

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

RONALD D. PAYNE,

Defendant-Appellant

Case Nos. 06-1245
06-1383

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 05AP-517

MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-462-3555
Fax: 614-462-6103
E-mail: sltaylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Assistant Prosecuting Attorney

COUNSEL FOR PLAINTIFF-APPELLEE

YEURA R. VENTERS 0014879
Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
Phone: 614-719-8867
Fax: 614-461-6470

and

PAUL SKENDELAS 0014896 (Counsel of Record)
Assistant Public Defender

COUNSEL FOR DEFENDANT-APPELLANT

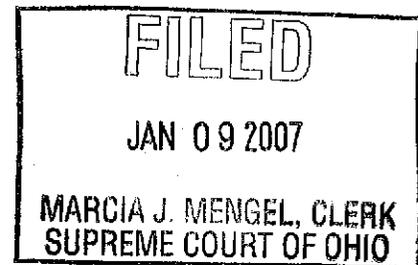


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STATEMENT OF FACTS

The grand jury returned an indictment on August 11, 2003, charging defendant Ronald Payne with six first-degree felony counts consisting of aggravated burglary, kidnapping, and four counts of rape. (Trial Rec. 1) The indictment also charged a second-degree felony for felonious assault. (*Id.*) The victim named in each count was Alonzetta Clark, and the dates of offense for most of the offenses were July 30 to 31, 2003. (*Id.*) The aggravated burglary and kidnapping counts each included a three-year firearm specification. (*Id.*)

Before the case reached trial, the United States Supreme Court on June 24, 2004, announced its decision in *Blakely v. Washington* (2004), 542 U.S. 296. Also before trial, the Court on January 12, 2005, announced its decision in *United States v. Booker* (2005), 543 U.S. 220.

Ten months after *Blakely* and three months after *Booker*, a trial commenced on April 25, 2005. (Trial and Plea Tr. 4) After Alonzetta Clark, Dominique Payne, and Latasha Roddy had testified, defendant voiced the desire to bring the case to a close by pleading to something. (*Id.* 139) Plea negotiations ensued, with defendant eventually entering an *Alford* guilty plea on April 27, 2005, to the indictment except for the firearm specifications. (*Id.* 143-44, 154-55, 157; Trial Rec. 327) After an extensive colloquy, (Trial and Plea Tr. 144-158), and after a further recitation of facts by the prosecutor, (*Id.* 159-64), the trial court found defendant guilty on all counts. (*Id.* 164)

The facts were harrowing. Defendant was Alonzetta Clark's ex-boyfriend and was the father of her son Dominique Payne. (Trial and Plea Tr. 38-39) Clark was

asleep in her home around 3:20 a.m. on July 30, 2003, when a masked intruder she later identified as defendant awakened her and threatened to kill another occupant in the home if she screamed. (*Id.* 45, 46, 53-55) Clark realized that defendant was carrying a stun gun when he stunned her with it. (*Id.* 45)

Defendant put handcuffs on Clark and put tape around her mouth, eyes, and legs and led her out of the house in her barefeet. (*Id.* 46, 48) Defendant led her to his SUV, and, after a drive of about twenty minutes, the car stopped, and defendant led her out of the car and carried her into his home and eventually placed her on a mattress. (*Id.* 48) Defendant cut the tape off her legs and raped her vaginally. (*Id.* 48, 49)

Defendant left after stunning her with the stun gun again. (*Id.* 50) He stunned her several times with the stun gun. (*Id.* 50)

Defendant returned after being gone for about fifteen minutes. (*Id.* 51) He cut a hole in the tape covering her mouth and tried to force her to perform fellatio. (*Id.* 49)

Defendant left again for a longer period of time. (*Id.* 52) Clark lost track of time. (*Id.* 52-53) When defendant returned, he raped Clark anally. (*Id.* 53)

Defendant left again, (*Id.* 53), and Clark used the time to scoot around the room to get a feel for the lay of the room. (*Id.* 53-54)

When defendant returned, he was angry. (*Id.* 56) He placed plastic over the mattress, placed Clark on the mattress, and raped her vaginally again. (*Id.* 56) After that rape, he began washing her down with something that smelled like raspberries, and then he used a spray bottle to spray a concoction of vinegar and water on her. (*Id.* 56)

Defendant left again. (*Id.* 56) When he returned, he removed her handcuffs but

replaced them with much more tape. (*Id.* 56) He then wrapped her in a blanket and taped the blanket up. (*Id.* 59) Defendant then put her in the trunk of a car and then eventually threw her out of the car. (*Id.* 60, 61, 97) Clark was discovered by someone who called 911. (*Id.* 61) She told police that the attacker was defendant. (*Id.* 64)

In total, Clark was raped four times vaginally, twice orally, and anally once. (*Id.* 58) She suffered several injuries from which she did not recover for a number of months, including nerve damage from the tightly placed handcuffs and scars from skin wounds caused by the taping. (*Id.* 85-86)

The prosecutor's opening statement and plea recitation confirmed that defendant's guilt would have been proven by overwhelming evidence. In a search of defendant's red SUV, police found Alonzetta's purse and other belongings. (*Id.* 34, 161) A search of the attic of defendant's home revealed features consistent with Alonzetta's account. (*Id.* 33, 162) Moreover, DNA evidence confirmed that defendant's skin cells were present on the inside of the ski mask found in Alonzetta's bedroom, that defendant's semen was present in used condoms found in a trash can in defendant's home, and that Alonzetta's skin cells were found on the outside of those condoms. (*Id.* 35, 163)

After accepting the plea and determining that defendant was not a sexual predator, the court turned to the issue of sentencing. The court noted that factors indicating recidivism were present and that recidivism is more likely. (*Id.* 180) The court found that the "more serious" factors outweighed any "less serious" factors. (*Id.* 180) The court noted defendant's previous conviction for aggravated assault and then

stated, as follows:

[T]he Court does find that it would demean the seriousness of the offenses involved here, would not adequately protect the public to impose simply minimum sentences for this conduct.

The Court also concludes that the Court could make the determination, actually does make the determination that this is the worst form of kidnapping and rape over a period of time, binding a person, keeping them isolated in a terrorist – not terrorist, but in terror of what's going to happen. We heard the victim testify that she fully believed that she was about to be killed. She knew a gun was involved. She had been brutally assaulted a number of times and kept over an extended period of time. And this is in fact the worst form of the offense of both aggravated burglary, removing somebody from the house under the circumstances in this case, and of kidnapping, holding a person against their will under these circumstances for a substantial period of time, and the brutal rapes and the felonious assault with the stun gun. The victim was scarred. The victim testified that it took months for nerve damage to be alleviated to the point where she could even hold a job and grasp things in her hands. She showed everyone in the courtroom the scars where she was handcuffed very tightly for the entire duration, duct taped, and suffered serious permanent injury in the Court's opinion. Now, whether I give a maximum sentence or not, I make those findings. I don't necessarily have to do so.

* * *

The Court considers that consecutive terms are necessary to protect and punish Mr. Payne, are not disproportionate by any means to the conduct, and the Court finds that the harm in this case was in fact, and I'm not just lip-reading – giving lip service to the statutory comments here, but the Court specifically finds that the harm was so great or unusual that a single term would not adequately reflect the seriousness of the conduct of Mr. Payne, and that overall, Mr. Payne's history shows that criminal – that consecutive terms are needed to protect the public.

(*Id.* 181-82, 183-84) Accordingly, the court imposed consecutive sentences of two years on the felonious assault, eight years on the kidnapping, and five years on each of the five remaining counts, for a total of thirty-five years. (*Id.* 183-84) Judgment was entered on April 28, 2005. (Trial Rec. 328-35)

On appeal, defendant raised a single assignment of error claiming that the non-minimum and consecutive sentences violated *Blakely*. (Appeal Rec. 29) The State opposed the appeal by contending that the defense had failed to raise a *Blakely* objection in the trial court, that the defense could not show plain error, that the same sentence would have been imposed without violating *Blakely*, and that Ohio's sentence-finding requirements did not violate *Blakely*. (Appeal Rec. 31)

After the parties jointly waived oral argument for January 19, 2006, (Appeal Rec. 35), this Court on February 27, 2006, issued its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

The Tenth District initially disposed of the case by judgment entry on March 31, 2006. (Appeal Rec. 37) The Tenth District found merit in defendant's *Blakely* argument, sustained defendant's assignment of error based on *Foster*, and remanded the case to the trial court for resentencing under *Foster*. However, by decision rendered on May 23, 2006, the Tenth District granted the State's application for reconsideration, found merit in the State's waiver analysis, and concluded that no *Foster* resentencing was required because defendant had waived the issue. (Appeal Rec. 49) The Tenth District therefore affirmed the judgment of conviction. (*Id.*)

By memorandum decision rendered on July 13, 2006, the Tenth District denied

defendant's application for reconsideration but granted defendant's motion to certify a conflict. (Appeal Rec. 64)

On October 4, 2006, this Court allowed defendant's discretionary appeal (Case No. 06-1245) and his certified-conflict appeal (Case No. 06-1383) and consolidated the two cases for briefing. *10/04/2006 Case Announcements, 2006-Ohio-5083.*

ARGUMENT

Proposition of Law: Reviewing courts apply ordinary prudential doctrines to appeals raising *Blakely* claims, including determining whether the issue was raised below, whether the issue fails the standards for plain error, and whether any error was harmless. (*United States v. Booker* (2005), 543 U.S. 220, 268, and *Washington v. Recuenco* (2006), 126 S.Ct. 2546, followed)

Certified Question for Review: Whether the lack of objection in the trial court waives or forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the *Blakely* decision was announced.

In *Apprendi v. New Jersey* (2000), 530 U.S. 466, the United States Supreme Court 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.” *Id.* at 490. The Court applied the *Apprendi* principle to state sentencing guidelines in *Blakely* and to federal sentencing guidelines in *Booker*.

While this case was pending in the Tenth District, this Court issued its decision in *Foster*, which held that *Apprendi* and *Blakely* required the invalidation of the Ohio sentence-finding requirements that applied to non-minimum, maximum, and

consecutive sentences, as well as those sentence-finding requirements that applied to the imposition of an additional 1-10 years on repeat violent offenders and major drug offenders. *Foster*, at paragraphs one, three, and five of the syllabus.

As its remedy for unconstitutionality, the *Foster* Court severed the unconstitutional sentence-finding requirements from the statutory scheme. *Foster*, at paragraphs two, four, and six of the syllabus. In light of such severance, the trial courts have full discretion to impose non-minimum, maximum, and consecutive sentences without making statutory findings. *Id.* at paragraph seven of the syllabus.

The main question here is whether waiver applies to defendants sentenced after *Blakely* when those defendants failed to object in the trial court.¹ A related question is whether a defendant's claim of *Blakely-Foster* error can be rejected as harmless error.

For the following reasons, the answer to the certified question is that a post-*Blakely* failure to object *does* waive or forfeit the issue for purposes of appeal. Moreover, *Blakely-Foster* error does not amount to plain error, and, even if not waived, a defendant's claim of *Blakely-Foster* error can be rejected on harmless-error grounds.

A. Lack of Contemporaneous Objection Generally Results in "Waiver"

As recognized in *State v. Murphy* (2001), 91 Ohio St.3d 516, 532, "The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review. The rule is of long standing, and it goes to the heart of an adversary system of justice." As stated in paragraph one of the syllabus in

¹ Unless the context clearly indicates otherwise, the State uses the word "waiver" in this brief to refer to the forfeiture of an issue through lack of timely objection. See Part K, *infra*.

State v. Williams (1977), 51 Ohio St.2d 112, death penalty vacated (1978), 438 U.S. 911:

An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, approved and followed.)

The principle requiring timely objection in the trial court extends to sentencing issues. *State v. Comen* (1990), 50 Ohio St.3d 206, 211 (merger issue: "failure to raise this issue in the trial court constitutes a waiver of the error claimed.").

It also extends to constitutional questions. As held in *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus:

Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal.

"[T]he question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court." *Id.* at 122.

"Constitutional rights may be lost as finally as any others by a failure to assert them at the proper time." *State v. Childs* (1968), 14 Ohio St.2d 56, 62. "The legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to discourage defendants from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones." *Awan*, 22 Ohio St.3d at 123. The longstanding waiver rule is "strict." *State v. Long* (1978), 53 Ohio St.2d 91, 96.

B. Plain-Error Review is Strict

Although an issue is waived through lack of objection, the Criminal Rules provide that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). But plain error will be recognized only when, “but for the error, the outcome of the trial clearly would have been otherwise.” *Long, supra*, paragraph two of the syllabus. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.* at paragraph three of the syllabus. “The power afforded to notice plain error, whether on a court’s own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then.” *Id.* at 94.

This Court extensively addressed the plain-error standard in *State v. Barnes* (2002), 94 Ohio St.3d 21, in which the trial court without objection gave an instruction on felonious assault as a lesser-included offense of attempted murder. After the defendant was convicted of felonious assault, the defendant contended on appeal that felonious assault was not a true lesser-included offense. This Court concluded that the defendant had “forfeited all but plain error” and that the plain-error standard could not be satisfied. This Court stated, as follows:

Under Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” By its very terms, the rule places three limitations on a reviewing court’s decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial

proceedings. Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court’s error must have affected the outcome of the trial.

Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court “may” notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”

As we noted above, the trial court incorrectly instructed the jury that felonious assault with a deadly weapon was a lesser included offense of attempted murder. Barnes therefore satisfied the “first condition to be met in noticing plain error,” *i.e.*, the trial court having committed a legal error in instructing the jury on felonious assault as a lesser included offense of attempted murder. This error, however, was not “plain” at the time that the trial court committed it. Before today, this court had not decided the question of whether felonious assault with a deadly weapon is a lesser included offense of attempted murder. The Ohio appellate courts were divided on this issue as well. The lack of a definitive pronouncement from this court and the disagreement among the lower courts preclude us from finding plain error.

Despite the lack of an obvious error by the trial court in giving the instruction, the court of appeals corrected the defect by reversing Barnes’s conviction for felonious assault. In doing so, the court of appeals emphasized the third limitation on plain-error review, noting that it recognized plain error when a defect in the trial proceedings affects a defendant’s substantial rights. But if a forfeited error is not plain, a reviewing court need not examine whether the defect affects a defendant’s substantial rights; the lack of a “plain” error within the meaning of Crim.R. 52(B) ends the inquiry and prevents recognition of the defect. By failing to conduct the proper plain-error analysis required by Crim.R. 52(B), the court of appeals erred as a matter of law in reversing Barnes’s

conviction for felonious assault.

Barnes, 94 Ohio St.3d at 27-28 (citations omitted). This Court has refused to liberalize the plain-error standard. *State v. Mills* (1992), 62 Ohio St.3d 357, 374.

C. Plain-Error Standard not Satisfied

In light of the longstanding contemporaneous-objection requirement, the Tenth District was on solid ground in concluding that defendant had waived the *Blakely* issue. *Blakely* had been announced ten months before defendant pleaded guilty and was sentenced. *Booker* had been announced three months before the plea and sentencing. The objection was available, and the defense failed to make the objection.

Nor can defendant show outcome-determinative “plain error.” *Foster* does not compel any lower or different sentence for any defendant. Rather, *Foster* severed the non-minimum, maximum, and consecutive sentence-finding requirements and left in place a sentencing scheme allowing trial courts even more latitude and discretion to impose the same or longer sentences if those courts desire. See *Foster*, at ¶ 105 (“nothing prevents the state from seeking greater penalties”).

Foster was a hollow victory for defendants. To be sure, *Foster* sustained the *Blakely* objections to the non-minimum, maximum, and consecutive sentence-finding requirements. But the remedy was to sever those sentence-finding requirements and to leave in place a sentencing scheme with even greater discretion for trial courts. If defendant had raised the *Blakely* objection, and if the trial court had sustained that objection and applied the severance remedy recognized in *Foster*, defendant would have been sentenced under a less-favorable sentencing scheme.

Defendant was actually better off being sentenced under the sentence-finding requirements. “[A] trial court’s application of the statutory sentencing scheme in existence before *Foster* generally benefitted defendants.” *State v. Bean*, 10th Dist. No. 06AP-208, 2006-Ohio-6745, ¶ 24. “[I]t was more difficult for a trial court to impose consecutive sentences before *Foster* than it is now. Consequently, the error committed by the trial court when it sentenced appellant to consecutive sentences pursuant to R.C. 2929.14(E)(4) benefited appellant and, therefore, was harmless beyond a reasonable doubt.” *State v. Peeks*, 10th Dist. No. 05AP-1370, 2006-Ohio-6256, ¶ 15. By not raising the *Blakely* issue, and by thereby avoiding the severance remedy, defendant received the benefit of the trial court thinking it must jump over sentence-finding hurdles to which he was not entitled.

In addition, the *Blakely-Foster* error “was not ‘plain’ at the time that the trial court committed it.” *Barnes*, 94 Ohio St.3d at 28. The law was unsettled, and it was not plain at the time of defendant’s sentencing that *Blakely* would invalidate the non-minimum, maximum, and consecutive sentence-finding requirements.

Finally, plain error should be recognized only “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” Defendant does not show how the enforcement of the waiver would amount to a manifest miscarriage of justice. Defendant has no entitlement to a lesser sentence, and, per *Foster*, the trial court would have had even greater discretion to impose the same or longer sentence if it had anticipated the *Foster* severance of the sentence-finding requirements. Moreover, defendant properly received a severe 35-year sentence. Awarding a

resentencing hearing to defendant would not correct a “manifest miscarriage of justice,” but it would amount to a needless waste of resources and time on the part of the trial court and prosecution, and, most of all, would likely amount to a needless toll on the time and emotions of the victim.

D. Defendant’s Plain-Error Arguments Lack Merit

While defendant complains that the Tenth District did not engage in any plain-error analysis, defendant does not show how the Tenth District would have been able to find plain error. Defendant asserts that he can satisfy the outcome-determination requirement by showing that the waiver is preventing a *Foster* remand for resentencing. But plain-error analysis focuses on whether the error had an effect on the outcome of the *trial-court* proceedings, not on whether it is having an effect on the outcome of the appellate-court proceedings. *Barnes*, 94 Ohio St.3d at 27-28 (“must have affected the outcome of the trial”). If a different outcome in appellate-court proceedings were the test, then waiver would never have any real effect, since a defendant would always be able to claim that, if he waived a meritorious claim, the outcome would have been different on appeal than if he had not waived. As *Barnes* shows, the existence of error alone is not enough to show plain error. Defendant’s focus on appellate-court outcomes would negate the second and third prongs of the *Barnes* test.

Defendant also speculates that the lack of a resentencing hearing will deprive defendant of the ability to “present additional favorable details or demonstrate that he had benefited from the punishment he had already suffered.” See Defendant’s Brief, at 19. But the State could equally speculate that a resentencing would result in “additional

[un]favorable details” and that a resentencing would allow the State to “demonstrate that defendant ha[s] [not] benefited from the punishment he ha[s] already suffered.”

Speculation begets speculation and yields no basis for decision.

In any event, the issue is whether the outcome of the original trial-court proceedings clearly would have been different. Defendant cannot show clear outcome determination on the basis of purported “favorable details” that went unmentioned by the defense at the original sentencing hearing, nor can defendant show clear outcome determination on the basis of his post-judgment adjustment to prison life. Such outside-record and post-judgment matters are speculative and provide no basis for reversal. *State v. Ishmail* (1978), 54 Ohio St.2d 402. Defendant points to nothing in this appellate record supporting the view that a resentencing hearing would clearly result in a lesser sentence, and, given the *Foster* severance remedy, the *Foster* holding itself provides no basis for thinking that defendant would clearly receive a lesser sentence.

Defendant also errs in contending that he “was unlawfully sentenced to a term that was unavailable at the time of his sentencing hearing.” See Defendant’s Brief, at 19. Consecutive sentencing was available before *Foster* and after *Foster*. The pertinent statutory sentence ranges are satisfied.

The unlawfulness was not in the imposition of the 35-year aggregate sentence but rather in the trial court’s erroneous view that it must satisfy the sentence-finding requirements of R.C. 2929.14(B) & (E)(4) before imposing non-minimum and consecutive sentences. For cases not yet final, the rule is that a finding of unconstitutionality invalidates the statutory provision *ab initio*. *Middletown v.*

Ferguson (1986), 25 Ohio St.3d 71, 80 (“an unconstitutional law must be treated as having no effect whatsoever from the date of its enactment.”). An unconstitutional provision confers no right or protections. *Id.* at 80. “[O]nce a statute has been found unconstitutional, it no longer applies to cases pending thereunder.” *Roberts v. Treasurer* (2001), 147 Ohio App.3d 403, 410. Under this principle, the sentence-finding requirements were unconstitutional and severable from the beginning and never were the law, and therefore defendant cannot claim unlawfulness emanating therefrom.²

E. No Reversal Absent Plain Error

Defendant contends that, beyond plain-error analysis, appellate courts possess a residuum of discretion to grant appellate relief based on waived issues. Defendant relies on the syllabus of *In re M.D.* (1988), 38 Ohio St.3d 149:

The waiver doctrine in *State v. Awan* (1986), 22 Ohio St. 3d 120, 22 OBR 199, 489 N.E.2d 277, is discretionary. Even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it.

While the State agrees that appellate courts possess the discretion to reverse based on plain errors, see *Barnes*, the State disagrees with the view that there is discretion to recognize waived errors beyond plain errors.

This Court has limited *M.D.* in *State v. Campbell* (1994), 69 Ohio St.3d 38, in

² For cases that have already become final, strict standards would apply in determining whether a defendant would be able to rely on *Blakely* or *Foster* on collateral review. See *Schriro v. Summerlin* (2004), 542 U.S. 348; R.C. 2953.23(A). Based on non-retroactivity and *res judicata* doctrine, and also often based on the tardiness of post-conviction petitions, Ohio courts have rightly held that *Blakely* and *Foster* do not warrant relief on post-conviction review. See, e.g., *State v. Wilson*, 10th Dist. No. 05AP-939, 2006-Ohio-2750.

which this Court specifically rejected the view that *M.D.* authorizes the overturning of convictions based on waived errors that are not plain errors. As stated in *Campbell*:

Campbell cites *In re M.D.* (1988), 38 Ohio St.3d 149, 527 N.E.2d 286, syllabus, for the proposition that we may review waived issues even where the alleged error does not amount to plain error. But in *M.D.*, there was no waiver; the appellant had raised her due process claim at trial via motion to dismiss. 38 Ohio St.3d at 151, 527 N.E.2d at 287-288.

Although we sometimes discuss the merits of a waived proposition of law as an alternative basis for *rejecting* it, that is consistent with the plain error rule. Our cases make clear that we will not *overturn* a conviction for alleged error not raised below, unless it amounts to plain error.

Campbell, 69 Ohio St.3d at 41 n. 2 (emphasis *sic*; some citations omitted).

Other cases are in accord. *Barnes* recognized that “the lack of a ‘plain’ error within the meaning of Crim.R. 52(B) ends the inquiry and *prevents recognition of the defect.*” *Barnes*, 94 Ohio St.3d at 28 (emphasis added) This Court also stated the following in *Murphy*:

Even constitutional rights “may be lost as finally as any others by a failure to assert them at the proper time.” The waiver rule operates even in capital cases, for “capital defendants are not entitled to special treatment regarding evidentiary or procedural rules.”

The Rules of Criminal Procedure *make but one exception* to the contemporaneous-objection requirement: “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B).

Under this rule, we may take notice of waived errors *only if* they can be characterized as “plain errors.” As we have repeatedly emphasized, the plain error test is a strict one: “An alleged error ‘does not constitute a plain

error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.” We have warned that the plain error rule is not to be invoked lightly. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”

Murphy, 91 Ohio St.3d at 532 (emphasis added; citations omitted).

This Court has repeatedly stated that plain-error review is the exclusive means to reverse based upon a waived error. On January 3, 2007, the State performed a Lexis search of this Court’s case law for “waiv! w/2 ‘all but plain error’”, and the search revealed a total of 101 cases. This Court has used or quoted the phrase “waived all but plain error” in 11 cases even since *Foster* was announced. See, e.g., *State v. Johnson*, ___ Ohio St.3d ___, 2006-Ohio-6404, ¶ 31; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶¶ 52, 93, 127; *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, ¶ 13; *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶¶ 63, 73, 115, 117, 137, 176, 187. See, also, *J.J.*, at ¶ 15 (“These cases establish the duty of a complaining party seeking review to object in the trial court and timely preserve the error for appeal * * *.”).

In light of the “waived all but plain error” case law, and in light of *Campbell*, *Murphy*, and *Barnes*, a waived error will not qualify as grounds for reversal unless it amounts to “plain error” under the strict standards for plain-error review.

Nor can defendant even satisfy the *M.D.* language that would allow review “where the rights and interests involved may warrant it.” *Foster* does not create an entitlement to a lesser sentence, nor does it create the right to a jury trial on the sentence-finding requirements. Rather, *Foster* severed those requirements, thereby resulting in a

sentencing regime that is less favorable to defendant. The “rights and interests” do not warrant review when the error was harmless to the party appealing and when, at most, review would result in a needless resentencing that will tax the time and resources of courts, prosecutors, and, most importantly, victims and their families.

M.D. also states that application of the waiver rule is discretionary. True enough, since an appellate court is not compelled to reverse under the plain-error doctrine.

Barnes, supra. But since discretion is the standard, then defendant cannot justify reversal of the Tenth District’s decision, as “[t]he appellate court did not abuse its discretion in refusing to review appellant’s claim of unconstitutionality.” *Awan*, 22 Ohio St.3d at 123.

F. Issue of Post-*Blakely* Failures to Object Was Not Presented in *Foster*

Contrary to defendant’s argument, *Foster* did not settle the issue of whether the lack of objection in a post-*Blakely* sentencing hearing constitutes a waiver of the *Blakely* objection. While defendant contends that *Foster* makes no distinction between pre-*Blakely* and post-*Blakely* failures to object, the *Foster* opinion shows that this Court thought that timing was important. In rejecting the State’s waiver argument regarding the defendant Foster, this Court focused on the fact that Foster had been sentenced before *Blakely* had been decided. *Foster*, at ¶ 31. This Court made the same observation regarding the defendant Quinones. *Id.* at ¶ 31 n. 35. To accept defendant’s argument that timing is irrelevant would be to assume that *Foster* was making gratuitous observations when it made these points.

It is noteworthy that *Foster* cited *Smylie v. State* (Ind. 2005), 823 N.E.2d 679, which held that waiver/forfeiture rules due to lack of objection applied to the *Blakely*

issue generally but that, as to pre-*Blakely* trial court proceedings, the defendant was not expected to have anticipated *Blakely*. *Id.* at 687-89. Given the *Foster* reliance on *Smylie*, the *Foster* Court's emphasis on the timing of Foster's sentencing hearing likely was not just a gratuitous aside.

The *Foster* ruling as to pre-*Blakely* failures to object can fit within the *Awan* waiver rule. This Court viewed *Blakely* as breaking new ground, see *Foster*, at ¶ 31 ("no one could have predicted"), and the *Awan* waiver rule makes allowance for failures to object when the objection was not "apparent at the time of trial." No similar allowance is justified for post-*Blakely* failures to object, since the tools to make an objection were certainly available after *Blakely*, and, in this case, also after *Booker*.

Defendant seems to contend that he could not be expected to make a *Blakely* objection because *Foster* had not yet been decided and because the Tenth District had rejected *Blakely* claims as to non-minimum, maximum, and consecutive sentences. But if counsel was aware of the Tenth District case law, counsel also would have been aware that the issue was not yet settled, since this Court had already ordered briefing in the *Foster* and *Quinones* cases. 01/28/2005 Case Announcements, 2005-Ohio-286.

Defendant's argument also fails to take into account the *Barnes* case, in which this Court applied the waiver rule even though this Court had not yet ruled on the issue of whether felonious assault was a lesser included offense of attempted murder. This Court concluded that the error was not "plain" at the time the trial court committed it and therefore that plain-error review did not justify reversal. In light of *Barnes*, the defense did not need the *Foster* decision from this Court in order for appellate courts to

enforce the waiver.

The newness or novelty of a legal claim should be grounds for excusing a failure to object only if the legal claim was so novel that its legal basis was not reasonably available at the time the objection should have been made. See, e.g., *Bousley v. United States* (1998), 523 U.S. 614, 622; *Engle v. Isaac* (1982), 456 U.S. 107, 133 (“we cannot say that respondents lacked the tools to construct their constitutional claim.”). On the other hand, defendants should not be excused from the need to preserve their legal issues by objection merely because an intermediate appellate court has rejected that argument or merely because the issue appears to be futile given earlier intermediate appellate rulings. *Bousley*, 523 U.S. at 623; *Engle*, 456 U.S. at 130. “Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.” *Id.* at 130. “[F]utility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.” *Bousley*, 523 U.S. at 623, citing *Engle*, 456 U.S. at 130 n. 35 (internal quotation marks omitted).

Consistent with this analysis, and as *Booker* acknowledged, waiver can apply to a legal issue even though the highest court in the jurisdiction is recognizing the validity of the objection for the first time. This is shown by this Court’s decision in *Barnes*. It is also shown by *United States v. Cotton* (2002), 535 U.S. 625, in which the Court applied the plain-error test to an *Apprendi* claim being made upon appeal from a pre-*Apprendi* trial. See, also, *Johnson v. United States* (1997), 520 U.S. 461 (also applying plain-error test to a defense failure to raise issue in trial even though that issue was first

recognized by the United States Supreme Court after trial). Given that *Cotton* and *Booker* both recognize that waiver applies to *Apprendi-Blakely* objections, the Tenth District acted properly in applying waiver to defendant's post-*Blakely* failure to object.

Defendant does not establish any novelty that would warrant excusing his failure to object. Defendant was sentenced in late April 2005, which was well after *Apprendi*, *Blakely*, and *Booker* had been decided and well after this Court had ordered briefing in the *Foster* and *Quinones* cases on January 28, 2005. The defense had tools by which to fashion an argument that the Ohio sentencing scheme was unconstitutional, and such objection was reasonably available, even though, as discussed in Part L, *infra*, a reasonable trial counsel could decide not to raise the objection.

G. Remand Discussion in *Foster* Does Not Exclude Waiver Rule, and *Foster*'s Approving Citations to *Booker* Support Application of Waiver Rule

Defendant also errs in contending that the *Foster* Court's comments in paragraphs 103 to 105 of the opinion settle the waiver-rule issue as to post-*Blakely* failures to object. This Court stated that "When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing." *Foster*, at ¶ 103. The important phrase is "ordinary course," which leaves open the notion that, in some cases, a remand for resentencing is not required because the cases are not "ordinary," such as when there was no objection preserving the issue.

Defendant attempts to draw greater clarity out of paragraph 104 of *Foster*, which states, as follows:

{¶ 104} These cases and those pending on direct review must be remanded to trial courts for new sentencing hearings *not inconsistent with this opinion*. We do not order resentencing lightly. Although new sentencing

hearings will impose significant time and resource demands on the trial courts within the counties, causing disruption while cases are pending on appeal, *we must follow the dictates of the United States Supreme Court.* Ohio's felony sentencing code must protect Sixth Amendment principles *as they have been articulated.* (Emphasis added)

This paragraph does not mandate a resentencing hearing in each case. The first sentence orders resentencing hearings "not inconsistent with this opinion." Such language, again, raises the question of why the Court thought it so important in paragraph 31 and footnote 35 to focus on the timing of the hearings in *Foster* and *Quinones*.

The third and fourth sentences in paragraph 104 also show that the *Foster* Court was focused on *following* precedent from the United States Supreme Court. This Court emphasized in paragraph 104 that "we must follow the dictates of the United States Supreme Court," and, in paragraph 106, this Court stated that it was ordering resentencing hearings *as mandated* by the United States Supreme Court:

{¶ 106} As the Supreme Court mandated in *Booker*, we must apply this holding to all cases on direct review. *Booker*, 543 U.S. at 268, 125 S.Ct. 738, 160 L.Ed.2d 621, quoting *Griffith v. Kentucky*, 479 U.S. at 328, 107 S.Ct. 708, 93 L.Ed.2d 649. ("A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final").

As this language shows, this Court was seeking to follow United States Supreme Court precedent.

When the express language of the *Booker* decision is consulted, it becomes clear that the waiver rule fully applies on direct appeal when defendants are challenging their post-*Blakely* sentences. As the Ninth District recognized in *State v. Dudukovich*, 9th

Dist. No. 05CA008729, 2006-Ohio-1309:

{¶23} We * * * find guidance from the U.S. Supreme Court's decision in *United States v. Booker* (2005), 543 U.S. 220, 160 L.Ed.2d 621. On a broad level, the *Foster* decision issued in Ohio followed the "blueprint" laid out in *Booker*. *Foster* at ¶90. Each Court determined the applicability of *Blakely*, ruled sentencing guidelines unconstitutional, and applied a severance remedy. In addition, both Courts explicitly found that their decisions would apply to cases on direct appeal. *Foster* at ¶106; *Booker*, 543 U.S. at 268. *Booker*, however, provided guidance to appellate courts faced with applying its decision.

"As these dispositions indicate, we must apply today's holdings -- both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act -- to all cases on direct review. That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, *determining, for example, whether the issue was raised below* and whether it fails the 'plain-error' test." (Emphasis added; internal citations omitted.) *Id.*

As the *Foster* Court chose to follow the path laid out by *Booker*, we are persuaded by the guidance the U.S. Supreme Court provided appellate courts. Accordingly, we proceed to apply our "ordinary prudential doctrines" to determine whether Defendant has preserved his constitutional challenge for review.

See, also, *Cotton, supra* (applying plain-error test to *Apprendi* claim).

As further stated by the Tenth District in *State v. Draughon*, 10th Dist. No.

05AP-860, 2006-Ohio-2445, ¶¶ 7-8:

We acknowledge the broad language the Supreme Court of Ohio used in *Foster* when it ordered resentencing for all cases pending on direct review.

However, we conclude that a defendant who did not assert a *Blakely* challenge in the trial court waives that challenge and is not entitled to a resentencing hearing based on *Foster*. We first note that, normally, constitutional arguments not made in the trial court are waived. Appellant did not present a *Blakely* argument in the trial court. We also must consider the language used in *Booker*, the case that *Foster* relied on in arriving at its choice of remedy. In *Booker*, the United States Supreme Court applied *Blakely* to the Federal Sentencing Guidelines. The *Booker* Court applied its holding to all cases on direct review. The *Booker* Court stated, however, that despite the application of its holding to all those cases, not every appeal would lead to a new sentencing hearing. The Court expected reviewing courts to apply “ordinary prudential doctrines,” such as waiver or plain error, to determine whether to remand a case for a new sentencing.

Thus, in accordance with the well-settled doctrine of waiver of constitutional challenges, and the language in *Booker*, we hold that a *Blakely* challenge is waived by a defendant sentenced after *Blakely* if it was not raised in the trial court. Unlike each of the defendants in *Foster*, appellant was sentenced after the Supreme Court’s decision in *Blakely*. Thus, he could have objected to his sentencing based on *Blakely* and the constitutionality of Ohio’s sentencing scheme. Appellant, however, did not raise such a constitutional challenge to Ohio’s sentencing statutes in the trial court. While he did object to the trial court’s imposition of a non-minimum sentence, he did not object based on *Blakely*. Therefore, appellant waived his *Blakely* argument on appeal. * * * (Citations omitted)

Consider also the following passage from the Indiana Supreme Court’s decision in

Smylie:

Of course, as the State points out, the application of *Blakely* to any case pending on direct review remains subject to the standard rules governing appellate procedure such as waiver and forfeiture.

* * *

On this principle of appellate law, Indiana jurisprudence is rather ordinary. In *United States v. Cotton*, 535 U.S. 625 (2002), for example, the Supreme Court applied the plain error test to a case pending on appeal when the new rule in *Apprendi* was announced. In so doing, the Court noted that Cotton's claim was "forfeited" because of his failure to object to alleged error at trial. *Id.* at 629, 631. Similarly, in *Johnson v. United States*, 520 U.S. 461 (1997), the Court considered the retroactive application of the rule announced in *United States v. Gaudin*, 515 U.S. 506 (1995), to a case pending on appeal at the time of that decision. In considering Johnson's claim, the Court noted that "because petitioner is still on direct review, *Griffith* requires that we apply *Gaudin* retroactively." *Johnson*, 520 U.S. at 467. The Court, however, still applied plain error review because of Johnson's failure to object at trial and preserve the error for appeal. *Id.* Unsurprisingly, a number of federal circuit cases reflect the same practice.

Smylie, 823 N.E.2d at 688-89 (footnote and parallel citations omitted).

Although the *Foster* Court recognized that its ruling would apply to all cases pending on appeal, see *Foster*, at ¶ 106, this conclusion that there would be retroactivity for all cases in the appellate pipeline did not settle the waiver issue. The principle requiring pipeline retroactivity "does not affect the long-standing rule that, absent plain error, legal issues will not be addressed for the first time on appeal." *United States v. Gonzalez* (C.A. 5, 2006), 436 F.3d 560, 576. *Booker* itself recognized that there would be pipeline retroactivity, and, even so, recognized that "ordinary prudential doctrines" would apply, including whether the issue was waived and whether there was plain error. *Booker* thus shows that pipeline retroactivity is a different question from waiver. See, also, *Smylie*, 823 N.E.2d at 688-89, citing *Johnson*, 520 U.S. at 467.

Unlike in *Foster*, a *Blakely* objection could have been raised at defendant's post-

Blakely sentencing hearing in April 2005. *Foster* does not compel appellate courts to ignore such failures to object. Indeed, to have addressed that issue in *Foster* and its companion cases would have been to render an advisory opinion on this question of law, since none of the four cases then before the Court involved a post-*Blakely* sentencing hearing. This Court has “consistently held that we will not issue advisory opinions, * * *.” *State ex rel. Barletta v. Fersch*, 99 Ohio St.3d 295, 2003-Ohio-3629, ¶ 22.

H. *Blakely-Foster* Error Does Not Result in Jurisdictionally-Void Sentence

Although defendant at some points concedes that *Blakely-Foster* error is not jurisdictional, see Defendant’s Brief, at 16, defendant is focusing on *Foster*’s use of the word “void” and in effect is making the argument that *Blakely-Foster* error results in a jurisdictionally-void sentence that is not subject to the waiver rule. For several reasons, the State disagrees with any such argument.

First, in the very sentence in which the word “void” appears, *Foster* also said that the “ordinary course” in such cases is to remand for resentencing. If *Blakely-Foster* error truly created a jurisdictionally-void sentence, reversal would not be the “ordinary course” but rather the “only course.”

Moreover, *Foster* was careful to say that its holding would apply to cases on direct appeal. See *Foster*, at ¶ 32 (“cases pending on direct appeal”); *id.* at ¶ 104 (“pending on direct review”); *id.* at ¶ 105 (“all cases on direct review”); *id.* (“on direct review or not yet final”). If *Foster* had meant to create a “jurisdictional” claim, it would not have focused so much on “direct review,” since jurisdictional defects can be raised at any time, including in a collateral attack on the conviction. As stated

previously, the *Blakely/Foster* issue is not applicable on collateral review. See footnote 2, *supra*.

But even if *Foster* treated *Blakely-Foster* error as “jurisdictional,” that treatment now would be inappropriate in light of *Washington v. Recuenco* (2006), 126 S.Ct. 2546, in which the United States Supreme Court held that *Blakely* error is subject to harmless-error analysis. *Recuenco* establishes for Sixth Amendment purposes that *Blakely* error is not “jurisdictional” in any sense. Accordingly, the *Blakely* errors found in *Foster* do not render the resulting sentences jurisdictionally void.

Even if state law applied here, it would not aid defendant’s position. Under state law, most sentencing errors are not jurisdictional. See *State ex rel. Massie v. Rogers* (1997), 77 Ohio St.3d 449, 450; *Majoros v. Collins* (1992), 64 Ohio St.3d 442, 443 (“[w]e have consistently held that sentencing errors are not jurisdictional * * *.”); *Johnson v. Sacks* (1962), 173 Ohio St. 452, 454 (“The imposition of an erroneous sentence does not deprive the trial court of jurisdiction.”).

A narrow class of sentencing errors is treated as jurisdictionally void, but those errors are limited to sentences that facially fall outside the permitted statutory range. Thus, giving only a fine when the statute on its face requires a two-year prison sentence amounts to a jurisdictionally-void sentence. *State v. Beasley* (1984), 14 Ohio St.3d 74. Imposing a jail sentence for a probation violation, when no statute authorizes such a sentence, is another kind of facially invalid sentence. *Colegrove v. Burns* (1964), 175 Ohio St. 437. These kinds of facially-invalid sentences are beyond the trial court’s statutory power to impose (or not impose). *Beasley, supra*.

Foster does not implicate the pertinent statutory ranges. Before and after *Foster*, Ohio trial courts have the basic power to impose sentences within the statutory ranges in R.C. 2929.14(A) and to run those sentences consecutively. As *Foster* holds, non-minimum, maximum, and consecutive sentencing all remain within the power of trial courts even after the *Foster* severance remedy. Necessarily, then, *Foster* does not implicate the basic statutory power of the trial courts to sentence offenders. See *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 2005-Ohio-2591, ¶ 6 (*Apprendi-Blakely* claim did not affect basic statutory jurisdiction).

This conclusion is supported by the Tenth District's analysis in *State v. Peeks*, 10th Dist. No. 05AP-1370, 2006-Ohio-6256:

{¶13} In this case, there is no question that the trial court had jurisdiction/authority to impose the sentence. The trial court did not disregard a statutory requirement or exceed its authority when it sentenced appellant. Rather, the trial court erred by sentencing appellant under a statute that was subsequently declared unconstitutional and severed from the statutory scheme by the *Foster* court. Sentencing errors such as this are not jurisdictional errors that would render a sentence void. See *Majoros, supra*, at 443 (allegation that trial court applied statute not in effect at time of sentencing would only raise non-jurisdictional sentencing error). Instead, the erroneous sentence in this case is merely voidable.

Since *Blakely-Foster* error is not jurisdictional, it is subject to the waiver rule.

Defendant does not recognize the ultimate import of his argument. If *Blakely-Foster* error renders non-minimum and consecutive sentences jurisdictionally void, then such sentences would be subject to motions to vacate filed *by the prosecution*, which would thereby allow the prosecution to press for even longer sentences. The State

arguably could also seek to vacate minimum and concurrent sentences when the State can show that the sentence-finding requirements deterred a higher sentence. Most defendants serving these sentences would not welcome this development.

Some might contend that the *Foster* holding is a “structural” issue that cannot be waived. However, characterizing an issue as “structural” does not avoid the waiver rule. Structural errors can be waived through lack of objection and are subject to plain-error standards of review. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 23, citing *Johnson*, 520 U.S. at 466.

In addition, *Recuenco* shows that *Blakely* error is not “structural.” The “structural” characterization would be particularly inappropriate because a finding of harmless error is easily reached. See Parts C & D, *supra*, and Part J, *infra*.

I. Remand Orders in Other Cases Do Not Constitute Precedent on This Issue

This Court’s *en masse* remand order of May 3, 2006, and its subsequent remand orders do not settle the issue of whether *Blakely-Foster* error is subject to waiver in post-*Blakely* sentencing hearings. The *en masse* order stated that the Court was entering its orders “based on our decision in *State v. Foster* * * *.” *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, ¶ 1. Subsequent remand orders have similarly been “based on our decision in *State v. Foster* * * *.” See *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 411, 2006-Ohio-2394, ¶ 1; *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 509, 2006-Ohio-2721, ¶ 1; *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 518, 2006-Ohio-3254, ¶ 1; *In re Ohio Criminal Sentencing Statutes Cases*, 110

Ohio St.3d 70, 2006-Ohio-3663, ¶ 1; *In re Ohio Criminal Sentencing Statutes Cases*, 110 Ohio St.3d 156, 2006-Ohio-4086, ¶ 1; *In re Ohio Criminal Sentencing Statutes Cases*, 110 Ohio St.3d 264, 2006-Ohio-4475, ¶ 1. As can be seen, the *en masse* order itself and the subsequent remand orders all depend on the question of what the *Foster* opinion had decided or not decided, and *Foster* did not give an advisory opinion on whether waiver applies to post-*Blakely* failures to object.

Defendant attempts to draw precedential weight out of the fact that the Court remanded a large number of cases without any apparent consideration of whether the issue was waived or whether a plain-error standard should be applied. But such silence more likely supports the view that the Court was not addressing the waiver issue at all.

An appellate court does not necessarily address every possible issue when it rules on a case. Issues often lurk in the record and are not decided by the appellate court. *Webster v. Fall* (1925), 266 U.S. 507, 511. Sometimes, an appellate court assumes issues without deciding them or simply does not address them. See, e.g., *In re Nowak*, 104 Ohio St.3d 466, 2004 Ohio 6777, ¶¶ 25-27 (validity of statute was assumed in earlier decision).

In such circumstances, the court's decision does not become precedent on the issue that was lurking, assumed, or unaddressed. "A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication." *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202, paragraph four of the syllabus; *State v. Waller* (1976), 47 Ohio St.2d 52, 53 n. 1 (issue of

constitutionality not “presented as an issue for review” in earlier cases; earlier cases therefore do not settle the issue).

The United States Supreme Court has recognized the same point. A decision does not constitute firm precedent on a particular issue unless it “squarely addresses” that issue. See *Brecht v. Abrahamson* (1993), 507 U.S. 619, 630-31. “[U]nexplained silences of our decisions lack precedential weight.” *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 232 n.6. “The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, * * * and such assumptions -- even on jurisdictional issues -- are not binding in future cases that directly raise the questions.” *United States v. Verdugo-Urquidez* (1990), 494 U.S. 259, 272. When the Court assumes an issue without deciding it, the assumption is “not dispositive.” *Id.*

Of some interest here is the decision in *United States v. L.A. Trucker Truck Lines* (1952), 344 U.S. 33, in which a party to an administrative proceeding had contended for the first time in federal district court that the administrative hearing examiner had been improperly appointed. The United States Supreme Court recognized the applicability of a longstanding contemporaneous-objection requirement as applicable to administrative proceedings. In response to the contention that an objection was unnecessary because a prior decision implied that the issue was jurisdictional, the Supreme Court rejected that view, concluding that the question of jurisdiction had not been raised or decided in the prior case, and therefore that the prior case was not “a binding precedent on this point.” *Id.* at 38.

Much like in *L.A. Trucker*, the issue of post-*Blakely* waiver went unaddressed and therefore undecided in this Court's prior remand orders. Those silent orders do not constitute precedent on that issue.

The Seventh District's decision in *State v. Buchanan*, 7th Dist. No. 05MA60, 2006-Ohio-5653, demonstrates how unsatisfying the search for "silent" precedent can be. The Seventh District conceded that "*Foster* does not speak to the situation where a defendant was sentenced after *Blakely* was decided and failed to raise issues concerning *Blakely* and Ohio's felony sentencing scheme." *Id.* at ¶ 33. The Seventh District also conceded that "[t]he doctrine of waiver is fundamental and well established." *Id.* at ¶ 43. Even so, the Seventh District concluded that "*Foster* and its progeny created an exception to the doctrine of waiver," and the Seventh District reached this conclusion based on "[m]any of the cases the Ohio Supreme Court has remanded pursuant to *Foster* involved post-*Blakely* sentencing dates." *Id.* at ¶ 43. The Seventh District noted that "the Ohio Supreme Court gave no indication whether *Blakely* issues were raised to the trial court. Instead, it has unlimitedly remanded the cases." *Id.* at ¶ 43.

The Seventh District's analysis is insufficient to show that the remand orders constitute precedent on this issue. The Seventh District conceded that *Foster* did not decide the issue, and the remand orders were "based on" *Foster*. Since *Foster* did not decide the issue, neither did the remand orders.

More importantly, the Seventh District's analysis of sentencing dates in a handful of cases does not show that this Court's remand orders decided the waiver issue. If the State failed to argue waiver in the court of appeals in those cases, then the

State could be deemed to have waived the waiver issue itself. If the State argued waiver in the court of appeals, the court of appeals may not have addressed the issue, and the State may have abandoned the argument when the defendant appealed to this Court. Most importantly, even if the State preserved its waiver argument in the court of appeals and raised it again in this Court when the defendant appealed here, the fact remains that this Court at no point addressed or decided the post-*Blakely* waiver issue one way or the other. Silence indicates the absence of a ruling, not the presence of one.

Notably, the dissenter in *Buchanan* also analyzed the handful of cases cited by the *Buchanan* majority and found that “none of the cases cited by the majority provide ‘a clear indication that *Foster* is a special case in which the doctrine of waiver is inapplicable.’” *Buchanan*, at ¶ 58 (DeGenaro, J., dissenting). The dissenter also deduced that this Court may have affirmed a Fourth District case in the *en masse* order because of the waiver rule. *Id.* at ¶ 59.

In the end, the *en masse* order and the subsequent remand orders are Delphic and yield no discernible rule of law on the precise question of whether *Blakely* error can be waived through lack of objection in post-*Blakely* sentencing hearings. It is often difficult to determine what a higher Court meant by a summary disposition. See *Mandel v. Bradley* (1977), 432 U.S. 173, 176. But a summary action “is not to be read as a renunciation * * * of doctrines previously announced * * *” and is not assumed to break new legal ground. *Id.* at 176.

For decades, this Court in decision after decision has recognized and applied the requirement that issues must be preserved by objection in the trial court. It is well-

settled that the plain-error doctrine applies to such forfeited errors, and the plain-error standard is set forth in Criminal Rule 52(B). Yet, defendant is essentially arguing that this Court's remand orders have silently created an exception to this case law and Crim.R. 52(B). The remand orders simply will not bear the weight of this interpretation. This Court would not have silently created an exception to its longstanding waiver rule.³

J. No Reason to Reverse after Harmless-Error Review under *Recuenco*

As stated before, *Recuenco* provides further support for the State's views. *Recuenco* recognizes that *Blakely* error is not structural error. Since harmless-error analysis applies, it follows that waiver and plain-error analysis would also apply to the present case, as the *Booker* Court recognized.

Applying *Recuenco*, the State also submits as an alternative ground for affirmance that any *Blakely* error was harmless. Defendant would have gained no benefit from the sustaining of a *Blakely* objection and the resulting severance of the sentence-finding requirements. Such severance merely would have left the trial court with even more discretion to impose the 35-year sentence.

Defendant contends that he suffered prejudice because the trial court considered sentencing criteria that have now been ruled unconstitutional. But the unconstitutional criteria *favored* defendant by setting higher hurdles to be cleared before the court could impose non-minimum and consecutive sentences. Only the State could have been

³ This Court's recent *Elmore* decision likewise cannot be seen as creating such an exception, since this Court noted that the defense had made an objection in the trial court in that case. *Elmore*, at ¶ 136.

prejudiced by the trial court mistakenly thinking that it must satisfy these pro-defendant hurdles.

Defendant errs in assuming that these sentence-finding requirements were “aggravating circumstances” that the trial court could not constitutionally consider. There was nothing unconstitutional in the trial court *considering* “demean the seriousness,” *considering* whether the harm was so great that consecutive sentencing was needed, or *considering* whether defendant’s history showed that a severe sentence was needed to protect the public. These are seriousness and recidivism criteria that a sentencing court may always *consider*.

Indeed, *Foster* approvingly quoted parts of the sentencing scheme that require sentencing courts to consider seriousness and recidivism issues. In a section of the opinion entitled “Statutory ‘Considerations’ in Every Case: R.C. 2929.11 and 2929.12,” *Foster* noted that, in “every sentencing,” courts “‘shall consider’ the overriding purposes of felony sentencing, which are ‘to protect the public from future crime by the offender and others and to punish the offender.’” *Foster*, at ¶ 36 (emphasis added; quoting R.C. 2929.11(A)). *Foster* also noted that, in “every sentencing,” the sentence shall be “‘commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim * * *.’” *Foster*, at ¶ 36 (quoting R.C. 2929.11(B)).

Foster then noted that the seriousness and recidivism factors mentioned in R.C. 2929.12 provided “a non-exclusive list for the court to consider.” *Foster*, at ¶ 37.

R.C. 2929.12 allows a sentencing court to consider “any other relevant factors” related to seriousness and recidivism. *Foster*, at ¶ 37 (citing R.C. 2929.12(B), (C), (D) & (E)).

Foster emphasized that the severance of the unconstitutional provisions had no effect on the sentencing court’s broad discretion. Courts have “full discretion” to impose non-minimum and consecutive sentences, see *Foster*, at ¶ 100, and “[e]xcising the unconstitutional provisions does not detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender.” *Foster*, at ¶ 98. *Foster* further emphasized that “[s]everance * * * will best preserve the paramount goals of community safety and appropriate punishment * * *.” *Foster*, at ¶ 102. “Courts shall consider those portions of the sentencing code that are unaffected by today’s decision and impose any sentence within the appropriate felony range.” *Foster*, at ¶ 105. Consideration of goals and purposes do not violate *Blakely* or *Foster*: “[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.” *Foster*, at ¶ 91 (quoting *Booker*, 543 U.S. at 234).

In light of the overriding purposes of criminal sentencing, the trial court could readily consider the seriousness of defendant’s conduct and the need to protect the public. Every sentencing court must consider the seriousness of the crimes and the need to protect the public and must consider whether the sentence would demean the seriousness of the offense. Community safety and proper punishment are the “overriding” and “paramount goals.”

Foster did not hold that a sentencing court may not consider things like “demean the seriousness” or “worst form” or “harm so great.” Under the general sentencing provisions, courts are *required* to give consideration to seriousness and recidivism under R.C. 2929.11 and 2929.12. *Foster* only held that it is unconstitutional to turn those matters into mandatory hurdles that require judicial factfinding in violation of the right to jury trial. Although severance means that these factors are no longer mandatory hurdles, these factors nevertheless remain valid sentencing considerations, and defendant suffered no prejudice from the trial court’s consideration of them. Again, the only party prejudiced by the trial court’s use of these factors as mandatory hurdles was the State, not defendant.

In this Court’s recent decision in *Elmore*, this Court stated that “the trial court’s factfinding in support of maximum and consecutive sentences violated *Foster*.” *Elmore*, at ¶ 139. This Court stated that “[t]he trial court’s reliance on unconstitutional sentencing statutes when imposing maximum and consecutive sentences on the noncapital offenses violated *Elmore*’s constitutional rights and must be corrected.” *Id.* at ¶ 139.

Inasmuch as the *Elmore* court did not discuss *Recuenco*, there is some doubt about whether the harmless-error issue was being addressed therein. It is highly doubtful that this Court would silently break ranks with the United States Supreme Court. Thus, *Elmore* represents another case in which the issues of waiver, plain error, and harmless error were not decided.

To the extent this Court's *Elmore* language might be seen as rejecting harmless-error analysis, the State respectfully disagrees with it. As stated in *Recuenco*, "We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless." *Recuenco*, 126 S.Ct. at 2551 (internal quotation marks omitted). *Recuenco* recognized that, in "rare cases," an error will be deemed "structural," but *Recuenco* specifically rejected the notion that *Blakely* error is structural error.

The present case is not a matter of defendant having been deprived of the jury's fact-finding role on any factor, although, even then, harmless-error analysis would still apply as found in *Recuenco*. Defendant never had a right to a jury on any sentence-finding requirement, as those requirements have been severed, and the result of the severance as to this pending case is that those requirements never were the law. Again, the only error was an error in defendant's favor. These circumstances strongly support a finding of harmless error.

K. Personal Knowing Waiver is not Required to Waive *Blakely-Foster* Error Through Lack of Objection

Some might contend that a waiver should not be enforced here because there was no showing that it was a knowing "waiver." But issues waived through lack of objection are deemed "defaulted" or "forfeited," and these kinds of waivers need not be shown to be knowing.

This Court recognized the difference in *Campbell*, in which this Court stated that errors not raised in the trial court "are waived," although "[a] more precise term would be 'procedurally defaulted.'" However, we have usually described failures to

object and similar procedural defaults as ‘waivers,’ even though they are not the kind of waivers described in *Johnson v. Zerbst* (1938), 304 U.S. 458, 464.” *Campbell*, 69 Ohio St.3d at 41 n. 1. Personal waivers are “different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *United States v. Olano* (1993), 507 U.S. 725, 733. The key point is that a personal knowing waiver immunizes an issue from all review, but a forfeiture through lack of objection still allows plain-error review. “Mere forfeiture * * * does not extinguish an ‘error’ under Rule 52(b),” but a personal waiver does. *Id.*

Although a waiver of the right to a jury trial usually requires a personal knowing waiver, the unobjected-to omission of an element or sentencing factor from the jury’s consideration does not require a personal knowing waiver and such omissions are subject to harmless-error and plain-error analysis. *Recuenco, supra; State v. Adams* (1980), 62 Ohio St.2d 151, paragraphs two and three of the syllabus.

Moreover, no personal knowing waiver would be required here because there was no right to a jury trial. The statutes did not provide for a jury trial, see *Foster*, at ¶ 87, and neither did *Foster* itself. *Foster* severed the unconstitutional finding requirements, thereby leaving in place a sentencing scheme that does not require a jury trial to impose non-minimum or consecutive sentences. Pursuant to *Foster*, sentencing *still* remains with the trial judge, and no jury trial is required even in the cases that were remanded for resentencing.

Again, the upshot of *Foster* is that the only error that occurred was that defendant was sentenced under pro-defendant sentencing hurdles that were unconstitutional. The marginal difference between being sentenced with such hurdles and being sentenced without them does not involve the right to jury trial.

L. Ineffectiveness Claim is Waived and Lacks Merit

Defendant asserts that his trial counsel was ineffective in failing to object based on *Blakely*. However, this issue was not raised in the court of appeals or in his proposition of law in his jurisdictional memorandum, and therefore it is waived. In addition, the argument lacks merit.

To succeed on a claim of ineffectiveness, a defendant must initially show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668. In assessing such claims, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101. Courts must make every effort to avoid the distorting effects of hindsight in assessing this prong. *Strickland*, 466 U.S. at 690.

The test for ineffectiveness is an objective one, *i.e.*, whether the trial counsel acted within the wide range of *reasonable* professional assistance. *Strickland*, 466 U.S. at 688-90. The defendant “must establish that no competent counsel would have taken the action that his counsel did take.” *Chandler v. United States* (C.A. 11, 2000), 218 F.3d 1305, 1314; see, also, *Bullock v. Carver* (C.A. 10, 2002), 297 F.3d 1036,

1048-49; *Cofsky v. United States* (C.A. 1, 2002), 290 F.3d 437, 444.

Even if a defendant shows that his counsel acted unreasonably, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “[T]he defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687, 692. “An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like.” *Id.* at 695.

When counsel’s alleged ineffectiveness involves the failure to raise an objection, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the objection “is meritorious,” and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the objection had been sustained. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 175 (“Lott has not demonstrated that the trial court would have granted such a motion”); *State v. Kole* (2001), 92 Ohio St.3d 303, 309 (Cook, J., dissenting). Unless the defendant actually lost a substantive or procedural right to which he was legally entitled, a defendant cannot suffer any ineffective assistance in the failure to pursue a supposed objection. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 372. “To hold otherwise would grant criminal defendants a windfall to which they are not entitled.” *Id.* at 366. The right to effective counsel does not entitle

a defendant to the luck of a lawless decisionmaker. *Strickland*, 466 U.S. at 695.

Counsel acted reasonably in not objecting to the sentence-finding requirements. After *Booker* approved severance regarding the federal sentencing guidelines, a reasonable counsel could decide that raising the *Blakely* issue would carry with it the danger of severance. A reasonable counsel could decide that a defendant was better off being sentenced under the pre-severed sentencing scheme, rather than potentially having the findings severed and having the trial court enjoy even greater leeway to impose longer sentences.

In addition, “[b]ecause attorney performance is not to be judged by hindsight, courts generally do not find that an attorney performs deficiently by failing to anticipate a future decision or development in the law.” *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, ¶ 50. Although counsel reasonably could have raised the objection, counsel reasonably could have chosen not to object given the majority of previous appellate rulings rejecting application of *Blakely* to non-minimum and consecutive sentencing. Of course, *Foster* did extend *Apprendi-Blakely* to non-minimum and consecutive sentencing, but that decision issued many months after counsel acted does not factor into the analysis of the reasonableness of counsel’s action.

Defendant will likely contend that the prosecution is trying to “have it both ways” by contending that the tools were available to object at the April 2005 sentencing hearing but that counsel acted reasonably in not objecting. But this is not “having it both ways” because the standards are different. *Pitts v. Cook* (C.A. 11, 1991), 923 F.2d 1568, 1571 (“The state can ‘have it both ways,’ because the standard for ‘cause’ to

excuse a procedural default differs from the standard for objective unreasonableness of counsel.”). The tools to construct a constitutional claim can exist, thereby not excusing the failure to object, but that does not mean that “every astute counsel” would have asserted the constitutional claim. *Engle*, 456 U.S. at 133-34. “Counsel might have overlooked or chosen to omit [the] * * * argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.” *Id.*

Defendant also cannot satisfy the actual prejudice prong of the *Strickland* test. *Foster* was a hollow victory for defendants because the finding requirements were severed, thereby giving trial courts even greater leeway in sentencing. If anything, defendant benefited from not being sentenced under this findings-free sentencing scheme. Defendant cannot show a reasonable probability of a different outcome because, even if a timely objection had been sustained, it would have resulted in a severance of the sentence-finding requirements that would have left defendant worse off. “Because *Foster* generates such a result, we can find no prejudice from appellant’s trial counsel’s failure to raise a *Blakely* challenge to appellant’s sentences, and we conclude that appellant’s trial counsel’s failure to raise the *Blakely* challenge does not rise to the level of ineffective assistance.” *Bean*, at ¶ 25.

As with his plain-error argument, defendant would likely contend that the failure to object has prejudiced him because, if counsel had objected, he would have obtained a resentencing hearing under *Foster* on appeal. But that argument assumes

that the sentence will escape affirmance based on harmless-error analysis. As stated above, the *Blakely-Foster* error is harmless and does not warrant resentencing.

Even if a preserved *Blakely-Foster* claim would otherwise require a remand for a resentencing hearing, defendant still cannot satisfy the actual prejudice prong of *Strickland*. That prong focuses on how the attorney's error affected the "result of the proceeding," *i.e.*, conviction or acquittal or dismissal, or, in regard to sentencing, what sentence would have been imposed. A resentencing hearing is not a "result" but rather a mere chance to obtain a different result. The mere possibility of a different result is not enough to satisfy the actual prejudice prong. *Strickland*, 466 U.S. at 693.

Under the result-oriented *Strickland* standard, the focus ultimately must be on whether there is a reasonable probability that counsel's error resulted in a harsher sentence than otherwise would have been imposed. *Id.* at 700 ("no reasonable probability that the omitted evidence would have changed * * * the sentence imposed."); see, also, *Glover v. United States* (2001), 531 U.S. 198, 203 (minimal amount of additional prison time can constitute prejudice); *United States v. Grammas* (C.A. 4, 2004), 376 F.3d 433, 438 ("a reasonable probability that, but for Harris's actions, Grammas would have received a lesser sentence than he did"). But see *Strickland*, 466 U.S. at 686 (leaving open the question of what ineffectiveness standards might apply in context of standardless, noncapital sentencing).

Nothing in *Foster* would entitle defendant to a lesser sentence in a resentencing hearing, and *Foster* would leave the trial court with even more discretion to sentence defendant to the same or even a longer sentence. Defendant simply cannot show a

reasonable probability of a lesser sentence, even if counsel had objected and even if defendant would obtain a resentencing.

Finally, defendant wrongly suggests that enforcement of the waiver rule would “open the door to ineffectiveness challenges” and would cause defendants to file successive reopening applications. See Defendant’s Brief, at 21. Ohio should not be deterred from properly enforcing its longstanding waiver rule merely because some defendants will *claim* trial counsel ineffectiveness. As shown in the preceding paragraphs, claims of ineffectiveness lack merit.

The danger of increased litigation is also exaggerated. Successive reopening applications are not allowed. *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, ¶ 6. *Res judicata* and time limits will also bar post-conviction review at this point.

There would be a far greater danger of increased litigation if defendant’s arguments were to succeed. Adoption of defendant’s arguments likely would lead to an increase of post-conviction petitions claiming “jurisdictional” error. Defendant’s arguments also would liberalize the longstanding waiver rule to the point that the waiver rule would rarely be enforced, thereby increasing appellate litigation rather than lessening it.

M. No *Blakely* Violation

For the purposes of preserving the State’s arguments if there is review in the federal courts, the State hereby respectfully submits that *Foster* was wrongly decided as to non-minimum and consecutive sentencing. In regard to non-minimum sentences, R.C. 2929.14(B)(2) required a trial court to make one of two findings in imposing more

than the minimum prison term on an offender who had never served a prison term: (1) the shortest prison term will demean the seriousness of the offender's conduct, or (2) the shortest prison term will not adequately protect the public from future crime by the offender or others.

These criteria are not the kind of factual findings that would implicate the right to a jury trial. In discussing what "findings" would trigger the need for a jury trial, the *Blakely* Court repeatedly referred to *factual* findings. Indicative of this emphasis on factual findings is the following passage:

Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Blakely, 542 U.S. at 305 (emphasis in original). "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in original). Other passages repeatedly focus on sentencing-enhancing "facts." See, e.g., *id.* at 303 ("factual finding"; "facts reflected in the jury verdict"); *id.* at 305 n. 8 ("finding aggravating facts"); *id.* at 307 ("facts of the crime"); *id.* at 309 ("facts bearing upon that entitlement"); *id.* at 312 ("facts extracted after trial"); *id.* at 313 ("facts are better discovered"). The Court continued this emphasis on *factual* findings in *Booker*. See *Booker*, 543 U.S. at 230, 235.

While the R.C. 2929.14(B)(2) criteria were routinely referred to as "findings," they were not findings of *fact*, but rather, at best, only findings that certain penological

goals were being considered, *i.e.*, adequate punishment of the offender and adequate deterrence to protect the public. See R.C. 2929.11(A). These kinds of penological benchmarks are not matters of fact, and neither *Apprendi* nor *Blakely* would require “proof” of such matters to a jury.

Insofar as consecutive sentencing is concerned, the consecutive-sentence findings likewise amounted to penological benchmarks rather than findings of “fact” encompassed by *Blakely*. In addition, neither *Blakely* nor *Apprendi* purported to address the issue of consecutive sentencing but rather only the problem of exceeding the maximum on individual counts. Courts therefore have concluded that there is no jury-trial right on consecutive sentence findings. *United States v. Pressley* (C.A. 11, 2003), 345 F.3d 1205, 1213; *United States v. Diaz* (C.A. 5, 2002), 296 F.3d 680, 684; *United States v. McWaine* (C.A. 5, 2002), 290 F.3d 269, 275-76. This conclusion applies even when an affirmative finding is required to impose the consecutive sentences. *Smylie*, 823 N.E.2d at 686. In addition, the problem of deciding whether to run sentences on multiple counts consecutively or concurrently is a problem that arises only after guilt has been determined, and therefore that post-trial decision does not implicate the right to a jury trial.

Defendant’s proposition of law should be overruled, and the State’s proposition of law should be adopted.

CONCLUSION

For the foregoing reasons, plaintiff-appellee requests that this Court affirm the judgment of the Tenth District Court of Appeals. The answer to the certified question is that a defendant's failure to object in a post-*Blakely* sentencing hearing *does* waive or forfeit the issue for purposes of appeal.⁴

Respectfully submitted,

RON O'BRIEN
Franklin County Prosecuting Attorney


STEVEN L. TAYLOR /0043876
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 9th day of Jan., 2007, to the office of Paul Skendelas, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellant.


STEVEN L. TAYLOR
Assistant Prosecuting Attorney

⁴ If this Court contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

§ 2929.11. Purposes of felony sentencing; discrimination prohibited.

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

HISTORY: 146 v S 2. Eff 7-1-96.

§ 2929.12. Seriousness and recidivism factors.

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender,

the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 [2929.14.1] of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty

to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

HISTORY: 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.

§ 2953.23. Time for filing petition; appeals.

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an inmate for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

HISTORY: 132 v H 742 (Eff 12-9-67); 146 v S 4. Eff 9-21-95; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06.

CrimR 52. Harmless Error and Plain Error.

(A) **Harmless error.** Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) **Plain error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.