

**IN THE SUPREME COURT OF OHIO**

IN RE A.W.,

Appellant.

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CASE NO. 2018-1182

On Appeal from the Cuyahoga County  
Court of Appeals, Eighth Appellate  
District.

C.A. Case No. CA-105845

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**BRIEF OF AMICI CURIAE JUVENILE LAW CENTER, OFFICE OF THE OHIO PUBLIC  
DEFENDER, AND NATIONAL JUVENILE DEFENDER CENTER IN SUPPORT OF  
APPELLANT A.W.**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST..... 1

STATEMENT OF FACTS ..... 2

ARGUMENT..... 2

I. *Proposition of Law of Amicus Curiae*..... 2

THE ADULT PORTION OF AN SYO SENTENCE CANNOT BE INVOKED FOR FAILURE TO COMPLETE ODYS PROGRAMMING UNLESS THE OFFENDER WAS GIVEN NOTICE THAT THE FAILURE TO COMPLY COULD TRIGGER INVOCATION OF THE ADULT SENTENCE AND IT WAS POSSIBLE FOR THE OFFENDER TO HAVE COMPLETED IT..... 2

A. The juvenile Court Violated A.W.’s Due Process Rights By Invoking The Adult Portion Of His Sentence Without Providing Adequate Notice That Sex Offender Treatment Was A Necessary Condition Of His Release ..... 3

1. Due process required that A.W. be notified in writing at the time of his plea..... 3

2. A.W. has a substantial liberty interest in avoiding the devastating consequences of the adult justice system..... 6

B. Ohio Violated A.W.’s Due Process Rights By Invoking The Adult Portion Of His Sentence When He Failed To Complete A Condition Of His Release Through No Fault Of His Own..... 8

1. The juvenile court departed from the “further serious wrongdoing” standard in invoking A.W.’s adult sentence for a non-willful violation..... 8

2. The juvenile court lacks the authority to order sex offender treatment and make it a condition of release ..... 10

3. Due process requires that the adult portion of an SYO sentence only be invoked for willful conduct ..... 12

4. Imposing an adult sentence on A.W. solely for his juvenile offense fails to adequately account for his developmental status ..... 14

CONCLUSION..... 19

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	12
<i>Cleveland Bd. of Ed. v. Loudermill</i> , 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).....	3
<i>In re D.E.</i> , 2010-Ohio-209 (12th Dist.) .....	11
<i>In re Gault</i> , 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).....	4, 5
<i>Gibbs v. State</i> , 609 So.2d 76 (Fla. Dist. Ct. App. 1992) .....	13
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....	14, 15, 16
<i>State ex rel. Indus. Comm’n v. Day</i> , 136 Ohio St. 477, 26 N.E.2d 1014 (1940) .....	5
<i>In re J.B.</i> , 2005-Ohio-7029 (12th Dist.) .....	8
<i>In re K.D.</i> , 2014-Ohio-2368 (1st Dist.).....	11
<i>Lambert v. California</i> , 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957).....	4
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).....	14, 15, 16
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).....	14, 16
<i>Rose v. Locke</i> , 423 U.S. 48, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975).....	4
<i>State v. Austin</i> , 165 Vt. 389, 685 A.2d 1076 (1996).....	13, 14

<i>State v. Bleasdale</i> , 69 Ohio App.3d 68, 590 N.E.2d 43 (11th Dist. 1990).....	12, 13
<i>State v. Crawford</i> , 54 Ohio App.2d 86, 375 N.E.2d 69 (1st Dist. 1977) .....	12
<i>State v. Hand</i> , 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448 .....	3, 4
<i>State v. Leason</i> , 2011-Ohio-6591 (9th Dist.) .....	5
<i>State v. Scott</i> , 6 Ohio App.3d 39, 452 N.E.2d 517 (2nd Dist. 1982).....	12
<i>In re Stein</i> , 2009-Ohio-913 (3rd Dist.) .....	11
<i>In re Sturm</i> , 2006-Ohio-7101 (4th Dist.) .....	8
<i>In re T.B.</i> , 2010-Ohio-523 (8th Dist.) .....	5, 6
<i>In re T.M.</i> , 2018-Ohio-2450, –N.E.3d– (11th Dist.).....	11
<i>In re T.W.</i> , 2011-Ohio-6855 (11th Dist.) .....	5, 6
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).....	3
<b>Statutes</b>	
R.C. 2152.14 .....	8
R.C. 2152.19 .....	10
R.C. 2152.20 .....	10
R.C. 2152.22 .....	11
R.C. 5139.51 .....	11
R.C. 5139.52 .....	11

**Other Authorities**

Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 7 (2007).....7

Chart of Collateral Consequences of an R.C. 2907.02 Conviction, found on Ohio's CIVICC website at <http://civiccoho.org> .....7

Elizabeth Letourneau & Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293 (2005).....18

Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15 (2008) .....15

ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE, 31 (2008).....16, 17

Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUSTICE Q. 58 (2009).....18

Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 CRIMINOLOGY & PUB. POL'Y 507 (2007).....18

Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC (Jan. 8, 2016), available at <http://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adultprisons/423201/>.....7

Judith Becker & Scotia Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions, & Policy Issues*, 989 ANN.NYACAD.SCI. 397 (2003) .....18

Juv.R. 34 .....6

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003) .....16

Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216 (2010).....15

Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD.DEV. 28 (2009).....15

Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through The Lens of Childhood and Adolescence*, 15 U.PA.J.L. & SOC. CHANGE 285 (2012).....17

MARTY BEYER, EXPERTS FOR JUVENILES AT RISK OF ADULT SENTENCES IN MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICES 18-20 (P. Puritz, A. Capozello & W. Shang eds., 2002).....6

Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL., PUB. POL’Y, & L. 89 (2008) .....17

Michael F. Caldwell et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197 (2010).....17, 18

Michael F. Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 SEXUAL ABUSE: J.RES. & TREATMENT 107 (2007).....17

Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Re-Offense Risk*, 7 CHILD MALTREATMENT 291 (2002).....18

Michael P. Hagan et al., *Eight-Year Comparative Analysis of Adolescent Rapists, Adolescent Child Molesters, Other Adolescent Delinquents, and the General Population*, 45 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 314 (2001).....17

R. Karl Hanson et al., *High Risk Sex Offenders May Not be High Risk Forever*, 29 J. OF INTERPERSONAL VIOLENCE 2792 (2014) .....18

Richard E. Redding, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* Juvenile Justice Bulletin (June 2010).....7

RICHARD J. BONNIE ET AL., EDS. REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH at 91, 97 (2013) .....15, 16, 17

Sarah B. Berson, *Beyond the Sentence-Understanding Collateral Consequences*, National Institute of Justice, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx> .....7

## STATEMENT OF INTEREST

**Juvenile Law Center** advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values. Juvenile Law Center has represented hundreds of young people and filed influential amicus briefs in state and federal cases across the country.

**The Office of the Ohio Public Defender** ("OPD") is a state agency, designed to represent criminal defendants, adults, and juveniles, and to coordinate defense efforts throughout Ohio. The OPD, through its Juvenile Department, provides juveniles who have been committed to the Ohio Department of Youth Services their constitutional right to access to the courts. *See John L. v. Adams*, 969 F.2d 228, 1992 U.S. App. LEXIS 16208 (6th Cir.1992). Like this Court, the OPD is interested in the effect of the law that this case will have on parties who are or may someday be involved in similar litigation. Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system, ensuring equal treatment under the law, and safeguarding the rehabilitative purpose of the juvenile court system. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio's juvenile rules and laws.

The **National Juvenile Defender Center** ("NJDC") was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more

permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC has participated as Amicus Curiae before the United States Supreme Court, as well as federal and state courts across the country.

### **STATEMENT OF FACTS**

*Amici* adopt the Statement of Facts as articulated in the brief of Appellant A.W.

### **ARGUMENT**

#### ***I. Proposition of Law of Amicus Curiae***

**THE ADULT PORTION OF AN SYO SENTENCE CANNOT BE INVOKED FOR FAILURE TO COMPLETE ODYS PROGRAMMING UNLESS THE OFFENDER WAS GIVEN NOTICE THAT THE FAILURE TO COMPLY COULD TRIGGER INVOCATION OF THE ADULT SENTENCE AND IT WAS POSSIBLE FOR THE OFFENDER TO HAVE COMPLETED IT**

At seventeen years old, A.W. committed a sexual offense that resulted in a serious youthful offender (“SYO”) adjudication. At the time of his adjudication, the court advised A.W. that the adult portion of his sentence would only be enforced if he committed further serious wrongdoing while in the State’s custody. A.W. received no notice at that time that he had to complete sex offender treatment as a condition of his SYO sentence. When A.W. had only five months left under juvenile court jurisdiction, the court informed him that he must participate in sex offender treatment, and he complied. But no treatment was provided to him until he had only two months left under the juvenile court’s jurisdiction. Because the course of treatment required more than two months, A.W. could not complete it before turning twenty-one. The court then imposed an adult

sentence, exposing A.W. to a heightened risk of victimization and violence in the adult prison system, requiring him to register as a tier III sex offender registrant for life, and saddling him with a criminal adult record. By imposing an adult sentence with no notice, no finding of further wrongdoing, and no opportunity for A.W. to comply with the conditions upon which the sentence was based, the court violated due process and Ohio law.

**A. The juvenile Court Violated A.W.’s Due Process Rights By Invoking The Adult Portion Of His Sentence Without Providing Adequate Notice That Sex Offender Treatment Was A Necessary Condition Of His Release**

**1. Due process required that A.W. be notified in writing at the time of his plea**

The Fourteenth Amendment of the United States Constitution and Article 1, Section 16 of the Ohio Constitution provide criminal defendants and citizens due process rights that must be adequately met before liberty interests can be taken away. *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶ 11 (“The ‘due course of law’ provision [of Article 1, Section 16] is the equivalent of the ‘due process of law’ provision in the Fourteenth Amendment to the United States Constitution.”). While due process is a flexible notion that calls for such protections as demanded by the individual situation, the “touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 32 L.Ed. 623 (1889)).

With the ultimate goal of providing fundamental fairness, “[a]n essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Indeed, the U.S. Supreme Court has found the Constitution’s notice requirement to be “[e]ngrained in [the] concept of due process.”

*Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). The Supreme Court has further articulated that the Constitution’s notice requirement “prohibits the States from holding an individual ‘criminally responsible for conduct which he could not reasonably understand to be proscribed,’” *Rose v. Locke*, 423 U.S. 48, 49, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975) (quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954)), and requires that the State “give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.” *Id.* at 50.

Children in juvenile proceedings, like adults, are entitled to due process, including the right to notice. *In re Gault*, 387 U.S. 1, 30-31, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, at ¶ 18 (“The United States Supreme Court has held that juveniles are entitled to basic constitutional protections such as the right to counsel, the right to receive notice of the charges alleged, the privilege against self-incrimination, the application of the proof-beyond-a-reasonable-doubt standard, and the protection against double jeopardy.” (citing *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984))) Indeed, the United States Supreme Court in *Gault* emphasized that notice in the juvenile system must include sufficient particularity to provide the child with clear guidance about the specific issues in dispute:

We cannot agree with the [Arizona Supreme Court’s] conclusion that adequate notice was given in this case. Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must ‘set forth the alleged misconduct with particularity.’ . . . Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth’s freedom and his parents’ right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.

*Gault*, 387 U.S. at 33-34 (internal citations omitted). For the juvenile court to comply with constitutional due process requirements at A.W.’s dispositional hearing, it had to provide notice

“of the specific issues that [A.W.] must meet,” *id.* at 34, to avoid the court invoking the adult portion of his serious youthful offender sentence—*e.g.*, he had to be notified of the express condition that he comply with sex offender treatment.

Not only was A.W. entitled to notice of the express conditions for invoking the adult sentence, but such notice had to be in writing, contained in the court’s written judgment at the time of his plea. *State ex rel. Indus. Comm'n v. Day*, 136 Ohio St. 477, 480, 26 N.E.2d 1014, 1015 (1940) (“It is a familiar rule that the court speaks only through its journals. Were the rule otherwise it would provide a wide field for controversy as to what the court actually decided.”); *State v. Leason*, 2011-Ohio-6591, ¶ 8 (9th Dist.) (“[A]n order must be journalized, or ‘filed,’ before it may be considered valid.”).

Ohio appellate courts have made clear that notice in juvenile proceedings must be written, repeatedly overturning probation revocation orders on due process grounds for failure to comply with the written notice requirement. *See In re T.W.*, 2011-Ohio-6855, ¶ 48-51 (11th Dist.) (reversing and remanding juvenile probation revocation order because the juvenile court failed to inquire into whether the juvenile had received notice of the conditions of probation under Juv.R. 34(C)); *In re T.B.*, 2010-Ohio-523, ¶ 15-17 (8th Dist.) (same). In addressing the written notice requirement for revocation of probation, the Eleventh District Court of Appeals in *In re T.W.* explained:

This step is not form over substance. The purpose of this requirement is to not only assure that the juvenile was on notice of the conditions so he would know how to comport himself while on probation, but to assure the court before it revokes probation that the child actually received a copy of the terms and conditions of probation. Due process requires nothing less when the child is facing a loss of liberty, and the juvenile rules require those specific findings to be made.

*In re T.W.* at ¶ 49.<sup>1</sup> A.W. received no such written notice.

**2. A.W. has a substantial liberty interest in avoiding the devastating consequences of the adult justice system**

By invoking the adult portion of A.W.’s SYO sentence, the court exposed him to a devastating loss of liberty. Ohio courts have recognized that the liberty interest at juvenile probation revocation hearings is sufficiently substantial to invoke the right to due process. *See In re T.B.*, 2010-Ohio-523 at ¶ 14 (“Juv.R. 35(B) recognizes a juvenile’s due process rights through its requirements.” (quoting *In re Royal*, 132 Ohio App.3d 496, 507, 725 N.E.2d 685 (1999))). In such cases, a young person risks confinement in a juvenile institution where “the loss of liberty . . . is a significant potential consequence” of a failure to provide due process. *Id.* at ¶ 9. A.W.’s loss of liberty—incarceration in an adult prison and a criminal record—are significantly greater and warrant at least the same due process protections.

Research on the impacts of the adult justice system on young people highlights the severity of the liberty interest at stake. Young people incarcerated in adult prisons are particularly vulnerable to victimization. *See* MARTY BEYER, EXPERTS FOR JUVENILES AT RISK OF ADULT SENTENCES IN MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICES 18-20 (P. Puritz, A. Capozello & W. Shang eds., 2002). As A.W. is twenty-one years old, he will not receive the “sight and sound separation” protections mandated by the Prison Rape Elimination Act of 2003 and will be housed with much older inmates. Often the youngest members of the prison population face physical and

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<sup>1</sup> The requirement of written notice is further reflected in the Ohio Rules of Juvenile Procedure. *See* Juv.R. 34(C) (“In all cases where a child is placed on probation, the child shall receive a written statement of the conditions of probation.”). Additionally, Rule 34 provides that at the conclusion of a dispositional hearing the judge must enter an “appropriate judgment,” and if the judgment is conditional, as it is here, “the order shall state the conditions.” JuvR. 34(C).

sexual abuse and even death. Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 7 (2007). One study showed that youth in adult facilities were five times more likely to be sexually assaulted while incarcerated and two times more likely to be assaulted with a weapon than youth in the juvenile justice system. Richard E. Redding, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* Juvenile Justice Bulletin (June 2010). Youth in adult prisons were also 36 times more likely to commit suicide than those held in facilities apart from adult offenders. Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, THE ATLANTIC (Jan. 8, 2016), available at <http://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adultprisons/423201/>.

In addition to the risk of severe physical harm, the collateral consequences of a criminal record with an adult sentence constitute a serious deprivation of liberty. The criminal record that A.W. will carry when he is ultimately released will negatively affect employment and business opportunities, as well as access to government benefits and program participation, including student loans, housing, contracting, and other forms of participation in civil life. Sarah B. Berson, *Beyond the Sentence-Understanding Collateral Consequences*, National Institute of Justice, <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>. Under Ohio's law, an adult conviction triggers more than 500 collateral consequences. *See* Chart of Collateral Consequences of an R.C. 2907.02 Conviction, found on Ohio's CIVICC website at <http://civiccoho.org>.

Given the severe consequences that A.W. faces, he is entitled to the full measure of due process that the Constitution requires. The juvenile court's failure to provide notice at the time of the plea that A.W. comply with sex offender treatment to avoid imposition of the adult sentence,

coupled with the Court invoking the adult sentence when it was impossible for A.W. to adequately comply, violated A.W.'s due process rights.

**B. Ohio Violated A.W.'s Due Process Rights By Invoking The Adult Portion Of His Sentence When He Failed To Complete A Condition Of His Release Through No Fault Of His Own**

**1. The juvenile court departed from the “further serious wrongdoing” standard in invoking A.W.’s adult sentence for a non-willful violation**

The court’s invocation of the adult sentence despite A.W.’s compliance with all available treatment violated Ohio statutory law. To invoke the adult portion of a serious youthful offender dispositional sentence, the Ohio Revised Code requires the juvenile court to find on record by clear and convincing evidence either that the juvenile (1) violated rules of the facility by committing any felony or a first-degree misdemeanor offense of violence; (2) engaged in conduct that created a substantial risk to the safety or security of the facility, the community, or the victim; (3) while on community control or parole, violated a condition of the community control or parole by committing any felony or a first-degree misdemeanor offense of violence; or (4) while on community control or parole, engaged in conduct that created a substantial risk to the safety or security of the community or of the victim. R.C. 2152.14(E).

Ohio courts have repeatedly interpreted this statute to establish that the court may not invoke the adult portion of the SYO sentence unless the youth engages in additional serious wrongdoing while in custody, on probation or under community control. *In re J.B.*, 2005-Ohio-7029, ¶ 139 (12th Dist.) (“[T]he juvenile court can only invoke the adult punishment if the juvenile is at least 14 years old, and if the juvenile has engaged in further serious wrongdoing.” (citing R.C. 2152.14(E))); *In re Sturm*, 2006-Ohio-7101, ¶ 9 (4th Dist.) (“Only after a juvenile is at least 14 years-old and has engaged in further serious wrong doing[sic] can the court impose the adult sentence.”).

The “further serious wrongdoing” standard is consistent with the juvenile court’s original statement to A.W. at his September 13, 2016 dispositional hearing about what conduct would trigger the adult portion of the SYO sentence:

THE COURT: And the notice of mandatory bindover is withdrawn. So he will stay in Juvenile Court. And the only way you will go to Adult Court, young man, is if you act out so badly at ODYS that they cannot handle you. Meaning, that you continually fight, you continually create delinquent acts. Once you are 21 years of age, this Court loses jurisdiction and the SYO, what we call the serious youth offender specification goes away. Does that make sense?

....

THE COURT: Okay. When I say acts out, I don't mean just get into random fights. I mean, he literally refuses to follow any of the rules and is constantly—

[REDACTED]: Constantly a problem?

THE COURT: Yes. And I mean serious. Like I have only had one that's been invoked and that was because the young man not only was part of the Heartless Felons, but he kicked—he wound up fighting a guard and kicking him in the head to the point where he was charged with an assault in the county that he was in. So it has to be fairly severe.

(September 13, 2016 tr. 78-80.)

Four months later, at the January 18, 2017 review hearing, in an abrupt about-face, the juvenile court formally ordered A.W. to comply with sex offender treatment or risk invoking his adult sentence. In justifying the new requirement that A.W. comply with sex offender treatment to avoid imposition of the adult sentence, the juvenile court indicated that it would be applying a broader standard and looking to invoke far more adult sentences for SYO adjudicated youth. (Jan. 18, 2017 tr. 10.) (“[O]ne of the things we are [doing] is we’re stepping up our game [of invoking adult sentences] because you guys are just running the facilities and I won’t have that.”).

At a subsequent hearing, the juvenile court recognized that ODYS failed to make treatment available to A.W. for another seventy-two days. (March 31, 2017 tr. 5-6.) In its journal entry

following the March 31, 2017 hearing, the juvenile court stated that A.W. “needs to complete as much of the [sex offender] program as he can . . . the youth shall participate and engage in individualized sex offender treatment . . . [and] [f]ailure to engage with services may result in the Serious Youth Offender disposition being invoked.” (Apr. 3, 2017 Journal Entry). At the time, the juvenile court recognized that sex offender treatment would take a minimum of nine months and A.W. had less than two months until he was due for conditional release. (March 31, 2017 tr. 5-6.) While A.W. then completed the treatment available to him without incident or objection, upon the State’s motion, the juvenile court invoked his adult sentence for failure to comply with the sex offender treatment requirement. (May 22, 2017 tr. 72.)

When the court ordered A.W. into treatment, he could not possibly comply as he would age out of the juvenile system before completing the course of treatment. When ODYS then failed to provide treatment for almost three additional months, A.W.’s opportunity to comply was even further curtailed. A.W. was sentenced to adult prison not for any “further serious wrongdoing” but because of a condition he could not meet, through no fault of his own.

**2. The juvenile court lacks the authority to order sex offender treatment and make it a condition of release**

Even if the juvenile court had properly notified A.W. at his dispositional hearing that he had to comply with sex offender treatment and that the failure to complete treatment could result in invocation of his adult sentence, that would have been problematic because only ODYS could determine whether A.W. needed treatment. The juvenile court, by setting conditions beyond the SYO statute’s requirement of further serious wrongdoing, was exceeding its authority.

In Ohio, juvenile courts are authorized only to impose dispositions that are provided for by statute. R.C. 2152.19(A), 2152.20(A) (providing that if a child is adjudicated delinquent, the court may order any of the following dispositions, “in addition to any other disposition authorized or

required by this chapter”); *In re K.D.*, 2014-Ohio-2368, ¶ 7 (1st Dist.) (reversing because “the juvenile court had no authority” to commit the child to DYS for a period longer than that authorized by statute); *In re D.E.*, 2010-Ohio-209, ¶ 17 (12th Dist.) (finding that “the juvenile code provides no indication that the limited jurisdiction of the juvenile court is extended for the purpose of imposing a lifetime license suspension”); *In re Stein*, 2009-Ohio-913, ¶ 24 (3rd Dist.) (finding that the juvenile court imposed an unauthorized sanction on the child’s future right to apply for a driver’s license).

“The extent of a juvenile court’s control over a child following a commitment order is also addressed in R.C. 2152.22(A).” *In re T.M.*, 2018-Ohio-2450, –N.E.3d–, ¶ 29 (11th Dist.); R.C. 2152.22(A) provides that when a child is committed to the legal custody of DYS, “the juvenile court relinquishes control with respect to the child so committed,” except in a narrow set of circumstances. R.C. 2152.22(A). These circumstances include: (1) classifying the child a juvenile offender registrant and modifying or terminating a prior order requiring a child to register; (2) granting judicial release; (3) granting supervised release; and (4) presiding over violations of supervised release, including revoking a child’s parole if necessary. R.C. 2152.22(A). Once the child is committed to DYS, the department has the sole authority to determine and prepare a treatment plan for that child. R.C. 5139.51-.52. As recognized by the Eleventh District in *T.M.*,

[n]one of the exceptions set forth in R.C. 2152.22(A) grant a juvenile court the general authority to enforce other pending orders in the case. Instead, the provision only allows for the issuance of new orders pertaining to three specific subjects: judicial release, supervised release granted by the youth services department, and modification or termination of the child's sexual offender status.

*T.M.* at ¶ 33.

**3. Due process requires that the adult portion of an SYO sentence only be invoked for willful conduct**

In addition to the lack of notice and exceeding statutory authority, punishing A.W. for failing to meet an impossible condition violates due process. In *Bearden v. Georgia*, the United States Supreme Court addressed the question of whether “it is fundamentally unfair or arbitrary for the State to revoke probation” when someone is unable to pay the fine through no fault of their own. *Bearden v. Georgia*, 461 U.S. 660, 666, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983) (overturning probation revocation for indigent defendant who was imprisoned for failure to pay fines and restitution). The Court determined that “if the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.” *Id.* at 668. However, the Court found that “if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.” *Id.* at 669.

Ohio courts have also required that probation violations be willful before probation can be revoked. *See State v. Scott*, 6 Ohio App.3d 39, 41, 452 N.E.2d 517 (2nd Dist. 1982) (finding it “unconstitutionally discriminatory to revoke probation and imprison an indigent probationer for the nonpayment of fines and costs, where the record shows that the only reason for nonpayment is an inability to pay, and there is no evidence that the probationer willfully or intentionally failed or refused to pay such fines and costs or willfully or intentionally failed to obtain employment in order to pay them”); *State v. Crawford*, 54 Ohio App.2d 86, 87, 375 N.E.2d 69 (1st Dist. 1977) (reversing revocation of probation where “evidence fails to prove that [defendant] willfully or intentionally failed or refused to pay the fines and costs, or to gain employment in order to pay them”); *State v. Bleasdale*, 69 Ohio App.3d 68, 72, 590 N.E.2d 43 (11th Dist. 1990) (reversing

revocation of probation for appellant's failure to complete a drug treatment program through no fault of his own) Notably, in *Bleasdale*, appellant's probation had been conditioned on his being accepted into and completing a specific drug program. *Bleasdale* at 69. Appellant was terminated from the program after it was discovered that he had additional mental health problems the program was not equipped to deal with. *Id.* at 69. The Court of Appeals found that there was no willful or intentional violation of the conditions of probation, that the evidence showed that appellant was cooperating with the drug program before his termination, and that the termination was due to the program's inability to handle his case appropriately. *Id.* at 72. Based on these findings the Court of Appeals reversed the lower court's revocation order. *Id.*

Courts in other states have also required that the violation of treatment program conditions must be willful before probation can be revoked. *See Gibbs v. State*, 609 So.2d 76, 79 (Fla. Dist. Ct. App. 1992) (reversing order revoking probation for failure to participate in substance abuse treatment program where the court found the reason for the failure was not willful behavior but was due to manifestations of antisocial behavioral characteristics beyond the probationer's control); *State v. Austin*, 165 Vt. 389, 400, 685 A.2d 1076 (1996) (reversing order revoking probation for failure to comply with sex offender treatment). In *Austin*, the Vermont Supreme Court evaluated whether due process required a finding of willfulness where defendant's probation was revoked for violation of the specific condition that he "successfully complete any therapy on sexual aggressiveness to satisfaction of probation officer." *Austin* at 398. In reviewing previous cases where the revocation of probation had been upheld for failure to comply with sex offender treatment conditions, the Vermont Supreme Court found that in those cases there was "evidence that defendant's willful conduct had led either to actual discontinuation of treatment by the therapist or to a determination that continued treatment would be futile." *Id.* at 400. Because the

Court found that “neither the evidence nor the findings support the conclusion that defendant had willfully obstructed his therapy, such that continued therapy was futile,” his conviction for violating the treatment condition “cannot stand.” *Id.* Applying the requirement of willfulness to a juvenile court’s invocation of an adult sentence under Ohio’s SYO statute is particularly important in the context of youth in the juvenile justice system, which was designed to provide treatment and rehabilitation to reform youthful offenders into productive citizens, not punish criminals for their crimes. This is why adult sentences have historically only been invoked upon findings of serious further wrongdoing, and why only willful violations of the conditions for release can justify submitting a juvenile offender to the adult justice system.

Due process similarly requires that the adult portion of an SYO sentence only be invoked for willful conduct, and not for failure to comply with an impossible condition.

**4. Imposing an adult sentence on A.W. solely for his juvenile offense fails to adequately account for his developmental status**

The court invoked A.W.’s adult sentence based on a finding that A.W., because of his underlying sexual offense, presented a continuing threat to society without adequately taking into account his developmental status.

The United States Supreme Court has repeatedly held that juvenile offenders should be treated differently than adult offenders in sentencing. *Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that imposition of the death penalty on minors violates the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (ruling that the imposition of life without the possibility of parole on a minor for non-homicide crimes violates the Eighth Amendment); *Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding that mandatory sentence of life without possibility of parole for minors violates the Eighth Amendment).

These decisions emphasize three categorical distinctions between youth and adults that explain why juvenile offenses must be treated differently than adult offenses under the law. “First, children have a ‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” *Miller* at 471 (citing *Roper* at 569)); *Graham*, 560 U.S. at 68. Research demonstrates that adolescents, as compared to adults, are less capable of making reasoned decisions. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008) (“Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices.”). Adolescent decision-making is characterized by sensation- and reward- seeking behavior. Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010). Greater levels of impulsivity during adolescence may stem from adolescents’ weak future orientation and their related failure to anticipate the consequences of decisions. Laurence Steinberg *et al.*, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD.DEV. 28, 29-30 (2009). RICHARD J. BONNIE ET AL., EDS. REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH at 91, 97 (2013).

Second, the Supreme Court recognized that youth are distinct from adults in constitutionally relevant ways because of their susceptibility to outside pressures. As the Court explained, “children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller*, 567 U.S. at 471 (alterations in original) (citing *Roper*, 543 U.S. at 569); *Graham*, 560 U.S. at 68. That teenagers are more susceptible to peer pressure is widely confirmed in the social science literature.

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003) (hereinafter “Steinberg & Scott, *Less Guilty by Reason of Adolescence*”); BONNIE, *supra*, at 91 (“[A]dolescents have a heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives, relative to adults.” (citations omitted)).

As scientists explain:

Peer influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents make choices in response to direct peer pressure to act in certain ways. More indirectly, adolescents’ desire for peer approval—and fear of rejection—affect their choices, even without direct coercion.

Steinberg & Scott, *Less Guilty by Reason of Adolescence*, at 1012.

Finally, the Supreme Court has recognized that juvenile offenses are different from adult offenses because adolescence is a transitional phase. “[A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].” *Miller*, 567 U.S. at 471 (second and third alterations in original) (quoting *Roper*, 543 U.S. at 570). Indeed, “[t]he personality traits of juveniles are more transitory, less fixed.” *Roper*, 543 U.S. at 570. Youth “are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.” *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570). As a result, “a greater possibility exists that a minor’s character deficiencies will be reformed.” *Id.*

Developmental research reaches the same conclusions. It is well known that “[adolescence] is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships.” ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE, 31 (2008) (hereinafter “SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE”). The research confirms that “many of the factors

associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.” Marsha Levick *et al.*, *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through The Lens of Childhood and Adolescence*, 15 U.PA.J.L. & SOC. CHANGE 285, 297 (2012) (citations omitted). “[T]he period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood.” BONNIE, *supra*, at 90 (citations omitted). *See also* SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE at 53 (explaining that “[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment”).

These differences between adults and children are especially important when considering appropriate punishments for sex offenders. By improperly focusing on A.W.’s underlying offense rather than any subsequent wrongdoing, the court based A.W.’s adult sentence on a determination that he presented a risk to society because of the sex offense he committed when he was seventeen. The research contradicts such a finding, showing instead very low rates of sexual recidivism among juvenile offenders. *See* Michael F. Caldwell *et al.*, *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197, 198 (2010) [hereinafter Caldwell, *Recidivism Study 2010*]; (citing to recidivism studies dating back to 1994); *see also* Michael F. Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 SEXUAL ABUSE: J.RES. & TREATMENT 107 (2007); Michael F. Caldwell *et al.*, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL., PUB. POL’Y, & L. 89 (2008); Michael P. Hagan *et al.*, *Eight-Year Comparative Analysis of Adolescent Rapists, Adolescent Child Molesters, Other Adolescent Delinquents, and the General Population*,

45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 314 (2001); Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUSTICE Q. 58 (2009); Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 CRIMINOLOGY & PUB. POL'Y 507 (2007). When youth have remained in their community for a period of time after their offense, their likelihood of recidivism further declines. R. Karl Hanson et al., *High Risk Sex Offenders May Not be High Risk Forever*, 29 J. OF INTERPERSONAL VIOLENCE 2792, 2805 (2014) (finding that individuals who remain offense-free in the community cut their recidivism rates in half every five years).

Further, multiple studies confirm that children who commit sexual offenses are motivated by impulsivity and sexual curiosity, not the predatory, paraphilic, or psychopathic characteristics that are more common in adult sexual offenders. Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Re-Offense Risk*, 7 CHILD MALTREATMENT 291 (2002); Elizabeth Letourneau & Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293, 331 (2005); Judith Becker & Scotia Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions, & Policy Issues*, 989 ANN.NYACAD.SCI. 397, 399-400, 406 (2003); Caldwell, *Recidivism Study 2010* at 197-98. The immature thought processes of children and young adolescents, combined with their emerging sexual curiosity, can lead youth such as A.W. to engage in peer sexual conduct for which they are unprepared and for which they do not bear the same level of culpability as an adult.

The Supreme Court's jurisprudence based on and coupled with the existing research on the risk posed by juvenile sexual offenders demonstrates the impropriety of subjecting A.W. to an

adult sentence without finding that he had committed further serious wrongdoing to warrant such a punishing sentence.

### CONCLUSION

The juvenile court's imposition of an adult sentence on A.W. based on his failure to satisfy a condition that went beyond the court's authority, that it was factually impossible for him to meet and for which A.W. had not received adequate notice, violates the constitutional requirements of the Due Process Clause and Ohio law. For the foregoing reasons *Amici* respectfully request that this Court find the imposition of the adult sentence unconstitutional.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January, 2019, I caused copies of the foregoing Brief of Amici Curiae Juvenile Law Center et al. on Behalf of Appellant and Motion of Attorneys Marsha L. Levick and Andrew R. Keats for Permission to Appear *Pro Hac Vice* to be served via electronic mail on:

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