

# Ohio General Assembly

The Ohio House of Representatives Criminal Justice Committee

Written Testimony in Support of HB 394

February 13, 2018

Justice Judith Ann Lanzinger, Supreme Court of Ohio, retired

To the Chair and Members of the Ohio House of Representatives Criminal Justice committee:

On December 12, 2017, I had the opportunity to speak before the Senate Judiciary Committee in support of SB 64, a proposal to eliminate the mandatory bindover of certain cases from juvenile court to common pleas court. Today I submit the following written comments in support of HB 394, the bill offered by Representative Rezabek that discusses the same issue.

My remarks are informed generally by my 32 years as a judge at all levels of Ohio's judiciary, but more specifically by my service on both the Criminal Justice Recodification Committee and the Criminal Sentencing Commission. I participated in recommending massive changes to Title 29 of the Revised Code in 1996, and since then have had a deep interest in sentencing legislation. I believe that the provisions related to elimination of mandatory bindover in HB 394 would be a step forward in juvenile justice.

As a preliminary matter, I note that while HB 394 agrees with SB 64 in the need to eliminate mandatory bindover, it proposes additional modifications to juvenile sentencing (i.e., elimination of reverse transfers, modifications in discretionary transfer, addition of a right to appeal, changes to confinement credit, court costs and fines, restitution, and parole eligibility. ) I express no opinion on those provisions, and wish to focus solely on the elimination of mandatory bindover.

My concerns can be illustrated by the following Ohio Supreme Court case.

## *A Case on Mandatory Bindover*

Matthew Aalim, an African American youth, was 16 when he allegedly used a gun and committed what would be considered aggravated robbery if committed by an adult. Because there was probable cause that he had committed the offense, the mandatory bindover law applied, meaning that he was automatically sent to the common pleas general division in Montgomery County to be prosecuted as an adult. No amenability hearing was held to evaluate his capacity for rehabilitation or suitability for juvenile court treatment. The facts of his age and the finding of probable cause on the charges he faced meant the juvenile judge had no opportunity to consider whether his case should remain in juvenile court. Transfer was automatic, according to the current statutes, R.C. 2152.10(A) and 2152.212(A). Matthew plead guilty to aggravated robbery and was sentenced to 2 terms of 4 years of incarceration, run concurrently. His case finally came to the Supreme Court on appeal.

In December 2016 I wrote the majority opinion in *State v. Aalim*.<sup>1</sup> The Supreme Court held that *mandatory* transfer of juveniles without providing for the protection of a discretionary determination by the juvenile court judge violates juveniles' right to due process as guaranteed by the Ohio Constitution<sup>2</sup>.

A few months later after two new justices joined the court, and the new makeup of the Court voted to reconsider the case.

It is interesting to note the groups supported elimination of mandatory bindover by filing briefs with the Court in the reconsideration case. The Children's Law Center along with numerous other organizations supporting juvenile rights, filed an amicus brief in support of Matthew. They argued that the mandatory bindover statutes conflict with the primary goals of rehabilitating juveniles, and are based on a number of unsupported myths such as deterrence and the prevention of recidivism. They emphasized the racial disparity with

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<sup>1</sup> *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278

<sup>2</sup> Art I, Sect. 16 of the Ohio Constitution states "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, *shall have remedy by due course of law*, and shall have justice administered without denial or delay." (emphasis added).

respect to those subject to mandatory transfer. They alleged that even the Ohio Judicial Conference supports eliminating mandatory bindovers.

The Juvenile Law Center and National Juvenile Defender Center filed a joint brief on behalf of Matthew. They argued the mandatory bindover statutes are unconstitutional because they do not allow for individualized determinations regarding the propriety of prosecuting certain minors in adult criminal court rather than juvenile court. They emphasized the statutes' negative effects—increased recidivism, deprivation of proper rehabilitative programs, and increased collateral consequences. They also contended that public policy and public opinion largely oppose mandatory transfers.

The decision was reversed after the reconsideration.<sup>3</sup> Chief Justice Maureen O'Connor, in a thorough dissent<sup>4</sup> maintained the Court's earlier majority position that Ohio's mandatory-transfer proceeding does not comply with the fundamental-fairness standard required for juvenile-transfer proceedings and stated that "this case implores a closer look by the high court."<sup>5</sup>

But the General Assembly need not wait for the U.S. Supreme Court to require action. It can re-establish Ohio's forward-looking juvenile jurisprudence by eliminating mandatory bindover by enacting HB 394.

*The General Assembly will honor due process by eliminating the mandatory bindover as provided in HB 394.*

Because the legislature created a state juvenile court system, Ohio juveniles have been given special status with special protections. Once a state provides statutory rights greater than those afforded by the federal Constitution, the state may not divest citizens of those rights without due process. In examining what process is "due," a court

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<sup>3</sup> *State v. Aalim*, 150 Ohio St 3d 489, 2017-Ohio-2956.

<sup>4</sup> Id. ¶¶52-109.

<sup>5</sup> Id. ¶ 105.

examines three things under the federal test <sup>6</sup>: 1) what private interest is at risk, 2) how great is the risk of an error in the government's procedure and the value of other procedural safeguards, 3) the government's interest and the burden of a substitute procedural requirement. On the first factor, a child's interest in retaining his or her juvenile status and the significant risk that juveniles capable of rehabilitation will be prosecuted in adult court as a result of the perfunctory procedure set forth in the mandatory-transfer statute clearly outweigh the state's limited burden of conducting an amenability investigation in potentially transferable cases. The juveniles' liberty interests are in jeopardy if they are subject to adult penalties in criminal courts; disposition consequences are harsher, and may include imprisonment with hardened adult offenders; collateral consequences are greater, including prevention from various types of employment; offenses are not sealed but may remain always on the public record.

On the second due process factor of risk of error, the mandatory-transfer statute permits the judge to consider just two factors beforehand: the juvenile's age at the time of the offense and whether there is probable cause to believe that the juvenile committed the mandatory-transfer-eligible conduct. The statute does not permit the judge to consider any mitigating evidence, such as whether the accused lacks criminal history, has a mental illness, is emotionally or psychologically immature, or was under duress at the time of the alleged crime. All of these factors may be considered only at a discretionary-transfer hearing. R.C. 2152.12(E). Most importantly, in a mandatory bindover, a judge has no right to even inquire into a juvenile's potential for rehabilitation, let alone weigh it. Without allowing a judge to conduct any inquiry beyond probable cause or age, there is significant risk of turning a delinquent capable of rehabilitation into a lifelong criminal. Thus, the risk of erroneous deprivation of the child's status as a juvenile offender is substantial.

Third, the alternative that HB 64 provides by eliminating the mandatory bindover and allowing all bindovers to be discretionary is not a burden to the state. As the U.S. Supreme Court has said "none of what [Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011,

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<sup>6</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)

176 L.Ed.2d 825 (2010)] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”<sup>7</sup> And the court has recognized that “it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”<sup>8</sup>

As HB 394 proposes, R.C. 2152.12 will set forth the factors to consider in its amenability/community safety decision at a discretionary-transfer hearing. The factors ensure that the juvenile judge will consider the unique facts and circumstances of the particular offense and the offender. This procedure will remedy the concerns expressed by the majority in the first Aalim opinion and the Chief Justice’s dissent in the second.

*The Discretionary Transfer Process Satisfies Due Process and Promotes Public Safety*

It is important to emphasize that enactment of HB 394 would not compromise public safety or be considered “soft on crime.” Passage would mean a juvenile judge will have discretion to carry out judicial duties. Artificial mandates for transfer will disappear and decisions on the proper jurisdiction for a case will remain with the judge who is most likely to understand the intricacies of a situation. A judge may always find a juvenile unamenable after a hearing and may choose to transfer the case to common pleas court. The judge would no longer be prevented from full consideration of a juvenile case.

Ohio has a well-deserved reputation for being in the forefront of juvenile justice. We have judges who currently serve at a national level and those who recognize the importance of exercising their discretion appropriately. The juvenile judges should be

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<sup>7</sup> Miller v. Alabama 567 U.S. at 473, 132 S.Ct. 2455, 183 L.Ed.2d 407.

<sup>8</sup> Roper v Simmons, 543 U.S. at 570, 125 S.Ct. 1183, 161 L.Ed.2d 1.

trusted to determine the best interest of the community, the public safety and the individual juvenile in each case. HB 394 allows just that.

I earnestly support this legislation.

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