

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
 :
 APPELLEE : Case No. 2015-0677
 :
 :
 v. : ON APPEAL from the Montgomery
 : County Court of Appeals
 MATTHEW AALIM : Second Appellate District
 :
 :
 APPELLANT :
 : C.A. Case No. 26249

REPLY BRIEF OF APPELLANT MATTHEW AALIM

Mathias H. Heck, Jr. #0014171
Montgomery County Prosecuting Attorney

Andrew T. French #0069384
Assistant Montgomery County Prosecutor

Montgomery County Prosecutor's Office
301 West Third Street
5th Floor Courts Building
Dayton, Ohio 45402
(937) 225-5757
(937) 225-3470—Fax
frencha@mcoho.org

Counsel for the State of Ohio

Amanda J. Powell #0076418
(Counsel of Record)
P.O. Box 281
Columbus, Ohio 43216
0076418@gmail.com

Counsel for Matthew Aalim

The Office of the Ohio Public Defender
Charlyn Bohland #0080080
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167—Fax
charlyn.bohland@opd.ohio.gov

Co-Counsel for Matthew Aalim

Michael Dewine #0009181
Attorney General of Ohio
Eric E. Murphy #0083284
State of Solicitor
(Counsel of Record)
Michael J. Hendershot #0083284
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087—Fax
eric.murphy@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Attorney General of Ohio

Kimberly P. Jordan #0078655
Director, Justice for Children Project
Moritz College of Law Clinical Programs
Drinko Hall, 55 West 12th Avenue
Columbus, Ohio 43210
(614) 688-3657
(614) 292-5511—Fax
jordan.723@osu.edu

Counsel for *Amicus Curiae*
Justice for Children Project

D.K. (Rudy) Wehner #0016080
Montgomery County Public Defender's Office
117 South Main Street, Suite 400
Dayton, Ohio 45422
(937) 225-4652
(937) 225-3449—Fax
WehnerR@mcoho.org

Counsel for *Amicus Curiae*
Montgomery county Public Defender's Office

Marsha L. Levick (PHV 1729-2016)
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107
(215) 625-0551
(215) 625-2808—Fax
mlevick@jlc.org

Counsel for *Amicus Curiae*
Juvenile Law Center

Rickell L. Howard #0081982
Ohio Director of Litigation and Policy
Children's Law Center, Inc.
1002 Russell Street
Covington, KY 41011
(859) 431-3313
(859) 655-7553—Fax
rhoward@childrenslawky.org

Counsel for *Amicus Curiae*
Children's Law Center, Inc.

Maritza S. Nelson #0084610
Law Office of Maritza S. Nelson, LLC
81 Mill Street, Suite 300
Gahanna, Ohio 43230
(614) 416-8146
(614) 416-8153—Fax
mnelson@msnlawoffice.com

Counsel for *Amicus Curiae*
Juvenile Justice Coalition, League of
Women Voters and Ohio Association
of Child Caring Agencies

Assistant Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
(614) 525-3194
(614) 4616470—Fax
dlstrait@franklincountyohio.gov

Counsel for *Amicus Curiae*
Franklin County Public Defender

Melissa Lindsay #0085605
Staff Attorney, Family and Youth Law Center
Capital University Law School
303 East Broad Street
Columbus, Ohio 43215
(614)236-7312
(614) 236-6580—Fax
mlindsay@law.capital.edu

Counsel for *Amicus Curiae*
Family and Youth Law Center

Beatrice Jessie Hill #0074770
Associate Dean for Academic Affairs
Judge Ben C. Green Professor of Law
Case Western Reserve University
School of Law
11075 East Blvd.
Cleveland, Ohio 44106
(216) 368-0553
(216) 368-2086—Fax
jessie.hill@case.edu

Counsel for *Amicus Curiae*
Schubert Center for Child Studies

Dorianne Mason #0093176
Ohio Justice and Policy Center
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202
(513) 421-1108 ext. 34
(513) 562-3200—Fax

Counsel for *Amicus Curiae*
Ohio Justice and Policy Center

Michele Temmel #0077606
Hamilton County Public Defender's
Office
125 East Court Street, 9th Floor
Cincinnati, Ohio 45202
(513) 946-8241
(513) 946-8242—Fax
mtemmel@cms.hamilton-co.org

Counsel for *Amicus Curiae*
Hamilton County Public Defender's
Office

Nadia N. Seeratan
Senior Staff Attorney & Policy
Advocate
National Juvenile Defender Center
1350 Connecticut Avenue NW, Suite
304
Washington, DC 20036

Counsel for *Amicus Curiae*
National Juvenile Defender Center

Table of Contents

Page No.

Table of Authorities v

Introduction1

Argument.....4

Proposition of Law I: The mandatory transfer of juvenile offenders to adult court pursuant to R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violates their right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, Ohio Constitution4

Proposition of Law II: The mandatory transfer of juvenile offenders to adult court pursuant to R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violates their right to equal protection as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2, Ohio Constitution7

Conclusion.....9

Certificate of Service10

Table of Authorities

Page No.

Cases:

<i>Conley v. Shearer</i> , 64 Ohio St.3d 284, 595 N.E.2d 862 (1992)	9
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)	1, 7, 8
<i>J.D.B. v. North Carolina</i> , ___ U.S. ___, 131 S.Ct. 2394, 180 L.Ed.2d 310.....	1, 7
<i>In re C.P.</i> , 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729	5, 6, 7
<i>In re C.S.</i> , 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177.....	5
<i>In re D.S.</i> , Slip Opinion No. 2016-Ohio-1027	5, 6, 7
<i>In re D.W.</i> , 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894.....	4
<i>In re Gault</i> , 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).....	7
<i>Kent v. United States</i> , 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966)	4, 5
<i>Miller v. Alabama</i> , ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)	1, 7, 8
<i>Montgomery v. Louisiana</i> , 577 U.S. ___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016).....	1, 5, 6, 7
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).....	1, 5, 7, 8
<i>State v. Aalim</i> , 2d Dist. Montgomery No. 26249, 2015-Ohio-892	6
<i>State v. Brookshire</i> (No. 2015-0192), http://www.ohiochannel.org/ video/case-no-2015-0192-state-of-ohio-v-delaquan-brookshire	2

Constitutional Provisions:

Fourteenth Amendment, U.S. Constitution	4, 7, 9
---	---------

Table of Authorities

Page No.

Constitutional Provisions (cont'd):

Article I, Section 2, Ohio Constitution7, 9

Article I, Section 16, Ohio Constitution4, 7

Statutes:

R.C. 2152.018

R.C. 2152.104, 7, 9

R.C. 2152.121, 4, 7, 9

R.C. 2152.1212, 3

R.C. 2152.866

Other Authorities:

Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 *Psychiatric Services* 965 (2008)8

Introduction

In the last decade, the United States Supreme Court has issued a series of decisions addressing a specific class: children under 18 who commit offenses that would be crimes if committed by adults. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). And, when deciding the retroactive effect of *Miller*, the Court recently refined the definition of the members of this class as: “juvenile offenders whose crimes reflect the transient immaturity of youth” as opposed to “the rarest of children, those whose crimes reflect ‘irreparable corruption.’” (Citations omitted.) *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, syllabus, 725, 193 L.Ed.2d 599 (2016).

This refined definition should be applied to Ohio’s transfer process as follows: the transfer hearing is designed to allow the juvenile judge to mete out the rare instances where the child’s crimes reflect irreparable corruption, such that transfer is appropriate; versus the instances in which the child’s crimes reflect the transient immaturity of youth, such that retention in the juvenile court is appropriate. Under current law, when the State elects not to pursue transfer for a given case or when the juvenile court judge is required to conduct an amenability hearing under R.C. 2152.12(B)(3), the meting-out process can be effective. The problem this case must

address is that Ohio's mandatory transfer statutes prohibit any meting out at all, and require what is supposed to be the exception to swallow the rule for children like Matthew.

Matthew asserts that Ohio's mandatory transfer provisions are unconstitutional in violation of due process and equal protection. The opportunity for this Court to consider these arguments comes at a time in which this Court has recognized the significant problems that the transfer statutes and the recent changes in R.C. 2152.121 have caused.

Specifically, on December 16, 2015, this Court heard oral argument in Case No. 2015-0192, *State v. Brookshire*. In the hour-long argument, the parties addressed the practical nightmare that Ohio's mandatory transfer system has become under the "reverse transfer" provision in R.C. 2152.121. In *Brookshire*, this Court is considering what is required under that statute when a child is charged with a mixture of mandatory and discretionary transfer offenses and all the charges are transferred to the common pleas court based upon the mandatory transfer offense, but the child is ultimately convicted of offenses that would not be subject to mandatory transfer, and thus must "ping pong" back to juvenile court for the imposition of an SYO or an amenability determination. See Oral Argument at 51:10, *State v. Brookshire* (No. 2015-0192), <http://www.ohiochannel.org/video/case-no-2015-0192-state-of-ohio-v-delaquan-brookshire>. When discussing the Eighth District's decision in *Murphy*, in which a child

was transferred to adult court for prosecution but was only convicted of an auto theft, Chief Justice O'Connor stated, "Every time we burrow down this rabbit hole, we are getting more and more absurd results." *Id.* at 33:28.

It is not surprising that the General Assembly enacted R.C. 2152.121 to avoid the absurd result that Ohio's transfer statutes formerly permitted—an end-around to the amenability determination based upon the state's decision to pursue a mandatory-transfer complaint in juvenile court, even when the child was convicted of what would be only a discretionary transfer offense. And, it is not surprising that a legislative remedy that attempts to "fix" the transfer system while ignoring the larger problems the statutes pose would only lead to more and more absurd results.

This Court's decision in this case may not only lead to the enactment of a transfer system that passes constitutional muster, but also will simplify the entire transfer process by requiring an amenability hearing in every child's case in which transfer is sought. Such a decision would also render R.C. 2152.121 meaningless and eliminate all the difficulty the statute causes in its practical application. More importantly, the remedy sought in this case will restore juvenile court judges' unique role in the transfer process and give their expertise a meaningful place in every child's case.

Argument

Proposition of Law I: The mandatory transfer of juvenile offenders to adult court pursuant to R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violates their right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, Ohio Constitution.

Due process requires the unique expertise of a juvenile court judge. The parties in this case agree that due process requires the opportunity to be heard “at a meaningful time and in a meaningful manner.” (Brief of Appellee at 7; Brief of Amicus Curiae Ohio Attorney General for Appellee at 8; Brief of Appellant at 8). But, although the mandatory transfer statutes prohibit the juvenile judge from making any individualized determination beyond the child’s age and offense, the State and its Amicus ask this Court to conclude the juvenile court judge’s limited role in such hearings make it meaningful enough.

Ohio law recognizes that the amenability determination in discretionary transfer cases is a “critical stage of the juvenile proceeding” which is a “vital safeguard.” *In re D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 12, 17-21. In mandatory transfer cases, the prohibition of an individualized amenability determination renders the juvenile court hearing, and more importantly, the juvenile court judge’s unique role in such a hearing, meaningless.

The Court in *Kent* emphasized that “[m]eaningful review requires that the reviewing court should review[; and that the decision] should not be remitted to

assumptions." *Kent v. United States*, 383 U.S. 541, 561, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). Because Ohio's mandatory transfer statutes require the assumption that a 16-or 17-year-old child who uses a gun to commit certain offenses is irreparably corrupt, and prohibits an investigation into the circumstances of the child's life or offense to consider whether the child's impulsivity or impetuosity regarding his decision to use a gun reflect the transient immaturity of youth, this Court must find that they are unconstitutional in violation of due process. *See Montgomery*, 577 U.S. ___, 136 S.Ct. at syllabus, 193 L.Ed.2d 599.

Such a conclusion is supported by this Court's recent decision in *D.S. In re D.S.*, Slip Opinion No. 2016-Ohio-1027. In *D.S.*, this Court held that Ohio's juvenile sex offender registration statutes do not violate due process, because the statutes require juvenile court judges to exercise discretion within their unique expertise, and that the procedural protections provided by the statutes "satisfy the due-process requirement of fundamental fairness." *Id.* at ¶ 37.

This Court reasoned, "What process is due depends on considerations of fundamental fairness in a particular situation." *Id.* at ¶ 28, citing *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 80 and *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 71. This Court drew a distinction between the sex offender classification proceedings in traditional juvenile cases and the imposition of a blended sentence for a serious-youthful-offender disposition on one side, and the automatic and

mandatory sex offender classification procedure in R.C. 2152.86, which it struck down as unconstitutional in *C.P. D.S.* at ¶ 29-32.

And crucial to the holding in *C.P.* was the determination “that fundamental fairness is not a one-way street that allows only for an easing of due process requirements for juveniles; instead, fundamental fairness may require, as it does in this case, additional procedural safeguards for juveniles in order to meet of the juvenile system’s goals of rehabilitation and reintegration into society.” *C.P.* at ¶ 85. Further, the Court emphasized that “fundamental fairness to the child demands the unique expertise of a juvenile judge.” *C.P.* at ¶ 76. This Court concluded that the automatic and mandatory process in R.C. 2152.86 violated due process because it eliminated the “essential element of the juvenile process’ — the judge’s discretion.” *D.S.* at 30.

Given this, it strains credulity for the State and its Amicus to suggest that the cursory hearing in a mandatory transfer proceeding occurs at a meaningful time and in a meaningful manner. In reality, as the concurring opinion below recognized, “The judicial branch is shut out of the transfer process entirely in [mandatory-transfer cases, because the] juvenile judge’s ability to exercise sound discretion is subjugated to the legislative branch.” *State v. Aalim*, 2d Dist. Montgomery No. 26249, 2015-Ohio-892, ¶ 24 (Donovan, J., concurring).

Nearly fifty years ago, the United States Supreme Court emphasized, “[I]t is these instruments of due process which enhance that possibility that truth will emerge

from the confrontation of opposing versions and conflicting data [because p]rocedure is to law what 'scientific method' is to science." *In re Gault*, 387 U.S. 1, 21, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Matthew asks this Court to apply the reasoning in *D.S.* and *C.P.* to this case and require a learned juvenile court judge to determine the truth about whether a child should be transferred to adult court. Accordingly, this Court should hold that R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violate the right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, Ohio Constitution.

Proposition of Law II: The mandatory transfer of juvenile offenders to adult court pursuant to R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violates their right to equal protection as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2, Ohio Constitution.

The Supreme Court's decisions in *Roper*, *Graham*, *J.D.B.*, *Miller*, and *Montgomery* support the conclusion that children must be recognized as children, no matter the criminal stage or the constitutional context; therefore, Matthew rests on his assertion that strict scrutiny is the appropriate standard to be employed in this case. But, this Court need not go that far, because there exists no rational basis for requiring more procedural protections for younger children than older children in transfer proceedings.

In its brief, Amicus for Appellee asserts that the mandatory transfer provisions bear a rational relationship to the legitimate governmental interest in "protect[ing] the public interest and safety" and in "hold[ing] the offender accountable" as set forth in

R.C. 2152.01(A). (Brief of Amicus Curiae Ohio Attorney General for Appellee at 17.) Then, without reference to any authority, the Attorney General rationalizes that the offenses are serious, and the offenders are “nearly adults,” and that “older juvenile offenders are more likely to possess the violent capabilities of adults.” (Brief of Amicus Ohio Attorney General for Appellee at 17.)

In fact, research reflects that public interest and safety is not served by mandating transfer without a determination of amenability in every case, because “evidence indicates that transferred youths reoffend more quickly and are more likely to engage in violent crimes after release than youths processed in the juvenile justice system.” (Citation omitted.) Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 *Psychiatric Services* 965, 972 (2008). (See also Brief of Amicus Curiae Children’s Law Center, et al. for Appellant at 9-11; Brief of Amicus Curiae Juvenile Law Center and National Juvenile Defender Center for Appellant at 15-18.)

Further, there can be no legitimate interest in mandating adult treatment for offenders under 18, whom the United States Supreme Court has repeatedly recognized are “categorically less culpable than the average criminal” while prohibiting the procedural protections that an amenability hearing provides. *Roper*, 543 U.S. at 567, 125 S.Ct. 1183, 161 L.Ed.2d 1; *Graham*, 560 U.S. at 67-70, 130 S.Ct. 2011, 176 L.Ed.2d 825; *Miller*, ___ U.S. ___, 132 S.Ct. at 2458, 183 L.Ed.2d 407.

The differential treatment at issue in this case is that the juvenile court judge is required to assess younger children's amenability before transfer but is prohibited from making such a determination for older children who are alleged to have committed the same offense. In order to be constitutional, a law must be applicable to all persons under like circumstances and not subject individuals to an arbitrary exercise of power. *Conley v. Shearer*, 64 Ohio St.3d 284, 288-289, 595 N.E.2d 862 (1992). It is difficult to imagine a more arbitrary exercise of power than denying a class of children the enhanced procedural protections provided younger children, based solely on a child's age. Accordingly, Matthew asks this court to hold that Ohio's mandatory transfer statutes, which forbid equal treatment of all children under 18, are unconstitutional in violation of their right to equal protection as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2, Ohio Constitution.

Conclusion

Children have a recognized liberty interest in the individualized treatment that the juvenile court must provide, which cannot be circumvented in a manner that violates due process or equal protection; therefore, Matthew asks this Court to find that R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) are unconstitutional.

Respectfully submitted,

/s/ Amanda J. Powell

Amanda J. Powell #0076418
(Counsel of Record)

P.O. Box 281
Columbus, Ohio 43216
0076418@gmail.com

The Office of the Ohio Public Defender

/s/ Charlyn Bohland

Charlyn Bohland #0080080
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
charlyn.bohland@opd.ohio.gov

Co-Counsel for Matthew Aalim

Certificate of Service

I hereby certify that on March 21, 2016, a copy of the foregoing Reply Brief of

Appellant Matthew Aalim was served by regular mail to the following:

Mathias Heck
Montgomery County Prosecutor
301 West Third Street
5th Floor Courts Building
Dayton, Ohio 45402

Counsel for *Amicus Curiae*
Montgomery County Public Defender's
Office

Michael Dewine
Attorney General of Ohio
Eric E. Murphy
State of Solicitor
Counsel of Record

Michael J. Hendershot
Chief Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for *Amicus Curiae* Attorney
General of Ohio

Kimberly P. Jordan
Director, Justice for Children Project
Drinko Hall, 55 West 12th Avenue
Columbus, Ohio 43210

Counsel for *Amicus Curiae*
Justice for Children Project

D.K. (Rudy) Wehner
Montgomery County Public Defender's
Office
117 South Main Street, Suite 400
Dayton, Ohio 45422

Counsel for *Amicus Curiae*
Attorney General of Ohio

David L. Strait
Assistant Franklin County Public
Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Franklin County Public Defender

Melissa Lindsay
Staff Attorney, Family and Youth Law
Center
Capital University Law School
303 East Broad Street
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Family and Youth Law Center

Beatrice Jessie Hill, Associate Dean
Case Western Reserve University
11075 East Blvd.
Cleveland, Ohio 44106

Counsel for *Amicus Curiae*
Schubert Center for Child Studies

Marsha L. Levick
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Counsel for *Amicus Curiae*
Juvenile Law Center

Nadia N. Seeratan
Senior Staff Attorney & Policy Advocate
National Juvenile Defender Center
1350 Connecticut Avenue NW, Suite 304
Washington, DC, 20036

Counsel for *Amicus Curiae*
National Juvenile Defender Center

Rickell L. Howard
Ohio Director of Litigation and Policy
Children's Law Center, Inc
1002 Russell Street
Covington, KY 41011

Counsel for *Amicus Curiae*
Children's Law Center, Inc.

Maritza S. Nelson
Law Office of Maritza S. Nelson, LLC
81 Mill Street, Suite 300
Gahanna, Ohio 43230

Counsel for *Amicus Curiae*
Juvenile Justice Coalition, League of
Women Voters and Ohio Association of
Child Caring Agencies

Dorianne Mason
Ohio Justice and Policy Center
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202

Counsel for *Amicus Curiae*
Ohio Justice and Policy Center

Michele Temmel
Hamilton County Public Defender's
Office of the Ohio Public Defender 125
East Court Street, 9th Floor
Cincinnati, Ohio 45202

Counsel for *Amicus Curiae*
Hamilton County Public Defender's Office

/s/ Amanda J. Powell

Amanda J. Powell #0076418

Counsel for Matthew Aalim