

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 04-1568
Plaintiff-Appellee,	:	On Appeal from the
	:	Licking County
v.	:	Court of Appeals,
	:	Fifth Appellate District
ANDREW FOSTER,	:	
Defendant-Appellant.	:	Court of Appeals
	:	Case No. 03CA-95
	:	Expedited Review Requested

APPELLANT ANDREW FOSTER’S MOTION FOR RECONSIDERATION

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**APPELLANT ANDREW FOSTER’S MOTION FOR RECONSIDERATION
AND MEMORANDUM IN SUPPORT**

Introduction

On February 27, 2006, this Court entered a decision finding portions of R.C. 2929.14, 2929.19 and 2929.41 to be unconstitutional. *State v. Foster*, ___ Ohio St.3d ___, 2006-Ohio-856, syllabus paragraphs 1, 3 and 5. To remedy the constitutional violations, the Court severed those portions of the statutes declared to be unconstitutional. *Id.* at syllabus paragraphs 2, 4 and 6. Additionally, the Court found that R.C. 2953.08(G), providing for appellate review of consecutive sentences, no longer applied. *Id.* at ¶97.

The Court’s remedy, as it pertains to Foster and to the hundreds of cases awaiting sentencing and those already on direct appeal, is unconstitutional because it effectively raises the presumptive sentences for first-time offenders and those convicted of fourth and fifth degree felonies to the statutory maximum. *Miller v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446, 96 L. Ed. 2d 351. As a result, the Court’s remedy violates the Ex Post Facto and Due Process Clauses of the United States Constitution. The *Foster* remedy also directly conflicts with the Legislature’s intent when it enacted the “truth-in-sentencing” reforms embodied in the severed statutes.

Since the Court did not analyze whether application of the *Foster* remedy to Foster and other defendants impacted by the decision implicates ex post facto and due process concerns, Foster moves this Court to reconsider its decision to sever the unconstitutional statutes. S.Ct. Prac. R. XI, Section 2(4).

The Booker severance remedy maintained significant sentencing elements of the federal sentencing statutes that this Court's severance remedy completely removed in the corresponding Ohio statutes.

Foster suggests that the severance remedy adopted by the United States Supreme Court in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, served as the blueprint for the remedy ultimately adopted by the Court. *Foster* at ¶90. While the *Booker* majority did sever a portion of the sentencing statute, the severance was limited and maintained the significant parts of the statute designed to effect Congressional intent. As *Foster* notes, the United States Supreme Court severed the subsection that required a trial court to impose a sentence within the applicable guidelines and the subsection setting forth the standards of review on appeal. *Id.*, n. 97. What is noticeably absent from the *Foster* opinion, however, is what remains in the federal sentencing statutes to insure that the intent of the statute was preserved.

Booker still demands that a trial court consider the guideline ranges established for a particular offense category as applied to a particular category of defendant to accomplish the congressional goal of uniformity. *United States v. Booker*, 543 U.S. at 259-260. Significantly, the United States Supreme Court did not sever 18 U.S.C. §3553(c)(2), which mandates that a trial court state its reasons for departing from the guidelines. Consequently, although the four separate standards of appellate review were severed, the statute as amended allows appellate review by either party to determine the reasonableness of the trial court's sentence. *United States v. Booker*, 543 U.S. at 260, 261.

By contrast, the severance employed in *Foster* cuts a wide swath through the sentencing statutes, eliminating presumptions, save those favoring incarceration, eliminating a trial court's duty to explain reasons for departing from the guidelines, thus effectively eliminating the ability

of an appellate court to effectively review a sentence, and essentially eliminating any real chance of accomplishing the Legislature's goal of establishing uniformity and proportionality in Ohio's criminal sentencing. Because the *Foster* remedy will substantially disadvantage the hundreds of defendants affected by the decision, the remedy violates the Ex Post Facto and Due Process Clauses of the United States Constitution.

The Due Process Clause of the United States Constitution bars retroactive application of the severance remedy adopted in State v. Foster.

1. Severance operates as an ex post facto law.

It is well-established that due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue. *Bouie v. City of Columbia* (1964), 378 U.S. 347, 354, 12 L. Ed. 2d 894, 84 S. Ct. 1697. As this Court has recognized, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law * * *," and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Garner*, 74 Ohio St.3d 49, 57, 656 N.E.2d 623, quoting *Bouie v. Columbia*, 378 U.S. at 353 (internal citations omitted).

Accordingly, although the constitutional prohibition against ex post facto laws is applicable only to legislative enactments, judicial enlargement of a statute implicates the same concerns expressed by the Ex Post Facto Clause. *State v. Garner*, 74 Ohio St. 3d at 57. The Clause provides simply that "no State shall . . . pass any . . . ex post facto Law." Art. I, § 10. The scope of the Ex Post Facto Clause's protection includes "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 3 Dallas 386, 390, 1 L. Ed. 648, 3 Dall. 386 (1798) (seriatim opinion of Chase, J.).

Based upon these basic constitutional concerns, the United States Supreme Court vacated a state prisoner's sentence because a state's revised sentencing guidelines, as applied to a defendant whose crimes occurred before the revisions took effect, violated the Ex Post Facto Clause and thus violated the prisoner's right to due process. *Miller v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446, 96 L. Ed. 2d 351. In *Miller*, revisions to Florida's state's sentencing guidelines after the defendant's offense transpired raised the "presumptive" sentence that the defendant could receive when he was finally sentenced. Florida's revision of its sentencing guidelines fell within the ex post facto prohibition because it met two critical elements: first, the law was retrospective, applying to events occurring before its enactment; and second, it disadvantaged the offender affected by it. *Miller* at 430. A law is retrospective if it "changes the legal consequences of acts completed before its effective date." *Miller* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31, 101 S. Ct. 960, 67 L. Ed. 2d 17. As to the second element, the Court observed that it is "axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Id.* (internal citation omitted).

This Court's severance of the unconstitutional statutes will operate retrospectively and disadvantage the hundreds of defendants awaiting sentencing or on direct appeal. Foster's situation perfectly illustrates why the Court's remedy will subject him to an ex post facto change in the law.

Foster pled no contest to all twenty-six counts contained within his indictment. All counts were fourth and fifth degree felonies except for one second degree felony which was premised upon all the other counts in the indictment. Foster had no record. His crimes were nonviolent property offenses. Under the sentencing statutes in effect at his sentencing, there

was a presumption that he would be sentenced to minimum concurrent sentences, or two years. R.C. 2929.14(A)-(E).

By severing the statute, this Court has eliminated presumptive sentences and increased the potential total sentence to beyond the nine years imposed by the trial court. Indeed, although the state has defended the trial judge's sentence as reasonable, based upon all the factors known to the trial judge at the time of sentencing, the state is now free to ask for higher sentences and the trial court is apparently free to sentence Foster to more time. *Foster* at ¶105. This "remedy" allows the Court to effect the very result that it deemed to be a unconstitutional violation of *Blakely v. Washington* (2004), 530 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

In addition, as in *Miller*, severance presents another disadvantage by virtue of its application to Foster. By eliminating the presumptive sentencing levels contained within the severed statutes and the judicial fact-finding that attended sentences exceeding the presumptive range, the Court has effectively foreclosed appellate review. In *Miller*, the Supreme Court found that eliminating appellate review was a second reason to find that the defendant had been "substantially disadvantaged" by the retrospective application of the revised guidelines to his crime. *Miller* at 433.

The retroactive application of sentencing statutes, as amended by this Court, changes the punishment Foster may suffer and compromises his ability to appeal his sentence. Accordingly, the Court's remedy as applied to Foster will violate the Ex Post Facto Clause and thereby deny Foster due process.

2. The Court's remedy was unforeseeable and indefensible in light of the law expressed by this Court prior to *Foster*.

In *Bowie v. South Carolina*, the United States Supreme Court observed that due process demands that a defendant have fair warning of what constitutes a crime. *Id.* at 350. Fair

warning is denied, however, when there is an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Id.* at 352. Consequently, the Court determined that if a judicial construction of a criminal statute is “‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ [the construction] must not be given retroactive effect.” *Id.* at 354 (citation omitted).

When Foster entered his plea in Licking County Common Pleas Court, he could not have foreseen that this Court would sever the portions of Senate Bill 2 that replaced a trial court’s “guided discretion” with unfettered, unreviewable discretion. *Foster* at ¶89. Even after *Blakely v. Washington*, (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, defendants could not have foreseen severance, given this Court’s instruction in *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644, at ¶17, that if the statutes were found to be unconstitutional (after *Blakely*), a trial court “should apply the pertinent sentencing statutes without any enhancement provisions found to be unconstitutional[.]”

The Court’s severance remedy is also indefensible by reference to prior law governing the sentencing scheme. The enabling statute, R.C. 181.24, clearly intended for the statutes enacted to provide uniformity, proportionality, “with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender,” with judicial discretion to be limited by those goals. R.C. 181.24(B)(1)-(3). Those goals were embodied in the statutes ultimately enacted and subsequently reviewed by this Court. The Court expressly stated that the purposes and intent of Senate Bill 2 was to reserve consecutive sentences for the worst offenses and offenders. *State v. Comer*, 99 Ohio St. 3d 463, 2003 Ohio 4165, 793 N.E.2d 473, at ¶21, citing *State v. Boland* (2002), 147 Ohio App. 3d 151, 162, 2002-Ohio-1163, 768 N.E.2d 1250. “Consistency and proportionality are hallmarks of the new sentencing law.” *Id.*,

citing Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W.Res.L.Rev. 1, 12. And while consecutive sentences were permitted, imposition of consecutive sentences required that “findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision.” Griffin & Katz, Ohio Felony Sentencing Law, at 458-459, Section 1.21.

These laudable goals are now history, replaced by a judicially enacted scheme that requires findings only when a trial court seeks to give a “downward departure” pursuant to R.C. 2929.20(H). *State v. Mathis*, ___ Ohio St.3d ___, 2006-Ohio-855, syllabus, paragraph 1. Given the Court’s prior pronouncements on the laudable goals inherent in Senate Bill 2, the severance remedy was indefensible by reference to prior law.

Conclusion

Foster’s severance remedy eliminates guided discretion, eliminates effective appellate review, and encourages increased sentences to those defendants with the temerity to demand a new hearing pursuant to *Foster*. Retroactive application of the remedy to Foster and all other defendants whose sentences may be revisited pursuant to this Court’s decision violates the Constitution’s prohibition against ex post facto laws and thus violates due process.

Accordingly, Appellant Andrew Foster moves the Court to reconsider the application of the remedy imposed in *State v. Foster* to him at his resentencing.

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing APPELLANT ANDREW FOSTER'S MOTION FOR RECONSIDERATION was forwarded by regular U.S. Mail, postage prepaid to the office of Kenneth Oswalt, Assistant Licking County Prosecutor, Administration Building, 20 S. 2nd Street, Newark, Ohio 43055; Diane Richards Brey, Deputy Solicitor, Ohio Attorney General's Office, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; Steven L. Taylor, Franklin County Assistant Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215; John T. Martin, Cuyahoga County Assistant Public Defender, 1200 West Third Street, Cleveland, Ohio 44113; Jason Macke, Attorney at Law, 400 S. Fifth Street, Columbus, Ohio 43215; Jeffrey M. Gamso, Esq., Max Wohl Civil Liberties Center, 4506 Chester Avenue, Cleveland, Ohio 44103 this 8th day of March, 2006.

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