

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF J.B., A MINOR : Case No.  
: On Appeal from the Butler  
: County Court of Appeals,  
: No. CA-2004-09-0226

---

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

---

KATHERINE HUNT FEDERLE (0069334)  
JASON A. MACKE (0069870) (*of record*)

ROBIN N. PIPER (0023205)  
Butler County Prosecuting Attorney

Ohio State University Moritz College of Law  
Justice for Children Project  
55 W. 12<sup>th</sup> Ave.  
Columbus, Ohio 43210  
(614)292-9177  
FAX (614) 292-5511  
COUNSEL FOR *AMICUS CURIAE*,  
THE JUSTICE FOR CHILDREN PROJECT

MICHAEL A. OSTER, JR. (0076491)  
Assistant Prosecuting Attorney  
11th Floor, Government Services Center  
315 High Street  
Hamilton, Ohio 45011  
513/887-3474

COUNSEL FOR THE STATE OF OHIO

DAVID H. BODIKER (0016590)  
Ohio Public Defender

JILL E. BEELER (0069459)  
Assistant State Public Defender  
Counsel of Record

MOLLY J. BRUNS (0070972)  
Assistant State Public Defender  
Counsel of Record

Office of the Ohio Public Defender  
8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
614/466-5394  
614/752-5167 (fax)

COUNSEL FOR THE MINOR J.B.

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND MATTERS OF GREAT GENERAL AND PUBLIC INTEREST ..... 1

STATEMENT OF THE INTEREST OF *AMICUS CURIAE* ..... 3

STATEMENT OF THE CASE AND FACTS ..... 4

ARGUMENT ..... 4

*Petitioner’s First Proposition of Law:*  
There is no protective custody exception to *Miranda v. Arizona* (1966), 384 U.S. 436, and if a juvenile is interrogated without warning while held in police custody and not free to leave, any statements resulting from the interrogation must be suppressed ..... 4

*Petitioner’s Second Proposition of Law:*  
Statements obtained from juveniles under fourteen during custodial interrogation are presumptively involuntary ..... 6

*Petitioner’s Third Proposition of Law:*  
An adjudication of delinquency for homicide by felony-murder is not supported by sufficient evidence when the predicate offense for the felony-murder is child endangering, and the same conduct forms the basis of both the child endangering and the homicide ..... 8

*Petitioner’s Fourth Proposition of Law:*  
R.C. 2152.13(A) requires the State, until an indictment or bill of information is obtained, to file a written notice of intent to seek a “serious youthful offender” dispositional sentence and to serve such notice on the alleged delinquent ..... 10

*Petitioner’s Fifth Proposition of Law:*  
The R.C. 2945.37(G) standard for assessing an adult's competency to stand trial governs competency determinations in a “serious youthful offender” proceedings..... 12

*Proposition of Law of Amicus Curiae:*  
The application of R.C. 2903.02(B), the Ohio felony-murder rule, to juveniles under fourteen is an unconstitutional violation of the right to due process of law..... 13

CONCLUSION ..... 15

CERTIFICATE OF SERVICE ..... 16

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

This case warrants review because it presents several novel and substantial constitutional questions about the rights of minors in serious youthful offender and other delinquency proceedings. Moreover, these issues are matters of public and great general interest because they implicate the integrity of juvenile court proceedings.

Thirteen-year-old J.B. was adjudicated delinquent for the crimes of felony child endangering and felony murder by child endangering, arising from the death of J.B.'s 13-month-old brother after he and three other siblings (aged ten, three, and two years) were irresponsibly left alone in J.B.'s care by their mother. The trial court committed J.B. to the Department of Youth Services until the age of 21, and imposed a discretionary serious youthful offender sentence of 15 years to life, and both determinations were affirmed by the court of appeals. J.B. could spend the rest of his natural life in the custody of the State because the lower courts failed to extend basic constitutional and statutory protections to *J.B.* because of his young age.

The appellate court's opinion is critically flawed. First, when it held that J.B.'s police station confession was admissible despite the fact that he had not been properly warned of his rights, the court created an unprecedented "protective custody" exception to the requirements of *Miranda v. Arizona* (1966), 384 U.S. 436. The court seems to have done this specifically to avoid the consequences of a United States Supreme Court case that holds the 'question-first' interrogation technique to which J.B. was subjected to be unconstitutional, and therefore compels exclusion of J.B.'s statement.

Second, the application of the felony murder rule in this case is particularly disturbing. Initially, it is unclear whether the felony murder rule may be constitutionally

applied in delinquency cases. The felony murder rule relieves the State of its burden to prove the specific intent to commit homicide. Because juveniles have a lessened ability to form specific intent, the felony murder rule has an unequal and unfair impact in delinquency cases. However, even if the rule can be applied, due process demands that the underlying felony must be one that is independent of the homicide, such that the conduct comprising the underlying felony is different from the conduct that constitutes the homicide itself. This historic common law limitation on the felony murder rule should be explicitly recognized in Ohio to avoid results like this case.

Third, the court of appeals adopted a reading of R.C. 2152.13 that is wholly inconsistent with its language and structure, and one that fails to account for the rule of lenity in interpreting criminal statutes. The appellate court's opinion abandons the procedures mandated by the legislature to initiate a "serious youthful offender" (SYO) prosecution, and instead awards county prosecutors with unfettered discretion to ignore the requirements of the statute. Allowing this misinterpretation to stand encourages the very type of disregard for the rights of young offenders that the statute was carefully drafted to avoid.

Finally, there are critical flaws in the procedure and standard used to conclude that J.B. was competent to stand trial. This Court has not previously articulated the proper standard to be applied when examining the competency of juveniles to stand trial, although several appellate courts have concluded that the standard enunciated in R.C. 2945.37 is appropriate so long as it is applied in light of "juvenile norms." However, because the "serious youthful offender" statutes subject juveniles to adult punishment, it is improper to modify R.C. 2945.37 to include "juvenile norms" when a

case includes a SYO specification. Given that the available research reveals that Ohio's SYO specification is primarily used—contrary to the intent of the sentencing commission—to indict children who are too young to be bound over to the criminal court, this question of the proper competency standard will arise in virtually every SYO case. For that reason, guidance from the Ohio Supreme Court on this issue is vital.

This case presents an ideal opportunity for this Court to address pressing issues regarding the prosecution of serious youthful offenders, as well as broader questions relating to the constitutional rights of juveniles charged with delinquency violations. *Amicus Curiae* respectfully requests the Court to accept jurisdiction on the merits of this case, as it presents both substantial constitutional questions and matters of public and great general interest. Cf. 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:*

There is no protective custody exception to *Miranda v. Arizona* (1966), 384 U.S. 436, and if a juvenile is interrogated without warning while held in police custody and not free to leave, any statements resulting from the interrogation must be suppressed.

In *Missouri v. Seibert* (2004), 542 U.S. 600, the United States Supreme Court held that *Miranda* warnings given mid-interrogation were ineffective and therefore a confession repeated after such warnings were given was inadmissible at trial. *Id.* at 617. *Seibert* forbids a specific interrogation practice of first engaging in unwarned questioning until the suspect makes an incriminating statement, providing *Miranda* warnings to the suspect, and then coaxing the suspect into repeating the statement. *Id.* at 609-10. The Court noted that the object of this "question-first practice," which was developed and popularized by a national police training organization, was "to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 611. It is clear from both the record of

the suppression hearing and the opinion of the court of appeals that the detective who interrogated J.B. used the same “question-first” practice that the United States Supreme Court rejected in *Seibert*. See *In Re J.B.*, Butler App. No. CA2004-09-226, 2005-Ohio-7029 at ¶¶57-8. Moreover, it is undisputed that J.B. was not free to leave the police station where he was being questioned. *Id.* at ¶60. Accordingly, based on *Miranda* and *Seibert*, J.B.’s statements should have been suppressed.

The appellate court’s opinion completely ignores *Seibert*, although appellant properly raised the issue before that court. Instead, the court held that both J.B.’s oral statement and the written statement he provided following *Miranda* warnings were admissible, because J.B. was in “protective custody” while he was being questioned.

At the time of his interview, [J.B.] was at the police station for his protection and because of his status as a potential witness. \* \* \* \* Detective Hayes did testify that appellant would not have been "free to go" prior to making his oral statement, but simply because the department would not release a 13 year old to the high crime area where the station was located without an adult to care for him. Detective Hayes made clear in his testimony that appellant "was free to stop speaking" to him. After reviewing the transcript of the suppression hearing, this court does not find that appellant was subjected to the restraint associated with a formal arrest. Therefore, the juvenile court properly denied appellant's motion to suppress the oral statement.

*Id.* at ¶60. The lower court does not cite a single case supporting this rationale or this “protective custody” exception to the requirements of *Miranda*, *id.* at ¶¶54-60; for good reason—there are none. The very definition of “custodial interrogation” is questioning a person when that person is not free to leave. See *Miranda*, 384 U.S. at 444. (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”) The fact that J.B. was “free to stop speaking” to the detective has

absolutely no bearing on whether he was in custody. Neither does the detective's "credible" testimony that he was questioning J.B. merely "to obtain information from [him] about the incident." See *Stansbury v. California* (1994), 511 U.S. 318, 320 ("a police officer's subjective view . . . does not bear upon the question whether the individual is in custody . . . . [t]he same principle obtains if an officer's undisclosed assessment is that the person being questioned is not a suspect"). Finally, merely because J.B. was not "officially" under arrest does not negate the fact that he was in custody. Cf. *California v. Beheler* (1983), 463 U.S. 1121, 1125.

J.B. was questioned by a police officer without receiving *Miranda* warnings, he was in custody, and he was not free to leave. Unless the appellate court's "protective custody" rule applies, admission of his statements violated *Miranda* and *Seibert*. Because that court's new "protective custody" exception dramatically expands the scope of permissible police interrogation and because its approach essentially exempts most juveniles from *Miranda* protection, this Court should accept jurisdiction and adopt the petitioner's first proposition of law.

*Petitioner's Second Proposition of Law:*

Statements obtained from juveniles under fourteen during custodial interrogation are presumptively involuntary.

New developmental and neurological research relating to brain functioning demonstrates that adolescents often use different regions of the brain to process information than adults, and further that "less cortically mature adolescents . . . are cognitively less able to select behavioral strategies associated with self-regulation, judgment, and planning . . . ." Gruber and Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?* (forthcoming 2006), 3 Ohio St. J. Crim. L. ---, 13. Both this

brain development research and earlier cognitive functioning research suggest adolescents, in particular, may have significant trouble both comprehending their rights under *Miranda v. Arizona* (1966), 384 U.S. 436, and the effect of waiving those rights. But see *Fare v. Michael C.* (1979), 442 U.S. 707, 726-27. Even if a juvenile's waiver of *Miranda* rights appears to be voluntary, it is "rarely 'knowing' or 'intelligent' and without an informed decision, a 'voluntary' waiver is meaningless." See Larson, Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of *Miranda* (2003), 48 Vill. L. Rev. 629, 630. To address this problem, several other states have adopted *per se* rules to provide additional protection to children during custodial interrogation over and above those provided by *Miranda*. See Generally Huang, "Less Unequal Footing": State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation, 86 Cornell L. Rev. 437. Cf. *In re Jerrell C.J.* (Wis. 2005), 699 N.W.2d 110 (creating supervisory rule that all questioning of juveniles must be electronically recorded). While the Fifth Amendment does not require the adoption of such rules, the Due Process Clause of the Fourteenth Amendment continues to require that statements extracted from juveniles be voluntary. See, e.g., *Haley v. Ohio* (1948), 332 U.S. 596, 298 (suppressing confession of fifteen-year old obtained after five-hour interrogation beginning after midnight as involuntary). Because of the cognitive and neurological limitations of children under the age of fourteen, statements obtained from them during custodial interrogation are generally not voluntarily made. Accordingly, this Court should grant jurisdiction and adopt the petitioner's second proposition of law.

*Third Proposition of Law:*

An adjudication of delinquency for homicide by felony murder is not supported by sufficient evidence when the predicate offense for the felony-murder is child endangering, and the same conduct forms the basis of both the child endangering and the homicide.

Ohio's felony murder statute, R.C. 2903.02(B), provides that "[n]o person shall cause the death of another as the proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree . . . ." The statute is relatively new, and thus far has received relatively little attention from this Court. See *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶21. Cf. *In Re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215 at ¶3 (noting statute in passing).

In *Miller*, this Court was untroubled by the fact that the statute permits the State to prove culpability for murder based upon a lessened culpable mental state. *Miller* at ¶34. However, the Court did not address a more fundamental issue: whether the statute incorporates the independent felony limitation on felony murder. Both the common law felony murder doctrine and the versions of the rule in effect in other states recognize this "merger" limitation on felony murder.

Most states recognize some form of 'independent felony' or 'collateral felony' limitation. That is, the felony-murder rule only applies if the predicate felony is independent of, or collateral to, the homicide. If the felony is *not* independent, the felony *merges* with the homicide and cannot serve as the basis for a felony-murder conviction.

Joshua Dressler, *Understanding Criminal Law* (2001) at 520. See also Binder, *The Origins of American Felony Murder Rules* (2004), 57 *Stan. L. Rev.* 59, 173 (discussing "merger rule" in nineteenth century American cases). Courts have recognized that a mechanical application of the felony murder rule can lead to tremendous injustice, and thus have adopted the independent felony limitation as a judicially-created means of

ensuring the rule is not used capriciously. See generally “Application of Merger Doctrine,” Am. Jur.2d Homicide Sec. 66 (collecting cases). Because the effect of the felony murder rule is to relieve the State of its burden to prove the specific intent to commit murder, see *Miller* at ¶34, most states have adopted a “sensible” version of the ‘independent felony’ limitation providing that “a felony does not merge if the assaultive conduct involves ‘an independent felonious purpose’ . . . .” Dressler, *supra* at 521-22. See also *People v. Morgan* (Ill. 1999), 718 N.E.2d 206, 211-13 (adopting ‘independent felonious purpose’ limitation).

This case exemplifies the injustice that occurs when the independent felony limitation is not applied. J.B. was convicted of the predicate offense of child endangering under R.C. 2919.22, a crime that has a culpable mental state of recklessness. See, e.g., *State v. McGee* (1997), 79 Ohio St.3d 193, 195-96. It is absolutely clear that the same conduct that formed the basis of the child endangering charge was the basis for the felony murder charge. See *In Re J.B.*, 2005-Ohio-7029 at ¶¶73-75. In fact, J.B. did not even know that his brother had died until he was informed of that fact while he was being interrogated. *Id.* at ¶57. There is simply no way that J.B. committed the act of child endangering with an ‘independent felonious purpose’ that would prevent merger. To avoid the injustice created by a mechanistic application of the felony murder rule, this Court should accept jurisdiction and adopt the petitioner’s third proposition of law.

*Petitioner's Fourth Proposition of Law:*

R.C. 2152.13(A) requires the State, until an indictment or bill of information is obtained, to file a written notice of intent to seek a “serious youthful offender” dispositional sentence and to serve such notice on the alleged delinquent.

Under R.C. 2152.13(A), “[a] juvenile court may impose a serious youthful offender dispositional sentence on a child *only if the prosecuting attorney of the county in which the delinquent act allegedly occurred initiates the process against the child in accordance with this division . . .*” (emphasis added). By its plain terms, the statute provides four specific ways a serious youthful offender (SYO) prosecution may be initiated--by direct indictment, by agreed information, by requesting such a sentence in the original complaint, or by filing a written notice with the court and serving that notice upon the alleged juvenile offender prior to an indictment or information being obtained. *Id.* Further, the notice requirements of the statute are by their plain terms both mandatory and jurisdictional—a juvenile court may impose an SYO disposition “*only if the prosecuting attorney . . . initiates the process against the child in accordance with this division.*” *Id.* (emphasis added). See also Ohio Leg. Serv. Comm’n Analysis of 123 S.B. 179, *as introduced*, at 47 (discussing R.C. 2152.13(A)(1)(a) and stating that “[g]enerally, if the prosecuting attorney does not timely file the written notice, *the juvenile court is prohibited from ordering a serious youthful offender dispositional sentence in the case*”).

It is undisputed the prosecutor in this case did not obtain a direct indictment or agreed information. *In Re J.B.*, 2005-Ohio-7029 at ¶¶14-30. Instead, the prosecutor first filed two complaints in the juvenile court, neither of which mentioned an SYO specification. J.B. appeared in court at an initial hearing to answer those allegations.

*Id.* at ¶5. Cf. R.C. 2152.13(A)(4)(a) (requiring the prosecutor to file notice of intent to seek an SYO disposition “within twenty days after . . . [t]he date of the child’s first juvenile court hearing regarding the complaint”). Moreover, the prosecutor never filed written notice of intent to seek an SYO disposition, and did not inform J.B. of his intent to seek an SYO disposition until a month later, when J.B. was indicted. *J.B.* at ¶6.

Despite the prosecutor’s clear failure to comply with R.C. 2152.13(A)(4)(a), the trial court overruled J.B.’s motion to dismiss the indictment. In its opinion affirming the juvenile court, the court of appeals adopted a reading of R.C. 2152.13(A) that simply defies its plain meaning. *Id.* at ¶27. Despite the language restricting the juvenile court from imposing an SYO disposition if the prosecutor fails to comply with R.C. 2152.13(A), the appellate court held that “nothing in R.C. 2152.021 or R.C. 2152.13 prohibits a prosecutor from initiating serious youthful offender proceedings via an indictment when a complaint has previously been filed.” *Id.* This holding is not only at odds with the plain language of R.C. 2152.13(A)(1)(a), it completely ignores the express intent of the legislature provided in the analysis of the statute. See *Supra* Analysis of 123 S.B. 179 at 47. The court’s opinion legislates away the procedural protections embedded in the statute, and invites prosecutors to ignore both the precise meaning of the statute and the statutory purpose of protecting the due process rights of juveniles. Moreover, until it is rejected, the appellate court’s rule will encourage juvenile courts to impose SYO dispositions in cases where the legislature has clearly prohibited them from doing so. Because the appellate court’s opinion directly contradicts both the text of the statute and the purpose of the legislature, this Court should accept jurisdiction and adopt the petitioner’s fourth proposition of law.

*Petitioner's Fifth Proposition of Law:*

The R.C. 2945.37(G) standard for assessing an adult's competency to stand trial governs competency determinations in a "serious youthful offender" proceedings.

Ohio does not have a statute or rule enunciating a standard for juvenile competency evaluations. The general competency statute, R.C. 2945.37(G), provides that "[a] defendant is presumed to be competent to stand trial," but that if a preponderance of the evidence demonstrates that "the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense," the court should find the defendant incompetent."<sup>1</sup> Cf. *Dusky v. United States* (1960), 362 U.S. 402, 402 (Fourteenth Amendment test for determining competency is "whether the defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him").

Most Ohio appellate courts have concluded that the R.C. 2945.37 adult competency standard controls competency evaluations of juveniles, "so long as it is applied in light of juvenile rather than adult norms." See, e.g., *In Re Williams* (1997), 116 Ohio App.3d 237, 242. However, even if the case law were clear as to what "juvenile norms" were to be applied (and it is not, cf. *id.* at 230), because the serious youthful offender statutes subject juveniles to the same punishment as adults, it is a violation of the Equal Protection Clause to modify R.C. 2945.37 to include "juvenile

---

<sup>1</sup> If the defendant can attain competency within one year, the court should order the defendant to treatment and competency attainment proceedings pursuant to R.C. 2945.38(B)(1). If the defendant is unattainable, the court shall order the discharge of the defendant, commitment of the defendant pursuant to R.C. 2945.39, or refer the defendant to the probate court for civil commitment pursuant to R.C. Chapter 5122.

norms” when a case includes an SYO specification. Cf. *In Re Gillespie*, 150 Ohio App.3d 502, 2002-Ohio-7025 at ¶¶19-24 (noting that because juveniles are not subject to adult punishment, juveniles adjudicated delinquent and adults convicted of a crime are not groups that are similarly situated, and therefore treating adults and juveniles differently does not present an equal protection problem). Moreover, the available research reveals that Ohio’s “serious youthful offender” specification is often most often used to indict children who are too young to be bound over to the criminal court. Delaware Cty. Magistrate David Hejmanowski (2004), Report on Serious Youthful Offender Sentencing to Ohio Sentencing Commission, *unpublished* at 13 (noting consensus to “utilize blended sentencing procedure only for younger offenders”). This younger population is the very same group of juveniles whose competency to stand trial is most in question. See, e.g., Scott & Grisso, Developmental Incompetence, Due Process and Juvenile Justice Policy (2005), 83 N. C. L. Rev. 793 (noting that developmental incompetence is “concentrated in a readily identified group—younger teens”). Accordingly, the proper competency standard will be an issue in a significant number of SYO cases, and for this reason, the Court should accept jurisdiction and adopt the petitioner’s fifth proposition of law.

*Proposition of Law of Amicus Curiae:*

The application of R.C. 2903.02(B), the Ohio felony-murder rule, to juveniles under fourteen is an unconstitutional violation of the right to due process of law.

Over the past forty years, juvenile courts have become increasingly punitive. See *id.* (discussing *In Re Gault* (1967), 387 U.S. 1, and *In Re Winship* (1969), 397 U.S. 358). However, recent scientific developments support the growing recognition that

children are simply developmentally, neurologically, and cognitively different than adults. See, e.g., Gruber and Yurgelun-Todd, *supra* at 17 (“[r]ecent neurobiologic investigations have begun to clarify some of the reasons why adolescents are not able to plan carefully, utilize good judgment and practice behavioral inhibition when faced with difficult situations that often require a near immediate decision”). As a result, they are often are less capable of forming the type of specific intent that is traditionally associated with culpability for serious crimes. See, e.g., *Roper v. Simmons* (2005), 543 U.S. 551, 125 S.Ct. 1183, 1194 (holding that “[c]apital punishment must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution” and abolishing death penalty for juveniles). Interestingly, this new scientific evidence supports the well-established common-law rule that children under fourteen were presumed to lack the mental capacity to commit crimes. See Drizen and Keegan, *The Aftermath of the Lionel Tate Case: Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager* (2004), 28 *Nova L. Rev.* 507, 529-30. (“By 1338, children over the age of seven were presumed to lack the capacity to commit a crime, however this could be rebutted by proof of malice. It was firmly established by the seventeenth century that the presumption of incapacity operated until a child was fourteen years old.”)

As noted above, the function of the felony murder rule is to relieve the State of its burden to prove that the accused acted with the specific intent to commit a homicide. See *supra* at 8. The rule in its most general form predates Blackstone; however, at common law, the rule was not applicable to children under the age of fourteen, who were presumed to be incapable of forming criminal intent. Drizen and Keegan, *supra* at

528-30. R.C. 2903.02(B), by contrast, does not contain an express provision whether or not it applies to children under fourteen, but in light of the history of the felony murder rule and the legislative silence on the issue, it would be grossly unfair to allow such an application:

Applying the felony-murder rule to children under the age of fourteen also produces unfair and nonsensical outcomes. By relieving prosecutors of the burden of rebutting the presumption of incapacity through proof of premeditation or malice, *courts essentially would be permitting murder convictions of child-defendants who are presumed incapable of forming criminal intent*. It is inconsistent with common law to make it easier for prosecutors to obtain a murder conviction in the case of youthful defendants, when the objective of the presumption of incapacity is just the opposite--to make it harder to prove intent when the defendant is a child.

*Id.* at 531 (emphasis added). Because the felony murder rule has a unfairly harsh impact on juveniles, Due Process demands an interpretation of R.C. 2903.02(B) that recognizes the cognitive and developmental limitations of children. Cf. *Roper*, 125 S.Ct. at 1194 (holding juvenile death penalty unconstitutional under the Eight Amendment) and *Gault*, 387 U.S. at 25-27. See also Drizen and Keegan, *supra* at 536-37 (proposing an “absolute ban” on applying the felony murder rule to juveniles under fourteen and a “presumptive ban” on the applying the rule to juveniles under seventeen). Accordingly, this Court should adopt the proposition of law of *amicus curiae*, and hold that the due process forbids the application of R.C. 2903.02(B) to juveniles under the age of fourteen.

#### CONCLUSION

Further review of the judgment of the Butler County Court of Appeals, Twelfth Appellate District is warranted. This Court should accept jurisdiction and adopt the six propositions of law stated herein.

Respectfully submitted,

KATHERINE HUNT FEDERLE 0069334  
Professor of Law and Director  
Justice for Children Project  
The Ohio State University  
Michael E. Moritz College of Law

---

JASON A. MACKE 0069870  
Staff Attorney  
Justice for Children Project  
The Ohio State University  
Michael E. Moritz College of Law  
55 West 12th Avenue  
Columbus, OH 43210  
(614)292-9177

Counsel for *Amicus Curiae*  
Justice for Children Project

#### 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 13th day of February, 2006:

Jill E. Beeler  
Ass't. Ohio Public Defender  
8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
Michael A. Oster, Jr.

Butler County Ass't. Pros. Attorney  
315 High Street, 11th Floor  
Hamilton, Ohio 45011

---

Jason A. Macke  
Counsel for *Amicus Curiae*  
Justice for Children Project