a common pleas court's imposition of a mandatory sentence of imprisonment. Accordingly, *Warren* is the relevant precedent here. It upheld a *harsher* mandatory sentence than the one Anderson faces. 2008-Ohio-2011 ¶ 51 (O'Connor, J., op.); *see also Walls*, 2002-Ohio-5059 ¶ 17. Moreover, as noted above, when the Supreme Court has held that due process rights of juveniles and adults diverge, it has held that juveniles possess *fewer* due process rights. *See Parham*, 442 U.S. at 607-08, 620-21; *Ingraham*, 430 U.S. at 682; *McKeiver*, 403 U.S. at 551. All of these precedents demonstrate that no due process violation occurred here.

Additionally, neither *C.P.* nor any other case has held that a mandatory sentence violated due process alone. That is because, as discussed above, mandatory sentencing is ultimately a punishment issue. That is why *C.P.* analyzed federal and state prohibitions on cruel and unusual punishment before addressing due process and seemingly made the due-process ruling contingent upon the prior holdings in the case. That is also why *Miller* addressed a claim about a mandatory sentence under the Eighth Amendment, not the Due Process Clause. As mentioned above, Anderson appears to concede as much, as he subsumes his due process claim within his Eighth Amendment claim. *See* Anderson Br. at 8. Accordingly, *C.P.* does not support Anderson's claim.

2. A mandatory sentencing statute creates no unconstitutional presumption because it is a routine legislative classification.

As part of his due process argument, Anderson asserts, without much explanation, that "Ohio's mandatory sentencing requirements contain irrebuttable presumptions that do not permit individualized determinations about juvenile offenders." Anderson Br. at 14. That argument has multiple problems.

First, the irrebuttable-presumption doctrine is essentially a dead letter. *See Weinberger v. Salfi*, 422 U.S. 749 (1975). As the Seventh Circuit has noted, "[t]he irrebuttable presumption doctrine, never consistently applied during its brief life, was soon rejected by the Supreme Court." *Cozart v. Winfield*, 687 F.2d 1058, 1061 (7th Cir. 1982); *see also* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 Harv. L. Rev. 1534, 1556 (1974) ("There appears to be no justification for the irrebuttable presumption doctrine. . . . [I]rrebuttable presumptions are nothing more than statutory classifications."); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 Mich. L. Rev. 800, 827 (1974) (doctrine "rests upon a disingenuous, misleading analysis" because it confuses evidentiary rules and legislative classifications). Accordingly, the doctrine cannot support a procedural due process claim; at best, it is a species of substantive due process. *Michael H. v. Gerald D.*, 491 U.S. 110, 120-21 (1989) (pl. op.); *Malmed v. Thornburgh*, 621 F.2d 565, 576 (3d Cir. 1980).

Second, the "presumption" here does not fit the mold because the doctrine is properly understood as applying specifically to evidentiary rules created by statute, not generally to legislatures' policy decisions. The doctrine, assuming its validity, applies only to statutes that "purport" to be about a given fact, but then "make plainly [ir]relevant" evidence of that fact. *Weinberger*, 422 U.S. at 772. Any other view of the doctrine would create an unstoppable "engine of destruction for countless legislative judgments which have heretofore been thought

wholly consistent with the . . . Constitution." *Id.* A view like the one Anderson embraces would invalidate as "irrebuttable presumptions" all kinds of legislative judgments. Speed limit at 65? Illegal. Speed is only prima facie evidence of unsafe driving. *See Conclusive Presumption Doctrine*, *supra*, at 832-33. Minimum age to be on the ballot? Prohibited. Some 20-year-olds are mature enough to handle the responsibility (and vice versa, alas). *Cf. McClafferty v. Portage Cnty. Bd. of Elections*, 661 F. Supp. 2d 826 (N.D. Ohio 2009) (minimum age of 23 for mayoral candidate constitutional under equal protection). The examples are endless. What Anderson attacks as an illegal presumption is just a legislative classification. Like thousands of others, it is constitutional.

Finally, Anderson mistakenly relies on *In re J.B.*, 107 A.3d 1 (Pa. 2014). Anderson Br. at 14. That case struck down a sex-offender registry law for juveniles on irrebuttable-presumption grounds. *See id.* at 2. According to the court, the law presumed that juvenile offenders are likely to recidivate, but that presumption "is not universally true and a reasonable alternative means currently exists for determining which juvenile offenders are likely to reoffend." *Id.* at 14. Anderson's reliance on this case is problematic for several reasons.

For one, this Court's cases foreclose any application of *J.B.* in this case. Specifically, *Warren* held that imposing a mandatory sentence on a juvenile did not violate due process. 2008-Ohio-2011 ¶ 51 (O'Connor, J., op.). To the extent that *J.B.* is inconsistent with that conclusion, this Court should follow its own precedent.

Additionally, *J.B.* is distinguishable. The court in that case recognized that the law at issue was "'nonpunitive'" and simply "allows the community to prepare and protect themselves from recidivist acts by sexual offenders." 107 A.3d at 3 (citation omitted). In other words, the law presumed a risk of recidivism. Because not all sex offenders pose such a risk, and because

that risk can be assessed by other means, the court determined that the law created an irrebuttable presumption. *See id.* at 10, 19. The punishment for a given crime, in contrast, is not a falsely presumed fact but rather an appropriate legislative judgment. The determination that anyone who commits a certain crime should receive a minimum punishment regardless of their characteristics is not a disprovable fact. *J.B.* does not apply.

Lastly, applying *J.B.* here would effectively invalidate *all* mandatory sentences for juveniles and adults alike. After all, the same presumption cannot be irrebuttable for a juvenile but rebuttable for an adult. Nor can a legislative judgment about proper punishments be irrebuttable for some crimes but rebuttable for others. Thus, if the mandatory sentence at issue here is an unconstitutional irrebuttable presumption, so are all others. Mandatory sentencing for aggravated murder? Unconstitutional; the defendant might be able to show that he does not "deserve" the sentence (however "deserve" might be defined now that the legislature has no say). Such an approach would require this Court to overrule numerous decisions upholding mandatory punishments. *See, e.g.*, *State v. Blankenship*, 145 Ohio St. 3d 221, 2015-Ohio-4624; *State v. Willan*, 144 Ohio St. 3d 94, 2015-Ohio-1475; *Warren*, 2008-Ohio-2011; *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169. Moreover, it would bring the Court dangerously close to infringing on the General Assembly's "plenary power to prescribe crimes and fix penalties." *State v. Morris*, 55 Ohio St. 2d 101, 112 (1978); *see also State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424 ¶ 48.

3. Anderson's Eighth Amendment argument about a "shift" in Ohio's treatment of juveniles misses the mark.

Anderson concedes that the national consensus permits mandatory sentencing for juveniles. Anderson Br. at 10-11. Nevertheless, he perceives a "shift" in Ohio's treatment of juveniles, citing legislation from 2011 that permits juvenile courts to regain jurisdiction over

certain juveniles whose transfer to common pleas court was discretionary. *Id.* at 11. The statute has no bearing on the constitutional questions here. For one, it does nothing to undermine the national consensus permitting mandatory sentences for juveniles. Moreover, the General Assembly did not eliminate mandatory sentencing for juveniles in the 2011 legislation, and when a legislature "amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). In fact, effective September 14, 2016, the General Assembly revised the mandatory gun-specification statute, which is the only mandatory sentencing statute at issue here, App. Op. ¶ 36, to reaffirm that it applies in juvenile proceedings, R.C. 2941.145(C). Accordingly, this Court should reject Anderson's request that the Court eschew the national consensus by penning legislation the General Assembly did not.

4. This Court should decline to follow *Lyle*, the sole outlier supporting Anderson's cruel-and-unusual punishment claim.

As discussed at length above, Anderson's attempt to sweep all mandatory sentences for juveniles into *Miller*, *Graham*, and *Roper* fails because those cases were limited to the harshest penalties—life without parole and death. Likewise, *C.P.* affords Anderson no help because it was limited to juveniles who remain in juvenile court and addressed a lifetime penalty imposed after confinement. Unable to fit his expansive claim into this precedent, Anderson turns to the Iowa Supreme Court's *Lyle* decision, the sole case to reach the conclusion he seeks. *See* 854 N.W.2d at 386 ("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"). This Court should decline to follow that decision.

Regarding the first step in the cruel-and-unusual-punishment analysis, *Lyle* acknowledged but brushed past the national consensus recognizing the propriety of mandatory

minimum sentences for juveniles. *See id.* at 386-87. It did so in part by discussing a recent Iowa law doing away with most mandatory minimum sentences for juveniles. *Id.* at 387-88. Apparently the *statewide* consensus *allowing* some mandatory minimum sentences could substitute for a non-existent *national* consensus allowing *none*, thus freeing the court to do away with the sentences the legislature did not. *Cf. id.* at 389 ("If there is not yet a consensus against mandatory minimum sentencing for juveniles, a consensus is certainly building in Iowa in the direction of eliminating mandatory minimum sentencing.").

The problems with this approach are apparent. For one, it is unmoored from the standard recognized by the Supreme Court for analyzing society's standards. *See Graham*, 560 U.S. at 61. Even if it makes sense to consider state consensus rather than national consensus under the state constitution, it makes little sense to conclude that a legislature's decision to do away with some mandatory sentences for juveniles while keeping others actually reflects societal disapproval of all mandatory sentences. *Cf. Gross*, 557 U.S. at 174. Regardless, as explained above, Ohio has not enacted such laws. Rather, it recently *reaffirmed* that the mandatory gun-specification at issue in this case applies to juveniles. *See* R.C. 2941.145(C).

Turning to the next step, the court held that the "text, meaning, purpose, and history" of Iowa's prohibition on cruel and unusual punishment showed that it outlawed all mandatory sentences for juveniles, citing "watershed" changes in juvenile justice "over the last decade" but also "salient" history dating back "more than a century." *Lyle*, 854 N.W.2d at 390. This holding is curious on both counts.

As to the "salient" century-old practices, *Lyle* broadly attempted to show that children are different than adults. Of course they are. But that does not mean they cannot be subjected to mandatory sentences, and the history *Lyle* cites does not suggest otherwise. The court

acknowledged that, "[p]rior to the creation of juvenile courts, 'adult crime' meant 'adult time.'" *Id.* at 390 (citation and quotation marks omitted). In fact, the court suggests that throughout history children have primarily been treated differently when they were too young to be tried at all, *id.* at 390, were deemed eligible for treatment in juvenile court rather than adult court, *id.* at 390-91, were given *fewer* rights, *id.* at 396-97, or faced death sentences, *id.* at 393 ("So long as the juvenile would not be executed, virtually any sentence or statutory sentencing scheme was acceptable."). In other words, the "salient" history recognized differences not relevant here, but *approved* of mandatory sentences for juveniles other than extremely harsh ones like death.

As to the "watershed" changes in juvenile justice "over the last decade," the court is referring to *Roper*, *Graham*, and *Miller*. *See id.* at 393-95. The court acknowledges that "*Roper* was a death penalty case," *Miller* "concerned a statute that required a person be incarcerated for the remainder of their life," and *Graham* recognized that life without parole is "'the second most severe penalty permitted by law.'" *Id.* at 396 (citation and quotation marks omitted). In other words, said the court, "[w]e recognize the prior cases considering whether certain punishments were cruel and unusual all involved harsh, lengthy sentences including death sentences." *Id.* at 398-99 (collecting cases). Nevertheless, the court concluded that failing to apply these cases to *all* mandatory sentences would be "an irrational exercise," because children are different and can change. *See id.* at 399-401.

The problem with this approach is that the U.S. Supreme Court addressed only "the harshest sentences" and declined to consider whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles," let alone a categorical ban on other penalties, mandatory or not. *Miller*, 132 S. Ct. at 2465, 2469. *Lyle* says a categorical ban is compelled by these cases and that "no other logical result can be reached," 854 N.W.2d at 401,

but the Supreme Court plainly circumscribed its holdings in a way that *Lyle* does not. And the courts in dozens of other states must be similarly illogical, since all of them have rejected the position that *Lyle* deems obvious. *See, e.g.*, *Vasquez*, 781 S.E.2d at 925; *Okoro*, 26 N.E.3d at 1099; *Taylor G.*, 110 A.3d at 345-46; *Ouk*, 847 N.W.2d at 701; *Brown*, 331 P.3d at 797; *Springer*, 856 N.W.2d at 466; *Johnson*, 573 S.E.2d at 367. In reality, it is *Lyle*'s approach that defies logic. As mentioned above, such an approach would require the court to conclude that a mandatory one-day sentence for aggravated murder committed by a juvenile shocks the conscious. But no reasonable person would find such a sentence shocking. Accordingly, this Court should decline Anderson's invitation to apply *Lyle*'s outlier approach.

5. Even if this Court were to play the role of policymaker as Anderson requests, mandatory sentencing should be maintained because it encourages "truth in sentencing" and promotes certainty and reliability across courts.

Because Ohio law does not prohibit all mandatory minimum sentences against juvenile offenders, Anderson asks this Court to fill the policy gap. He asks this Court to write policy. But "[i]t is not the role of the courts to 'establish legislative policies or to second-guess the General Assembly's policy choices.'" *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 2010-Ohio-1029 ¶ 35 (citations omitted). Even if the Court abandoned its long-held practice, it would be compelled to continue the General Assembly's tradition and allow mandatory minimum sentences for juveniles because they encourage "truth-in-sentencing," and science has not established that they are categorically inappropriate.

For decades, mandatory minimum punishments have been a part of Ohio' sentencing laws. In 1995, the General Assembly, upon the advice of the Ohio Criminal Sentencing Commission, passed major sentencing reform. *See* 146 Ohio Laws, Part IV, 7136 ("S.B. 2"). The General Assembly concentrated on "truth-in-sentencing"—if a judge imposes a sentence, the offender will serve it—and the new law accomplished this by removing indefinite sentences and

parole. As relevant here, S.B. 2 added additional mandatory sentences for an expanding list of crimes. David J. Diroll, Ohio Criminal Sentencing Commission, *A Decade of Sentencing Reform*, at 23 (Mar. 2007). Judges, prosecutors, and defense attorneys all condoned these sentences. David J. Diroll, Ohio Criminal Sentencing Commission, *Monitoring Sentencing Reform: Survey of Judges, Prosecutors, & Defense Attorneys and Code Simplification*, at 13-14 (Jan. 2009).

The defense bar's general support for mandatory sentencing is not surprising. A definite sentencing scheme can benefit the convicted. Consider this pre-S.B. 2 example: The trial court decides that a convicted rapist should spend four years in prison. It has no authority over parole or good-time credit, and based on past practice, the court assumes the offender will reap the benefit of both programs. *See A Decade of Sentencing Reform*, at 11. Thus, the court sentences the offender to a term of six to 25 years. *Id.* If the court's assumption is wrong, the defendant may serve a longer sentence than the court intended. Mandatory sentencing eliminates this risk.

Anderson also asks this Court to rush to a scientific judgment. He does so by citing the Iowa Supreme Court, which openly defied the national consensus. *See Lyle*, 854 N.W.2d at 387. If the Court is looking for a sister supreme-court model, it should look instead to Massachusetts. *See Okoro*, 26 N.E. 3d 1092. In *Okoro*, the court rejected a challenge to a juvenile's 15-years-to-life sentence for second degree murder on cruel-and-unusual-punishment grounds. *Id*. at 1101. Addressing the "rapidly changing" science related to juvenile sentencing, the court saw "value in awaiting further developments," because the court could not "predict what the ultimate results of this research will be, or more importantly, how it will inform [its] understanding of constitutional sentencing as applied to youth." *Id*. at 1100.

This Court should exercise the same restraint and refuse to extend *Miller* beyond its limits—especially when *Okoro*'s 15-years-to-life sentence compared to Anderson's modest, 19-year sentence bore a much higher risk of depriving him of a "'meaningful opportunity to obtain release.'" *Miller*, 132 S. Ct. at 2469 (citation omitted).

CONCLUSION

For these reasons, the Court should affirm the judgment of the Second District.

Respectfully submitted,

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