IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | |
| | : | |
| Plaintiff-Appellee, | : | Case Nos. 2007-291 & 2007-0472 |
| | : | |
| v. | : | On Appeal from the Tenth District Court of Appeals, Franklin County Case No. 06AP-250 |
| D.H., | : | |
| | : | |
| Defendant-Appellant. | : | |

**BRIEF OF AMICUS CURIAE, THE OFFICE OF THE OHIO PUBLIC DEFENDER, IN SUPPORT OF DEFENDANT-APPELLANT D.H.**


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A juvenile has a constitutional right to a jury trial when the state seeks to punish him as an adult by imposing adult prison terms upon him. Therefore, a statute that requires a judge, rather than a jury, to make factual findings that require the imposition of an adult prison term upon a juvenile, is unconstitutional under *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 and *Blakely v. Washington* (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403. ..... 2

*Certified Conflict Issue:*

Do constitutional jury trial rights, as articulated under the Sixth Amendment to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution, and as applied to an adult felony sentencing in accordance with *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, and *Blakely v. Washington* (2004) 542 U.S. 296, also apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio's adult felony sentencing statutes when the juvenile court imposed the adult portion of a blended juvenile/adult sentence under R.C. 2152.13 of Ohio's serious youthful offender statutes? ..... 2

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## STATEMENT OF INTEREST
## OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender is a state agency, designed to represent criminal defendants, adults and juveniles, and to coordinate defense efforts throughout Ohio. The Ohio Public Defender Office, through it's Juvenile Section, provides juveniles who have been committed to the Ohio Department of Youth Services, their constitutional right of access to the courts. See, *John L. v. Adams,* 969 F.2d 228 (6th Cir. 1992).

Like this Court, the Ohio Public Defender is interested in the effect of the law that the instant case will have on those parties who are, or may someday be involved in, similar litigation. The Ohio Public Defender currently represents other juveniles who have been sentenced under the discretionary serious youthful offender statutes, who have claims that have been held for the decision in this matter, or who have jurisdictional memorandum pending before this Court regarding the constitutionality of this sentencing scheme. See, *In the Matter of Bryan Christopher Sturm* (Case Number 2007-0229); *In re Tracy S.* (Case Number 07-1258); *In re Lee J.* (Case Number 07-1191).

Accordingly, the Ohio Public Defender has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law. To this end, the Ohio Public Defender supports the fair, just, and correct interpretation and application of Ohio's serious youthful offender statutes.

## STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the Statement of the Case and Facts set forth in the Memorandum of the Appellant.

## ARGUMENT

*Petitioner's First Proposition of Law:*

> A juvenile has a constitutional right to a jury trial when the state seeks to punish him as an adult by imposing adult prison terms upon him. Therefore, a statute that requires a judge, rather than a jury, to make factual findings that require the imposition of an adult prison term upon a juvenile, is unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 and *Blakely v. Washington* (2004), 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403.

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In 1971, the United States Supreme Court held a trial by jury is not constitutionally required in the adjudicative phase of a state juvenile court delinquency proceeding. *McKeiver v. Pennsylvania* (1971), 403 U.S. 528. The Court left it up to the states to continue to experiment to achieve the high promise of the juvenile court concept, noting that states may install a jury system, or a juvenile court judge may use an advisory jury in a particular case, but that is the state's privilege, and not its obligation. Id. at 547. However, in the last several years, rather than continue to try and achieve the high promise of the juvenile court, many states, including Ohio, have developed laws that combine the juvenile court concept with adult felony sentencing, in what is known as serious youthful offender proceedings, or blended sentencing.

### A. Due Process and the Right to Trial by Jury for Juveniles Facing Serious Youthful Offender Proceedings:

The right to an impartial jury "in all criminal prosecutions" under federal law is guaranteed by the Sixth Amendment. *McKeiver*, 403 U.S. at 540. That requirement has been

imposed upon the States, through the Fourteenth Amendment, "in all criminal cases which – were they to be tried in federal court – would come within the Sixth Amendment's guarantee." Id. This is because the Court has said it believes "that trial by jury in criminal cases is fundamental to the American scheme of justice." Id. (citing *Duncan v. Louisiana* (1968), 391 U.S. 145, 149; *Bloom v. Illinois* (1968), 391 U.S. 194, 210-211).

With respect to trial by jury, accepting "the proposition that the Due Process Clause has a role to play," the task "is to ascertain the precise impact of the due process requirement." *McKeiver*, 403 U.S. at 541, (citing *Application of Gault* (1967), 387 U.S. 1, 13-14 ). The applicable due process standard in juvenile proceedings, as developed by *Gault* and *In re Winship* (1970), 397 U.S. 358, is fundamental fairness. *McKeiver*, 403 U.S. at 543. In *Gault,* the Court declared civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of liberty for years is comparable in seriousness to a felony prosecution." *Gault*, 387 U.S. at 36. In addition, the Due Process Clause protects the accused juvenile against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Winship*, 397 U.S. at 365-66.

The juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label. *McKeiver*, 403 U.S. at 541 (citing *Kent v. U.S.* (1966), 383 U.S. 541, 554; *In re Gault*, 387 U.S. at 17; *In re Winship*, 397 U.S. at 365-66). However, the development of this new sentencing scheme, the serious youthful offender proceeding, i.e. blended sentencing, changes the traditional juvenile

court proceeding from something that is quasi-criminal, to a full-fledged "criminal prosecution." In all meaningful respects, serious youthful offender proceedings are the same as criminal trials: there is the right to grand jury determination of probable cause, the right to an open and speedy trial by jury, the same right to bail as an adult charged with a criminal offense, and all provisions of the criminal rules apply in the case and to the child. R.C. 2152.13(C). While the Ohio legislature provided procedural safeguards, by stating that the juvenile court shall afford the juvenile all of the rights afforded to a person who is prosecuted for committing a crime, Ohio courts have failed to apply Supreme Court precedent, established by *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296; and this Court's precedent, established by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to juveniles caught in this blended sentence arena. *State v. D.H.*, 169 Ohio App.3d 798, 2006-Ohio-6953; *In re J.B.*, 12th Dist. No. CA2004-09-226, 2005-Ohio-7029; *In the Matter of Sturm*, 4th Dist. No. 05CA35, 2006-Ohio-7101; *In re Seavolt*, 5th Dist. Nos. 2006CA0010 and 2006CA0011, 2007-Ohio-2812; *In re Lee J.*, 6th Dist. No. S-06-030, 2007-Ohio-2400. Given that the proceedings and punishment are essentially the same as a criminal trial, it violates fundamental fairness to deny a juvenile accused as a serious youthful offender the constitutional jury trial rights that adult criminal defendants enjoy.

B. Discretionary Serious Youthful Offender Proceedings:

Ohio's serious youthful offender (SYO) law came into effect on January 1, 2002. Over the past several years, fourteen other states have developed a similar sentencing scheme: that which combines the juvenile court process with adult sentencing ramifications. Patrick Griffin, National Center for Juvenile Justice, Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and Blended Sentencing Laws (available at

http://ncjj.servehttp.com/NCJJWebsite/pdf/transferbulletin.pdf.) If the juvenile is brought before the juvenile court and a serious youthful offender proceeding is initiated, the juvenile court shall afford the juvenile all of the rights afforded to a person who is prosecuted for committing a crime, including the right to an open and speedy trial by jury. R.C. 2152.13(C)(1), (2).

Once the juvenile is convicted, if the juvenile court makes certain statutory findings, the juvenile court may impose a sentence on the child, as if the child were an adult, under Chapter 2929 of the Ohio Revised Code, except that the juvenile court shall not impose on the child a sentence of death, or life imprisonment without parole; the juvenile court shall also impose upon the child one or more traditional juvenile dispositions; and, the juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending successful completion of the traditional juvenile dispositions imposed. R.C. 2152.13(D)(2).

A juvenile who receives a serious youthful offender dispositional sentence has a right to appeal the adult portion of the dispositional sentence and the court shall consider the appeal as if the adult portion were not stayed. R.C. 2152.13(D)(3).

C. Discretionary Serious Youthful Offender Sentencing vs. Mandatory Serious Youthful Offender Sentencing:

A juvenile's age and the offense(s) charged will determine whether a juvenile is subject to a discretionary serious youthful offender proceeding, a mandatory serious youthful offender proceeding, or simply a traditional juvenile delinquency proceeding. See R.C. 2152.11. Pursuant to statutory requirements, a juvenile court can only impose a serious youthful offender dispositional sentence on a child if the prosecuting attorney initiates the process and the child is eligible for the dispositional sentence. R.C. 2152.13(A). The statute lists four ways in which the prosecutor may initiate the process. R.C. 2152.13(A). Once a prosecutor initiates the serious youthful offender process, the juvenile and the court are on notice that it is the prosecutor's

intent to seek a serious youthful offender dispositional sentence, i.e., a traditional juvenile delinquency sentence and an adult criminal sentence, also known as "blended sentencing".

Based on the prosecutor's intent to seek a serious youthful offender sentence, the nature of the proceedings change and the child is provided with certain rights he is not otherwise provided. However, he is only automatically subject to a blended sentence if he qualifies as a mandatory SYO. According to the mandatory SYO statute:

> If a child is adjudicated a delinquent child for committing an act under circumstances that require the juvenile court to impose upon the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:
>
> (a) The juvenile court shall impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929 of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.
>
> (b) The juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20, and, if applicable, section 2152.17 of the Revised Code.
>
> (c) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

R.C. 2152.13(D)(1). If the child is eligible for a mandatory serious youthful offender dispositional sentence, then the jury verdict or admission by the defendant automatically subjects him to the juvenile disposition and the adult criminal sentence.

To the contrary, if the child is eligible for a discretionary SYO dispositional sentence, then the child can only be given an adult criminal sentence if the juvenile court makes the findings, on the record, in R.C. 2152.13(D)(2)(a)(i):

> If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a

> reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation as if the child were an adult, under Chapter 2929 of the Revised Code ***.

R.C. 2152.13(D)(2)(a)(i). These findings are the only thing that distinguishes discretionary from mandatory serious youthful offender sentences. Based on the discretionary SYO statute, if the juvenile court does not make the findings, the juvenile court may not impose upon the child an adult criminal sentence. In fact, "If the court does not find that a [blended] sentence should be imposed under division (D)(2)(a)(i) of this section, the juvenile court may impose one or more traditional juvenile dispositions under sections 2152.16, 2152.19, 2152.20, and, if applicable, section 2152.17 of the Revised Code." R.C. 2152.13(D)(2)(b).

The findings are required in order for a discretionary SYO child to receive an adult criminal sentence. Without these findings, and based on the jury verdict of guilty or admission by the defendant-juvenile, the maximum sentence a juvenile can receive is a commitment to the Department of Youth Services until his twenty-first birthday. Only if the court makes the discretionary SYO findings on the record at disposition, is the court able to sentence a juvenile to a sentence available for the violation as if he were an adult, under Chapter 2929 of the Revised Code.

D. Ohio law regarding serious youthful offender proceedings directly contravenes Supreme Court precedents and this Court's precedent and must be corrected to avoid further constitutional encroachments:

This Court, in its recent decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, held specific provisions of Ohio's criminal sentencing statute unconstitutional in light of *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296. Notably, this Court excised the provisions of Ohio criminal sentencing statutes that required judicial fact-finding before the imposition of a sentence greater than the maximum term

authorized by a jury verdict or admission by the defendant. *Foster*, 2006-Ohio-856 at ¶97. Those provisions were deemed unconstitutional because of the judicial fact-finding requirement. Id. This Court addressed the *Blakely* issue as applied to adult criminal defendants in *Foster*, but has not addressed the judicial fact-finding requirement in serious youthful offender cases, until now.

In *Foster*, the issue before this Court was "whether Ohio's felony sentencing structure violated the Sixth Amendment to the United States Constitution in the manner set forth in *Apprendi* and *Blakely*." Id. at 477 (internal citations omitted). The Sixth Amendment to the United States Constitution guarantees an accused the right to trial by jury. U.S. CONST. amend. VI. The Ohio Constitution provides, "the right of trial by jury shall be inviolate," OH. CONST. art. I, §5, and, the right to a "speedy public trial by an impartial jury." OH. CONST. art. I, §10.

In *Apprendi*, the U.S. Supreme Court ruled that "Apprendi's sentence, by exceeding the statutory maximum based only on judicial fact-finding, violated his Sixth Amendment rights since the jury, rather than judge, must find all facts essential to punishment." *Foster*, 2006-Ohio-856 at ¶3 (citing *Apprendi*, supra.). *Apprendi* held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. (citing *Apprendi*, 530 U.S. at 490).

Similarly, the Supreme Court struck down Blakely's sentence, finding that Washington's sentencing procedure violated Blakely's Sixth Amendment right to a trial by jury. *Blakely*, 542 U.S. at 308. *Blakely* clarified that the "maximum sentence" to which the *Apprendi* rule referred is the maximum a judge "may impose without any additional findings." Id. at 304. It is the

"maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id.

The Supreme Court clarified the *Apprendi* and *Blakely* holdings in *Cunningham v. California* (2007), 127 S. Ct. 856, 2007 U.S. Lexis 1324:

> Our precedents make clear ... that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* ... In other words, the relevant 'statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' ... and the judge exceeds his proper authority. *Blakely* at 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (emphasis in original) (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)).

*Cunningham*, 127 S. Ct. at 865, 2007 U.S. Lexis at 26-28. According to the Court, "Factfinding to elevate a sentence ***, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." Id. at 870, 42-43.

There is no principled distinction between the unconstitutional judicial fact-finding in *Blakely, Apprendi*, *Cunningham*, and *Foster* and the judicial fact-finding required by Ohio's discretionary serious youthful offender statute. The discretionary serious youthful offender statute, R.C. 2152.13(D)(2)(a), offends the federal and Ohio Constitutions because it compels a juvenile court, not a jury, to make specific findings before the court may impose a serious youthful offender sentence (i.e., a traditional juvenile disposition and an adult criminal sentence) upon a youth. R.C. 2152.13(D)(2)(a). Specifically, the juvenile court must find: "(1) the nature and circumstances of the violation; (2) the history of the child; and (3) the length of time, level of security, and types of programming and resources available in the juvenile system alone" are

insufficient to satisfy the purposes of the juvenile code.[1] R.C. 2152.13(D)(2)(a)(i). Absent these findings, the juvenile court can only impose a traditional juvenile disposition upon a youth. R.C. 2152.13(D)(2)(b).

The maximum juvenile disposition is a commitment to the Department of Youth Services for a minimum period of commitment and a maximum period not to exceed the juvenile's attainment of age twenty-one. Any adult criminal sentence imposed upon a juvenile, by the juvenile court, is a sentence that exceeds the maximum term of incarceration.

In *Blakely,* the Court reasoned that Blakely's sentence violated his Sixth Amendment right to trial by jury because a jury did not find the facts that permitted an "exceptional" sentence. *Blakely*, 542 U.S. at 325. In juvenile court, if the court makes the findings required by R.C. 2152.13(D)(2)(a)(i), the juvenile receives an "exceptional" sentence. Namely, a juvenile receives a traditional juvenile disposition and an adult criminal sentence which is suspended pending successful completion of the juvenile disposition. R.C. 2152.13(D)(2)(a)(ii).

In conducting a *Blakely* analysis, the inquiry is, "is the sentence allowed simply as a result of a conviction or plea or must the judge find additional facts first?" *Foster*, 845 N.E.2d at 489. If the judge is required to make additional findings before imposing the sentence, the sentence is invalid. Id. at 494. Following this analysis, the only permissible sentence after conviction or plea in a discretionary SYO case is a traditional juvenile disposition because the adult criminal sentence requires the judge to make additional findings. R.C. 2152.13(D)(2)(a). Because the judge is required to make these findings, the sentence is invalid. U.S. CONST. amend. VI, XIV; *Blakely,* 542 U.S. 296.

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[1] The Ohio Revised Code section 2152.01(A) provides, "the overriding purposes for dispositions under this chapter are to provide for the care, protections, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender ..."

The Supreme Court's analysis in *Blakely* and this Court's analysis in *Foster* applies to Ohio's discretionary serious youthful offender law with equal force. Because juveniles for whom a serious youthful offender disposition is sought must be entitled to a constitutional right to trial by jury, and Ohio's discretionary serious youthful offender statutes require judicial fact-finding before a serious youthful offender sentence can be imposed, the discretionary serious youthful offender law is unconstitutional. See *Blakely*, 542 U.S. 296; *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

## CONCLUSION

For these reasons, amicus curiae respectfully requests this Court to adopt the appellant's proposition of law, to answer the certified question in the affirmative, and to reverse the judgment of the Franklin County Court of Appeals.

Respectfully submitted,

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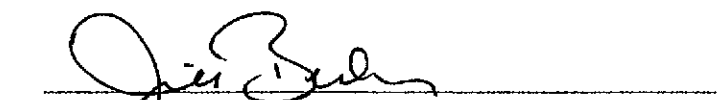

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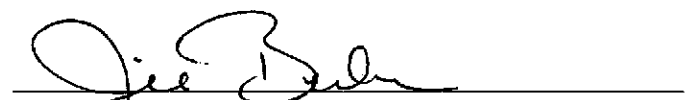
CERTIFICATE OF SERVICE

A copy of the foregoing BRIEF OF AMICUS CURIAE, THE OFFICE OF THE OHIO PUBLIC DEFENDER, IN SUPPORT OF DEFENDANT-APPELLANT D.H. was forwarded by regular U.S. Mail this 31st day of July, 2007 to the office of John W. Keeling, Assistant Franklin County Public Defender, 373 S. High Street, 12th Floor, Columbus, Ohio 43215 and to Katherine Press, Assistant Franklin County Prosecutor, 373 S. High Street, 13th Floor, Columbus, Ohio 43215.



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