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INTEREST OF *AMICI*

Amici Juvenile Law Center *et al*. work on issues of child welfare, juvenile justice and children's rights. *Amici* have a unique perspective on the constitutional rights and developmental psychology of children involved in the juvenile and criminal justice systems.[1]

This Court has never settled the question of whether age matters for *Miranda* custody determinations. *Amici* share a deep concern that the Ohio state court's decision that age does not matter, if left to stand, would subject scores of youth to interrogations which they do not desire or fully understand, but cannot, because of their age, terminate.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, this Court has clearly established that defendants are entitled to a jury trial for all factual findings that increase their sentences beyond the statutory maximum. *Amici* share the concern that the state court's conclusion that this rule does not apply in the context of juvenile blended sentencing statutes deprives children facing adult sentences of their Constitutional right to trial by jury.

Amici join together in support of Plaintiffs-Appellees' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This case involves two issues of extraordinary importance to the lives of vulnerable youth - first, to what extent does age factor into custody determinations for purposes of *Miranda* warnings, and second, does Ohio's blended sentencing scheme unconstitutionally violate a juvenile's right to a jury trial.

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[1] *Amici* file this brief with the consent of the Ohio Public Defenders on behalf of J.B. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. A brief description of all *Amici* appears at Appendix A.

This case calls upon the Court to determine whether J.B., a 13-year-old, would feel reasonably free to terminate an interrogation and leave the room when being questioned in the middle of the night in a police station. If he would *not* feel free to leave, police would be required to issue *Miranda* warnings.

This Court historically has recognized that the "status of minors under the law is unique." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). The Ohio court's conclusion that age does not matter for Fifth Amendment custody determinations contradicts this Court's precedents, statutes and case law from numerous states, and developmental theory regarding adolescent perceptions and decision-making.

In *Yarborough v. Alvarado*, 541 U.S. 652 (2004) this Court considered whether the age of a suspect just shy of his 18th birthday mattered for establishing custody. Because *Yarborough* required the Court to apply a deferential *habeas* standard, the Court never reached the merits of Alvarado's case. *J.B. v. Ohio* presents an opportunity for the Court to clarify unsettled law in the first instance and provide necessary guidance to state courts and law enforcement.

Ohio is one of many states to have passed a "blended sentencing" law allowing juvenile courts to impose adult, rather than juvenile, sentences on the basis of judicial fact-finding. The consequences to adolescents are monumental. J.B.'s maximum sentence, for example, increased from eight years to life. Additionally, while Ohio law prohibits incarcerating children with juvenile sentences in adult facilities, J.B. was sentenced to an adult correctional facility, where he faced a greater risk of abuse and a diminished likelihood of rehabilitation.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that a defendant is entitled to trial by jury beyond a reasonable doubt for any fact that increases a defendant's sentence beyond the statutory maximum. This Court has clarified that the requirements of *Apprendi* apply to fact-

finding that enhances a sentence under federal sentencing guidelines, the Armed Career Criminal Act, or that imposes the death penalty. The Court has not, however, directly confronted the application of *Apprendi* to juvenile blended sentencing statutes.

Apprendi applies to juvenile blended sentencing statutes. Like the other sentencing schemes in which this Court applied *Apprendi*, blended sentencing statutes require judicial fact-finding as a prerequisite to increased adult criminal sentences. Moreover, *Ring v. Arizona*, 536 U.S. 584 (2002) instructs that *Apprendi* applies to the statutory structure and type of facts at issue here. *Amici* therefore respectfully request this Court's clarification that children facing increases to adult sentences are entitled to the jury rights guaranteed by the Sixth Amendment.

ARGUMENT

I. THIS COURT SHOULD GRANT *CERTIORARI* TO ENSURE THAT FIFTH AMENDMENT PROTECTIONS APPLY MEANINGFULLY TO YOUTH FACING POLICE INTERROGATIONS

This Court has historically recognized that juvenile status is legally salient.[2] Indeed, this Court has grounded its legal treatment of adolescents in an understanding of the developmental differences between youth and adults. *See Roper v. Simmons,* 543 U.S. 551 (holding that the death penalty cannot be applied to youth under the age of 18 when their crimes were committed). Custody determinations warrant a similar analysis; a reasonable child experiences custody differently from a reasonable adult.

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[2] *See Bellotti v. Baird*, 443 U.S. 622, 633 (1979), *May v. Anderson*, 345 U.S. 528, 536 (1953), *Hodgson v. Minnesota*, 497 U.S. 417 (1990)

A. J.B. Was in Custody During his Interrogation.

To determine whether J.B. was in custody, the Court must consider the circumstances surrounding the interrogation, and then consider, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112.

J.B., a 13-year-old child was transported to the Hamilton Police Department around 1:00 a.m. with his younger siblings. J.B. had just witnessed his youngest brother being taken away by an ambulance. J.B. and his siblings were placed in a hallway behind a locked door for over one hour. The only persons in their view were police officers; no familiar adults were present. At 2:20 a.m. Detective Hayes brought J.B. to his office and began questioning him without any other adults in the room.[3] Detective Hayes did not explain to J.B. that he could leave the room, refrain from answering questions, take a break, or use the restroom.

Courts must determine how "a reasonable person *in the position of the individual being questioned* would gauge the breadth of his or her freedom of action." [emphasis added] *Stansbury v. California*, 511 U.S. 318, 322. Thus, the relevant analysis is whether a reasonable 13-year-old, who has just experienced a traumatic event and is taken to the police station by a police officer at one in the morning, placed in a hallway behind a locked door for over an hour, escorted into a detective's office and questioned by police would have felt he was at liberty to terminate the interrogation and leave. *See Berkemer v. McCarty*, 468 U.S. 420. This requires an understanding of how a 13-year-old would perceive his or her breadth of "freedom of action" differently than an adult or an older juvenile. *Stansbury v. California*, 511 U.S. 318.

[3] Spanish is J.B.'s primary language; he has limited English proficiency. As he has moved back and forth from Mexico and between states in the U.S., he has only attended school on a limited basis. There was no interpreter during the interrogation.

1. Supreme Court Precedent Establishes the Relevance of Age to the Analysis of Confessions.

This Court has yet to squarely address how age factors into custody determinations. In *Yarborough v. Alvarado*, 541 U.S. 652, the Court considered the habeas petition of a teenager who had argued that age should affect the *Miranda* custody inquiry. Because of the deference due a state court on habeas review, this Court never reached a decision on the merits. It determined only that the state court's refusal to consider Alvarado's age was a "reasonable" application of "clearly established law." *Id.* at 660-69.[4] The law was not "clearly established" because the question of age had *not* been addressed by earlier *Miranda* cases. *Id.* at 666.[5] Because J.B.'s case comes to the Court on direct appeal, it allows the Court to address the issue on the merits in the first instance.

The *Yarborough* Court acknowledged that "fair-minded jurists could disagree over whether Alvarado was in custody." *Id.* at 664. J.B.'s case, however, is much stronger than Alvarado's. As the majority observed in *Yarborough*, Alvarado was "five months shy of his 18th birthday" at the time of the offense, *id.* at 656, while J.B. was only thirteen at the time of his interrogation.[6] As Justice O'Connor's concurrence acknowledged, a difference in the child's age could impact both the child's ability to understand and

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[4] *Amici* clarify here that the appropriate standard for considering a *Miranda* issue on direct review is *de novo*, *See Clewis v. Texas*, 386 U.S. 707 (1967). There is no reason to apply the Antiterrorism and Effective Death Penalty Act (AEDPA) "unreasonable application of clearly established federal law" standard here. Petitioners' brief provides no indication that they intended to invoke the AEDPA standard; they did not cite to the statute, nor does the statute apply to cases on direct review.

[5] The *Yarborough* Court addressed age and experience. The question of experience is not at issue here. Moreover, unlike age, the experience of a suspect is difficult, if not impossible for an officer to know.

[6] Additionally, J.B., unlike Alvarado, was brought into the police station by an officer, and did not have his parents present at the station.

terminate police questioning and the ability of police to predict the child's reaction.

> There may be cases in which a suspect's age will be relevant to the *Miranda* "custody" inquiry. In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority. Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave. That is especially true here; 17 ½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults.

Id. at 669 (O'Connor, J., concurring). In contrast, a 13-year-old's age can be discerned by police, and police can assume that a young adolescent's age will have a bearing on his or her behavior in reaction to police questioning.

The *Yarborough* majority acknowledged the possible concern that there would be no "clear guidance to police" in taking a subjective factor into account. *Id.* at 667. Age is an objective factor. Police could simply ask young suspects their age at the beginning of an interrogation. Moreover, as Justice O'Connor's concurrence implicitly acknowledges, while it might be difficult for police to distinguish between 17 ½-year-old and an 18-year-old, it is not difficult to distinguish between a 13-year-old and an 18-year-old.

Although the Court has not squarely decided the importance of age to custody determinations, it has applied a Fifth Amendment analysis to a child's confession. In *Gallegos v. State of Colorado*, 370 U.S. 49, this Court found unconstitutional the confession of a 14-year-old held for five days without access to his parents, lawyers or a judge. Although the Court's holding rested on due process grounds, the Court acknowledged that also at issue was "the element of compulsion. . . condemned by the Fifth Amendment." *Id.* at

51. *Gallegos* illustrates how juvenile status implicates the ability to exercise constitutional rights. Gallegos was "not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded" and therefore was "unable to know how to protest his own interests or how to get the benefits of his constitutional rights." *Gallegos* at 54. To interrogate a 14-year-old boy during a five day detention would therefore be "to treat him as if he had no constitutional rights. *Id.* Like Gallegos, J.B., held at the police station with no access to familiar adults, was "unlikely to have any conception" of what would confront him during a police interrogation, *id.*, and was therefore denied his constitutional rights.

Moreover, this Court has long held that youth is a salient factor in assessing the voluntariness of a confession under the Due Process Clause. In *Haley v. State of Ohio*, 332 U.S. 596, the Supreme Court held that a 15-year-old boy's confession should have been excluded because it was involuntarily extracted by methods violative of due process requirements of the Fourteenth Amendment. Haley was interrogated from midnight to five in the morning by police officers working in relays. He was not informed of his rights or provided access to counsel, friends, or family. This Court's analysis of the voluntariness of Haley's confession turned on his juvenile status:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. . . . A 15-year old lad, questioned through the dead of the night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal. . . . But we cannot believe that a lad of tender years is a match for the police in such a contest.

Haley, 332 U.S. at 599-600. *Haley* elucidates how the defendant's age informs his relationship with state agents; Haley's youth inhibited him from exercising or even understanding his rights. This very analysis applies to J.B., a child two years younger than Haley. J.B. was uninformed of his rights, he had no familiar adults with him, and was questioned in the middle of the night when he was likely disoriented and traumatized from witnessing his brother being rushed away in an ambulance. J.B.'s age left him more vulnerable, fearful and unable to terminate the interrogation.

2. State Courts and Legislatures Have Recognized the Importance of Granting Special Protections to Youth Facing Police Interrogations.

Numerous states have recognized that youth facing police interrogations require additional protections. New Mexico, for example, does not allow any statement, confession, or admission made by a child under the age of thirteen to be admitted against the child. N.M. Stat. Ann. 1978, § 32A-2-14(F). For youth 13 or 14 years of age, the law provides a rebuttable presumption that any statements, admissions, or confessions are inadmissible. *Id*. Several other state statutes mandate that a juvenile's parent/guardian, legal custodian or attorney be present during the questioning, or at the very least that the minor is given an opportunity to consult with a parent/guardian or attorney before waiving his or her rights.[7] State courts have also held that a parent or guardian must be present when a minor is questioned. *See e.g.*, *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657

[7] *See e.g.*, COLO. REV. STAT. § 19-2-511; CONN. GEN. STAT. ANN. § 46b-137(a) (West Supp.1984); IND. CODE § 31-32-5-1; IOWA CODE § 232.11; KAN. STAT. ANN. § 38-1624, (c)(3)(A); *See also In the Matter of B.M.B.*, 955 P.2d 1302, 1312-13 (Kansas 1998); 15 ME. REV. STAT. § 3203-A(2)(A); MISS. CODE ANN. § 43-21-303(3), *see also M.A.C. v. Harrison County Family Court*, 566 So.2d 472, 475 (Miss. 1990); MONT. CODE ANN. § 41-5-331; N.C. GEN. STAT. § 7B-2101; OKLA. STAT. tit. 10, § 7303-3.1; TEX. FAM. CODE ANN. § 51.09; W.VA. CODE § 49-5-2(k)(1).

(Mass. 1983); *In the Interest of J.F.*, 668 A.2d 426, 430 (N.J. 1995); *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982). In fact, at least one state supreme court has held that the presence of a parent was insufficient to constitute representation and that counsel must be present during the interrogation. *In re J.D.Z.*, 431 N.W.2d 272, 276 (N.D. 1988); N.D. Cent. Code § 27-20-26 (Michie 1991 & Supp. 2001). Finally, state courts have held that even when the law does not require an adult's presence during the interrogation, the minor's request for a parent is an invocation of his or her rights against self-incrimination and therefore all questioning must immediately cease. *See e.g., People v. Burton*, 491 P.2d 793 (Cal. 1971); *People v. Castro*, 462 N.Y.S.2d 369, 380-81 (1983).

States have also addressed importance of age-appropriate language for young people receiving *Miranda* warnings. In at least one state juvenile code, a law enforcement officer must advise the minor of his or her rights in the "juvenile's own language." Ar. Juv. Code § 9-27-317. Furthermore, the New Hampshire State Supreme Court held that the form presented to a minor when waiving his or her rights must be in simplified language. *State v. Benoit*, 490 A.2d 295, 304 (N.H. 1985). If the juvenile is not presented the statement of his or her rights in a simplified form, the court will presume that the juvenile's explanation of his or her rights was inadequate. *Id.*

Texas requires an even higher level of protection: the minor must be taken before a magistrate to be informed of his or her rights. The child's statement must then be "signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present ... [and] the magistrate must be fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily." TEX. FAM. CODE ANN. § 51.095 (West Supp. 2002). *See also Murray v. Earle*, 405 F.3d 278, 287 (5th Cir. 2005).

3. Social Science Research Underscores the Importance of Juvenile Status in *Miranda* Custody Determinations.

Adolescent development research demonstrates that developmental status directly impacts a juvenile's perception of his freedom of action. Psychosocial factors influence adolescent perceptions, judgments and decision-making and limit their capacity for autonomous choice. Elizabeth Cauffman and Laurence Steinberg, *Researching Adolescents' Judgment and Culpability,* in Youth on Trial: A Developmental Perspective on Juvenile Justice 325 (Thomas Grisso & Robert G. Schwartz eds., 2000). Specifically, present-oriented thinking, egocentrism, greater conformity to authority figures, less experience and greater vulnerability to stress and fear than adults leave juveniles more susceptible than adults to feeling that their freedom is limited.[8] The tendency of juveniles to think only about the present moment combined with their intense self-consciousness leads them to have difficulty thinking past the time of interrogation to a point in which they would be free, and prevents them from recognizing the possibility of terminating an interrogation.

Juveniles' responses to stress further heighten their inability to consider a range of options. Since adolescents have less experience with stressful situations, they have a lesser capacity to respond adeptly to such situations. Laurence Steinberg & Robert G. Schwartz, *Development Psychology Goes to Court* in Youth on Trial; a Development Perspective on Juvenile Justice 9, 26 (Thomas Grisso and Robert Schwartz eds. 2000). Adolescents tend to process information in an 'either-or' capacity, particularly in stressful situations. While adults may perceive multiple options in a

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[8] *See* Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Ky. Child Rts. J. 16, 17 (Summer 1999); David Elkind, *Egocentrism in Adolescence*, 38 Child Dev. 1025, 1029-30 (1967); Kids are Different: How Knowledge of Adolescent Development Theory Can Aid in Decision-Making in Court (L. Rosado ed. 2000); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 27 (Summer 2000).

particular situation, adolescents may only perceive one. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 27 (Summer 2000), Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Ky. Child Rts. J. 16, 17-18 (Summer 1999). Thus, a juvenile in the stressful situation of police interrogation will likely see his only option as remaining in the room until he is informed that he may leave.

The propensity of juveniles to defer to adults also makes them less likely to end an interrogation with police officers when they have not explicitly been instructed to do so. Adolescents tend to comply with expectations of authority. Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages* 172-73 (1984). Thus, "[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures … when being interrogated by the police." Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants,* Law and Human Behavior Vol 27, No. 4 (Aug. 2003) at 333-363.

Younger children, like J.B., have even more limited capacities for autonomous choice. A recent law review article found that "a significant body of developmental research indicates that, on average, youths under the age of fourteen differ significantly from adolescents sixteen to eighteen years of age in their level of psychological development." Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice*, 83 N.C. L. Rev. 793, 817 (2005). Children under 14 are "significantly more likely than older adolescents and young adults to be impaired" in legal contexts. Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants,* Law and Human Behavior Vol 27, No. 4 (Aug. 2003) at 333-363. Indeed, a study of youths' comprehension of *Miranda* warnings revealed that

"understanding … was significantly poorer among juveniles who were 14 years of age or younger than among 15-16 year old juveniles or adult offenders …" *Id*. at 356 citing Grisso, T. (1981) *Juveniles' Waiver of Rights: Legal and Psychological Competence*. New York: Plenum.[9] Another study revealed that juveniles age 14 and below "demonstrate incompetence to waive their right to silence …" *Id.*

When understood in the context of this psychological research, it becomes apparent that a 13-year-old boy like J.B. would not have believed that he was able to refuse to answer Detective Hayes' questions and leave the police station.

B. Detective Hayes Interrogated J.B. without Providing Requisite *Miranda* Warnings.

Miranda safeguards apply when a person in custody is subjected either to "express questioning or its functional equivalent." *Innis*, 441 U.S. 291 at 301-302. Thus, once Hayes' questioning evolved into an interrogation, J.B. was entitled to *Miranda* warnings. Detective Hayes began his interview with "rapport building." When J.B. told Hayes that J.R. was injured from falling down the stairs, Hayes responded that this story was not consistent with J.R.'s bruises or the number of stairs in the apartment. Hayes then realized that J.B. may not know that J.R. had died. Once he informed J.B. of the tragic news, J.B. began to cry. He then stated, "he was sorry for what he did, he didn't mean to hurt him ***." Petitioner's Brief at 4. At this juncture, Detective Hayes transformed their friendly discussion into express questioning by asking J.B. to explain his apology, a question that was "reasonably likely to elicit an incriminating response." *Innis*, 441 U.S. 291, 301-302 (1980). Indeed, the facts in the instant matter surpass the threshold interrogation requirement since Hayes' question was not just "reasonably

[9] *See* also Thomas Grisso, *Juveniles' capacities to waive Miranda rights: An empirical analysis*, 68 Cal. L. Rev. 1134 (1980).

likely" but rather specifically calculated to elicit an incriminating response. The very purpose of Haley's question was to obtain a confession from J.B. Only *after* J.B. offered a full confession did Detective Hayes read J.B. his *Miranda* rights.

II. THIS COURT SHOULD CLARIFY THAT BLENDED SENTENCING SCHEMES THAT INCREASE A CHILD'S SENTENCE BEYOND THE STATUTORY MAXIMUM ON THE BASIS OF JUDICIAL FACT-FINDING VIOLATE THE SIXTH AMENDMENT.

A. Ohio's Blended Sentencing Scheme Allows Increases in Juvenile Sentences Beyond the Statutory Maximum Solely on the Basis of Judicial Fact-Finding.

A little more than a century since the creation of the first juvenile court in 1899, a wave of legislative change has directed children into the adult system. This legislation subjects children who are too young to get married, vote, serve in the armed services or drink alcohol to adult sentences in adult correctional facilities. It disproportionately affects minority youth, and applies most frequently to children charged with non-violent property and drug offenses.[10]

Ohio is one of at least 15 states to have passed a juvenile "blended sentencing" scheme allowing juveniles to be tried in juvenile court, but subjected to adult sentences.[11] Research suggests that prosecutors may be significantly more likely to seek adult sentences in states with blended

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[10] Coalition for Juvenile Justice, *Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Criminal Court*, found at http://www.appa-net.org/about%20appa/CJJ-report.pdf (2005) (hereinafter *Childhood on Trial*) at 1, 5-6, 28.

[11] National Center for Juvenile Justice, *Which states try juveniles as adults and use blended sentencing?, found at* http://www.ncjj.org/stateprofiles/overviews/transfer_state_overview.asp.

sentencing statutes than in states with juvenile transfer or waiver laws.[12]

At issue is whether Ohio's scheme adequately protects a child's right to trial by jury for the facts necessary to enhance his or her sentence. Ohio's scheme permits blended sentencing for children designated "Serious Youthful Offenders" (SYO). Ohio Rev. Code Ann. §§ 2152.13(D)(2)(a)(1); 2152.13(2)(a)(i). SYOs are eligible for all adult sentences other than the death penalty or life without the possibility of parole. Ohio Rev. Code Ann. § 2152.13(E)(2)(a)(i). In SYO cases, the procedural protections granted to adults – including the right to a jury trial – are in place throughout the adjudication. *See* Ohio Rev. Code Ann. § 2152.13. Such protections are constitutionally required. *See, e.g., Duncan v. Louisiana,* 391 U.S. 145, 158-9, 88 S.Ct. 1444 (1968) (asserting that the right to trial by jury is fundamental for serious offenses, and defining serious offenses by the penalty authorized). Indeed, every state to pass a comparable juvenile blended sentencing law has explicitly guaranteed the right to trial by jury for children eligible for adult sentences.[13] The question presented here is whether those procedural safeguards adequately protect juveniles like J.B. during sentencing.

J.B.'s age and level of offense made him eligible for "discretionary SYO" sentencing. *See* Ohio Rev. Code Ann. §§ 2152.11(B)(2), 2152.(E)(2). To impose a discretionary SYO sentence, the judge must make factual findings regarding the nature and circumstances of the offense, the child's amenability to rehabilitation, and the sufficiency of

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[12] *Childhood on Trial* at 43.

[13] Alaska Stat. §§ 47.12.065, 47.12.110; Ark. Cod Ann. § 9-27-325; Colo. Rev. Stat. Ann. § 19-2-601(3)(a); Conn. Gen. Stat. Ann. §§ 46b-133c(c), 46b-133d(d), 705 ILCS 405/5-810(3); Kan. Stat. Ann. § 38-1636(f)(2); Mass. Gen. Laws 119 § 55A; Mich. Comp. Laws § 712A.2d(7); Minn. Stat. Ann. § 260B.163(1)(a); Mont. Code. Ann. § 41-5-1607; Ohio Rev. Code § 2152.13(C)(1); R.I. Gen. Laws. Tex. Fam. Code 54.04(d)(3).

the resources in the juvenile system. Ohio Rev. Code Ann. §§ 2152.02(H); 2152.13(D)(2)(a)(1).

The imposition of an adult sentence on the basis of judicial fact-finding alone is typical of juvenile blended sentencing schemes.[14] While state legislatures have ensured that defendants are guaranteed a right to jury trial in adjudications resulting in adult sentences, these statutes do not protect the child's right to jury trial for the facts that make him or her eligible for enhanced sentencing.

For a child in J.B.'s situation, the difference in sentencing ranges between a juvenile sentence and an SYO sentence is monumental. As a juvenile, J.B. faced a possible commitment to the youth services department until his twenty-first birthday. Ohio Rev. Code Ann. § 2152.16 (A)(1)(a). As an adult, J.B. was subject to – and received – a sentence of fifteen years to life for murder and two years for child endangering in an adult correctional institution.[15] J.B.'s maximum sentence increased from eight years to life. This difference is typical for children receiving blended sentences.

Additionally, had J.B. been sentenced as a juvenile, the court would have been prohibited from placing him in an adult correctional facility. Ohio Rev. Code Ann. § 2152.19(8)(a). Instead, he would have been placed in a juvenile system designed for the care and development of youth. Ohio Rev. Code Ann. § 2152.01. *See also McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (In the juvenile system, confinement "is aimed at rehabilitation, not at . . . imposing pains or penalties.") In a juvenile facility, J.B.'s chance of rehabilitation would be greater; his risk of serious

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[14] *See, e.g.,* Ak Stat. §§ 47.12.140; 47.12.120(j); Ar Stat. §9-27-503; Co Stat. § 19-2-601; Conn. Stat. §§ 46b-133c; 46b-133d; Ill. Stat. § 405/5-810; Kans. Stat § 38-1636; Mass. Gen. Laws 119 § 58; M.C.L.A. §712A.2d; Minn. Stat. Ann. 260B.130 (statute held unconstitutional on other grounds by *In re Welfare of T.C.J.*, 689 N.W.2d 787, 789 (Minn. App., 2004), *State v. Garcia*, 683 N.W.2d 294, 295(Minn., 2004)); Mont. Code. Ann. §§ 41-5-1603; 41-5-1606; N.M. Stat. Ann. § 32A-2-20.

[15] Petitioners' Brief at 5.

harm, including victimization by staff or prisoners as well as suicide, would be dramatically lower.[16]

B. This Court's Decision in *Ring v. Arizona* Clarifies that J.B. was Entitled to a Jury Determination Beyond a Reasonable Doubt of the Factual Findings Necessary to Impose a Discretionary SYO Sentence.

As Petitioner has explained, the discretionary SYO scheme unconstitutionally denied J.B. the right, articulated in *Apprendi v. New Jersey*, 530 U.S. 466, to a jury trial for the factual findings that could increase his sentence beyond the statutory maximum. This Court has clarified that *Apprendi* jury trial requirements apply to aggravating and mitigating factors that support imposition of the death penalty, *Ring v. Arizona*, 536 U.S. 584, sentencing factors under the Armed Career Criminal Act, *Shepard v. United States*, 544 U.S. 13 (2005), and sentencing under the federal sentencing guidelines *United States v. Booker*, 543 U.S. 220 (2005). It has not, however, clarified the applicability of *Apprendi* to juvenile blended sentencing schemes.

The statutory maximum is "the maximum [a judge] may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296 (2004). *Amici* support the argument set forth by Petitioner. Pursuant to *Apprendi* and *Blakely*, a judge must make additional factual findings before

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[16] Craig A. Mason, *Rearrest Rates Among Youth Sentenced in Adult Court, found at* http://www.sentencingproject.org/pdfs/2077.pdf at 2; James Austin, Kelly Dedel Johnson, Maria Gregoriou, Juveniles in Adult Prisons and Jails. A National Assessment, Institute on Crime, Justice and Corrections at The George Washington University an National Council on Crime and Delinquency, Bureau of Justice Assistance Monograph, Oct. 2000 *available at* http://www.ncjrs.gov/pdffiles1/bja/182503.pdf (Describing research showing the suicide rate for juveniles substantially higher in adult facilities than in juvenile facilities and observing that "sexual assault was five times more likely in prison, beatings by staff nearly twice as likely, and attacks with weapons were almost 50 percent more common in adult facilities.")

imposing a discretionary SYO sentence. Such a sentence exceeds the statutory maximum for the relevant delinquent offenses and entitles the defendant to a jury trial and proof beyond a reasonable doubt. *Amici* write separately to clarify that, pursuant to this Court's decision in *Ring v. Arizona*, 536 U.S. 584, (1) the structure of the Ohio sentencing scheme makes application of *Apprendi* appropriate; and (2) the types of factual determinations required for the imposition of an SYO sentence are appropriate for jury fact-finding.

1. Pursuant to *Ring*, Children in Ohio are Entitled to Jury Determinations of the Facts Necessary for an SYO Sentence.

The Sixth Amendment entitles children to a jury determination beyond a reasonable doubt of the facts that authorize a discretionary SYO sentence. According to the Ohio Court of Appeals – the highest court to issue a written opinion on this issue in J.B.'s case – *Apprendi* did not apply to J.B.'s case because the charges of murder and child endangering made J.B. eligible for SYO sentencing at the discretion of the judge. Therefore, the sentence was *within* the statutory maximum.[17] This analysis ignores the requirement set forth in provisions of the SYO statutory scheme that require a judge to conduct additional fact-finding before imposing a discretionary SYO sentence. *See* Ohio Rev. Code Ann. §§ 2152.02(H); 2152.13(D)(2)(i). In *Ring*, this Court clarified that even when a statute makes an individual eligible for a heightened punishment, the sentence is beyond the statutory maximum if other statutory provisions require the judge to make factual findings before imposing the sentence. *Ring*, 536 U.S. 584.

The *Ring* Court held that a capital sentencing scheme structurally comparable to the SYO sentencing scheme violated *Apprendi*. The statute at issue in *Ring* authorized an

[17] *In re J.B.*, 2005 Ohio 7029 at ¶ 126.

increased penalty for murder, but cross-referenced a statute requiring the judge to make additional factual findings before the heightened sentence (of death) could be imposed. 536 U.S. 584. According to the Court, the argument that Ring was sentenced within the range of punishment authorized by the jury verdict could not stand in light of the additional factual findings a death sentence required. A conclusion to the contrary

> overlooks *Apprendi's* instruction that "the relevant inquiry is not one of form but of effect." In effect, the required finding [by the judge] expose[d] [Ring] to a greater punishment than the jury's guilty verdict. The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense". . . . If Arizona prevailed on its opening argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule.

Id. at 586 (internal citations omitted).

Similarly, the Ohio statutes under which J.B. was sentenced identify SYO as a possible sentence, but explicitly implicate other statutory provisions which require judicial fact-finding before the SYO sentence can be imposed.[18] Thus, like the defendant in *Ring*, J.B. could not be sentenced unless the judge made additional findings; the SYO sentencing scheme is therefore unconstitutional.

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[18]A 13-year-old like J.B. who is convicted of murder or child endangering is "eligible" for "discretionary SYO." Ohio Rev. Code Ann. §§ 2152.11(B)(2), 2152.(E)(2). "Discretionary SYO" is defined by statute as "a case in which the juvenile court, in the juvenile court's discretion, may impose a serious youthful offender disposition under section 2152.13 of the Revised Code. Ohio Rev. Code Ann. § 2152.02(H). Section 2152.13, in turn, clarifies that a judge may only impose an SYO sentence if the court makes factual findings on the record. Ohio Rev. Code Ann. § 2152.13(D)(2)(i) ("If the juvenile court on the record makes [the required findings], . . . the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult. . . .")

2. The Type of Fact-Finding Required by the Discretionary SYO Statute must be Conducted by a Jury.

This Court's decision in *Ring* underscores that the right to a jury determination applies to the factual considerations required by the Ohio SYO statute. The SYO statute allows heightened punishment to be imposed if the judge finds that "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" are not adequate "to provide the juvenile court with a reasonable expectation" that the goals of the juvenile system will be met. Ohio Rev. Code Ann. § 2152.13(D)(2)(a)(i).[19]

The first of the factors listed in the discretionary SYO statute – the "nature and circumstances of the violation" – is the precise type of sentencing factor this Court has already held entitles a defendant to a jury trial. *United States v. Booker*, 543 U.S. 220; *Blakely v. Washington*, 542 U.S. 296; *Apprendi v. New Jersey*, 530 U.S. at 496; *Ring*, 536 U.S. at 592; *Apprendi v. New Jersey*, 530 U.S. at 496.[20]

More importantly, the dispositive question for determining whether the jury right attaches is not whether the facts are labeled sentencing factors or elements, but whether

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[19] Those goals include: "to provide for the care, protection, and mental and physical development of children, . . . protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." *Id.* at § 2152.01.

[20] In contrast, this Court has held that a court may enhance a sentence based on prior convictions even if they are not treated as separate elements and listed in the indictment. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Almendarez-Torres* does not govern this case. First, *Almendarez-Torres* addressed the issue of notice, not of sentencing. Second, *Almendarez-Torres* has been explicitly called into question by *Apprendi* and its progeny. *See Apprendi*, 530 U.S. at 489; *Shepard v. United States*, 544 U.S. 13, 27- 28 (2005) (Thomas, J., concurring) Third, prior convictions raise fewer Sixth Amendment issues than other questions of fact because they are rarely contested and are procedurally protected by the initial trial. *See Apprendi*, 530 U.S. at 488, 496.

increased punishment beyond the statutory maximum is contingent on those facts. In *Ring,* this Court explained,

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would have received if punished according to the facts reflected in the jury verdict alone."

536 U.S. at 602 (internal citations omitted). Thus, the determination of aggravating and mitigating facts necessary to the imposition of the death penalty must be proven by a jury beyond a reasonable doubt. *Id.* at 609.

Moreover, the complexity of the factual determinations at issue cannot undermine the importance – or eliminate the Constitutional guarantee – of a jury trial. In *Ring,* the Court explicitly rejected the State's argument that the elaborate sentencing procedures in death penalty cases, and the particular considerations regarding aggravating factors, mandated judicial sentencing in capital cases. *Id.* at 606. The *Ring* Court asserted that the right would apply even in cases where the jury might be less educated than the judge on the issues. *See id.* at 609, *quoting Duncan v. Louisiana,* 391 U.S. 145, 155-56, 88 S.Ct. 1444 (1968). *See also id.* at 607 ("The Sixth Amendment jury trial right. . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders.") If J.B. thought he could receive a more just sentencing determination from a judge, he could waive the right to jury trial. The constitutional right, however, is not dependent on the type of facts at issue.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this court grant J.B.'s petition for a Writ of Certiorari.