IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Nos. 2007-291 & 2007-0472
Plaintiff-Appellee,	:	
	:	On Appeal from the Court of Appeals of Ohio, Tenth Appellate District, Franklin County Court of Appeals, No. 06AP-250
v.	:	
	:	
D.H.,	:	
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE, THE JUSTICE FOR CHILDREN PROJECT, IN SUPPORT OF DEFENDANT-APPELLANT D.H.

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

Amicus curiae, the Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. The Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum, a one-semester course open to eligible third-year law students certified as Legal Interns by the Ohio Supreme Court, and through its amicus representation, the Justice for Children Project strives to advance the cause of children's rights.

Because of the important interests raised in this case, the Justice for Children Project hereby offers this amicus memorandum in support of jurisdiction pursuant to S. Ct. Prac. R. III, Section 5. Amicus has no relationship to any of the individuals involved in this litigation. The Justice for Children Project gratefully acknowledges the assistance of Jason Macke, Esq. in the preparation of this brief.

STATEMENT OF THE CASE AND FACTS

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

ARGUMENT

Amicus's Proposition of Law:

> A discretionary adult sentence imposed on a juvenile by a judge pursuant to the serious youthful offender provisions 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.

Certified Conflict Issue:

> Do constitutional jury trial rights, as articulated under the Sixth Amendment to the United States Constitution, and as applied to an adult felony sentencing in accordance with *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, 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?

A discretionary adult sentence imposed on a juvenile by a juvenile court judge pursuant to the serious youthful offender provisions, when the judge makes factual findings necessary to enhance the sentence beyond the normal statutory maximum authorized in juvenile cases, violates *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. Accordingly, amicus curiae respectfully asserts that this Court should find the imposition of a discretionary adult sentence in the case at bar unconstitutional and reverse the judgment of the Franklin County Court of Appeals.

In *Blakely v. Washington* (2004), 542 U.S. 296, the United States Supreme Court held that no sentence imposed in a criminal case after a jury trial may be enhanced beyond the statutory maximum for that offense unless the aggravating fact is found by the jury. A year later, the United States Supreme Court reiterated its position in *United*

States v. Booker (2005), 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621, that the maximum sentence a judge may impose must rest "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" In other words, any factor required to impose a greater term must be decided by the jury and not the judge. The Supreme Court made clear that to impose a sentence greater than the statutory maximum, without the necessary factual findings from the jury which would warrant an enhanced sentence, violates the defendant's right to counsel under the Sixth Amendment to the United States Constitution. In light of the Supreme Court's holdings in *Blakely* and *Booker*, this Court reviewed Ohio's sentencing scheme and invalidated those criminal sentencing provisions requiring trial courts, and not juries, to make the factual findings necessary to enhance a sentence beyond the normal statutory maximum for the underlying offense. *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

Ohio's discretionary "serious youthful offender" (SYO) provisions require exactly the type of judicial factfinding prohibited by *Blakely*, *Booker*, and *Foster*. Legislative enactments, effective January 1, 2002, recognize that minors in "serious youthful offender" (SYO) proceedings have a right to a jury trial. In certain cases, where the jury finds the subject minor to be delinquent, the law permits, but does not require, the juvenile court to impose a stayed adult prison sentence (a "discretionary SYO sentence"). See R.C. 2152.11(B)(2), (C)(2), (D)(2), (E)(1), (E)(2), (F)(1), (F)(2), and (G)(1). See also R.C. 2152.13(D)(2). Prior to imposing a discretionary SYO sentence, the juvenile court is required to make a finding on the record 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 Revised Code will be met . . . .

R.C. 2152.13(D)(2)(a)(i). The statute provides that after that finding is made, "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 . . . ." *Id.* Such prison sentences can be lengthy, and are indistinguishable from sentences imposed on adult offenders.

As this Court is well aware, a statute that requires the judge to make the factual findings necessary to enhance a sentence beyond the normal statutory maximum is constitutionally flawed. The discretionary SYO provision plainly states that the juvenile court judge must make an initial factual determination before imposing an adult criminal sentence. R.C. 2152.13(D)(2)(a)(i). Moreover, the imposition of the adult criminal sentence is *in addition to* a traditional juvenile disposition. "If a sentence is imposed under division (D)(2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions...." R.C. 2152.13(D)(2)(a)(ii). Thus, the discretionary SYO statute clearly authorizes the juvenile court judge to impose a sentence beyond the normal statutory maximum based on a finding of fact made by the judge and not the jury. Consequently, a discretionary SYO sentence is unconstitutional because it is "not determined 'solely on the basis of facts reflected in the jury verdict or admitted by the defendant,' as *Blakely* requires." *Foster* at ¶53 (emphasis added), quoting *Blakely v. Washington* (2004), 542 U.S. 296, 303.

The state unsuccessfully sought to bind the minor over for trial as an adult in criminal court. The state then initiated a serious youthful offender prosecution. D.H.

properly invoked his jury trial rights pursuant to R.C. 2152.13(C)(1) and trial by jury was held in juvenile court. After the jury found D.H. delinquent, the juvenile court judge then ruled that D.H. was a discretionary SYO. In addition to imposing a traditional indefinite juvenile disposition committing D.H. to the Department of Youth Services until he reaches the age of 21 (the maximum disposition authorized by statute), the juvenile court also imposed a discretionary adult sentence of six years. See *State v. D.H.*, Franklin App. No. 06AP-250, 2006-Ohio-6953 at ¶¶25-6. The facts of the case at bar thus clearly illustrate that the imposition of the discretionary adult sentence violates *Blakely* and *Foster*.

As this Court is well aware, both the United States Supreme Court's decision in *Blakely* and this Court's decision in *Foster* rest on the right to jury trial protected by the Sixth Amendment to the United States Constitution. Equally clear is the fact that a minor in a serious youthful offender proceeding has such a Sixth Amendment right to a jury trial. R.C. 2152.13(C)(1) plainly states that once a child is indicted, charged by information, or is eligible for a serious youthful offender disposition as determined by the juvenile court, "the child is entitled to an open and speedy trial by jury in juvenile court...." Furthermore, R.C. 2152.13(C)(2) states that a juvenile in an SYO proceeding has "*all rights* afforded a person who is prosecuted for committing a crime." Thus it is beyond dispute that juveniles have a statutory right to a jury trial in Ohio SYO cases. Moreover, what is indisputable is the fact that a juvenile court has the authority to impose an *adult criminal sentence on a juvenile for a term of years*; to hold that the imposition of a criminal sentence under these circumstances does not warrant a jury trial is to eviscerate the very core protections guaranteed by the Sixth Amendment.

Nor has the United States Supreme Court ever held that a minor is not entitled to a jury trial under the circumstances of this case. In *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, the Supreme Court spoke to the issue of the right of a juvenile to a jury trial but only in the context of a traditional juvenile court proceeding. Although the Court held that the Sixth Amendment right to jury trial does not strictly apply to traditional juvenile court proceedings, and that the Fourteenth Amendment Due Process Clause does not require trial by jury in traditional juvenile proceedings as a matter of "fundamental fairness," *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 540-545 (Blackmun, J., plurality op.), the Court never contemplated a situation where the juvenile court could impose an adult criminal sentence on the juvenile since neither SYO proceedings nor any other analogous procedure existed in any state at the time it was decided. See, e.g., Randi-Lynn Smallheer, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle* (1999), 28 Hofstra L. Rev. 259, 277-79 (noting that Minnesota enacted the first SYO/blended sentencing statute in 1992, some twenty-one years after *McKeiver*). Rather, *McKeiver* deals with the right of a juvenile to a jury trial in a juvenile proceeding where only a traditional juvenile disposition could be imposed. Accordingly, *McKeiver* does not compel the conclusion that a minor in an SYO proceeding is not entitled to a jury trial as a constitutional matter.

When it enacted the SYO statutes, the Ohio legislature for the first time specifically authorized the use of a jury in juvenile court. Based on the text of the statute it is logical to conclude that, had the legislature known that judicial factfinding would subject the statute to additional constitutional scrutiny, it would have instead

required such factfinding to have been done by the jury. See, *e.g., Cunningham v. California* (2007), 127 S.Ct. 856, 871 (noting that "several States have modified their systems in the wake of *Apprendi* [*v. New Jersey* (2000), 530 U.S. 466] and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence"). It is hardly a stretch to conclude that had it been cognizant of the constitutional issues raised by *Blakely*, the legislature would have authorized that same jury to engage in specific factfinding to avoid any constitutional difficulties. Cf. *Foster* at ¶87 ("Certainly the General Assembly may enact legislation to authorize juries to find beyond a reasonable doubt all facts essential to punishment in felony cases . . . .The General Assembly undoubtedly never anticipated that the judicial-finding requirements contained within S.B. 2 would be held unconstitutional"). Alternatively, the legislature might have adopted a different procedure for SYO prosecutions. Ultimately, it is not for this Court to design a legislative remedy but to uphold the mandates of the Sixth Amendment.

Based on the reasoning announced by the Supreme Court of the United States in *Blakely* and adopted by the Ohio Supreme Court in *Foster,* the discretionary SYO sentencing provisions are unconstitutional under the Sixth Amendment to the United States Constitution.

CONCLUSION

For all these reasons, amicus curiae respectfully requests that this Court 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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CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons, by hand delivery on this 31st day of July, 2007:

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