

**ORIGINAL**

IN THE SUPREME COURT OF OHIO  
NO. 2011-0107

IN RE: J.V.

:  
: On Appeal from the Eighth  
: District Court of Appeals,  
: Case No. CA 94820  
:

Appellant

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APPELLANT'S MERIT BRIEF

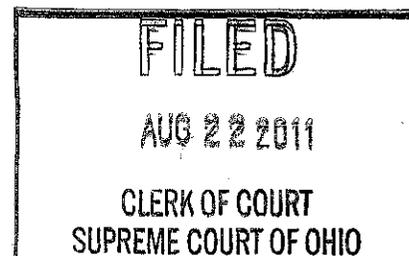
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## INTRODUCTION

The instant case presents two discrete legal issues regarding the constitutionality of Ohio's Serious Youthful Offender ("SYO") statute and the authority of juvenile courts to impose criminal punishment upon an individual who is the age of 21.

J.V.'s first proposition of law asks this Court to decide whether an adult prison sentence can be invoked for an SYO juvenile on the basis of judicial findings of fact made pursuant to a burden of proof less than beyond a reasonable doubt. Before a juvenile can actually serve an adult prison sentence pursuant to an SYO sentence, two separate sets of findings must be made at two different proceedings. First, a juvenile court *imposes* a "stayed adult sentence" upon an SYO juvenile as a part of either a mandatory or discretionary SYO blended sentence.<sup>1</sup> *State v. D.H.* (2009), 120 Ohio St. 3d 540, 546. The adult sentence remains stayed unless the juvenile court in a subsequent proceeding makes several necessary findings to "invoke" the adult sentence pursuant to R.C. 2152.14. J.V. maintains that R.C. 2152.14(E)(1)'s requirement that a judge—and not a jury—decide, based on a relaxed burden of proof, facts necessary to subject a juvenile to *adult* imprisonment violates the juvenile's right to a jury trial and to due process.<sup>2</sup> Moreover, J.V.'s equal protection rights are violated because, unlike bound-over juveniles and adults, he received an adult prison sentence without the benefit of a jury determination, beyond a reasonable doubt, of the facts necessary to send him to prison.

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<sup>1</sup> A "blended sentence" under Ohio law includes an ordinary juvenile disposition and stayed adult sentence.

<sup>2</sup> Because J.V.'s adult sentence was actually invoked, this case raises the question specifically reserved by this Court in *State v. D.H.* (2009), 120 Ohio St. 3d 540, 546 ("Since the adult portion of D.H.'s sentence has not been invoked, this opinion does not address the constitutional ramifications of invoking the adult sentence under R.C. 2152.15 in light of *Blakely* and *Foster*.")

J.V.'s second proposition of law presents a straightforward question regarding the jurisdictional reach of juvenile courts. Prior to the instant case, Ohio courts have established a bright-line rule that juvenile courts retain jurisdiction over delinquent children *only* until the age of 21. Without identifying a statutory basis to do so, the Eighth District concluded that the juvenile court retained the authority to sentence J.V. and impose post-release control *for the first time* after he turned 21. This Court should apply the plain language of the juvenile jurisdiction statutory provisions, reverse the Eighth District, and hold that juvenile courts cannot impose criminal punishment (including post-release control) after the delinquent child turns 21.

### **STATEMENT OF THE CASE**

J.V. was charged by complaint in juvenile court with multiple counts of felonious assault and aggravated robbery. The offenses also included firearm specifications and serious youthful offender specifications.

#### **A. The juvenile court imposes a blended sentence for felonious assault, aggravated robbery, and a 3-year firearm specification.**

On June 17, 2005, J.V. and the State entered into a plea agreement whereby J.V. entered an admission to one count of felonious assault, one count of aggravated robbery, and the firearm and serious youthful offender specifications attendant to those two counts. (6/17/05 Tr. at 7, 10, 26-29, and 39-40). The State dismissed the remaining counts. As a part of the agreement, the parties reached an agreed upon disposition regarding both the juvenile and the stayed adult portions of the blended sentence that resulted from the SYO specifications. (6/17/05 Tr. at 7-8 and 10). As to the juvenile disposition, the parties agreed to two years of concurrent incarceration at Ohio Department of Youth Services ("ODYS"). (6/17/05 Tr. at 8 and 10). As to the adult portion of the blended sentence, the parties agreed to recommend a stayed adult sentence of six years. (6/17/05 Tr. at 8-10). Based on J.V.'s admission, the trial court found him

“delinquent and guilty” of the two charges along with the firearm and SYO specifications. (6/17/05 Tr. at 29, 39-40, and 50). The trial court then imposed the juvenile disposition and the stayed adult sentence recommended by the parties. (6/17/05 Tr. at 62-63 and 66-68). The trial court did not, however, impose a term of post-release control as part of the stayed adult sentence.

**B. J.V. begins serving his juvenile disposition and the case is remanded to the juvenile court to correct a sentencing error.**

J.V. appealed the blended sentence, contending that the journal entry misstated his stayed adult sentence. The Eighth District agreed, vacated J.V.’s sentence, and remanded the case to the juvenile court to ensure that journal entries correctly reflected J.V.’s “disposition articulated at the June 17, 2005 hearing.” *In re J.V.*, Cuyahoga App. No. 86849, 2006 Ohio 2464, ¶ 14 (“*J.V. F*”). Upon remand, the juvenile court conducted a new dispositional hearing and imposed both the juvenile and stayed adult portions of J.V.’s sentence. (1/5/07 Tr. at 3-12). Once again, the trial court did not impose post-release control as part of the stayed adult sentence.

In the meantime, J.V. began serving his juvenile sentence at Marion Juvenile Correctional Facility. (1/13/09 Tr. at 84). J.V. was scheduled to be released from juvenile detention on September 24, 2008. (1/13/09 Tr. at 75 and 86). He was not, however, released on that date and was told that he would have to go to court for “problems” at ODYS. (1/13/09 Tr. at 94).

**C. The juvenile court invokes J.V.’s stayed adult prison sentence, but fails to impose post-release control.**

On October 16, 2008, the State filed a motion to invoke the adult portion of J.V.’s SYO sentence, pursuant to R.C. 2152.14(A)(2)(a), on the basis that J.V. purportedly committed two acts while at ODYS that could be charged as felonies or first-degree misdemeanors. (11/20/08 Tr. at 3 and 6-7). Specifically, the State alleged that J.V. assaulted a juvenile corrections officer

on July 22, 2008 and a fellow inmate in September 2008, both in violation of R.C. 2903.13. (11/20/08 Tr. at 7).

The juvenile court held a hearing on the State's motion on January 13, 2009. At the hearing, the State elicited testimony concerning the two incidents that served as the basis for its request to invoke J.V.'s six-year adult sentence. After the State rested and J.V. testified, the trial court explained that there was "not clear and convincing evidence" to support "some of the things that [the State's witness] said" but that there is "something called guilt by association" and that J.V. made some poor choices at Marion. (1/13/09 Tr. at 144-49). The trial court then took the motion under advisement. (1/13/09 Tr. at 144-49). On February 5, 2009, the trial court issued a journal entry which granted the State's motion to invoke the adult portion of J.V.'s sentence. In that entry, the trial court found that the "allegations of the motion have been proved by clear and convincing evidence." It then ordered the "adult portion of the disposition ordered on January 16, 2007" into effect. Again, the trial court did not impose post-release control.

**D. J.V. turns 21 years old on March 11, 2009.**

J.V. was born March 11, 1988 and thus turned twenty-one on March 11, 2009. (2/12/10 Tr. at 45).

**E. The Eighth District concluded, on January 14, 2010, that J.V.'s sentence was "void" and remanded the case to juvenile court for a new hearing.**

J.V. appealed the trial court's decision to invoke the adult portion of his SYO sentence to the Eighth District Court of Appeals. In that appeal, J.V. argued, among other things, that the juvenile court lacked the authority to invoke the suspended adult sentence because the suspended sentence was void due to the omission of post-release control. On January 14, 2010, the Eighth District concluded that "J.V.'s fourth assignment of error has merit," held that his sentence was

“void,” and remanded the case for a “new hearing.”<sup>3</sup> *In re J.V.*, Cuyahoga App. No. 92869, 2010 Ohio 71, at ¶¶ 23-24 (“*J.V. II*”). The Eighth District concluded that J.V.’s remaining assignments of error were moot.<sup>4</sup>

J.V. appealed the Eighth District’s decision in *J.V. II* to this Court, raising the following two propositions of law:

Proposition of Law I: A juvenile court does not have the authority to invoke the suspended adult portion of a serious youthful offender sentence after the delinquent child is twenty-one years old.

Proposition of Law II: When a delinquent child challenges the sufficiency of the evidence with respect to the findings necessary to invoke the appellant’s suspended adult sentence, the appellate court must address the sufficiency argument even if it vacates the adult sentence on other grounds.

This Court declined jurisdiction, though two Justices dissented on appellant’s first proposition of law. *In re J.V.*, Sup. Ct. Case No. 2010-451 (Lundberg Stratton and O’Connor, JJ., dissenting).

**F. The juvenile court held a *de novo* sentencing hearing, imposed a new blended sentence including a stayed adult sentence (with PRC for the first time), and invoked that newly imposed adult sentence on the very same day.**

Upon remand, the juvenile court proceeded to hold a *de novo* sentencing hearing to correct *both* the original disposition of a stayed adult sentence of six years *and* the actual imposition of that six year sentence. (2/9/10 Tr. at 19; 2/12/10 Tr. at 16-26 and 44-49). In other words, it imposed a blended SYO sentence that included a juvenile disposition and a stayed adult sentence and then invoked that newly imposed sentence on *the very same day*. The basis for

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<sup>3</sup> J.V.’s fourth assignment of error provided: “The Juvenile Court Lacked the Authority to Invoke a Void Adult Sentence.”

<sup>4</sup> In his other three assignments of error, J.V. argued that the State failed to present legally sufficient evidence regarding the findings necessary to invoke the suspended adult sentence, that the trial court failed to make adequate findings on the record as required by R.C. 2152.14(D) and (E)(1), and that the judicial fact-finding relied on to invoke the adult sentence violated J.V.’s constitutional rights.

invoking the February 12, 2010 stayed adult sentence was the conduct alleged by the State in its *October 16, 2008* motion to invoke. The trial court simply took “judicial notice of its hearing on June 13<sup>th</sup>, 2009,”<sup>5</sup> (2/12/10 Tr. at 30), and made the following findings:

1. J.V. was at least 14, was serving the juvenile portion of a SYO sentence, and was in the custody of DYS “at the time of the hearing on [January] 13, 2009.”
2. J.V. committed an act that both was a violation of the rules of the institution and could have been charged as “a first-degree misdemeanor offense of violence if committed by an adult.”
3. J.V. engaged in conduct that created “a substantial risk of harm to the safety or security of the institution, community or the victim.”
4. J.V.’s conduct demonstrates that he was “unlikely to be rehabilitated during the remaining period of the juvenile jurisdiction, which [at the time of the January 13, 2009 hearing] was only 60 more days.

(2/12/10 Tr. at 44-45). The trial court imposed a six-year prison sentence and five years of mandatory post-release control. (2/12/10 Tr. at 46-47).

**G. The Eighth District affirmed the juvenile court’s February 12, 2010 imposition and invocation of J.V.’s adult sentence.**

J.V. appealed the juvenile court’s second attempt to invoke his suspended adult sentence and argued that his adult sentence should be vacated for four reasons: 1) The State failed to present sufficient evidence to carry its burden of proof on the findings necessary to invoke the adult sentence;<sup>6</sup> 2) The juvenile court lacked the authority to invoke the newly imposed and stayed SYO adult sentence based on conduct that occurred prior to the imposition of a valid adult sentence; 3) The juvenile court lacked jurisdiction to invoke the adult sentence because J.V. was over the age of

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<sup>5</sup> The hearing that the juvenile court seems to be referring to actually occurred on January 13, 2009.

<sup>6</sup> J.V. raised this argument in his prior appeal, but the Eighth District declined to address it in light of its holding that the sentence was void.

twenty-one; and 4) R.C. 2152.14 is unconstitutional because it requires judicial fact-finding to invoke the adult sentence and because it imposes a relaxed burden of proof.<sup>7</sup>

On November 10, 2010, the Eighth District affirmed the juvenile court's invocation of J.V.'s suspended adult sentence. *In re J.V.*, Cuyahoga App. No. 94820, 2010 Ohio 5490 ("*J.V. III*"). The Eighth District held that there was sufficient evidence to support the judicial fact-finding that was necessary to invoke the adult sentence, that the trial court had the authority and jurisdiction to invoke the adult sentence (including PRC), and that the judicial fact-finding necessary to invoke the adult sentence did not violate J.V.'s constitutional rights.

J.V. filed an appeal with this Court. And, on May 25, 2011, this Court accepted the appeal with respect to the following two propositions of law:

Proposition of Law I: The invocation of an adult prison sentence upon a juvenile, pursuant to R.C. 2152.14, violates the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

Proposition of Law II: A juvenile court does not have the authority to impose criminal punishment (including post-release control) after the delinquent child turns 21.

J.V.'s merit brief follows.

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<sup>7</sup> J.V. raised this argument in his prior appeal, but the Eighth District declined to address it in light of its holding that the sentence was void.

## STATEMENT OF FACTS

Because the allegations in the State's motion to invoke the adult sentence depend largely on a mass disturbance at Marion Juvenile Correctional Institution, J.V. starts with a discussion of the well-documented problems at Marion before turning to the specific allegations in this case.<sup>8</sup>

### **A. Marion Juvenile Correctional Facility**

Both J.V. and Kevin Lacey, a unit manager at Marion Juvenile Correctional Facility, (1/13/09 Tr. at 7 and 24), painted a fairly bleak picture about Marion. Lacey testified that Marion is a very difficult place to work and that it was "down a tremendous amount of staff". (1/13/09 Tr. at 13 and 23-24). Lacey admitted that there is a "culture of survival" or "culture of fighting" at these institutions. (1/13/09 Tr. at 19).

J.V. testified that there were more than three fights per week in his unit. (1/13/09 Tr. at 96). When asked to describe the culture of fighting and what would happen if someone refused to fight, J.V. explained:

They're going to hit you. [T]hey tell you, you're still going to fight. They tell you you're going to another unit where his boys at. He's going to tell his boys and they going to fight you. That's how it is.

(1/13/09 Tr. at 99).

J.V. and Lacey's description of Marion is consistent with the results of a system-wide conditions of confinement lawsuit filed against the Ohio Department of Youth Services in federal court. *S.H., et al. v. Strickrath*, Case No. 2:04-CV-1206 (S.D. Ohio). In May 2007, the federal court approved a case management plan in which the parties agreed to a joint fact-finding team who would assess the conditions in the juvenile institutions around the State. On December

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<sup>8</sup> ODYS closed Marion in July 2009.

13, 2007, the fact-finding team issued its final report (hereinafter referred to as the “Cohen Report”) and its findings were staggering.<sup>9</sup> The Cohen Report concluded that, “[m]ost ODYS facilities were found to be overcrowded, understaffed, and underserved in such vital areas as safety, education, mental health treatment, and rehabilitative programming.” *Id.* at pg. i. The Cohen Report concluded that ODYS institutions do *not* provide a safe environment for youth:

The needless and excessive use of force is engrained within ODYS, with Ohio River Valley, Marion, and Indian River in the top tier on use of force, restraints, and isolation. We consistently found flawed training, deficient oversight, seriously inadequate reporting and subsequent review of ‘incidents.’ Our findings support the conclusion that ODYS youth are *not provided with the constitutional minima relating to a safe environment*. Their physical and psychological well-being is at risk and often damaged at the present time. This environment, in turn, dramatically impedes whatever efforts are made to provide treatment and programs.

*Id.* at pg. iii (emphasis added). The Cohen Report also found that “[e]xcessive force and the excessive use of isolation, some of it extraordinarily prolonged, is endemic to the ODYS system.” *Id.* at pg. ii. With respect to the use of isolation, the Cohen Report explained that it is used far too often and for too long and its use “must be immediately revisited and dramatically changed.” *Id.* at pg. iii. It concluded that “prolonged and highly deprivational isolation whether in the name of treatment, behavior modification, or punishment is *not constitutionally permissible*.” *Id.* (emphasis added).<sup>10</sup>

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<sup>9</sup> The Cohen Report can be found at [www.dys.ohio.gov](http://www.dys.ohio.gov) by selecting “Settlement Agreement” and then “Consultant Report.”

<sup>10</sup> On May 21, 2008, DYS entered into a 90-page stipulation agreement in *Stickrath* which required the implementation of fundamental changes at ODYS facilities and created a monitoring team to assess DYS’s progress over the next five years at implementing the wide-scale changes required by the agreement. The federal monitor issued his first report on May 9, 2009. And, while the monitor noted significant improvements, he also highlighted numerous areas where there had been a lack of progress. All of these documents can be found online at <http://www.dys.ohio.gov/dnn/AgencyInformation/SettlementAgreement/tabid/81/Default.aspx>.

The Cohen Report singled out Marion as a particularly troubling facility. The Marion facility was among the leaders in “gratuitous staff-on-youth violence and almost devoid of meaningful treatment.” Id. at 20.

**B. J.V. is approved for early release.**

Despite Marion’s difficult environment, J.V. was approved for early release because of the progress he had made at the institution.

J.V. was first placed at Marion Juvenile Correctional Facility on July 27, 2005. (1/13/09 Tr. at 68 and 84). While at Marion, he participated in numerous programs including Thinking for a Change, anger management, substance abuse, and victim awareness. (1/13/09 Tr. at 84-85). As of 2008, J.V. had completed all of the available programs. (1/13/09 Tr. at 69 and 85). J.V. also attended school. (1/13/09 Tr. at 77). J.V. had fewer write-ups than the average kid, but was involved in a few more serious incidents. (1/13/09 Tr. at 71).

Based on his progress at Marion, J.V. was approved, in July 2008, for release from Marion onto juvenile parole.<sup>11</sup> (1/13/09 Tr. at 74-75 and 87). J.V.’s early release was derailed, however, by the July 22, 2008 incident involving Lacey and for which he was subsequently found not guilty by a Marion hearing officer. (1/13/09 Tr. at 77 and 87).

**C. July 22, 2008 Incident: J.V. Found Not Guilty of Alleged Assault on Unit Manager Lacey.**

Unit Manager Lacey testified before the Juvenile Court that, on July 22, 2008, he participated in a search of J.V.’s cell. (1/13/09 Tr. at 10). According to Lacey, C.H., J.V.’s roommate, was upset about getting his cell searched and hit Lacey in the head twice. (1/13/09 Tr. at 10). Lacey grabbed C.H.’s hand, and J.V. allegedly hit Lacey as he tried to pull Lacey off

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<sup>11</sup> J.V.’s initially scheduled release date was September 24, 2008. (1/13/09 Tr. at 75 and 86).

his roommate. (1/13/09 Tr. at 10-11 and 15). Both Harris and J.V. were quickly restrained and placed in handcuffs. (1/13/09 Tr. at 11). Lacey testified that he did *not* suffer physical harm as a result of this incident. (1/13/09 Tr. at 39). J.V. remembered the incident but denied ever touching Lacey. (1/13/09 Tr. at 89).

During an internal review hearing at Marion, J.V. was found not guilty of assault and cleared of any wrongdoing. (1/13/09 Tr. at 12, 35-36, and 90). At the juvenile court hearing, Lacey criticized the Marion hearing officer, claiming that the hearing officer failed to view available video footage of the incident. (1/13/09 Tr. at 13-14 and 36-37). J.V., for his part, testified that he was told that the hearing officer reviewed the video. (1/13/09 Tr. at 91). Nevertheless, the State elected not to present the video of the incident to the trial court in this case. (1/13/09 Tr. at 124-25).

**D. September 25, 2008 Incident: Participation in a Unit-Wide Mass Disturbance.**

On September 25, 2008, Unit Manager Lacey received a call about a large fight going on in another unit. (1/13/09 Tr. at 15-18). When he responded, he observed about 27 of the 30 youth in the unit, including J.V., participating in “mass chaos.” (1/13/09 Tr. at 18 and 45). According to Lacey, J.V. kicked one youth on the ground and chased other youth around the unit. (1/13/09 Tr. at 19 and 53-54). Lacey conceded, however, that he did not see how this fight started or who started it. (1/13/09 Tr. at 45). He also testified that these kind of multiple youth fights occur about two to three times a month. (1/13/09 Tr. at 31).

Regarding this incident, J.V. testified that the fight was started by an individual named Vladimir. (1/13/09 Tr. at 95). J.V. testified that he only got involved in the fight once another individual hit him from behind. (1/13/09 Tr. at 95). J.V. admitted to kicking the person who had hit him. (1/13/09 Tr. at 112). Although there was video of this incident, the State did not present

it as evidence in this case.<sup>12</sup> (1/13/09 Tr. at 53).

## LAW AND ARGUMENT

### *PROPOSITION OF LAW I:*

#### THE INVOCATION OF AN ADULT PRISON SENTENCE UPON A JUVENILE, PURSUANT TO R.C. 2152.14, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

Under Ohio's SYO law, J.V. was sent to an adult prison because a juvenile court judge found that the State proved certain facts by clear and convincing evidence. The invocation of the adult portion of J.V.'s SYO sentence based on (1) judicial fact-finding and (2) a relaxed burden of proof violated the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

As discussed below, United States Supreme Court and Ohio Supreme Court jurisprudence make abundantly clear that the judicial fact-finding required by R.C. 2152.14(E)(1) would violate the Sixth Amendment if it were purely an adult sentencing provision. The question presented here is whether a juvenile's constitutional rights are likewise violated when such fact-finding is a necessary prerequisite for the imposition of an *adult* prison sentence. J.V. maintains that, by virtue of the Sixth and Fourteenth Amendments (and Ohio's constitutional counterparts), he cannot receive an *adult* prison sentence predicated on judicial fact-finding and based on a relaxed burden of proof.

Moreover, because J.V. was denied a right to a jury on the findings required by R.C. 2152.14(E)(1) and a right to have those findings proved beyond a reasonable doubt, he was

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<sup>12</sup> Unit Manager Lacey also testified, over several objections, about J.V.'s alleged involvement in a gang at the institution called the "Felons." (1/13/09 Tr. at 16 and 20). However, because Lacey had no first hand knowledge of these allegations which were made by other youth who did

necessarily denied equal protection of the law. Unlike adults and bound-over juveniles, J.V. received an *adult* prison sentence based on judicial fact-finding.

**A. Judicial Fact-Finding, Under a Relaxed Burden of Proof, Is a Necessary Prerequisite to the Invocation of the Adult Portion of an SYO Sentence.**

As this Court explained in *D.H.*, a juvenile “cannot be sent directly to an adult facility for the acts that led to his serious-youthful-offender statutes.” (2009), 120 Ohio St. 3d 540, 546.

Rather, the trial court must find additional facts based on the subsequent conduct of the juvenile in order for the juvenile to actually serve an adult prison sentence.

R.C. 2152.14 governs the circumstances under which a juvenile court may invoke the adult portion of a serious youthful offender sentence. *D.H.*, 120 Ohio St. 3d at 545. To invoke the adult portion of the SYO sentence, a juvenile court judge must find the following by *clear and convincing evidence*:

1. The person is “serving the juvenile portion of a serious youthful offender dispositional sentence.” R.C. 2152.14(E)(1)(a).
2. The person is at least fourteen years old and has been admitted to a DYS facility, or criminal charges are pending. R.C. 2152.14(E)(1)(b).
3. The “person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. R.C. 2152.14(E)(1)(c).
4. And either of the following:
  - The person committed an act, while in custody or on parole, that is a violation of the rules of the institution or the conditions of supervision and could be charged as any felony or as a first-degree misdemeanor. R.C. 2152.14(A)(2)(a), (B)(1), and (E)(1)(c).
  - The person is engaging in conduct that “creates a substantial risk to the safety or security” of the institution, community, or victim. R.C. 2152.14(A)(2)(b), (B)(2), and (E)(1)(c).

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not testify at the hearing, (1/13/09 Tr. at 47), the juvenile court appropriately disregarded that testimony (1/13/09 Tr. at 129-30).

Id.

**B. Judicial Fact-Finding in R.C. 2152.14(E)(1) Would Clearly Violate an Adult's Sixth Amendment Right to a Jury Trial.**

While R.C. 2152.14(E)(1) obviously applies only to juvenile offenders, J.V. begins his analysis by considering whether the judicial fact-finding in that section would pass constitutional muster if applied to an adult. Clearly it would not.

R.C. 2152.14(E)(1) authorizes a court to impose an adult prison term if it finds certain facts by clear and convincing evidence, including that the person committed a serious violation of the rules of the institution that could be charged as a felony or first-degree misdemeanor or the person was engaging in conduct that "creates a substantial risk to the safety or security" of the institution, community, or victim. R.C. 2152.14(A)(2)(a) and (b), (B)(1) and (B)(2), and (E)(1)(c). Thus, a juvenile cannot serve an adult prison term unless a judge finds certain facts including that the juvenile was engaged in criminal and/or dangerous conduct *after* the blended sentence was imposed.

If this were an adult sentencing provision, there is little question that the judicial fact-finding would be unconstitutional as it increases the penalty for a crime based on facts found by a judge by clear and convincing evidence. In *Apprendi v. New Jersey*, the United States Supreme Court held that, "[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." (2000) 530 U.S. 466, 489. *Apprendi* creates a "bright-line

rule” to which there is but one exception (existence of a prior conviction). *Cunningham v. California* (2007), 549 U.S. 270, 127 S.Ct. 856, 868-69.<sup>13</sup>

The United States Supreme Court, in *Blakely v. Washington*, explained that the “statutory maximum” referred to in *Apprendi* is the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (2004) 542 U.S. 296, 303-304 (emphasis in original). “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Id.*; see also *Cunningham*, 127 S.Ct. at 860.

After *Blakely*, it is clear that a sentencing judge “exceeds his proper authority” when he inflicts punishment which “the jury’s verdict alone does not allow.” *Id.* This is true whether the enhanced sentence is dependent on finding “a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as [*in Blakely*])” and “[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it.” *Id.* at 305, n.8 (emphasis in original). If the sentencing judge must find an additional fact of any kind (other than existence of a prior conviction) to impose a longer prison term, the sentencing scheme does not comport with the Sixth Amendment. *Cunningham*, 127 S.Ct. at 869.

In *Foster*, this Court considered the constitutional implications of *Blakely* and *Apprendi* on Ohio’s felony sentencing structure. The Court held that sentences that exceed minimum and concurrent terms of imprisonment based on statutorily required judicial factfinding violated *Blakely*. *State v. Foster* (2006), 109 Ohio St.3d 1, 19-21. It therefore struck down numerous sentencing provisions as unconstitutional. *Id.* at paragraphs one, three, and five of the syllabus.

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<sup>13</sup> The continued viability of that exception is in doubt as a majority of the United States Supreme Court now recognizes that the decision establishing the prior conviction exception was wrongly decided. *Shepard v. United States* (2005), 544 U.S. 13, 27-28 (Thomas, J., *concurring*).

Here, R.C. 2152.14(E)(1) permits the imposition of an additional penalty (an adult prison sentence) based on judicial fact-finding made under a relaxed burden of proof.

Such a sentencing provision, if applied to an adult, would clearly violate *Apprendi*, *Blakely*, and *Foster*.

**C. Judicial Fact-Finding in R.C. 2152.14(E)(1) Violates a Juvenile's Constitutional Rights to a Jury Trial, Due Process, and Equal Protection.**

As explained above, existing law makes clear that the sentencing provision in R.C. 2152.14(E)(1) would be unconstitutional if employed by an “adult” court to send someone, including a bound-over juvenile, to adult prison. The question presented here is whether that provision is unconstitutional when employed by a juvenile court to send someone to adult prison.<sup>14</sup> In other words, this Court must decide whether an SYO juvenile, who faces the same potential sanction of adult prison, is entitled to the same constitutional protections as an adult or bound-over juvenile, or whether an SYO juvenile can be sent to adult prison with fewer constitutional protections.

As explained in detail below, J.V. cannot be required to serve an adult prison sentence without the same constitutional protections afforded to adults and bound-over juveniles. An SYO juvenile may not receive an adult prison sentence when that sentence depends on judicial fact-finding and a relaxed burden of proof. The imposition of an adult prison sentence under such circumstances violates the juvenile's right to a jury trial as well as his or her due process and equal protection rights.

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<sup>14</sup> This Court did not address this issue in *D.H.* because the adult sentence in that case remained stayed and had not yet been invoked. 120 Ohio St. 3d at 546 (“Since the adult portion of D.H.’s sentence has not been invoked, this opinion does not address the constitutional ramifications of invoking the adult sentence under R.C. 2152.14 in light of *Blakely* and *Foster*.”)

1. Due process and the right to trial by jury for juveniles facing the imposition of an adult prison sentence under R.C. 2152.14.

Whether flowing directly from the Sixth Amendment or conceived as a component of Fourteenth Amendment due process, a juvenile has the right to have a jury determine, beyond a reasonable doubt, all facts necessary for the imposition of an *adult* prison sentence. “When commitment to an adult criminal facility is permitted,[] a juvenile is constitutionally entitled to a jury trial.”<sup>15</sup> *In re Jeffrey C.* (N.H. 2001), 781 A.2d 4, 6; *see also State v. Hezzie* (Wis. 1998), 580 N.W.2d 660, 673-74 (severing the statutory provision permitting the transfer of delinquent juveniles, who had no jury trial right, to adult prison); *In re C.B.* (La. 1998), 708 So.2d 391, 395.

Juvenile proceedings must “measure up to the essentials of due process and fair treatment.” *In re Gault* (1967), 387 U.S. 1, 31. While courts have recognized the “original laudable purpose of juvenile courts,” there have consistently been doubts as to whether their actual performance justifies treating juveniles differently in terms of the constitutional guarantees afforded adults. *Kent*, 383 U.S. at 555 (noting that there is evidence 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”); *see also* Cohen Report (outlining the widespread failures of Ohio’s juvenile detention system). Regardless of the performance of the juvenile courts, the United States Supreme Court has consistently made clear that “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.” *In re Winship* (1970), 397 U.S. 358, 365-66. Accordingly, the

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<sup>15</sup> The Kansas Supreme Court has taken it a step further and extended to juveniles the constitutional right to a jury trial even if they are facing *only* juvenile dispositions. *In re L.M.* (Kan. 2008), 186 P.3d 164. The Court explained that changes to the Kansas Juvenile Justice Code have made the juvenile system “more akin to an adult criminal prosecution” such that juveniles are entitled to a jury trial under both the Sixth Amendment and its state counterpart. *Id.* at paragraphs one and two of the syllabus.

Court has already afforded many of the same constitutional protections afforded adult criminal defendants to juveniles such as notice of the charges, right to counsel, right to confrontation, and a privilege against self-incrimination. *In re Gault*, 387 U.S. at 31. Moreover, juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law. *See In re Winship*, 397 U.S. at 365-68.

Because the right to a jury is distinct from the right to have one's guilt proven beyond a reasonable doubt, these two rights are discussed separately below.

a. *Facts Necessary to the Invocation of an Adult Prison Sentence Must Be Proven Beyond a Reasonable Doubt.*

In light of *Winship*, R.C. 2152.14(E)(1)'s clear and convincing burden cannot pass constitutional muster. Although a proceeding to invoke the adult portion of an SYO sentence is not technically a separate delinquency proceeding, it nonetheless charges the juvenile with violations of Ohio law and imposes the severe sanction of *adult* imprisonment if those violations are proven. As such, due process requires that the State prove its allegations beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364; *see also Jackson v. Virginia* (1979), 443 U.S. 307, 319; *State v. McGee* (1997), 79 Ohio St. 3d 193, 196-97. This is true regardless of whether this Court finds that the SYO juvenile is entitled to a jury. *See McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 533 (explaining that the standard of proof beyond a reasonable doubt applies to juvenile proceedings even absent the right to a jury trial).

b. *Facts Necessary to the Invocation of an Adult Prison Sentence Must Be Found By a Jury.*

R.C. 2152.14(E)(1)'s requirement that a judge—and not a jury—decide facts that subject a juvenile to *adult* imprisonment violates a juvenile's right to a jury trial and to due process.

“[T]rial by jury in criminal cases is fundamental to the American scheme of justice.” *McKeiver*,

403 U.S. at 540 (citing *Duncan v. Louisiana* (1968), 391 U.S. 145, 149; *Bloom v. Illinois* (1968), 391 U.S. 194, 210-211). Although the United States Supreme Court has held that a traditional juvenile court delinquency proceeding is not a “criminal prosecution” within the meaning of the Sixth Amendment, *McKeiver*, 403 U.S. at 541, the Court never considered whether the Sixth Amendment (or due process) would require a jury trial for juveniles who face the imposition of an *adult* prison sentence if the State proves its allegations under R.C. 2152.14. “Imprisonment in an adult facility fundamentally changes the nature of the underlying proceedings.” *In re Jeffrey C.*, 781 A.2d at 5; *see also In re C.B.*, 708 So.2d at 398-401 (concluding that *McKeiver* was inapplicable to juvenile dispositions that include adult prison sentences).

SYO proceedings are not traditional juvenile court proceedings but rather are, in all meaningful respects, a criminal prosecution in which juveniles enjoy the right to a grand jury indictment, the right to a speedy trial, the right to bail as an adult, and a right to a jury trial on the underlying charges. R.C. 2152.13(C). Moreover, like all adults prosecuted in Ohio, the provisions of Chapter 29 of the Ohio Revised Code and the Criminal Rules apply to juveniles prosecuted as serious youthful offenders. R.C. 2152.13(C). Finally, juveniles receive the same sentence as an adult under Chapter 2929 (with the exception of the death penalty and life without parole), though it is initially stayed. R.C. 2152.13(D). Because an SYO proceeding is a “criminal prosecution” within the meaning of the Sixth Amendment, J.V., like an adult, has a constitutional right to have a jury determine all the facts necessary to invoke an adult prison sentence pursuant to R.C. 2152.14. *See Apprendi, Blakely, and Foster, supra.*

Even if J.V. does not have a right to a jury determination of facts that increase his sentence by virtue of the Sixth Amendment, he has that right as matter of state and federal due

process and fundamental fairness. When an adult sentence is invoked, any pretense of civil labels and the purported rehabilitative goals of the juvenile system have evaporated:

[Once] the State has exercised its discretion to seek adult punishment for the accused child[, its] focus is no longer on rehabilitation. Its focus is now on punishment of the child to the same degree the State would want to punish an adult for the same crime.

*State v. Rudy B.* (N.M. 2010), 243 P. 3d 726, 743 (Chavez, J. *dissenting*). The imposition of an adult sentence is criminal and fundamental fairness requires that the juvenile receive the same constitutional protections as an adult before that sentence is imposed.

Whether conceived as matter of the Sixth Amendment or due process, the United States Supreme Court's analysis in *Apprendi* and *Blakely* and this Court's analysis in *Foster* apply with equal force to the findings required before invoking an adult sentence under R.C. 2152.14. There is no principled distinction between the unconstitutional judicial fact-finding required by R.C. 2152.14(E) and the judicial fact-finding previously struck down as unconstitutional by this Court and the United States Supreme Court. R.C. 2152.14(E)(1) offends the state and federal constitutions because it requires a court, and not a jury, to make specific findings, by clear and convincing evidence, before an adult prison sentence can be imposed on a juvenile. Because R.C. 2152.14(E) requires judicial fact-finding before a juvenile can be forced to serve an adult sentence, it is unconstitutional.

2. New Mexico Supreme Court: *State v. Rudy B.* (2010), 243 P. 3d 726

There are presently 14 states that have blended sentencing schemes.<sup>16</sup> However, only one state supreme court—New Mexico—has considered the implications of the United States

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<sup>16</sup> Alaska, Arkansas, Colorado, Connecticut, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Mexico, Ohio, Rhode Island, Texas, and Vermont. Griffin, Patrick. 2007. "National Overviews." *State Juvenile Justice Profiles*. Pittsburgh, PA: National Center for

Supreme Court's Sixth Amendment jurisprudence on its blended sentencing scheme. Although the New Mexico Supreme Court upheld the New Mexico statute as constitutional, its conclusion was based on an erroneous application of *Oregon v. Ice* (2009), 555 U.S. 160 and the qualitatively different features of the New Mexico law. *State v. Rudy B.* (2010), 243 P. 3d 726. Even with its expansive interpretation of *Ice*, the New Mexico Supreme Court's decision supports J.V.'s contention that Ohio's SYO statute is unconstitutional.

*a. New Mexico's Blended Sentencing Law*

New Mexico's youthful offender law is substantially different from Ohio's SYO law. It does not include a stayed adult sentence and operates more like a traditional bindover statute. In New Mexico, a youthful offender is a child between 14 and 18 who is adjudicated delinquent for certain felonies or has three prior, separate adjudications within the three previous years. *Rudy B.*, 243 P.3d at 730. When a child is an alleged youthful offender, the State may seek an adult sentence by giving notice of its intent to do so within ten days of the filing of the initial complaint. *Id.* If the child is ultimately adjudicated delinquent for the alleged offense, the juvenile court must hold an "amenability hearing" to determine whether it has "the discretion to sentence the child as an adult." *Id.* To sentence the child as an adult, the juvenile court must make two findings: 1) the child is not amenable to treatment or rehabilitation as a child in available facilities; and 2) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders. *Id.* at 727.

*b. New Mexico Supreme Court's analysis of "the Apprendi Line of Cases Through Cunningham"*

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Juvenile Justice. Available online at [www.ncjj.org/stateprofiles/](http://www.ncjj.org/stateprofiles/). As noted *supra* in fn. 15, Kansas has extended juveniles the right to a jury trial even in purely juvenile dispositions.

In *Rudy B.*, the juvenile argued that the Sixth Amendment required that the “amenability determination” be made by a jury rather than a judge as provided by the statute.

The New Mexico Supreme Court began by explaining that *Apprendi* created a “bright-line rule” that, other than the fact of a prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum “must be submitted to a jury, and proved beyond a reasonable doubt.” *Rudy B.*, 243 P.3d at 731. *Rudy B.* noted that, post-*Apprendi*, the United States Supreme Court explained that the “statutory maximum” was the maximum sentence that could be imposed without judicial fact-finding and consistently applied the bright-line rule to strike down any sentencing scheme that permitted a judge to find facts that increased criminal punishment. *Id.*

The New Mexico Supreme Court then explained that, absent the United States Supreme Court’s decision in *Oregon v. Ice*, it would have been “hard-pressed to disagree with [the lower court’s ruling] that judge-made amenability determinations . . . violate the *Apprendi* rule.” *Id.* at 732. The Court reached that conclusion because there was no question that the youthful offender law permitted a trial court to increase the sentence “far beyond the juvenile disposition that would otherwise apply” based upon facts found by a judge—an amenability determination—rather than a jury. *Id.*

c. *New Mexico Supreme Court’s analysis of Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711.

The New Mexico Supreme Court did not, however, strike down its youthful offender law because, in its view, the United States Supreme Court’s decision in *Oregon v. Ice* marked the “outer limit of the *Apprendi* rule” and thereby “reframed” its analysis. *Id.* at 732.

In *Ice*, the United States Supreme Court confronted the question of whether the *Apprendi* rule requires “jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences.” 129 S.Ct. at 714. The Court held that it did not. The United

States Supreme Court explained that *Apprendi*'s core concern involved "a legislative attempt to 'remove from the [province of the jury]' the determination of facts that warrant punishment for a specific statutory offense." *Id.* at 718. According to the United States Supreme Court, the imposition of consecutive sentences did not implicate that core concern because juries historically "played no role in the decision to impose sentences consecutively or concurrently." *Id.* at 717. Accordingly, it held that the Sixth Amendment did not apply to judicial fact-finding with respect to consecutive sentences. *Id.* at 719.

The New Mexico Supreme Court viewed *Ice* as a "pivotal turning point in the [United States Supreme] Court's Sixth Amendment analysis, signaling a demarcation of how far at least a majority of the Court will extend *Apprendi*'s black-or-white rule." 243 P.3d at 733. Relying on *Ice*'s "twin considerations" of "historical practice and respect for state sovereignty" the New Mexico Supreme Court concluded that *Apprendi* did not apply to the amenability findings required to sentence a youthful offender as an adult. *Id.* at 735-36. In reaching this conclusion, the New Mexico Supreme Court emphasized that the amenability factors to be considered by the judge in New Mexico were "largely identical" to factors used in other jurisdictions for waiver (or bind-over) decisions and that waiver or bind-over decisions were historically made by judges. *Id.* at 737. Because "an amenability determination has never been based upon facts 'historically found by the jury,'" the New Mexico Supreme Court concluded that such judicial fact-finding did not represent a threat to the jury's domain as preserved by the Sixth Amendment. *Id.* at 739.

*d. The New Mexico Supreme Court misapplied Oregon v. Ice.*

Before considering how the New Mexico Supreme Court's analysis would apply to Ohio's fundamentally different SYO statute, J.V. takes issue with the Court's misapplication of *Ice*. As explained by the dissenting justice in *Rudy B.*, *Ice*'s appreciation of the historical roles of

judge and jury actually supports the conclusion that juries, and not judges, must find facts that expose juveniles to adult sentences. *Id.* at 742 (Chavez, J. dissenting). The *Rudy B* majority's analysis of historical practice was truncated and ignored "over 125 years of historical common law practice whereby a *jury* traditionally decided the facts that authorized a child between the ages of fourteen and eighteen to be punished as an adult." *Id.* at 742 (emphasis added); see *In re C.B.*, 708 So. 2d at 399 (explaining that, until 1908, juveniles were incarcerated with adults and, like adults, had the right to a jury trial). Likewise, in Ohio, prior to the creation of a separate juvenile justice system in the early twentieth century, juveniles charged with criminal offenses received jury trials. See e.g. *Williams v. State* (1846), 14 OHIO 222 (a criminal defendant under the age of 14 received a jury trial on rape charges); see also *Hiltabiddle v. State* (1878), 35 Ohio St. 52 (same).

Because separate juvenile proceedings did not exist at common law, it "was impossible for the Framers of the Bill of Rights to understand that a judge and not a jury would make findings that authorized the imprisonment of a child in an adult prison." *Rudy B.* 243 P.3d at 742 (Chavez, J. dissenting). Indeed, the Framers "would be alarmed to learn that a child can be condemned to an adult prison term for up to a life sentence without at least the same constitutional protections afforded adults." *Id.* at 740. Historical practice clearly establishes that juveniles, faced with the prospect of an adult sentence, enjoyed the right to a jury trial. Accordingly, the Sixth and Fourteenth Amendments (and Ohio's counterparts) do not permit the General Assembly to dispense with the right to a jury trial to decide facts necessary to the invocation of an adult sentence.

*Ice* is distinguishable for another reason as well. *Ice* recognized that the *Apprendi* rule did not apply to fact-finding for consecutive sentences because multiple crimes were involved.

However, *Ice* re-affirmed *Apprendi*'s holding that judicial fact-finding did not permit the increase of a sentence for a "discrete crime." 129 S.Ct. at 717. The essential inquiry for determining the application of the *Apprendi* rule is whether the findings at issue "involve a sentence for a discrete offense." *Rudy B.*, 243 P.3d at 744 (Chavez, J. dissenting). And, there is no dispute that the "adult sentence received by the child after the sentencing judge made additional findings is related to a discrete crime." *Id.* Accordingly, *Ice* is inapplicable.

*e. Even under the New Mexico Supreme Court's analysis, Ohio's SYO statute is unconstitutional.*

Because of significant qualitative differences between the New Mexico youthful offender law and Ohio's SYO law, Ohio's SYO law is unconstitutional even under the analytical framework applied by the *Rudy B.* majority.

The principle reason that the New Mexico Supreme Court upheld its youthful offender law was that the *only* factual finding necessary to the imposition of an adult sentence related to the amenability of child to juvenile sanctions—a factual determination that has been made by judges (and not juries) since the inception of separate juvenile courts. Ohio's SYO law is fundamentally different. In order to invoke an adult prison sentence under Ohio's SYO law, a judge not only makes an amenability-type finding, R.C. 2152.14(E)(1)(c), *but also* has to make one of the two following factual findings:

- The person *committed an act*, while in custody or on parole, that is a violation of the rules of the institution or the conditions of supervision and could be charged as any felony or as a first-degree misdemeanor. R.C. 2152.14(A)(2)(a), (B)(1), and (E)(1)(c).
- The person is engaging *in conduct* that "creates a substantial risk to the safety or security" of the institution, community, or victim. R.C. 2152.14(A)(2)(b), (B)(2), and (E)(1)(c).

(Emphasis added). Both of these findings require proof of conduct, i.e. that the person is engaged in criminal and/or dangerous conduct deserving of further criminal punishment. Findings of fact relating to unlawful conduct are the “traditional domain” of a jury. And United States Supreme Court jurisprudence makes “clear that the Sixth Amendment does not countenance legislative encroachment on the jury’s traditional domain.” *Ice*, 129 S.Ct. at 717.

Thus, even applying *Rudy B.*’s analytical framework, Ohio’s SYO law is unconstitutional because, in order to send a juvenile to adult prison, it requires a judge (rather than a jury) to find facts, the traditional domain of a jury, by clear and convincing evidence (rather than beyond a reasonable doubt).

3. Equal protection requires that juveniles receive the same constitutional protections as adults when facing the imposition of an adult prison sentence.

J.V.’s equal protection rights were violated when he received an adult sentence predicated on judicial fact-finding by clear and convincing evidence under R.C. 2152.14 while bound-over juveniles and adults, in light of *Blakely* and *Foster*, cannot receive a harsher sentence without a jury finding of the necessary facts beyond a reasonable doubt.

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. 14<sup>TH</sup> AMEND., U. S. CONST.; OHIO CONST. ART. I, SEC. 2. In order to be constitutional, a law must be applicable to all persons under like circumstances and must not subject individuals to an arbitrary exercise of power. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289.

SYO juveniles and bound-over juveniles are identically situated at the time an adult sentence is actually invoked or imposed. The fact that one juvenile receives an adult sentence from a common pleas court when another receives one from a juvenile court is a distinction

without a difference. The juvenile court and the common pleas court are imposing identical sentences (with the exception of life without parole) based on Chapter 29 of the Ohio Revised Code. R.C. 2152.13(D). Moreover, while SYO juveniles and adults are obviously not identically situated in all respects, they are similarly situated in all *relevant* respects when facing the imposition of an *adult* prison sentence. When a state elects to pursue adult sanctions against a juvenile, the juvenile, whether bound-over or an SYO, must be afforded the same constitutional protections adult criminal defendants enjoy. Because there is no legitimate basis for denying SYO juveniles the equal protection of the laws when facing an adult sentence, R.C. 2152.14(E) is unconstitutional.

### C. Conclusion

This case presents an unfortunate example of the failure of the juvenile court system and the consequence of the procedural shortcuts in Ohio's SYO law. J.V. spent three years at a juvenile facility where there is a "culture of fighting" and where the juveniles are "not provided with the constitutional minima relating to a safe environment." (1/13/09 Tr. at 19; Cohen Report at p. iii). And, although he did well enough to qualify for early release, J.V. ultimately served a six-year *adult* prison term because he was caught up in one of the frequent group fights. He was sent to adult prison based largely on the testimony of a unit manager whose testimony was rejected by a Marion hearing officer, who did not even witness how the melee started, and who admitted that these kind of multiple youth fights occur about two to three times a month. (1/13/09 Tr. at 31 and 45). He was sent to adult prison by a trial court judge who concluded that there "was not clear and convincing evidence" to support "some of the things" that the State's witness said and also said: "And somehow, although the evidence is not clear and convincing, I'm not persuaded that on some level they know what they know what they know." (1/13/09 Tr.

at 145-46). He was sent to adult prison by a trial court judge who said that there is “something called guilt by association” and that J.V. should have been “sophisticated enough” to keep himself out of the “fray.” (1/13/09 Tr. at 145-46).

While the proceeding analysis has focused primarily on the constitutional shortcomings of the SYO invocation proceeding as an abstract legal matter, the constitutional violations are even more egregious when the practical realities of Ohio’s juvenile detention facilities are considered. In theory, Ohio’s SYO “encourages a juvenile’s cooperation in his own rehabilitation” by using the threat of an adult sentence as “both a carrot and a stick.” *D.H.*, 120 Ohio St. 3d at 544. Here, as is often the case, theory diverges from reality. J.V. was placed in a juvenile system that has failed in its rehabilitative goals and where the conditions of confinement have fallen below constitutional standards. As documented in the Cohen Report, ODYS facilities were “underserved in such vital areas as safety, education, mental health treatment, and rehabilitative programming,” and that ODYS youth were “not provided with the constitutional minimum relating to a safe environment. Pg. i and iii. The unit manager at Marion admitted that there was a “culture of survival” and “culture of fighting” at Marion. (1/13/09 Tr. at 19). And, even the trial court judge did not “disagree with [J.V.’s] assessment or . . . description of the institution.” (1/13/09 Tr. at 144).

It is fundamentally unfair to devise a sentencing scheme that places a juvenile within a system that is replete with violence and lacking in education, treatment, and care and then argue that an individual should receive a lengthy adult sentence because he failed to overcome these unconstitutional conditions of confinement. Principles of due process do not permit a State to impose a lengthy adult sentence based on a juvenile’s failure to rehabilitate himself in a failed system. This fundamental unfairness is exacerbated when the juvenile is sent to adult prison

without the fundamental procedural protections afforded by a *jury* finding the facts necessary to send him there *beyond a reasonable doubt*.

The final question for this Court is how to remedy the constitutional problems with the SYO statute. There are three possible remedies that would address these constitutional flaws: 1) afford SYO juveniles the right to have a jury determine, beyond a reasonable doubt, the findings necessary to invoke the adult sentence; 2) sever the statutory provisions that allows for judicial findings to invoke an adult sentence (R.C. 2152.14(E)(1)) and leave the remaining SYO provisions intact; or 3) declare the SYO statute unconstitutional in its entirety. Appellant urges this Court to adopt the third remedy because the other two remedies would amount to judicial legislation.

This Court has already rejected, in the adult context, the possibility that sentencing juries be used to remedy a *Blakely* violation. *See Foster*, 109 Ohio St. 3d at 26; *State ex rel. Mason v. Griffin* (2004), 104 Ohio St. 3d 279, 281-82. And, while there are significant differences the SYO statute and pure adult sentencing provisions, they are identical in one critical respect—both statutes explicitly require a judge to make the necessary findings. And while the “General Assembly may enact legislation to authorize juries to find beyond a reasonable doubt all facts essential to” the invocation of an adult sentence, such a decision should be left to the General Assembly. *Cf. Foster*, 109 Ohio St. at 26.

It is also readily apparent that the SYO statutory provisions cannot be saved by severing only those provisions that are unconstitutional. Severance is only appropriate if: 1) The constitutional and unconstitutional parts are “capable of separation so that each may be read and may stand by itself[;]” 2) The unconstitutional part is not “so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the

clause or part is stricken out[;]” and 3) It is unnecessary to insert words or terms “to separate the constitutional part from the unconstitutional part, and to give effect to the former only[.]” *Foster*, 109 Ohio St. 3d at 28, 29 (quoting *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466). It is clear that severance of the invocation provision, R.C. 2152.14(E)(1), fails the first two parts of the severance test. The “threat” that an adult sentence could be invoked is fundamental to the SYO scheme, “functioning as both carrot and stick” to encourage successful completion of the juvenile disposition. *D.H.*, 120 Ohio St. 3d at 544. If this Court severed the invocation statutory provision in 2152.14(E)(1), no adult sentence could be invoked and the SYO statutory scheme would be devoid of meaning. Because the invocation statute is not capable of severance from the constitutional portions of the statute and is so interconnected with the general scope of the SYO legislation, severance of R.C. 2152.14(E)(1) is not an option.

J.V. asks this Court to strike down the SYO provisions in their entirety and leave to the General Assembly the questions of whether to reenact an SYO provision and, if so, how to restructure it in a manner consistent with the State and Federal Constitution. If the General Assembly wishes to enact a constitutional SYO provision, it can certainly do so by providing for a right to have a jury make the necessary findings beyond a reasonable doubt. On the other hand, the General Assembly may elect not to continue the SYO “innovation,” recognizing that the SYO provisions have failed to further the mission of the juvenile courts and have simply increased “the overall risk that juvenile-age offenders will be sanctioned as adults” and will serve an adult prison sentence. *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws, With Recommendations for Reform*, National Center for Juvenile Justice, 5 (November 2008); see also Podkopacz and Feld, *The Back-Door to Prison: Waiver Reform, “Blended Sentencing,” and the Law of Unintended Consequences*, J. CRIM. L. &

CRIMINOLOGY, Vol. 91, No. 4, at 10171028-30 (November 2001). Either way, such policy decisions should be left to the General Assembly to resolve.

*PROPOSITION OF LAW II:*

**A JUVENILE COURT DOES NOT HAVE THE AUTHORITY TO IMPOSE CRIMINAL PUNISHMENT (INCLUDING POST-RELEASE CONTROL) AFTER THE DELINQUENT CHILD TURNS 21.**

In this case, the Eighth District concluded that the juvenile court had the authority to invoke an adult sentence and impose post-release control, for the first time, after J.V. was twenty-one years old. J.V. maintains that the juvenile court lacked jurisdiction to invoke the adult portion of an SYO sentence and/or impose post-release control after he turned twenty-one.

**A. The Juvenile Court Did Not Impose Post-Release Control Until After J.V. Turned Twenty-One.**

When the juvenile court first imposed a blended sentence upon J.V. on June 17, 2005, it neglected to impose post-release control as a part of the stayed adult sentence. Upon remand from *J.V. I*, the juvenile court imposed on a new blended sentence. Once again, no post-release control was imposed. When the juvenile court first invoked the stayed adult portion of the blended sentence on February 5, 2009, it did not impose post-release control.

J.V. turned twenty-one on March 11, 2009. (2/12/10 Tr. at 45). Subsequently, the Eighth District, in *J.V. II*, concluded that J.V.'s sentence was "void" because it did not include post-release control and remanded the case for a "new hearing." *J.V. II* at ¶¶ 23-24.

Upon remand from *J.V. II*, J.V. argued that the juvenile court lacked jurisdiction to conduct any hearing or to impose or invoke any adult sentence because J.V. was over the age of twenty-one. (2/9/10 Tr. at 3). Despite the fact that J.V. was over 21, the juvenile court imposed a new blended sentence including a stayed adult sentence (with PRC for the first time), and invoked that newly imposed adult sentence on February 12, 2010.

**B. The Juvenile Court Lacked Jurisdiction to Impose Criminal Punishment Upon J.V. After He Turned Twenty-One.**

The juvenile court lacked jurisdiction to invoke J.V.’s stayed adult sentence and impose post-release control *after* he turned 21. The juvenile court had no authority to impose criminal punishment upon J.V. beyond his twenty-first birthday.

Juvenile courts have exclusive original jurisdiction over children who are alleged to be delinquent. R.C. 2151.23(A)(1). In delinquency proceedings, “‘child’ means a person who is under eighteen years of age, except as otherwise provided” in R.C. 2152.02(C)(2)-(6). R.C. 2152.02(C)(1); *In re Andrew*, 119 Ohio St.3d 466, 2008-Ohio-4791, 895 N.E.2d 166, ¶4.<sup>17</sup> Revised Code 2152.02(C)(2) provides, “Subject to division (C)(3) of this section, any person who violates [the law] prior to attaining eighteen years of age shall be deemed a ‘child’ irrespective of that person’s age at the time the complaint with respect to that violation is filed or the hearing on the complaint is held.” R.C. 2152.02(C)(6) explicitly states that a juvenile court’s jurisdiction ends on the juvenile’s twenty-first birthday: “The juvenile court has jurisdiction over a person who is adjudicated a delinquent child or juvenile traffic offender prior to attaining eighteen years of age *until the person attains twenty-one years of age.*” (emphasis added).

This Court has consistently interpreted R.C. 2152.02 as providing a bright-line rule regarding the jurisdictional limits of juvenile court judges over delinquent children. In *State v. Walls*, this Court explained that changes to the juvenile statutory scheme “effectively removed anyone over 21 years of age from juvenile-court jurisdiction, regardless of the date on which the person allegedly committed the offense.” (2002), 96 Ohio St. 3d 437, 442. This Court reiterated

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<sup>17</sup> R.C. 2152.02(C)(3)-(5) are not relevant to this case as they address juvenile cases that are transferred for criminal prosecution pursuant to R.C. 2152.12, new cases filed after an SYO adult sentence has been invoked, or cases in which the individual was taken into custody after the age of 18 but prior to the age of 21.

that bright-line in *State v. Warren* (2008), 118 Ohio St. 3d 200, 205-206; *In re Andrew* (2008), 119 Ohio St. 3d 466; and *In re J.F.* (2009), 121 Ohio St. 3d 76, 80 (explaining that juvenile dispositions terminate at the age of 21). In explaining that “a juvenile court retains jurisdiction over a person adjudicated a delinquent child ‘until the person attains twenty-one years of age.’” *In re Andrew* (2008), 119 Ohio St. 3d 466, 467 (citing R.C. 2152.02(C)(6)), this Court has necessarily recognized the fact that a juvenile court’s jurisdiction over a delinquent child ceases when the child turns twenty-one. There are no exceptions to this jurisdictional age limit pertinent to this case.

Moreover, Ohio’s SYO provisions, R.C. 2152.13 and R.C. 2152.14, do not provide any authority for the extension of juvenile jurisdiction beyond the age of 21. On the contrary, these provisions further establish that the juvenile court’s jurisdiction is confined to individuals who have not exceeded the age of 21. Pursuant to R.C. 2152.14(A)(1)(c) and (B), a motion to invoke the stayed adult sentence can only be filed if the person “is serving the juvenile portion” of the SYO sentence. Moreover, the juvenile court may not invoke the stayed adult sentence unless the person “is serving the juvenile portion” of the SYO sentence. R.C. 2152.14(E)(1)(a). And, once the juvenile court invokes the adult sentence, the “juvenile portion of the dispositional sentence shall terminate,” and the department of youth services “shall transfer the person to the department of rehabilitation and correction or place the person under another sanction imposed as part of the sentence.” R.C. 2152.14(F). In short, a juvenile court is only empowered to impose the stayed adult portion of an SYO blended sentence until the person turns 21, at which point the person is no longer serving the juvenile portion of his sentence.

Here, the juvenile court’s jurisdiction over this case ceased when J.V. turned twenty-one on March 11, 2009. When J.V. returned to juvenile court in February 2010, he was almost 22

years old. At that time, the juvenile court lacked jurisdiction over the case. Accordingly, the juvenile court both lacked the authority to impose a de novo SYO sentence (which is what it did) and lacked the authority to just add post-release control (which is what the Eighth District concluded it could do). *Cf. In re Mack*, Defiance App. No. 4-09-22, 2010 Ohio 2295, ¶¶ 11 and 18 (concluding that a juvenile court lacks jurisdiction to issue a sex offender classification order after the child turns twenty-one).

**CONCLUSION**

WHEREFORE, for the foregoing reasons, appellant respectfully requests that this Honorable Court adopt his two propositions of law and reverse the decision of the Eighth District Court of Appeals. With respect to appellant's first proposition of law, this Court should hold that R.C. 2152.14 is unconstitutional and vacate the sentence imposed upon appellant pursuant to that provision. With respect to appellant's second proposition of law, this Court should hold that the juvenile court lacked the authority to impose criminal punishment upon appellant after his twenty-first birthday, vacate the invocation of the adult sentence, and discharge him from APA supervision.

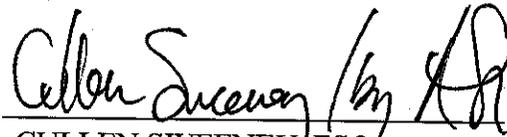
Respectfully submitted,

*Cullen Sweeney / by [Signature]* #0076418

CULLEN SWEENEY, ESQ.  
Assistant Public Defender

## CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief and the Appendix to Appellant's Merit Brief Filed Under Seal were forwarded by regular U.S. Mail to William Mason, Cuyahoga County Prosecutor at, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 22<sup>nd</sup> day of August, 2011.

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