

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF D.H., A MINOR : Case No.  
: :  
: On Appeal from the Court  
: of Appeals of Ohio, Tenth  
: Appellate District, Franklin  
: County Court of Appeals,  
: No. 06AP-250  
:

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE, THE JUSTICE FOR CHILDREN PROJECT

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A juvenile has a constitutional right to a jury trial when the state seeks to punish him as an adult by imposing adult prison terms upon him. Therefore, a statute that allows a judge, rather than a jury, to make factual findings that require the imposition of an adult prison term upon a juvenile, is unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 and *Blakely v. Washington* (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403. .... 3

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## EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

This case presents a perfect opportunity for this Court to address an issue left unresolved by the otherwise comprehensive decisions in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855. Specifically, the case squarely presents the issue of whether juvenile courts may rely on judicial factfinding to impose a discretionary prison sentence upon a “Serious Youthful Offender” (SYO) determination under R.C. 2152.13. The *Foster* decision, the U.S. Supreme Court decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, *Blakely v. Washington* (2004), 542 U.S. 296, and the Court’s recent decision in *Cunningham v. California* (2007) --- U.S. ---, --- S.Ct. ---, 2007 WL 135687, No. 05-6551, all indicate that such sentences violate the United States Constitution. See *id.* at \*1 (holding that “placing sentence-elevating factfinding within the judge’s province, violates a defendant’s right to trial by jury safeguarded by the Sixth and Fourteenth Amendments”). Given that a significant number of young alleged delinquents are now being treated as “serious youthful offenders,” the validity of such discretionary sentences is important both to those individuals charged and to the broader populace, including those directly impacted by juvenile crime. Moreover, if the Court chooses not to address this issue, it is likely that both the merits and any remedy will be decided by a federal court. Cf. Order Requesting State Response to Petition for Certiorari filed in *J.B. v. Ohio* (December 22, 2006), --- U.S. ---, No. 06-7611. Given this Court’s role as the primary interpreter of Ohio law, as well as the gravity of the issues at stake, amicus curiae respectfully requests the Court to accept jurisdiction over this case, as it presents a substantial constitutional question about Ohio’s sentencing

statutes for serious youthful offenders. and is a matter of public and great general interest. See S. Ct. Prac. R. III, Section 6.

#### STATEMENT OF THE INTEREST OF AMICUS CURIAE

Amicus curiae, the Justice for Children Project, is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. The Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum, a one-semester course open to eligible third-year law students certified as Legal Interns by the Ohio Supreme Court, the Justice for Children Project strives to advance the cause of children's rights.

Because of the important interests raised in this case, the Justice for Children Project hereby offers this amicus memorandum in support of jurisdiction pursuant to S. Ct. Prac. R. III, Section 5. Amicus has no relationship to any of the individuals involved in this litigation.

## STATEMENT OF THE CASE AND FACTS

Amicus curiae hereby adopts the Statement of Case and Facts set forth in the Memorandum of the petitioner.

## ARGUMENT

### *Petitioner's First Proposition of Law:*

A juvenile has a constitutional right to a jury trial when the state seeks to punish him as an adult by imposing adult prison terms upon him. Therefore, a statute that allows a judge, rather than a jury, to make factual findings that require the imposition of an adult prison term upon a juvenile, is unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 and *Blakely v. Washington* (2004) 542 U.S. 296, 124 Sup.Ct. 2531, 159 L.Ed.2d 403.

S.B. 179, effective January 1, 2002, authorizes Ohio's juvenile courts to conduct jury trials in "serious youthful offender" (SYO) cases. Where the jury finds the subject minor to be delinquent, the law requires the juvenile court to impose a stayed adult prison sentence in certain cases (a "mandatory SYO sentence"). See R.C. 2151.11(B)(1), (C)(1) and (D)(1). See also R.C. 2151.13(D)(1). The statute also permits the court, in its discretion, to impose a deferred adult prison sentence in other cases (a "discretionary SYO sentence"). See R.C. 2151.11(B)(2), (C)(2), (D)(2), (E)(1), (E)(2), (F)(1), (F)(2), and (G)(1). See also R.C. 2151.13(D)(2).

Such prison sentences can be lengthy, and are indistinguishable from sentences imposed on adult offenders. In this case, for example, in addition to imposing a traditional indefinite juvenile disposition committing D.H. to the Department of Youth Services until he reaches the age of 21, the juvenile court also imposed a discretionary adult sentence of six years incarceration. See *State v. D.H.*, Franklin App. No. 06AP-250, 2006-Ohio-6953 at ¶¶25-6.

Prior to imposing such a discretionary SYO sentence, the trial court is required to make a finding on the record that

given the nature and circumstances of the violation and the history of the child, the length of time, level of security and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of Revised Code will be met . . . .

R.C. 2152.13(D)(2)(a)(i). As this Court is well aware, statutes that require courts to engage in factfinding prior to imposing an enhanced sentence raise serious constitutional questions. See generally *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, this Court held several provisions of Ohio's felony sentencing statutes to be unconstitutional based on the very same type of judicial factfinding required by R.C. 2151.13(D)(2).

The reason for this is that, like many state legislatures that attempted sentencing reform, the Ohio General Assembly, through its enactment of S.B. 2 in 1996, authorized narrower sentencing ranges and *restricted the discretion of trial judges by mandating that underlying "findings" be made before increasing what seems to be a presumptive sentence*. In other words, the sentence is not determined "solely on the basis of facts reflected in the jury verdict or admitted by the defendant," as *Blakely* requires.

*Foster* at ¶53 (emphasis added), quoting *Blakely v. Washington* (2004), 542 U.S. 296, 303. Both the United States Supreme Court's decision in *Blakely* and this Court's decision in *Foster* rest on the right to jury trial protected by the Sixth Amendment to the United States Constitution.

Although prior precedent suggests that juveniles do not have a constitutional right to a jury trial in delinquency proceedings, reliance on such precedents would be misplaced. In *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, the United States Supreme Court held that the constitutional right to a jury trial does not strictly apply to

*traditional* juvenile court proceedings. See *Id.* at 543 (Blackmun, J., for the plurality) (holding that the Sixth Amendment right to jury trial does not attach to traditional juvenile court proceedings). Of course, SYO cases are hardly *traditional* juvenile proceedings because of the potential imposition of adult sanctions. Moreover, it is clear that a juvenile in an SYO proceeding is “entitled to an open and speedy trial by jury in juvenile court,” R.C. 2152.12(C)(1); and has “all rights afforded a person who is prosecuted for committing a crime.” R.C. 2152.13(C)(2). Thus, juveniles have a right to a jury trial in SYO cases; to undermine that right not only constitutes a statutory violation but also runs afoul of both the state and federal Constitutions.

*McKeiver* is inapposite for an additional reason. The *McKeiver* Court specifically rejected the claim that the failure to extend the right to a jury trial violated the Fourteenth Amendment Due Process Clause because, in the Court’s view, “[t]he imposition of the jury trial on the juvenile court would not strengthen greatly, if at all, the fact-finding function . . . .” *Id.* at 547. By contrast, the United States Supreme Court decisions in *Apprendi* and *Blakely* demonstrate that both the Fourteenth Amendment “proscription of any deprivation of liberty without ‘due process of law’” and the Sixth Amendment right to trial by jury are “constitutional protections of surpassing importance” that require any factfinding to be conducted by a jury. *Apprendi*, 530 U.S. at 476-8. See also *Blakely*, 542 U.S. at 306 (“Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary”) and Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts* (2003), 38 Wake Forest L. Rev. 1111, 1161 (noting that “*Apprendi* emphasized

the importance of the jury to assure the constitutional reliability of fact-finding” and arguing that the “conclusion in *McKeiver* that states do not need to provide juries to assure accurate fact-finding . . . fails to take account of to the real differences in fact-finding processes between juries and judges.”) In short, *McKeiver* rests largely on the notion that juries and adversarial factfinding are not necessarily more accurate than alternative means of truth-seeking. See, e.g., *McKevier*, 403 U.S. at 547 (“We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial”). But, as noted in *Blakely*, “[o]ur Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.” *Blakely*, 542 U.S. at 313.

The 35-year-old *McKeiver* case did not envision a blended sentencing scheme and has absolutely no application to SYO cases. Moreover, *Apprendi* and *Blakely* state that both due process and the right to jury trial require a jury to find any fact that would increase the penalty beyond the statutory maximum before the court may impose that sanction. Juveniles in SYO proceedings have a right to a jury trial, therefore the jury, and not the court, must find those factors which militate in favor of imposing the criminal sanction. In the absence of these jury findings, juveniles in SYO proceedings may not receive penalties in excess of the statutory maximum available for traditional juvenile dispositions. Unfortunately, the SYO statutory scheme fails to provide for jury factfinding and thus violates *Blakely* and *Foster*.

When it enacted the SYO statutes, the Ohio legislature for the first time specifically authorized the use of a jury in juvenile court. Cf. *McKeiver*, 403 U.S. at 547-8. Based on the text of the statute it is logical to conclude that, had the legislature known that judicial factfinding would subject the statute to additional constitutional scrutiny, it would have instead required such factfinding to have been done by the jury. See, e.g., *Cunningham v. California* (2007) --- U.S. ---, --- S.Ct. ---, 2007 WL 135687, No. 05-6551 at \*10 (noting that “several States have modified their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence”). It is hardly a stretch to conclude that had it been cognizant of the constitutional issues raised by *Blakely*, the legislature would have authorized that same jury to engage in specific factfinding to avoid any constitutional difficulties. Cf. *Foster* at ¶87 (“Certainly the General Assembly may enact legislation to authorize juries to find beyond a reasonable doubt all facts essential to punishment in felony cases . . . .The General Assembly undoubtedly never anticipated that the judicial-finding requirements contained within S.B. 2 would be held unconstitutional”).

Simply put, based on the reasoning announced by the Supreme Court of the United States in *Blakely* and adopted by this Court in *Foster*, the discretionary SYO sentencing provisions of R.C. Chapter 2152 are unconstitutional. This case presents a perfect opportunity for this Court to address the problem before it develops into a parallel of the re-sentencing avalanche caused by the *Blakely* and *Foster* decisions.

CONCLUSION

For all these reasons, further review of the judgment of the Franklin County Court of Appeals is warranted. This Court should accept jurisdiction and adopt the proposition of law stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons, by hand delivery on this 12th day of February, 2007:

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