IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

KELLI GARRETT,

:

Petitioner, Case No. 3:09-cv-058

:

-vs- Magistrate Judge Michael R. Merz

WARDEN, Ohio Reformatory for Women,

:

Respondent.

DECISION AND ORDER

This habeas corpus case is before the Court for decision on the merits. The parties have unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c) and the case has been referred by Judge Rose on that basis (Doc. No. 5).

Petitioner pleads one ground for relief:

> The remedy that the Ohio Supreme Court set forth in *State v. Foster*, 109 Ohio St. 3d 1, 845 N.E. 2d 470 (Ohio Sup. Ct. 2006), violates the Ex Post Facto and Due Process Clauses of the United States Constitution.

(Petition, Doc. No. 1, at 16.)

Procedural History

Petitioner was indicted by the Clark County grand jury in 1997 on five counts of aggravated robbery and ten counts of kidnapping, all having firearm specifications, arising from the robbery of

a jewelry store which she committed with her brother. Convicted by the trial jury, she was sentenced on March 26, 1998, to four consecutive nine-year terms and one concurrent nine-year term and ten concurrent eight-year terms on the underlying robbery and kidnapping charges plus a consecutive three-year term on the firearm specification. Allowed a delayed appeal in 2003, she was unsuccessful in persuading the Second District Court of Appeals. However, she appealed that court's adverse ruling on her claim under *Blakely v. Washington*, 542 U.S. 296 (2004), to the Ohio Supreme Court which reversed and remanded for resentencing after it decided *Foster*. After a new sentence was imposed, she appealed, raising among others the claim she brings here. (Brief on Appeal at Assignment of Error 2, Ex. 29 to Doc. No. 9.) While reversing as vindictive the new sentence she had received, the Court of Appeals declined to consider the second assignment of error because it would have involved considering the constitutionality of the decision of a superior court, a matter which it believed was beyond its authority. The Ohio Supreme Court, however, declined to consider this claim and Petitioner filed in this Court.

Analysis

Respondent concedes that Petitioner's claim is exhausted and not barred by a procedural default in presenting it to the state courts. She also concedes that, because the state courts did not decide the merits of this claim, this Court is to consider it *de novo*, rather than under the deferential standard of 28 U.S.C. § 2254(d).

As adopted by the Ohio General Assembly in Senate Bill 2, Ohio law at the time Petitioner committed the offenses in this case required that the statutory minimum sentence be imposed "unless a finding was made [by the sentencing judge] that the defendant previously served a prison term or that "the shortest prison term w[ould] demean the seriousness of the offender's conduct or w[ould]

not adequately protect the public from future crime by the offender or others. Ohio Rev. Code Ann. § 2929.14(B) (1997)." (Traverse, Doc. No. 10 at 4.) Ohio Revised Code § 2929.14(E) also provided

> consecutive, non-mandatory sentences could be imposed on defendants only when [the trial judge finds]:
>
> 1) Consecutive service [was] necessary to protect the public from future crime or to punish the offender; and
>
> 2) Consecutive sentences [were] not disproportionate to the seriousness of the offender's conduct and to the danger the offender pose[d] to the public; and
>
> 3) If [a] court also [found] any of the following:
> (a) The offender committed one or more of the offenses while the offender [was] awaiting trial, sentencing, or while under supervision;
>
> (b) At least two of the offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflect[ed] the seriousness of the offender's conduct; or
>
> (c) The offender's history of criminal conduct demonstrate[d] that consecutive sentences [were] necessary to protect the public from future crime by the offender.

(Traverse, Doc. No. 10, at 4-5.) At the time of Petitioner's sentencing in March, 1998, the sentencing judge made all of the requisite findings. (Return of Writ, Doc. No. 9, Ex. 4). It was not until six years later that the United States Supreme Court decided in *Blakely v. Washington*, 542 U.S. 296 (2004), that any fact which increases a criminal sentence beyond a legislatively-mandated guideline, even if within a statutory maximum for the offense, must be pled as an element in the indictment and proved to the jury beyond a reasonable doubt. It was another two years before the Ohio Supreme Court decided that *Blakely* renders the Ohio sentencing scheme as enacted by S.B. 2 unconstitutional. *State v. Foster*, 109 Ohio St. 3d 1, 845 N.E. 2d 470 (2006). As a remedy, the Ohio Supreme Court severed the portions of S.B. 2 it found to be unconstitutional and remanded all

cases then pending on direct appeal, including Petitioner's case, for resentencing without the offending provisions but within the statutory maximums set by the General Assembly. Petitioner in fact received the benefit of *Foster* in that she was resentenced. But what she wants – and claims she is entitled to as a matter of constitutional right – is the benefit of *Foster's* declaration of unconstitutionality without the burden of being resentenced. In other words, she wants those portions of her sentence which required a finding of fact beyond the jury verdict to be excised.

Petitioner claims that the remedy adopted by the Ohio Supreme Court violates the Ex Post Facto Clause and the Due Process Clause.

Article I, § 9 of the United States Constitution provides in pertinent part "No Bill of Attainder or ex post facto Law shall be passed." On its face, the *Ex Post Facto* Clause applies only to statutes, but Petitioner relies on *Bouie v. City of Columbia*, 378 U.S. 347 (1964), where the Court struck down as unconstitutional a new judicial construction of a trespass statute which applied it to persons who failed to leave a store after notice, as opposed to the prior construction, in which it applied only to those who received notice prior to entry.

However, in *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court distinguished *Bouie* and held that the Due Process Clause does not incorporate as to state judicial decisionmaking all the restrictions imposed on state legislatures by the *Ex Post Facto* Clause. In *Rogers* the Tennessee Supreme Court, as an act of common-law lawmaking, (1) abolished the common-law rule that the death of an assault victim within a year and a day after the assault is a prerequisite to a homicide prosecution and (2) applied the abolition to uphold the murder conviction in that case where death occurred fifteen months after the assault. The United States Supreme Court upheld the conviction, holding that the retroactive abolition of the year-and-a-day rule did not violate Rogers' due process rights. In *Rogers*, the Court described the situations to which it had applied *Bouie*:

> Those decisions instead have uniformly viewed *Bouie* as restricted to its traditional due process roots. In doing so, they have applied

> *Bouie's* check on retroactive judicial decisionmaking not by reference to the *ex post facto* categories set out in *Calder [v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798)], but, rather, in accordance with the more basic and general principle of fair warning that *Bouie* so clearly articulated. See, e.g., *United States v. Lanier*, 520 U.S. 259, 266, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997) ("Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); *Marks v. United States*, 430 U.S. at 191-192 (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties); *Rose v. Locke*, 423 U.S. 48, 53, 46 L. Ed. 2d 185, 96 S. Ct. 243 (1975) (per curiam) (upholding defendant's conviction under statute prohibiting "crimes against nature" because, unlike in *Bouie*, the defendant "[could] make no claim that [the statute] afforded no notice that his conduct might be within its scope"); *Douglas v. Buder*, 412 U.S. 430, 432, 37 L. Ed. 2d 52, 93 S. Ct. 2199 (1973) (per curiam) (trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); *Rabe v. Washington*, 405 U.S. 313, 316, 31 L. Ed. 2d 258, 92 S. Ct. 993 (1972) (per curiam) (reversing conviction under state obscenity law because it did "not give fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

532 U.S. at 460.

In *Bouie*, the South Carolina Supreme Court had, by a new interpretation of the trespass statute which is applied retrospectively, made criminal conduct which was innocent when it was done: remaining in a place of public accommodation after being asked to leave when one had had no notice before entering the store that one was unwanted. That is the most radically unfair sort of retrospective state action: criminalizing primary conduct when it is too late for the subject to conform his conduct to the prohibition. Petitioner suffered no unfairness like this. At the time she committed the robbery and kidnapping, her primary conduct was plainly prohibited by law. Indeed, unlike the conduct of the defendants in Bouie, her behavior was *malum in se*: everybody knows you

can't rob people at gunpoint.[1]

Petitioner does not claim she didn't know her primary conduct was criminal. Instead, she says she could not have anticipated the secondary consequences of her crime:

> On the date that the alleged[2] offenses occurred, Ms. Garrett could not have foreseen that the supreme court would replace the portions of Senate Bill 2 that gave a trial court "guided discretion" with unfettered unreviewable discretion.

(Traverse, Doc. No. 10, at 9.) That claim is completely credible. In 1997 most, if not all, Ohio intermediate appeals courts could not have anticipated the specific *Foster* remedy or that there would ever even be a need for a *Foster* remedy. In 1997 Ohio had just barely joined the movement for determinate sentencing which S.B. 2 represented. At that time the federal courts were ten years into guideline sentencing as part of the same movement. No federal judge of whom the undersigned is aware anticipated that three years later the Supreme Court would decide that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Once *Apprendi* was decided, people began gingerly to anticipate *Blakely* and *United States v. Booker*, 543 U.S. 220 (2005), which declared the federal Sentencing Guidelines unconstitutional under *Apprendi*. But the progression was by no means inevitable. Footnote 9 in Justice Scalia's opinion disclaimed consideration of United States Sentencing Guidelines. In *United States v. Montgomery*, 2004 U.S. App. LEXIS 14384 (6th Cir. July 14,2004), the Sixth Circuit declared the Guidelines unconstitutional on the basis of *Blakely* and

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[1]Contrast the *Bouie* situation: the restaurant operator held out an invitation to the general public to come in to eat, although it had a policy "not to serve Negroes in that [luncheonette] department." *Columbia v. Bouie*, 239 S.C. 570, 572, 124 S.E. 2d 332 (1962).

[2]Ms. Garrett makes no actual innocence claim, but the standard rhetoric of the criminal defense bar seems to compel counsel to call these "alleged" offenses.

held that the federal courts must return to discretionary indefinite sentencing, exactly the same result reached by the Supreme Court in *Booker*. However, the panel opinion in *Montgomery* was vacated upon granting of hearing en banc, and then the appeal dismissed by the parties.

The point of recounting this history is to show that Petitioner cannot credibly claim any reliance interest in the Ohio sentencing law as it stood in 1997. Assuming Ms. Garrett calculated the possible results of her intended crime in 1997, what she was entitled to expect was that, if caught and convicted, she would serve concurrent minimum sentences unless the judge made the additional findings then required by Ohio Revised Code § 2929.14. Had she consulted an experienced criminal defense lawyer and presented her intended crime as a hypothetical, that is what he or she would have predicted. There was no violation of Ms. Garrett's due process rights in applying the *Foster* remedy in her case.

Miller v. Florida, 482 U.S. 423 (1987), relied on by Petitioner is not to the contrary: the revised sentencing guidelines in *Miller* were a legislative act, not a judicial act. Thus the more expansive protections against retroactivity of the *Ex Post Facto* Clause, rather than the more limited due process protections.

Petitioner argues that the Ohio Supreme Court "severed a constitutional presumption" when it eliminated the presumption against consecutive sentences," citing *Oregon v. Ice*, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), where the Court held imposition of consecutive sentences for multiple offenses, based on facts found by the court rather than the jury, does not violate constitutional right to jury trial, since the jury historically played no role in determining consecutive or concurrent sentences and state had sovereign authority to administer its penal system. Based on *Ice*, it appears the *Foster* remedy was overbroad in that the Ohio Supreme Court projected the extension of *Apprendi/Blakely* to consecutive sentences. Petitioner however had the benefit of the presumption when she was initially sentenced and essentially retained the benefit of the presumption

when her second sentence was reduced to the original time by the Court of Appeals on her post-*Foster* resentencing.

Petitioner also argues that the *Foster* severance remedy is not completely analogous to the *Booker* severance remedy. The Court agrees. In *Booker* the sentencing guideline statute was left in place and the Supreme Court merely severed the mandatory application of the Guidelines; in *Foster*, the Ohio Supreme Court eliminated the presumptions in favor of lesser sentences altogether. However, the difference is not unconstitutional. Whenever a court applies a severance remedy, its purported objective is to maintain as much of what the legislature adopted as is consistent with whatever constitutional provision is being applied. This always leaves the legislature free to act again, to say in effect, "That's not what we meant or wanted." With both *Booker* and *Foster*, many expected follow-on legislation, but none has come. But unless the statute without the excised portions itself falls below a constitutional minimum, no defendant is harmed. That is, no Ohio felon was constitutionally entitled to have the presumptions enacted in S.B. 2 and no federal felon was constitutionally entitled to have a mandatory guideline regime.

Although the argument in this case is well made, Petitioner is ultimately not entitled to habeas corpus relief. The Clerk will enter judgment dismissing the Petition with prejudice.

May 19, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge