Supreme Court of Ohio Clerk of Court - Filed February 29, 2016 - Case No. 2016-0315

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	Case No.
APPELLEE	:	
	:	
V.	:	ON APPEAL from the Franklin
	:	County Court of Appeals
STEVEN LEE	:	Tenth Appellate District
	:	
APPELLANT	:	
	:	C.A. Case No. 14-AP-001009

MEMORANDUM IN SUPPORT OF JURISDICTION OF STEVEN LEE

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Table of Contents

Page No.

Explanation of Why this Case is one of Public or Great General Interest and Involves a Substantial Constitutional Question. 1

Statement of the Case and Facts 2

Arguments in Support of Propositions of Law 3

Proposition of Law I: A juvenile court commits plain error when it transfers juvenile offenders to criminal court pursuant to R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i), because those sections are unconstitutional, in violation of the right to due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, Ohio Constitution. 3

Proposition of Law II: A juvenile court commits plain error when it transfers juvenile offenders for criminal prosecution pursuant to 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i), because those sections are unconstitutional, in violation of the right to equal protection of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2, Ohio Constitution. 9

Conclusion 13

Certificate of Service 14

Appendix

State of Ohio v. Steven Lee, Franklin County Court of Appeals
Case No. 14AP-1009, Decision and Journal Entry (January 14, 2016) A-1

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

At issue in this case is whether Ohio's mandatory transfer scheme contained in R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i), 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 recent decisions by the Supreme Court of the United States. The Court's jurisprudence relies heavily on developmental research, brain science, and long-held beliefs about what it means to be a child, and the law now recognizes that children are different from adults in a constitutional sense. *Montgomery v. Louisiana*, ___U.S.___, 136 S.Ct. 718, 723-724, 193 L.Ed.2d 599 (2016); *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.

This case presents the issues accepted by this Court in Case No. 2015-0677, *State v. Aalim*, but involves the mandatory transfer of a category one offense under R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i). In his appeal below, Steven challenged the constitutionality of Ohio's mandatory transfer statutes below as plain error. Because this Court's resolution of *Aalim* will have significant implications for these related issues, this Court should accept jurisdiction of this case and hold it for the decision in *Aalim*.

Statement of the Case and Facts

Because Steven Lee was sixteen at the time he was accused of committing a category one offense, the State was required to transfer his case for criminal prosecution. *Opinion* at ¶ 2. After transfer, Steven was charged with aggravated robbery, aggravated murder, and murder. *Id.* Prior to trial, the court entered a nolle prosequi on the aggravated murder charge. *Id.* After a jury trial, Steven was convicted of aggravated robbery, felony murder, and two corresponding firearm specifications. *Id.* at ¶ 8. The court imposed sentenced Steven to five years for aggravated robbery, fifteen years-to-life for murder, and three years on each firearm specification. *Id.* at ¶ 9. The court ordered the sentences for the underlying offenses be served concurrently with each other, but consecutively to the two firearm specifications, for a total term of 21 years to life. *Id.*

Steven 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. *Id.* at ¶ 2. And, Steven assigned error to the trial court's failure to merge Steven's convictions for aggravated robbery and felony murder. *Id.* The court of appeals affirmed Steven's mandatory transfer and convictions, and this appeal timely follows.

Arguments in Support of Propositions of Law

Introduction

The following propositions of law raise issues that are similar to those considered by this Court in *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900. This Court declined to address the substantive questions in *Quarterman*, finding that the appellant in that case failed to preserve the claims or allege plain error on review. *Id.* at ¶ 17-18. This Court has accepted nearly identical issues for review in Case No. 2015-0677, *State v. Aalim*. In this case, Steven did not raise his constitutional challenges to the mandatory transfer statutes in the juvenile or trial courts, but alleged plain error on appeal. *Opinion* at ¶ 24; *Appellant's Brief* at p.10-18.

Proposition of Law I: A juvenile court commits plain error when it transfers juvenile offenders to criminal court pursuant to R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i), because those sections are unconstitutional, in violation of the right to due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 16, Ohio Constitution.

A. Ohio's statutory scheme requiring mandatory transfer pursuant to R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) violates due process

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.

Revised Code Sections 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) 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 one offense. Like R.C. 2152.86, 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) are unconstitutional because they create an irrebuttable presumption that the child is not amenable to the juvenile system, and 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 one offense. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) 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 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, 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) require only that the court determine the age of the child and whether probable cause supports that the child committed a category one offense. Under R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i), 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 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) forbid the court from conducting a meaningful review of all of the facts and circumstances necessary to making a finding of such tremendous consequence, 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) 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 Steven Lee. *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)(1)(a) and 2152.12(A)(1)(a)(i) 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. The Supreme Court recently expanded *Miller*, and held that *Miller* created a substantive rule of constitutional law that applies retroactively. *Montgomery v. Louisiana*, ___U.S.___, 193 L.Ed.2d 599, 609 (2016). The Court upheld petitioner Montgomery's collateral attack on his life without parole sentence. The Court reasoned that *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—*i.e.* juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery* at 609.

The Court iterated that *Miller's* "central intuition" is that "children who commit even heinous crimes are capable of change. *Montgomery* at 609. And, even if a court considers a child's age before sentencing a child to life in prison, that sentence is still unconstitutional "for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 619. Under 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i), 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 one offense 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."). 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i). 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.

B. A juvenile court's transfer order pursuant to an unconstitutional statutory scheme creates a manifest injustice and constitutes plain error

In criminal court, Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988). This Court has applied the plain error analysis from Crim.R. 52(B) to constitutional challenges to statutes on direct appeal when there was no objection made in the trial court. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 15. First, there must be an error. *Id.* at ¶ 16. Secondly, the error must be plain, meaning an "obvious defect" in the trial proceedings. *Id.* Third, the error must affect substantial rights, meaning that the trial court's error must have affected the outcome of the case. "Courts are to notice plain error 'only to prevent a manifest miscarriage of justice.'" *Id.* quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

While legislation enjoys a strong presumption of constitutionality, "in exercising the power of judicial review, no amount of deference to a legislative enactment should force a court to concede that something is that which it is not." *In re W.Z.*, 194 Ohio App.3d 610, 2011-Ohio-3238, 957 N.E.2d 367, ¶ 16 (6th Dist.), citing *State v. Skilwies*, 2d Dist. Montgomery No. 17077, 1999 Ohio App. LEXIS 20 (Jan. 8, 1999) and *Marathon Oil Co. v. Bd. of Zoning Adjustment*, 44 Ohio App.2d 402, 339 N.E.2d 856 (10th Dist.1975). Steven asks this Court to recognize the constitutional violations propagated by a statutory scheme which subjects him to mandatory transfer and an adult prison term, when there was no opportunity to for the juvenile court to consider his amenability to the juvenile justice system. If this Court accepts his constitutional claims, it must necessarily find that the statutes mandating his mandatory transfer are defective and affect his substantial rights. Failing to hold otherwise would result in a manifest miscarriage of justice.

Alternatively, though Steven raised this claim for the first time in the court of appeals, this Court should decline to apply the waiver doctrine set forth in *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986). As this Court later clarified, "the waiver doctrine announced in *Awan* is discretionary[, and] * * * 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 may warrant it." *M.D.*, 38 Ohio St.3d at 151, 527 N.E.2d 286. In light of the constitutional implications of Ohio's statutory scheme, Steven 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 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i).

Proposition of Law II: A juvenile court commits plain error when it transfers juvenile offenders for criminal prosecution pursuant to 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i), because those sections are unconstitutional, in violation of the right to equal protection of law 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 one offense 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. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i).

Although the legislature may set more severe penalties for acts that it believes should have greater consequences, the differences in 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) 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 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) are not rationally related to the purpose of juvenile delinquency proceedings

The differential treatment of children under 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) 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)(1)(a) and 2152.12(A)(1)(a)(i) 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 five 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"); *Montgomery*, 136 S.Ct. at 724, 193 L.Ed.2d 599 (holding that *Miller* created a substantive rule of constitutional law, and "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—*i.e.* juvenile offenders whose crimes reflect the transient immaturity of youth.").[1] In reaching these conclusions, 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)(1)(a) and 2152.12(A)(1)(a)(i). And, the General Assembly gives no rationale for treating older children who have committed a category one offense differently from younger children who have committed the same offense. Therefore, R.C. 2152.10(A)(1)(a) and

[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. Henry Montgomery was 17 years old at the time of his offense. *Montgomery* at 723.

2152.12(A)(1)(a)(i), 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, violate equal protection

The Supreme Court's decisions in *Roper*, *Graham*, *Miller*, and *Montgomery* support the conclusion that a child's status be considered as a mitigating factor at every stage of the proceedings, including transfer. Although recognizing a new suspect classification is generally disfavored, the United States Supreme Court has done so to prevent unequal treatment:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Lawrence, 539 U.S. at 584, 123 S.Ct 2472, 156 L.Ed.2d 508, O'Connor, J., concurring, quoting *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 112-113, 93 L.Ed. 533, 69 S.Ct. 463 (1949) (Jackson, J,. concurring).

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.

D. A juvenile court's transfer order pursuant to an unconstitutional statutory scheme creates a manifest injustice and constitutes plain error

As set forth in Proposition of Law I, if this Court accepts Steven's constitutional claim that mandatory transfer violates his right to equal protection, it must necessarily find that the

statutes mandating his mandatory transfer are defective and affect substantial rights. Failing to hold otherwise would result in a manifest miscarriage of justice.

Alternatively, though Steven raised this claim for the first time in the court of appeals, this Court should decline to apply the waiver doctrine set forth in *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), because his rights and interests warrant consideration. *In re M.D.*, 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988). Therefore, Steven asks this Court to accept review of this case and hold that the mandatory transfer provisions in R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) 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

For the foregoing reasons, Steven Lee 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 Steven Lee** was served by ordinary U.S. Mail, postage-prepaid, this 29th day of February, 2016, to the office of Valerie B. Swanson, Assistant Franklin County Prosecutor, Franklin County Prosecutor's Office, Hall of Justice, 14th Floor, 373 S. High Street, Columbus, Ohio 43215

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APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION OF STEVEN LEE