THE CONNECTICUT SUPREME COURT

S.C. 18449

STATE OF CONNECTICUT

v.

DAVID A. FERNANDES, JR.

BRIEF OF THE CENTER FOR CHILDREN'S ADVOCACY AND JUVENILE LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT DAVID A. FERNANDES

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Statement of Issues

Amici adopt the statement of issues as articulated by Defendant, David Fernandes.

Interest of *Amici*[1]

Juvenile Law Center, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center advocates for the protection of children's due process rights at all stages of juvenile court proceedings, from arrest through disposition and from post-disposition through appeal. Juvenile Law Center, works to align juvenile justice policy and practice, including state laws on transfer with modern understandings of adolescent development and time-honored constitutional principles of fundamental fairness. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

The Center for Children's Advocacy is a non-profit organization based at the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education

[1] *Amici* file this brief with the Court's permission. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure that children's voices are heard and that children are afforded legal protections everywhere – community, foster placements, educational institutions, justice system and child welfare.

Statement of Facts and Proceedings

Amici adopt the statement of facts and proceedings as articulated by Defendant, David Fernandes.

Argument

The difference in possible outcomes in juvenile versus adult prosecution and sentencing is profound, resulting in life-altering consequences for juveniles treated as adults. Connecticut statute, C.G.S. §46b-127(b), unlawfully delegates to the prosecutor the power to choose the forum in which juvenile offenders are prosecuted without providing standards to guide that choice, without requiring a statement of reasons for that choice, and without affording an opportunity for review of that choice. As a matter of *forum selection*, not *charging*, prosecutorial discretion does not provide any special justification for the denial of process. The need for process is even greater when a prosecutor, who is inherently adversarial, rather than a judge, who is inherently neutral, chooses adult court over juvenile court. The transfer statute that divested the juvenile court of jurisdiction over Defendant David Fernandes is constitutionally defective because it deprives youth of their vested liberty interest guaranteed them by C.G.S. §46b-120 *et seq.* (juvenile docket has original jurisdiction over youth under age sixteen until prosecutor moves for and judge orders transfer) without due process. For that reason, this court must affirm his conviction's reversal.

I. DUE PROCESS REQUIRES A HEARING WHEN JUVENILES ARE TRANSFERRED TO THE ADULT CRIMINAL SYSTEM.

In *Kent v. United States*, 383 U.S. 541 (1966), the United States Supreme Court declared that a statutory scheme that subjected a particular child to adult/criminal jurisdiction without any hearing or opportunity to contest the transfer violates the minor's due process rights. *Kent* teaches that "procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness" is constitutionally required when the legislature creates a juvenile court by statute, *id.* at 553,

and that "there is no place in our system of law for reaching a result [waiver of juvenile court jurisdiction over a youth] of such tremendous consequences without ceremony– without hearing, without effective assistance of counsel, without a statement of reasons." Id. at 554. Such procedural regularity does not exist in the Connecticut discretionary transfer provision. While *Kent* dealt with a judicial decision to waive juvenile jurisdiction and transfer a child's case to adult court, its reasoning is as applicable, if not more so, to a prosecutor's decision to prosecute a juvenile in adult court. Indeed, the Connecticut Supreme Court has held that Kent stands for the proposition that "if a statute vests a juvenile with the right to juvenile status, then that right constitutes a liberty interest, of which the juvenile may not be deprived without due process, i.e., notice and a hearing." *State v. Angel C.*, 245 Conn. 93, 105 (1998) quoting *State v. Matos*, 240 Conn. 743, 749 (1997). Statutory schemes that divest the juvenile court of its original jurisdiction over a youth and transfer the youth to criminal court must include procedural safeguards that "satisfy the basic requirements of due process and fairness." *Id.* at 553. See also *Kent*, 383 U.S. at 554.

In addition to running afoul of *Kent's* holding, the broad and unfettered prosecutorial discretion granted by C.G.S. §46b-127(b) is unparalleled in the United States.[2] Many states grant the prosecutor discretion to move for the juvenile's transfer to adult criminal court. However, the overwhelming majority of these states require a judicial hearing regarding the defendant's suitability for prosecution in the adult system. *See, e.g.*, **Arizona**,

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[2] This Court should follow the example set by its opinion in *State v. Angel C.* to acknowledge the relevance and informative value of other state statutes when deciding the constitutionality of Connecticut's own laws. *See* 245 Conn. 93, 111, 111 n. 19 (1998). In *Angel C.*, this Court wisely examined the laws of other states when faced with the question of whether *Kent* required a hearing for automatic, mandatory transfers of juveniles to adult court.

Ariz. R. Juv. P. 34 (discretionary transfer cannot occur without a formal written opinion issued after two-tiered hearing to determine probable cause and whether transfer would serve public safety); **Delaware**, 10 Del. C. §1010 (a juvenile cannot be moved to superior court on the prosecutor's motion unless, after a hearing, the court finds six (6) factors showing that the child "is not amenable to the rehabilitative processes of the [c]ourt"); **Idaho**, Idaho Code §20-508 (in addition to a court hearing, the county probation department must conduct a "full and complete investigation" into the child's suitability for adult criminal proceedings); **Illinois**, 705 ILCS 405/5-805 (on motion of the state's attorney, a special judge is assigned to conduct a hearing about whether waiver would best serve the interests of the public – five general factors must be considered, and the state rules of evidence apply); **Michigan**, MCLS 712A.2d (the court must consider eight factors in a judicial hearing, giving particular weight to the seriousness of the offense and the juvenile's prior record); **Mississippi**, Miss. Code §43-21-157 (the court may not grant a prosecutor's motion to transfer without conducting a bifurcated hearing finding probable cause and then determining whether there are "reasonable prospects of rehabilitation in the juvenile justice system" using 14 guiding factors); **Oregon**, ORC Ann. §§2152.10, 2152.12 (upon motion to transfer, the court must hold a hearing to decide if "[t]he child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community...require[s] adult sanctions"); **Rhode Island**, R.I. Gen. Laws §14-1-7.1 (a prosecutorial motion for transfer triggers a hearing at which the court must consider whether "the interests of society or the protection of the public necessitate the waiver of jurisdiction").[3]

[3] *See also* statutes requiring a hearing before a juvenile court may grant a prosecutor's motion to transfer a defendant to adult court under a discretionary transfer regime: Code of Ala. §12-15-203; Alaska Stat. §47.12.100; C.R.S. §19-2-518; D.C. Code §16-2307; Fla.

Section 46b-127(b)'s failure to comply with the due process clause is compounded by Connecticut's lack of a robust reverse waiver provision. While the state provides for reverse waiver in limited situations, this does not sufficiently overcome the denial of due process under the discretionary transfer statute and is itself an inadequate safeguard of juvenile rights when measured against the reverse waiver provisions of many other states. *Compare, e.g.*, C.G.S. §47b-127b (allowing for reverse waiver of a discretionary transfer only within 10 days after such transfer and providing no guidance as to when such reversal must or should occur) *with* Miss. Code §43-21-157 (any transferred juvenile may move for reversal, which the circuit court must grant unless the transfer is supported by "substantial evidence"), *and* Va. Code §16.1-269.4 (providing an immediate appeal for transfers from juvenile to circuit court).

Courts around the country also have ruled that reverse waiver decisions must adhere to strict procedural requirements that consider factors similar to those that justify transfer to adult court. For example, a Maryland court held that, like transfer to adult court, reverse waiver requires a hearing considering "(1) the age of the child; (2) the mental and physical condition of the child; (3) the amenability of the child to treatment in an institution, facility, or program available to delinquent children; (4) the nature of the alleged crime; and (5) the public safety." *Whaley v. State*, 974 A.2d 951, 959-60 (Md. Ct. Spec. App. 2009). *See also State v. Vogt*, 693 N.W.2d 146 at *7, n. 4 (Wis. Ct. App. 2005) (holding that reverse waiver

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Stat. §985.556; O.C.G.A. §15-11-30.2; HRS §571-22; Burns Ind. Code §§31-30-3-1 to -10; Iowa Code 232.45; K.S.A. §38-2347; La. Ch.C. Art. §§857, 862; Md. Rule 11-113; Minn. Rules Juv. Proc. 18; §211.071 R.S. Mo.; Nev. R. Stat. §62B.390 ; RSA §169-B:24; N.C. Gen. Stat. §§7B-2200, -2203; N.D. Cent. Code §27-20-34; 10 Okl. St. §§7306-2.8 to -2.9; ORS §419C.349; 42 Pa. C.S. §6355; S.D. Codified Laws §26-11-4; Tenn. Code §37-1-134; Tex. Fam. Code §54.02; 33 V.S.A. §5204; Va. Code. 16.1-269.1; Rev. Code. Wash. §13.40.110; W. Va. Code §49-5-10; Wis. Stat. §938.18; Wyo. Stat. §14-6-237.

is justified if treatment in the adult criminal system would be inadequate, trial in juvenile court would not "depreciate the seriousness of the offense," and adult proceedings are not required to deter the targeted malfeasance); *State v. Buelow*, 587 A.2d 948, 953 (Vt. 1990) (holding that a court may consider *Kent*'s judicial waiver factors at a reverse waiver hearing). Thus, Connecticut's reverse waiver provision neither remedies the constitutional defects of its discretionary transfer system nor provides a sufficient shield for juvenile rights by itself.

II. JUVENILES SHOULD BE AFFORDED THE OPPORTUNITY TO SHOW THEY ARE AMENABLE TO TREATMENT IN THE JUVENILE SYSTEM.

Youth have a greater likelihood of being amenable to treatment than adults due to their lack of maturity and psychosocial and physiological development. The juvenile court was created because of these inherent differences and juveniles' greater ability to be rehabilitated. The United States Supreme Court has recognized that developmental differences of youth as compared to adults mandate treatment consistent with those differences. An opportunity to show their amenability to treatment in the juvenile justice system in a due process hearing before being stripped of their liberty interests in treatment is consistent with this research.

Connecticut law previously required a non-mandatory juvenile transfer of a youth fourteen or older charged with serious felonies to be preceded by a hearing. *See* C.G.S. §46b-127(b), *See* §17-60a (transferred to C.G.S.A. §§51-307, 51-308 in Gen. Sess., 1977). The judge was required to assess the child's amenability to treatment in juvenile court before relinquishing jurisdiction, and, if transferring, find probable cause that: (1) the child has committed the action for which he is charged; (2) *the child is not amenable to treatment* in any institution or state agency or other available facility designed for the care and

treatment of children to which said court may effect placement of such child which is suitable for his care or treatment; and (3) the *sophistication, maturity* and previous adjudications of the juvenile are such that the facilities used for regular criminal sessions of the superior court provide a more effective setting for the disposition of the case." *See* C.S.G. §46b-126(a) (repealed by P.A. 95-225, 2005). (emphasis added).

A. A Majority of States and the Federal Court Require a Determination of the Youth's Amenability to Treatment Prior to Transferring the Youth to the Adult Criminal System.

Twenty-eight states and the District of Columbia require some inquiry into the juvenile's amenability to rehabilitation and treatment in the juvenile system prior to permitting transfer into the adult criminal system. These states require a juvenile court judge to consider the child's likelihood of rehabilitation during the discretionary transfer hearing, including an inquiry into the child's background, school and home life, maturity, sophistication, mental capacity, past treatment and rehabilitative services. *See* **Alabama**, Code of Ala. §12-15-203(d)(5); **Arkansas**, A.C.A. §9-27-318(g); **Colorado**, C.R.S.A., §19-2-518(4)(b)(IV)-(V); **Delaware**, 10 Del. C. §§1010(a)(2), (c)(1); **District of Columbia**, D.C. Code §16-2307(d)(2)(a), (e); **Florida**, Fla. Stat. §985.556(4)(c)(6), (8); **Hawaii**, HRS 571-22(c)(5), (7); **Idaho**, Idaho Code §20-508(8)(d), (f); **Illinois**, ILCS 705 §§405/5-805(3)(b)(i)-(v), 405/5-805(2)(b)(i)-(v); **Kentucky**, KRS §640.010(2)(b)(3), (7); **Kansas**, K.S.A. §38-2347(e)(6)-(7); **Maine**, 15 M.R.S. §3101(4)(D)(2); **Mississippi**, Miss. Code Ann. §43-21-157(5); **New Hampshire**, N.H. Rev. Stat. §169-B:24(I)(f), (h); **New Mexico**, N.M. Stat. Ann. §32A-2-20(B)(1), (C)(5); **North Carolina**, N.C. Gen. Stat. §7B-2200(b); **North Dakota**, N.D. Cent. Code §27-20-34(3); **Ohio**, R.C. §2152.12(e); **Oklahoma**, 10 Okl. St. §7306-2.8(2)(d), (f); **Oregon**, ORS §419C.349(4); **Pennsylvania**, 42 Pa.C.S. §6355(A)(4)(iii)(G); **Texas**, Tex.

Fam. Code §54.02(f)(2), (4); **West Virginia**, W. Va. Code, §49-5-10(f)-(g); **Wyoming**, Wyo. Stat. §14-6-237(b)(v), (vii); **Vermont**, V.A.M.S. §211.071(6); **Virginia**, Va. Code Ann. §16.1-269.1(A)(4)(a)-(j).

Other states place the burden on the prosecutor to demonstrate that it is contrary to the public interest or child's interests for the child to remain in juvenile court or that the child cannot be rehabilitated in juvenile court. *See* Utah Code Ann. §§78A-6-703(2)(b), (3)(e), (g); Wis. Stat. §938.18(5)(a); La. Ch. C. art. 862(a)(2); Alaska Stat. §47.12.100(b), (c)(2); Cal. Welf. & Inst. Code §707(a)(1).

Moreover, before a juvenile can be prosecuted as an adult in federal court, the youth must be afforded a due process hearing. *See* 18 U.S.C.A. §5032 (Federal Juvenile Delinquency Act). The district court must determine whether the transfer is "in the interest of justice" by considering "the age and social background of the juvenile; . . . the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; [and] the availability of programs designed to treat the juvenile's behavioral problems." *Id.* The Second Circuit further explained that rehabilitation is a crucial consideration in the transfer decision and six-factor inquiry. *United States v. Nelson*, 90 F.3d 636, 640 (2d Cir. 1996).

B. Research in Adolescent Development Supports *Amici's* Position That Juveniles Should Have the Opportunity to Demonstrate their Amenability to Treatment.

The fundamental differences between juveniles and adults endorsed by the United States Supreme Court in *Roper v. Simmons* are well-established in scientific literature and provide strong support for the focus on amenability to treatment prior to transferring a juvenile to adult court. The transient nature of a youth is confirmed by psychological and

psychiatric practice. *Roper v. Simmons*, 543 U.S. 551, 573 (2005). Research shows that as youth develop, they become less likely to engage in antisocial activities, an attribute that can be dramatically enhanced with appropriate treatment. "Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. *See* Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psych. 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). As a result, "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled." *Id.* at 1014. Youth are developmentally capable of change and research demonstrates that when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions.

These findings are primarily grounded in behavioral research, and also are consistent with recent findings in developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott

& Steinberg, *Rethinking Juvenile Justice* 46-68.[4] Indeed, compelling evidence demonstrates that non-rehabilitative, punitive sanctions have negative effects on juveniles' normal development from childhood to adulthood. Studies have shown that punitive sanctions may actually promote reoffending rather than help rehabilitate the youth. *See* Peter W. Greenwood, *Changing Lives: Delinquency Prevention as Crime- Control Policy* (2006). When treatment is appropriate and not overly punitive, youth are more amenable to treatment than their adult counterparts.

III. JUVENILES SUFFER GRAVE CONSEQUENCES WHEN CONVICTED IN THE ADULT CRIMINAL SYSTEM.

Although the consequences of juvenile adjudications for youth as they grow into adulthood include barriers to obtaining education, employment, and enlisting in the military, an adult criminal conviction imposes greater and more severe consequences. In almost every state, adult criminal convictions, as distinguished from juvenile adjudications, bar individuals from employment in certain jobs and from accessing certain public benefits, and can even affect their family's housing. *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Conviction and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623 (2006). Almost every job and higher education application asks about criminal convictions, while fewer ask specifically about juvenile adjudications. *Id.* And, finally, while almost every state provides for juvenile records expungement even for more serious offenses, adult criminal record expungement is usually

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[4] *See also* Elizabeth Sowell, et al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, 2 Nat. Neurosci. 859-861 (1999); Nitin Gogtay, et al. *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 Nat'l Acad. Sci. Proc. 8174-8179 (2004), *at* http://www.loni.ucla.edu/~thompson/DEVEL/PNASDevel04.pdf.

limited to citations and minor misdemeanors, making it virtually an unavailable option for convicted persons. *Id.*

Moreover, youth who are tried and detained as adults suffer grave consequences while in the adult criminal system and are typically at greater risk of recidivism. For example, one study found youth who were detained in New York's adult system were 85 percent more likely to be re-arrested for violent offenses, and 44 percent more likely to be arrested for property crimes than were youth committing similar offenses in the New York metropolitan area but detained within New Jersey's juvenile justice system. Fagan, J. (1996). *The comparative advantages of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders. Law and Policy, 18* (1 &2), 77-113. Another study found youth in adult facilities were 500 times more likely to be sexually assaulted while incarcerated and 200 times more likely to be physically assaulted by facility staff (e.g., beaten) than were youth in the juvenile justice system. And, youth in adult facilities were eight times more likely to commit suicide than their counterparts held in the juvenile justice system. Beyer, M., *Experts for juveniles at risk of adult sentences*, in P. Puritz, A. Capozello, & W. Shang (Eds.), *More than meets the eye: Rethinking assessment competency and sentencing for a harsher era of juvenile justices.* Washington, DC: American Bar Association Juvenile Justice Center (1997).

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the foregoing reasons, *Amici Curiae*, Juvenile Law Center and Center for Children's Advocacy, respectfully request that this Court affirm the reversal of David's conviction and hold that transfer of jurisdiction requires a due process hearing including the opportunity to demonstrate amenability to treatment in the juvenile system.

Respectfully submitted,

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Dated: April 6, 2010

CERTIFICATION

I, Martha Stone, Esq., do hereby certify, this 6th day of April 2010 that this brief complies with all provisions of Rule of Appellate Procedure §67-2. In compliance with Rule of Appellate Procedure 62-7, I certify that I have served the original and twenty-five true and correct copies of this brief, via hand delivery, to:

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Additionally, I certify that I have served a true and correct copy of this brief on each of the parties listed below, via first class mail, postage prepaid:

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