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**BLURRING THE LINES: WHEN THE “BEST INTERESTS OF
THE CHILD” FALL TO THE WAYSIDE.
AN ANALYSIS OF OHIO’S SERIOUS YOUTHFUL
OFFENDER STATUTE.**

*Emily L. Barth**

I. INTRODUCTION

“[T]rial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.”¹

Historically, juvenile courts were designed to appear fatherly and benevolent—seeking to provide for the best interests of the child rather than to inflict punishment, as in the adult system. This is consistent with the stated legislative purpose of the Ohio juvenile justice system.² However, the juvenile justice system has evolved considerably since its inception in the late nineteenth century,³ especially with the implementation of blended sentencing systems like Ohio’s Serious Youthful Offender (SYO) statute. The present realities of the Ohio juvenile justice system are out of sync with the mission of the Ohio Department of Youth Services (ODYS).⁴ In many jurisdictions the “best interests of the child” rehabilitative model has faded to the background as more punitive and adult criminal sanctions are imposed upon youth sentenced in juvenile court.

This Comment argues that an Ohio juvenile offender, receiving a discretionary blended sentence under the Ohio SYO statute,⁵ has a right

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1. *Duncan v. Louisiana*, 391 U.S. 145, 155 n.23 (1968) (quoting SIR PATRICK DEVLIN, TRIAL BY JURY 164 (Stevens & Sons, Ltd., 1956)).

2. See *In re Caldwell*, 666 N.E.2d 1367, 1368 (Ohio 1996) (“to provide for the care, protection, and mental and physical development of children, to protect the public from the wrongful acts committed by juvenile delinquents, and to rehabilitate errant children and bring them back to productive citizenship”). See also OHIO REV. CODE ANN. § 2151.01 (2002).

3. See *In re Anderson*, 748 N.E.2d 67, 69 (Ohio 2001). *In re Anderson* recounts the history of the juvenile courts.

4. See generally Ohio Department of Youth Services, Mission Statement, <http://www.dys.ohio.gov/dnn> (last visited November 11, 2009) (“to encourage positive change in the lives of youthful offenders through collaborative partnerships and culturally relevant therapeutic and academic interventions that support public safety and prepare youth to lead productive lives”).

5. OHIO REV. CODE ANN. § 2152.13 (2002). Section 2152.13 (D)(2)(a)(i) addresses the factors a judge must consider when applying a discretionary serious youthful offender dispositional sentence.

to a jury trial in a juvenile proceeding as articulated under the Sixth Amendment to the United States Constitution⁶ and sections 5⁷ and 10⁸ of Article I of the Ohio Constitution, where the juvenile court judge, in addition to a traditional juvenile disposition, is authorized to impose an adult criminal sentence. The Ohio Supreme Court recently addressed this issue in *State v. D.H.*⁹ The Ohio Supreme Court held a jury determination on the imposition of a SYO dispositional sentence is unnecessary,¹⁰ and that, given the juvenile system's goal of rehabilitation, leaving the determination to a judge does not offend fundamental fairness or notions of due process.¹¹ This Comment argues that a juvenile should be afforded the right to a jury trial when the state seeks to punish him as an adult by imposing adult prison terms upon him.

Part II of this Comment provides an overview of the history and background of the federal approach to juvenile jury trial rights and the *parens patriae* rationale behind the juvenile justice system. Part III discusses the development and rationale of the utilization of blended sentences in the juvenile justice system. Part IV outlines Ohio's juvenile justice system and analyzes the Supreme Court of Ohio's decision in *State v. D.H.*

Part V argues that juvenile offenders receiving a discretionary blended sentence should be entitled to a jury trial right at the dispositional stage of their trial based on existing case law and the plain language of Ohio's SYO statute. Finally, Part VI of this Comment concludes that juveniles receiving a discretionary sentence under Ohio's SYO statute would be best served with access to complete jury trial rights at both the adjudicatory and dispositional phases, and, accordingly, *State v. D.H.* was wrongly decided.

II. THE JUVENILE JUSTICE SYSTEM

The United States juvenile justice system came into being in the late 1890s in an era of unprecedented industrial and urban development, a time when the United States was also dealing with many social problems resulting from massive immigration.¹² Prior to this time, juveniles and

6. U.S. CONST. amend. VI.

7. OHIO CONST. art. I, § 5 (amended 1912).

8. *Id.* art. I, § 10.

9. *State v. D.H.*, 901 N.E.2d 209 (Ohio 2009), *cert. denied*, 129 S. Ct. 2775 (2009).

10. *Id.* at 217.

11. *Id.*

12. See generally David Shichor, *Historical and Current Trends in American Juvenile Justice*, 34

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adults were treated similarly under the criminal common law.¹³ Part II of this Comment will briefly explore the historical development of the juvenile justice system in the United States and discuss the original goals of the juvenile justice model, with particular focus on the model of *parens patriae*. Part II will conclude with a summation of the Supreme Court's gradual expansion of procedural due process rights to juvenile defendants, culminating with the decision in *McKeiver v. Pennsylvania*, which withheld the expansion of jury trial rights to the juvenile court setting.

A. Historical Development and Original Goals of the Juvenile Justice System

In response to the emergence of pauperism and the development of prisons at the end of the nineteenth century, moralist proponents created correctional institutions designed specifically for juvenile delinquents.¹⁴ Since 1899, when America's first juvenile court was founded in Chicago,¹⁵ two primary assumptions have governed the administration of juvenile justice systems: (1) that states should operate them in *parens patriae*¹⁶ for the best interests of the child¹⁷ and (2) that states should be given flexibility in doing so.¹⁸ Despite the lofty aspirations of the juvenile justice system, "the informality and private nature of the proceedings resulted in little public oversight and led to arbitrary dispositions with indeterminate and punitive sentences."¹⁹ In 1966, Supreme Court Justice Abraham Fortas questioned the juvenile justice system when he noted that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."²⁰ Although the United States

JUV. & FAM.CT. J. 61 (Aug. 1983).

13. See generally Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

14. See generally JAMES C. HOWELL, JUVENILE JUSTICE AND YOUTH VIOLENCE 47 (1997). See also, e.g., Francis Barry McCarthy, *Pre-adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 457-58 (1981).

15. Mack, *supra* note 13, at 107.

16. Stanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192-93 (1970).

17. *Id.* at 1230. See also *McKeiver v. Pennsylvania*, 403 U.S. 528, 568 (1971); Steven Friedland, *The Rhetoric of Juvenile Rights*, 6 STAN. L. & POL'Y REV. 137, 139 (1995) (quoting Mack, *supra* note 13, at 119-20).

18. *In re Winship*, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting).

19. Courtney P. Fain, *What's In a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495, 500 (2008).

20. *Kent v. United States*, 383 U.S. 541, 556 (1966).

Supreme Court has extended nearly all adult procedural due process rights to juveniles,²¹ the Court has not granted juveniles a constitutional right to a jury trial.²²

B. *The Parens Patriae Model*

One theory behind the origin of juvenile law is the doctrine of *parens patriae*, which literally means “parent of the country.” The doctrine of *parens patriae* legitimized the state’s exercise of sovereign power of guardianship and protection over persons under a legal disability, including infancy. Under the doctrine of *parens patriae*, the juvenile court system is “theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct.”²³ Juvenile courts were founded to remove children from criminal proceedings and to “get away from the notion that the child is to be dealt with as a criminal.”²⁴

The social acceptance of the doctrine of *parens patriae*, and the viewpoint of the judge as the benevolent and fatherly guide, fell out of favor in the 1960s. The juvenile justice system was gradually perceived as more punitive than rehabilitative in nature. Also, during the 1960s, civil liberties attorneys and criminologists discovered that many youth in the juvenile justice system were treated punitively in the juvenile court but did not have the due process protections provided to adults in the criminal justice system.²⁵ Subpart II(C) discusses the gradual extension

21. These rights will be discussed fully in subpart II(C) of this Comment.

22. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 550–51 (1971) (plurality opinion).

23. *Kent*, 383 U.S. at 555.

24. Mack, *supra* note 13, at 110. Note the legal doctrine of *parens patriae* legitimated intervention in the “best interests” of the child offender, and supported the juvenile justice concept that juvenile courts conducted civil rather than criminal proceedings. The doctrine of *parens patriae* was developed around the concept of an ideal juvenile court judge—a judge with the qualities of a good father, a brilliant psychologist, and a dedicated social worker—who would address questions about the juvenile defendant beyond concerns of guilt or innocence. *Id.* Justice Fortas further expanded upon this belief in *In re Gault*, 387 U.S. 1, 17 (1967) when he stated:

The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right ‘not to liberty but to custody.’ He can be made to atton to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is ‘delinquent’—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the ‘custody’ to which the child is entitled.

Id. (footnote omitted).

25. See generally Eric Jensen, *An Historical Overview of the American Juvenile Justice System*, in *JUVENILE LAW VIOLATORS, HUMAN RIGHTS, AND THE DEVELOPMENT OF NEW JUVENILE JUSTICE SYSTEMS* 83 (Eric L. Jensen and Jorgen Jepsen eds., 2006).

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of due process rights to juvenile offenders in the juvenile justice system and the general departure from the purely *parens patriae* rationale behind the juvenile court model.

C. The Supreme Court’s Stance: Kent, In re Gault, In re Winship, and McKeiver

In the nearly seven decades that followed the implementation of United States juvenile courts, the Supreme Court did not hear a single case regarding the structure of the juvenile court system.²⁶ However, beginning in the mid–1960s, the Court undertook a systematic re-examination of the procedural manifestations of the *parens patriae* model of the juvenile court. The lack of constitutional protections afforded to juvenile offenders led to a new wave of reform in the 1960s and was the result of little progress and significant defects in the juvenile court system.²⁷ This subpart briefly examines the United States Supreme Court cases that extended procedural due process rights to juveniles. This subpart also examines the Supreme Court’s unvarying reasoning, despite the increasingly punitive nature of juvenile courts, for refusing to extend a jury trial right to juveniles.

1. One Toe in the Water: *Kent v. United States*

Kent v. United States,²⁸ one of the first United States Supreme Court cases addressing the rights of juvenile offenders, dealt narrowly with the process by which youth offenders are transferred to criminal court to be tried as adults.²⁹

In *Kent*, Morris Kent’s fingerprints were matched to fingerprints found at the scene of a crime in which a woman had been robbed and raped. As Kent was sixteen years old at the time, he was subject to the exclusive jurisdiction of the District of Columbia Juvenile Court.³⁰ Kent was apprehended and taken into custody by the police.³¹ The police, without a guardian or court appointed officer present, interrogated Kent. Kent was then detained without proper arraignment or determination by

26. W.J. Keegan, *Jury Trials for Juveniles: Rhetoric and Reality*, 8 PAC. L. J. 811, 812 (1977).

27. *In re Gault*, 387 U.S. 1, 18 (1967). By the 1960s, problems with the juvenile court system “demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.” *Id.*

28. 383 U.S. 541.

29. *Id.* at 552.

30. *Id.* at 543.

31. *Id.*

a judicial officer of probable cause for almost a week.³² In addition, the juvenile court waived its jurisdiction without holding a hearing or ruling on motions submitted by Kent's counsel.³³ Kent was ultimately indicted by a grand jury of the United States District Court for the District of Columbia and sentenced to serve a total of thirty to ninety years in prison.³⁴

The *Kent* Court recognized the possibility that children in juvenile court suffer because they do not enjoy the procedural safeguards that criminal courts extend to adult defendants, nor do they benefit from the rehabilitative care that the juvenile justice system promised.³⁵ The Court also recognized there was significant evidence that some juvenile courts³⁶ lack "the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation."³⁷ Noting that a decision on waiver of jurisdiction and transfer can bring hefty differences in sentencing, the Court determined juveniles are entitled to certain procedures during the transfer process, including a hearing, access by representative counsel to the probation records, and a statement by the juvenile court giving the reasons for its decision.³⁸ The Court's holding that the Due Process Clause of the United States Constitution applied to waiver hearings in juvenile proceedings was especially relevant because the Court had not previously applied the Due Process Clause to children in juvenile court.³⁹

32. *Id.* at 544–45.

33. *Id.* at 544–46. Kent's counsel promptly made known to the juvenile court his intention to oppose any waiver from juvenile to district court. *Id.* While Kent was initially detained, his counsel arranged for examination of Kent by two psychiatrists and a psychologist. *Id.* He also filed a motion for a hearing on the question of waiver of juvenile court jurisdiction, along with an affidavit of a psychiatrist certifying that petitioner was a victim of severe psychopathology. *Id.* Kent's counsel also moved for the juvenile court to give him access to Kent's social service file. The juvenile court judge did not rule on these motions, held no hearing, and did not confer with Kent, Kent's parents, or Kent's counsel. *Id.*

34. *Id.* at 548, 550.

35. *Id.* at 556.

36. The Court specifically cited the District of Columbia Juvenile Court, where the *Kent* case takes place. *Id.* at 555.

37. *Id.* 555–56.

38. *Id.* at 557.

39. *Id.*

2. A Big Splash of Procedural Due Process Rights for Juveniles: *In re Gault*

In *Gault*,⁴⁰ the Supreme Court built upon the holding in *Kent* and transformed the juvenile court into a very different system than that embodied by the traditional *parens patriae* model. Decided less than a year after *Kent*, *Gault* is still considered one of the most important cases regarding children's rights in juvenile proceedings. Declaring that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"⁴¹ the Court set a new constitutional standard, significantly altering the course of the nation's juvenile courts.⁴²

Gerald Gault and a friend, both minors, were taken into custody as the result of a verbal complaint made by Gault's neighbor.⁴³ When Gault was arrested and placed in detention, his parents were not given notice of the event. The petition filed by the deputy probation officer was not served on the Gaults. Additionally, at the subsequent hearing, none of the participants were sworn in, no transcript or recording was made, and no memorandum or record of the proceedings was prepared.⁴⁴ After a second undocumented hearing, Gault was adjudicated delinquent and committed to a detention center until he turned twenty-one.⁴⁵

Challenging the rationale behind the traditional *parens patriae* model, the *Gault* Court asserted that a lack of constitutional safeguards does not result in lowering juvenile crime rates or rehabilitating offenders.⁴⁶ After applying the Due Process Clause of the Fourteenth Amendment, the *Gault* Court expanded the rights of juvenile offenders to include notice of the charges brought against them,⁴⁷ the right to representation by counsel,⁴⁸ the right to confrontation and cross-examination of witnesses,⁴⁹ and the right to protection against self-incrimination.⁵⁰ Despite the Court's vast expansion of procedural due process rights for

40. *In re Gault*, 387 U.S. 1 (1967).

41. *Id.* at 13.

42. Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 CRIM. L. BULL. 5 (2008).

43. *In re Gault*, 387 U.S. at 4. The neighbor complained that the two boys had made a lewd telephone call to her. *Id.* At the time of the telephone call, Gault was still subject to a six month's probation order from the juvenile court. *Id.*

44. *Id.* at 5.

45. *Id.* at 5–7. Note, Gault's neighbor, the complaining witness, was never made to appear before the court at either hearing. *Id.*

46. *Id.* at 22.

47. *Id.* at 33.

48. *Id.* at 41.

49. *Id.* at 56–57.

50. *Id.* at 55.

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juveniles, the *Gault* majority maintained that children and adults are sufficiently different in nature to justify a separate court system.⁵¹

3. Establishing a Standard of Proof in the Juvenile Justice System: *In re Winship*

Three years after *Gault*, the Court continued its expansion of juvenile rights in *In re Winship*.⁵² The *Winship* Court addressed whether the reasonable doubt standard should be applied to juvenile criminal adjudications, as in adult criminal adjudications. Prior to this decision, the state, in juvenile criminal adjudications, was only required to prove a juvenile defendant's guilt by a preponderance of the evidence.⁵³

Winship, a twelve-year-old boy, was accused of stealing cash from a woman's pocketbook.⁵⁴ The crime, if committed by an adult, would constitute larceny.⁵⁵ The New York Family Court judge noted that the available proof of *Winship*'s guilt might not establish guilt beyond a reasonable doubt, but rejected *Winship*'s contention that proof beyond a reasonable doubt was required by the Fourteenth Amendment.⁵⁶ *Winship* was convicted and sentenced to an eighteen-month incarceration, which could be extended into a six year commitment.⁵⁷

After focusing on the right of adults to have guilt proven beyond a reasonable doubt—"[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child"⁵⁸—the Court held the evidentiary standard of proof beyond a reasonable doubt must be applied in the adjudication of juveniles as delinquent.⁵⁹ Explaining that the reasonable doubt standard was essential to protect society from questioning whether those condemned were actually guilty, the *Winship* Court concluded the reasonable doubt standard is vital to the American criminal justice

51. See Mlyniec, *supra* note 42, at n.15.

52. *In re Winship*, 397 U.S. 358 (1970).

53. *See id.*

54. *Id.* at 359–60. There was conflicting testimony that the salesperson who identified *Winship* as the thief was in another part of the store at the time of the theft. See Korine L. Larsen, *With Liberty and Juvenile Justice For All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 854 (1994).

55. *In re Winship*, 397 U.S. at 360.

56. *Id.* Rather, the judge relied upon a New York Family Court statute that provided the determination of proof at a juvenile adjudicatory hearing must be based on a preponderance of the evidence.

57. *Id.*

58. *Id.* at 365.

59. *Id.* at 368.

system.⁶⁰

4. Everyone out of the Pool: *McKeiver* and the Juvenile Jury Trial Right

The Court's expansion of due process rights to juveniles came to a dramatic halt in 1971, with the *McKeiver*⁶¹ plurality decision. One year after deciding *Winship*, the *McKeiver* Court held a jury trial was not constitutionally required in juvenile court proceedings,⁶² although the right to a jury trial is a constitutional safeguard in adult criminal trials.

Joseph McKeiver, age sixteen, was charged with a series of three felonies: robbery, larceny, and receiving stolen goods.⁶³ McKeiver's request for a jury trial was denied.⁶⁴ McKeiver argued he should be granted a jury trial because his juvenile court proceedings were overwhelmingly similar to adult criminal trials.⁶⁵

The *McKeiver* Court disagreed with the defendant and offered three reasons to support the Court's position that a juvenile jury right is not a fundamental right: (1) the adjudication of delinquency in juvenile court is much less onerous than the conviction of a crime in the criminal system;⁶⁶ (2) juvenile court judges handle cases differently than criminal judges;⁶⁷ and (3) a jury trial is the one due process right that would most disrupt and destroy the uniqueness of the juvenile court process.⁶⁸ The *McKeiver* plurality also considered the possibility that a constitutionally mandated jury trial would "remake the juvenile proceeding into a fully adversary process," thereby eliminating the "idealistic prospect of an intimate, informal protective proceeding."⁶⁹ The *McKeiver* Court concluded that if the jury procedures of the adult criminal justice process were adopted by the juvenile system, the need for a separate juvenile justice system would no longer exist.⁷⁰

60. *Id.* at 363–64.

61. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

62. *See id.*

63. *Id.* at 534–35.

64. *Id.* at 535.

65. *Id.* at 541–42. For example, the delinquency proceeding petition uses the language of an indictment, prior to trial a juvenile is detained in a building substantially similar to an adult prison, McKeiver's counsel and the prosecution engaged in plea bargaining, motions to suppress are routinely heard and decided, the usual rules of evidence are applied, customary common-law defenses are available, the press and public are admitted in the court room, and once adjudged delinquent, a juvenile may be confined until the age of majority in a prison-like environment. *Id.*

66. *Id.* at 540.

67. *Id.* at 541.

68. *Id.* at 540.

69. *Id.* at 545.

70. *Id.* at 551.

Although the *McKeiver* Court prevented the federal expansion of juvenile constitutional rights, it did leave room for state expansion. The Court recognized that the promise of the juvenile court concept largely depends on the availability of resources, public interest and commitment, the willingness to learn, and on understanding as to cause and effect and cure.⁷¹ With this in mind, the Court recognized that states are free to experiment and seek new ways to solve the problems posed by juvenile offenders.⁷² The *McKeiver* Court explicitly stated that although states are under no obligation to do so, they may adopt a juvenile jury trial right in all cases or in certain kinds of cases, as they see fit.⁷³

III. JUVENILE BLENDED SENTENCING STRUCTURES

There's this tug of war going on between those who believe we've been too soft on juveniles . . . and those that feel we treat juveniles differently because we believe they can be reformed and rehabilitated . . . [Blended sentencing is] really a marriage of convenience between those that want to punish more and those that want to give kids one more chance.⁷⁴

A. *Origins of Blended Sentence Statutes in Juvenile Courts*

As the juvenile court *parens patriae* “best interests of the child” rationale began to decline in the 1960s,⁷⁵ the juvenile courts began to impose a more retributive rather than rehabilitative model of punishment.⁷⁶ Three main factors accounted for the shift in philosophy from rehabilitative to retributive. One factor was the extensive media coverage of violent crimes by juveniles in the early 1990s that fueled perceptions of a juvenile crime epidemic. Second, a philosophical shift from rehabilitation to punishment resulted in states’ revision of their transfer/waiver laws. Finally, there was an increase in the public view that juvenile courts fail to punish adequately and that juvenile

71. *Id.* at 547.

72. *Id.*

73. *Id.*

74. Pam Belluck, *Fighting Youth Crime, Some States Blend Adult and Juvenile Justice*, N.Y. TIMES, Feb. 11, 1998 (quoting John Stanoch, Chief Juvenile Court Judge for Hennepin County, Minnesota). See also Richard E. Redding and James C. Howell, *Blended Sentencing in American Juvenile Courts*, in THE CHANGING BORDERS OF JUVENILE JUSTICE 145 (Jeffrey Fagan and Franklin E. Zimring, eds., 2000).

75. See generally Mack, *supra* note 13.

76. See Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 711–14 (1997).

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rehabilitation programs are ineffective.⁷⁷

Blended sentencing structures refer to the imposition of juvenile and adult correctional sanctions on serious and violent juvenile offenders who have been either adjudicated in juvenile court or convicted in criminal court.⁷⁸ The underlying principle of blended sentencing structures is one of compromise: "The idea is to give a young offender some rope, enough to yank himself out of a life of crime—or to hang himself and wind up in prison."⁷⁹ Under blended sentencing structures, when a case involves a minor, judges in criminal and juvenile courts have the ability to impose either juvenile sentences, adult sentences, or a combination of the two, while retaining juvenile court jurisdiction and discretionary control over serious and violent juvenile offenders.⁸⁰ If the juvenile offender fails to conform to the requirements of the blended sentence disposition, the stay of the adult criminal sentence may be revoked, and the juvenile offender may be transferred to an adult correctional facility.⁸¹

B. Jurisdictional Waiver and Blended Sentencing Structures in Juvenile Court

Juvenile blended sentencing models were offered as an alternative to the harsh practice of judicial transfer. The most common form of transfer in the United States is judicial waiver, a practice provided for in forty-six states. Under the judicial waiver method, the judge is the primary decision-maker as to whether a child should be transferred to the adult system.⁸² The prosecutor also maintains discretion, as the transfer process must be initiated by prosecutorial motion. Judicial waiver is typically governed by state statute, outlining when waiver is permitted. Typical waiver factors include the age of the juvenile offender at the time of the offense, the nature of the offense committed, and the juvenile's past history of juvenile offenses.⁸³ Blended

77. See Redding and Howell, *supra* note 74, at 145–46.

78. PATRICIA TORBET, ET AL., NAT'L CENTER FOR JUV. JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME (1996).

79. See Belluck, *supra* note 74.

80. See Redding and Howell, *supra* note 74.

81. See TORBET, *supra* note 78 (Blended sentencing structures offer juvenile offenders a "last chance" at rehabilitation within the juvenile justice system—an incentive to respond to treatment in order to avoid the consequences of an adult sentence.).

82. Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 385 (1998).

83. A PLAN FOR JUVENILE SENTENCING IN OHIO, OHIO CRIMINAL SENTENCING COMMISSION 28–29 (David J. Diroll ed. 1999). See also Redding and Howell, *supra* note 74.

sentencing models may also be governed by statute. The five basic types of blended sentencing models are discussed in Subpart III(C).

C. Five Types of Blended Sentencing Models

As of 1999, twenty states had some form of blended sentencing laws.⁸⁴ Five basic models of blended sentencing have emerged in recent legislation: (1) juvenile-exclusive,⁸⁵ (2) juvenile-inclusive, (3) juvenile-contiguous,⁸⁶ (4) criminal-exclusive,⁸⁷ and (5) criminal-inclusive.⁸⁸ The underlying purpose of these models is to afford a broader range of punishment options for violent juvenile offenders, while maintaining rehabilitation as the central focus.⁸⁹ Ohio's blended sentencing structure is briefly summarized below.

1. Ohio's Blended Sentencing Structure

Ohio adopted a juvenile-inclusive blended sentencing model.⁹⁰ The juvenile-inclusive blend model allows the court to impose both a juvenile and adult sentence, with the adult sentence conditionally suspended unless the juvenile violates the terms of the juvenile sentence, or commits a new offense.⁹¹ As in states following a juvenile-exclusive

84. See Redding and Howell, *supra* note 74.

85. See A PLAN FOR JUVENILE SENTENCING IN OHIO, *supra* note 83, at 29. The juvenile-exclusive blend model allows the juvenile court to impose either a juvenile disposition or an adult sentence on the juvenile offender, but not a combination of the two.

86. See *id.* The juvenile-contiguous blend model allows for the court to impose a juvenile sentence extending until age eighteen to twenty-one, when a transfer/sentencing hearing or other procedures are triggered to determine if the juvenile offender should be transferred to serve an adult sentence in the criminal justice system.

87. See *id.* Different from the three aforementioned blend models, the criminal-exclusive blend model grants jurisdiction over the juvenile in the adult criminal court. The adult criminal court is therefore given the authority to impose a sanction on the juvenile offender in either the juvenile or adult correctional systems with jurisdiction continuing in adult criminal court.

88. See *id.* The criminal-inclusive blend model mirrors the juvenile-inclusive blend of sentencing in that the criminal-inclusive blend model allows for imposition of both juvenile and adult sentences upon the juvenile offender. Typically, the adult sentence is suspended unless the juvenile offender violates the terms of probation. However, the notable difference between the criminal-inclusive blend model and the juvenile-inclusive blend model is that under the criminal-inclusive blend model the adult court, rather than the juvenile court, retains jurisdiction.

89. Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, 2 CRIM. JUST. 167, 188 (2000). Within the scope of the five basic models, juvenile court justices might not "draw on the traditionally richer treatment and supervision resources available in the juvenile justice system without having to sacrifice the lengthy periods of incarceration once available only in the criminal court system." *Id.*

90. A PLAN FOR JUVENILE SENTENCING IN OHIO, *supra* note 83, at 31.

91. See *id.* at 29-30.

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blend model, states that adopt a juvenile–inclusive blend model extend juvenile court jurisdiction over juvenile offenders until the age of twenty-one.⁹²

2. Ohio’s Serious Youthful Offender Statutes

In 2002, the Ohio Legislature adopted three statutes⁹³ to govern juveniles charged as potential serious youthful offenders. Under Ohio’s blended sentencing model, a juvenile charged as a potential serious youthful offender does not face immediate bind-over to an adult court. The case remains in the juvenile court. Section 2152.11(A) of the Ohio Revised Code, describing dispositions for child adjudicated delinquent, states a juvenile defendant who commits certain acts is eligible for “a more restrictive disposition.”⁹⁴ The “more restrictive disposition” is a serious youthful offender disposition, which includes a blended sentence.⁹⁵ The adult sentence remains stayed unless the juvenile fails to successfully complete his or her traditional juvenile disposition—a determination made by a judge, not a jury.⁹⁶

Section 2152.11 of the Ohio Revised Code defines which acts committed by a delinquent child are considered “enhanced.”⁹⁷ The commission of one or more of the specified enhancements may lead to a blended sentence. If the juvenile defendant meets the requirements of serious youthful offender status, section 2152.11(B)–(G) lays down the combination of factors that determine whether the juvenile defendant will face a traditional juvenile disposition, a mandatory SYO disposition, or a discretionary SYO disposition.⁹⁸ The factors primarily

92. *See id.*

93. *See generally* OHIO REV. CODE ANN. §§ 2152.11, 2152.13, 2152.14 (2002).

94. *Id.* § 2152.11(A).

95. *Id.* § 2152.13.

96. *Id.* § 2152.13(D)(2)(a)(iii).

97. *See generally id.* §§ 2152.13(A)(1)–(3). These acts include (1) the act charged against the child would be an offense of violence if committed by an adult, (2) the child used, displayed, brandished, or indicated that the child possessed a firearm and actually possessed a firearm during the commission of the act charged, and (3) the child previously was admitted to a department of youth services facility for the commission of an act that would have been aggravated murder, murder, a felony of the first or second degree if committed by an adult, or an act that would have been a felony of the third degree and an offense of violence if committed by an adult. *Id.*

98. *Id.* § 2152.13(B)–(G). D.H. was fifteen at the time of the commission of the act, the crime of reckless homicide is considered an act of violence if committed by an adult, and D.H. used a firearm in the commission of the crime. *State v. D.H.*, 901 N.E.2d 209, 210 (Ohio 2009), *cert. denied*, 129 S. Ct. 2775 (2009). However, D.H. had no prior contact with the juvenile system and had a clean record. *Id.* Therefore, under this statutory scheme, in the case of D.H., the combination of D.H.’s offense and age left the juvenile court with the discretion to impose a blended sentence. *Id.* at 211. The imposition of D.H.’s blended sentence was not mandatory, and was solely at the discretion of the juvenile court judge.

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consider the age of the juvenile and the seriousness of the offense.

If the prosecuting attorney intends to seek a SYO dispositional sentence, the juvenile court is required to hold a preliminary hearing to determine if probable cause exists that the child committed the act charged and that the requirements of section 2152.11 are met.⁹⁹ A juvenile defendant for whom a SYO dispositional sentence is sought has the right to a grand jury determination of probable cause that the juvenile defendant committed the act charged.¹⁰⁰ Once the juvenile defendant is indicted, the juvenile is entitled to an open and speedy trial by jury in juvenile court and is given a transcript of the proceedings.¹⁰¹ The juvenile court must afford the juvenile defendant all the rights afforded a person who is prosecuted for committing a crime, including the right to counsel and the right to raise the issue of competency. The juvenile may not waive the right to counsel.¹⁰²

If the juvenile defendant is adjudicated a delinquent child for committing an act under circumstances that permit, but do not require, the juvenile court to impose on the juvenile defendant a SYO dispositional sentence under section 2152.11, section 2152.13, describing the SYO dispositional sentences, sets forth the factors a juvenile court must consider before imposing a discretionary blended sentence. The juvenile court is required to consider several factors including: (1) the nature and circumstances of the violation; (2) the history of the child; (3) the length of time; (4) the level of security; and (5) the types of programming and resources available in the juvenile system.¹⁰³ If an adult sentence is imposed in addition to a traditional juvenile sentence, the juvenile court shall stay the adult portion of the SYO dispositional sentence, pending the successful completion of the juvenile disposition.¹⁰⁴

Id.

99. OHIO REV. CODE ANN. § 2152.13(B) (2002).

100. *Id.* § 2152.13(C)(1).

101. *Id.*

102. *Id.* § 2152.13(C)(2).

103. *Id.* § 2152.13(D)(2)(a)(i).

104. *Id.* § 2152.13(D)(2)(a)(iii). Note that section 2152.14(E) of the Ohio Revised Code governs instances when a juvenile court may invoke the adult portion of a serious youthful offender's sentence for failure to successfully complete the traditional juvenile disposition. The statute requires a finding by clear and convincing evidence that the juvenile is "unlikely to be rehabilitated during the remaining period of juvenile jurisdiction" and that the juvenile has engaged in further bad conduct pursuant to section 2152.14(A) or (B). See also *State v. D.H.*, 901 N.E.2d 209, 214 (Ohio 2009), *cert. denied*, 129 S. Ct. 2775 (2009).

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D. Do Blended Sentencing Structures Achieve Their Goals?

As discussed in Subpart III(A), blended sentencing structures are considered a compromise—combining the goal of juvenile offender rehabilitation with the public’s need for accountability and punishment of crimes committed by juveniles.¹⁰⁵ However, the question remains as to whether new blended sentencing models “ultimately provide[] serious young offenders with one last chance at rehabilitation, or whether [they] consign[] less serious youths to the adult corrections system.”¹⁰⁶ Critics have argued juvenile blended sentencing models actually serve to widen the net of juveniles subject to adult sentences, serving as a supplement to existing transfer laws.¹⁰⁷ Therefore, critics posit the argument that blended sentencing models are more detrimental to juvenile offenders than helpful. This argument will be discussed in more detail in Part V of this Comment.

IV. OHIO’S JUVENILE JUSTICE SYSTEM

The stated goal of the Ohio juvenile justice system is “[t]o provide for the care, protection, and mental and physical development of children.”¹⁰⁸ This goal reflects the historical, overarching goals of the national juvenile justice system.¹⁰⁹ Subpart IV(A) will discuss the history and development of the juvenile justice system in Ohio, and analyze the methods Ohio presently uses to address serious and violent crimes committed by juveniles, particularly focusing on Ohio’s SYO Statutes.

A. History and Development of the Juvenile Justice System in Ohio

The foundation for the Ohio juvenile justice system was first laid in 1857 when the Ohio General Assembly made a provision for the special disposition of infants accused of crime.¹¹⁰ In 1902, the first Ohio

105. See TORBET, *supra* note 78.

106. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1124 (1995).

107. See Redding and Howell, *supra* note 74, at 160.

108. OHIO REV. CODE ANN. § 2151.01(A) (2002).

109. See generally Mack, *supra* note 13.

110. See *In re Alger*, 249 N.E.2d 808, 810 (Ohio 1969).

In legislation establishing houses of refuge, it was added that ‘the grand jurors may, in their discretion, instead of finding an indictment against the accused [infant], return to the court that it appears to them that the accused is a suitable person to be committed to the guardianship of the directors of the house of refuge.’

Juvenile Court was established in Cuyahoga County and subsequent State General Assemblies enacted extensive, substantive juvenile legislation that conferred juvenile jurisdiction on courts throughout the state.¹¹¹ Although subsequent enactments have refined the system, the essential elements of the Ohio Juvenile Court system have remained unchanged.¹¹² As in the federal system, the Ohio Juvenile Court system does not recognize a constitutional right of juvenile offenders to trial by jury.¹¹³

The right to trial by jury for juvenile offenders was first challenged in the 1869 Ohio Supreme Court case *Prescott v. State*.¹¹⁴ In *Prescott*, Benjamin Prescott, a fourteen-year-old boy accused of burning a barn, challenged his commitment to the reform farm upon the finding of the grand jury.¹¹⁵ Prescott argued the court erred in depriving him of a trial by an impartial jury, in derogation of Article I, Section Five of the Ohio constitution.¹¹⁶ The *Prescott* Court disagreed with Prescott's claims, holding that the nature of a juvenile proceeding "is neither a criminal prosecution, nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed."¹¹⁷

B. State v. D.H.

One of the most recent cases before the Ohio Supreme Court challenged whether juvenile offenders have a constitutional right to a

Id. at 810 (quoting 54 Ohio Laws, pp. 163, 166, § 8). *See also* *Prescott v. State*, 19 Ohio St. 184 (1869). This provision remained the foundation of Ohio's juvenile law for over eighty years until a major revision of the Ohio Juvenile Code in 1937, which granted the juvenile court exclusive jurisdiction over juvenile offenders. *In re Alger*, 249 N.E.2d at 810.

111. *In re Alger*, 249 N.E.2d at 810.

112. *Id.*

113. *See id.* at 814. The Ohio Supreme Court asserted they can perceive no benefit worthy of destroying a juvenile's traditional entitlement to special status which might accrue to an alleged delinquent from a jury trial. Unquestionably, fair adjudication can be had for a child represented by counsel, from a judge applying proper rules of evidence, and a proper standard of proof. *Id.*

114. *Prescott v. State*, 19 Ohio St. 184 (1869).

115. *Id.* at 185.

116. *Id.* at 187-88.

117. *Id.* The *Prescott* Court further observed the juvenile court proceeding does not warrant a jury trial because the proceeding is purely statutory. *Id.* The *Prescott* Court further noted the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority. *Id.* The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or the penitentiary. *Id.*

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jury trial. *State v. D.H.*¹¹⁸ examined a very narrow sub-holding of the juvenile jury trial right. *State v. D.H.* specifically challenged a juvenile offender’s right to jury determination on the imposition of a SYO dispositional sentence.¹¹⁹

1. Factual Background

The conviction in *State v. D.H.* stems from a December 28, 2004 incident where D.H., a fifteen-year-old minor, fired a gun into a crowd of people outside the home of his friend, Christopher Harris.¹²⁰ A few months prior to the incident Harris had a disagreement with another youth, Preston “PJ” Smith. On the day of the incident, Harris telephoned PJ and told him to apologize for his prior behavior. Instead of apologizing, PJ decided to fight Harris and showed up at the Harris home with an entourage. In preparation for the fight, Harris located his father’s loaded gun, a nine-millimeter semi-automatic handgun and phoned D.H. When D.H. arrived at Harris’s home, Harris gave the loaded gun to D.H.¹²¹ Another youth, Brandon Russell, appeared soon after with his companion and both punched Harris. Harris turned to run away, slipped, and heard gunfire. Harris looked up to find D.H. on the porch with Harris’s father’s gun pointed in the air.¹²² D.H.’s gunfire struck and killed Harris’s sister, Kiera. Another youth, Preston Smith, was shot in the leg.¹²³

2. Juvenile Court Procedural History

D.H. was indicted on several charges stemming from the incident. The charges, totaling six counts, included murder with a firearm specification, attempted murder with a firearm specification, and

118. *State v. D.H.*, 901 N.E.2d 209 (Ohio 2009), *cert. denied*, 129 S. Ct. 2775 (2009).

119. *See generally id.* D.H. challenged his conviction on two grounds. This Comment only discusses D.H.’s challenge as to whether juveniles charged under section 2152.13(D)(2)(a)(i) of the Ohio Revised Code have the right to a jury determination at the dispositional level, as opposed to a judge determining the sentence. D.H.’s other challenge related to whether constitutional jury trial rights apply in a pre-*Foster* sentencing. The *D.H.* court held that constitutional jury trial rights do not apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio’s adult felony sentencing statutes when the juvenile court imposes the stayed adult portion of a serious youthful offender dispositional sentence pursuant to section 2152.13. *See generally* *State v. Foster*, 845 N.E.2d 470 (Ohio 2006).

120. *See D.H.*, 901 N.E.2d at 210.

121. Merit Brief of Appellee, the State of Ohio at 1, *State v. D.H.*, 901 N.E.2d 209 (Ohio 2003) (Nos. 2007-0291, 2007-0472), 2007 WL 2905855.

122. *Id.* at 2.

123. *Id.* at 2–3.

felonious assault with a firearm specification.¹²⁴ Each count alleged that D.H., fifteen years old at the time of the offenses and using a firearm, was subject to a SYO disposition pursuant to sections 2152.11 and 2152.13 of the Ohio Revised Code.¹²⁵

D.H. requested to have a jury trial. Under the statute, a juvenile who is tried as a serious youthful offender is entitled to a jury trial at the adjudicatory stage.¹²⁶ The jury determined that D.H. was a delinquent minor child for committing the offense of reckless homicide,¹²⁷ that D.H. was fifteen years old at the time of the offense, and that D.H. had a “firearm on or about his person or under his control and did . . . display, . . . brandish, indicate he possessed and/or used the firearm in the commission of the offense.”¹²⁸ The culmination of the jury’s findings made D.H. eligible for a SYO disposition, a blended sentence.¹²⁹ However, under the SYO statute, D.H.’s age and the nature of his crime rendered the imposition of the adult portion of the sentence discretionary, rather than mandatory.¹³⁰

At the sentencing hearing, the juvenile court considered the circumstances and facts of the case, D.H.’s history, and the fact that any adult sentence would be stayed or suspended pending a juvenile disposition.¹³¹ Citing the “seriousness of this incident,”¹³² the juvenile court imposed a blended sentence.¹³³

The juvenile court committed D.H. to the legal custody of the Ohio Department of Youth Services (ODYS) for three years on the gun specification, followed by a minimum term of six months with a maximum period not to exceed D.H.’s twenty-first birthday on the

124. *D.H.*, 901 N.E.2d at 210. D.H. was formally indicted on two counts of murder with a firearm specification in violation of sections 2903.02(A) and 2941.145 of the Ohio Revised Code, two counts of attempted murder with firearm specifications in violation of section 2923.02 as it relates to sections 2903.02 and 2941.145, and two counts of felonious assault with firearm specifications in violation of sections 2903.11 and 2941.145. *Id.*

125. *Id.* Sections 2152.11 and 2152.13 will be discussed in detail in subpart IV(C) of this Comment. In short, a serious youthful offender disposition consists of a “blended” sentence: a traditional juvenile disposition and a stayed adult sentence. The court may choose to enforce the adult portion of the sentence at a later time—i.e. when the offender maxes out of the juvenile facility—if the juvenile engages in behavior that indicates the juvenile disposition has been unsuccessful in rehabilitating the juvenile offender.

126. OHIO REV. CODE ANN. § 2152.13(C)(1) (2002).

127. Reckless homicide is a third-degree felony, and is a lesser included offense of murder and felony murder. *See id.* § 2903.041. *See also D.H.*, 901 N.E.2d at 210.

128. *D.H.*, 901 N.E.2d at 210.

129. *See generally* OHIO REV. CODE ANN. §§ 2152.11(A)(2), (F)(2), 2152.13 (2002).

130. *D.H.*, 901 N.E.2d at 210–11. *See also* OHIO REV. CODE ANN. § 2152.11(F)(2).

131. *D.H.*, 901 N.E.2d at 211.

132. *Id.*

133. *Id.*

reckless homicide charge. As for the adult sentence, the juvenile court imposed a total of six years' confinement on D.H.: a single three-year prison sentence for D.H.'s reckless homicide, and an additional three-year prison sentence on the accompanying firearm specification. It is important to note that the adult “three-year prison sentence for D.H.'s reckless homicide” is above the one-year, statutory-minimum prison sentence for such felonies.¹³⁴ In accordance with the SYO statute's language,¹³⁵ the juvenile court stayed the adult portion of the sentence, pending D.H.'s successful completion of the juvenile disposition.¹³⁶

3. D.H.'s Arguments on Appeal

On appeal, D.H. argued only a jury may make the factual determinations required under section 2152.13(D)(2)(a)(i), the SYO statute, that lead to the discretionary imposition of an adult sentence. The appellate court disagreed and affirmed the trial court.¹³⁷ The Supreme Court of Ohio denied D.H.'s discretionary appeal, and held that “constitutional jury trial rights do not apply . . . to findings that a juvenile court has made under Ohio's adult felony sentencing statutes when the juvenile court imposed the adult portion of a serious youthful offender dispositional sentence pursuant to [section] 2152.13.”¹³⁸

V. EXTENDING COMPLETE JURY TRIAL RIGHTS TO JUVENILES

A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. *The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’*¹³⁹

Part V advocates that the rights of juvenile offenders sentenced under the discretionary SYO statute would best be served with complete jury trial rights at both the adjudicatory and dispositional stages of the trial. To support this premise, Part V examines the holding of the *McKeiver*

134. *Id.*

135. See OHIO REV. CODE ANN. § 2152.13(D)(2)(a)(iii) (2002).

136. *D.H.*, 901 N.E.2d at 211.

137. *Id.* at 211–12.

138. *Id.* at 212.

139. *In re Gault*, 387 U.S. 1, 36 (1967) (emphasis added).

case, and reviews juvenile jury rights in other states. As additional support, Part V cites the plain language of the SYO statute, and the notes of the Ohio Sentencing Commission Report regarding blended sentencing. Part V then examines the current state of ODYS, in particular the ongoing class action *S.H. v. Stickrath*.¹⁴⁰ Part V also briefly considers the proposition that statutes such as Ohio's SYO statute are wholly in opposition to the stated rehabilitative goals of the Ohio juvenile justice system, such that the abolishment of the state juvenile justice system may better protect Ohio's youth from arbitrary and unnecessary punishment.

A. Imposition of Adult Punishment Equals Access to Adult Rights

Ohio juvenile offenders receiving a discretionary blended sentence should be entitled to a jury trial right at the dispositional stage of the trial. Under the SYO statute, Ohio juvenile defendants adjudicated delinquent under the statute are afforded a jury trial right at the adjudicatory stage of the trial.¹⁴¹ However, jury trial rights are also essential at the dispositional phase of the trial, as the applicable SYO statute requires the judge to consider several factors in determining whether or not to impose a blended sentence, including whether the juvenile has been rehabilitated.¹⁴²

1. *McKeiver* Did Not Consider Juvenile Blended Sentencing Structures

As discussed in Subpart II(C), recognizing significant deficiencies in the juvenile court system, the Supreme Court systematically extended procedural constitutional protections to juvenile offenders. The procedural constitutional protections include the right to counsel, the right to notice of charges, the right to confrontation and cross-examination, the privilege against self-incrimination, and the right to a standard of proof beyond a reasonable doubt.¹⁴³ In *McKeiver v. Pennsylvania*, the Supreme Court stopped short of extending a constitutional jury trial right to juveniles.¹⁴⁴

Decided in 1971, the *McKeiver* plurality considered a juvenile justice system void of blended sentencing structures such as Ohio's current SYO statutes. The *McKeiver* Court's view that juvenile proceedings are

140. *S.H. v. Stickrath*, 251 F.R.D. 293 (S.D. Ohio 2008).

141. OHIO REV. CODE ANN. § 2152.13(C)(1) (2002).

142. *Id.* § 2152.13 (D)(2)(a)(i).

143. See generally subpart II(C) of this Comment.

144. See generally *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

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civil in nature, or at best quasi-criminal, in addition to the belief that juvenile courts do not impose punishment, is not in line with the present realities of Ohio's juvenile justice system, specifically the discretionary serious youthful offender disposition.¹⁴⁵ In fact, the United States Supreme Court has never determined whether a minor has a Sixth Amendment right to a jury trial when that minor receives a criminal sentence of imprisonment for a term of years to be served in an adult institution imposed by a juvenile court.¹⁴⁶

The *McKeiver* plurality held the Sixth Amendment right to a jury trial does not apply when a juvenile court may only impose a traditional juvenile disposition.¹⁴⁷ *McKeiver* stated juvenile adjudicatory hearings do not constitute "criminal prosecutions" for purposes of the Sixth Amendment.¹⁴⁸ However, Ohio's SYO statute mirrors the punishment, procedures, and rights afforded defendants in a criminal prosecution. For example, section 2152.13 requires indictment, speedy trial, jury trial at the adjudicatory phase, and allows for stayed adult punishment of punitive incarceration in SYO proceedings.¹⁴⁹ Given these factors, it seems natural to extend complete jury trial rights to juvenile defendants sentenced under Ohio's SYO statute, especially when juvenile defendants face adult imprisonment, regardless of whether the adult portion of the sentence is initially stayed.

A few state courts have examined the issue of whether *McKeiver* applies in juvenile proceedings when commitment to an adult criminal institution is permitted. Two such cases, *In re L.M.*¹⁵⁰ and *In re Jeffrey C.*,¹⁵¹ are outlined below.

In the case of *In re L.M.*, a Kansas juvenile challenged the constitutionality of Kansas state court precedent denying complete jury trial rights to juvenile offenders.¹⁵² The Supreme Court of Kansas recognized that amendments to the original 1982 Kansas Juvenile Offender Code (KJOC) "have eroded the benevolent *parens patriae* character that distinguished it from the adult criminal system."¹⁵³ Noting the juvenile justice system is now patterned after the adult

145. See generally *id.* See also Brief Amicus Curiae of the Ohio State University Justice for Children Project in Support of Petitioner at 3, *State v. D.H.*, 129 S. Ct. 2775 (2009) (No. 08-9702), 2009 WL 1339249.

146. Brief Amicus Curiae, *D.H.*, 129 S. Ct. 2775 (No. 08-9702).

147. *McKeiver*, 403 U.S. at 540-45.

148. *Id.* at 550.

149. See generally OHIO REV. CODE ANN. § 2152.13 (2002).

150. *In re L.M.*, 186 P.3d 164 (Kan. 2008).

151. *In re Jeffrey C.*, 781 A.2d 4 (N.H. 2001).

152. *In re L.M.*, 186 P. 3d at 165.

153. *Id.* at 170.

criminal system, the Kansas Supreme Court concluded a minor in a juvenile proceeding has a right to a jury trial under the Sixth and Fourteenth Amendments of the United States Constitution as well as under the Kansas state constitution.¹⁵⁴

The Supreme Court of New Hampshire reached a similar conclusion in *In re Jeffrey C.*, in which a juvenile defendant challenged his confinement to an adult correctional facility without first being afforded a jury trial.¹⁵⁵ The New Hampshire Supreme Court rejected the argument presented in *McKeiver* that juvenile proceedings are fundamentally different from adult criminal trials,¹⁵⁶ and held that when commitment to an adult criminal facility is permitted, the juvenile defendant is constitutionally entitled to a trial by jury.¹⁵⁷ The New Hampshire Supreme Court further asserted that it is a well-settled principle that all defendants facing the possibility of incarceration are entitled to a trial by jury, and that imprisonment in an adult facility fundamentally changes the nature of the underlying proceedings.¹⁵⁸

*In re L.M.*¹⁵⁹ and *In re Jeffrey C.*¹⁶⁰ support the premise that juveniles sentenced under Ohio's SYO statute should be extended complete jury trial rights. The imposition of an adult sentence, regardless of whether it is stayed, significantly alters the nature of the juvenile proceeding to that of an adult criminal proceeding. Therefore, it is reasonable to conclude that the reasoning of *McKeiver* no longer applies to the imposition of a discretionary serious youthful offender punishment. The *McKeiver* plurality reasoned that a jury trial right is the one due process right that would most disrupt the uniqueness of the juvenile court process.¹⁶¹ However, the punitive nature of the SYO statute, especially the imposition of adult prison time, has destroyed any vestiges of the rehabilitative goals of the juvenile court system. Without the essential procedural due process right of a jury trial, juveniles sentenced under the discretionary SYO statute become vulnerable to arbitrary and unnecessary punishment.

154. *Id.*

155. *In re Jeffrey C.*, 781 A.2d at 5.

156. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545–51 (1971).

157. *In re Jeffrey C.*, 781 A.2d at 6.

158. *Id.*

159. *In re L.M.*, 186 P.3d at 164.

160. *In re Jeffrey C.*, 781 A.2d at 4.

161. *McKeiver*, 403 U.S. at 540.

2. The Plain Meaning of Ohio’s SYO Statutes

The plain meaning of Ohio’s SYO statutes indicates that serious youthful offenders are entitled to jury trials. Section 2152.13(C)(1) states that once a child is indicted, charged by information, or is eligible for a SYO disposition as determined by the juvenile court, “the child is entitled to an open and speedy trial by jury in juvenile court.”¹⁶² In addition, the statute states that a juvenile in a serious youthful offender proceeding has “*all rights* afforded a person who is prosecuted for committing a crime *including the right to counsel . . .*”¹⁶³ In fact, according to the statutory language, the juvenile defendant may not waive the right to counsel.¹⁶⁴

The Ohio Criminal Sentencing Commission (Commission) appears to support the proposition that the plain language of the SYO statutes supports complete jury trial rights. The Commission noted that because an SYO-eligible offender could receive an adult sentence, the juvenile should be given rights akin to those granted to adults appearing in criminal court, including the right “to an open, speedy, jury trial.”¹⁶⁵ The Commission recognized that guaranteeing the right to a jury trial for juveniles troubles some juvenile courts. In a survey conducted by the Commission, juvenile judges were asked whether juvenile offenders should be given a jury trial right. Of the judges surveyed, 89.5% said “no.”¹⁶⁶ However, 94.9% of judges responded that there should be a mechanism for transferring juveniles from DYS to the adult prison system.¹⁶⁷ Despite these apparent concerns, the Commission affirmatively concluded “any system that allows adult punishment must recognize a right to a trial by jury.”¹⁶⁸ In summation, following the plain language of the SYO statute and the intentions of the Ohio Criminal Sentencing Commission, complete jury trial rights for juvenile offenders sentenced under the discretionary SYO statute are essential.

B. The Ohio Department of Youth Services is Broken

Under the SYO statute, if a juvenile defendant is eligible for a discretionary SYO dispositional sentence, as in the case of D.H., then

162. OHIO REV. CODE ANN. § 2152.13(C)(1) (2002).

163. *Id.* § 2152.13(C)(2) (emphasis added).

164. *Id.*

165. A PLAN FOR JUVENILE SENTENCING IN OHIO, *supra* note 83, at 32.

166. *Id.* at 32–33. Note, the survey does not indicate the reasoning behind the strong opposition.

167. *Id.* at 33.

168. *Id.*

the juvenile defendant can only be given an adult criminal sentence if the juvenile court makes findings consistent with the statute.¹⁶⁹ One of the factors the juvenile judge must consider is whether “the types of programming and resources available in the juvenile justice system alone”¹⁷⁰ are adequate to meet the rehabilitative goals of the juvenile justice system.¹⁷¹ If the juvenile court does not make the requisite findings, the court may not enforce an adult criminal sentence.¹⁷²

However, ODYS is currently under a federal court order,¹⁷³ and is unable to provide adequate programming and resources—one of the key factors a juvenile judge must consider when deciding whether to impose a discretionary SYO sentence. Some practitioners, including the court-appointed Independent Fact-Finder, found the DYS system “utterly deficient” and in need of “basic overhauling.”¹⁷⁴ Arguably, the ODYS system is broken. Given the status of the ODYS system, jury determination of whether the juvenile defendant meets the statutory factors for imposition of a discretionary SYO dispositional sentence would better serve the notions of fundamental fairness and due process. In support of this Comment’s claim that ODYS is broken, this Section examines the Final Fact-Finding Report of *S.H. v. Stickrath*.¹⁷⁵

S.H. v. Stickrath is a recent class action filed by an association alleging a myriad of unconstitutional practices in ODYS facilities.¹⁷⁶ The issues raised “include the application by staff of unnecessary force; arbitrary and excessive use of isolation and seclusion; arbitrary and excessive discipline; inadequate mental health, medical, and dental care; inadequate education services; *inadequate structured programming*; broadly inadequate training of staff; an unsafe living environment; and a dysfunctional grievance system.”¹⁷⁷ The Final Fact-Finding report sustained each area of the plaintiff’s complaint.¹⁷⁸

In the area of structured programming, which is one of the factors a juvenile judge must consider before deciding to impose a discretionary serious youthful offender disposition, the Final Fact-Finding report found ODYS lacks academic and career technical counseling, making re-entry into society after detention difficult for some juvenile offenders

169. OHIO REV. CODE ANN. § 2152.13(D)(2)(a)(i) (2002).

170. *Id.*

171. *Id.*

172. *Id.* § 2152.13(D)(2)(b).

173. *S.H. v. Stickrath*, 251 F.R.D. 293 (S.D. Ohio 2008).

174. FRED COHEN, FINAL FACT-FINDING REPORT: *S.H. v. STICKRATH* iv (2008).

175. *Stickrath*, 251 F.R.D. at 293.

176. *Id.*

177. COHEN, *supra* note 174, at i (emphasis added).

178. *Id.*

and impossible for others.¹⁷⁹ The report also found the ODYS education system to be “utterly deficient” in human and physical resources devoted to educating to ODYS youth. For example, on a randomly selected day, 43% (598 youth) were found to receive less instruction than a legally mandated, full school day.¹⁸⁰ Therefore, under the discretionary SYO statute, a judge may be unable to accurately consider whether a juvenile has been rehabilitated through access to ODYS programming in order to avoid the imposition of the stayed adult sentence.

Although there is no current alternative to ODYS, if a jury was allowed to decide whether to impose an adult sentence—rather than the judge, as per the discretionary SYO statute—the jury may be better suited to weigh the seriousness of the offense without having to consider factors such as the current status of the DYS system, which are outside of the juvenile offender’s control.

C. Moving Towards the Abolishment of the Juvenile Justice System

The import of blended sentencing structures such as Ohio’s SYO statutes shift the original goals of the juvenile justice system away from the rehabilitative model and towards a retributive model of juvenile justice. Some scholars, most notably Barry Feld,¹⁸¹ have advocated for the abolishment of the juvenile justice system so that juveniles can enjoy the same due process rights as adults. According to Professor Feld, “[n]o compelling reasons exist to maintain separate from an adult criminal court, a punitive juvenile court whose only remaining distinctions are its persisting procedural deficiencies.”¹⁸²

Ohio has given no indication that it intends to abolish its current juvenile justice system. Despite the shift from rehabilitative towards retributive models of juvenile justice, clear drawbacks exist to abolishing the juvenile justice system.¹⁸³ However, the implications of both the mandatory and discretionary Ohio SYO statutes illustrate that juvenile defendants may be better protected by the adult system than by the existing juvenile system. In the adult system, juvenile defendants facing the imposition of adult time would be afforded a mandatory and complete jury trial right.

179. *Id.* at iv.

180. *Id.*

181. See generally Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997).

182. *Id.* at 69.

183. For a summary of the arguments against abolishment of the juvenile justice system, see, for example, Claudia Noriega, *Stick a Fork In It: Is Juvenile Justice Done?*, 16 N.Y.L. SCH. J. HUM. RTS. 669, 696–98 (2000).

VI. CONCLUSION

In 1966, the United States Supreme Court recognized, “[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”¹⁸⁴ Ohio’s SYO statutes certainly fall into the “worst of both worlds” category. Although it may not be time to abolish the juvenile justice system, cases such as *State v. D.H.* illustrate, that Ohio juvenile defendants receiving a discretionary serious youthful offender sentence would be best served with complete jury trial rights at every stage of the trial, for “trial by jury in criminal cases is fundamental to the American scheme of justice.”¹⁸⁵

184. *Kent v. United States*, 383 U.S. 541 (1966).

185. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).