

IN THE SUPREME COURT OF OHIO

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

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MATTHEW AALIM**

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**Explanation of Why this Case is one of Public or Great General Interest
and Involves a Substantial Constitutional Question**

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. Although this trend toward “adultification” is shifting back in light of recent Supreme Court precedent, Ohio law still requires juvenile courts to treat children like Matthew as though they are not really children.

The law now recognizes that children are different from adults in a constitutional sense. *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The Supreme Court directs that children be recognized as children, no matter the criminal stage or the constitutional context. This means that children now 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 or equal protection.

At issue in this case is whether Ohio’s mandatory transfer scheme contained in R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b), which forbids any consideration of the accused child’s youthfulness as a mitigating factor and requires consideration of a child’s age as an aggravating factor, can pass constitutional muster in light of these recent decisions, which rely heavily on developmental research, brain science, and long-held beliefs about what it means to be a child.

These are the same issues considered by this Court in a recent, similar case. *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900. In that case, this Court affirmed the court of appeals’ decision, finding that Alexander Quarterman forfeited his

constitutional challenges by not properly presenting or preserving them. Accordingly, this Court held, “Because Quarterman has failed to preserve the issue of the constitutionality of Ohio’s mandatory bindover statutes, the matter is not properly before us, and we decline to address it.”

Unlike Quarterman, Matthew entered a no contest plea in the trial court and has preserved his claims at every stage of his case. Further, the concurring judge noted, “Although I am compelled to follow our jurisprudence on mandatory transfer, I’d urge the Ohio Supreme Court to take up the issue.” *Op.* at ¶ 23. The concurring opinion continued, reasoning that decisions regarding transfer must be given meaningful review in every child’s case, as follows:

The judicial branch is shut out of the transfer process entirely in Aalim’s case. The juvenile judge’s ability to exercise sound discretion is subjugated to the legislative branch. Although there may be strong policy reasons for drawing a line based upon chronological age, this ignores the fact that the “signature qualities of youth are transient” as noted in *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 2467, 183 L.Ed.2d 407, 422 (2012). Whether an individual defendant has reached a stage of mental and emotional development where society must subject them to adult rules of criminal responsibility is best decided on a case by case basis by a learned juvenile judge.

Id. at ¶ 24.

Without further guidance on these important issues, judges across Ohio remain compelled to follow the law, even when they may believe that adult treatment is not warranted, or that the facts and circumstances of a child’s case warrants further investigation regarding whether transfer is appropriate. Accordingly, Matthew asks this Court to accept review and hold that in light of recent United States Supreme Court and Ohio precedent, a child’s youthfulness is a factor that cannot be ignored in a proceeding to determine whether a child will be retained in juvenile court, or will receive life-long consequences after being prosecuted as an adult.

Statement of the Case and Facts

Because Matthew Aalim was sixteen at the time he used a gun to rob two women, the Montgomery County Juvenile Court was required to transfer his case to adult court. *State v. Aalim*, 2d Dist. Montgomery No. 26249, 2015-Ohio-892, ¶ 3. After transfer, Matthew entered a plea of no contest and was convicted of two counts of aggravated robbery and was sentenced to four years in prison. *Id.* at ¶ 4. Matthew will be released from prison when he is 20 years of age—within the time the juvenile court would have jurisdiction over him, had his case been eligible to be retained by the juvenile court. *See* Ohio Department of Rehabilitation and Correction Offender Search Detail, <http://www.drc.ohio.gov/OffenderSearch/details.aspx?id=A705662&pg=x> (accessed Apr. 22, 2015).

Matthew appealed his conviction, asserting that Ohio's mandatory transfer scheme is unconstitutional because it prohibits the juvenile court from considering the mitigating factors of youth before transferring the case to adult court in violation of due process, equal protection, and the prohibition against cruel and unusual punishment. The Second District affirmed his conviction. *Op.* at ¶ 6-22. The concurrence urged this Court to accept review of the issues raised in Matthew's appeal. *Id.* at ¶ 23-24. This appeal timely follows.

Arguments in Support of Propositions of Law

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.

The guarantees of the Due Process Clause apply to juveniles and adults alike. *In re Gault*, 387 U.S. 1, 30-31, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). The applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).

In 2012, this Court reasoned, “[t]he disposition of a child is so different from the sentencing of an adult that fundamental fairness to the child demands the unique expertise of a juvenile judge.” *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 76, citing *In re D.H.* 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 59. In *C.P.*, this Court held that R.C. 2152.86’s automatic, mandatory, life-long sex offender classification for juveniles who had been adjudicated of a sex offense as a Serious Youthful Offender (SYO) violated due process because it divested the juvenile court judge of the ability to “decide the appropriateness of any such penalty.” *C.P.* at ¶ 78. And, the concurring opinion below recognized that the “judicial branch is shut out entirely in Aalim’s case [because the] juvenile judge’s ability to exercise sound discretion is subjugated to the legislative branch.” *Op.* at ¶ 24.

Revised Code Sections 2152.10(A)(2)(b) and 2152.12(A)(1)(b) require a juvenile court to transfer a child’s case to adult court for prosecution if the child is 16 or 17 and there is probable cause to support that the child has committed a category two offense with a firearm. Like R.C. 2152.86, 2152.10(A)(2)(b) and 2152.12(A)(1)(b) are unconstitutional because they prohibit the

court from making any individualized determination of the appropriateness of the transfer of a particular child's case to adult court.

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. R.C. 2152.10(A)(2)(b); 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.

Over four decades ago, the Supreme Court held that the transfer from juvenile to adult criminal court imposes a significant deprivation of liberty and therefore warrants protection under the Due Process Clause of the Fourteenth Amendment. *Kent v. United States*, 383 U.S. 541, 546, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) (finding that transfer is a “‘critically important’ action determining vitally important statutory rights of the juvenile”). 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. The process required by Ohio's Juvenile Code doesn't only allow assumptions, it requires them.

In *Kent*, the Court reasoned that a transfer proceeding must provide due process protections commensurate with the critical nature of the proceedings, because “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” *Id.* at 554. The Court held that due process required a juvenile court to consider eight factors:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i. e., whether there is evidence upon which a Grand Jury may be expected to return an indictment * * *.
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime * * *.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 566-567. The Court in *Kent* held that to ensure that a child's interest in the child's juvenile status and freedom from confinement are adequately protected, a "full investigation" is required before transfer to adult court. *Id.* at 553, fn.15.

Ohio's mandatory transfer provisions do not provide any such opportunity for a meaningful transfer proceeding after full investigation. Specifically, R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) require only that the court determine the age of the child and whether probable cause supports that the child committed a category two offense with a gun. Under R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b), a juvenile court is prohibited from considering any of the information required in the first, third, and fifth through eighth factors set forth in *Kent*. *Id.* at 566-567. What remains is nothing more than a probable cause hearing. *See, e.g., State v. Carnes*, 12th Dist. Clermont No. CA2001-02-018, 2002-Ohio-1311, ¶ 11 ("[T]he state only must establish 'probable cause to believe' that the juvenile has committed the charged act."), citing

R.C. 2151.26(B); Juv.R. 30(A); (B). Because R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) forbid the court from conducting a meaningful review of all of the facts and circumstances necessary to making a finding of such tremendous consequence, R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) cannot withstand constitutional scrutiny.

Further, Ohio law recognizes that an amenability determination is a “critical stage of the juvenile proceeding” which is a “vital safeguard,” but denies this safeguard for children like Matthew Aalim. *See In re D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, 978 N.E.2d 894, ¶ 12, 17-21. Revised Code Sections 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 conclusive or irrebuttable presumption in violation of due process.

The Court held in *Miller* 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. Under R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b), the juvenile court is forbidden from considering the mitigating factors of youth before transferring the case to adult court because 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. Worse, the mandatory transfer statutes improperly require the court to treat age as an aggravating, rather than a mitigating factor. *See Penry v. Johnson*, 532 U.S. 782, 787, 121 S.Ct. 1910, 150 L.Ed.2d 9(2001) (finding that a mitigating factor cannot be “relevant only as an aggravating factor.”). 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.” *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 12, quoting *Roper*, 543 U.S. at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1.

Matthew asks this Court to accept review of this case and 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).

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 United States Supreme Court has found that while children’s constitutional rights are not “indistinguishable from those of adults * * * children generally are protected by the same constitutional guarantees against governmental deprivations as are adults.” *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979). The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article 1, Section 2; *see also Sorrell v. Thevenir*, 69 Ohio St.3d 415, 424, 1994-Ohio-38, 633 N.E.2d 504 (finding that the Equal Protection clause of the Ohio Constitution has been interpreted to be essentially identical in scope to the analogous provision of the U.S. Constitution). 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, 1992-Ohio-133, 595 N.E.2d 862. In other words, the Equal Protection Clause prevents the state from treating

differently or arbitrarily, persons who are in all relevant respects alike. *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 18.

A. Revised Code Sections 2152.10 and 2152.12 create classes of similarly situated children who are treated differently, based solely upon their ages

Children who were 14 or 15 at the time they committed a category two offense with a firearm are subject only to discretionary transfer if the court finds they are not amenable to rehabilitation in the juvenile system. R.C. 2152.10(B), 2152.12(A), (B). But, children who were 16 or 17 at the time of the same offense are subject to mandatory transfer and are not entitled to an amenability determination. R.C. 2152.10(A)(2)(b), 2152.12(A)(1)(b).

Although the legislature may set more severe penalties for acts that it believes should have greater consequences, the differences in R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) are not based on acts of greater consequence, but simply on the child's age at the time of the offense. Under the rational basis test, if the age-based classification is not rationally related to the State's objective in making the classification, it will be found to be in violation of the Equal Protection Clause. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

B. The age-based distinctions in R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) are not rationally related to the purpose of juvenile delinquency proceedings

The differential treatment of children under R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) is not supported by empirical evidence, because current research and jurisprudence recognizes the differences between adults and children, not between older children and younger children who are all under the age of 18. Notwithstanding the lack of scientific support, R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) draw bright-line distinctions between children who were 16 or 17 and those who were 14 or 15 at the time of their offense.

The legislature may impose special burdens on defined classes in order to achieve permissible ends, but equal protection requires that the distinctions drawn are relevant to the purpose for which the classification is made. *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (holding that there must be some rationality in the nature of the classes singled out). In four different contexts, the Supreme Court has refused to differentiate younger and older children. *Roper*, 543 U.S. at 568-569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (noting that all children under the age of 18 are not as culpable as adults for their conduct, are “more vulnerable or susceptible to negative influences,” and their characters are not as “well formed as that of an adult”); *Graham*, 130 S.Ct. at syllabus, 176 L.Ed.2d 825 (issuing a categorical rule that all children under the age of 18 cannot be subject to life in prison without the possibility of parole for non-homicide offenses); *J.D.B.*, 131 S.Ct. at 2403, 180 L.Ed.2d 310 (“No matter how sophisticated, a juvenile subject of police interrogation cannot be compared to an adult subject.”); *Miller*, 132 S.Ct. at 2469, 183 L.Ed.2d 407 (requiring a court “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison”).¹ In reaching this conclusion, the Supreme Court relied on common sense, as well as adolescent brain science research. *See, e.g.*, International Association of Chiefs of Police, *Reducing Risks: An Executive’s Guide to Effective Juvenile Interview and Interrogation* 4 (finding that the part of the brain regulating judgment and decision making is not fully developed until the end of adolescence).

There is no evidence to support the need for disparate treatment under R.C. 2152.10(A)(2)(b) and R.C. 2152.12(A)(1)(b). And, the General Assembly gives no rationale for

¹ Christopher Simmons was 17 years old at the time of his offense. *Roper* at 556. Terrance Graham was 16 years old at the time of his offense. *Graham* at 2018. *J.D.B.* was a 13-year-old seventh grader at the time of his offense. *J.D.B.* at 2399. Evan Miller and Kuntrell Jackson were 14 years old at the time of their offenses. *Miller* at 2461-2462.

treating older children who have committed a category two offense with a gun differently from younger children who have committed the same offense. Therefore, R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b), which allow for similarly-situated children to receive disparate treatment without any rational basis whatsoever cannot withstand constitutional scrutiny.

C. Under strict scrutiny review, R.C. 2152.10 and 2152.12, which require a juvenile court to consider the mitigating factors of youth in an amenability hearing for some, but not all children, based solely on a child's age, violates equal protection

The Supreme Court's decisions in *Roper*, *Graham*, and *Miller* support the conclusion that children 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." *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. 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.

Matthew asks this Court to accept review of this case and hold that the mandatory transfer provisions in R.C. 2152.10(A)(2)(b) and 2152.12(A)(1)(b) violate juveniles' rights to equal protection as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2, of the Ohio Constitution.

Conclusion

As urged by the concurring opinion below, Matthew Aalim respectfully requests that this Court accept jurisdiction of this appeal.

Respectfully submitted,

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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Matthew Aalim** was served by ordinary U.S. Mail, postage-prepaid, this 27th day of April, 2015, to Andrew T. French, Assistant Montgomery County Prosecutor, Montgomery County Prosecutor’s Office, 301 West Third Street, 5th Floor, Courts Building, Dayton, Ohio 45402.

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