IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Nos. 2007-0291 & 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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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.

The cases cited by the state and amicus curiae for the state are completely irrelevant. The United States Supreme Court and this Court long have held that juveniles may be treated differently *as juveniles.* But where, as here, juveniles are treated *as adults*, then they must be afforded the same constitutional protections. The Ohio Legislature recognized this essential proposition when it enacted Ohio's serious youthful offender provisions. Consequently, the statutes provide serious youthful offenders with a right to a jury trial because to do otherwise would violate basic constitutional rights.

In essence, the state's position is that serious youthful offenders are not entitled to a jury trial because they receive a juvenile disposition *in addition to* an adult term. However, R.C. 2152.13(C)(1) states that once a child is indicted, charged by information, or is eligible for a serious youthful offender (SYO) disposition as determined by the juvenile court, "the child is entitled to an open and speedy trial by jury in juvenile court...." R.C. 2152.13(C)(2) states that a juvenile in an serious youthful offender proceeding has "*all rights* afforded a person who is prosecuted for committing a crime." The state thus argues that this Court should ignore the plain meaning of these statutes and conclude that serious youthful offenders are not entitled to a jury trial. This Court, however, has emphasized the importance of plain meaning in statutory interpretation.

The state thus finds itself in the untenable position of attempting to persuade this Court that serious youthful offenders do not have a right to a jury trial in order to avoid the application of *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. Citing to *McKeiver v. Pennsylvania* (1971), 403 U.S. 528 and *In Re Agler* (1969), 19 Ohio St.2d 70, the state contends that the federal and state constitutions do not require a jury trial in SYO proceedings. This argument, however, is constitutionally flawed because the United States Supreme Court and this Court have never held that a minor is not entitled to a jury trial when he receives an *adult* prison term. *McKeiver* is limited to traditional juvenile court proceedings, in which a juvenile is treated as a juvenile for committing a delinquent act. SYO cases are hardly "traditional" juvenile proceedings because of the potential imposition of adult sanctions; for this reason the Ohio legislature has required that the accused juvenile be given the same substantive protections as adults facing criminal charges. See R.C. 2152.13(C)(1) and (2).

Direct application of the *McKeiver* rule to discretionary SYO proceedings would constitute a significant broadening of that decision's reach. *McKeiver's* actual holding is that "trial by jury *in the juvenile court's adjudicative stage* is not a constitutional requirement." *McKeiver*, 403 U.S. at 545 (plurality op., emphasis added). Accord *Agler*, 19 Ohio St.2d at 79. *McKeiver* does not discuss the jury trial right at the dispositional stage of juvenile proceedings for the same reason that Ohio courts have not traditionally addressed the right to jury at criminal sentencings: because "[i]t was not anticipated that jury rights may be implicated in sentencing until *Apprendi v. New Jersey*." *Foster*, 109 Ohio St.3d at 4, 2006-Ohio-856 at ¶3. Moreover, while *McKeiver* stated that juvenile

adjudicatory hearings do not constitute "criminal prosecutions" for purposes of the Sixth Amendment to the United States Constitution, *McKeiver*, 403 U.S. at 550-51 (plurality op.) and *id.* at 557 (Harlan, J., concurring in judgment), it would be an entirely new and different constitutional interpretation to hold that SYO proceedings are not "criminal prosecutions" under the Sixth Amendment, as the punishment, procedures, and rights provided for in such proceedings are entirely different than those in traditional juvenile adjudications. Compare R.C. 2152.13 (requiring indictment, speedy trial, jury trial, open trial, transcript and counsel, and allowing for stayed adult punishment of punitive incarceration) with R.C. 2151.35 (hearings conducted in informal manner, may exclude public, parent, custodian, or guardian of child shall attend all hearings).

In sum, the state can offer no valid constitutional justification for denying minors the Sixth Amendment right to a jury trial in SYO proceedings. Thus, the only issue before this Court is whether the SYO provisions violate the mandates of *Blakely* and *Foster*. Those cases hold unequivocally that a statute which requires a judge to make factual findings necessary to enhance a sentence beyond the normal statutory maximum is constitutionally flawed. R.C. 2152.13(D)(2)(a)(i) requires a juvenile court judge to make just those sorts of factual determinations before imposing an adult criminal sentence on a juvenile. Consequently, the judge is authorized to impose a sentence beyond the normal statutory maximum based on a finding of fact made by the judge and not the jury. Such a sentence is unconstitutional under *Blakely* and *Foster*.

CONCLUSION

For all these reasons, amicus curiae respectfully requests this Court to adopt the amicus'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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I certify a copy of the foregoing document has been served upon the following persons, by regular U.S. mail on this 19th day of September, 2007:

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