

IN THE SUPREME COURT OF OHIO

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

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

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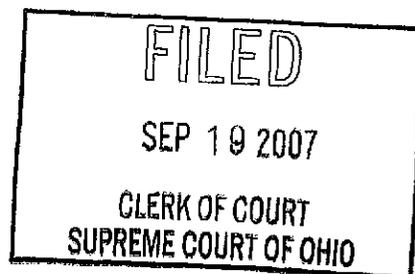
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ARGUMENT

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.

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?

Back in 1966, the U.S. Supreme Court recognized, "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. U.S.* (1966), 383 U.S. 541, 556. Today, there is more cause for concern than ever.

The State posits the argument that children who are subject to discretionary SYO sentences are not constitutionally entitled to trial by jury, because the goals and purposes of the juvenile justice system are different from those of the criminal justice system. "The juvenile court is given broad discretion to take any steps 'necessary to fully and completely implement the rehabilitative disposition of a juvenile ***.'" (Brief of Appellee pg. 15 citing *In re Caldwell* (1996), 76 Ohio St.3d 156, 159. And, "R.C. 2152. 13, rather than criminalizing juvenile crime, emphasizes the overriding goal of treatment and rehabilitation for children within the juvenile

system.” (Brief of Appellee pg. 15). Although the State relies on *In re Agler* (1969), 19 Ohio St.2d 70 and *McKeiver v. Pennsylvania* (1971), 403 U.S. 528 to support its contention that the right to trial by jury does not apply in juvenile delinquency proceedings, neither of those cases dealt with children receiving adult criminal consequences from the juvenile court.

Amicus Curiae, The Office of the Ohio Public Defender, neither disputes nor negates the importance that the overriding goals of the juvenile justice system are the treatment and rehabilitation of Ohio’s wayward children. But, once a child is subject to a potential adult criminal consequence, he must be provided full constitutional rights. It is not constitutionally permissible to sentence a child to an adult criminal consequence without affording him 6th Amendment rights, simply because the goal at the beginning of the proceeding was rehabilitation. And, it is constitutionally insignificant that the adult sentence is initially suspended, pending successful completion of the juvenile disposition. Put simply, the means do not justify the end.

Under Ohio law, there are three types of individuals who may find themselves in the Department of Rehabilitation and Correction. First: an adult who is indicted, convicted, and sentenced to prison; second: a juvenile who is bound over to the adult criminal system, indicted, convicted, and sentenced to prison; and third: a juvenile who is given a blended sentence, and prior to completing the juvenile disposition, the juvenile court imposes the adult sentence. The first two individuals are entitled to 6th Amendment protections; the question before this Court is, is the third? The answer from Appellant and it’s amicus curiae is, yes.

The General Assembly, in drafting the Serious Youthful Offender law, intended to give these children the same rights and protections as adults in the criminal justice system. For example, if a SYO proceeding is initiated, the child is statutorily entitled to:

- Grand jury determination of probable cause
- Open and speedy trial by jury
- Same right to bail as an adult
- All provisions of Title XXIX and the Criminal Rules
- All rights afforded a person who is prosecuted for committing a crime

R.C. 2152.13(C). The SYO statute recognizes that children who face adult criminal consequences must be entitled to the same rights afforded to adults. The constitutional dilemma arose because the General Assembly was unable to predict the U.S. 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.

The discretionary SYO law offends the U.S. 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)(i). 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. R.C. 2152.13(D)(2)(a)(i). Absent these findings, the juvenile court can only impose a traditional juvenile disposition upon a child. R.C. 2152.13(D)(2)(b). Notably, a child has a right to appeal the adult portion of the serious youthful offender sentence. R.C. 2152.13(D)(3). “The child may appeal the adult portion, and the court shall consider the appeal as if the adult portion were not stayed.” *Id.* See, *In re Casey Gerken*, 5th App. No. 2006-COA-010, 2006-Ohio-6720 at ¶23 (the time to appeal from the adult portion of a serious youthful offender dispositional sentence is the same whether the adult

portion is stayed or imposed at the dispositional sentence hearing. Pursuant to App.R. 4(A) that time is thirty days from the [original] dispositional sentence hearing.)

The State asks this Court to treat mandatory and discretionary SYO sentencing equally. The State claims, “the adult portion of the blended sentence is derived exclusively from the jury’s verdict *** and not from any additional factfinding by the juvenile court.” (Brief of Appellee pg. 17). The State’s claim is correct for mandatory SYO. In those cases, the jury verdict or admission by the defendant automatically subjects the child to the juvenile disposition and the adult criminal sentence. R.C. 2152.13(D)(1). To the contrary, the proceeding before this Court is a discretionary SYO. When 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).

Additionally, the State submits that the type of findings required by R.C. 2152.13(D)(2)(a)(i) are more “appropriately left to the judgment and unique perspective of the juvenile judge” rather than a jury. (Brief of Appellee pg. 16). However, *Apprendi* and *Blakely* leaves no room for such exception. *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.” *Apprendi*, 530 U.S. at 490.

Our system of justice simply cannot offer children fewer protections than adults when they are both facing the same potential criminal consequences¹. If a child with a discretionary SYO sentence is successfully rehabilitated and never serves the adult portion of his sentence, that

¹ There are two exceptions in the discretionary SYO statute: a juvenile may not be sentenced to death or life imprisonment without parole. R.C. 2152.13(D)(2)(a)(i). After the statute was enacted, the U.S. Supreme Court held the 8th Amendment to the U.S. Constitution prohibits imposition of the death penalty for crimes committed when offenders were under 18 years of age. *Roper v. Simmons* (2005), 543 U.S. 551.

is a success story; not a justification to deny him the same constitutional rights adults facing the same consequences are entitled to. And, if the adult sentence is imposed, and the child is placed in the Department of Rehabilitation and Correction, he must have been afforded the same rights as the adults he now resides with. There can be no other answer. As much as it may pain the State and the General Assembly for their valiant efforts to keep children in the juvenile justice system, an effort shared by Appellant and his Amicus Curiae, the discretionary SYO law is unconstitutional.

CONCLUSION

Juveniles facing adult criminal consequences are constitutionally entitled to a trial by jury. U.S. CONST. amend. VI; OH. CONST. art. I, §5, 10. And, the discretionary SYO law requires judicial fact-finding before the juvenile can receive an adult criminal sentence. See, *Blakely*, 542 U.S. 296; *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. 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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CERTIFICATE OF SERVICE

A copy of the foregoing REPLY 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 19th day of September, 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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