PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner, B.T.D., by and through his attorneys of record, Gary L. Blume, Blume & Blume, Attorneys at Law, P.C., and Marsha L. Levick, of Juvenile Law Center, and, pursuant to Rule 39 of the *Alabama Rules of Appellate Procedure*, respectfully petitions for a writ of certiorari to review the [redacted] decision of the Court of Criminal Appeals.

The Circuit Court held the automatic transfer provision of §12-15-204(a)(4) Ala. Code 1975 unconstitutional. The Court of Criminal Appeals reversed and held the entirety of §12-15-204 constitutional, ignoring the express language and rationale of the trial court.

The decision of the Court of Criminal Appeals is attached hereto as Exhibit I. Petitioner timely filed an Application for Rehearing. The Order overruling of B.T.D.'s Application for Rehearing is attached as Exhibit II.

GROUNDS FOR PETITION

The decision of the Court of Criminal Appeals is in conflict with prior decisions of the United States Supreme Court. The Court of Criminal Appeals' holding contains no wording that clearly acknowledges such. Petitioner applies for certiorari review pursuant to Rule 39(a)(1)(D)(2) for this Court to bring Alabama in line with the United States Supreme Court's well-established precedents.

ARGUMENTS

I. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE COURT OF CRIMINAL APPEALS MISINTERPRETATION OF SECTION 12-15-204(a)(4), AS CONSTITUTIONAL ON PROCEDURAL AND SUBSTANTIVE DUE PROCESS GROUNDS.

This case involves a quintessential example of adolescent behavior – and highlights how Alabama's automatic transfer statute at Section 12-15-204(a)(4) unjustly punishes young people with adult consequences for youthful behavior without any procedural protections.

This court should accept certiorari to explicitly advance the rights of children in the Alabama justice system in line with the U.S. Supreme Court's juvenile justice jurisprudence. The Court of Criminal Appeals erroneously and too narrowly interprets well-established U.S. Supreme Court caselaw establishing the rights of young people in the court system. The Court of Criminal Appeals holds, that because the legislature establishes juvenile court jurisdiction through statute, they can take away the jurisdiction without process. (p. 20). The court further reasons that there is a rational basis for the automatic

transfer statute because prosecuting children as adults is related to the legitimate governmental interests of retribution and deterrence of serious crimes. (p. 46, 49, 50, 53, 55). However, this conclusion ignores the U.S. Supreme Court's juvenile justice jurisprudence and this century's neuroscientific child-developmental research that underpins landmark Supreme Court decisions. *Roper v. Simmons*, 543 U.S. 551, 578, (2005), *Graham v. Florida*, 560 U.S. 48, 82, (2010), *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)(a child-custody case).

> **A child's age is far "more than a chronological fact."** *Eddings* v. *Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); accord, *Gall* v. *United States*, 552 U.S. 38, 58, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *Roper* v. *Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Johnson* v. *Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). It is a fact that **"generates commonsense conclusions about behavior and perception."** *Alvarado*, 541 U.S., at 674, 124

S.Ct. 2140, 158 L.Ed.2d 938 (Breyer, J., dissenting). **Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.**

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that **children "generally are less mature and responsible than adults,"** *Eddings*, 455 U.S., at 115-116, 102 S.Ct. 869, 71 L.Ed.2d 1; that they **"often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,"** *Bellotti* v. *Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion); that they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper*, 543 U.S., at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1; and so on. See *Graham* v. *Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (finding no reason to "reconsider" these observations about the common "nature of juveniles"). Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley* v. *Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (plurality opinion); see also *Gallegos* v. *Colorado*, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962) [180 L.Ed.2d 324] ("[N]o matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" to an adult subject). Describing no one child in particular, **these observations restate what "any parent knows" --indeed, what any person knows--about children generally**. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1.

Our various statements to this effect are far from unique. **The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.** See, *e.g.*, 1 W. Blackstone,

> Commentaries on the Laws of England *464-*465 (explaining that limits on children's legal capacity under the common law "secure them from hurting themselves by their own improvident acts"). Like this Court's own generalizations, the legal disqualifications placed on children as a class-- *e.g.*, **limitations on their ability to alienate property**, **enter a binding contract** enforceable against them, and **marry without parental consent**--exhibit the **settled understanding that the differentiating characteristics of youth are universal.**

J.D.B. v. North Carolina, 564 U.S. 261, 272-274 (2011)(emphasis added)(establishing special 8th Amendment standards for a child's custodial interrogation).

The myriad of special legal protections afforded children by the U.S. Supreme Court mandate a principle that states cannot automatically treat young people like adults in the criminal justice system and laws that do so are unconstitutional. This case gives the Alabama Supreme Court the opportunity to advance the rights of children in the justice system by concluding that the Supreme Court's jurisprudence requires that youth receive process before automatically being subject to the adult system. Because there is no judicial recourse for Alabama children who are thrust into the adult criminal justice system at the whim of a law enforcement officer or prosecutor, Alabama's automatic transfer law is unconstitutional. The legislative

scheme that sanctioned the unilateral removal of 17-year-old B.T.D. from the protections and rehabilitative atmosphere of the juvenile justice system without due process cannot stand in light of the U.S. Supreme Court's articulations of the rights of youth in the justice system.

This court must grant certiorari to hold that B.T.D.'s automatic transfer to the adult system via §12-15-204(a)(4) violates the U. S. Supreme Court requirement that criminal procedure laws consider a "defendant's youthfulness" and that courts must make individualized considerations before subjecting children to the consequences of the adult system. *Graham v. Florida*, 560 U.S. 48, 76 (2010); *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

Consideration of the distinct characteristics of youth, which has driven the Supreme Court's sentencing and interrogation decisions, is no less essential at the transfer stage. The decision to prosecute a child in the adult justice system is one of the most "critically important" steps that youth face in the justice system. *Kent v. United States*, 383 U.S. 541, 555 (1966). Legislatures cannot foreclose individualized considerations of youth and its attendant circumstances through automatic

transfer statutes. *See, e.g. Miller,* 567 U.S. at 466 (importance of individualized sentencing decisions).

For the last 15 years, at least 18 states have modified their transfer laws. *Appellee's Reply Brief p. 14-23.* While this legislative trend does not directly address the constitutionality of automatic transfer laws, these changes confirm a national trend to return discretion to juvenile court judges to decide which children are amenable to treatment and rehabilitation in the juvenile system, rather than punishment in the adult criminal justice system.

The U.S. Supreme Court has articulated broad protections for youth in the justice system which require courts to consider the attendant characteristics of youth before treating children like adults. The Supreme Court has also held that transfer from juvenile to adult court is a "critically important" step. *Kent,* 383 U.S. AT 555 (1966). The Court of Appeals erred in holding that these decisions do not require procedural protections. It is vital that this court grant certiorari to correct their erroneously narrow holding and find §12-15-204(a)(4) unconstitutional.

II. THIS COURT SHOULD ACCEPT REVIEW TO HOLD SECTION 12-15-204(a)(4) UNCONSTITUTIONALLY VAGUE OR OVERBROAD AS APPLIED TO B.T.D. AND IN ITS ENTIRETY.

The Juvenile Justice Act’s purpose is to “facilitate the care, protection and discipline of children” and provide “the necessary treatment, care, guidance, and discipline to assist him or her in becoming a responsible, productive member of society.” Ala. Code. §§ 12-15-101(a) & 12-15-101(b)(4) (1975). The legislative purpose permeates the *Juvenile Justice Act*, with one exception -- §12-15-204, which requires automatic removal of juvenile jurisdiction. Specifically, §12-15-204(a)(4) conflicts with the goals and purpose of the *Act*. This court should accept certiorari to resolve this conflict, by holding that §12-15-204(a)(4) is vague and overbroad.

It is well established that the government violates its guarantees of due process by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983). These constitutional principles of fair play apply not only to statutes defining elements of crimes, but also to sentencing statutes. *Johnson v. United States,* 135 S.Ct. 2551, 2557 (2015); *United States v. Batchelder* 442 U.S.

114, 123 (1979). In one instructive case, the U.S. Supreme Court struck the government's imposition of an increased sentence based upon a vague statute. *See Johnson v. United States, supra* (statutory sentence enhancement provision for a defendant with three prior convictions for a "violent felony that otherwise involves conduct that presents a serious potential risk of physical injury" was unconstitutionally vague). *See also United States v. Davis,* 588 U.S. ___ (June 24, 2019)(statute requiring longer sentences for "crime of violence" with a firearm is unconstitutionally vague); *Sessions v. Dimaya*, 584 U.S. ___ (2018)(statute requiring deportation for an "aggravated felony" that includes a "crime of violence" is void for vagueness). Certainly, subjecting a child to the enhanced consequences of adult criminal prosecution is equivalent to a sentence enhancement.

The Court of Criminal Appeals' opinion affords law enforcement and prosecutors with unfettered discretion in the automatic transfer of 16- and 17-year-old children to adult court under §12-15-204(a)(4) for a crime against a person resulting in *any* sort of physical injury by alleging that it is serious, without impartial judicial review. In

other words, the “seriousness” of the injury is in the eye of the beholding prosecutor or arresting officer. That is patently arbitrary.

With the enactment of vague language in §12-15-204(a)(4), the legislature has impermissibly delegated its policy-making responsibility to prosecutors and police. A vague law impermissibly delegates basic policy matters to law enforcement officers and prosecutors for resolution on an *ad hoc* and unconstitutionally subjective basis. *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972). *See also Sessions v. Dimaya*, supra (J. Gorsuch, concurring)(“Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives.”). It also the rule of lenity’s teaching that ambiguities about a criminal statute’s breadth should be resolved in a defendant’s favor. *United States v. Davis,* supra.

Prosecutors and police do not act in the open and accountable forum of a legislature. A critical aspect of the vagueness doctrine is the requirement that a legislature establish guidelines to govern law enforcement

and "keep the separate branches within their proper spheres." *Sessions v. Dimaya,* supra (J. Gorsuch, concurring), citing *Kolender v. Lawson,* 461 U.S. 352, 358 (1983) and *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

In *Johnson*, the court reviewed a section of the Armed Career Criminal Act of 1984, where a defendant with a felony conviction for felon in possession of a firearm faces more severe punishment if he has three or more prior convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." *Johnson*, 567 U.S. at ___, 135 S.Ct. at 2555 quoting 18 U.S.C. § 924(e)(2)(B). The Court reasoned that the definition was unconstitutionally vague because it leaves uncertainty about how to estimate the risk posed by a crime, without tying the judicial assessment of risk to real world facts or statutory elements. *Id.* at 2557. This language is markedly similar to §12-15-204(a)(4).

Vague laws such as §12-15-204(a)(4) leave judges, prosecutors, defense lawyers, law enforcement, and others to attempt to construe and apply the statute. But, how they do that was aptly questioned by Justice Scalia: "[a]

statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Johnson,* 576 U.S. at ___, 135 S. Ct. at 2557 citing United States v. Mayer, 560 F.3d 948, 952 (C.A.9 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc).

The effect of the vague language of §12-15-204(a)(4) is that a child may be unilaterally charged as an adult without judicial review – without any sort of "check and balance." The State's decision to charge a child with a felony implicates constitutional rights not present in the average charging decision of an adult. The consequences of over-charging an adult are readily buffered by a trial resulting in an acquittal or conviction of a lesser-included offense. Conversely, there is no such judicial review for a child automatically transferred under §12-15-204(a)(4). Meaningful judicial review as a "check and balance" is markedly absent in §12-15-204(a)(4).

The trial court correctly analyzed the inherent problems with the language of §12-15-204(a)(4) in light of the vagueness doctrine. The trial court held, *inter alia*, that §12-15-204(a)(4) was unconstitutionally void for vagueness as a whole, and not merely as applied to B.T.D.

(C. 1238-1253). That ruling must be affirmed at least to the extent that it applies to B.T.D. in this specific case.

CONCLUSION

This court must resolve the difference of opinion between the U. S. Supreme Court's jurisprudence on the rights of children in the justice system and the Court of Criminal Appeals narrow holding that such jurisprudence does not render §12-15-204(a)(4) unconstitutional.

Respectfully submitted on July 11, 2019.

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CERTIFICATE OF SERVICE

I have served the above and foregoing Petition upon:

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as indicated on this the 11th day of July 2019.

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