ORIGINAL

IN THE SUPREME COURT OF OHIO
S.CT. NO: 2008-0661

11-0107

IN RE J.V.	:	On Appeal from the Eighth District Court of Appeals CA 94820
A Delinquent Child	:	
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	:	
	:	

APPELLANT'S REPLY BRIEF

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INTRODUCTION

J.V. maintains, in his first proposition of law, that the SYO procedure for invoking a stayed adult sentence violates his due process, jury trial, and equal protection rights because it is predicated on judicial findings of fact under a relaxed burden of proof. In response briefs, the State and its Amicus Curiae the Ohio Attorney General, recognize that judicial fact-finding is a prerequisite to an SYO juvenile serving an adult prison sentence. (State's Br. at 12-14; AG's Br. at 17). Nevertheless, both argue that the SYO invocation procedure is constitutional for two related reasons: 1) the adult sentence is authorized, irrespective of any judicial fact-finding, by the underlying plea or verdict (State's Br. at 18-19 and AG's Br. at 16-17); and 2) the decision to invoke a delinquent child's adult sentence is "akin" to a trial court's decision to revoke a defendant's probation. (State's Br. at 19-21 and AG's Br. at 18-21). Both of these arguments are similarly flawed. The plea or verdict authorizes only an SYO dispositional sentence and keeps the child in the juvenile court for rehabilitation and not punishment. A juvenile court *cannot* impose punishment and send an SYO juvenile to adult prison based simply on his or her plea or verdict. It is only after the juvenile court finds the facts required by R.C. 2152.14 that it is permitted to exceed the "statutory maximum" of a stayed adult sentence, send the child to adult prison, and impose an adult conviction. In the adult context, the defendant's plea or verdict *by itself* results in an adult conviction for which the trial court can immediately send the adult to prison, though the court may elect to impose probation instead. Judicial fact-finding as a prerequisite to sending a child to adult prison with an adult conviction is fundamentally different than the "run of the mill" consequence of revoking an adult criminal defendant's probation. (AG's Br. at 21).

In his second proposition of law, J.V. argues that a juvenile court cannot impose criminal

punishment, including post-release control, after a child turns 21. The State fails to identify any legal authority to the contrary. Rather, it simply contends that the juvenile court had jurisdiction because it "was acting in compliance with an order of remand from the Eighth District Court of Appeals." (State's Br. at 22). Such an argument must fail because a court only has the jurisdiction conferred on it by law and jurisdiction cannot be created by judicial mandate.

CLARIFICATION REGARDING THE STATE'S STATEMENT OF THE FACTS

The issues presented on appeal do not turn on the specific testimony presented at J.V.'s invocation hearing or on the trial court's assessment of that testimony. Nevertheless, the State's recitation of the facts requires clarification in certain important respects.

A. Kevin Lacey made an unsubstantiated accusation against J.V. and had very little first-hand information about him.

Although the State argues that the invocation of the adult sentence was supported by Kevin Lacey's claim that he was assaulted by J.V. in July 2008, (State's Br. at 13), a neutral hearing officer from another facility found that allegation to be unsubstantiated. (1/13/09 Tr. at 12, 35-36, and 90). While the State seeks to discredit the hearing officer's conclusion, it is consistent with the Cohen Report's finding that staff at Marion around this time period "frequently submit[ted] reports that [were] incomplete and/or false." Cohen Rep. at 33. In any case, Lacey's unsubstantiated accusation cannot support the invocation of J.V.'s adult sentence because it was determined not to be a violation of the rules of institution.

In addition, while the State does not explicitly state that Kevin Lacey was J.V.'s unit manager, its brief could be misunderstood to suggest that he was J.V.'s unit manager. That is not the case. Lacey testified that he was *not* J.V.'s unit manager. (1/13/09 Tr. at 8-9 and 40). And, while Lacey apparently reviewed various daily reports regarding activity going on throughout the institution, Lacey's first-hand knowledge about J.V.'s conduct at Marion was limited to: 1) his

unsubstantiated allegation of assault; and 2) his response to a call about a large fight that took place in another unit on September 25, 2008 and involved 27 youth including J.V.

B. The juvenile court rejected Lacey's alleged testimony about J.V.'s role in a gang.

The State also argues that the invocation of J.V.'s adult sentence was supported by Lacey's testimony regarding J.V.'s alleged involvement in a gang. (State's Br. at 13). Here, the State fails to recognize that Lacey's testimony was not based on personal knowledge, was classic hearsay, and was specifically disregarded by the juvenile court. (1/31/01 Tr. at 129-30).

C. J.V.'s three successful years at Marion led to his approval for early release.

J.V. was first placed at Marion Juvenile Correctional Facility on July 27, 2005. (1/13/09 Tr. at 68 and 84). While at Marion, J.V. participated in numerous programs, and, by 2008, had completed all of the available programming. (1/13/09 Tr. at 69 and 84-85). Based on his progress at Marion, J.V. was approved, in July 2008, for release from Marion onto juvenile parole. (1/13/09 Tr. at 74-75 and 87). J.V.'s early release was derailed, however, by the July 22, 2008 incident involving Lacey—for which he was found not guilty. (1/13/09 Tr. at 77 and 87).

D. The State did not present sufficient evidence that J.V. engaged in conduct that created a 'substantial risk' to Marion.[1]

The State did not present adequate evidence that J.V.'s conduct created a "substantial risk" to the safety or security at Marion. It simply argued that J.V.'s removal made Marion "just a little bit safer." (1/13/09 Tr. at 131). Even that argument was based on pure conjecture. The State's primary argument regarding J.V.'s impact on the safety of the institution was that, after his transfer to adult prison, "the number of incidents at [Marion] decreased." (State's Br. at 7).

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[1] In its motion to invoke the adult sentence, the State did not allege that J.V. created a "substantial risk" to Marion. It made this argument for the first time at the invocation hearing, thereby violating J.V.'s due process right to notice. *Cole v. Arkansas* (1948), 333 U.S. 196, 201.

That argument was based entirely on Lacey's testimony that there were only 8-9 incident reports in J.V.'s unit in the December (after J.V. had been removed from Marion) as opposed to 31 incidents during J.V.'s last month at Marion. (1/13/09 Tr. at 54-55). Such testimony has no probative value because J.V. spent his last month at Marion out of his unit and therefore obviously did not contribute to the 31 incidents during that month. (1/13/09 Tr. at 62-63 and 110-11). Moreover, even if J.V. had been in the unit at the time (which he was not), the State's contention that J.V. "must have contributed to the problem," (1/13/09 Tr. at 131), is wildly speculative. This is particularly true given that Kevin Lacey did not have any first-hand knowledge about the dynamics and problems of J.V.'s unit before or after his departure.

LAW AND ARGUMENT

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

Under Ohio's SYO law, J.V. was sent to an adult prison because a judge found certain facts by clear and convincing evidence. Without judicial fact-finding, J.V. could not be punished and could never have been required to serve an adult prison sentence. Such judicial fact-finding, based upon a relaxed burden of proof, violated the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

With this reply brief, J.V. addresses the State and the Attorney General's various arguments that this Court should not reach the constitutional question or, in the alternative, should reject the constitutional arguments on their merit. Before turning to the legal arguments, J.V. begins by addressing the relevancy of the good intentions underlying the SYO sentencing option and the serious problems at DYS facilities.

A. Regardless of whether an SYO blended sentencing option is a sound policy choice, it

must comport with the State and Federal Constitutions.

The Attorney General spends much of its brief lauding the "effectiveness" of the blended sentencing approach, emphasizing its practical utility and flexibility, and arguing that it was championed by Chief Justice Moyer. (AG's Br. at 1-6, 20-21, and 24-28). However, the Attorney General fails to recognize that Chief Justice Moyer and the Ohio Sentencing Commission promoted the SYO legislation *before* the United States Supreme Court decided *Apprendi v. New Jersey* (2000), 530 U.S. 466, and thus obviously did not consider the implications of *Apprendi* and its progeny. J.V. does not doubt that the SYO statute was passed with good intentions; however, well-intentioned laws still must be constitutional.

B. The practical shortcomings of the juvenile justice system highlight the need for juveniles to receive the same constitutional protections as an adult before being required to serve an adult sentence.

While the Ohio Attorney General argues that this Court should consider the good intentions underlying the SYO sentencing option, it simultaneously discredits, as "irrelevant" and an "unwarranted distraction," any discussion of the shortcomings of the juvenile justice system. (AG's Br. at 26). The SYO invocation statute is not unconstitutional simply because of the severe problems at Ohio's youth detention facilities. However, the unfortunate reality facing juveniles in those facilities is relevant to a determination of what process is required before labeling their rehabilitation a failure and shipping them off to adult prisons.

With blended sentences, juveniles are offered a "last chance at rehabilitation" and their ability to avoid an adult sentence depends on their "successful" completion of a DYS term. (AG's Br. at 2 and 4). The blended sentencing theory breaks down when, as documented by the 2007 Cohen Report, juveniles are placed at DYS facilities that are "overcrowded, understaffed, and underserved," that are "almost devoid of meaningful treatment," that do not provide the

"constitutional minima" of a safe environment, and that are marked by an endemic use of "needless and excessive" force and isolation. Cohen Report at ii, iii, and 20. When a juvenile's failure to succeed in a failed system dictates whether he or she has to serve a lengthy adult prison sentence, due process requires strict adherence to procedural protections demanded by the state and federal constitutions to determine whether the failure should be fairly attributed to the juvenile as opposed to the system.

In the end, the Ohio Attorney General cannot have it both ways. This Court cannot simply view blended sentences through a theoretical lens, but must examine the reality of blended sentences as implemented in an imperfect juvenile justice system.

C. The Attorney General's procedural arguments fail to recognize that SYO proceedings involve two distinct stages and that this Court has already held that constitutional challenges to R.C. 2152.14 are ripe only *after* the second stage.

In urging this Court to avoid the constitutional issues presented by J.V.'s appeal, the Ohio Attorney General relies on a series of misplaced procedural objections. First, the Attorney General argues that this Court lacks jurisdiction to review the trial court's invocation of J.V.'s adult sentence pursuant to R.C. 2152.14 because J.V. and the State agreed upon an SYO dispositional sentence that included a juvenile disposition and *stayed* adult sentence. Second, the Attorney General argues that J.V. waived any challenge to the invocation of his adult sentence by entering an admission to an SYO specification. Both arguments fail to recognize that there are two *distinct* SYO proceedings and that a juvenile has the right to appeal each proceeding.[2]

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[2] The Attorney General also separately argues that J.V. failed to preserve his due process and equal protection claims. This argument does not rely on what actually occurred below, but on a misstatement in J.V.'s June 14, 2010 appellate brief. While that brief did state that "these constitutional arguments were not raised below," that statement was mistakenly copied from another brief and was inaccurate. Both constitutional arguments were made before the juvenile court by defense counsel. (2/9/10 Tr. at 5-8) (arguing that J.V. was improperly being treated "like an adult" without "the same Constitutional protections.") Moreover, contrary to the Attorney

1. The two stages of an SYO proceeding: 1) imposition of a juvenile disposition and a stayed adult sentence; and 2) invocation of an adult sentence.

Before a juvenile can actually serve an adult prison sentence pursuant to an SYO dispositional sentence, two separate sets of findings must be made at two different proceedings.

At the first stage of the proceeding, a juvenile court imposes a "serious youthful offender dispositional sentence" upon a delinquent child who is eligible for an SYO sentence.[3] R.C. 2152.13(D). At this stage, the juvenile court imposes "one or more traditional juvenile dispositions" and an adult sentence that is automatically stayed "pending the successful completion of the traditional juvenile dispositions imposed." R.C. 2152.13(D). A juvenile cannot, at this stage of the proceeding, "be sent directly to an adult facility for the acts that led to his serious-youthful-offender status." *State v. D.H.* (2009), 120 Ohio St. 3d 540, 546. The juvenile must be kept in the juvenile system after the first stage in the SYO proceeding and does not receive an adult conviction. The instant appeal does *not* address this stage of the SYO proceeding.

What the instant appeal does address is the *second stage* of the SYO proceeding. An SYO juvenile can only be "committed to an adult facility" if a juvenile court makes several additional findings, including that the juvenile subsequently "engage[d] in separate conduct detrimental to his own rehabilitation in the juvenile system." Id. (R.C. 2152.14(E)(1)). If the

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General's contention in its brief, the Eighth District did not "decline[] to address" J.V.'s Fourteenth Amendment arguments. (AG's Br. at 22). The Eighth District specifically recognized that J.V.'s constitutional challenge was based on "the Sixth and Fourteenth Amendments to the United States Constitution and Ohio's constitutional counterparts" and rejected the arguments on their merits. *In re J.V.*, Cuyahoga App. No. 94820, 2010 Ohio 5490, ¶¶ 22-24.

[3] The SYO dispositional sentence can either be discretionary or mandatory. In J.V.'s case, the SYO dispositional sentence was mandatory because he was adjudicated delinquent of a first-degree felony offense of violence involving a firearm and because he was over 15 years old at the time of the offense. R.C. 2152.11(D)(1).

juvenile court does not make the necessary findings, it lacks the authority to invoke the juvenile's adult sentence. Id. at 545-46.

2. The appropriate time to challenge the constitutionality of the invocation of the adult sentence is *after* the sentence is invoked pursuant to R.C. 2152.14.

The Ohio Attorney General argues that J.V. cannot challenge the constitutionality of the second stage of the SYO proceeding—where the adult sentence is actually invoked—because he did not contest the first stage of the SYO proceeding. Specifically, the Attorney General argues that J.V.'s is procedurally barred from challenging the invocation of his adult sentence because he agreed, during the first stage of the proceeding, to the length of the stayed adult sentence and because he admitted to acts that gave the juvenile court the authority to impose an SYO dispositional sentence under R.C. 2152.13.

The Attorney General's procedural arguments fail to appreciate the distinction between the two stages of the SYO proceeding. Because the two stages of an SYO proceeding are separate and distinct, a juvenile has the right to appeal from both proceedings. The juvenile can challenge either, neither, or both the imposition of a SYO dispositional sentence (stage one) and the invocation of the adult sentence (stage two). In fact, this Court has already held that constitutional arguments challenging the invocation of the adult sentence (stage two) are premature when an SYO dispositional sentence has been imposed under R.C. 2152.13, but not yet invoked under R.C. 2152.14. *D.H.*, 120 Ohio St. 3d at 546. The proper time to challenge the "constitutional ramifications of invoking the adult sentence under R.C. 2152.14" is after that sentence is invoked. Id. That is precisely what J.V. has done in this case.

The Attorney General's "agreed sentence" argument is misplaced because J.V. is not challenging his SYO dispositional sentence under R.C. 2152.13 or the length of J.V.'s stayed sentence from that proceeding. The parties agreed to a particular SYO dispositional sentence

under R.C. 2152.13, but neither party agreed to have the adult portion of that sentence invoked at a future time based upon unknown future allegations. While R.C. 2953.08(D) would limit J.V.'s ability to challenge the first stage of the proceeding, his agreement to the length of the stayed adult sentence does not restrict his ability to challenge the second stage of the SYO proceeding.

The Attorney General's second procedural objection is similarly meritless. The Attorney General argues that J.V.'s admission (or plea) to delinquent conduct that led to an SYO disposition "waived any Sixth Amendment rights he had with respect to the adult portion of his sentence." (AG's Br. at 15). This argument misunderstands the nature of SYO proceedings. As explained by this Court in *D.H.*, the constitutional challenge to the invocation of an adult sentence is not even ripe until after the adult sentence is actually invoked. *D.H.*, 120 Ohio St. 3d at 546. Regardless of whether the SYO dispositional sentence arises from jury verdict or a plea, the juvenile court "may not invoke the adult sentence without another hearing" at which the juvenile court must make certain factual findings. *Id.* at 545-46. Indeed, the Attorney General acknowledges that, despite any admissions by the juvenile to the original SYO dispositional sentence, the juvenile court lacks the authority to invoke the adult sentence (stage two) absent a finding of "future misconduct." (AG's Br. at 15). It is the juvenile court's finding of "future misconduct" which is the subject of the constitutional challenge here. Because that finding was not resolved by J.V.'s admissions during the first stage of the proceeding, there is no waiver.[4]

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[4] The Attorney General's reliance on *State v. Hunter* (2009), 123 Ohio St. 3d 164, is particularly misplaced. In *Hunter*, this Court held that because the defendant "chose to submit [the repeat violent offender] determination" to the trial court, instead of a jury, he waived any arguments that the judicial determination of his RVO status violated his Sixth Amendment rights. *Id.* at 170. In *Hunter*, the defendant specifically executed a written jury trial waiver on the RVO issue. *Id.* at 165. In this case, J.V. did not explicitly or implicitly waive his Sixth Amendment rights in connection with the second stage of the SYO proceeding. On the contrary, he specifically argued that the invocation stage of the SYO proceeding was unconstitutional. (2/9/10 Tr. at 5-6).

D. The second stage of Ohio's SYO proceeding is unconstitutional because it permits a juvenile to be sent to adult prison and receive an adult conviction based on judicial fact-finding and a clear and convincing evidence standard.

Turning, then, to the second stage of the SYO proceeding reveals the constitutional problem at the heart of J.V.'s first proposition of law. At the second stage, a juvenile is denied the right to a jury determination, beyond a reasonable doubt, of the facts necessary for the juvenile to receive an adult conviction or to serve an adult sentence.

1. The "statutory maximum," for *Apprendi* purposes, based on J.V.'s plea was a juvenile disposition and a *stayed* adult sentence.

The State and its Amicus argue that there is no constitutional violation because, in their view, the juvenile court did not impose any punishment during the second stage of the SYO proceeding that was "greater than that allowed by" J.V.'s plea at the first stage of the proceeding. (AG's Br. at 16-18). That argument fails as it is based upon a misinterpretation of the "statutory maximum" authorized by J.V.'s plea.

It is by now well-established that *any fact* "[o]ther than the fact of a prior conviction" that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 489; see also *Cunningham v. California* (2007), 549 U.S. 270, 288-89 (explaining that *Apprendi* creates a "bright-line rule" to which there is but one exception (existence of a prior conviction)). "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington* (2004), 542 U.S. 296, 303 (emphasis in original). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-304.

Based solely on the facts reflected in J.V.'s plea, the juvenile court could *not* send him to

adult prison. *D.H.*, 120 Ohio St. 3d at 546. Without any additional findings, the "statutory maximum" sentence based on J.V.'s plea is simply a traditional juvenile disposition—the second stage adult sentence has been *stayed.* To send J.V. to adult prison and exceed the "statutory maximum" of a stayed adult sentence, additional fact-finding is required pursuant to R.C. 2152.14(E)(1). And, because that fact-finding is entrusted to a judge based upon a clear and convincing standard, it does not comport with the Sixth and Fourteenth Amendments.[5] Before sending a juvenile to adult prison, the State "should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State." *Blakely v. Washington* (2004), 542 U.S. 296, 313-14.

2. The adult probation model is an inapt comparison for SYO invocation hearings.

The State also argues that judicial-fact finding to invoke an adult prison sentence is constitutionally sound because such a proceeding is no different than probation, post-release control, and supervised release violation hearings. While there may be some superficial similarities between an SYO invocation hearing and adult probation violation hearings, there are three fundamental differences that render the comparisons inapt: 1) while the adult could be immediately sent to prison based solely upon the fact of the conviction, the juvenile cannot be sent to prison based solely upon the conduct underlying the adjudication; 2) while the adult

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[5] The Attorney General claims that six appellate courts have addressed the "very issue" presented by this case—whether a judge can constitutionally invoke an adult sentence based upon additional fact-finding—and that "all six have affirmed the constitutionality of Ohio's blended sentencing scheme." (AG's Br. at 17-18). That is not actually true. Only one of the Attorney General's cases addressed a constitutional challenge to the invocation of an adult sentence, the second stage of the SYO proceeding. *In re D.F.*, Summit App. No. 25026, 2010 Ohio 2999. The other cases involved a constitutional challenge to the first stage of the SYO proceeding and were decided before this Court resolved that issue in *D.H. In re Strum*, Washington App. No. 05-35, 2006 Ohio 7101; *In re J.B.*, Butler App. No. 2004-09-226, 2005 Ohio 7029; *In re Seavolt*, Morrow App. No. 2006-10 & 2006-11, 2007 Ohio 2812; *In re Lee J.*, Sandusky App. No. 06-30, 2007 Ohio 2400; *In re Wheeler*, Cuyahoga App. No. 90766, 2008 Ohio 3656.

defendant was already subject to punishment before the revocation hearing and is kept within the same justice system, the juvenile was being rehabilitated and was not punished until after the invocation hearing sent him to adult prison; and 3) while the adult revocation hearing does not result in a new criminal conviction, the invocation of the juvenile's adult sentence does result in an adult criminal conviction.

First, unlike an adult sentence to probation, the juvenile court, in the SYO context, has *no* authority to send a juvenile "directly to an adult facility for the acts that led to his serious-youthful-offender status." *D.H.*, 120 Ohio St. 3d at 546. When a juvenile is adjudicated delinquent of acts that lead to a SYO dispositional sentence, the most the trial court can impose is a juvenile disposition and a stayed adult sentence. The same is not true for probation. When a trial court elects to impose probation, it does so as an "act of grace." *Thomas v. Maxwell* (1963), 175 Ohio St. 233, 235. The trial court, based merely on the conviction itself and nothing more, can send the adult immediately to prison. At an adult probation violation hearing, the trial court is simply doing what it could have done originally; it is imposing the prison sentence that was already authorized by the jury's verdict or the defendant's plea. Because no additional fact-finding was necessary to impose prison, there is no Sixth Amendment violation to judicial fact-finding at a probation violation hearing.

Second, the State's comparisons of SYO invocation hearings to adult post-release control and supervised release revocation hearings overlook the fact that an SYO juvenile does not actually face criminal punishment *for the first time* until *after* the judge makes the necessary stage two findings and invokes the adult sentence. As long as the SYO juvenile remains in stage one, the juvenile has never been punished at all. The jury finding (or admission) of delinquency only authorizes rehabilitation; it does not permit punishment. It has long been recognized that

juvenile proceedings are civil in nature and that juvenile dispositions, including detention at a DYS facility, are intended "to rehabilitate, not to punish." *In re Caldwell* (1996), 76 Ohio St.3d 156, 157; see also *In re Anderson* (2001), 92 Ohio St.3d 63, 65; *D.H.*, 120 Ohio St. 3d at 549. A juvenile's commitment to a DYS facility "is not designed as a punishment for crime" but rather to place delinquent juveniles "under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority." *In re Agler* (1969), 19 Ohio St. 2d 70, 72; *see also In re Caldwell*, 76 Ohio St. 3d at 159 (explaining that "detention . . . is itself a means and method of education and rehabilitation.")

The fact that punishment is not imposed until after the adult sentence is invoked pursuant to R.C. 2152.14 distinguishes it from the supervised release (and post-release control) revocation hearings. In rejecting Sixth Amendment challenges to the supervised release revocation hearings, federal courts have emphasized that supervised release is "not additional punishment" but rather is simply part of the original punishment authorized by the conviction. *See United States v. Heurta-Pimental* (9th Cir. 2006), 445 F. 3d 1220, 1225; *see also United States v. McIntosh* (7th Cir. 2011), 630 F. 3d 699, 703. Revocation of supervised release is simply part of the punishment already authorized by a jury verdict.

The Sixth Amendment does not permit a judge to inflict "punishment that the jury's verdict alone does not allow." *Blakely*, 542 U.S. at 304. That fundamental principle is not violated for an adult when a jury verdict permits the imposition of punishment, including supervised release (or post-release control) and its potential revocation. It is violated, however, when a judge punishes the juvenile for the first time at stage two based on judicially-found facts that were wholly unrelated to the conduct underlying the SYO dispositional order. In the latter case, the jury is improperly "relegated to making a determination that the defendant at some point

did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Id.* at 307 (emphasis in original).

Finally, the probationary comparisons offered by the State also fail to recognize that the invocation of an adult sentence not only sends a juvenile to an adult prison and punishes the juvenile for the first time, but also has the consequence of convicting the juvenile of an adult criminal offense.[6] An SYO juvenile can only be convicted of an adult offense if the State proves *both* that: 1) the juvenile committed acts that require or permit the imposition of a serious-youthful-offender disposition; *and*, 2) the juvenile, while serving the juvenile portion of an SYO dispositional sentence, committed further "misconduct." R.C. 2152.13(D) and 2152.14(E).

Thus, proof of further misconduct pursuant to R.C. 2152.14(E) is an essential element of the adult criminal conviction for an SYO juvenile. It is axiomatic that an individual has a right to a jury determination of "all of the elements" of an adult criminal charge, *see United States v. Gaudin* (1995), 515 U.S. 506, 511; and that an individual cannot be convicted of a crime absent proof of "every element" beyond a reasonable doubt, *Jackson v. Virginia* (1979), 443 U.S. 307, 314 and 316. Because the findings in R.C. 2152.14(E) are essential elements of an adult criminal conviction, a juvenile has the right to have a jury find those facts beyond a reasonable doubt.

In sum, the State's reliance on adult probation/post-prison supervision models fall short when juxtaposed to an SYO proceeding. When a juvenile court invokes the adult portion of an SYO sentence, it has several serious and constitutionally-significant consequences: 1) It transfers a child (as young as fourteen years old) from the rehabilitative-focused juvenile justice system to the adult criminal justice system; 2) It sends the child to an adult prison facility; and 3)

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[6] Juveniles who do not have their adult sentences invoked "leave the system at age twenty-one with a clean record" and do not have a permanent record. (AG's Br. at 27).

It imposes an adult criminal conviction upon the child. The adult models do not provide apt comparisons because the adult defendant is kept within the same justice system, receives a punishment that is authorized by the mere fact of the conviction, and does not receive a new criminal conviction. The "run-of-the-mill" consequence of revoking an adult criminal defendant's probation/supervision, (AG's Br. at 21), is fundamentally different from placing a child in an adult prison and saddling the child with a permanent adult criminal record.

E. The proper remedy for the constitutional violations is to declare the SYO statute unconstitutional.

As explained in J.V.'s initial brief, the proper remedy for the constitutional violations in this case is to declare the SYO provisions unconstitutional in their entirety. The State and its Amicus, on the other hand, suggest that the proper remedy is "severance of the factfinding requirement in R.C. 2152.14(E)(1)." While the State's proposed remedy would keep the SYO option available, it would severely undermine the integrity of the SYO sentencing procedure.

If this Court were to sever the offending provisions without adding any language, then the invocation statute would be deprived of all meaning. R.C. 2152.14(A), (B), (C) would still purportedly limit the situations under which the prosecuting attorney or DYS can seek the invocation of the adult sentence. However, there would be no check on the prosecutorial discretion and juvenile court judges could invoke an adult sentence even if the necessary conditions established by the General Assembly in subsections (A), (B), and (C) were not met. By severing the unconstitutional portions of R.C. 2152.14(E)(1), all that would remain is "The juvenile court may invoke adult portion of a person's serious youthful offender dispositional sentence[.]"[7] Such unfettered discretion is inconsistent with purported goals of the SYO

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[7] The severed portions of R.C. 2152.14(E)(1) are crossed out:

sentencing procedure and is an unavoidable consequence from the State's suggested remedy.[8]

The SYO sentence is designed to encourage juvenile offenders to make efforts at rehabilitation with the promise that they will not serve an adult prison sentence if they successfully complete their traditional juvenile disposition. R.C. 2152.13(D)(1)(c) and (D)(2)(a)(iiii). If this Court were to sever the fact-finding in R.C. 2152.14(E)(1), there would be no guidance as to what successful completion means and no guarantee that a juvenile would remain in the juvenile justice system absent specific future misconduct. Severance of R.C. 2152.14(E)(1) would dramatically alter the "carrot/stick" feature of the blended sentence. The

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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:~~

~~1. The person is "serving the juvenile portion of a serious youthful offender dispositional sentence." R.C. 2152.14(E)(1)(a).~~

~~2. The person is at least fourteen years old and has been admitted to a DYS facility, or criminal charges are pending. R.C. 2152.14(E)(1)(b).~~

~~3. The "person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction. R.C. 2152.14(E)(1)(c).~~

~~4. And either of the following:~~

- ~~The person committed an act, while in custody or on parole, that is a violation of the rules of the institution or the conditions of supervision and could be charged as any felony or as a first-degree misdemeanor. R.C. 2152.14(A)(2)(a), (B)(1), and (E)(1)(c).~~

- ~~The person is engaging in conduct that "creates a substantial risk to the safety or security" of the institution, community, or victim. R.C. 2152.14(A)(2)(b), (B)(2), and (E)(1)(c).~~

[8] While the Attorney General suggests that juvenile courts would need to consider the objectives in R.C. 2152.01 in "deciding whether to invoke the adult sentence," (AG's Br. at 24, n.3), that is not the case. The generic considerations set forth in R.C. 2152.01 apply to "dispositions" for juvenile offenders. They do not apply to adult sentences.

blending sentencing scheme would still carry a significant "stick"—an adult prison sentence—but that stick could be used at any time, for any reason, and would be virtually unreviewable. The "carrot" of the blended sentencing scheme—the promise of remaining in the juvenile system if offenders "make a break with their criminal past"—would be substantially eroded and could not be enforced. Because severance of just R.C. 2152.14(E)(1) would "fundamentally disrupt" the blended sentencing statutory scheme, it is not appropriate.

The State's severance remedy would merely trade one constitutional problem for another by creating an unconstitutionally vague law. A vague law violates due process for two reasons: 1) It fails to give "fair notice of the offending conduct," *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162; and 2) It impermissibly "delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109; *see also State v. Collier* (1991), 62 Ohio St. 3d 267, 269-72. The State's severance remedy creates just such a vagueness problem with respect to the second stage of the SYO proceeding. When SYO juveniles can be sent to adult prison for any reason, they do not have "fair notice" of the offending conduct and cannot conform their behavior to ensure they remain in the juvenile system. Further, by eliminating any limitation on when SYO juveniles could be sent to adult prison, that important decision would be left to the unfettered discretion of prosecutors and judges, creating the danger that the invocation of an adult sentence would be "arbitrary and discriminatory."

The Attorney General also urges this Court to adopt severance as a remedy because otherwise "juvenile courts will lose this valuable tool and juvenile offenders will lose this valuable opportunity." (AG's Br. at 27). In essence, the Attorney General is arguing that it would

be better to have an imperfect SYO sentencing system rather than none at all. However, that is a false choice. If the SYO sentencing system has been as successful as the Attorney General claims, then the General Assembly could certainly reenact an SYO sentencing option that remains consistent with its goal of encouraging rehabilitation with a "carrot/stick" approach without violating the state and federal constitution.[9]

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

J.V.'s second proposition of law requires a simple application of the statutory provisions governing the jurisdiction of juvenile courts. As explained in J.V.'s initial merit brief, the statutory provisions dealing with juvenile jurisdiction conclusively establish that a juvenile court cannot impose criminal punishment after a delinquent child turns twenty-one. In this case, the juvenile court invoked the adult portion of J.V.'s serious youthful offender disposition and imposed a six-year prison sentence with post-release control *after* J.V. turned 21. Because the juvenile court had no jurisdiction over J.V. after he turned 21, this Court must vacate his adult sentence, including the term of post-release control.

In its response, the State failed to identify a single statutory provision in the juvenile code to support its claim that the juvenile court had jurisdiction to impose criminal punishment upon J.V. after the age of 21. Instead, it argues the juvenile court "maintained jurisdiction to impose the adult prison sentence upon him because the juvenile court was acting in compliance with an

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[9] Even if this Court elects the State's proposed remedy of severance, that remedy cannot be applied to J.V. because the juvenile court no longer has jurisdiction over his case. Moreover, the retroactive application of the severance remedy would violate J.V.'s due process rights by subjecting him to an adult sentence without the guarantee that his adult sentence would only be invoked under the circumstances required by R.C. 2152.14(E)(1). *See Rogers v. Tennessee* (2001), 532 U.S. 451, 456; *Bouie v. South Carolina* (1964), 378 U.S. 347, 354.

order of remand from the Eighth District Court of Appeals." (State's Br. at 22 and 25). In essence, the State is arguing that the juvenile court's jurisdiction was created by the appellate court mandate.

This Court should reject the State's argument because jurisdiction cannot be created by court order. "Courts derive their jurisdiction from constitutional provisions, or from laws enacted by the legislature acting within its constitutional authority, and can exercise only the jurisdiction that is so granted to them." *Apt v. Apt* (2011), 192 Ohio App. 3d 102, 105. A court only has the jurisdiction "conferred on it by law" and cannot create its own jurisdiction. *Cox v. Court of Common Pleas* (1988), 42 Ohio App. 3d 171, 174. Because courts cannot create their own jurisdiction, the State's argument, that the appellate court mandate conferred jurisdiction on the juvenile court, lacks merit.

The State also urges this Court to reject J.V.'s proposition of law because it creates a "windfall" for J.V. and "leads to a result that can be considered nothing less than absurd." (State's Br. at 26). The State's hyperbolic concerns cannot justify ignoring the clear jurisdictional limits of juvenile courts. Moreover, the State's concerns have already been resolved by this Court in *State v. Fischer* (2010), 128 Ohio St. 3d 92. Prior to *Fisher*, the failure to impose post-release control rendered a criminal defendant's entire sentence void. *See State v. Bezak* (2007), 114 Ohio St. 3d 94, syllabus. However, this Court overruled that portion of the *Bezak* decision in *Fischer*, explaining that the failure to properly impose post-release control only invalidates that portion of the sentence. 128 Ohio St. 3d at 101-102.

While in J.V.'s case the failure to impose post-release control invalidated his entire SYO dispositional sentence, the analysis would be different post-*Fischer*.[10] Post-*Fischer*, the juvenile

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[10] Because J.V.'s case was not governed by *Fischer*, the juvenile court's failure to impose post-

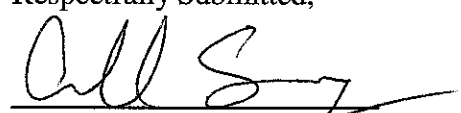
court's failure to impose post-release control would not imperil any adult prison sentence invoked pursuant to R.C. 2152.14. And, the juvenile court would be free to add post-release control as long as it still had jurisdiction (i.e. before the juvenile turned 21).

Ultimately, the State asks this Court to muddy clear jurisdictional lines to ensure that one individual receives a few years of post-release control that the juvenile court failed to impose on no less than three different occasions. The law does not permit, and common sense does not support, such a result.

CONCLUSION

For the reasons set forth above and in appellant's initial brief, Defendant-Appellant J.V. respectfully asks this Court to adopt his propositions of law, reverse the decision of the Eighth District Court of Appeals, and vacate the adult portion of his SYO sentence.

Respectfully Submitted,



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SERVICE

A copy of the foregoing Appellant's Reply Brief was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 28 day of October 2011.

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release control rendered his adult prison sentence void. However, given that he has now served the entirety of his prison sentence, the state's "windfall" arguments are particularly misplaced.