

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF B.S., A MINOR : Case No.  
: :  
: On Appeal from the Court  
: of Appeals of Ohio, Fourth  
: Appellate District,  
: Washington County Court  
: of Appeals, No. 05 CA 35  
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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE JUSTICE FOR CHILDREN PROJECT

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

This case presents a substantial question that is of great general interest regarding the constitutionality of Ohio's sentencing statutes for serious youthful offenders.

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

accept jurisdiction over this case, as it presents both a substantial constitutional question and a matter of public and great general interest. See S. Ct. Prac. R. III, Section 6.

#### STATEMENT OF THE INTEREST OF AMICUS CURIAE

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

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

#### STATEMENT OF THE CASE AND FACTS

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

## ARGUMENT

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

The imposition of a discretionary adult sentence under Ohio's serious youthful offender law violates a juvenile's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Jury Trial Clause of the Sixth Amendment to the United States Constitution

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

Such prison sentences can be lengthy, and are indistinguishable from sentences imposed on adult offenders. In this case, for example, in addition to imposing a traditional juvenile disposition committing B.S. to the Department of Youth Services until he reaches the age of 21, the juvenile court also ordered that B.S. serve two consecutive sentences of fifteen years to life imprisonment. B.S., like other serious youthful offenders, could spend the rest of his life behind bars. Cf. *e.g. In Re J.B.*, Butler App. No. CA2004-09-226, 2005-Ohio-7029 at ¶10, petition for certiorari filed in *J.B. v. Ohio* (December 22, 2006), --- U.S. ---, No. 06-7611 (juvenile offender sentenced to fifteen years to life imprisonment).

However, pursuant to the statute, the trial court prior to imposing an discretionary SYO sentence is required to “on the record make[ ] a finding”:

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

R.C. 2152.13(D)(2)(a)(i). There is no question that the trial court made the required statutory finding in this case. However, as this Court is well aware, statutes that require courts to engage in factfinding prior to imposing an enhanced sentence raise serious constitutional questions. See generally *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, this Court held several provisions of Ohio’s felony sentencing statutes to be unconstitutional based on the very same type of judicial factfinding required by R.C. 2151.13(D)(2).

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

*Foster* at ¶53 (emphasis added), quoting *Blakely v. Washington* (2004), 542 U.S. 296, 303. Both the United States Supreme Court’s decision in *Blakely* and this Court’s decision in *Foster* rest on the right to jury trial protected by the Sixth Amendment to the United States Constitution. Admittedly, this right may not strictly apply to traditional juvenile court proceedings. See *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543 (Blackmun, J., for the plurality) (holding that the Sixth Amendment right to jury trial does not attach to traditional juvenile court proceedings). However, there is no persuasive

reason to believe it does not apply to discretionary SYO cases, which provide a statutory right to jury trial, where the proceeding is a “fully adversarial process . . . [rather than] an intimate, informal protective proceeding,” cf. *id.* at 545, and, perhaps most importantly, which have a potential for severe adult criminal punishment, but as a result of certain lower court decisions, lack the concomitant formality and constitutional protections that must be provided to adults accused of the same crime. Cf. *State v. D.H.*, Franklin App. No. 06AP-250, 2006-Ohio-6953 at ¶¶60-1 (relying on forty-four year old federal circuit case to conclude that potential adult sentence is “irrelevant” to Sixth Amendment analysis).

This disparity in formality and treatment between juvenile SYO proceedings and criminal prosecutions does not seem to have been intended by the Ohio legislature when it adopted the SYO statute. R.C. 2152.13, which governs serious youthful offender trials, states in part that “[t]he juvenile court shall afford the child all 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.” R.C. 2151.13(C)(2). Clearly, the Sixth Amendment right to a jury trial is a “right[ ] afforded a person who is prosecuted for committing a crime,” and the statute provides no other textual reason to suggest the legislature meant to exempt or modify that right, particularly given the fact that the enactment of the SYO statute predates both *Blakely* and *Foster* and where serious adult punishment is at issue.

When it enacted the SYO statutes, the legislature for the first time in Ohio history specifically authorized the use of a jury in juvenile court. Based on the text of the statute it is logical to conclude that, had the legislature known that judicial factfinding would

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

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

## CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing document has been served upon the following persons, by regular U.S. mail on this 5th day of February, 2007:

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