

IN THE SUPREME COURT OF OHIO

Case Nos. 2007-0291 and
2007-0472

State of Ohio, :
Appellee, :
v. :
D. H. (a minor child), :
Appellant. :

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-250

REPLY BRIEF OF APPELLANT D. H. (A MINOR CHILD)

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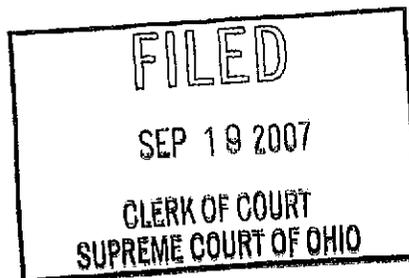
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ARGUMENT

PROPOSITION OF LAW

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ISSUE ACCEPTED AS A CONFLICT

Do constitutional jury trial rights, as articulated under the Sixth Amendment to the United States Constitution and Section 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 had 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 youthful offender statutes?

When government seeks to engage in activities that affect the penal, liberty, or property interests of individual citizens, or to take away privileges or rights of individuals, constitutional due process considerations come into play. See, *Sniadach v. Family Finance Corp.* (1969), 359 U.S. 335 (wage garnishment); *Boddie v. Connecticut* (1971), 401 U.S. 371, (family relationships); *Goldberg v. Kelly* (1970), 397 U.S. 354, (termination of welfare benefits); *Connel v. Higginbotham* (1971), 402 U.S. 207, (interest in continued governmental employment); *Bell v. Burson* (1971), 402 U.S. 535 and *Williams v. Dollison* (1980), 62 Ohio St. 2d 297, (driving privileges)

Historically, the amount and type of process that becomes due in any given situation has always depended upon what is being done to the individual

and not upon who is doing it. The amount of process that is due increases with the severity of the consequences.

The Due Process Clause has been interpreted to contain two components: substantive due process and procedural due process. "Procedural due process" ensures that a state will not deprive a person of life, liberty, or property unless fair procedures are used in making that decision, *Zinerman v. Burch* (1990), 494 U.S. 113, 125, 108 L. Ed. 2d 100, 110 S. Ct. 975. Procedural due process is a "guarantee of fair procedure." Procedural due process guarantees an affected individual the right to some form of hearing, with notice and an opportunity to be heard, before that individual is divested of a protected interest. The requirements of procedural due process are "flexible" and call for such procedural protections "as the particular situation demands." *Mathews v. Eldridge* (1976), 424 U.S. 319, 334, 47 L. Ed. 2d 18, 96 S. Ct. 893; *State v. Hamilton* (1996), 75 Ohio St. 3d 636, 639, 665 N.E.2d 669. The process due an individual varies according to the type of proceeding involved.

The right to a jury trial in federal cases is guaranteed by Clause 3, Section 2, Article III, United States Constitution ("the trial of all crimes, except in cases of impeachment, shall be by jury") and by the Sixth Amendment ("in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury ***")

The United States Supreme Court examined these constitutional provisions in *Callan v. Wilson* (1888), 127 U.S. 540, 8 S.Ct. 1301, where a person claimed that he had been denied his constitutional right to a jury trial

where he had been convicted and ordered to pay a fine of \$25 or serve thirty days in jail. The Court concluded that due to the nature of the crime charged, the defendant was entitled to a jury trial but conceded that the drafters of the Constitution may not have intended to mean that everyone had a right to a jury trial for every violation of public law, no matter how minor. Conceding that the drafters may have meant that a person had a right to a jury trial in those matters where he had a right to a jury trial at common law, the Court still found that the instant charge did not fit in the category of a minor charge and that a right to a jury trial existed for the petitioner.

In *Columbia v. Clawans* (1937) 300 U.S. 617, 57 S.Ct.660, 81 L.Ed. 843, the Court held that a crime that carried a penalty of only ninety days was a petty offense and, as such, did warrant the right to a jury trial as guaranteed by the Constitution. The Court noted that it was obligated to look at the severity of the penalty as a factor in determining whether or not the person was entitled to the right to a jury trial under the Constitution. *Id.* 300 U.S. at 625. Finally, in *Baldwin v. New York* (1970), 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437, the Supreme Court noted:

In *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), we held that the Sixth Amendment, as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury. We also reaffirmed the long-established view that so-called 'petty offenses' may be tried without a jury. Thus the task before us in this case is the essential if not wholly satisfactory one, see *Duncan*, at 161, 88 S.Ct. at 1453, of determining the line between 'petty' and 'serious' for purposes of the Sixth Amendment right to jury trial. [*Id.* 399 U.S. at 68, footnote omitted]

The Supreme Court then noted that for purposes of due process considerations, the focus should be on the seriousness of the potential penalty and held that right to a jury trial would attach to any offense that had a potential sentence of greater than six months.

Thus, under the Supreme Court's rule of law, anyone facing a sentence of imprisonment greater than six months is entitled, pursuant to the Due Process Clause, to the right to a trial by a jury. The Court of Appeals, below, and the state, in its brief, has grossly misinterpreted the holding in *McKeiver v. Pennsylvania* (1970), 403 U.S. 528, 545. The focus in *McKeiver* was on what was being done to the juvenile and not on who was doing it. The Court noted that a juvenile court's disposition and treatment of a juvenile was not comparable to the treatment of adult offenders because the underlying purpose was to help, treat, and rehabilitate the juvenile rather than to punish him. The Court noted that juvenile proceedings were not "criminal prosecutions" and that there were "elements in the juvenile process which render the right to a trial by jury less essential***." [Id. 403 U.S. at 539] The Court further noted that supervision or confinement was aimed at rehabilitation and not punishment and was designed to last no longer than necessary to implement these goals. Id. 403 U.S. at 552.

The Court's final conclusion was that the period of juvenile confinement, which terminated at age twenty-one and which was designed to treat and rehabilitate the juvenile and not to punish him, was not sufficiently serious as to warrant the right to a jury trial. The Court noted that the treatment of the

juvenile was different from adult punishment, which warrants the right to a jury trial if the potential punishment is greater than six months of incarceration.

The Supreme Court's decision was based on what was being done to the juvenile and not on who was doing it to him as the Court of Appeals concluded herein. The decision did not stand for the proposition that juvenile courts can do whatever they want to juveniles without fear of violating the juvenile's due process right to a jury trial. The decision was based upon the fact that the consequences faced by the juvenile, at that particular time, were not severe enough to invoke the due process right to a jury trial. As a practical matter, it matters little to a juvenile who sends him to prison for seven years or for the rest of his life. The consequences are the same whether it is a kind and gentle juvenile judge or a mean and vindictive judge from the general division. It is the consequences faced by the individual that determines whether or not due process warrants the right to a jury trial. This is the holding of *McKeiver* and of all the other cases regarding an individual's right to a jury trial.

This is also the holding taken of *McKeiver* by all the constitutional scholars, legislatures, and most lawyers and judges. The appellate court's decision in this case is an aberrant decision and is contrary to the beliefs, practices, and decisions of almost everyone. No one of consequence read *McKeiver* to hold that juvenile courts could impose adult punishments on juveniles without the right to a trial by jury. Every state has bindover proceedings where a juvenile can be transferred from the jurisdiction of the juvenile court to be tried as an adult. If adult punishments could be inflicted upon juveniles

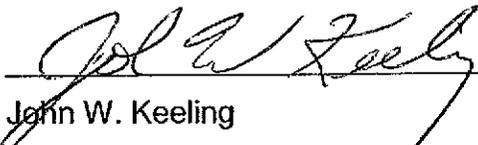
without the benefit of a jury trial, as long as the benevolent juvenile courts were doing it, there would be no need to engage in these cumbersome proceedings. When blended juvenile/adult sentences were introduced, it was recognized by everyone that if the state wanted to impose adult penalties upon juveniles, then it would be necessary to provide them with adult protections, including the right to a jury trial, in juvenile court. That is why Ohio, and the other states, provided for the right to a jury trial when the juvenile was faced with adult sentences in juvenile court. The experts properly understood the implications of jury trial rights with respect to imposing adult sentences upon juveniles even when they are tried in juvenile court. What the experts failed to grasp were the further reaching implications of jury trial rights as determined by the Supreme Court in *Blakely v. Washington* (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403.

The Court of Appeals misapplied the decision in *McKeiver*. The opinion does not stand for the proposition that a juvenile court can do anything to a juvenile without violating the juvenile's right to a jury trial because of its peculiar status as a juvenile court. *McKeiver* was based upon the traditional analysis regarding due process. The amount of due process that must be afforded an individual, including the right to a trial by jury, depends upon what is being done to the individual and not upon who is doing it.

CONCLUSION

If the state seeks to treat children as adults for the purposes of inflicting adult punishment upon them, then children are entitled to the same due process protections as adults and the Court of Appeals was wrong to hold otherwise.

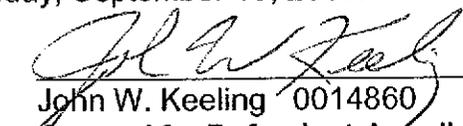
This Court should find that the adult prison sentence imposed upon the defendant violated the defendant's constitutional rights. The adult sentence should be vacated.



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PROOF OF SERVICE

I certify that a copy of this brief was served upon **Katherine J. Press**, Assistant Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215, by hand delivery on Tuesday, July 31, 2007, and that a copy of this was mailed by regular U.S. mail to **Katherine Hunt Federle**, Counsel for The Justice for Children Project, at the Ohio State University Moritz College of Law, 55 West 12th Avenue, Columbus, Ohio, 43210, and also mailed to **Jill Beeler**, Assistant Ohio Public Defender, 8 East Long Street, Columbus, OH 43215 and to **Elsie Porter**, Deputy Solicitor General, 30 East Broad Street, 17th floor, Columbus, OH 43215, on Wednesday, September 19, 2007.



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