

In the
Supreme Court of Ohio

STATE OF OHIO, : Case Nos. 2007-0291,
 : 2007-0472
 Plaintiff-Appellee, :
 :
 v. : On Appeal from the
 : Franklin County
 D.H., : Court of Appeals,
 : Tenth Appellate District
 Defendant-Appellant. :
 : Court of Appeals Case
 : No. 06AP-250

**MERIT BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL MARC DANN
IN SUPPORT OF APPELLEE STATE OF OHIO**

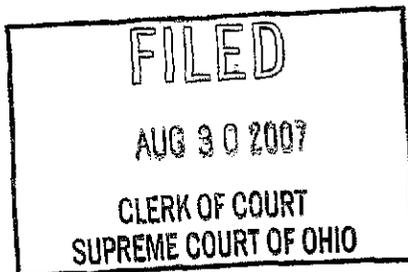
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INTRODUCTION

Ohio's Serious Youthful Offender law ("SYO law"), R.C. 2152.13, adopts a carrot-and-stick approach to rehabilitating the State's more serious juvenile offenders. Designed for youth whose transgressions are severe but for whom rehabilitation remains a likely prospect, the SYO law by all measures has been a success since it was implemented in 2002. The vast majority of the youthful offenders who have received SYO dispositional sentences have been released after juvenile supervision. Only a small percentage have gone on to serve some portion of their adult sentence.

This innovative system is commonly called "blended sentencing" because the offender is subject to both juvenile supervision and a conditional, suspended adult sentence. The SYO law proceeds in two steps. First, during the "adjudicative" phase—the analog in the juvenile system to the guilt phase of adult criminal trials—the statute affords the accused the rights to indictment by grand jury, to counsel, to bail, to raise the issue of competency, and to a public trial by jury in juvenile court.

If the jury "adjudicates" the offender "a delinquent" (in the traditional parlance of the juvenile justice system), the proceeding moves into its "dispositional" phase, which correlates with the sentence stage of adult trials. In cases like D.H.'s, the SYO law permits the juvenile court to impose both a juvenile portion—usually juvenile supervision—and a conditional adult portion. But the court may only impose an adult sentence if it first finds—on the record but without a jury—that the resources of the juvenile supervision system are not adequate, in light of the nature of the offense and the youth's history, reasonably to assure the court that the offender will be rehabilitated and protected. The court then must stay the conditional adult sentence and can later invoke it only after finding at a hearing that the offender has demonstrated during the course of his juvenile disposition that he continues to pose a safety threat.

The SYO law more than satisfies the standard of fundamental fairness required by the state and federal Constitutions. Neither of those charters requires the elimination of all differences in the treatment of juveniles, and neither confers a jury trial right during juvenile proceedings. Because the dispositional phase at issue here is part and parcel of a juvenile proceeding, no jury trial is necessary. In fact, to inject a jury requirement during the dispositional phase would disrupt the SYO law's successful marriage of due process protections with the juvenile's rehabilitative needs. The Constitution does not mandate such a result.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Marc Dann is Ohio's chief law enforcement officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring rigorous and consistent enforcement of Ohio's criminal laws, including those involving juvenile offenders. Attorney General Dann is responsible for ensuring that Ohio's citizens are given the full protection of the State's criminal statutes. And as the State's lawyer, the Attorney General has a responsibility to enforce the will of both the General Assembly in passing legislation and of the Governor in signing it into law.

The legislative aim of Ohio's SYO law is to give serious youthful offenders one last meaningful chance at rehabilitation before being subject to the State's adult prison system. Attorney General Dann therefore joins the State of Ohio in urging this Court to affirm the judgment of the Tenth District Court of Appeals and hold that the right to a jury trial does not apply in serious youthful offender sentencing proceedings.

STATEMENT OF THE CASE AND FACTS

A Franklin County grand jury indicted D.H. on multiple counts for the murder of Kiera Harris in an incident that also injured two other individuals. The indictment specified that D.H. was 15 years old at the time of the offenses and was therefore subject to a serious youthful offender dispositional sentence under the SYO law. *State v. D.H.* (10th Dist.), 169 Ohio App. 3d 798, 2006-Ohio-6953, ¶ 2. The State moved to transfer D.H.'s case to the juvenile division for an SYO proceeding, and D.H. invoked his statutory right to a jury trial. *Id.* at ¶ 3.

The jury adjudicated D.H. a delinquent minor for having committed reckless homicide. The jury also adjudicated D.H. a delinquent on an accompanying firearm specification. The jury's findings rendered D.H. eligible for a blended SYO dispositional sentence. *Id.* at ¶ 21.

The juvenile court conducted a dispositional hearing as required by the SYO law. The court held the hearing on February 8, 2006—just 19 days before this Court's decision concerning the effect of *Blakely v. Washington* (2004), 542 U.S. 296, on Ohio's adult felony sentencing laws in *State v. Foster*, 109 Ohio St. 3d 1, 29, 2006-Ohio-856. Noting its discretion to impose a blended sentence and its duty "to provide for the protection, care and mental and physical development of the child," the court considered "the circumstances and facts [and] the juvenile's history" as well as "the seriousness of the offense." *D.H.*, 2006-Ohio-6953, at ¶ 24. In light of all of these factors, the court concluded that a blended sentence was appropriate. *Id.*

On the juvenile portion of the disposition, the court committed D.H. to the legal custody of the Department of Youth Services for an indefinite term of six months and a maximum period not to exceed age 21. *Id.* at ¶ 25. On the adult portion, the court turned to R.C. 2929.14(B) and found that the minimum one-year sentence would have demeaned the seriousness of D.H.'s conduct. It accordingly sentenced D.H. to three years in prison for the reckless homicide—more

than the one-year minimum, but less than the five-year maximum. *Id.* at ¶ 26. The court also imposed an additional three-year prison sentence on the firearm specification. *Id.* at ¶ 25.

On appeal, the Tenth District Court of Appeals affirmed. The appellate court rejected D.H.'s argument that the adult portion of his SYO dispositional sentence offends the *Blakely* rule because it was based on judge-made findings. On D.H.'s motion, the Court of Appeals noted that its decision on the *Blakely* question conflicted with the decision of the Third District Court of Appeals in *In re Hill* (3d Dist.), 2006-Ohio-2504, ¶ 21 ("Since Hill was sentenced to more than the minimum and consecutive sentences under statutes found unconstitutional by the Ohio Supreme Court, we must vacate the sentence and remand this case to the trial court for further proceedings consistent with *Foster*."). The Court of Appeals accordingly certified the following conflict:

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?

State v. D.H. (10th Dist. Feb. 27, 2007), App. to D.H. Br. A-39. This Court granted both D.H.'s discretionary appeal and the certified conflict.

Amicus Attorney General Dann submits this brief in support of the State of Ohio.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

Ohio's blended sentencing law fully comports with the constitutional requirement of fundamental fairness because youthful offenders are not entitled to a jury trial when the juvenile court at the dispositional phase of a juvenile proceeding makes findings concerning the juvenile supervision system's capacity to rehabilitate the offender.

The procedures of the SYO law offend neither the Ohio nor the United States Constitutions. The proceedings in D.H.'s case took place in juvenile court, and he remains a part of the juvenile justice system. The constitutional standard of fundamental fairness does not confer on youthful offenders a right to a jury trial in juvenile proceedings. That rule holds particular sway during the dispositional phase, when the juvenile court is best suited to determine the appropriate disposition by virtue of its expertise in the rehabilitative programs available in the juvenile system. Nothing about *Blakely* and *Foster* changes the well-settled distinction between juvenile proceedings and adult criminal trials.

A. Blended sentencing is an innovative procedure that gives serious youthful offenders one last meaningful chance at rehabilitation.

1. Blended sentencing systems apply the longstanding goals of the juvenile justice system to the modern experience with serious youthful offenses.

The juvenile justice system has evolved considerably since it was conceived in the late nineteenth century. See *In re Anderson*, 92 Ohio St. 3d 63, 65, 2001-Ohio-131 (recounting history of juvenile courts). In recent years, intense media scrutiny of high-profile offenses has increased public anxiety over juvenile crime. See Christian Sullivan, Note, *Juvenile Delinquency in the Twenty-First Century* (2001), 21 N. Ill. U. L. Rev. 483, 483. Lawmakers across the country have responded by altering their juvenile proceedings, often by expanding the eligibility of youthful offenders for processing and sanctioning in the adult criminal system. See Patricia

Torbet et al., *Juveniles Facing Criminal Sanctions* (April 2000), U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, at xi.

The get-tough approach of binding juveniles over to the adult criminal system is appropriate in many instances, but not all. For many juveniles—even those whose offenses are severe—the abiding goals of the juvenile justice system remain attainable: “to provide for the care, protection, and mental and physical development of children, to protect the public from the wrongful acts committed by juvenile delinquents; and to rehabilitate errant children and bring them back to productive citizenship.” *In re Caldwell* (1996), 76 Ohio St. 3d 156, 157.

Blended sentencing systems like Ohio’s SYO law represent a middle way: an approach to juvenile justice that acknowledges legitimate public safety concerns while remaining confident in the juvenile justice system’s ability to rehabilitate even serious juvenile offenders. A blended sentencing system affords the juvenile court both a carrot and a stick. In the typical blended sentencing system, the juvenile court imposes two dispositions at the outset: (1) a juvenile disposition that places the offender in the juvenile supervision system, and (2) an adult sentence. The court does not immediately decide whether the adult sentence will follow the juvenile disposition. Instead, “a blended sentence gives the court time to learn if the child simply needs guidance under the juvenile system and the tools to deal with a juvenile who poses an ongoing threat.” *Id.*

First crafted in the 1990s, blended sentencing systems permit juvenile courts to set a sentence using the treatment flexibility of the juvenile system and, where necessary, the stiffer sanctions of the adult criminal system. See Ohio Crim. Sentencing Comm’n, *A Plan for Juvenile Sentencing in Ohio* (David J. Diroll, ed., Fall 1999) 28 (“*Plan for Juvenile Sentencing*”). Although blended sentencing systems can differ in their particulars, they are all variations on a

theme: a system of juvenile justice that gives juvenile supervision one last chance before a serious offender who remains an unrehabilitated threat to public safety is transferred to the adult penal system.

- 2. Under Ohio's SYO law, as in other blended sentencing schemes, a juvenile serves an adult sentence only if he or she remains a threat to public safety after a period of juvenile supervision and rehabilitation.**

The "overriding purposes" of an SYO disposition under the Ohio law¹—which became effective on January 1, 2002, see Am. Sub. S.B. No. 179—"are to provide for the care, protection, and mental and physical development of" youthful offenders, to "protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." R.C. 2152.01(A). Whether or not a youth is eligible for SYO treatment depends on the seriousness of the offense and the offender's age at the time of the offense. In short, the more serious the offense, the younger the age at which the offender may be to be eligible for SYO treatment. R.C. 2152.11(H).

If the prosecution decides to seek SYO treatment of an eligible youth, it may initiate SYO proceedings in one of several ways, including by indictment as a serious youthful offender or by written notice. R.C. 2152.13(A). Whatever form the charge takes, the youth must be informed of the prosecutor's intent to seek an SYO dispositional sentence. Once the prosecutor makes clear its intent to seek an SYO dispositional sentence, the youth is entitled to a grand jury

¹ Ohio's blended sentencing system is one of five types enacted by States nationwide. In the first type of system, the adult court may impose either a juvenile sentence or an adult one. In the second system, also held in adult court, the judge is required to impose both a juvenile sentence and adult term. The court then stays the adult portion. The remaining approaches occur in juvenile court. Under the third approach, the juvenile judge may impose either a juvenile sentence or an adult term. In the fourth system, the juvenile court imposes a juvenile sentence that may extend beyond the normal jurisdictional age limits of juvenile court. "At that point, various procedures are invoked to determine if the remainder of the sanction should be imposed in adult correctional facility." *Plan for Juvenile Sentencing* at 30. Ohio's is the fifth, most juvenile-oriented type.

determination of probable cause that the youth committed the charged offense and that he or she is age-eligible for an SYO dispositional sentence. *Id.* 2152.13(C)(1). Following indictment, the youth has the right “to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings.” *Id.* As the youth awaits adjudication, he or she has the right to bail, and throughout the proceedings the youth has “the right to counsel and the right to raise the issue of competency. The child may not waive the right to counsel.” *Id.* 2152.13(C)(2).

Once the jury has adjudicated the youth a delinquent, the juvenile court’s disposition depends on whether the statute makes the SYO dispositional sentence mandatory or discretionary. *Id.* 2152.11. If mandatory, the trial court must impose both a juvenile disposition and an adult sentence. The adult sentence shall be “the 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.” *Id.* 2152.13(D)(1)(a). The SYO law requires the juvenile court to stay the adult portion “pending successful completion of the traditional juvenile dispositions imposed.” *Id.* 2152.13(D)(1)(c). In other words, by “mandatory,” the statute means that the judge must impose an adult sentence, but that sentence is only later *invoked* if the juvenile court makes further findings explained below.

If the SYO dispositional sentence is *discretionary* rather than mandatory, further findings are required. The juvenile court may impose an adult sentence only if it makes an on-the-record 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 [R.C. 2152.01] will be met.” *Id.* 2152.13(D)(2)(a)(i). Again, the court may not impose an adult penalty of death or life without parole, *id.*, and the

court must stay the adult portion pending completion of the juvenile disposition. *Id.* 2152.13(D)(2)(a)(ii)-(iii). The youth has the right to appeal the SYO dispositional sentence. *Id.* 2152.13(D)(3).

If the prosecutor files a motion to invoke the adult portion of a mandatory or discretionary SYO dispositional sentence, the SYO law requires the juvenile court to hold a full public hearing at which the youth is entitled to be present and represented by counsel. R.C. 2152.14(D). The court may invoke the adult sentence only if it finds on the record by clear and convincing evidence that: (1) the offender is at least 14 years of age; (2) the offender engaged in conduct that creates a substantial risk to the safety or security of the community or victim; and (3) the offender's conduct demonstrates that he or she is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. *Id.* 2152.14(E). After the juvenile court invokes the adult portion, the offender is transferred to the adult criminal justice system. *Id.* 2152.14(F).

3. Blended sentencing succeeds in rehabilitating juvenile offenders.

Blended sentencing systems have proven successful, both nationally and in Ohio. Nationwide, "the majority of juveniles" receiving blended sentences "have shown improvement in the juvenile phase of their sentence[s]." Brandi Miles Moore, Comment: *Blended Sentencing for Juveniles: The Creation of a Third Criminal Justice System?* (2001/2002) 22 J. Juv. L. 126, 135. "Juveniles appear to be responding to this type of rehabilitation knowing the threat of adult sanctions is only one violation away." *Id.* at 137. Blended sentencing has also resulted in lower recidivism rates as compared to juveniles incarcerated alongside adult prisoners. See Sullivan at 495-496. As a "sensible alternative[] to simply trying more kids as adults," blended sentencing has received "acclamation by legal experts" and "is being adopted by an increasing number of jurisdictions." *Id.*

Ohio's experience with blended sentencing since the SYO law was enacted in 2002 is equally positive. The vast majority of serious youthful offenders have successfully completed the juvenile portion of their sentences and been released without serving a single day of their adult sentence. The Department of Youth Services reports that, of the 137 SYO dispositional sentences imposed from 2002-2005, adult sentences were invoked in only four cases. Ohio Crim. Sentencing Comm'n, *A Decade of Sentencing Reform* (David J. Diroll, ed., March 2007) 27. A broader, ongoing study conducted by the Cuyahoga County Prosecutor's Office similarly found that adult sentences were invoked in only 15 of the 291 SYO cases statewide. *Id.*

These successes result from the availability of social and educational services in juvenile facilities, and from the continued emphasis on rehabilitation in Ohio's juvenile justice system. "Punishment is not the goal of the juvenile system, except as necessary to direct the child toward the goal of rehabilitation." *Caldwell*, 76 Ohio St. 3d at 157. Rehabilitative goals remain paramount under the SYO law, which took effect in 2002. See *In re Chappell* (7th Dist.), 2005-Ohio-6451, ¶ 49 ("[T]he revisions in the juvenile code which took effect in 2002 did not dramatically alter the basic purposes of juvenile dispositions. . . . The juvenile disposition statutes do not exist merely to punish children and prevent future crime . . ."). And this focus distinguishes the SYO law from Ohio's adult sentencing scheme, under which punishment is explicitly a chief objective. Compare R.C. 2152.01(A) ("The overriding purposes for dispositions under this chapter are to provide for the care, protection, 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."), with R.C. 2929.11(A) ("The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender."); see also

Chappell, 2005-Ohio-6451, at ¶ 49 (“The juvenile code and the adult criminal code serve different purposes, and the caselaw in this area has taken into account those ongoing differences.”). This fundamental difference between the juvenile and adult justice systems accounts for the unique procedures of the SYO law. Any alterations to those procedures could hinder the SYO law’s successful track record and are not constitutionally required.

B. Youthful offenders do not have a constitutional right to a jury trial during the dispositional phase of a juvenile proceeding, even one that results in a suspended, conditional adult sentence.

1. The rule of fundamental fairness does not mandate jury trial rights during juvenile proceedings, particularly at the dispositional phase.

Procedural rules in the juvenile justice system must meet the standard of “fundamental fairness.” *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543. The United States Supreme Court has explained that “certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles.” *Schall v. Martin* (1984), 467 U.S. 253, 263. But the Court has also made clear that “the Constitution does not mandate elimination of all differences in the treatment of juveniles.” *Id.* Recognizing that the State’s “‘interest in preserving and promoting the welfare of the child’ . . . makes a juvenile proceeding fundamentally different from an adult criminal trial,” the Court has struck a balance between the “‘flexibility’” required in juvenile proceedings and the “‘fundamental fairness’ demanded by the Due Process Clause.” *Id.* (citations omitted). The protections afforded to juveniles therefore include notice of charges, the right to counsel, the privilege against self-incrimination, the right to confrontation and cross-examination, *In re Gault* (1967), 387 U.S. 1, 31-57; proof beyond a reasonable doubt, *In re Winship* (1970), 397 U.S. 358, 364; and the privilege against double jeopardy, *Breed v. Jones* (1975), 421 U.S. 519, 541. *Schall*, 467 U.S. at 263. They do not, however, include the right to a

jury trial. *McKeiver*, 403 U.S. at 545. The same is true under the Ohio Constitution. *In re Agler* (1969), 19 Ohio St. 2d 70.

McKeiver made clear that a proceeding can be fundamentally fair without the presence of a jury, because a jury is not “a necessary component of accurate factfinding.” 403 U.S. at 543. The decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely* do not affect that conclusion. Those rulings rested on “principles extend[ing] down centuries into common law” that entitled criminal defendants to a trial by jury. *Apprendi*, 530 U.S. at 477. *McKeiver* concerned something different: the fairness of juvenile proceedings, a relatively recent creature of statute with no analog at common law. In light of the differences between juvenile and adult proceedings, the *McKeiver* Court determined that “[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court’s assumed ability to function in a unique manner.” 403 U.S. at 547.

The *McKeiver* rule holds true even if the juvenile is sentenced to an *adult* facility to serve out his *juvenile* disposition. See *United States ex rel. Murray v. Owens* (2d Cir. 1972), 465 F.2d 289, 292 (holding that juveniles have no jury trial right “during the adjudicatory stage . . . whether the juvenile once adjudged a delinquent, is committed to a juvenile or an adult facility”). This is because “[t]he *nature* of incarceration remains juvenile regardless of the custody venue.” *Monroe v. Soliz* (Wash. 1997), 939 P.2d 205, 208 (emphasis added).

The case law also reflects a difference in due process requirements during the adjudicative and dispositional phases. The Supreme Court in *Gault* was careful to note that it was not directing its “attention to the post-adjudicative or dispositional process.” 387 U.S. at 13. Similarly, the *McKeiver* Court expressly observed that the arguments before it concerned “the

adjudicative phase” without addressing the dispositional phase. 403 U.S. at 550. In the same breath, the Court underscored the special role of the juvenile court in protecting youthful offenders, *id.*, thereby intimating that the procedures required by the Constitution may vary up or down depending on the degree to which the juvenile court’s protective function is implicated. In other words, the more the procedure at issue relates to the juvenile court’s uniquely paternal role—such as in setting an appropriate disposition—the more flexible are the dictates of the Due Process Clause.

2. The SYO law is a juvenile proceeding to which the same standard of fundamental fairness applies.

Despite the well-settled *McKeiver* rule, D.H. argues that *Blakely* and *Foster* entitle him to a jury trial at the dispositional phase simply because he received an adult sentence. But D.H. misconceives the SYO proceedings. The adult portion of his dispositional sentence was imposed in the course of a strictly juvenile proceeding, and only after the juvenile court made findings about D.H.’s history, the nature of his offense, and the rehabilitative programs available in the juvenile system. Moreover, the adult portion is currently stayed as D.H. remains under juvenile supervision, and the court can invoke it only after a hearing at which it must find that D.H. is not successfully rehabilitated. Because the proceedings were juvenile, D.H. was not entitled to a jury trial.

D.H.’s dispositional proceedings were juvenile in nature, and he remains part of the juvenile justice system. See *Anderson*, 92 Ohio St. 3d at 66 n.2 (“The new law still attempts to treat or dispose of youthful offenders in the juvenile system.”). Because the jury adjudicated D.H. a delinquent for reckless homicide, a third-degree felony, the SYO law made him eligible for a discretionary, rather than mandatory, SYO dispositional sentence. *D.H.*, 2006-Ohio-6953, at ¶ 22 (citing R.C. 2152.11(F)). That meant that the juvenile court had to make two sets of

findings. First, the SYO law permitted the court to impose an adult sentence only if it found 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 [R.C. 2152.01] will be met.” R.C. 2152.13(D)(2)(a)(i). This determination is precisely the sort of finding that should be made by a juvenile court, with its experience in juvenile rehabilitation and familiarity with available programs, rather than a jury.

Only after making the determination required by R.C. 2152.13(D)(2)(a)(i), see *D.H.*, 2006-Ohio-6953, at ¶ 24, did the trial court here turn to the second set of findings—those concerning the adult portion of the dispositional sentence. The court found under R.C. 2929.14(B) of the felony sentencing guidelines that the shortest sentence would demean the seriousness of D.H.’s offense, and it accordingly entered an adult sentence of three years for the reckless homicide—more than the minimum but less than the maximum available sentence.²

D.H. is currently under juvenile supervision, serving the juvenile portion of his SYO dispositional sentence in the custody of the Department of Youth Services. *D.H.*, 2006-Ohio-6953, at ¶ 25. He can be transferred to the adult criminal system to serve the adult portion only if the juvenile court makes yet further findings. The court must hold a full public hearing at which D.H. is entitled to be present and represented by counsel. R.C. 2152.14(D). It may invoke the adult sentence only if it finds on the record by clear and convincing evidence that D.H.

² These judge-made findings occurred only because the dispositional proceeding took place before this Court severed R.C. 2929.14(B) in *Foster*, 109 Ohio St. 3d at 29, 2006-Ohio-856, at ¶ 99. After *Foster*, courts have greater discretion in selecting a sentence within a specified range, and the judicial findings about which D.H. complains are not statutorily required. In any event, the *Blakely* rule, for the reasons explained above, has no effect on juvenile proceedings.

(1) engaged in conduct that creates a substantial risk to the safety or security of the community, and (2) that his conduct demonstrates that he is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. *Id.* 2152.14(E).

The judge-made determination that D.H. challenges under *Blakely* and *Foster* was therefore part and parcel of the juvenile proceedings. It was merely one finding that occurred during a dispositional phase that appropriately occurred in front of a juvenile judge rather than a jury. And the sentence that resulted from that finding will only be invoked if the juvenile court makes yet more findings—and only if D.H. demonstrates during juvenile supervision that he remains a threat to the safety of others. Nothing about the process suggests that it was the kind of adult proceeding in which the full array of procedural protections afforded to adults comes into play. On the contrary, it was precisely the sort of determination that *McKeiver* left to the juvenile court, and not at all the kind of finding that *Blakely* meant to reach.

The dispositional phase is the aspect of the SYO proceeding that most requires the juvenile court's expertise in dealing sensitively with the needs of youthful offenders. It is the phase during which the goals of protection and rehabilitation are most important. And it is a task—balancing the juvenile's rehabilitative interests with the needs to punish a serious offender and protect public safety—for which a jury's expertise in factfinding is poorly suited. To impose a jury trial requirement during the dispositional phase would effectively eliminate all procedural differences between SYO proceedings and adult criminal trials—a step that the *McKeiver* Court specifically declined to take. 403 U.S. at 551 (“If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.”).

CONCLUSION

The appeals court's judgment should be affirmed.

Respectfully submitted,

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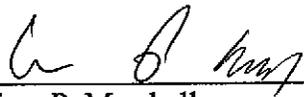
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