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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Mr. McGhee was sentenced on *Foster* remand from an initial appeal to a prison term of ten (10) years for conduct that occurred prior to February 27, 2006, despite the statutory presumption for a minimum sentence.

Subsequent to his conduct, the Ohio Supreme Court had declared the sentencing law applicable to his case unconstitutional and void, and remanded all cases on direct review back for resentencing, mandating that Ohio trial courts sentence without the benefit to the accused of statutory presumptions that operated as a limitation on the trial courts prior to *Foster* and, accordingly, as a benefit to the accused.

Mr. McGhee appealed his new sentence, claiming that the *Foster* decision operated as a denial of Due Process of Law, because the judicial reconstruction of Ohio sentencing law after the completion of his criminal conduct changed his potential sentence *ex post facto*. The Third District rejected his appeal, deciding that the act of the Supreme Court in reinterpreting the statutes did not deprive Mr. McGhee of his Due Process rights.

This appeal raises the question of whether retroactive application of *Foster* to conduct completed prior to February 27, 2006, violates the Due Process rights of the accused, by operating as an *ex post facto* judicial interpretation of existing Ohio law, increasing the potential penalty for criminal conduct after the crime is committed. It is well known that this issue will affect hundreds, if not thousands, of cases currently working themselves through the trial courts and the courts of appeals in Ohio.

## STATEMENT OF THE CASE AND FACTS

Mr. McGhee was charged in the Shelby County Court of Common Pleas with multiple counts of Drug Trafficking and/or Possession, along with a sole count of Engaging in a Pattern of Corrupt Activity. He was convicted by plea of the one (1) count of Engaging in a Pattern of Corrupt Activity.

A sentencing hearing was held on September 30, 2005. Mr. McGhee received a maximum sentence of ten (10) years on the case, enabled only by a finding of “worst form” offense or offender. He appealed to the Third District Court of Appeals, claiming that the Trial Court should have imposed a non-maximum sentence, as any other sentence would violate his right to a jury trial and to grand jury presentment and to proof beyond a reasonable doubt of all elements embodied in Ohio’s sentencing scheme.

After *Foster* remand, Mr. McGhee objected to the *Foster* remedy of removing the presumptions that benefited him, as the same was effectively amendment of the potential penalty of felony offenses such that non-aggravated felonies now faced penalties only previously possible for the most aggravated of felonies. The Third District rejected Mr. McGhee’s claims in Due Process.

This appeal followed.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### **Proposition of Law 1:      **Ohio Sentencing Law is Unconstitutional for Violation of the Right to Due Process.****

The United States Supreme Court, in *Blakely v. Washington* (June 24, 2004), No. 02-1632, addressed the impact of *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, wherein the Court had held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” The import of *Blakely* was to define the term “statutory maximum.” In *Blakely*, the Court addressed a statutory scheme where the statute referred to a range of up to ten (10) years in prison but where additional statutory provisions limit the discretion of the judge further within that limit to a smaller actual limit unless the sentencing court makes additional findings. The Court ruled that “the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” Whenever the statute, as in *Washington*, calls for one range, and yet requires some lesser range but for additional findings not made by a jury, then sentencing above that lesser range violates the *Apprendi* rule. “When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment \* \* \* and the judge exceeds his proper authority.” *Blakely*. Ultimately, the holding was that “because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury.” *Blakely*, at Syllabus.

Consider the Syllabus further:

“The relevant statutory maximum for Apprendi purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard range sentence. Petitioner’s sentence is not analogous to those upheld in *McMillan v. Pennsylvania*, 477 U.S. 79, and *Williams v. New York*, 337 U.S. 241, which were not greater than what state law authorized based on the verdict alone. Regardless of whether the judge’s authority to impose the enhanced sentence depends on a judge’s finding a specified fact, one of several specified facts, or any aggravating fact, it remains the case that the jury’s verdict alone does not authorize the sentence. Pp. \_\_\_\_.” *Blakely*, at Syllabus.

This decision also affects Ohio sentencing law as it pertains to Mr. McGhee.

Granted, Mr. McGhee was convicted of one felony of the first degree, carrying a statutorily noted range of 3-10 years. However, Mr. McGhee only faced a maximum of ten (10) years if his conduct was deemed “worst form.” The law in force at the time of his offense limited his actual possible sentence to a non-maximum sentence unless the sentencing court made one or more findings. Interestingly, the State of Ohio, plaintiff on the criminal case, recommended a sentence of six (6) years, suggesting that the parties had agreed that this was not “worst form.” The Trial Court, therefore, overrode the agreement of the parties. This was the law as of the date of commission of the offenses.

As difficult as these findings may be for a jury, so also they would be equally difficult for a sentencing judge. Nonetheless, they are “findings” required by some trier of fact prior to enabling of sentencing above minimum. As the accused has no right to trial by jury on the issue of seriousness or recidivism likelihood, *Blakely* and *Apprendi* are violated if a maximum sentence is imposed.

In any event, each “finding” is as unacceptable under *Blakely* as the findings required for exceeding minimum sentencing. That is precisely the ill sought avoided in the Supreme Court decisions. The intent of the Ohio legislature was to force the judiciary to use minimum sentencing for the first-timer going to prison as often as one could stomach the same, resorting to higher sentences only when certain aggravating circumstances existed. However, when the legislature chose to usurp judicial discretion, it erred from a constitutional perspective. Extreme complexity often has such unintentional results. In any event, the recent pronouncement of the United States Supreme Court clearly forces short-term resolution of cases like that herein where minimum sentencing is forced, despite aggravating circumstances.

This perhaps unfortunate result is better than the risk of a tail-that-wags-the-dog alternative. Without *Apprendi* and *Blakely*, the legislature could make the range for marijuana possession \$50 up to life in prison. A man with a joint in his hand would be easily convicted. Then, if sentencing required a fine of \$50 if no more than a joint was possessed, and 10 years for a pound, the man might get 10 years for a pound found in his house, despite strong evidence of his lack of knowledge of the same. Justice Scalia, writing for the majority, offered similar outrageous results in *Blakely*.

Ohio may correct the problem. Until then, Mr. McGhee was entitled to only be sentenced according to the facts contained in the plea, meaning alleged in the indictment. Those facts alone do not support any sentence other than non-maximum sentencing, for a net of three (3) to nine (9) years. Therefore, remand with instruction to impose a sentence within that range is required.

The *Foster* decision (*State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470), provided a procedure for getting beyond these presumptions, to enable the Trial Court to impose a greater sentence. The Ohio Supreme Court was compelled by the decision in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, to recognize that the procedure enacted in Ohio to overcome the presumptions benefiting the accused violated the right of the accused to trial by jury. Therefore, the provision of law establishing this procedure was struck down and invalidated.

That left a huge problem, however. Senate Bill 2 seemed to be working, generally, in that the presumptions were usually honored. The *Blakely* appeals all involved that rare case when presumptions were overcome, meaning those that the legislature probably intended for higher sentences. Thus, remand for re-sentencing to the minimums would not have reflected the intended result of the legislature in enacting Senate Bill 2. For this reasons, the Ohio Supreme Court had a problem. To sever a portion of the law but keep the rest, the balance of the statute must approximate very closely the intended will of the People as to the entirety of the statute before the stricken portion was removed. There were two end results possible.

The first possible end result was the “cure” from *Blakely* itself, namely enforced minimums. That resolution was suggested as the only plausible result in *State ex rel. Mason v. Griffin* (2004), 104 Ohio St.3d 279, 2004-Ohio-6384. The Ohio Supreme Court directed that Judge Griffin, of the Cuyahoga County Court of Common Pleas, could not bifurcate trials and create a new jury trial for the sentencing factors. Instead, the Ohio Supreme Court directed Judge Griffin to adopt the *Blakely* cure, enforced minimums, if Judge Griffin determined that the right to trial by jury was, in fact, violated,

as later found by the Ohio Supreme Court. This solution, however, missed legislative intent. The Ohio Supreme Court found an alternative, however, when the United States Supreme Court issued the decision in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621. The *Booker* remedy was thought to be severance of both the procedure for override of the presumption *and* the presumption itself. The end result, then, was that the resulting law seemed to better approximate legislative intent.

The Ohio Supreme Court, for these reasons, adopted something similar to the *Booker* remedy. Precisely, the procedure was erased because of *Blakely*, and the presumption was erased because *Booker* seemed to authorize also removing the presumption, not because the presumption was unconstitutional but because the presumption without an override procedure was inconsistent with legislative intent.

Applied retroactively, however, a new problem arises. It is undeniably the case that, when Tyrone McGhee committed his crimes, he did so with the understanding that the law forbade his conduct. Engaging in that conduct would subject him to prison time, but the presumption was for a non-maximum sentence. If Mr. McGhee avoided aggravating circumstances, therefore, he expected to face three (3) to nine (9) years of incarceration for his conduct.

Now, however, the law has changed, such that he is deemed to have placed himself in jeopardy of the ten (10) years of incarceration that he received, even if he avoided any aggravating circumstances. Relevant herein, the agreement of the parties also was not protection. Thus, after the crimes were committed, a new and stricter penalty has been established, applied retroactively.

This retroactive application of a new sentencing scheme to already-completed criminal conduct is just as unconstitutional as is the denial of a right to trial by jury. In fact, the constitutional wrong is more substantial, as Mr. McGhee had removed any procedure to challenge the enhancement. Previously, he might have successfully challenged that procedure, resulting in remand if the Trial Court had failed to make findings necessary for the enhancement. On remand, however, the Trial Court would no longer be required to make those findings. Hence, whereas the Ohio Supreme Court might have ruled that he was sentenced too much under the prior law, that ruling is impossible now because the law has changed, removing the need to even give to Mr. McGhee the lesser sentence previously applicable to Mr. McGhee, and recommended by the prosecution.

Why is this retroactive application of *Foster* to Mr. McGhee unconstitutional? In *Bouie v. City of Columbia* (1963), 378 U.S. 347, at Syllabus, the United States Supreme Court held that “the State Supreme Court [of South Carolina], in giving retroactive application to its new construction of the statute, has deprived Petitioners of their right to fair warning of a criminal prohibition, and thus has violated the Due Process Clause of the Fourteenth Amendment.” The *Bouie* decision relied upon a principle that the judiciary cannot by interpretation of an existing and unambiguous law violate the right of an accused to freedom from an *ex post facto* law by judicial creation of that which the legislature could not create. The *Bouie* standard is whether the late action of the judiciary was unforeseeable at the time of the commission of the offense.

Mr. McGhee herein claims that his case involves an unforeseeable decision. It should be apparent that the Ohio Supreme Court, in overturning its *Comer* decision, clearly did not foresee this conclusion at the time of the *Comer* decision. It should also

be apparent that the inconsistencies between *Griffin* and *Foster* suggests that the Ohio Supreme Court only came up with this new solution after *Booker* provided the suggestion. If the Ohio Supreme Court itself could not foresee this blended decision in *Foster*, then it was unforeseeable.

The *Foster* decision dealt with the unconstitutionality of the *procedure* established in Ohio for rebutting a presumption, one that benefited the accused. The remedy was not to establish a new, constitutional procedure (the right to a trial by jury on the rebuttal questions). The remedy was to erase the presumption, changing the *substantive* law in question. This is not a “remedy” that one could anticipate at the time that Mr. McGhee committed his crimes.

The Ohio Supreme Court never had before it whether this new remedy would violate Due Process per *Bouie*, as that issue was premature until trial courts re-sentenced people under the *Foster* mandate. Instead, the Ohio Supreme Court had only two issues, primarily, the constitutionality of the law, and secondarily, the need to apply principles of severability to have a resulting remainder of the law approximate legislative intent. The decision was clear, that the procedure was unconstitutional. As a result, the *Foster* decision struck down that procedure, employing severability to *interpret the remainder of the statutes*. In so doing, the mandate sent the cases back for sentencing under the severed remainder, removing the presumption to protect the legislative intent.

For the reasons stated above, however, this mandate carries a matter “left open.” That matter is whether the remainder of the statute, as now interpreted by the Ohio Supreme Court to be consistent with legislative intent, can be applied retroactively without any other implications not considered by the Ohio Supreme Court because the

issues were premature. In its mandate relative to retroactive application, Due Process concerns as to notice and *ex post facto* analysis were not necessary to resolve. Now, it is. Applying *Bouie* to this case, it seems clear and apparent that the retroactive application to Appellant did, in fact, violate his right to Due Process.

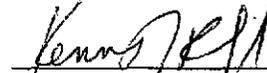
Although the *Booker* solution works for all future cases, the *Booker* remedy applied retroactively violates Mr. McGhee's constitutional right to freedom from *ex post facto* legislation. "Legislation" means, in this situation, the act of the Ohio Supreme Court in judicial construction after severance of an unconstitutional part of a provision, and act deemed by the United States Supreme Court as a "legislative" act for *ex post facto* analysis.

The *Foster* decision avoided federal review for all crimes committed after February 27, 2006. However, it merely changed the federal question for cases involving offenses committed prior to February 27, 2006, including those offenses for which Mr. McGhee has been sentenced. That federal question has not been answered. In no Ohio Supreme Court opinions is the *Bouie* case discussed. *Bouie* is only mentioned in three appellate cases in 2006, all three from the Third District and all three argued by the undersigned; in all three, the *Bouie* issue was deemed premature, until now. In no United States Supreme Court decision is *Blakely* and *Bouie* analyzed together after a *Booker* remedy has been adopted.

## CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



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Kenneth J. Rexford

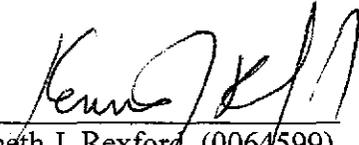
**Counsel for Tyrone McGhee**

**Proof of Service**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee,

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on the 5<sup>th</sup> day of November, 2006.

By:   
Kenneth J. Rexford (0064599)  
COUNSEL FOR APPELLANT,  
TYRONE MCGHEE

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
SHELBY COUNTY**

**STATE OF OHIO**

**CASE NUMBER 17-06-05**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**TYRONE MCGHEE**

**DEFENDANT-APPELLANT**

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**CHARACTER OF PROCEEDINGS:** Criminal Appeal from Common Pleas Court.

**JUDGMENT:** Judgment affirmed.

**DATE OF JUDGMENT ENTRY:** October 2, 2006

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**BRYANT, P.J.**

{¶1} The defendant-appellant, Tyrone McGhee (“McGhee”), appeals the judgment of the Shelby County Common Pleas Court sentencing him to ten years in prison.

*Statement of the Case*

{¶2} On March 4, 2005, the Shelby County Grand Jury indicted McGhee on nine charges including: three counts of trafficking in cocaine, violations of R.C. 2925.03, felonies of the fifth degree; two counts of trafficking in cocaine, violations of R.C. 2925.03, felonies of the fourth degree; one count of possession of cocaine, a violation of R.C. 2925.11, a felony of the second degree; one count of possession of cocaine, a violation of R.C. 2925.11, a felony of the third degree; one count of possession of cocaine, a violation of R.C. 2925.11, a felony of the fourth degree; and one count of engaging in a pattern of corrupt activity, a violation of R.C. 2923.32, a felony of the first degree. On June 17, 2005, the trial court held a change of plea hearing. McGhee withdrew his previously tendered pleas of not guilty and pled guilty to one count of engaging in a pattern of corrupt activity, a first degree felony, and the State of Ohio (“State”) dismissed the remaining charges. At that time, McGhee signed a petition to enter guilty plea, stating he understood he could be sentenced to the maximum prison term of ten years. On September 30, 2005, the trial court held a sentencing hearing and filed

its judgment entry. The court sentenced McGhee to serve the maximum sentence of ten years in prison for a first degree felony. On appeal, we vacated the sentence based on the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *State v. McGhee*, 3<sup>rd</sup> Dist. No. 17-05-27, 2006-Ohio-1885. On remand, the trial court held a new sentencing hearing and sentenced McGhee to ten years in prison. McGhee appeals the trial court's judgment and asserts the following assignment of error:

**The sentence imposed on remand was imposed pursuant to a judicially-created version of Ohio sentencing laws that, applied retroactively to Mr. McGhee, violated his right to freedom from ex post facto laws.**

### *Sentencing History*

{¶3} In 1996, the General Assembly enacted S.B. 2, which “recognized the importance of ‘truth in sentencing’” and which was intended to “introduce certainty and proportionality to felony sentencing.” *Foster*, at ¶ 34. See also Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136. S.B. 2 established the range of definite prison sentences that could be imposed for each degree of felony offense. For example, if a defendant committed a third degree felony, he or she could be sentenced to either one, two, three, four, or five years in prison. R.C. 2929.14(A)(3). During any felony sentencing hearing, the trial court was, and still is, required to consider the principles and purposes of sentencing under R.C. 2929.11 and the recidivism and seriousness factors under R.C. 2929.12. S.B. 2

also directed trial courts to sentence defendants to the lowest possible sentence unless the court made certain findings justifying an upward departure. Additionally, the trial court was required to state factual reasons for making the findings. For example, the trial court would impose a one year sentence on a first-time offender who committed a third degree felony, unless the court could make findings justifying a sentence of either two, three, or four years. Additionally, S.B. 2 required findings of fact before the court could sentence an offender to the maximum prison term or before the court could impose consecutive sentences. See R.C. 2929.14(C); (E)(4).

{¶4} In 2000, the United States Supreme Court held, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Foster*, at ¶ 3 (quoting *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435). In 2004, the court applied *Apprendi* to Washington’s state sentencing statute. *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. In *Blakely*, the court stated that the statutory maximum sentence “‘is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.’ (Emphasis sic and citations omitted)”. *Foster*, at ¶ 7 (quoting *Blakely*, at 303-304). Therefore, *Blakely* ultimately stood for the

proposition that the Sixth Amendment “prohibits a judge from imposing a sentence greater than that allowed by the jury verdict or by the defendant’s admissions at a plea hearing.” *Id.* However, the court did not offer a remedy for the defect.

{¶5} Ohio’s appellate districts were divided as to *Blakely*’s effect on our sentencing laws. In 2005, we decided *State v. Trubee*, 3<sup>rd</sup> Dist. No. 9-03-65, 2005-Ohio-552, in which we held *Blakely* inapplicable to Ohio’s sentencing scheme. Numerous appeals were taken to the Ohio Supreme Court. Later in 2005, the United States Supreme Court decided *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, in which the court found the federal sentencing guidelines to be unconstitutional because judges were making findings of fact in order to arrive at a sentence. *Foster*, at ¶ 8 (citing *Booker*, at 227). The court remedied the problem by making the sentencing guidelines advisory. *Id.*

{¶6} On February 27, 2006, the Ohio Supreme Court decided *Foster*. Pertinent to this appeal, the court considered whether R.C. 2929.14(B), (C), and (E)(4) were unconstitutional. The court evaluated *Apprendi*, *Blakely*, and *Booker* and determined that the above mentioned statutory provisions violated defendants’ Sixth Amendment rights because judges were required to engage in judicial fact-finding before sentencing to more than the minimum sentence, before imposing the maximum sentence, and/or before ordering consecutive sentences. The court

discussed several potential remedies. First, the court rejected the idea of separate jury trials for the guilt phase and the sentencing phase. *Id.* at ¶ 87 (citing *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644). Second, the court found that simply requiring trial courts to impose the minimum sentence did not comply with the legislative intent behind S.B. 2. *Id.* at ¶ 88-89. Finally, the court relied on *Booker* and determined that severing the offending provisions from the statute would be the appropriate remedy. *Id.* at ¶ 90-92. The court held that all cases on direct appeal and those cases pending in the trial courts were subject to sentencing pursuant to *Foster*. *Id.* at ¶ 104. Therefore, we were directed to vacate unconstitutional sentences and remand those cases to the trial courts for sentencing in compliance with *Foster*. *Id.* at ¶ 103.

#### *Arguments of the Parties*

{¶7} McGhee argues the new sentence violates his due process rights because the effect of *Foster* is to create an ex post facto law. McGhee contends that *Foster* applies retroactively and increases the penalty for offenses committed prior to the court's decision. Under *Bouie v. Columbia* (1964), 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894, McGhee contends the test of whether a judicial act creates an ex post facto law is "whether the late action of the judiciary was unforeseeable at the time of the commission of the offense." McGhee argues that *Foster* did not create a new sentencing procedure, but merely erased a

presumption that was beneficial to the defendant, which was an unanticipated remedy. McGhee essentially seeks the benefit of *Foster's* substantive holding, but he wishes to avoid the remedial holding.

{¶8} In response, the State contends *Foster* does not violate constitutional protections against ex post facto laws because McGhee had notice of the potential maximum sentence when he committed his crime and when he made the decision to plead guilty. The State contends “this court should not find that the Ohio Supreme Court ordered trial courts to violate the constitution.” Furthermore, the State argues that “[a] due process claim resting on ex post facto can only succeed if this Court were to determine that the Appellant did not have fair warning of the potential punishment at the time of the conduct or was subject to more severe punishment.”

#### *Analysis*

{¶9} McGhee raises an issue of first impression for our court; however, two other appellate districts have considered the question. In *State v. Smith*, 2<sup>nd</sup> Dist. No. 21004; 2006-Ohio-4405, the court addressed whether *Foster* violates the ex post facto clause. The court vacated the defendant’s original sentence and remanded the case to the trial court pursuant to *Foster*, but then the court went on to consider whether *Foster's* holding created an ex post facto law. *Smith*, at ¶ 31-34. In so doing, the court concluded that *Foster* does not violate the ex post facto

clause because defendants face the same potential sentences as they did before *Foster* was decided. *Id.* at ¶ 34. While we do not believe the constitutional question was properly before the court, we find its dicta persuasive. Additionally, the Ninth District Court of Appeals has considered the issue. The court found *Foster* does not violate the ex post facto clause, because it was “confident that the Supreme Court would not direct [it] to violate the constitution.” *State v. Newman*, 9<sup>th</sup> Dist. No. 23038, 2006-Ohio-4082, at ¶ 11 (citations omitted).

{¶10} “In contrast to determinations of fact which are accorded considerable deference, questions of law are examined by this court *de novo*.” (Emphasis sic.) *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 145, 147, 593 N.E.2d 286 (citing *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 388 N.E.2d 1370). De novo is an independent review, without deference to the trial court’s judgment. *Consumers' Counsel*, at 110.

{¶11} Article I, Section 10 of the United States Constitution provides that no state shall pass ex post facto laws. The ex post facto clause extends to four types of laws:

**“1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or**

**different, testimony than the law required at the time of the commission of the offense, in order to convict the offender.”**

(Emphasis added). *Rogers v. Tennessee* (2001), 532 U.S. 451, 121 S.Ct.1693, 149 L.Ed.2d 697 (quoting *Calder v. Bull* (1798), 3 U.S. 386, 390, 3 Dall. 386, 1 L.Ed. 648 (seriatum opinion of Chase, J.)).

{¶12} Additionally, “Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments.” *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, at ¶ 6 (quoting *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99, 566 N.E.2d 154). “The retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or *new liabilities* not existing at the time [the statute becomes effective].” (Bracketed material sic.) (Emphasis added.) *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 2000-Ohio-451, 721 N.E.2d 28 (quoting *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749).

{¶13} Although the federal and state constitutions prohibit ex post facto *legislation*, similar restrictions have been placed on judicial opinions. In *Bouie*, the Supreme Court stated: “[i]ndeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law”. *Bouie*, at 353. Soon after *Bouie*, appellants began arguing that various

judicial decisions violated the ex post facto clause. The Supreme Court later explained and clarified *Bowie*, stating that the holding was:

**rooted firmly in well established notions of *due process* \* \* \* It's rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct. \* \* \* [W]e couched [*Bowie's*] holding squarely in terms of that established due process right, and not in terms of the ex post facto-related dicta to which petitioner points.**

(Emphasis sic.) *Rogers*, at 459 (citations omitted). The court's message that *Bowie* is limited to issues of due process is clear. Likewise, the Ohio Supreme Court noted that “[a]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law” and *can violate due process* “even though the constitutional prohibition against ex post facto laws is applicable only to legislative acts.” (Emphasis added.) *State v. Garner*, 74 Ohio St.3d 49, 57, 1995-Ohio-168, 656 N.E.2d 623 (quoting *Bowie*, at 353) and (citing *Marks v. United States* (1997), 430 U.S. 188, 191-192, 97 S.Ct. 990, 51 L.Ed.2d 260). Therefore, we must consider both the state and federal constitutional ramifications of *Foster*, and we elect to consider the federal issues first.

#### ***Federal Constitutional Considerations***

{¶14} McGhee urges us to find *Foster* unconstitutional as in violation of the ex post facto clause. For the reasons that follow, we are unable to do so. Due

process guarantees notice and a hearing. Since the right to a sentencing hearing has not been implicated by *Foster*, we are concerned only with the issue of warning as to potential sentences. Looking to the federal circuit courts for guidance, we have discerned three arguments the courts have employed in finding that *Booker* does not violate the ex post facto clause because there has been no due process violation.

{¶15} Most circuit courts have held that defendants were on notice as to statutory maximums, regardless of whether the federal sentencing guidelines were mandatory. *United States v. Duncan* (11<sup>th</sup> Cir. 2005), 400 F.3d 1297. See also *United States v. Pennavaria* (3d Cir. 2006), 445 F.3d 720; *United States v. Davenport* (4<sup>th</sup> Cir. 2006), 445 F.3d 366; *United States v. Alston-Graves* (D.C. Cir. 2006), 435 F.3d 331; *United States v. Vaughn* (2<sup>nd</sup> Cir. 2005), 430 F.3d 518; *United States v. Dupas* (9<sup>th</sup> Cir. 2005), 419 F.3d 916; and *United States v. Jamison* (7<sup>th</sup> Cir. 2005), 416 F.3d 538. In *Duncan*, the court found the defendant committed a certain offense, knowing that the possible sentence was life imprisonment. *Duncan*, at 1307 (citing 21 U.S.C. 841(b)(1)(A)(ii)(I)). “The Guidelines at the time also informed Duncan that a judge would engage in fact-finding to determine his sentence and could impose up to a sentence of life imprisonment.” *Id.* (citing 18 U.S.C. 3551 et seq.). The court compared the appellant’s argument to similar arguments previously made to and rejected by the

United States Supreme Court. *Id.* at 1307-1308 (quoting *Dobbert v. Florida* (1977), 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (citing *Chicot Cty. Drainage Dist. v. Baxter State Bank* (1940), 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329)) (“the existence of the statute served as an ‘operative fact’ to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted \* \* \* This was sufficient compliance with the ex post facto provision of the United States Constitution”).

{¶16} Likewise, prior to *Foster*, people who decided to commit crimes were aware of what the potential sentences could be for the offenses committed. R.C. 2929.14(A). In this case, McGhee pled guilty to one count of engaging in corrupt activity, a first degree felony, for trafficking in drugs. The indictment alleged that McGhee engaged in this activity from January 2004 through March 2005. The first of McGhee’s individual offenses were committed after *Apprendi*, but before *Blakely*; however, the last of McGhee’s offenses were committed after *Booker*. The range of sentences available for a first degree felony remained unchanged during that time. McGhee clearly had notice that a first degree felony carried a potential penalty of three, four, five, six, seven, eight, nine, or ten years in prison. As in *Duncan*, McGhee knew the court would engage in judicial fact-finding in constructing a sentence within the statutory range. On this reasoning, we cannot find the protections of the due process clause implicated in this case.

{¶17} The Sixth Circuit Court of Appeals found that *Booker* did not implicate the ex post facto clause for several reasons. *United States v. Barton* (6<sup>th</sup> Cir. 2006), 455 F.3d 649. First, the court held the remedy announced in *Booker* was not unexpected. *Barton*, at 653-654. The court noted that the appellant's offenses were committed after *Blakely* was decided “[t]hus, it would not have been a leap of logic to expect the Supreme Court to apply *Blakely* to the Guidelines in some manner.” *Id.* The court noted, “defendant offers no argument as to why the remedy selected by the Supreme Court was unexpected.” *Id.* at 654. We find this rationale convincing. As stated above, the criminal activity began after *Apprendi*, but continued until after *Booker*, and McGhee has offered no explanation as to why the remedy applied in *Booker* and *Foster* was unexpected, especially in Ohio. The Ohio Supreme Court decided *Griffin* on December 1, 2004, clearly disallowing trial courts from bifurcating the issues of guilt and sentencing in criminal jury trials. See *Griffin*, *supra*. While McGhee wishes to be charged with an intimate knowledge of the criminal sentencing statutes and the substantive case law that is beneficial to a defendant, we also impute knowledge to McGhee of the remedial cases, such as *Griffin*, *Booker*, and *Foster*. Again, we fail to see how the protections of due process are implicated.

{¶18} Second, the Sixth Circuit wrote, “[f]or this court to find that notice is a significant concern in this situation, it would have to find that a defendant would

likely have changed his or her conduct because of a possible increase in jail time.”

*Barton*, at 656. The court went on to write:

**it is difficult to see why a person who was intent on committing a bank robbery and who was presumably prepared to spend a lengthy period of time in prison if he or she was caught would be dissuaded by the prospect of a somewhat longer prison term. Notice concerns are, therefore, limited in this case.**

Id. We find this reasoning persuasive as well, particularly on the facts of this case, where the defendant continued to commit criminal offenses for more than a year. With each offense, McGhee knew he would be subject to additional punishments if caught. McGhee contends he anticipated a prison sentence of up to nine years for engaging in a pattern of corrupt activity. However, as noted above, he was aware that the court could engage in judicial fact-finding and that the maximum sentence was ten years. Therefore, as the Sixth Circuit noted, notice concerns are limited in this case.

{¶19} Finally, several circuit courts have held that the United States Supreme Court would not order “lower courts to engage in unconstitutional conduct.” *Barton*, supra at 659 (citing *Pennavaria*, supra; *United States v. Wade* (8<sup>th</sup> Cir. 2006), 435 F.3d 829; *United States v. Austin* (5<sup>th</sup> Cir. 2005), 432 F.3d 598; *Vaughn*, supra; *United States v. Rines* (10<sup>th</sup> Cir. 2005), 419 F.3d 1104; *Jamison*, supra; *Duncan*, supra). This conclusion is similar to that reached by the Ohio Ninth District Court of Appeals in *Newman*. While the argument is appealing, we

find it unpersuasive. Confronting this argument, the Sixth Circuit Court of Appeals stated, “[d]ue process concerns of the type raised here were not on appeal in *Booker*. Thus, the Supreme Court may not have considered the due process implications of its holding. \* \* \* its decision cannot be read as necessarily foreclosing arguments such as those advanced by defendant here.” *Barton*, at 659.

{¶20} Because McGhee knew the potential statutory sentence for committing a first degree felony, because he had notice that Ohio’s sentencing statutes were subject to judicial scrutiny, and because McGhee was unlikely to amend his criminal behavior in light of a sentencing change, we cannot find the Ohio Supreme Court’s holding in *Foster* violates federal notions of due process as established in *Bowie* and *Rogers*.

#### ***State Constitutional Considerations***

{¶21} In construing Ohio’s constitution, we must adapt the test for retroactive legislation to apply to retroactive judicial decisions. In determining whether a law violates Section 28, Article II of the Ohio Constitution, we must first evaluate whether the court intended its holding to apply retroactively. See *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, at ¶ 6 (quoting *Bielat*, at 353). In *Foster*, the court applied its holding retroactively, but only so as to affect cases on direct appeal and those cases pending in the trial courts. *Foster*, at ¶ 104. The holding operates retroactively because defendants are sentenced according to

the law at the time the crime was committed, and the court did not limit its holding to those cases where the offenses were committed on or after February 27, 2006.

{¶22} Even though a law may apply retroactively, it is not necessarily unconstitutional. A substantive retroactive law will be held unconstitutional, while a remedial retroactive law is not. *Smith*, at ¶ 6 (quoting *Bielat*, at 353). A statute is substantive if it “impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.” *Id.* at ¶ 6 (quoting *Bielat*, at 354) and (citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106-107, 522 N.E.2d 489).

{¶23} For the following reasons, we do not believe the court’s holding in *Foster* creates a substantively retroactive law. As stated above, *Foster*’s holding applies retroactively in a limited number of cases. However, it does not affect a vested right or an accrued substantive right. A vested right “so completely and definitely belongs to a person that it cannot be impaired or taken away without that person’s consent.”” *Smith*, at ¶ 20 (Resnick, J., dissenting) (quoting *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112, at ¶ 9 (quoting *Black’s Law Dictionary* (7<sup>th</sup> Ed. 1999) 1324)). A vested right is “more than a mere expectation or interest based upon an anticipated continuance of existing law.” *Id.* at ¶ 20 (quoting *In re Emery* (1978), 59 Ohio App.2d 7, 11, 391 N.E.2d 746 (citing *Moore v. Bur. of Unemp. Comp.* (1943), 73 Ohio App. 362, 56

N.E.2d 520)). “A right, not absolute but dependent for its existence upon the action or inaction of another, is not basic or vested.” Id. (quoting *Emery*, at 11 (citing *Hatch v. Tipton* (1936), 131 Ohio St. 364, 2 N.E.2d 875)).

{¶24} Under S.B. 2, Ohio’s sentencing statutes created a “presumption” that a defendant would be sentenced to the lowest prison term of those available for the degree of offense. The statutes created a “presumption” that a defendant would be sentenced to concurrent sentences if more than one offense was committed, and the statutes created a “presumption” that a defendant would not receive the maximum penalty available for any offense. *Foster*, at ¶ 49 (“Ohio has a comprehensive and complicated felony sentencing plan, both determinate and indeterminate in nature and containing aspects of presumptive sentencing”). By its very definition a presumptive sentence is not guaranteed. A “presumptive sentence” is “[a]n average sentence for a particular crime \* \* \* that can be raised or lowered based on the presence of mitigating or aggravating circumstances.” Black’s Law Dictionary, (7<sup>th</sup> Ed. 1999) 1368. Most importantly, the defendant’s sentence is dependent on the action of the judge. Even in cases where the State and defendant have negotiated a plea and the State agrees to a recommended sentence, we have not found the court bound by such a recommendation. *State v. Smith*, 3<sup>rd</sup> Dist. No. 14-2000-18, 2000-Ohio-1784 (citing *State v. Miller* (1997), 122 Ohio App.3d 111, 701 N.E.2d 390; *State v. Tutt* (1988), 44 Ohio App.3d 138,

541 N.E.2d 1090) (“the decision as to the sentencing of a defendant is within the sound discretion of the trial court and the trial court is not bound by any plea agreement. \* \* \* An appellate court will not reverse a trial court’s exercise of discretion in the sentence imposed is within the statutory limit and the trial court considered the statutory criteria.”). These cases illustrate that a presumed sentence *can* be “taken away” without the defendant’s consent. Therefore, we cannot find a vested right has been affected by *Foster*.

{¶25} Nor can we find an accrued substantial right has been affected. A “substantial right” is a “right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1). We cannot find that *Foster* destroyed a substantial right because defendants are not entitled to enforce or protect specific sentences prior to sentencing. R.C. 2929.14(A) establishes a range of determinative sentences available for each degree of felony offense. Even under S.B.2, defendants could not expect a specific sentence because judges could make findings to sentence anywhere within the range provided by R.C. 2929.14(A). This is true even when the State and a defendant agreed on a recommended sentence, which the trial court opted not to impose. See *State v. Smith*, 2000-Ohio-1784 (citations omitted). Furthermore, an audit of those sentences challenged under S.B.2’s “protections” will indicate the multitude of facts trial

courts could rely upon in sentencing under R.C. 2929.14(B); (C); and (E)(4), so that defendants could not predict which facts a court might use in making the statutory findings. A substantial right has not been affected, and therefore, we cannot find that the retroactive application of *Foster* is substantive.

{¶26} For the reasons stated above, we cannot find *Foster* in violation of Section 28, Article II of the Ohio Constitution or Article I, Section 10 of the United States Constitution. Therefore, the sole assignment of error is overruled.

{¶27} The judgment of the Shelby County Common Pleas Court is affirmed.

*Judgment affirmed.*

**SHAW and CUPP, JJ., concur.**

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