IN THE SUPREME COURT OF OHIO

IN RE: J.F.,	:	Case No. 2007-2239
A MINOR CHILD.	:	On Appeal from the Greene County Court of Appeals, Second Appellate District, No. 06-CA-123

BRIEF OF AMICUS CURIAE JUSTICE FOR CHILDREN PROJECT IN SUPPORT OF APPELLANT J.F.

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FILED
MAY 27 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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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. Begun in January 1998, 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 Justice for Children 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 and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights.

Because of the extremely important interests raised in this case, the Justice for Children Project hereby offers this *amicus* brief and urges this Court to reverse the Second District Court of Appeals.

Amicus has no relationship to any of the individuals involved in this litigation. This brief is submitted pursuant to S. Ct. R. VI, Sec. 6.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae hereby adopts the Statement of Case and Facts set forth in the Brief of the Appellant.

ARGUMENT

Amicus Proposition of Law:

> A juvenile court violates due process when it imposes a suspended commitment to the Department of Youth Services at a hearing where the minor was unrepresented by counsel and was not provided adequate notice of the conditions of probation.

In *In re Cross,* this Court embraced the U.S. Supreme Court's acknowledgment that "[c]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile court, for '[a] proceeding where the issue is whether the child will be found 'delinquent' and subjected to the loss of liberty for years is comparable in seriousness to a felony prosecution.'" *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, at ¶22 (quoting *In re Winship* (1970), 397 U.S. 358, 365-66, 90 S.Ct. 1068, 25 L.Ed.2d 368 (quoting *In re Gault* (1967), 387 U.S. 1, 36, 87 S.Ct. 1428, 18 L.Ed.2d 527)). "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which . . . delimits the power which the state may exercise." *Gault* at 20. Consequently, the Court in *Gault* held that due process requires "timely notice, in advance of the hearing, of the specific issues that they must meet," *Gault* at 34; and the right to counsel. *Gault* at 41. Yet, in the case at bar, the minor was denied due process because a suspended commitment to the Department of Youth Services (DYS) was imposed at a hearing where the minor was unrepresented by counsel and he was not provided adequate notice of the alleged conditions of probation. Thus, amicus curiae respectfully urges this Court to reverse the Second District Court of Appeals' decision in *In re J.F*, Greene App. No. 2006-CA-123, 2007-Ohio-5762.

A. *In re Cross* clearly and unambiguously held that a juvenile court's jurisdiction over a child for the purpose of imposing a suspended sentence is limited to the time period during which the juvenile court actually oversees the child on probation.

Adhering to the principles enumerated in *Winship* and *Gault*, this Court held in *Cross* that the minor could not be sent to a DYS facility to serve a suspended commitment after his period of probation had been terminated by the trial court. *Cross*, 2002-Ohio at ¶ 28. "As with adults, a 'court [loses] its jurisdiction to impose * * * suspended sentences once the term of probation expire[s].'" *Id.* (quoting *State v. Yates* (1991), 58 Ohio St.3d 78, 80, 567 N.E.2d 1306). The reasoning behind the Court's decision is both constitutionally and statutorily sound. A child must be given timely and specific notice that he is subject to a potential loss of liberty. *Gault* at 33-34. Thus, to impose a suspended sentence based on an alleged violation of monitored time for which the child had no notice violates both *Gault* and *Cross*. Moreover, an indefinite term holds a child perpetually at risk of incarceration, without requiring the state to prove the conduct beyond a reasonable doubt. Thus, juveniles could be denied their liberty for legal infractions which would not be crimes if committed by adults and which, if charged independently in juvenile court could not result in a commitment to DYS, such as for underage consumption of alcohol or a curfew violation. Finally, as the *Cross* Court noted, "[t]here is no . . . statutory authority that allows a juvenile court to suspend a DYS commitment outside of probation." *Cross*, 2002-Ohio ¶ 27.

Suspending a DYS commitment outside of probation is exactly what the juvenile court in *J.F.* did. The record clearly states that J.F.'s probation was terminated on March 1, 2006. The transcript of the March 1, 2006 hearing is entitled "Probation Termination Hearing." At the probation termination hearing, the juvenile court found that

J.F.'s probation was terminated: ". . . you've successfully completed probation, I hear that you've gone above and beyond what you need to do, so I am terminating you successfully today." 3/1/2006 Tr. 7. Similarly, at the September dispositional hearing on new charges, the juvenile court inquired: "Since he was released from probation with Ms. Buckwalter, tell me what concerns you've had for your son." 9/20/2006 Tr. 4. From the record, it is clear that the juvenile court believed J.F. had successfully completed his probation.

Despite the clarity of the record, the Second District nevertheless concluded that the minor was still on probation by finding that "it is reasonable to infer that the juvenile court used the term 'community control' interchangeably with the term 'probation.'" *J.F.* at ¶ 51. Yet the juvenile court never explicitly provided that probation was to continue and, in fact, in its original dispositional order which provided for monitored time, the court cited an erroneous statutory provision unrelated to monitored time. 3/24/2004 Disposition order; *see also* R.C. 2152.19(A)(3); 2152.19(A)(4)(i). J.F. was reasonably left to conclude that his probation terminated in March 2006, a view that the juvenile court seemed to share. Moreover, at least one appellate court has held that the lower court must explicitly provide that "probation [would] not terminate, but continue until further court hearing." *In re Walker*, Franklin App. No. 02AP-421, 2003-Ohio-2137, at ¶14. In *J.F.*, the Second District further relied on the fact that the probation officer (not the court) had stated that "of course monitored time will still be in existence." 3/1/2006 Tr. 3. To suggest that it is the probation officer rather than the juvenile court judge who has the authority to determine whether probation is to continue is blatantly unconstitutional.

Neither the U.S. Constitution nor the Ohio Constitution can allow a deprivation of liberty grounded in what a court probably meant or how a witness described particular legal realities. Furthermore, it is unreasonable to conclude that any juvenile, especially one unrepresented by counsel, understood himself to be at risk of his suspended sentence after having been told that he successfully completed probation. Amicus curiae respectfully asks this Court to reverse the Second Appellate District and find that due process demands more than a single statement as to the existence of monitored time (cited to an erroneous statutory provision) more than two years and multiple court hearings before a suspended sentence is imposed and liberty so brutally infringed.

B. The essentials of due process are meaningless without the right to counsel.

Juveniles are entitled to "proceedings [that] comport with the 'fundamental fairness' demanded by the Due Process Clause." *In re Anderson*, 92 Ohio St.3d 63, 66, 2001-Ohio-131, 748 N.E.2d 67, 70 (quoting *Schall v. Martin* (1984), 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed. 207). Notice must "be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *Gault* at 33; *see also* Juv.R. 35(B) (requiring that probation may not be revoked "except upon a finding that the child has violated a condition of probation of which the child had, pursuant to Juv.R. 34(C), been notified"). Moreover, the fact that the right to counsel in a juvenile case arises from due process does not diminish its importance. *In re C.S.,* 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, at ¶ 82.

In *C.S.*, this Court recognized that "the General Assembly's general intent in enacting R.C. 2151.352 was to ensure the juvenile's constitutional right to representation by an attorney -- -not representation by a parent, custodian or guardian." *C.S.* at ¶ 90. Thus, while *C.S.* held that a juvenile may waive his right to counsel, it nevertheless clearly stated that there is "a strong presumption against waiver of the constitutional right to counsel." *C.S.* at ¶ 105 (quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, 58 S.Ct. 1019, 83 L.Ed. 1461). The Court then explained that before allowing a child to waive his right to counsel, "the judge is to engage in a meaningful dialogue with the juvenile." *C.S.* at ¶ 107.

Given the strong presumption against waiver and the trial court's obligation to engage in a meaningful dialogue with the minor, it is clear that J.F. did not waive his right to counsel. The trial court in *J.F.* was required to consider "a number of factors and circumstances, including the age, intelligence, and education of the juvenile; the juvenile's background and experience generally and in the court system specifically; the presence or absence of the juvenile's parent, guardian, or custodian; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the complexity of the proceedings," in order to determine whether J.F.'s waiver was valid. *C.S.* at ¶ 108. The transcript of the August 2006 adjudication reveals that the juvenile court engaged in nothing even approaching a meaningful dialogue with J.F., especially in light of the fact that J.F.'s admission would result in imposition of a suspended sentence that had been imposed more than two and a half years before. During the exchange, the juvenile court first asked J.F. if he would admit or deny responsibility to the two offenses for which he was charged, and *then*

asked him "Do you want a lawyer to represent you?" 8/31/2006 Tr. at 5. J.F. responded "No, Your Honor." 8/31/2006 Tr. at 5. The court then asked J.F. and his mother to sign the waiver form. 8/31/2006 Tr. at 5. This abbreviated exchange clearly violates this Court's recent ruling in *C.S.* and ignores the U.S. Supreme Court's admonition that "no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively." *Gault* at 38-39 fn. 65 (quoting Nat'l Crime Comm'n Report (1967), 86-87).

Moreover, it is clear that J.F.'s mother did not provide useful assistance or advice to him. At J.F.'s disposition on September 21, 2006, the court engaged in the following exchange with J.F.'s mother:

> THE COURT: . . . We gave your mother the Public Defender's number and advised her to contact a lawyer because there was a possibility you could be committed to DYS. Did you do so?
>
> [MOTHER]: I did do that and they said I made too much.
>
> THE COURT: Ineligible? Did you contact another attorney?
>
> [MOTHER]: I contacted (INDECIPHERABLE) money, and making payments and (INDECIPHERABLE).

> THE COURT: Do you wish to go forward today without a lawyer representing your son?
>
> [MOTHER]: I don't have a choice.
>
> THE COURT: All right. Well, I'm going to have you and [J.F.] sign a waiver of counsel form, and then we'll move forward for final disposition hearing today on these offenses.
> All right. [J.F.], is there anything that you would like to state today regarding final disposition of these two offenses?

9/20/2006 Tr. at 2–3.

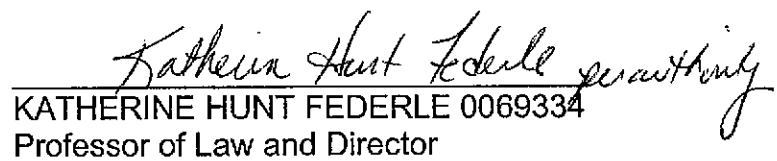
Despite the fact that this Court admonished juvenile courts to remember that not all parents will "sufficiently counsel and advise, that is 'represent,' their child in a delinquency proceeding," the trial court in *J.F.* proceeded to disposition without ensuring the minor validly waived his right to counsel. *C.S. at* ¶ 93. This waiver quickly resulted in J.F.'s loss of liberty when the juvenile court imposed his suspended commitment, a devastating consequence. Social scientists are increasingly finding that incarcerating young people in secure facilities increases their chances of committing crimes in the future. *See* Barry Holman and Jason Ziedenberg (2006), *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, at 4. Children like J.F. who are detained in secure facilities also face "statistically significant higher levels of substance abuse, school difficulties, delinquency, violence, and adjustment difficulties in adulthood." *Id.* at 5. There is simply no justification for imposing such a punishment on J.F. or any child without rigorous application of the due process procedures this Court so carefully enumerated in *C.S.*

The juvenile court failed to act in J.F.'s case to ensure that "fundamental fairness" as required by *Gault* and the Due Process Clause protected J.F. from a significant loss of his liberty and, as a result, should be reversed.

CONCLUSION

For all these reasons, *amicus curiae* respectfully requests that this Court reverse the decision of the Second District 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 regular U.S. mail on this 27th day of May, 2008:

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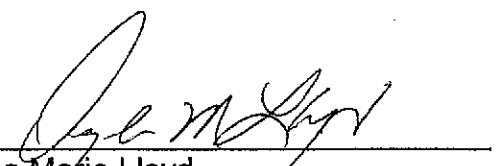

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