In the

Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2004-1568
Plaintiff-Appellee,	:	On Appeal from the Licking County
v.	:	Court of Appeals, Fifth Appellate District
ANDREW FOSTER,	:	
Defendant-Appellant.	:	Court of Appeals Case No. 03CA95

MEMORANDUM OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL JIM PETRO OPPOSING MOTION FOR RECONSIDERATION

DAVID H. BODIKER (0016590)
Ohio Public Defender
THERESA G. HAIRE* (0020012)
Assistant State Public Defender
**Counsel of Record*
8 East Long Street, 11th Floor
Columbus, Ohio 43215
614-466-5394
614-752-5167 fax

Counsel for Defendant-Appellant
Andrew Foster

ROBERT L. BECKER (0010188)
Licking County Prosecutor
KENNETH OSWALT* (0037208)
Assistant Prosecuting Attorney
**Counsel of Record*
Administration Building
20 South 2nd Street
Newark, Ohio 43055
740-349-6195
740-349-6179 fax

JIM PETRO (0022096)
Attorney General of Ohio

DOUGLAS R. COLE (0070665)
State Solicitor
DIANE RICHARDS BREY* (0040328)
FRANKLIN E. CRAWFORD (0076280)
Deputy Solicitors
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
dbrey@ag.state.oh.us

Counsel for *Amicus Curiae*
Attorney General Jim Petro

JEFFREY M. GAMSO* (0043869)
**Counsel of Record*
Max Wohl Civil Liberties Center
4506 Chester Avenue
Cleveland, Ohio 44103
216-472-2220
216-472-2210 fax

Counsel for Plaintiff-Appellee
State of Ohio

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR* (0043876)
SETH L. GILBERT (0072929)
Assistant Prosecuting Attorneys
*Counsel of Record
373 South High Street, 13th Floor
Columbus, Ohio 43215
614-462-3555
614-462-6103 fax

Counsel for *Amicus Curiae*
Ohio Prosecuting Attorneys Association

Counsel for *Amicus Curiae*
American Civil Liberties Union of Ohio Foundation, Inc.

ROBERT L. TOBIK (0029286)
Cuyahoga County Public Defender
JOHN T. MARTIN* (0020606)
Assistant Public Defender
*Counsel of Record
1200 West 3rd Street
Cleveland, Ohio 44113
216-443-7580
216-443-3632 fax
JASON MACKE (0069870)
400 South 5th Street
Columbus, Ohio 43215
614-464-0011

Counsel for *Amicus Curiae*
Ohio Association of Criminal Defense Lawyers and Cuyahoga County Public Defender

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations **Page(s)**

Other Authorities **Page(s)**

Other Authorities (continued) **Page(s)**

INTRODUCTION

At the heart of Foster's and Quinones's motions for reconsideration is this: an attempt to argue issues that they failed to brief before, despite having every opportunity and incentive to do so. Foster and Quinones ("the Defendants") now claim that the remedy the Court chose in *State v. Foster*, __ Ohio St. 3d __, 2006-Ohio-856—i.e., severing a provision from the sentencing statute—as applied to cases on direct review, violates the Due Process Clause because it unfairly expands the available punishment for an already-convicted defendant.[1] But, in their briefing of the case, one of the Defendants (Quinones) did not say a word about severability. The other (Foster) expressly recognized that, if the Court found a constitutional violation, severing the offending portion of the statute may be a possibility. But, while he said that such a remedy would do a "grave disservice to the legislative intent," he never once suggested that it would violate the Due Process Clause. Foster Reply Br. at 9.

The Defendants' attempt to raise additional anti-severance arguments here is unwarranted for at least three reasons. First, motions for reconsideration are not an appropriate vehicle for "reargument of the case," i.e., raising arguments that could have been, but were not, raised in the initial briefs. See Sup. Ct. R. XI(2)(A). Second, that is particularly true here where the remedy the Court chose—severing the offending provisions—could hardly come as a surprise. It was the very remedy that the U.S. Supreme Court chose in *United States v. Booker* (2005), 543 U.S. 220, the case that Defendants expressly asked the Court to apply here. Moreover, the remedy is also

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[1] Foster's motion for reconsideration contests application of this Court's remedy to his consecutive sentences. Foster received minimum prison terms, and this Court held that he was properly sentenced to prison for his fourth- and fifth-degree felonies because trial courts have always had discretion to impose prison terms for these types of felonies without making findings. See *Foster*, 2006-Ohio-856, ¶¶ 69–70.

consistent with, perhaps even compelled by, Ohio statute, see R.C. 1.50, and long-standing case law, see *Geiger v. Geiger* (1927), 117 Ohio St. 451, 469.

Third, even if the Defendants offered a compelling case for ignoring their earlier failure to brief the issue they now raise, they cannot make out a viable due process claim. The fairness principles embodied in that clause prevent courts from creating an "unexpected and indefensible" expansion of a state law through judicial interpretation. This Court's decision in *Foster* does not fall into that category. Before *Foster*, defendants in Ohio well understood that they potentially faced the maximum and consecutive prison sentences for their crimes. No defendant could have reasonably believed that, after committing three first-degree felonies, for example, he was entitled to what the Defendants now claim: a three-year sentence at most. In short, the *Foster* remedy comports with the Constitution's requirements, and no reason exists for this Court to reconsider that remedy here.

ARGUMENT

A. The Defendants' motion should be rejected, as the Defendants failed during the merits briefing to raise their present arguments against the *Booker* remedy and the severability analysis mandated by Ohio law.

A motion for reconsideration is not the time nor place to argue for the first time an issue omitted from the party's merits brief. Yet that is precisely what Foster, Quinones, and their *amici* do here. Severability and its consequences to Foster, Quinones, and all other defendants on direct review were issues that were always on the table in this case, so the parties were well aware that this Court could address these issues in its opinions. Indeed, the Court stayed briefing in these cases until *after* the U.S. Supreme Court decided *Booker*. See *01/28/2005 Opinions and Announcements*, 2005-Ohio-286. In holding that mandatory application of the federal guidelines violated the Constitution, and then severing a portion of the federal statute that made the

guidelines' application mandatory, the *Booker* Court made clear what its remedy was: "[W]e *must* apply today's holdings—*both* the Sixth Amendment holding *and our remedial interpretation of the Sentencing Act*—to *all cases on direct review*." 543 U.S. at 268 (emphasis added). Thus, when the parties filed their briefs here, everyone was well aware that: (1) the U.S. Supreme Court held the guidelines unconstitutional; (2) the Court severed the offending statutes; and (3) the Court applied the severed statutes to cases pending on direct review. Yet in their merits briefs, Foster, Quinones, and their *amici* focused their discussion on the constitutionality of Ohio's sentencing scheme. Foster said little, and Quinones said nothing, about severability as a remedy. And neither the Defendants nor their *amici* raised the Due Process Clause objection to severability that they do now.

Additionally, several briefs filed in support of the Defendants in these cases sung the praises of *Booker*. In fact, Quinones *expressly* urged this Court to follow *Booker* and apply its holding to all cases on direct review. In his merits brief, Quinones quoted with approval the *Booker* Court's statement that "today's Sixth Amendment holding *and the Court's remedial interpretation . . . must be applied to all cases on direct review.*" Quinones Br. at 14 (emphasis added). Foster took a similar position. See, e.g., Foster Br. at 4 ("The Court's analysis in its recent decisions through *Booker* applies with equal force to Ohio's sentencing provisions."). What this shows is that the Defendants were well aware of the *Booker* holding and its implications, but they failed to raise their present concern about the *Booker* remedy in their briefing to this Court. So having strongly urged this Court to apply its *Foster* holding to their cases, and having succeeded, they now ask for a caveat: the Court should only apply the favorable aspects of its judgment to their cases. The Court should reject this unsound approach.

B. This Court's remedial holding regarding Ohio's sentencing statutes closely follows the U.S. Supreme Court's treatment of the federal sentencing guidelines.

In seeking reconsideration, the Defendants face a huge and ultimately insurmountable obstacle: in ordering that courts must apply its holding to all cases pending on direct review, this Court in *Foster* did what the U.S. Supreme Court did to fix the federal sentencing guidelines in *Booker*. Foster tries to solve this problem by first distinguishing *Booker* on the premise that *Booker*'s changes to the federal sentencing guidelines were less severe than this Court's changes to Ohio's law, and therefore the *Booker* Court's retroactive application of its holding works no injustice while this Court's *Foster* remedy does. Foster's contentions, however, are mistaken.

Foster first argues that *Booker* still requires federal sentencing courts to consider the sentencing guidelines, while Ohio judges have totally unbridled discretion, but that argument is mistaken because this Court left untouched R.C. 2929.11 and 2929.12, which require sentencing courts to consider "the overriding purposes of felony sentencing." Indeed, this Court cited R.C. 2929.11 with approval when it held that its severance remedy "does not detract from the overriding objectives of the General Assembly." *Foster*, 2006-Ohio-856, ¶ 98. And in *State v. Mathis*, __ Ohio St. 3d __, 2006-Ohio-855, decided the same day as *Foster*, the Court directed that in choosing a sentence, trial courts still must carefully consider R.C. 2929.11 and 2929.12, as well as the record before the court. *Id.* at ¶¶ 37–38. This is precisely what U.S. Supreme Court did when it held that "[w]ithout the 'mandatory' provision, the [Sentencing] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals." *Booker*, 543 U.S. at 249. Cf. *Foster*, 2006-Ohio-856, ¶ 91 ("'If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.'") (quoting *Booker*, 543 U.S. at 234).

C. The Defendants are also mistaken in arguing that by following the U.S. Supreme Court's lead, this Court has violated either the Ex Post Facto Clause or the Due Process Clause.

Having failed to distinguish *Booker*, both Defendants, along with the Cuyahoga County Public Defender, argue as their main contention that in applying *Foster* to all cases pending on direct review, this Court has violated the Due Process Clause by unfairly enlarging the interpretation of a criminal statute. Their fear appears to be that on resentencing, some defendants may possibly receive a harsher penalty. That possibility, however, is one the *Booker* Court expressly recognized when it noted that even though Fanfan's sentence did not violate the Sixth Amendment, the *government* was still free to seek resentencing because the district court had imposed a sentence *below* the guideline range. 543 U.S. at 268. The obvious aim of the government's appeal would be a harsher sentence, but the *Booker* Court never suggested that was a problem. But even if *Booker* does not foreclose the Defendants' retroactivity argument, this Court's *Foster* decision does not violate the Constitution.

The Defendants and their supporters first argue that ex post facto principles foreclose the result in this case, but this Court should reject that argument out-of-hand. The Ex Post Facto Clause has no application to the judicial interpretation of a statute. "As the text of the Clause makes clear," the U.S. Supreme Court has held, "it is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Rogers v. Tennessee* (2001), 532 U.S 451, 456 (quotation marks omitted). Thus, the Defendants' reliance upon *Miller v. Florida* (1987), 482 U.S. 423, is misplaced. That case involved the Florida *legislature's* alteration of its sentencing guidelines, not the efforts of a state supreme court to bring its sentencing statutes in line with constitutional mandates. It is no answer, moreover, to analogize the Due Process Clause to the requirements of the Ex Post Facto Clause. The U.S.

Supreme Court squarely rejected that notion in *Rogers*: any defendant that "argues that the Due Process Clause incorporates the specific prohibitions of the *Ex Post Facto* Clause . . . misreads [our precedent.]" 532 U.S. at 458.

Although the Ex Post Facto Clause does not apply to judicial interpretations, the Due Process Clause does by prohibiting courts from retroactively applying "unexpected and indefensible" judicial expansions of a criminal statute, *Rogers*, 532 U.S. at 459, but this is not a problem here. Bringing Ohio's sentencing scheme within Constitutional mandates is neither "unexpected" nor "indefensible." First, this Court has long recognized that after holding a statute unconstitutional, the Court should apply severability principles to preserve as much of the General Assembly's work as possible. The Court's leading severability case, *Geiger*, was decided nearly *eighty* years ago. Moreover, the General Assembly expressly *requires* this Court to apply severability principles. R.C. 1.50 tells courts that when "the [constitutional] invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application . . . the provisions *are* severable." (emphasis added). As the Court was merely doing what the U.S. Supreme Court already condoned in *Booker*, this Court's actions are hardly "unexpected" or "indefensible."

Second, whether a judicial interpretation of a statute offends the Due Process Clause rests in large part on what a defendant could fairly expect the law to mean when he committed his crimes. See *Rogers*, 532 U.S. at 459 ("[Our decisions] have applied [the due process] check on retroactive judicial decisionmaking . . . in accordance with the more basic and general principle of fair warning."). The Defendants cannot seriously contend that when they committed their crimes, they reasonably expected to receive a minimum, non-consecutive sentence. Rather, they surely expected to face what they face today: a sentence that falls within the basic ranges set by

R.C. 2929.14(A), plus any additional specifications (e.g. major drug offender), with the prospect of serving sentences on multiple counts consecutively. Pre-*Foster*, Ohio's scheme gave judges the ability to impose non-minimum sentences based on findings (subject to deferential review) that the defendant, for example, committed "the worst form of the offense" or that the minimum sentence will "demean the seriousness of the offender's conduct." R.C. 2929.14(C), (B).

In shaping his conduct, no defendant could have relied on the hope that an unknown judge on a future date would *fail* to find that the proven conduct was the "worst form of the offense," for example. That sort of subjective, conclusory judicial "finding" simply created no realistic expectation that a defendant could rely on in assuming he was entitled to a minimum, non-consecutive sentence. (Indeed, the subjective determinations inherent in Ohio's "findings" differ from the more fact-specific findings declared unconstitutional in the U.S. Supreme Court's decisions in *Blakely v. Washington* (2004), 542 U.S. 296, and *Booker*.) Rather, the only plausible expectation was that a defendant faced the maximum possible sentence under the statutes—10 years, for example, for a first-degree felony. This explains why reverting to a discretionary scheme works no injustice on defendants, as they realistically expected all along that they faced the full range of punishments based on their degree of felony and other factors.

Indeed, this no doubt explains why judges do not say "three years" when informing a first-degree felony defendant, for example, of his maximum penalty as required by Crim. R. 11(C) during a plea hearing. Instead, judges tell defendants that the maximum penalty is the largest one possible under the statute (e.g., 3–10 years for a first-degree felony), including the possibility of consecutive sentences, and any specifications (e.g. repeat violent offender). See, e.g., *State v. Corbin* (8th Dist.), 141 Ohio App. 3d 381, 387, 2001-Ohio-4140 (ordering resentencing because no one informed the defendant that he faced a sentence for a third-degree felony, described in

R.C. 2929.14(A)(3), "which carried a presumption of incarceration of one, two, three, four or five years"); *State v. Bragenzer* (4th Dist.), 2003-Ohio-5597, ¶¶ 3, 21–22 (trial court adequately informed defendant of maximum sentence for two first-degree felonies when "the trial court specifically informed Bragenzer that the court could sentence him up to ten years on each count and that the court could order Bragenzer to serve the sentences either consecutively or concurrently"). It also explains why the Ohio Sentencing Commission suggested that when conducting a sentencing hearing, judges should "[s]tate a prison term, including a term from the basic range [plus] and any gun spec[ifications], RVO, MDO, consecutive [sentences], etc." See Ohio Sentencing Commission, Felony Sentencing Quick Reference Guide (2002), at 3, available at http://www.sconet.state.oh.us/sentencing_commission/publications/FelonyQuickRef03.pdf.

It also explains why non-lawyers, like journalists, do not report that the minimum, non-consecutive sentences are what defendants likely face. The Columbus Dispatch, for example, recently quoted Franklin County Prosecutor Ron O'Brien as saying Maurice Clarrett "could be sentenced to up to 25 years in prison" on multiple armed robbery charges. Bruce Cadwallader, *Clarett Indicted*, The Columbus Dispatch, Feb. 11, 2006, at 1D. The newspaper further explained that "[a]ggravated robbery is a first-degree felony punishable by up to 10 years in prison for each count." *Id.* The Dispatch did not, by contrast, report that Maurice Clarrett faced "3 years, maybe more," if convicted. These illustrations, then, only underscore the common understanding that the Defendants had fair warning—surely sufficient to satisfy due process concerns—that they faced more than the minimum, non-consecutive sentences they claim they are entitled to.

In sum, this tells us that the common expectation of the possible punishment *before* this Court's *Foster* decision is precisely the same expectation that defendants have *after* this Court's

Foster decision. This forecloses any claim that this Court's decision offends the Due Process Clause's fairness mandate.

The two remaining cases that the Defendants chiefly rely on do not help them. *Bouie v. City of Columbia* (1964), 378 U.S. 347, invalidated the South Carolina Supreme Court's thinly-veiled attempt to twist a statute beyond recognition so that the police had a law available to keep blacks out of "whites only" restaurants in the heyday of the 1960s civil rights movement. That is a far cry from this Court's carefully-considered effort to remedy what it found to be unconstitutional provisions of Ohio's sentencing statutes under recent U.S. Supreme Court decisions. The South Carolina Supreme Court in *Bouie* engaged in the sort of judicial arbitrariness that offends even the most reserved notions of fundamental fairness. The South Carolina court took a statute that criminalized entry on land "after" the owner gave notice of no trespassing and read it include situations where the entry occurred "before" the owner gave notice. No one could have predicted that sort of countertextual interpretation. But as explained in the previous paragraph, this Court's *Foster* decision is a respectable effort to comply with the Constitution's mandates, not to redraw the line between innocent and criminal conduct based on the race of the defendant, as the South Carolina Supreme Court did in *Bouie*.

And *Rogers* is a case where the U.S. Supreme Court *rejected* a Due Process challenge to the Tennessee Supreme Court's decision to eliminate a common law defense to murder. 532 U.S. at 466. If eliminating a defense to murder is not necessarily the sort of "unexpected and indefensible" judicial interpretation that violates the Due Process Clause's fair warning principle, this Court has little reason to believe its *Foster* decision is. This is especially true considering that pre-*Foster*, Ohio defendants never had a realistic expectation of facing a maximum sentence lower than the one they face post-*Foster*. If the defendant in *Rogers* had fair warning of the

change in Tennessee law that deprived him a of a murder defense, then the Defendants here (and all others whose cases are on direct review) were fairly warned, too.

D. The ACLU's separation-of-powers argument is mistaken.

Taking a different approach, the ACLU claims that this Court's decision to sever the offending provisions of Ohio's sentencing scheme is a wholly illegitimate exercise of judicial power. But, as discussed above, what the Court did here is well within the parameters of its long-established severability jurisprudence, not to mention the U.S. Supreme Court's remedial holding in *Booker*. As explained above, this Court (and all others, no doubt), have applied severability principles to save as much of a legislative enactment as possible. Those principles appear in both eighty-year-old case law, see *Geiger*, and in the Ohio severability statute, R.C. 1.50. The ACLU completely ignores this statute. Far from offending the separation-of-powers principles identified by the ACLU, severability *respects* the relationship between the General Assembly and the Court.

In short, the ACLU's brief is long on rhetoric, and quick to make spurious aspersions (such as its attack on the Court's "judicial integrity"), but fails to offer any valid reasons supporting reconsideration.

CONCLUSION

For the above reasons, the Court should deny the motions for reconsideration.

Respectfully submitted,

JIM PETRO (0022096)
Attorney General of Ohio

DOUGLAS R. COLE (0070665)
State Solicitor
DIANE RICHARDS BREY* (0040328)
FRANKLIN E. CRAWFORD (0076280)
Deputy Solicitors
*Counsel of Record
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
dbrey@ag.state.oh.us

Counsel for *Amicus Curiae*
Attorney General Jim Petro

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of *Amicus Curiae* Ohio Attorney General Jim Petro Opposing Motion for Reconsideration was served by U.S. mail this 15th day of March, 2006, upon the following counsel:

David H. Bodiker
Theresa G. Haire
8 East Long Street, 11th Floor
Columbus, Ohio 43215

Counsel for Defendant-Appellant
Andrew Foster

Robert L. Becker
Kenneth Oswalt
Administration Building
20 South 2nd Street
Newark, Ohio 43055

Counsel for Plaintiff-Appellee
State of Ohio

Ron O'Brien
Steven L. Taylor
Seth L. Gilbert
373 South High Street, 13th Floor
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Prosecuting Attorneys Association

Jeffrey M. Gamso
Max Wohl Civil Liberties Center
4506 Chester Avenue
Cleveland, Ohio 44103

Counsel for *Amicus Curiae*
American Civil Liberties Union of Ohio Foundation, Inc.

Robert L. Tobik
John T. Martin
1200 West 3rd Street
Cleveland, Ohio 44113
Jason Macke
400 South 5th Street
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Association of Criminal Defense Lawyers and Cuyahoga County Public Defender

Diane R. Brey
Diane Richards Brey
Deputy Solicitor