ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2013-1591
Plaintiff-Appellee,	:	
vs.	:	On Appeal from the Summit County Court of Appeals, Ninth Appellate District Case No. 26400
ALEXANDER QUARTERMAN,	:	
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT ALEXANDER QUARTERMAN

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I. Introduction

In the 1990s, driven by the fear that American children were becoming "superpredators" who would sharply increase violent crime rates, state legislatures across the country, including Ohio, formalized their fears by making it easier, and in some cases mandatory, that children be tried as adults. (*See* Brief of Appellant at 16-18). Although this trend toward "adultification" is shifting back, the perception that older children are not really children, continues.

This erroneous perception is reflected in the State's brief when it refers to children like Alexander, as 16- and 17-year-old "'children' who steal at gunpoint" and bemoans the Supreme Court of the United States as an "unelected national legislature" for recognizing as a matter of law what is "self-evident to anyone who was a child once himself;" that children are different from adults, and that these differences must be considered, no matter the criminal context or stage of the proceeding. (Brief of Appellee at 10-11); *J.D.B. v. North Carolina*, __ U.S. __, 131 S.Ct. 2394, 2403, 180 L.Ed.2d 310 (2011); *see also State v. Long*, Slip Opinion No. 2014-Ohio-849, ¶ 11-14, quoting *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2464-2466, 2471, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 76, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Further, the State and its amicus scoff at the suggestion that requiring the juvenile court to subject a child to criminal treatment can harm the child, increase

recidivism, and make our communities less safe. (Brief of Appellee at 12, 14-15; Brief of Amicus Curiae for Appellee at 15-17). But, the State and its amicus miss what even the dissent in *Graham* recognized, "that juveniles can sometimes act with the same culpability as adults," but only in "rare and unfortunate cases." *Graham* at 109, (Thomas, J. dissenting), citing Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. Law & Family Studies 11, 69-70 (2007); Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2, 31 (2005). Further, this Court has recognized that serving time in a penitentiary is a "harsh penalty" for a child, and that the stigma of public notification of a child's offense "will define his adult life before it has a chance to truly begin." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 45.

Alexander asks this Court to recognize that R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) improperly mandate the adultification of children like Alexander, and hold that due process requires a court to consider the mitigating factors of youth any time a child appears in court, including during mandatory transfer proceedings. This would ensure the "unique expertise of a juvenile court judge" in the rare and unfortunate case that the law should subject a child to criminal treatment, and that children who can be rehabilitated are afforded that chance. *See C.P.* at ¶ 76, citing *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 59.

II. Alexander's claims are properly before this Court.

In their briefs, counsel for the State of Ohio and its amicus assert that Alexander has waived his claims. Specifically, the State asserts that this Court has accepted jurisdiction over a case that "has morphed into an original declaratory judgment action" and asks that the case be dismissed as improvidently accepted. (Brief of Appellee at 4). Counsel for the Ohio Attorney General asserts that Alexander has double waived his claims, and in "light of this double-waiver, the Court should dismiss" this case. Both claims are wrong.

Without question, this Court need not, but may consider a challenge to the constitutionality of a statute that is raised for the first time on appeal. Specifically, this Court has clarified "that the waiver doctrine announced in *Awan* is discretionary;" thus, "even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988); *State v. Awan*, 22 Ohio St.3d 120, syllabus, 489 N.E.2d 277 (1986).

The State and the Attorney General assert that Alexander may not appeal an alleged constitutional violation that occurred before the entry of a guilty plea. (Brief of Appellee at 4-5; Brief of Amicus Curiae for Appellee at 5, citing *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78; *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 105). But Alexander's earlier proceeding is different than a typical criminal proceeding, in

that a constitutionally infirm transfer process would deprive the criminal court of jurisdiction to accept transfer from the juvenile court or a guilty plea from Alexander. This is because the juvenile court has "exclusive original jurisdiction" before a transfer. R.C. 2151.23(A)(1). Alexander asserts that the transfer process in R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) is unconstitutional; therefore, the transfer to criminal court is void. "Because subject-matter jurisdiction involves a court's power to hear a case, the issue can never be waived or forfeited and may be raised at any time." *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, 951 N.E.2d 1025, ¶ 10, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11.

III. Due Process requires a statement of reasons supporting the juvenile court's decision to transfer.

The State claims that due process requires only a hearing and the assistance of counsel at a transfer hearing. (Brief of Appellee at 8). The Attorney General recognizes that *Kent* also requires "a statement of reasons," but never explains how Ohio's mandatory transfer statutes provide for such a statement. (Brief of Amicus Curiae for Appellee at 7-9). After a finding of probable cause, Ohio law requires that a 16- or 17-year old who is alleged to have committed a category two offense with a gun be transferred to criminal court. As such, R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) prohibit the court from considering, much less issuing a statement of reasons, why a child should face adult criminal sanctions and the label "felon."

The Attorney General erroneously asserts that "Ohio does not vest 'original and exclusive jurisdiction' in the juvenile court as was the case in *Kent*." (Brief of Amicus Curiae for Appellee at 11). But, R.C. 2151.23(A)(1) provides the juvenile court "exclusive original jurisdiction" before the transfer. *See also* R.C. 2151.23(H). This means, as in *Kent*, the juvenile court statutes in Ohio "confer upon the child the right to avail himself of that court's 'exclusive' jurisdiction." *Kent v. United States*, 383 U.S. 541, 560, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). The juvenile court's exclusive original jurisdiction is key, because "[i]t is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment the exception which must be governed by the particular factors of individual cases." (Citation omitted.) *Id.* at 560-561.

The mandatory transfer statutes at issue here make adult criminal treatment the rule, not the exception for 16- and 17-year-olds who are alleged to have committed a category two offense with a gun. 2152.10(A)(2)(b) and 2152.12(A)(1)(b). And, the juvenile court judge is prohibited from considering the particular factors of an individual case or the child—even for a child the judge may think is amenable to juvenile treatment.

The Court in *Kent* emphasized the need for a statement of reasons supporting the juvenile court's decision to transfer the child to criminal court, because "[m]eaningful review requires that the reviewing court should review[; and that the decision] should not be remitted to assumptions." *Kent* at 561. This was an important factor in the Court's decision to remand the matter to the court of

appeals, because that court had determined a statement of reasons was not required: although it "indicated that 'in some cases at least' a useful purpose might be served 'by a discussion of the reasons motivating the determination,' * * * it did not conclude the absence thereof invalidated the [transfer.]" *Kent* at 560. The process required by Ohio's Juvenile Code doesn't only allow assumptions, it requires them.

Ohio law recognizes that an amenability determination is a "critical stage of the juvenile proceeding" which is a "vital safeguard," but not for all children who are alleged to have committed a felony-level offense. *See In re D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 12; 17-21. Revised Code 2152.10(A)(2)(b) and 2152.12(A)(1)(b) make amenability irrelevant, and prohibit any judicial inquiry or determination regarding a particular child in the circumstances of an individual case. The court is therefore required to use the child's age as an aggravating factor, which arguably stands as an irrebuttable presumption in violation of due process. (*See* Brief of Amici Curiae Juvenile Law Center, et.al. at 9-15).

In *Miller*, the Court held that "a judge or jury must have the opportunity to consider mitigating circumstances [of youth] before imposing the harshest possible penalty for juveniles." *Miller*, __ U.S. __, 132 S.Ct. at 2475, 183 L.Ed.2d 407. The Court reasoned that a juvenile court's discretion in the transfer stage would not suffice, because the transfer decision is a different inquiry than mitigation at sentencing. *Id.* at 2474.

Justice Kagan expressed concern regarding the transfer procedure in the state of Alabama. *Id.* at 2462. Specifically, noting that although a judge for the court of appeals agreed that the transfer procedure did not permit a mental evaluation of the child before transfer, that judge "urged the State Supreme Court to revisit the question in light of transfer hearings' importance." *Id.* at fn.3, quoting *E.J.M.* v. *State*, No. CR-03-0915, pp. 5-7, 928 So.2d 1077, (Aug. 27, 2004) (unpublished memorandum); *Id.* at 1081 ("[A]lthough later mental evaluation as an adult affords some semblance of procedural due process, it is, in effect, too little, too late."); *see also Miller* at 2474.

The State and its amicus assert that the criminal court must consider the mitigating factors of youth at sentencing. (Brief of Appellee at 11; Brief of Amicus Curiae for Appellee at 13); *see also State v. Long*, Slip Opinion No. 2014-Ohio-849, ¶ 11-14. But, such consideration would likewise prove too little too late in a circumstance like Alexander's, where the legislature, not a judge, has predetermined that a 16- or 17-year-old child who is charged with a category two offense with a gun is as culpable as an adult. R.C. 2152.10(A)(2)(b); 2152.12(A)(1)(b). This is a particularly egregious presumption in light of the recognized "gaps between juveniles and adults;" specifically, that "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking.'" *Long* at ¶ 12, quoting *Roper v. United States*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Alexander asks this Court to hold that due process requires an amenability hearing before transferring a child to criminal court pursuant to R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b), and a statement of reasons justifying the transfer decision, which must reflect that the juvenile court judge considered the child's age as a mitigating factor in light of *Miller* and its progeny.

IV. R.C. 2152.10 and 2152.12 require a juvenile court to consider the mitigating factors of youth in an amenability hearing for some, but not all children, based solely on the child's age.

The Attorney General asserts that "a juvenile does not have a fundamental right to an amenability hearing." (Brief of Amicus Curiae for Appellee at 14-15). But, the Supreme Court's decisions in *Roper*, *Graham*, and *Miller* could support the conclusion that children now have a substantive due process right to have their youth and its attendant characteristics to be taken into account as a mitigating factor at every stage of the proceedings, including transfer. *See, e.g.*, Martin Guggenheim, *Graham v. Florida and a Juvenile's right to Age-Appropriate Sentencing*, 47 Harv.C.R.-C.L.L.Rev. 457, 492 (2012). Although recognizing a new substantive due process right is generally disfavored, the Supreme Court has done so, recognizing that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (Citation omitted.) *Lawrence v. Texas*, 539 U.S. 558, 572, 123 S.Ct 2472, 156 L.Ed.2d 508 (2003).

Under strict scrutiny review, Ohio's mandatory transfer statutes would unquestionably violate equal protection; and, requiring a uniform amenability

determination—that which is currently afforded to children under Ohio's discretionary transfer statutes—would make Ohio's transfer process constitutional.

V. Because the mandatory transfer provisions in R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) necessitate a mandatory prison term after conviction in criminal court, this Court should consider them punishment for Eighth Amendment analysis.

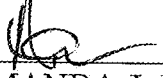
Both the State and its amicus assert that the mandatory transfer provisions at issue here do not constitute punishment. (Brief of Appellee at 12; Brief of Amicus Curiae for Appellee at 16). But, to be eligible for mandatory transfer under R.C. 2152.12(A)(1)(b), the juvenile court must find probable cause to support that a 16- or 17-year-old child committed a category two offense and that "[t]he child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged." R.C. 2152.10(A)(2)(b). Further, the mandatory transfer provisions require that the child actually had the firearm and used it to commit the offense, not that the child was merely complicit to another's use of the firearm. *State v. Hanning*, 89 Ohio St.3d 86, syllabus, 2000-Ohio-436, 728 N.E.2d 1059. And, if a person uses a firearm to commit a felony, the person must be csentenced to prison for a mandatory term pursuant to R.C. 2941.141 or 2941.145. Accordingly, because punishment is mandated after mandatory transfer and conviction, Alexander asks this Court to consider his Eighth Amendment claims as set forth in his merit brief.

CONCLUSION

Children must be recognized as children, no matter the criminal stage or the constitutional context. Therefore, because children have a recognized liberty interest in the individualized treatment that the juvenile court provides, which cannot be circumvented in a manner that violates due process, equal protection, or the Eighth Amendment, Alexander asks this Court to find that R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) are unconstitutional.

Respectfully submitted,

The Office of the Ohio Public Defender



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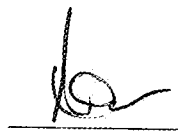
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief of Appellant Alexander Quarterman** was served by ordinary U.S. Mail, postage-prepaid, this 19th day of May, 2014, to the office of Richard Kasay, Assistant Summit County Prosecutor, Summit County Prosecutor's Office, 53 University Avenue, 7th Floor, Safety Building, Akron, Ohio 44308.



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