

In the
Supreme Court of Ohio

IN RE J.V.,

A Delinquent Child

Case No. 2011-0107

On Appeal from the
Cuyahoga County
Court of Appeals,
Eighth Appellate District

Court of Appeals Case No. 94820

**MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
MICHAEL DEWINE IN SUPPORT OF APPELLEE STATE OF OHIO**

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender

CULLEN SWEENEY* (0077187)
Assistant Public Defender
**Counsel of Record*
310 Lakeside Ave., Suite 200
Cleveland, Ohio 44113
216-443-7583
216-443-3632 fax
csweeney@cuyahogacounty.us

Counsel for Appellant J.V.

WILLIAM MASON (0037540)
Cuyahoga County Prosecutor

KRISTEN SOBIESKI* (0071523)
Assistant Prosecuting Attorney
**Counsel of Record*
1200 Ontario St., 9th Floor
Cleveland, Ohio 44112
216-443-7800

Counsel for Appellee State of Ohio

MICHAEL DEWINE (0009181)
Attorney General of Ohio

ALEXANDRA T. SCHIMMER* (0075732)
Solicitor General
**Counsel of Record*

DAVID M. LIEBERMAN (0086005)
Deputy Solicitor

ELIZABETH A. MATUNE (0078544)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
alexandra.schimmer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Michael DeWine

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INTRODUCTION

For years, juvenile courts confronted a difficult choice for youths charged with violent felonies. At the outset of a case, the court had to decide whether to (1) keep the offender in the juvenile justice system; or (2) “bindover” the case to the common pleas court for an adult criminal trial. Under the first option, the court would have to release the offender from all supervision at age twenty-one—no matter how violent his conduct or how little he might have progressed in rehabilitation. Under the second option, the juvenile court would irreversibly commit the youth to the adult criminal system.

Former Chief Justice Moyer and the Ohio Sentencing Commission decried this system because it failed to give juvenile courts sufficient time to tell if “the child need[s] a little guidance” or if instead “he or she [is] a serious public threat.” See Testimony of Thomas J. Moyer, Senate Judiciary Committee (Sept. 22, 1999). They proposed, and the General Assembly adopted, a “blended sentencing” option, where a juvenile court “simultaneously impose[s] a juvenile disposition and an adult sentence” on serious youthful offenders. If the offenders “make a break with their criminal past,” their case ends at age twenty-one, and the juvenile court releases them into society with a clean record. “But if they commit more crimes” while under supervision, “a juvenile judge could send them on to adult prison.” *Id.*

These reforms benefited J.V. The State of Ohio originally charged him with attempted murder, aggravated robbery, felonious assault, and firearm specifications—offenses that required the transfer of his case to the common pleas court for an adult trial. To avoid that harsh result, J.V. entered a plea—he would admit to the lesser charges and accept a “serious youthful offender” designation. The juvenile court also accepted the plea, committed J.V. to the Department of Youth Services (“DYS”) for two years, and imposed a six-year adult prison

sentence. The court informed J.V. that if he successfully completed his DYS term, he would not have to serve the adult sentence.

Unfortunately, J.V. assaulted a corrections officer and a fellow youth while in DYS custody. After learning of these incidents, the juvenile court activated the adult portion of his sentence. Upset with that decision, J.V. attacked the constitutionality of Ohio's blended sentencing scheme under the Sixth Amendment. Whether or not his adult sentence should be invoked, J.V. contends, is an issue for a jury—not a judge.

The Court should reject this claim for any of three distinct reasons. First, the Court lacks jurisdiction to review a sentence that “has been recommended jointly by the defendant and the prosecution.” R.C. 2953.08(D)(1). That is what occurred here: J.V. and the prosecutor proposed a two-year minimum DYS sentence and a six-year adult sentence—and they understood that this plea would give the juvenile court the power to invoke the adult sentence if J.V. misbehaved in DYS custody. Because J.V. recommended this arrangement with the prosecutor, this Court cannot entertain his constitutional attack.

Second, J.V. waived any claim of Sixth Amendment error by “consent[ing] to judicial factfinding” below. *State v. Hunter*, 123 Ohio St. 3d 164, 2009-Ohio-4147, ¶ 30. The juvenile court made clear to J.V. that, by entering the plea agreement, he was giving the court authority to invoke the adult portion of his sentence. Having “chose[n] to submit that determination to the court,” he “waived whatever right he had” to attack the constitutionality of that procedure. *Id.* ¶ 31.

Third, no constitutional error occurred in this case. J.V.'s plea agreement authorized the juvenile court to impose a two-year DYS sentence and a six-year adult sentence. When the juvenile court activated the adult portion of the sentence, it applied “a sentence . . . allowed . . .

by [J.V.'s] admissions at a plea hearing.” *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, ¶ 7. Because the juvenile court did not exceed the maximum sentence allowed by the plea, it did not violate the Sixth Amendment.

Blended sentencing is an important component of Ohio’s juvenile justice system. Instead of facing the harsh prospect of bindover to the adult criminal system, youth like J.V. who commit violent offenses are given one last chance to reform their behavior. Given the effectiveness of this approach and the dearth of support for J.V.’s legal arguments, this Court should reject his constitutional claims.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio’s chief law officer. See R.C. 109.02. He has a duty to defend the legislative actions of the General Assembly against constitutional attack. The Attorney General also has a strong interest in ensuring consistent enforcement of Ohio’s criminal laws, and an equally strong interest in supporting the rehabilitative efforts of Ohio’s juvenile justice system.

THE HISTORY OF OHIO’S JUVENILE SENTENCING LAWS

Under Ohio’s old law, juvenile courts had only two sentencing options for serious and violent juvenile offenders—neither of them satisfactory. The court could admit the child to the custody of DYS until his twenty-first birthday, but not a day longer. Former R.C. 2151.355. Or the juvenile court could relinquish jurisdiction and “bindover” the case to the common pleas court. Former R.C. 2151.26. If convicted, the juvenile would serve an adult sentence in an adult prison. See, e.g., *Agee v. Russell* (2001), 92 Ohio St. 3d 540, 541-42 (describing bindover process).

In the 1990s, then Chief Justice Moyer led efforts to forge a more flexible option. No longer would juvenile courts face two extremes—turning a violent juvenile loose at age twenty-

one; or stamping “adult” on the offender’s file and transferring jurisdiction to the common pleas court. Instead, the juvenile courts could maintain jurisdiction over a violent youth, impose a “blended sentence” on him, and supervise his rehabilitative efforts.

A. The Ohio Sentencing Commission urged the General Assembly to adopt blended sentencing for serious juvenile offenders.

The Ohio Criminal Sentencing Commission, chaired by Chief Justice Moyer, identified serious problems with the old approach to juvenile offender sentencing.¹ “Bindover is not the best option for all serious [juvenile] offenders,” the Commission said, because the common pleas court is not experienced in juvenile matters. Ohio Crim. Sentencing Comm’n, *A Plan for Juvenile Sentencing in Ohio* (Fall 1999), at 28. “It might be too lenient on some offenders” and “too harsh on others.” *Id.* The Commission further noted that serious juvenile offenders might “benefit from the greater rehabilitative opportunities in the juvenile system.” *Id.*

According to the Commission, “[t]he solution lies in a flexible sentencing structure involving both juvenile and adult sanctions.” *Id.* The strategy, called “blended sentencing,” “lets the court tailor a sentence using the treatment flexibility of the juvenile system and the more punitive sanctions of the criminal system.” *Id.* The Commission recommended a framework whereby the juvenile court could impose “both a juvenile disposition and an adult sentence.” *Id.* at 29. “The adult sentence is suspended pending successful completion of the juvenile term,” but it can be invoked if “the juvenile violates set conditions or institutional rules in such a way as to impede rehabilitation.” *Id.* at 29-30.

This “blended sentence,” the Commission believed, would provide “a ‘last chance at rehabilitation’ for serious juvenile offenders.” *Id.* at 31. “If they quit harming and threatening

¹ Members of the Commission included common pleas judges, municipal judges, juvenile court judges, prosecutors, public defenders, law enforcement, legislators, and county commissioners.

others, the case ends with the juvenile disposition.” *Id.* But if the juvenile continues his criminal activity, “the juvenile court judge could invoke the adult sentence.” *Id.*

The Commission had ample support for its recommendations; it studied nine States with blended juvenile sentencing systems. *Id.* at 29-30. And that tally has only grown in subsequent years. By the Attorney General’s count, thirty States now authorize some form of blended sentencing for serious juvenile offenders.

B. The General Assembly accepted the Commission’s recommendation and enacted the Serious Youthful Offender sentencing law.

Chief Justice Moyer transmitted this proposal to the General Assembly, and he offered testimony in support of the reforms: “Under the current system, a juvenile court judge has few options when dealing with a child accused of a serious felony. The judge can either keep the case in juvenile court or bind it over to the adult system.” Testimony of Thomas J. Moyer, Senate Judiciary Committee (Sept. 22, 1999). Blended sentencing, he explained, “would give judges and case workers the time to find out” whether “the child need[s] a little guidance” or whether “he or she [is] a serious public threat who would be better dealt with in adult court.” *Id.*

Under this model, a juvenile court would “simultaneously impose a juvenile disposition and an adult sentence,” but “[t]he adult portion typically would be suspended depending on the child’s efforts to rehabilitate.” *Id.* If the juvenile offenders “make a break with their criminal past, their case ends in the juvenile system. But if they commit more crimes, or refuse the assistance offered by the department of youth services, a juvenile judge could send them on to adult prison.” *Id.* This system, Chief Justice Moyer believed, would provide juvenile courts “the flexibility needed to get the right help, to the right child, at the right time.” *Id.*

By significant majorities, the House and the Senate adopted these reforms. See S.B. 179 (123rd G.A. 2000). Effective January 1, 2002, juvenile courts could impose a blended juvenile-

adult sentence on “serious youthful offenders” (“SYOs”). A juvenile’s eligibility for an “SYO” disposition depends on his age and the seriousness of his offense: Younger offenders receive traditional juvenile dispositions. Older offenders, offenders who commit serious offenses, and repeat offenders receive an SYO disposition. R.C. 2152.11(H). And for the most serious crimes, the law still requires the juvenile court to transfer the case to the common pleas court for adult prosecution. R.C. 2152.12(A)(1)(a).

If a juvenile is eligible for an SYO disposition, the law provides a number of procedural protections. The State must provide written notice of its intent to seek an SYO disposition, and it must secure an indictment unless the juvenile waives that requirement. R.C. 2152.13(A). The juvenile has a “right to a grand jury determination of probable cause” that he is eligible for an SYO disposition, a right “to an open and speedy trial by jury in juvenile court,” and a right “to be provided with a transcript of the proceedings.” R.C. 2152.13(C)(1). The juvenile also has “the right to counsel and the right to raise the issue of competency.” R.C. 2152.13(C)(2).

If the jury finds (or the parties stipulate) that the youth is delinquent, the juvenile court then determines whether an SYO disposition is “mandatory” or “discretionary” under the statute. R.C. 2152.11. Again, the age of the offender and the severity of the offense are determinative. Because J.V. was seventeen at the time of his offense, and because he committed an offense of violence (aggravated robbery and felonious assault) with a firearm, the law required an SYO disposition. R.C. 2152.11(D)(1). In discretionary cases, the juvenile court will examine several factors to determine the appropriateness of an SYO disposition: “the nature and circumstances of the violation,” “the history of the child,” and “the length of time, level of security, and types of programming and resources available in the juvenile system.” R.C. 2152.13(D)(2)(a)(i). If

the court opts not to impose the SYO disposition, the youth will receive a traditional juvenile sentence. R.C. 2152.13(D)(2)(b).

If the SYO disposition is imposed, the court shall order both a traditional juvenile sentence and an adult sentence. The adult sentence shall be “a sentence available for the violation, as if the child were an adult . . . except that the juvenile court shall not impose on the child a sentence of . . . life imprisonment without parole.” R.C. 2152.13(D)(1)(a); R.C. 2152.13(D)(2)(a)(i). The juvenile court will then “stay the adult portion” of the sentence “pending the successful completion of the traditional juvenile dispositions.” R.C. 2152.13(D)(1)(c); R.C. 2152.13(D)(2)(a)(iii). If the youth successfully completes his juvenile sentence, the adult sentence is never triggered.

While the youth is serving his juvenile sentence, the State can file a motion to invoke the adult sentence if the youth commits conduct “that could be charged as any felony or as a first degree misdemeanor offense of violence,” or engages in conduct “that creates a substantial risk to the safety or security of the institution, the community, or the victim.” R.C. 2152.14(A)(2).

If a motion is filed, the juvenile court must hold a public hearing at which the youth is entitled to be present and represented by counsel. R.C. 2152.14(D). The court may activate the adult sentence if it finds by clear and convincing evidence that: (1) the offender is at least fourteen years of age; (2) the offender engaged in conduct that creates a substantial risk to the safety or security of the community or the victim; and (3) the offender’s conduct demonstrates that he is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. R.C. 2152.14(E)(1). ~~If the juvenile court invokes the adult sentence, the offender is transferred to the~~ Department of Correction and Rehabilitation. R.C. 2152.14(F).

C. This Court and the lower appellate courts have uniformly rejected constitutional challenges to the Serious Youthful Offender law.

Prosecutors and juvenile courts have been judicious in triggering the adult portion of SYO sentences. In response to the Attorney General's inquiry, DYS supplied updated data on juvenile sentencing: Between 2002 and the present, juvenile courts ordered a total of 292 youths into custody under an SYO disposition. Of that group, juvenile courts invoked the adult portion of the sentence in only twenty-four instances—a mere eight percent of all SYO cases.

Several juvenile offenders have challenged the constitutionality of their SYO sentences, but none has succeeded. In *State v. D.H.*, 120 Ohio St. 3d 540, 2009-Ohio-9, a jury adjudicated the juvenile, D.H., delinquent for reckless homicide with a firearms specification. *Id.* ¶ 2. Emphasizing the seriousness of the offense, the juvenile court exercised its statutory discretion, imposed an SYO disposition, ordered D.H. to serve a juvenile sentence, and imposed a stayed adult sentence. *Id.* ¶¶ 4-11. D.H. appealed, arguing that he had a right under the Sixth Amendment and *Blakely v. Washington* (2004), 542 U.S. 296, to jury factfinding on the appropriateness of the SYO disposition. This Court rejected the challenge, reaffirming that the Sixth Amendment does not extend to juvenile proceedings. *Id.* ¶ 42. And, the Court held, the juvenile sentencing law passed muster under the “fundamental fairness” standard of the due process clause. *Id.* ¶ 61.

The Court emphasized, however, that D.H.'s adult sentence had never been triggered. It therefore refused to address the constitutionality of the SYO disposition with respect to a juvenile offender who has had his adult sentence invoked. *Id.* ¶ 37.

But the courts of appeals have addressed this scenario. Six districts have now rejected constitutional challenges to a juvenile court's decision to activate the adult portion of an SYO sentence. See *In re Strum* (4th Dist.), No. 05-35, 2006-Ohio-7101, ¶ 75; *In re Seavolt* (5th Dist.),

No. 2006-10, 2007-Ohio-2812, ¶ 35; *In re Lee J.* (6th Dist.), No. 06-30, 2007-Ohio-2400, ¶ 15; *In re Wheeler* (8th Dist.), No. 90766, 2008-Ohio-3656, ¶ 44; *In re D.F.* (9th Dist.), No. 25026, 2010-Ohio-2999, ¶ 20; *In re J.B.* (12th Dist.), No. 2004-09-226, 2005-Ohio-7029, ¶ 126.

STATEMENT OF THE CASE AND FACTS

A. The juvenile court accepted the parties' plea agreement, designated J.V. a "serious youthful offender," and imposed a blended sentence.

In June 2003, J.V. and three other males accosted an individual on the street, pinned him against a brick wall, and assaulted him. See Tr. (Jun. 17, 2005), at 17-20. In March 2005, J.V. approached a waiting car, brandished a gun, and demanded that the occupants turn over their money. The front-seat passenger attempted to push the gun away, prompting a struggle. J.V. then fired his gun, shooting the driver of the car in the leg. *Id.* at 40-42.

The State charged J.V. with aggravated robbery and a gun specification for the 2003 incident. *Id.* at 3. For the 2005 altercation, the State alleged aggravated robbery, attempted murder, and felonious assault with gun specifications. *Id.* at 4. Due to the serious and violent nature of the charges, Ohio law required the juvenile court to transfer the case to the common pleas court if it found probable cause to sustain the State's allegations. *Id.*

On the day of the probable cause hearing, the parties reached a plea agreement to avoid the transfer: J.V. would admit to one count of aggravated robbery for the 2003 incident, one count of felonious assault with a gun specification for the 2005 incident, and a "serious youthful offender" disposition. In exchange, the State would drop the more serious counts. *Id.* at 3-5.

Before accepting the agreement, the juvenile court conducted an extensive colloquy, explaining the various rights that J.V. would forfeit if he admitted the charges. *Id.* at 11-40. The court also explained the significance of the SYO disposition and the adult sentence:

[Y]ou also may find that [the Department of Youth Services] ask[s] that the adult sentence be imposed, and if I find that it is appropriate you will not be revoked back

to the Ohio Department of Youth Service. You will probably be carried to county jail for imposition of the adult sentence. . . . [T]he only way that the adult portion of the sentence goes away is that you reach 21 and a day. You have to get pas[t] age 21, otherwise, no promises, no threats. It's just a possibility all within your control.

Id. at 39.

Based on J.V.'s admissions and the State's proffer, the juvenile court found J.V. delinquent, *id.* at 60, and designated him a serious youthful offender, *id.* at 63. The court committed J.V. to the custody of DYS for a minimum period of two years, and it imposed a stayed adult sentence of six years. See Journal Entry, *In re J.V.* (Cuyahoga C.P. Jun. 22, 2005).

J.V. appealed, claiming that the journal entry misstated the length of the sentence imposed by the juvenile court. The State agreed that the entry contained an error, and the Eighth District "remand[ed] the matter to the juvenile division to modify its journal entries to accurately reflect [J.V.'s] disposition." *In re J.V.* (8th Dist.), No. 86849, 2006-Ohio-2464, ¶ 14. On remand, the juvenile court conducted a short hearing with the parties to clarify the language in its journal entry. See Tr. (Jan 5, 2007), at 3-12.

B. After J.V. assaulted a DYS officer and a fellow youth, the juvenile court invoked his adult sentence.

In October 2008, the State asked the juvenile court to activate J.V.'s adult sentence, alleging that he had assaulted a corrections officer and a fellow youth while in DYS custody. See Tr. (Nov. 20, 2008), at 7. At a January 13, 2009, hearing, the juvenile court received testimony from the corrections officer whom J.V. allegedly hit, a social worker, and J.V. himself. See Tr. (Jan. 13, 2009), at 7-122. Several weeks later, the juvenile court issued an order invoking the adult portion of J.V.'s sentence.

J.V. appealed. Among other claims, J.V. argued that his sentence was void because the juvenile court failed to include a term of post-release control in his adult sentence. The Eighth

District agreed that “J.V.’s sentence is void,” and it “remand[ed] this case to the docket of the juvenile court for a new hearing.” *In re J.V.* (8th Dist.), No. 92869, 2010-Ohio-71, ¶¶ 23-24.

On remand, J.V. stated that “this is a sentencing de novo.” Tr. (Feb. 9, 2010), at 14. He then argued that “th[e] State did not present sufficient evidence to support invocation of the adult sentence” at the 2008 hearing. *Id.* at 15. The juvenile court agreed to conduct a new sentencing hearing: The court re-advised J.V. of his constitutional and statutory rights, it entertained arguments on the appropriateness of the adult sentence, and it again invoked the adult portion of J.V.’s sentence. See Tr. (Feb. 12, 2010), at 3-54. Neither party presented new witnesses or evidence.

C. The Eighth District affirmed the SYO designation and the adult sentence.

J.V. again appealed the juvenile court’s decision to invoke his adult sentence. The Eighth District affirmed, finding “sufficient evidence to support the[] [juvenile court’s] findings.” *In re J.V.* (8th Dist.), No. 94820, 2010-Ohio-5490, ¶ 14.

The Eighth District also rejected J.V.’s argument that the juvenile court lost jurisdiction to invoke his adult sentence because, as of February 2010, he was twenty-one-years old. Dismissing this claim, the court concluded that the juvenile court had invoked J.V.’s adult sentence in February 2009—well before his twenty-first birthday. *Id.* ¶ 20.

Finally, the Eighth District rejected J.V.’s contention that the juvenile court’s invocation of his adult sentence violated the Sixth Amendment. Citing the *D.H.* decision, the Eighth District “f[ound] no constitutional violation.” *Id.* ¶ 24.

ARGUMENT

J.V. asks this Court to invalidate Ohio’s juvenile blended sentencing reforms “in their entirety.” Br. at 30. He seeks to return the State to its old system where juvenile courts faced two extreme options—release a violent juvenile offender at age twenty-one, or transfer him to

the common pleas court for trial as an adult. Juvenile courts would lose their middle option of imposing a blended juvenile-adult sentence.

J.V.'s constitutional challenge fails on three different grounds—jurisdiction, waiver, and substance. First, this Court lacks jurisdiction to review J.V.'s sentence under R.C. 2953.08(D)(1). Second, J.V. consented to judicial factfinding at his plea hearing, thereby waiving his right to challenge the constitutionality of such factfinding. Third, J.V.'s constitutional arguments lack merit. In every respect, Ohio's juvenile sentencing law complies with the Sixth Amendment.

Amicus Curiae Attorney General's Proposition of Law No. I:

Under R.C. 2953.08(D)(1), appellate courts lack jurisdiction to review a "serious youthful offender" sentence if both the prosecution and the defendant jointly agreed to that sentence.

Under Ohio law, a defendant cannot recommend a criminal sentence to a trial court and then challenge that sentence on appeal. That principle applies here. As part of his plea agreement, J.V. urged the juvenile court to impose an SYO disposition (a term of DYS custody and a stayed adult sentence) with an express understanding that the court could invoke the adult sentence in the future if he misbehaved. Having successfully persuaded the juvenile court to accept that arrangement, J.V. cannot turn around and attack it as unconstitutional.

The juvenile code gives SYO offenders the same appellate rights as adult defendants: "A child upon whom a serious youthful offender dispositional sentence is imposed . . . has a right to appeal under [R.C. 2953.08(A)] the adult portion of the serious youthful offender dispositional sentence." R.C. 2152.13(D)(3). But R.C. 2953.08 imposes a critical limitation on that right: "A sentence imposed on a defendant *is not subject to review* . . . if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." R.C. 2953.08(D)(1) (emphasis added).

All three prerequisites are satisfied here.² First, J.V.’s sentence is authorized by law. As this Court explained in *State v. Underwood* (2010), 124 Ohio St. 3d 365, 2010-Ohio-1, syl. ¶ 2, a sentence is “authorized by law” when “it comports with all mandatory sentencing provisions.” J.V.’s sentence does just that—it falls within the statutory range of possible sentences established by the legislature and it contains all the statutorily required terms. To be sure, J.V. argues that the juvenile court violated the Sixth Amendment because it relied on judicial (as opposed to jury) factfinding to invoke the adult portion of his sentence. But that claim does not contest the terms of the sentence, only *the procedure* by which the court imposed the sentence. Because J.V.’s sentence “comports with all mandatory sentencing provisions” in Ohio law, it satisfies the first prong of R.C. 2953.08(D)(1). *Id.* ¶ 20.

Second, J.V. and the prosecutor jointly recommended this sentence. To avoid bindover to the common pleas court, J.V. pled delinquent to two lesser offenses, accepted an SYO disposition, and asked the juvenile court for a blended sentence. See Tr. (Jun. 17, 2005), at 5 (“[A] blended sentence . . . is also agreed upon and recommended by both parties.”). The juvenile court explained, and J.V. understood, that this arrangement would vest the court with authority to invoke the adult sentence in the future. *Id.* at 39.

Third, the juvenile court accepted the parties’ recommendation—an SYO disposition, a two-year minimum term in DYS custody, and a stayed six-year adult sentence.

All three conditions of R.C. 2953.08(D)(1) are therefore present. Because J.V. “agreed to the serious youthful offender dispositional sentence and waived his right to a jury trial on the

² The State did not raise R.C. 2953.08(D)(1) as a bar to appellate review in the Eighth District, but that is of no moment. The statute limits an appellate court’s jurisdiction to review jointly-recommended sentences. “Because subject-matter jurisdiction involves a court’s power to hear a case, the issue can never be waived or forfeited and may be raised at anytime.” *State v. Mbodji*, 129 Ohio St.3d 325, 2011-Ohio-2880, ¶ 10.

charges,” “[h]e may not argue now that the trial court was obligated sua sponte to impanel a jury to make the requisite findings [to invoke his adult sentence].” *In re Gerken* (5th Dist.), No. 2006-COA-10, 2006-Ohio-6720, ¶ 40; see also *In re Lee J.* (6th Dist.), No. 06-30, 2007-Ohio-2400, ¶ 15 (Because the juvenile “pled guilty to the delinquency charges” and the juvenile “court then imposed an agreed-upon sentence,” he “cannot now challenge that his constitutional rights were violated.”); *State v. Speakman* (10th Dist.), No. 08AP-456, 2009-Ohio-1184, ¶ 8 (“*Blakely* and *Foster* do not apply to lawful sentences that were jointly recommended by the parties.”).

This outcome is hardly surprising or unfair. The State of Ohio charged J.V. with attempted murder, aggravated robbery, felonious assault, and several gun specifications—offenses that required J.V.’s transfer to the common pleas court for adult prosecution. To avoid that harsh result, J.V. sought a plea agreement—he would admit to the lesser counts, accept an SYO disposition, and face a blended sentence. Having first urged the juvenile court down this path, J.V. cannot now attack the disposition as infirm. The General Assembly enacted R.C. 2953.08(D)(1) to prohibit such sandbagging. See *State v. Porterfield*, 106 Ohio St. 3d 5, 2005-Ohio-3095, ¶ 25 (“The General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate.”).

Having no jurisdiction to review the jointly agreed-upon sentence, the Court should dismiss this case as improvidently allowed.

Amicus Curiae Attorney General’s Proposition of Law No. II:

A juvenile who stipulates to a “serious youthful offender” designation waives his right to raise a Sixth Amendment objection to his sentence.

J.V.’s appeal faces a second procedural obstacle: Waiver. “[W]hile the Sixth Amendment generally prohibits judicial fact-finding, there is an ‘exception for . . . the defendant’s consent to judicial factfinding.’” *State v. Hunter*, 123 Ohio St. 3d 164, 2009-Ohio-4147, ¶ 30 (quoting *State*

v. *Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, ¶ 7). This Court has made clear that “*Apprendi/Blakely* errors may be waived” by a defendant. *Id.*

That is precisely what occurred here: J.V. stipulated to the SYO disposition at his plea hearing. Before accepting that stipulation, the juvenile court explained three times that J.V. was forfeiting his right to remain silent, his right to a jury trial, his right to beyond-a-reasonable-doubt factfinding, and his right to call and cross examine witnesses. See Tr. (Jun. 17, 2005), at 12-13, 21-24, 31-33. With counsel at his side, J.V. agreed to waive all these rights.

The juvenile court then made clear to J.V. that, under his SYO stipulation, *the court* would have authority to invoke his adult sentence if he committed future misconduct: “[I]f I find that [the adult sentence] is appropriate you will not be revoked back to the Ohio Department of Youth Service. You will probably be carried to county jail for imposition of the adult sentence.” *Id.* at 39 (emphasis added). After that advisement, the juvenile court asked J.V. if he wanted to proceed: “Do you wish for me to accept your admission as to the amended complaint . . . and serious youth offender specification.” *Id.* at 39-40. J.V. responded, “Yes, ma’am.” *Id.* at 40.

At bottom, J.V.’s stipulation to the SYO disposition waived any Sixth Amendment rights he had with respect to the adult portion of his sentence. Because J.V. “chose to submit that determination to the court,” *Hunter*, 2009-Ohio-4147, at ¶ 31, he cannot claim error on appeal.

Amicus Curiae Attorney General’s Proposition of Law No. III:

The juvenile court’s decision to activate an adult sentence does not offend the Sixth Amendment because it does not increase the serious youthful offender’s punishment above the period allowed by the jury’s verdict or the plea agreement.

J.V.’s plea deal forecloses review of his Sixth Amendment claim. But even if he had not agreed to his SYO disposition, the outcome of this appeal would not change. When the juvenile court invoked the adult portion of J.V.’s sentence, it invoked a sentence already “allowed. . . by

[his] admissions at a plea hearing.” *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, ¶ 7.

Therefore, no Sixth Amendment violation occurred.

A. J.V.’s sentence does not exceed the maximum penalty allowed by his plea agreement.

“[T]he Sixth Amendment prohibits a judge from imposing a sentence greater than that allowed by the jury verdict or by the defendant’s admissions at a plea hearing.” *Foster*, 2006-Ohio-856, at ¶ 7 (citing *Blakely v. Washington* (2004), 542 U.S. 296, 303-04). If “judicial factfinding is required to exceed th[e] sentence” authorized by the verdict or the plea, the sentence is invalid. *Id.* ¶ 55.

Although J.V. had a right to jury trial on the charged offenses, see R.C. 2152.13(C)(1), he chose to enter a plea. To prevail on his Sixth Amendment claim then, J.V. must demonstrate that the juvenile court imposed a sentence greater than that allowed by his plea.

This he cannot do. J.V.’s plea to the SYO disposition defined his statutory maximum sentence—a juvenile sentence in DYS custody followed by the maximum authorized sentence under the adult criminal statutes. The juvenile court’s punishment (two years in DYS custody and a six year prison term) falls inside that range.

J.V. nevertheless claims that the adult portion of his sentence is unconstitutional because Ohio law requires the juvenile court to “find additional facts based on the subsequent conduct of the juvenile in order for the juvenile to actually serve an adult sentence.” Br. at 13. That argument ignores one critical step: The Sixth Amendment does not forbid all judicial factfinding. It forbids only judicial factfinding that “increases the penalty for a crime beyond the prescribed statutory maximum.” *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490.

The “statutory maximum” is the maximum “sentence . . . allowed by the jury verdict or by the defendant’s admissions at a plea hearing.” *Foster*, 2006-Ohio-856, at ¶ 7. If a jury imposes or a juvenile offender stipulates to an SYO disposition, the maximum sentence allowed is “one

or more traditional juvenile dispositions” followed by “a sentence available for the violation, as if the child were an adult, under [R.C.] Chapter 2929.” R.C. 2152.13(D)(1)(a),(b); R.C. 2152.13(D)(2)(a)(i),(ii). So long as the juvenile court imposes a sentence within that range, the Sixth Amendment is satisfied. The juvenile court did that here, imposing on J.V. a two-year DYS term and a six-year prison term.

It is true that, under the SYO law, the adult portion of J.V.’s sentence was automatically stayed, and it is true that the juvenile court had to make a series of findings before activating the adult portion. See R.C. 2152.14(E)(1). But this feature of the SYO law is irrelevant to the Sixth Amendment inquiry. “[T]he adult portion of the SYO sentence . . . was imposed . . . as a result of [J.V.’s] plea agreement.” *In re D.F.* (9th Dist.), No. 25026, 2010-Ohio-2999, ¶ 22. When the juvenile court “invoked the adult portion of the Serious Youth Offender sentence,” it invoked a sentence “which *had already been imposed*” by virtue of J.V.’s plea agreement. *Id.* (emphasis added). Thus, any judicial factfinding by the juvenile court in this case did not increase J.V.’s punishment beyond “that allowed by . . . [his] admissions at a plea hearing.” *Foster*, 2006-Ohio-856, at ¶ 7.

Six appellate courts have considered this very issue, and all six have affirmed the constitutionality of Ohio’s blended sentencing scheme. Once the jury finds, or the offender stipulates to, an SYO disposition, “he [is] automatically subject to a blended sentence.” *In re Strum* (4th Dist.), No. 05-35, 2006-Ohio-7101, ¶ 75. That sentence “include[s] the applicable adult punishment.” *In re J.B.* (12th Dist.), No. 2004-09-226, 2005-Ohio-7029, ¶ 126. A juvenile court’s subsequent decision to invoke the adult sentence does not implicate the Sixth Amendment or *Foster* because the court is simply “determining [the offender’s] punishment within the statutorily prescribed range.” *Id.*; accord *In re Strum* (4th Dist.), 2006-Ohio-7101, at

¶ 75; *In re Seavolt* (5th Dist.), No. 2006-10, 2007-Ohio-2812, ¶ 35; *In re Lee J.* (6th Dist.), No. 06-30, 2007-Ohio-2400, ¶ 15; *In re Wheeler* (8th Dist.), No. 90766, 2008-Ohio-3656, ¶ 44; *In re D.F.* (9th Dist.), 2010-Ohio-2999, at ¶ 20.

The juvenile court here imposed an adult prison term on J.V. as a result of his plea agreement, and the court's later decision to invoke the prison term did not "exceed th[e] sentence" allowed by that plea. *Foster*, 2006-Ohio-856, at ¶ 55. Therefore, no Sixth Amendment violation occurred.

B. A juvenile court's decision to invoke an offender's adult sentence is akin to a trial court's decision to revoke a defendant's probation.

Ohio's blended sentencing law is modeled after the concept of "probation"—a practice that poses no Sixth Amendment concerns. Trial courts have long had authority to impose prison terms on offenders who violate the terms of a probationary sentence, and they can do so without triggering the Sixth Amendment's right to jury trial. If trial courts may do this, so can juvenile courts.

1. An adult defendant has no Sixth Amendment right to jury factfinding at a probation hearing.

Probationary sentences are fixtures of the adult criminal system. A trial court typically imposes two sentences on a criminal defendant—a fixed prison term (where the defendant is incarcerated) followed by a probationary term (where the defendant is free, but subject to court supervision).

In the federal system, trial courts typically order defendants to serve a fixed prison term followed by a probationary period of "supervised release." 18 U.S.C. § 3583. During the period of supervised release, the defendant must comply with a series of conditions—drug testing, substance abuse treatment, home confinement, a prohibition on further criminal conduct, and the like. *Id.* § 3583(d). Violations lead to consequences. A trial court can order the defendant to

serve a prison term if the court “finds by a preponderance of the evidence that the defendant violated a condition of supervised release.” *Id.* § 3583(e)(3).

Ohio employs the same approach, albeit with different terminology. For certain convictions, the trial court “shall include a requirement that the offender be subject to a period of post-release control.” R.C. 2967.28(B). Under post-release control, the offender is subject to “a period of supervision by the adult parole authority” after his “release from imprisonment.” R.C. 2967.01(N). As in the federal system, trial courts may impose “conditions” on the defendant during this probationary period. R.C. 2967.28(D)(1). And if the “court finds that the releasee violated the sanction or condition,” it “may impose . . . a prison term.” R.C. 2967.28(F)(3).

These probationary sentences—“supervised release” in the federal system and “post-release control” in the state system—rely on “a carrot and stick approach to rehabilitation.” *United States v. Makres* (7th Cir. 1988), 851 F.2d 1016, 1019. “The ‘carrot’ is rehabilitation without institutional confinement; the ‘stick’ is the continuing power of the court to impose institutional punishment for the original offense in the event the defendant abuses this opportunity.” *Id.* (internal quotations, alterations, and citations omitted).

These sentences also share one critical feature: The trial court *alone* determines whether the defendant violated the terms of his probationary sentence, and the trial court *alone* decides whether to impose an additional prison term. Neither a jury, nor the “reasonable doubt” standard is used at a violation hearing. The U.S. Supreme Court has affirmed that “there is no right to a jury trial before probation may be revoked.” *Minnesota v. Murphy* (1984), 465 U.S. 420, 435

B.7.

Defendants nevertheless attacked this procedure under *Apprendi* and *Blakely*, claiming that the Sixth Amendment requires a jury trial on whether a defendant violated the terms of a

probationary sentence. The federal courts all disagreed: “[W]hen a defendant fails to abide by th[e] conditions [of his supervised release] the government is not then put to the burden of an adversarial criminal trial. Instead, there is . . . a revocation of release hearing at which . . . neither the right to a jury trial, nor proof beyond a reasonable doubt is required.” *United States v. Carlton* (2d. Cir. 2006), 442 F.3d 802, 809. Their explanation was simple: “[T]he rule in *Apprendi* does not apply to a sentence imposed . . . following the revocation of a supervised release” because the “possibility of reimprisonment after a violation of that release[] is a part of the original sentence imposed by the sentencing court.” *United States v. McIntosh* (7th Cir. 2011), 630 F.3d 699, 703; accord *United States v. Cunningham* (11th Cir. 2010), 607 F.3d 1264, 1268; *United States v. Cordova* (10th Cir. 2006), 461 F.3d 1184, 1187-88; *United States v. Heurta-Pimental* (9th Cir. 2006), 445 F.3d 1220, 1225; *United States v. Hinson* (5th Cir. 2005), 429 F.3d 114, 119; *United States v. Work* (1st. Cir. 2005), 409 F.3d 484, 491-92.

Simply put, a trial court can impose a prison term on a defendant who violates the terms of his probationary sentence. And the court can do so using judge-found facts because “there is no right to a jury trial before probation may be revoked.” *Murphy*, 465 U.S. at 435 n.7. “[O]nce the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence are not subject to Sixth Amendment protections.” *Work*, 409 F.3d at 491.

2. Blended juvenile sentencing follows the probation model and, therefore, does not violate the Sixth Amendment.

The same analysis applies here: Ohio’s juvenile sentencing law uses the “carrot and stick” approach of the probation model.

In an SYO case, the juvenile court imposes a juvenile sentence and a stayed adult sentence. *The stayed adult sentence is, in all respects, a probationary sentence.* If the offender “make[s] a break with [his] criminal past the[] case ends.” Testimony of Thomas J. Moyer, Senate Judiciary

Committee (Sept. 22, 1999). He never serves the adult sentence. But if the juvenile “commit[s] more crimes, or refuse[s] the assistance offered by the department of youth services, a juvenile judge could send [him] on to adult prison.” *Id.* This process comports with the Sixth Amendment because the juvenile offender receives “adult-like process”—“most notably the right to a jury trial”—before the SYO disposition is imposed. *Id.*

But the Sixth Amendment does not confer any rights *after* the SYO sentence is imposed. Just as a trial court can impose a prison term on an adult who commits a crime while on probation, a juvenile court can invoke a prison term for a youth who commits a crime while under its supervision. No jury is needed for this decision. A juvenile court’s activation of the adult sentence, like the “imposition of imprisonment following the revocation of supervised release,” is “authorized by the fact of conviction.” *Heurta-Pimental*, 445 F.3d at 1225. Under *Apprendi* and *Blakely*, it “does not constitute additional punishment beyond the statutory maximum.” *Id.*

Every state and federal appellate authority supports the Eighth District’s conclusion below: The juvenile court’s decision to invoke J.V.’s adult sentence did not violate the Sixth Amendment. To hold otherwise would expand jury trial rights to every run-of-the-mill probation violation hearing. No court has ever given credence to that argument.

Amicus Curiae Attorney General’s Proposition of Law No. IV:

Due to jurisdictional defects and waiver, the due process and equal protection claims are not before the Court.

J.V. also asserts that Ohio’s juvenile sentencing law violates due process and equal protection. Neither claim is before this Court.

As the Attorney General’s first proposition of law discussed, the Court lacks jurisdiction to review any aspect of J.V.’s sentence. J.V. and the prosecutor jointly recommended an SYO

disposition in a plea agreement, and J.V. understood that the plea would give the juvenile court authority to invoke the adult portion of the SYO sentence. See Tr. (Jun. 17, 2005), at 39. Because J.V. agreed to this arrangement, R.C. 2953.08(D)(1) prohibits appellate review.

Separate from jurisdiction, J.V. has waived any due process or equal protection claim. He pressed only one constitutional objection to the juvenile court—a Sixth Amendment challenge. See Tr. (Feb. 9, 2010), at 8. On appeal, J.V. openly admitted that he had not preserved his other claims. See Apt. Merit Br., *In re J.V.* (8th Dist. June 14, 2010), at 23 (“[T]hese constitutional arguments were not raised below.”). The Eighth District appropriately declined to address his due process and equal protection arguments, and this Court should as well. “[A] constitutional question cannot be raised in a reviewing court unless it appears it was urged in the trial court.” *State ex rel. Specht v. Oregon City Bd. of Educ.* (1981), 66 Ohio St. 2d 178, 182.

Setting these jurisdictional and procedural defects aside, J.V.’s claims lack merit. His brief treats the Sixth Amendment and due process arguments as one and the same. See, e.g., Br. at 20 (“Whether conceived as a 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.”). No matter how one labels the rubric, Ohio’s juvenile sentencing law satisfies *Apprendi*, *Blakely*, and *Foster*: The juvenile court imposed an adult prison term on J.V. as a result of his plea agreement; the court’s later decision to invoke the prison term did not “exceed th[e] sentence” allowed by the plea. *Foster*, 2006-Ohio-856, at ¶ 55.

J.V.’s equal protection claim also fails because he received “the same constitutional protections adult criminal defendants enjoy.” Br. at 27. As explained above, a trial court can impose a prison term on an adult defendant who violates the terms of his probation, and it can do

so entirely on the basis of judicial factfinding. The same is true here: A juvenile court can invoke a prison term for a youth who violates the terms of his SYO disposition, and it can do so entirely on the basis of judicial factfinding.

Because J.V.'s due process and equal protection arguments fail on jurisdiction, waiver, and their merits, the Court should reject the claims.

Amicus Curiae Attorney General's Proposition of Law No. V:

If the invocation procedures offend the Sixth Amendment, the references to judicial factfinding in R.C. 2152.14(E)(1) should be severed.

If J.V. were to somehow prevail on his constitutional claim, the Court must determine an appropriate remedy. J.V. asks the Court to take the dramatic step of invalidating the juvenile sentencing law in its entirety. Br. at 30. No authority supports such a dramatic request. Complete invalidation of the law would tie the hands of Ohio's juvenile court judges and funnel serious juvenile offenders into the common pleas court for adult criminal prosecutions. Neither outcome is warranted or desirable.

Even if J.V. could establish a constitutional defect in the law (and he cannot), only one remedy is appropriate—severance of the factfinding requirement in R.C. 2152.14(E)(1).

A. The factfinding provision, R.C. 2152.14(E)(1), is capable of severance.

J.V. attacks only one feature of Ohio's blended sentencing law. Before invoking the adult portion of an SYO sentence, the juvenile court must consider whether the offender "engaged in the conduct or acts charged under [R.C. 2152.14(A)-(C)]" and whether "the . . . conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction." R.C. 2152.14(E)(1). This language is severable from the statute.

The severance test is well established: "(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the

unconstitutional part 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? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?" *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466 (citation omitted). All three factors favor severance in this case.

First, the juvenile sentencing statute is capable of separation. The references to factfinding are all located in one provision—R.C. 2152.14(E)(1). If those references are excised, the alleged Sixth Amendment defect is cured. The juvenile courts would retain discretion to invoke the adult portion of an SYO sentence, but the courts would not need to issue any factual findings before the invocation.³ See *Foster*, 2006-Ohio-856, at ¶ 99. (Sentencing statutes “are capable of being severed” under the Sixth Amendment if, “[a]fter the severance, judicial fact-finding is not required before a prison term may be imposed.”).

Second, excising the references to factfinding in R.C. 2152.14(E)(1) would “not detract from the overriding objectives of the General Assembly.” *Id.* at ¶ 98. The General Assembly had one goal in mind when it approved blended juvenile sentencing—to increase the power and responsibility of juvenile court judges. “[A] juvenile court judge ha[d] few options when dealing with a child accused of a serious felony” under the old system—a traditional disposition up to age twenty-one, or transfer to the common pleas court for an adult prosecution. Testimony of Thomas J. Moyer, Senate Judiciary Committee (Sept. 22, 1999). “[T]he Sentencing Commission and judges thought that other alternatives should exist between traditional juvenile treatment and bindover.” Statement of Rep. Ann Wormer Benjamin, House Session (123rd G.A. Nov. 9,

³ Of course, juvenile courts would still consider the objectives in R.C. 2152.01—“the public interest and safety,” “hold[ing] the offender accountable,” “restor[ing] the victim,” and “rehabilitat[ing] the offender”—when deciding whether to invoke the adult sentence.

2000). Blended sentencing does just that—it gives juvenile courts “more discretion” and “more flexibility in sentencing options for serious youthful offenders.” *Id.*

Removing the reference to factfinding in R.C. 2152.14(E)(1) would preserve “[t]he overwhelming majority of those reforms.” *Foster*, 2006-Ohio-856, at ¶ 101. Prosecutors could still seek an SYO disposition for violent juveniles in lieu of transfer to common pleas court, juvenile courts would still retain their ability to invoke the adult portion of the SYO sentence, and the offenders would still receive the “carrot and stick” benefits of the juvenile justice system.

Third, severance would not require the Court to insert new words or terms into the statutory scheme. If the references to factfinding are removed, the language of R.C. 2152.14(E) stands on its own: “The juvenile court may invoke the adult portion of a person’s serious youthful offender dispositional sentence,” or “[t]he court may modify the adult sentence . . . to consist of any lesser prison term.” Severance would also not impact the statutory scheme: The prosecutor would still have to file an invocation motion if the juvenile offender commits misconduct; the juvenile court would still conduct a hearing on whether to invoke the adult sentence; and the court, if it invokes the sentence, would still transfer the offender to the Department of Rehabilitation and Correction. See R.C. 2152.14(B)-(F).

Foster confirms the propriety of the severance remedy. In that case, the Court concluded that Ohio’s felony sentencing laws violated the Sixth Amendment because they required judicial factfinding. But the Court did not then invalidate the laws in their entirety. It instead ordered that “[a]ll references to mandatory judicial factfinding . . . be eliminated” from the statutes, thereby curing the infirmities under *Apprendi* and *Blakely*. *Foster*, 2006-Ohio-856, at ¶ 96.

The same analysis holds here. If the Court finds infirmities in Ohio’s juvenile sentencing law, it need only excise the factfinding language in R.C. 2152.14(E)(1). Going forward, juvenile

courts could still invoke the adult portion of an SYO sentence, but they would “no longer [be] required to make findings” before doing so. *Foster*, 2006-Ohio-856, at ¶ 100.

B. Facial invalidation of Ohio’s juvenile sentencing law would deprive juvenile courts of a useful and effective sentencing tool.

J.V. instead urges this Court to strike down the sentencing law in its entirety, but he makes no effort to analyze the *Geiger* factors. Br. at 30. Rather, he criticizes Ohio’s entire juvenile justice system—courts, judges, prosecutors, and DYS—for “fail[ing] in its rehabilitative goals.” Br. at 28. And he complains that “[i]t is fundamentally unfair” to place him into a system “that is replete with violence and lacking in education, treatment, and care.” *Id.*

This argument is an unwarranted distraction. The question here is whether Ohio’s juvenile sentencing law complies with the Sixth Amendment—specifically, whether a juvenile court may invoke the adult portion of a previously imposed SYO sentence, or whether the offender is entitled to a jury trial on that question. Whether DYS provides appropriate facilities, staffing, and programs (questions that are subject to ongoing federal litigation) have no bearing on whether juvenile courts are complying with the Sixth Amendment when they sentence juvenile offenders.⁴

Not only is J.V.’s request for wholesale invalidation of Ohio’s juvenile sentencing scheme unsupported in law, but it is unsupportable in principle. Under the old statute, “too many juveniles were actually being bound over to the adult system.” Statement of Rep. Ann Wormer Benjamin, House Session (123rd G.A. Nov. 9, 2000). But for the SYO option here, J.V. would

⁴ The Ohio Public Defender’s Office also introduces a host of irrelevant factual assertions—none of which were presented to the juvenile court or the Eighth District. They complain that juvenile sentencing practices in Ohio vary by county. Some county prosecutors and juvenile court judges rely heavily on SYO sentences; others do so infrequently. Br. 11-12. The Public Defender’s Office also details allegations, reports, and studies from an unrelated federal conditions-of-confinement lawsuit against DYS. Br. 13-21. These disputes about prosecutorial discretion and facility conditions have nothing to do with the constitutionality of a sentencing statute.

have faced transfer to the common pleas court for prosecution on attempted murder. Indeed, but for the SYO option, hundreds of other serious youthful offenders would have faced transfer to the common pleas court for adult criminal trials.

Juvenile courts have instead deployed the “carrot and stick” approach of blended sentencing in these cases. Of the 292 youths ordered into DYS custody under an SYO disposition, only twenty-four have had the adult portions of their sentences invoked. Most juveniles refrain from violent conduct, pursue rehabilitative opportunities while in DYS custody, and leave the system at age twenty-one with a clean record.

Unfortunately, J.V. did not achieve such success. But if the Court invalidates Ohio’s blended sentencing law in its entirety, juvenile courts will lose this valuable tool and juvenile offenders will lose this valuable opportunity. If the SYO disposition is no longer available, prosecutors will do what they did in the past—seek automatic transfers of serious juvenile offenders like J.V. to the common pleas courts for adult prosecution. These offenders will then receive longer prison terms, they will serve their sentences in a Department of Rehabilitations and Correction facility, and they will have permanent criminal records. Any juvenile offender will prefer an SYO disposition over this option.

If the factfinding element in R.C. 2152.14(E)(1) is unconstitutional—a proposition the Attorney General vigorously disputes—the Court should do what it did in *Foster*: “Excis[e] the unconstitutional provision[],” and “preserve . . . the major elements of [the] sentencing code.” *Foster*, 2006-Ohio-856, at ¶¶ 98, 102. That remedy conforms to the *Geiger* standard, maintains

the sentencing reforms championed by Chief Justice Moyer and the Sentencing Commission, and preserves an important tool for juvenile court judges overseeing violent offenders in this State.⁵

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio



ALEXANDRA T. SCHIMMER* (0075732)
Solicitor General

**Counsel of Record*

DAVID M. LIEBERMAN (0086005)

Deputy Solicitor

ELIZABETH A. MATUNE (0078544)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

Ohio Attorney General Michael DeWine

⁵ If the Court severs the factfinding language in R.C. 2152.14(E)(1), it should remand the case to the juvenile court for discretionary consideration of whether to invoke J.V.'s adult sentence.

CERTIFICATE OF SERVICE

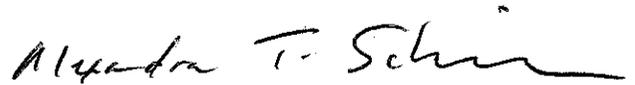
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee State of Ohio was served by U.S. mail this 7th day of October, 2011, upon the following counsel:

Cullen Sweeney
Assistant Public Defender
310 Lakeside Ave., Suite 200
Cleveland, Ohio 44113

Counsel for Appellant J.V.

Kristen Sobieski
Assistant Prosecuting Attorney
1200 Ontario St., 9th Floor
Cleveland, Ohio 44112

Counsel for Appellee State of Ohio



Alexandra T. Schimmer
Solicitor General