

ORIGINAL

NO. 2011-0107

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 94820

IN RE: J.V.

MERIT BRIEF OF APPELLEE

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RECEIVED  
OCT 10 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

FILED  
OCT 10 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

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## STATEMENT OF THE CASE

This originated in the Cuyahoga County Juvenile Court as a delinquency case against Appellant J.V. The six charges against him in case number DL05-103008 were resolved by his admissions—which were made pursuant to a negotiated agreement—in a hearing held before the juvenile court on June 17, 2005. Appellant admitted to one count of felonious assault with firearm and serious youthful offender specifications and one count of aggravated robbery also with firearm and serious youthful offender specifications and, in exchange, the remaining four charges against him were dismissed. At the delinquency hearing a jointly proposed Serious Youthful Offender (“SYO”) sentence (which included both juvenile and adult prison sanctions) was imposed. (6/17/05 Tr. 60-70.)

Appellant pursued a direct appeal of his disposition and sentence to the Eighth District Court of Appeals. *In re: J.V., A Minor Child*, Cuyahoga App. No. 86849, 86850, 2006-Ohio-2464. (“*J.V. I.*”) As a result of that appeal, the Eighth District “vacate[d] the appellant’s sentence as stated in the applicable journal entries and remand[ed] the matter to the juvenile division to modify its journal entries to accurately reflect appellant’s disposition as articulated at the June 17, 2005 hearing.” *Id.* at ¶ 14.

Pursuant to the remand in *J.V. I.*, another dispositional hearing was held before the juvenile court on January 5, 2007 at which time Appellant’s sentence, including both juvenile and adult portions, was imposed. (1/5/07 Tr. 3-12.) The events of this hearing were journalized in the lower court’s January 16, 2007 entry and Appellant began serving the juvenile portion of his term.

On October 16, 2008, the State filed with the juvenile court a motion to invoke the suspended adult sentence based on Appellant’s conduct while he was in the custody of Ohio Department of

Youth Services (“ODYS.”) The juvenile court held a hearing on the State’s motion on January 13, 2009. <sup>1</sup>

At the conclusion of the hearing, the matter was deemed heard and submitted. (1/13/09 Tr. 149.) In an entry filed on February 5, 2009, the juvenile court found, “by clear and convincing evidence that the child has been admitted to a Department of Youth Services facility, and the child’s conduct demonstrates that the child is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.” (2/5/09 Journal Entry.) Therefore the court ordered into execution the adult portion of Appellant’s sentence.

Appellant again sought review of his sentence in the Eighth District, which reversed and remanded finding, “At no time did the lower court ever advise J.V. of the mandatory five years of postrelease control associated with the adult portion of his sentence. Nor did the lower court properly incorporate postrelease control in its journal entry. Accordingly, J.V.’s sentence is void. J.V.’s fourth assignment of error has merit, and we hereby reverse in part and remand this case to the docket of the juvenile court for a new hearing.” *In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 23-24. (“*J.V. II.*”) This Supreme Court declined further review of that holding. *In re: J.V.*, 125 Ohio St.3d 1448, 927 N.E.2d 1128, 2010-Ohio-2510.

Pursuant to the remand in *J.V. II.*, the juvenile court held a hearing on February 9, 2010 during which the court heard argument from counsel as to the procedure on remand. The court determined that its original decision to invoke the adult sentence based on clear and convincing evidence remained in effect. It scheduled Appellant’s post release control sentencing hearing for February 12, 2010. (2/9/10 Tr. 18-20.) On February 12, 2010, the juvenile court imposed upon Appellant a

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<sup>1</sup> The evidence submitted at that hearing is outlined in the following section of this brief.

lawful SYO sentence that included the traditional juvenile disposition as well as the agreed suspended six-year adult prison term—and, this time, included the mandatory five-year period of post release control supervision. (2/12/10 Tr. 3-26.) The court specified that Appellant had not completed his term. (2/12/10 Tr. 6, 30.) With regard to the State’s motion to invoke the adult term the juvenile court reiterated, “I found the motion to be well-taken.” (2/12/10 Tr. 38, see also 2/9/10 Tr. 18-20.)

Appellant sought review of his sentence for the third time in the Eighth District Court of Appeals. This time the Eighth District affirmed Appellant’s SYO sentence. *In re: J.V.*, Cuyahoga App. No. 94820, 2010-Ohio-5490. (“*J.V. III.*”) On January 19, 2011, Appellant was released from Ohio’s adult Ross Correctional Institution and was placed under the supervision of the adult parole authority.<sup>2</sup> Appellant sought a delayed appeal and was granted jurisdiction in this Supreme Court.

### STATEMENT OF THE FACTS

Relevant to the imposition of Appellant’s SYO prison term; on January 13, 2009, the Cuyahoga County juvenile court held a hearing on a motion by the State to invoke Appellant’s suspended adult sentence. In the course of that hearing, the lower court heard the following evidence:

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<sup>2</sup> According to Ohio’s Department of Rehabilitation and Correction, Appellant completed his adult prison term, was released from the Ross Correctional Institution, and was placed under the supervision of the adult parole authority on January 19, 2011. <http://www.drc.state.oh.us/OffenderSearch/Search.aspx> However on June 17, 2011 Appellant was arrested on new charges of attempted murder, felonious assault, aggravated robbery, grand theft and having a weapon under disability, with firearm and criminal gang activity specifications. At the time of this writing, Appellant is being held in the Cuyahoga County Jail under indictment in Cuyahoga County Court of Common Pleas Case Number CR 552954. [http://cpdocket.cp.cuyahoga.cc/p\\_CR\\_CaseSummary.aspx](http://cpdocket.cp.cuyahoga.cc/p_CR_CaseSummary.aspx) If convicted of felony offense in 552954, Appellant will stand in violation of the conditions of his post release control and may be subject to an additional prison term in this matter.

Officer Kevin Lacey, a Unit Manager at the former Marion Juvenile Correctional Facility (“MJCF”), testified that he was responsible for the security of his unit, managing the officers and social workers of his unit, and taking care of the needs and discipline of the youths who reside there. (1/13/09 Tr. 7-8.) He testified that his educational background includes a bachelor’s degree in criminal justice as well as work towards his master’s degree. (1/13/09 Tr. 25.) Lacey worked for several years as a juvenile corrections officer before becoming a Unit Manager at Marion. (1/13/09 Tr. 25.)

Lacey testified that MJCF was considered a closed unit and housed the highest risk youth in terms of their criminal conduct and criminal offenses. (1/13/09 Tr. 23, 44.) Unlike facilities that may have open dorms and a single isolation cell, Marion accommodated, “youth that severely, severely act out.” (1/13/09 Tr. 44.) When youths placed at other juvenile correctional facilities proved to be dangerous or unmanageable, they were often transferred to Marion. (1/13/09 Tr. 51-52.) Lacey stated that, as a Unit Manager, he received daily reports regarding negative behavior by youths occurring throughout the facility. (1/13/09 Tr. 8.)

Lacey identified Appellant and indicated that Appellant spent time in the severe management unit, located in Building 2, which was the area designated for youth who, “are incapable of behaving well enough in general population.” (1/13/09 Tr. 8.) Lacey stated that he interacted with Appellant on multiple occasions over the summer of 2008. (1/13/09 Tr. 9, 28, 30.)

On one occasion, Lacey conducted a search of Appellant’s cell. Appellant and Appellant’s roommate were upset about the search and used abusive language, refused to comply with directions, and ultimately began hitting Lacey. (1/13/09 Tr. 10.) Appellant struck Lacey in the shoulder and tried to force Lacey to release his hold on Appellant’s roommate. (1/13/09 Tr. 10.) The incident

spiraled further and another youth became involved in hitting Lacey. Ultimately, all available staff had to be summoned to handcuff and restrain the youths, who Lacey described as being “extremely combative” and “unmanageable.” (1/13/09 Tr. 11, 32-33.)

A hearing on the incident was held, but contrary to usual procedure, the hearing officer was from the Mohican correctional facility—not MJCF where the incident occurred. (1/13/09 Tr. 12-13.)

At the time, MJCF was so short-staffed that the hearing had to be held by the outside agency and only involved a review of the written reports. (1/13/09 Tr. 13-14, 36-37.) The hearing officer did not view the recorded video of the incident, nor did he allow for witness testimony. Lacey, the victim, was not afforded the opportunity to be present for the hearing or to testify about the incident. (1/13/09 Tr. 14.) Although the hearing officer found Appellant not guilty of assault, Lacey testified to the juvenile court that Appellant “absolutely” struck him. (1/13/09 Tr. 14-15.)

Lacey also testified that on September 25, 2008, Appellant was involved in a “major incident” of fighting between youths. (1/13/09 Tr. 9.) Lacey responded to the location of the incident and witnessed Appellant repeatedly kicking another youth who was being held down on the ground, chasing other youth around the unit, refusing to go to his room, and refusing to comply with directions. (1/13/09 Tr. 9.) Lacey described the incident as involving a “security threat group” (commonly known as a gang). (1/13/09 Tr. 16.) He stated that Appellant was, “going after the rival gang.” (1/13/09 Tr. 16.) Lacey explained that Appellant was known to be a high-ranking member of the security threat group known as the “Heartless Felons” or the “Felons.” (1/13/09 Tr. 16-17.) He also explained that the activity of security threat groups at MJCF was monitored including who was involved, what the youths said about themselves, whether they were heard bragging about being in a gang, and whether they were observed displaying their gang’s signs. (1/13/09 Tr. 16, 47.) Lacey

testified that there is a hierarchy to the “Felons” and that Appellant’s position in the gang allowed Appellant “to call shots.” (1/13/09 Tr. 17.) Lacey testified that youths attain such status in security threat groups by gaining contraband, or committing physical violence. (1/13/09 Tr. 17.) Lacey stated that Appellant had a history of testing positive for THC. (1/13/09 Tr. 17.)

In the September 25, 2008 incident Lacey was one of the first to respond to the urgent call for immediate help. Lacey arrived at the scene to find “mass chaos” which he defined as: “There was youths on the ground getting kicked. There was youths fighting, squared-up fighting one-on-one. There was youths chasing youths around the—I mean, mass chaos.” (1/13/09 Tr. 18.) Twenty-seven youths, including Appellant were involved in that fight. (1/13/09 Tr. 18.)

Lacey testified that Appellant chased other youths around, kicked a youth who was on the ground, and that he kicked the youth in the head. (1/13/09 Tr. 19.) He stated that Appellant’s conduct was aggressive, not defensive. (1/13/09 Tr. 53-54.) Lacey stated that while fights sometimes happen, the frequency and magnitude of the fights Appellant was involved in is something that does not occur very often. (1/13/09 Tr. 19.) Lacey explained his concern that Appellant,

is a grown man. He’s 20 years-old. 19, 20 years-old when he committed these offenses. We have youth that are in there that are 15, 16 years-old. When you get to that age and you’re older, the kids that – or, I guess they’re grown men when they hit 20 – but you get men that are older with boys. That can cause severe damage when things like this start happening. When [Appellant] wants to kick a 16 year-old boy on the ground when he’s 20 years-old, it leads to more damage.

~~(1/13/09 Tr. 20.) Lacey further testified of his concern that Appellant, “being older, he’s considered~~  
a leader because of his age and his time that he served on ODYS, and, also, all the things he has done to get his high rank. (1/13/09 Tr. 20.) Lacey explained to the juvenile court that the very day of this

incident, Appellant had just been released from the severe case management unit and that Lacey had received a written bulletin warning him that Appellant intended to start trouble when he was returned to the regular unit. (1/13/09 Tr. 20-21.) In further explanation, Lacey testified that the severe management unit could be used for a day or two or for an entire six-week program—and that the unit was where youths who are unmanageable in the general population were housed. (1/13/09 Tr. 21, 41-44.) “This is where the most highly assaultive youth in the State are kept.” (1/13/09 Tr. 41.) For the first two weeks, the youths may be kept in lock-down for twenty-three hours per day. (1/13/09 Tr. 41.) Youths who followed the institutional rules at MJCF were not placed in this unit. (1/13/09 Tr. 22.)

Lacey testified that once Appellant was transferred out of MJCF to the adult prison, the number of incidents at MJCF decreased. (1/13/09 Tr. 48, 54-55.) In describing what his job was like and why the MJCF was short-staffed, Lacey testified: “to deal with these individuals, we have nothing more than a radio, a pair of handcuffs in our hands that we carry around with us. And it’s extremely difficult when you have the 20, 30 youth fighting at one time to extinguish that without getting hurt injured. Staff is out injured all the time. That’s why our numbers are so low. Everything from a unit manager – she had her jaw broke. She’s currently out on disability. Another unit manager had something wrong with his back from a restraint. You know, it just goes on and on. JCO’s getting assaulted, black eyes, spit on, urine thrown at them. That’s what it really is at Marion.” (1/13/09 Tr. 24.)

Lee Hayes, a social worker who was employed at MJCF, testified that she was assigned to Appellant’s unit. (1/13/09 Tr. 55-56.) Hayes testified that Appellant was involved in a number of behavioral incidents. (1/13/09 Tr. 58.) She stated that although Appellant was expected to attend

group sessions with her, he frequently did not. (1/13/09 Tr. 64-65.) In her opinion, Appellant needed the group meetings. (1/13/09 Tr. 66.) In her individual meetings with Appellant, he routinely told Hayes that he did not need help. (1/13/09 Tr. 65.)

Hayes testified that Appellant had a higher than average number of “behavioral incidents.” (1/13/09 Tr. 71.) She stated that she believed Appellant could control his behavior and that he chose not to control it. (1/13/09 Tr. 80-81.) At one point, Appellant was considered for early release; however, he then had four behavioral incident reports in a two-month span, two of which required the assistance of “all available” staff to extinguish. (1/13/09 Tr. 82.) Hayes stated her concern about releasing Appellant into the community due to his history of violent behavior and fighting. (1/13/09 Tr. 66-67.)

At the hearing on the State’s motion to invoke adult sentence, the juvenile court also heard testimony from Appellant about the three years he spent in ODYS custody. (1/13/09 Tr. 84-85.) Appellant stated that he completed a number of programs and requested early release. (1/13/09 Tr. 85-87.) With regard to the incident with Officer Lacey, Appellant stated that he never touched Officer Lacey and that no assault ever occurred. (1/13/09 Tr. 88-90.) Appellant denied being involved in the fighting. (1/13/09 Tr. 91.) Appellant indicated that, since the incident started between Officer Lacey and Appellant’s roommate, there was no need for Appellant to have involved himself at all. (1/13/09 Tr. 104-105.) Appellant also admitted that he did not know whether the hearing officer ever reviewed video of the incident, and that no one from Marion was present for the hearing. (1/13/09 Tr. 106, 109.)

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Appellant told the juvenile court that he believed he was going to be released on September 24, 2008. (1/13/09 Tr. 93-94, 100, 118-119.) With regard to the large group fight on September 25,

2008, Appellant testified that he was hit from a blind spot and then he, “got to hitting.” (1/13/09 Tr. 95.) Appellant stated, “A lot of people got to fighting” and that he sees a lot of fights. (1/13/09 Tr. 95-96.) Specifically Appellant admitted, “I was kicking him.” (1/13/09 Tr. 112-113.)

Appellant acknowledged the existence of gangs including the Bloods, Crypts, and the Felons. (1/13/09 Tr. 99.) He denied being a member of the Felons but admitted spending time with them because they were the only people in the facility that he knew. (1/13/09 Tr. 113-114.)

Appellant testified that of the six times that he was placed in the severe unit, only one of the times did he ever actually do anything wrong—and that was when he got into a fight in 2006. (1/13/09 Tr. 109-110.) In response to the judge’s repeated inquiries as to why Appellant got into fights, Appellant stated, “I blanked out of the situation” and “I blanked out.” (1/13/09 Tr. 120, 122.)

In her dialogue with Appellant at the hearing on the motion to invoke the adult sentence, the juvenile court judge inquired, “[H]ow many more times are you going to blank out if you get released? Because the same people that you met on the way down to Marion is the same people you’re going to meet right out there in that street.” (1/13/09 Tr. 122.) The court stated, “I don’t care what the kids do. I’m trying to assess what you do, and you’re still blanking out like a kid.” (1/13/09 Tr. 122.)

The court noted Appellant was, “20 years of age and plenty of time to keep it together.” (1/13/09 Tr. 139.) The court noted the escalation of criminal conduct that landed Appellant in MJCF to begin with—including the use of a firearm. (1/13/09 Tr. 144.) The court indicated that she did not find the incident involving the assault Officer Lacey to be the most persuasive (1/13/09 Tr. 144-145), rather the court specified:

[I]n my opinion, the most clear and convincing and damning evidence is what happened on September 25<sup>th</sup>.

You're too old to be in the fray, and you're sophisticated enough to know how to keep yourself out of it. I'm not saying that while you're sitting in a room and all H-E double hockey sticks breaks out that you won't get swung on and you won't get struck. I totally and completely understand that. But you forgot what you were there for.

(1/13/09 Tr. 146.) The juvenile court was also un-persuaded by the argument that Appellant was, at one point, considered for early release. (1/13/09 Tr. 146-147.) The court reaffirmed that she was most concerned by Appellant's admitted conduct in the September 25, 2008 fight and his gang association:

I'm to the point where you hit that boy back. You forgot. See, that's what scares me about you, \*\*\*. You don't – you still don't have control of you. You're still too close to Felons. They're talking drama. They're talking garbage. You're sitting too close to them. The reputation you should have is he knows them, he has to maneuver through them all, but hey, he really don't associate with them.

(1/13/09 Tr. 147.) In addressing Appellant's complaints about MJCF, the court cautioned Appellant that the Marion adult correctional facility was just down the street and that the conditions there could be worse because Appellant would no longer be in charge. (1/13/09 Tr. 148.) The court concluded with, "My personal disappointment is only that nobody gave you a reputation of being part of the solution to the problem. That's my personal disappointment for you." (1/13/09 Tr. 148-149.)

Appellant then sought review of the trial court's decision to invoke the adult portion of his sentence. Without considering the merits of Appellant's challenge to his SYO sentence, the Eighth District remanded to the trial court because the adult prison term imposed lacked post release control. *In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 23-24. ("*J.V. II.*")

Upon remand from the Eighth District in *J.V. II* the juvenile court set Appellant's case for hearing in February, 2010. At that hearing, the juvenile court noted that her decision to invoke the adult portion of Appellant's sentence was not reversed on appeal and, as such, remained in effect. (2/12/10 Tr. 35-38, 40-41, see also, 2/9/10 Tr. 18-20.) The court then resentenced Appellant to his adult prison term and included the mandatory five-year period of post release control. (Tr. 2/12/10 Tr. 3-30; 44-49.) Appellant's third and final appeal to the Eighth District resulted in his adult prison sentence being affirmed. *In re: J.V.*, Cuyahoga App. No. 94820, 2010-Ohio-5490.

The State's argument in opposition to Appellant's two propositions of law follows.

### **LAW AND ARGUMENT**

#### **APPELLANT'S PROPOSITION OF LAW NO. 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.

**R.C. § 2152.14 is constitutionally sound. This statute allows Juvenile Courts to invoke suspended adult prison terms upon serious youthful offenders who continue to commit criminal conduct while in juvenile correctional facilities.**

Appellant challenges the constitutionality of Ohio's serious youthful offender sentencing scheme. Appellant alleges that invoking the adult portion of a serious youthful offender's blended sentence calls for impermissible judicial fact-finding in violation of his constitutionally guaranteed rights to due process and equal protection. However when a juvenile court's decision to invoke an adult sentence against a serious youthful offender is made in accordance with R.C. § 2152.14, the right to a trial by jury is not implicated, nor are the juvenile's due process and equal protection rights violated.

**Juvenile courts and serious youthful offenders.**

The overriding purpose of establishing juvenile courts is codified at R.C. § 2152.01. The mission of juvenile courts includes providing for the care, protection, and development of children, protecting public interest and safety, holding juvenile offenders accountable and rehabilitating them, as well as restoring victims. “These purposes shall be achieved by a system of graduated sanctions and services.” R.C. § 2152.01(A).

A serious youthful offender lies in a class of juvenile offenders who are subject to the mid-level range of available sanctions. R.C. § 2152.01(X). Unlike an offender whose entire case is transferred for prosecution in an adult criminal court, and unlike an offender whose conduct and rehabilitative needs can be fully and effectively handled in the juvenile system, a serious youthful offender is subject to a blended sanction that includes both juvenile rehabilitative corrections as well as imposition of an adult prison term that is suspended. As serious youthful offenders have committed enhanced acts of criminal conduct, they are properly subject to the more restrictive SYO dispositions. R.C. § 2152.11.

This Court recently examined the use of the blended SYO sentencing scheme and noted that such sentences can assist Ohio’s juvenile courts in achieving their important objectives. *In re: D.H.*, 120 Ohio St.3d 540, 901 N.E.2d 209, 2009-Ohio-9, ¶ 55.

**The lower court properly applied R.C. § 2152.14 in invoking Appellant’s suspended adult prison sentence.**

In its motion to invoke Appellant’s suspended adult prison sentence the State charged that Appellant, while at MJCF, committed, (1) an act that was a violation of the rules of the institution and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult; and (2) that he engaged in conduct that created a substantial risk to the safety

or security of the institution, the community, or the victim. See, R.C. § 2152.14(A)(2)(a) & (b).

The clear and convincing evidence submitted to the juvenile court was that between July and September of 2008 Appellant engaged in frequent fighting while housed at MJCF. (1/13/09 Tr. 9, 28, 30, 71.) Specifically:

Appellant continued to engage in fights at ages 19 and 20 (1/13/09 Tr. 19-20);

Appellant was a known “high-ranking” gang member (1/13/09 Tr. 16-17);

In July of 2008 Appellant engaged in an incident during which he hit Officer Lacey (1/13/09 Tr. 9-15; 32-33);

On September 25, 2008 Appellant engaged in a “mass chaos” group fight (1/13/09 Tr. 9-19); and,

Appellant admitted that he “blanked out”, “got to hitting,” and that he kicked another juvenile. (1/13/09 Tr. 19, 25, 112-113, 120-122.)

Moreover, Appellant acknowledged that he was transferred six times from the general population area to the severe case unit—although, according to him, only one of those transfers was justified. (1/13/09 Tr. 109-110.) Testimony from two sources indicated that Appellant was involved in a higher than average number of behavioral incidents. (1/13/09 Tr. 9, 28, 30, 58, 71) Furthermore, the number of fighting disturbances at MJCF decreased after he was transferred out of MJCF. (1/13/09 Tr. 48, 54-55.)

Based on this evidence, the juvenile court found Appellant, “[C]ommitted an act that is violation of the rules of the institution and that could be charged as a felony or a first degree misdemeanor offense of violence if committed by an adult,” and that Appellant, “[E]ngaged in ~~conduct that created a substantial risk to the safety or security of the institution, the community, or the victim~~” based on Appellant’s own testimony that he “blanked out” and “got to fighting” and was “kicking” another youth on September 25, 2008. (See, 1/13/09 Tr. 122, 139, 144-149, and 2/12/10

Tr. 35-38.) The juvenile court's findings were first made at the time of the January, 2009 hearing on the State's motion to invoke adult sentence and were reiterated by the court in its February, 2010 hearing upon remand from the Eighth District in *J.V. II*. (2/12/10 Tr. 35-38) The juvenile court's findings constituted full compliance with R.C. § 2152.14 and were affirmed on appeal in *J.V. III*.<sup>3</sup>

**R.C. § 2152.14 is constitutionally sound.**

Appellant asserts to this Court that R.C. § 2152.14, Invoking adult portion of sentence, is constitutionally deficient and ought to be struck down in its entirety. As a starting point, all legislative enactments enjoy a strong presumption of constitutionality. *State v. Collier* (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552. Therefore, if at all possible, this Court must apply the rules of construction to uphold the statute. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 446 N.E.2d 449. As Appellant is challenging the constitutionality of R.C. § 2152.14, he bears the burden of proving its invalidity. *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224. Here, Appellant has not met his burden.

The relevant portion of R.C. § 2152.14 provides:

(E)(1) The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

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<sup>3</sup> Similarly, in the matter of *In re: M.S.*, Cuyahoga App. No. 93550, 2010-Ohio-2101, the appellate court upheld the juvenile court's invocation of the adult portion of a SYO sentence based on the statutorily prescribed "clear and convincing" standard. *Id.* at ¶ 31.

(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person's conduct demonstrates that the person unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

Although the juvenile court procedure and burden of proof is clearly delineated in the statute, Appellant contends that it violates his constitutional right to due process and equal protection and that he is entitled to have a jury make the necessary findings based on proof beyond a reasonable doubt.

However, imposing an adult prison term upon a qualifying serious youthful offender does *not* offend the Ohio or United States Constitutions. It is a practice that should be carefully administered in the juvenile court system in compliance with R.C. § 2152.14. The decision of whether or not to invoke the adult portion of a serious youthful offender's suspended adult sentence is a decision that is best left to the expertise of the juvenile judge—who is familiar not only with the facts of each case, but is also familiar with the juvenile justice system. *In re: D.H.*, 120 Ohio St.3d 540, 901 N.E.2d 209, 2009-Ohio-9, ¶ 55.

With regard to blended SYO sentences this Court has noted:

The statutory scheme establishes that a juvenile subject to serious-youthful-offender status, despite the carrot/stick of the possible imposition of an adult sentence, remains squarely in the juvenile court system. The juvenile cannot be sent directly to an adult facility for the acts that led to his serious-youthful-offender status. The juvenile court retains jurisdiction. The juvenile would have to engage in separate conduct detrimental to his own rehabilitation in the juvenile system to be committed to an adult facility. The aims of the juvenile system--and its heightened goals of rehabilitation and treatment--control his disposition. To get the rehabilitative benefit of the juvenile system, the juvenile's case must remain in juvenile court.

Id. at 38. Although this Court has already upheld the imposition of blended sentences on serious youthful offenders, finding that R.C. § 2152.13, Serious youthful offender dispositional sentence, did

not violate D.H.'s due process protections, this Court left unanswered the matter of whether invoking the adult portion of a serious youthful offender's sentence under R.C. § 2952.14, Invoking adult portion of sentence, bears constitutional ramifications. *Id.* at 37, 61.

**As a general proposition, juveniles do not enjoy the right to a trial by jury.**

More than forty years ago this Court commented on the special need for juvenile courts and why juvenile offenders are purposely and justifiably treated differently than their adult criminal defendant counterparts. The opening paragraph of this Court's decision in *In re: Alger* (1969), 19 Ohio St.2d 70, 76-78, 249 N.E.2d 808 sets forth:

The Juvenile Court stands as a monument to the enlightened conviction that wayward boys many become good men and that society should make every effort to avoid their being attainted as criminal before growing to the full measure of adult responsibility. Its Existence, together with the substantive provisions of the Juvenile Code, reflects the considered opinion of society that childish pranks and other youthful indiscretions, as well as graver offenses, should seldom warrant adult sanctions and that the decided emphasis should be upon individual, corrective treatment.

*Id.* at 71-72. With the juvenile courts' unique objectives at the forefront, it has become a standing legal principle that, unlike adults, juveniles do not enjoy an unlimited constitutional right to trial by jury. *Id.*, at 76-78, *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 91 S.Ct. 1976, *In re: Anderson*, 92 Ohio St.3d 63, 66, 748 N.E.2d 67, 2001-Ohio-131, *In re: D.H.*, 120 Ohio St.3d 540, 901 N.E.2d 209, 2009-Ohio-9, at ¶ 54-60. With regard to juveniles, jury trials have long been considered to be neither constitutionally guaranteed, nor sound public policy. *In re: Alger* (1969), 19 Ohio St.2d, at 77-78.

Although Appellant asserts to this Court that a jury should find, based on proof beyond a reasonable doubt, the factors that would justify invoking an adult prison sentence under R.C. §

2152.14, his proposition must fail for the simple reason that juvenile offenders are deliberately and expressly treated differently, *not equally*, under Ohio law as compared to adult criminal offenders when it comes to trials by jury.

In upholding the constitutionality of R.C. § 2952.13, this Court considered juvenile offenders' narrow rights to trial by jury and reasoned:

We need not transform juvenile proceedings into full-blown adult trials and dispositions to preserve a juvenile's due process rights. As the court related in *McKeiver*, If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.

*Id.* at ¶ 60, citing *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 551, 91 S.Ct. 1976, 29 L.Ed.2d 647. Applying this same rationale to the very next statute in the Ohio Revised Code, it follows that R.C. § 2952.14 likewise does not violate juveniles due process rights or implicate the right to trial by jury. 4

**R.C. § 2152.14 must not be construed to implicate the right to trial by jury.**

Contrary to Appellant's assertions, R.C. § 2152.14 must not be read to implicate a right to jury trial. Juries can, and do, play a role in some juvenile adjudications. However a jury is not required for a juvenile court to invoke a SYO adult prison term.

This Court noted in *In re: D.H.* "The jury plays an important role in the adjudicative portion of Ohio's serious-youthful-offender disposition statutory scheme. Only the jury's factual determination makes the juvenile defendant eligible for a disposition that might include a stayed adult sentence." *In re: D.H.*, supra, ¶ 58. Yet the Court ultimately held, "Despite the jury's role in the adjudicative phase, removing the jury from the dispositional

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4 See, *In re: J.B.*, Butler App. No. CA 2004-09-226, 2005-Ohio-7029, at ¶ 123-141, (Ohio's serious

process does not violate due process.” *Id.* ¶ 59.

Since a serious youthful offender does not have the right to have his adult sentence imposed by a jury under R.C. § 2152.13, nor should he have the right to have his adult sentence invoked by a jury under R.C. § 2152.14. Due process does not dictate that invoking the adult portion of a serious youthful offender sentence requires a full-blown jury trial.

**Even in light of *Foster*, *Blakely*, and *Apprendi*, R.C. § 2152.14 does not implicate the right to trial by jury.**

In *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, this Court considered the holdings of the United States Supreme Court in *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296 in which the U.S. Supreme Court determined that a judge alone may not impose a sentence greater than what the jury verdict or defendant’s admissions allowed. In 2006, *Foster* relied on the holdings of *Blakely* and *Apprendi* in severing several portions of Ohio’s then-existing adult sentencing scheme on the grounds that the Ohio statutes violated criminal defendants Sixth Amendment rights to trial by jury.

Since *Foster*, the severed portions of the Ohio sentencing law have largely been reenacted by the General Assembly via H.B. 86, which became effective on September 30, 2011. This legislation updates Ohio’s criminal sentencing scheme and brings it back in line with the United States Supreme Court’s more recent decision in *Oregon v. Ice* (2009), 555 U.S. 160. In *Oregon v. Ice* the High Court determined that constrained judicial discretion in imposing consecutive sentences does not implicate an offender’s right to trial by jury. *Id.* at 163.

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In any event *Foster*, *Blakely*, and *Apprendi*, should not be construed by this Court as invalidating R.C. § 2152.14 on grounds of a jury trial violation. In this case the juvenile court did

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youthful offender sentencing scheme does not violate due process.)

not make any factual determinations in January, 2009, that unconstitutionally increased Appellant's sentence. Appellant's adult sentence already existed, having been imposed in June, 2005.

At the time of his admissions, Appellant jointly proposed the blended sentence to the juvenile court, and that court imposed the agreed sentence. (6/17/05 Tr. 60-70.) Thus, Appellant's adult prison term was properly imposed in June, 2005 pursuant to R.C. § 2152.13, and was based only on Appellant's delinquency admissions.<sup>5</sup> Accordingly, in January, 2009, the juvenile court's order invoking his adult sentence did not amount to an unconstitutional increase in the sentence beyond that which was already authorized.

This critical fact distinguishes SYO blended sentences entirely from *Foster*, *Blakely*, and *Apprendi*.<sup>6</sup> Even in light of the *Foster*, *Blakely*, and *Apprendi* decisions, R.C. § 2152.14 does not implicate the right to trial by jury.

**R.C. § 2152.14's "clear and convincing" standard is not unconstitutional.**

Appellant asserts that, to invoke a serious youthful offender's adult prison term, this Court should require proof beyond a reasonable doubt and that R.C. § 2152.14 is invalid because it only requires "clear and convincing" evidence. However, R.C. § 2152.14's "clear and convincing" standard of proof is not unconstitutional.

The invocation of an SYO adult prison sentence is very much akin to a judge revoking a

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<sup>5</sup> This Supreme Court has determined that "the Sixth Amendment prohibits a judge from imposing a greater sentence than that allowed by the jury verdict or by the defendant's admissions at a plea hearing." *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, at ¶ 7.

<sup>6</sup> See also, *In re: D.F.*, Summit App. No. 25026, 2010-Ohio-2999, at ¶ 21-22, ("[W]e decline D.F.'s invitation to extend the logic of *Foster* to a juvenile proceeding. \* \* \* [W]hile the trial court did conduct a hearing to determine if the adult portion of D.F.'s SYO sentence should be invoked pursuant to R.C 2152.14(E)(1), the trial court did not impose an original or new sentence. Rather, it

criminal defendant's community control sanctions and imposing upon that defendant their suspended prison term—or the imposition of a prison term upon an offender for a violation of the conditions of their supervised release. Adults do not enjoy a right to trial by jury in the assessment of whether a suspended prison term should be invoked. Rather, the ability to order a suspended sentence into execution is a power that is traditionally held by the court.

With regard to the suspension of prison terms, it has long been the law of this State that:

The power to stay the execution of a sentence, in whole or in part, in a criminal case, is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute. The suspension, being in favor of the prisoner, is for his benefit, and is valid, whether consented to by him or not. *When the suspension is upon conditions expressed in the judgment, the prisoner has the right to rely upon such conditions, and, so long as he complies therewith, the suspension will stand.*

*Weber v. State* (1898), 58 Ohio St. 616, 619, 51 N.E. 116, emphasis added. Upon the suspension of a prison term, then, courts have the discretion to determine whether the offender has complied with the conditions or whether the prison term should be invoked. See, *State v. Garrett*, Stark App. No. 2010 CA 00210, 2011-Ohio-691, at ¶ 13; *State v. Scott* (1982), 6 Ohio App.3d 39, 452 N.E.3d 517. In the adult court context, a community control revocation hearing is not a criminal trial and, as such, proof beyond a reasonable doubt is not the standard employed. *State v. White*, Stark App. No. 2009 CA 00111, 2009-Ohio-6447, ¶ 13; *Morrissey v. Brewer* (1972), 408 U.S. 471, 480-485. Similarly, the imposition of a prison term upon an offender who has violated the conditions of their supervised release does not implicate the right to a jury trial or violate the holdings of *Apprendi*. See, *U.S. v. Huerta-Pimental* (C.A.9 Cal. 2006), 445 F.3d 1220, at 1225, (“Supervised release, its revocation,

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invoked the adult portion of the Serious Youth Offender sentence which had already been imposed and suspended on March 25, 2003.”)

and associated penalties are part of the original sentence authorized by the fact of conviction, none of which requires impermissible judicial fact-finding.”)

R.C. § 2152.14(E) sets forth the clear and convincing standard for invoking SYO suspended sentences. This Supreme Court has defined clear and convincing evidence as, “that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’”; it is that “which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, at paragraph three of the syllabus. Clear and convincing evidence is a reasonable certainty of the truth of the matter.

Before invoking Appellant’s adult prison term, Appellant was provided with notice of reasons that the State requested the invocation, and he was provided with a hearing. At that hearing, Appellant was represented by counsel and had the opportunity to present evidence and cross-examine State witnesses. R.C. § 2152.14 (A)-(F) were fully complied with by the juvenile court. When the juvenile court invoked Appellant’s adult sentence based on clear and convincing evidence and in accordance with R.C. § 2152.14, the right to a trial by jury was not implicated, nor were Appellant’s rights to due process and equal protection violated.

**Conclusion.**

To adopt Appellant’s first proposition of law would be to transform juvenile dispositional proceedings into full-blown adult trials. The decision of whether or not to invoke the adult portion of a serious youthful offender’s sentence is a decision that is best left to the expertise of the juvenile judge. The ability to order a suspended SYO sentence into execution is a power that is traditionally and statutorily held by the juvenile court and should not be the function of a jury.

R.C. § 2152.14 is not inconsistent with this Supreme Court's holding in *Foster*. Serious youthful offenders do not have the right to have their adult sentence imposed by a jury under R.C. § 2152.13 (see, *State v. D.H.*, *supra*), nor should juveniles have the right to have their adult sentences invoked by a jury under R.C. § 2152.14. Due process does not dictate that invoking the adult portion of a serious youthful offender sentence requires a full-blown jury trial. For these reasons, the State of Ohio respectfully requests this Court overrule Appellant's first proposition of law.

In the event this Court is persuaded by Appellant's assertions, the State respectfully requests this Court employ the remedy previously utilized by this Court in *Foster* and, instead of striking down Ohio's SYO sentencing scheme, sever any portions of R.C. § 2152.14 that might be found to require impermissible judicial fact-finding in violation of Appellant's constitutional protections.

**APPELLANT'S PROPOSITION OF LAW NO. II:**

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

**The Juvenile Court maintained jurisdiction to impose the adult prison sentence upon this serious youthful offender pursuant to the order of remand from the Eighth District Court of Appeals.**

Appellant contends that the juvenile court lacked jurisdiction to invoke the adult portion of his SYO sentence due to Appellant's age at the time of the sentencing rehearing. Contrary to Appellant's assertion, the juvenile court maintained jurisdiction to impose the adult prison sentence upon him because the juvenile court was acting in compliance with an order of remand from the Eighth District Court of Appeals. At the Eighth District's direction, the juvenile court held a sentencing rehearing at which the court properly imposed post release control. Despite Appellant's age, the juvenile court retained jurisdiction to hold that hearing and to carry out the appellate court's directive.

In *J.V. II*, Appellant challenged the adult portion of his blended SYO sentence. In considering that appeal, the Eighth District noted that the juvenile court failed to include the mandatory period of post release control as required by law. The appellate court took into account this Supreme Court's precedent in reaching its conclusion. *In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, at ¶ 19-25.

Among other cases, the Eighth District indicated its reliance on *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. In fact this Supreme Court determined in *Jordan*, "Because a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law. As a general rule, if an appellate court determines that a sentence is clearly and convincingly contrary to law, it may remand for resentencing." *Id.* at ¶ 23.

The Eighth District also indicated its reliance on *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. Indeed, in *Simpkins* this Supreme Court held "Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated. The effect of vacating the sentence places the parties in the same position they would have been in had there been no sentence. \* \* \* A trial court's jurisdiction over a criminal case is limited after it renders judgment, but it retains jurisdiction to correct a void sentence and is authorized to do so." *Id.* at ¶ 22-23, internal citations omitted.

Based on *Jordan* and *Simpkins*, the Eighth District properly concluded in *J.V. II* that the adult prison sentence imposed on Appellant was void for lack of post release control and that the juvenile court maintained jurisdiction to hold a rehearing upon remand. The appellate court stated:

J.V. was born on March 11, 1988, and therefore, under the age of 18 at the time of the offense. J.V. received a blended juvenile and adult

sentence. He was confined to a juvenile institution until he obtained the age of 21, and given a *potential* six-year adult sentence. The potential adult sentence was based on a two-year sentence for felonious assault and a three-year sentence for aggravated robbery. The felonious assault and aggravated robbery sentences were to be served concurrent to each other but consecutive to a single three-year firearm specification sentence of one year.

J.V.'s alleged fighting and bad behavior occurred when he was 20 years old and in the custody of the juvenile court. J.V. was under the jurisdiction of the juvenile court at that time and had not yet reached the age of 21. The juvenile court had jurisdiction at the time of the alleged misbehavior of J.V. and that case is still active, through this appeal. The fact that J.V. is now 21 does not automatically transfer venue to the common pleas court in this particular situation. Jurisdiction remains with the juvenile court for the *limited* purpose of conducting a new hearing; making any and all, required notifications to J.V.; and conducting any resentencing issues that become necessary.

*In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 17-18.

Pursuant to the Eighth District's order, the juvenile court held Appellant's sentencing rehearing in February, 2010, at which time Appellant had already attained the age of twenty-one. However this fact did not preclude the juvenile court from holding the hearing, nor did it absolve the juvenile court from its obligation to comply with the order of remand from the Eighth District.

App. R. 12 (D) specifies, "where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings." Similarly, R.C. § 2505.39 requires: "A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution but shall send a special mandate to the lower court for execution or further proceedings." Thus, the juvenile court had jurisdiction to hold Appellant's rehearing for the limited

purpose of properly advising Appellant of the mandatory five-year period of post release control associated with his adult prison term.

The juvenile court held its hearing imposed and invoked the adult portion of Appellant's SYO sentence. (1/13/09 Tr. 122-139; 2/9/10 Tr. 18-20; 2/12/10 Tr. 35-41) To justify invoking the adult prison term (which now included the mandatory period of post release control), the juvenile court referred back to its prior hearing and ruling—a ruling that was not vacated or even considered by the Court of Appeals. See, *In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 25. Contrary to Appellant's assertion to this Court, a new hearing with regard to the State's October, 2008, motion to invoke the adult sentence was not required based on the appellate court's explicit remand. *In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 18.

Upon his post release control rehearing in the juvenile court, Appellant again appealed his adult sentence to the Eighth District—not only to challenge the merits of the juvenile court's decision to invoke the prison term—but also on the matter of whether the juvenile court had authority to conduct its rehearing in light of the fact that by February, 2010, Appellant was age twenty-one. In Appellant's third appeal the Eighth District correctly overruled his assigned errors. *In re: J.V.*, Cuyahoga App. No. 94820, 2010-Ohio-5490, ¶ 20. (“*J.V. III.*”)

Although Appellant continues to assert that the juvenile court lacked authority to correct the post release control error in his adult sentence and that the juvenile court lacked the authority invoke that sentence, the facts remain:

- (1) the juvenile court acted in compliance with a directive from the appellate court;
- (2) the juvenile court had no authority to ignore the order of remand;
- (3) Appellant committed acts while at MJCF that not only constituted violations of the rules of the institution and which could be charged as felonies;

(4) Appellant's conduct created a substantial risk to the safety and security of the institution and the victim; and,

(5) Appellant committed this conduct while serving a lawful juvenile disposition.

See, R.C. § 2152.14(A)(2). As such, Appellant was properly subjected to the sentencing rehearing and to having the suspended adult portion of his blended sentence (including post release control) invoked and ordered into execution in February, 2010.

Appellant's second proposition of law must not be adopted as it urges this Court to contort the jurisdictional provisions of R.C. § 2152.14 and this Court's precedent in *Jordan* and *Simpkins* to create the windfall for Appellant of not having to serve any adult prison term at all.<sup>7</sup> Appellant's suggested interpretation leads to a result that can be considered nothing less than absurd. Criminal defendants do not escape having to serve prison terms just because their original sentence failed to include post release control. Rather, where a sentence is void for lack of post release control, the case is remanded to the trial court for rehearing. See, R.C. § 2929.191 ("Correction to judgment of conviction concerning post-release control"); *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, at ¶ 26. In line with R.C. § 2929.191 and *Singleton*, juveniles such as Appellant should not be discharged from serving a lawful adult sentence simply because the juvenile court made a post release control error at an initial sentencing and the juvenile turned twenty-one years old before the omission could be corrected.

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<sup>7</sup> As previously noted Appellant actually completed his adult prison term, was released from the Ross Correctional Institution, and was placed under the supervision of Ohio's adult parole authority on January 19, 2011. <http://www.drc.state.oh.us/OffenderSearch/Search.aspx>  
[http://cpdocket.cp.cuyahoga.cc/p\\_CR\\_Docket.aspx](http://cpdocket.cp.cuyahoga.cc/p_CR_Docket.aspx)

Further, Appellant's second proposition of law must not be adopted because such a ruling would conflict with this Court's rationale in *State v. Fischer*, 128 Ohio St.3d 92, 942 N.E.2d 332, 2010-Ohio-6238. In *Fischer* this Court made abundantly clear the law with regard to criminal sentences that are void for lack of post release control. In overruling *Bezak*,<sup>8</sup> this Court held, "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside. Neither the Constitution nor common sense commands anything more." *Id.* at 26. Applied herein, neither the Constitution nor common sense commands that Appellant should evade service of the adult portion of his SYO sentence simply because the originally imposed prison term lacked the post release control component. Following the underpinnings of *Fischer*, the State now asks that this Court find that the juvenile court's jurisdiction to carry out the appellate court's order of remand continued despite Appellant having reached his twenty-first birthday. Appellant must not be permitted to dodge the entirety of his agreed upon adult prison sentence based solely on a post release control error that could not be remedied until Appellant happened to turn twenty-one.

For all of the foregoing reasons, Appellant's second proposition of law must fail. The State of Ohio respectfully requests this Court find no error in the proceedings below and dismiss Appellant's second proposition as having been improvidently allowed.

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<sup>8</sup> "We hold that when a trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing \* \* \* the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing. The trial court must resentence the offender as if there had been no original sentence." *State v. Bezak*, 114 Ohio St.3d 94, 868 N.E.2d 961, 2007-Ohio-3250, ¶16, *overruled by State v. Fischer*, 128 Ohio St.3d 92, 942 N.E.2d 332, 2010-Ohio-6238.

## CONCLUSION

To adopt Appellant's first proposition of law would be to transform juvenile courts' serious youthful offender proceedings into full-blown adult trials. Instead the State asks this Court find R.C. § 2152.14 to be constitutionally sound. The decision to invoke a serious youthful offender's sentence must be left to the expertise of juvenile judges—not juries. Neither due process nor equal protection considerations should invalidate this valuable statute. Without the option of SYO sentences, juveniles such as Appellant will be faced with just two contrasted alternatives of juvenile proceedings or trials in adult criminal court. For this reasons, in the event this Court finds in favor of Appellant, the State respectfully requests this Court not strike down the statute altogether, but instead sever any portions of R.C. § 2152.14 that could be found to require impermissible judicial fact-finding.

With regard to Appellant's second proposition of law, no substantial constitutional question and no matter of public or great general interest are presented. Upon reversal of a judgment by an appellate court, the lower court not only maintains jurisdiction to but *must* follow the directive of the order of remand. Accordingly, the State of Ohio respectfully requests this Supreme Court dismiss the second proposition as improvidently allowed.

Respectfully submitted,

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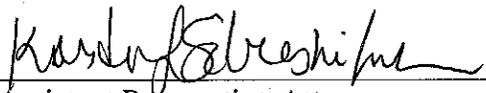
**SERVICE**

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