

IN THE SUPREME COURT OF OHIO

CASE NO. **07-0620**

STATE OF OHIO,	)	
Plaintiff-Appellee,	)	On Appeal from the
-vs-	)	Lake County Court of
WILLIAM R. SPICUZZA,	)	Appeals, Eleventh
Defendant-Appellant.	)	Appellate District
		Court of Appeals
		Case No. 2006-L-141

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF  
APPELLANT WILLIAM R. SPICUZZA**

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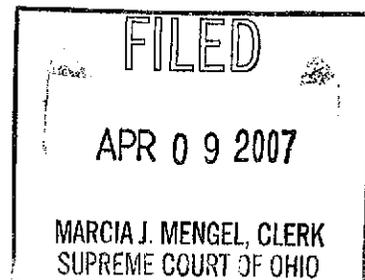
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**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION ..... 1

STATEMENT OF THE CASE AND FACTS ..... 1

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW .....2

**Proposition of Law #1:**

**A trial court violates an individual’s rights under Due Process and the Ex Post Facto Clauses of the Ohio and United States Constitutions when it sentences the individual to a more-than-the-minimum prison term that were not available to the court at the time the individual committed the offense.**  
.....2

**Proposition of Law #2:**

**A trial court violates and individual’s rights to Due Process when it sentences the individual to a more-than-the-minimum prison term with no additional findings made by a jury and when the individual had no actual or constructive notice of the possible sentences.**  
.....5

**Proposition of Law #3:**

**A trial court violates the principle of separation of powers provided in the United States and Ohio Constitution by sentencing an individual to a more-than-the-minimum prison term based on this Court’s severance of the offending statute provisions under *Foster*.**  
.....7

**Proposition of Law #4:**

**A trial court violates the Rule of Lenity when it imposes a more-than-the-minimum prison term upon an individual where the Rule of Lenity dictated a lesser penalty.**  
.....8

**Proposition of Law#5:**

**A trial court’s decision to sentence an individual to a more-than-the-minimum prison term is contrary to the intent of the Ohio legislature who drafted sentencing provisions with the clear intent of limiting judicial discretion to impose such a sentence.**

.....9

CONCLUSION .....10

PROOF OF SERVICE.....10

APPENDIX..... 11

Judgment Entry of the Eleventh District Court of Appeals.

*State v. Spicuzza*, Lake App. No. 2006-L-141, 2007-Ohio-783

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

On February 8, 2006, the Defendant-Appellant, William R. Spicuzza, pled guilty to one count each of Attempted Rape and Sexual Battery. He was sentenced to concurrent prison sentences of four and seven years.

Mr. Spicuzza appealed his sentence under *Blakely v. Washington* (2004), 542 U.S. 296, and, following this Court's decision in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, his case was sent back to the trial court for a resentencing hearing. The exact same sentence was imposed at his June 9, 2006 resentencing. Mr. Spicuzza again appealed his sentence, and the Eleventh District Court of Appeals affirmed his sentence.

Mr. Spicuzza asserts that his more-than-the-minimum prison term violates his rights under the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitutions as there were no additional findings of fact made by a jury and he had neither actual nor constructive notice of the possible punishments. He also asserts that this Court's severance of the offending portions of the sentencing statute in *Foster* was a violation of the principle of Separation of Powers. Finally, he argues that his sentence is contrary to the Rule of Lenity and contrary to the intent of the legislature. These infringements upon Mr. Spicuzza's constitutional rights raise substantial constitutional questions and are of public and great general interest.

**STATEMENT OF THE CASE AND FACTS**

The charges in this case arose out of an inappropriate sexual relationship between Mr. Spicuzza and his 14-year-old, step-daughter.

On February 8, 2006, the Defendant-Appellant, William R. Spicuzza, pled guilty to one count each of Attempted Rape and Sexual Battery. He was sentenced to concurrent prison sentences of four and seven years.

On June 9, 2006, following a remand of his case for a resentencing hearing under *Foster*, he was sentenced to the exact same more-than-the-minimum sentence. His second appeal of his sentence was rejected on February 26, 2007 by the Eleventh District Court of Appeals in *State v. Spicuzza*, Lake App. No. 2006-L-141, 2007-Ohio-783.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law #1: A trial court violates an individual's rights under the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitutions when it sentences the individual to a more-than-the-minimum prison term that were not available to the court at the time the individual committed the offense.**

At the time Mr. Spicuzza committed the offenses in the instant case, he enjoyed a presumptive sentence of minimum and concurrent terms of imprisonment. R.C. 2929.14(B)-(E)(2). The trial judge could only overcome that presumption by making statutorily prescribed findings. *Id.* For Mr. Spicuzza, that meant his minimum, presumptive prison sentence was two years in prison, not the seven years he ultimately received.

However, on February 27, 2006, this Court in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, found certain portions of Ohio's sentencing statute to be unconstitutional under *Blakely v. Washington* (2004), 542 U.S. 296. This Court's remedy was to sever the offending portions of the statute, retroactively eliminating the presumptive sentence, thus relieving the trial court of having to

make any findings whatsoever before imposing such a sentence. By eviscerating the statute, this Court has now given trial courts full discretion to apply more-than-the-minimum sentences, maximum sentences and consecutive sentences.

The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution prohibits any legislation that “changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed.” *Miller v. Florida* (1987), 482 U.S. 423, 429, quoting *Calder v. Bull* (1798), 3 U.S. 386, 390. The Ex Post Facto Clause “looks to the standard of punishment proscribed by the statute, rather than to the sentence actually imposed.” *Lindsey v. Washington* (1937), 301 U.S. 397, 401. Regardless of whether the change “technically” increased the punishment for the crime, the legislative enactment falls within the Ex Post Facto prohibition if it: 1) is retrospective; and 2) disadvantages the offender affected by it. *Miller*, 482 U.S. at 430.

Even if an act of judicial severance which expands the available range of punishment falls outside the proscriptions of the Ex Post Facto clause, it still clearly exceeds the limits on retroactive judicial decisions. *Rogers v. Tennessee* (2001), 532 U.S. at 461, expressly noted that its holding was based at least in part on the fact that the retroactive decision at issue involved “...not the interpretation of a statute but an act of common law judging.” As recognized in *Bowie v. City of Columbia*, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids.” 378 U.S. 347, 353 (1964); see also *Douglas v. Buder* (1973), 412 U.S. 430.

Accordingly, although the constitutional prohibition against *ex post facto* laws is applicable only to legislative enactments, judicial enlargement of a statute also implicates the same concerns. *State v. Garner* (1995), 74 Ohio St. 3d 49, 57. The Clause provides simply that “no State shall . . . pass any . . . *ex post facto* Law.” Art. I, § 10. The scope of the *Ex Post Facto* Clause’s protection includes “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3 U.S. at 390.

Based upon these basic constitutional concerns, the United States Supreme Court vacated a state prisoner’s sentence because a state’s revised sentencing guidelines, as applied to a defendant whose crimes occurred before the revisions took effect, violated the *Ex Post Facto* Clause and thus violated the prisoner’s right to due process. *Miller*, 482 U.S. at 432. In *Miller*, revisions to Florida’s state sentencing guidelines after the defendant’s offense transpired raised the “presumptive” sentence that the defendant could receive when he was finally sentenced. *Id.* at 424. Florida’s revision of its sentencing guidelines fell within the *ex post facto* prohibition because it met two critical elements: first, the law was retrospective, applying to events occurring before its enactment; and second, it disadvantaged the offender affected by it. *Miller* at 430. A law is retrospective if it “changes the legal consequences of acts completed before its effective date.” *Miller* at 430, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31. As to the second element, the Court observed that it is “axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.” *Id.* at 431 (internal citation omitted).

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

**Proposition of Law #2: A trial court violates an individual’s rights to Due Process when it sentences the individual to a more-than-the-minimum prison term with no additional findings made by a jury and when the individual had no actual or constructive notice of those possible sentences.**

The Due Process Clause of the Fourteenth Amendment applies the Sixth Amendment’s guarantee of a jury trial to the states. *Duncan v. Louisiana* (1968), 391 U.S. 145. Once a legislature, state or federal, has predicated the availability of a criminal penalty upon proof of a particular fact, the court may not impose the penalty unless the defendant admits the fact or a jury finds the fact beyond a reasonable doubt. *United States v. Booker* (2005), 543 U.S. 220; *Blakely v. Washington* (2004), 542 U.S. 296; *Apprendi v. New Jersey* (2000), 530 U.S. 466; accord *Jones v. United States* (1999), 526 U.S. 227. See also, *Foster* (2006), 109 Ohio St.3d at 3-5.

As explained in *Blakely*, if a legislature has enacted a mandatory determinate sentencing system, the Sixth Amendment forbids a court from imposing any penalty in excess of the statutory maximum unless it makes the

required findings in accordance with the right to trial by jury. The “statutory maximum” is “the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*...[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Blakely*, 542 U.S. at 303 (emphasis in original).

As a result, prior to the decision of the Ohio Supreme Court in *Foster*, the Sixth and Fourteenth Amendments, as well as R.C. 2929.14(B), prohibited the State of Ohio from imposing any sentence other than the statutory minimum upon Mr. Spicuzza; any other sentence would require additional factual findings which were neither admitted by Mr. Spicuzza nor proven to a jury. *Foster*, 109 Ohio St.3d at 19-20; *In re Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 326 (reversing *State v. Schweitzer*, 2005-Ohio-5611, and remanding for resentencing).

In *Bouie*, *supra*, the United States Supreme Court observed that due process demands that a defendant have fair warning of what constitutes a crime. 378 U.S. at 350. The defendant is denied fair warning, however, when there is an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Id.* at 352. Consequently, the Court determined that if a judicial construction of a criminal statute is “‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ [the construction] must not be given retroactive effect.” *Id.* at 354 (citation omitted).

Mr. Spicuzza could not have foreseen the Court's severance of the offending portions. He therefore had no fair warning of the potential punishment for the offenses, and the trial court should not have added any enhancements when imposing his sentences.

**Proposition of Law #3: A trial court violates the principle of separation of powers provided in the United States and Ohio Constitutions by sentencing an individual to a more-than-the-minimum prison term based on this Court's severance of the offending statute provisions under Foster.**

Separation of powers is fundamental to our system of governance. The Constitution of the United States clearly separates the powers of the legislative, judicial, and executive branches of government. The Constitution of the State of Ohio follows suit. See generally, Ohio Constitution.

In the context of this case, these principles mean that just as the General Assembly may not tell the courts how to do their job, so the courts may not legislate. They "have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. . . ." *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, 66. They may not "add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for." *Id.* As this Court said in *Foster*, "we are constrained by the principles of separation of powers and cannot rewrite the statutes." 109 Ohio St.3d at 30.

The first error is in this Court's conclusion that having found certain applications of Ohio's sentencing law unconstitutional, it was obliged to repair the damage to the sentencing law. "[W]e must decide on a remedy. The question

becomes, which remedy to apply?" *Foster* at 25. In fact, it had no such obligation. The remedy - a new sentencing law - is the province of the General Assembly. The fact that the General Assembly did not envision this concern when it enacted sentencing reform in 1996 does not change that.

The statute here was clear. Courts may enhance sentences only if judges make findings. That judges cannot make those findings may be troublesome to the General Assembly and may inspire it to revise the law. It does not authorize the Ohio Supreme Court to do that revision for it, no matter what the Court's belief about what the General Assembly might like. Yet that is precisely what this Court did because it did "not believe that the General Assembly would have limited so greatly the sentencing court's ability to impose an appropriate penalty." *Foster* at 27.

**Proposition of Law #4: A trial court violates the Rule of Lenity when it imposes a more-than-the-minimum prison term upon an individual where the Rule of Lenity dictated a lesser penalty.**

The Rule of Lenity means that the Court will not interpret a criminal statute so as to increase the penalty that it places on an individual when it can base that interpretation on no more than a guess of what the legislature intended. *Albernaz v. United States* (1981), 450 U.S. 333. The enactment of the statutory provisions struck down in the Ohio sentencing cases strongly suggests that the General Assembly did not intend for judges to impose consecutive or maximum sentences in all cases. It is a presupposition of our law that the courts will resolve doubts in enforcement of a penal code against the imposition of harsher punishment. *Bell v. United States* (1955), 349 U.S. 81, 83. "Sections of the

Revised Code defining...penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” R.C. 2901.04(A).

**Proposition of Law #5: A trial court’s decision to sentence an individual to a more-than-the-minimum prison term is contrary to the intent of the Ohio legislatures who drafted sentencing provisions with the clear intent of limiting judicial discretion to impose such sentences.**

This Court’s severance remedy is also indefensible by reference to prior law governing the sentencing scheme. R.C. 181.24 clearly intended for the statutes enacted to provide uniformity and proportionality, “with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender,” with judicial discretion to be limited by those goals. R.C. 181.24(B)(1)-(3). This Court has expressly stated that the purposes and intent of Senate Bill 2 was to reserve consecutive sentences for the worst offenses and offenders. *State v. Comer*, 99 Ohio St. 3d 463, 2003 Ohio 4165, 793 N.E.2d 473, at ¶21, citing *State v. Boland* (2002), 147 Ohio App. 3d 151, 162, 2002-Ohio-1163, 768 N.E.2d 1250. “Consistency and proportionality are hallmarks of the new sentencing law.” *Id.*, citing Griffin & Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan* (2002), 53 Case W.Res.L.Rev. 1, 12. While the statutes permitted consecutive sentences, imposition of consecutive sentences required that “findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision.” Griffin & Katz, *Ohio Felony Sentencing Law*, at 458-459, Section 1.21.

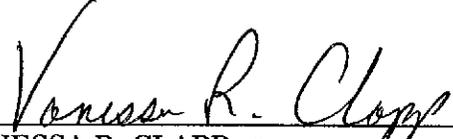
These laudable goals are now history, replaced by a judicially enacted scheme that requires findings only when a trial court seeks to give a “downward

departure” pursuant to R.C. 2929.20(H). *State v. Mathis*, 109 Ohio St.3d 54, 60. This Court’s remedy clearly detracts from the overriding objectives of Senate Bill 2, contradicting its goal to reserve consecutive and maximum sentences for the worst offenses and offenders.

**CONCLUSION**

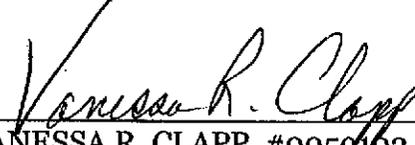
For the foregoing reasons, this case involves matters of public and great general interest and a substantial constitutional question. Mr. Spicuzza requests that this Court grant jurisdiction and allow this case so that the important issues presented in this case can be reviewed on their merits.

Respectfully submitted,

  
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**PROOF OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction is on this 6th day of April, 2007, sent by interoffice mail to Charles Coulson, Lake County Prosecutor, 105 Main Street, Painesville, Ohio 44077.



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**APPENDIX**

Judgment Entry of the Eleventh District Court of Appeals.

*State v. Spicuzza*, Lake App. No. 2006-L-141, 2007-Ohio-783.

STATE OF OHIO  
COUNTY OF LAKE

)  
)SS.  
)

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

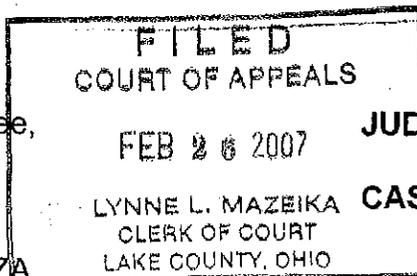
STATE OF OHIO,

Plaintiff-Appellee,

- vs -

WILLIAM R. SPICUZZA,

Defendant-Appellant.



JUDGMENT ENTRY

CASE NO. 2006-L-141

For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

A handwritten signature in cursive script, appearing to read 'Diane V. Grendell', is written over a horizontal line.

JUDGE DIANE V. GRENDALL

CYNTHIA WESTCOTT RICE, P.J., concurs,

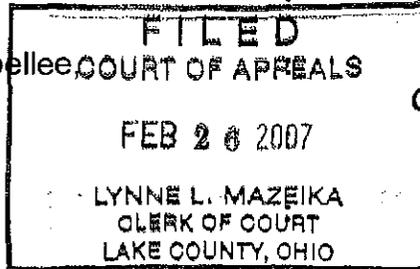
COLLEEN MARY O'TOOLE, J., concurs in judgment only.

**THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
LAKE COUNTY, OHIO**

STATE OF OHIO,

: OPINION

Plaintiff-Appellee,



CASE NO. 2006-L-141

- vs -

WILLIAM R. SPICUZZA,

Defendant-Appellant.

:

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 05 CR 000046.

Judgment: Affirmed.

*Charles E. Coulson*, Lake County Prosecutor and *Gregory J. Mussman*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

*R. Paul LaPlante*, Lake County Public Defender and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} In the instant appeal, submitted on the record and the briefs of the parties, defendant-appellant, William R. Spicuzza, appeals his judgment of sentence in the Lake County Court of Common Pleas, sentencing him to seven years in prison for Attempted Rape, and four years in prison for Sexual Battery, to be served concurrently. We affirm the judgment of the lower court.

{¶2} On January 20, 2005, Spicuzza was charged by way of information with one count of Attempted Rape (Count One), a felony of the second degree, in violation of

R.C. 2907.02(A)(2) and R.C. 2923.02 and one count of Sexual Battery, a felony of the second degree, in violation of R.C. 2907.03(A)(5), arising from an inappropriate sexual relationship between Spicuzza and his 14-year-old step-daughter.

{¶3} On February 8, 2006, Spicuzza entered a voluntary plea of guilty to both charges, which was accepted by the trial court.

{¶4} On February 27, 2006, the Ohio Supreme Court decided *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which declared unconstitutional those provisions of Ohio's felony sentencing statutes requiring "judicial factfinding" prior to imposing a more than minimum sentence, maximum sentence, or consecutive sentences. *Id.* at paragraphs one and three of the syllabus.

{¶5} On April 13, 2005, the matter proceeded to sentencing. Spicuzza was sentenced to seven years for Rape and four years for Sexual Battery, to be served concurrently, resulting in an aggregate prison term of seven years, and was adjudicated a Sexual Predator, pursuant to R.C. 2950.09.

{¶6} Spicuzza timely appealed his sentence to this court. We reversed the trial court's judgment entry of sentence and remanded for resentencing, based upon the Supreme Court of Ohio's decision in *Foster*, but upheld the trial court's sexual predator determination. See *State v. Spicuzza*, 11th Dist. No. 2005-L-078, 2006-Ohio-2379.

{¶7} On June 9, 2006, Spicuzza was resentenced pursuant to the Supreme Court's ruling in *Foster*. He now appeals, assigning the following as error.

{¶8} "[1.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms in violation of the Due Process and Ex Post Facto clauses of the Ohio and United States Constitutions.

{¶9} “[2.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms in violation of defendant-appellant’s right to due process.

{¶10} “[3.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms based on the Ohio Supreme Court’s severance of the offending provisions under *Foster*, which was an act in violation of the principle of separation of powers.

{¶11} “[4.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the rule of lenity.

{¶12} “[5.] The trial court erred when it sentenced the defendant-appellant to more-than-the-minimum prison terms contrary to the intent of the Ohio Legislators.”

{¶13} In his first assignment of error, Spicuzza argues that the trial court’s application of *Foster* to his sentencing violated the Ex Post Facto Clause, Article I, Section 10, of the United States Constitution, and Section 28, Article II of the Ohio Constitution. In his second assignment of error, Spicuzza argues that the trial court erred by sentencing him to more than the minimum prison term in violation of his right to due process since, he had neither actual nor constructive notice that the sentences ultimately imposed by the trial court were possible punishments for his crimes.

{¶14} “[L]imitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” *Rogers v. Tennessee* (2001), 532 U.S. 451, 456. Accordingly, we will consider Spicuzza’s first and second assignments in a consolidated fashion.

{¶15} Article I, Section 10 of the United States Constitution provides that no state shall pass *ex post facto* laws. The clause prohibits, *inter alia*, “Every law that changes the punishment, and inflicts a greater punishment [for a crime], than the law

annexed to the crime, when committed.” *Id.*, citing *Calder v. Bull* (1798), 3 U.S. 386, 389.

{¶16} “Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments.” (emphasis added). *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, at ¶6, quoting *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99. “The retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].” *Bielat v. Bielat*, 87 Ohio St.3d 350, 352-353, 2000-Ohio-451, quoting *Miller v. Hixson* (1901), 64 Ohio St. 39, 51.

{¶17} “The *Ex Post Facto* Clause, by its own terms, does not apply to the courts.” *Rogers*, 532 U.S. at 460. However, “if a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ [the construction] must not be given retroactive effect.” *Id.* at 457, citing *Bouie v. Columbia* (1964), 378 U.S. 347, 354. Notions of due process guarantee notice and a hearing. *State v. McGhee*, 3rd Dist. No. 17-06-05, 2006-Ohio-5162, at ¶14. “Since the right to a sentencing hearing has not been implicated by *Foster*, we are concerned only with the issue of warning as to potential sentences.” *Id.*

{¶18} Spicuzza argues that since he had committed the offenses for which he was convicted prior to the *Foster* decision, and had not served a prior prison term, *Foster’s* remedy of severing the statutory presumption of a minimum sentence unless judicial findings are made, unconstitutionally deprived him of the presumptive minimum

sentence of two years, since he did not have actual or constructive notice of the *Foster* remedy at the time the crimes were committed. We disagree.

{¶19} As an initial matter, we note that the Ohio Supreme Court's severance remedy did not implicate a vested right. *Id.* at ¶24. It is well-settled that "a presumed sentence *can* be 'taken away' without the defendant's consent." *Id.* (citations omitted)(emphasis sic).

{¶20} This court recently addressed these issues in *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, and held that the Supreme Court's severance remedy in *Foster* did not violate "Section 28, Article II of the Ohio Constitution or Article I, Section 10 of the United States Constitution." *Id.* at ¶30. *Elswick* also held that sentencing pursuant to the Ohio Supreme Court's remedial ruling in *Foster* did not violate "federal notions of due process." *Id.* at ¶25. In so doing, we reasoned that "in Ohio, prior to *Foster*, individuals who decided to commit crimes were aware of what the potential sentences could be for the offenses committed." *Id.* at ¶23, citing R.C. 2929.14(A). "There was no legislative alteration of Ohio's sentencing code post *Foster*" and "the range of sentences available for \*\*\* felonies remained unchanged." *Id.* at ¶24. As applied to the instant matter, the statute governing sentencing for second degree felonies provided for a prison term ranging from two to eight years both before and after *Foster*. See R.C. 2929.14(A)(2).

{¶21} In the case sub judice, Spicuzza's indictment alleged that he had committed the offenses to which he pled guilty on February 14, 2005, and February 27, 2005, which was before *Foster* was decided, but after *Apprendi v. New Jersey* (2000), 530 U.S. 466, *Blakely v. Washington* (2004), 542 U.S. 296, and *United States v. Booker* (2005), 543 U.S. 220 were decided by the United States Supreme Court.

{¶22} “The Supreme Court in *Foster*\*\*\* employed the same remedy used by the United States Supreme Court in *Booker*, in order to bring Ohio's sentencing scheme in line with constitutional mandates.” *Elswick*, 2006-Ohio-7011, at ¶38. Accordingly, the judicial construction of Ohio's sentencing statutes in *Foster* could hardly be considered “unexpected nor indefensible by reference to prior law concerning the application of the Sixth Amendment to sentencing enhancements.” *State v. Green*, 11th Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695, at ¶22.

{¶23} Spicuzza “knew the potential statutory sentence, had notice that Ohio's sentencing statutes were subject to judicial scrutiny, and was unlikely to amend his criminal behavior in light of a sentencing change.” *Elswick*, 2006-Ohio-7011, at ¶25.

{¶24} There is yet another reason for rejecting Spicuzza's argument. The remedy he now seeks “urges the application of the Ex Post Facto Clause for the purpose of being sentenced under a law declared unconstitutional” by the Ohio Supreme Court. *Green*, 2006-Ohio-6695, at ¶23. In practical effect, Spicuzza would “have this court remand this case with instructions for the trial court to violate the Constitution in resentencing him. Such a result contradicts the general rule that, when a supreme court strikes down a law as unconstitutional, ‘the effect is not that the former was bad law, but that it *never was the law.*” *Id.* citing *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 210. Thus, absent a subsequent ruling from the Ohio Supreme Court addressing these issues directly, we are unable to grant the relief sought. See *State v. Gibson*, 10th Dist. No. 06AP-509, 2006-Ohio-6899, at ¶15, citing *State v. Hildreth*, 9th Dist. No. 06CA8879, 2006-Ohio-5058, at ¶10 (“[I]nferior courts are bound by Supreme Court of Ohio directives.”); *State v. Durbin*, 2nd Dist. No. 2005-CA-134, 2006-Ohio-5125, at ¶42 (“As an Ohio court inferior to the Ohio Supreme Court, we

are required to follow its mandates; we lack the jurisdictional power to declare a mandate of the Ohio Supreme Court to be unconstitutional.”).

{¶25} For these reasons, Spicuzza’s first and second assignments of error are without merit.

{¶26} We next address Spicuzza’s fifth and third assignments of error. These will be discussed in a consolidated fashion, since both argue, in effect, that the *Foster* decision impermissibly encroached upon legislative prerogatives.

{¶27} In his third assignment of error, Spicuzza argues that the trial court erred in applying the *Foster* remedy, since the Supreme Court of Ohio’s act of severing the offending provisions in *Foster* was a violation of the principle of separation of powers. In his fifth assignment of error, Spicuzza argues that the trial court’s application of the *Foster* remedy was error, since the Supreme Court’s decision failed to preserve the intent of the Ohio General Assembly when it enacted Senate Bill 2 (“S.B. 2”) in 1996. We disagree.

{¶28} “The principle of separation of powers is embedded in the constitutional framework of our state government.” *State v. Hochhausler*, 76 Ohio St.3d 455, 463, 1996-Ohio-374. “The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government.” *Id.* (citations omitted). “It is inherent in our theory of government “that each of the three \*\*\* divisions of government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved.”” *Id.*, quoting *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159, quoting *Fairview v. Giffey* (1905), 73 Ohio ST. 183, 187.

{¶29} “With respect to the intent of the legislature in enacting S.B. 2 in 1996, the Supreme Court stated: ‘[w]ith the enactment of S.B. 2, the General Assembly adopted a comprehensive sentencing structure that recognized the importance of “truth in sentencing.” The general purpose of S.B. 2 was to introduce certainty and proportionality to felony sentencing.’” *Elswick*, 2006-Ohio-7011, at 51, quoting *Foster*, 2006-Ohio-856, at ¶34.

{¶30} R.C. 1.50 recognizes the authority of the courts to review legislative enactments and sever, if necessary, provisions that are deemed in conflict with the Ohio Constitution. *Id.* at ¶38. The statute states: “[i]f any provisions of a section of the Ohio Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section \*\*\* *which can be given effect* without the invalid provision or application, and to this end the provisions are severable.” R.C. 1.50 (emphasis added). Thus, pursuant to the statute, the legislature granted courts “a specific remedy \*\*\* the judicial branch may use when [determining] a statute’s constitutionality.” *Elswick*, 2006-Ohio-7011, at ¶38.

{¶31} In interpreting the constitutionality of Ohio’s sentencing statutes, the Supreme Court of Ohio stated as follows with regard to presumptive minimum terms: “Ohio has a presumptive minimum prison term that must be overcome by \*\*\* judicial findings. For someone who has never been to prison before (not necessarily a first-time offender), the court must find that the shortest prison term will ‘demean the seriousness’ of the crime or will inadequately protect the public; otherwise, the court must find that the offender has already been to prison to impose more than a minimum term.” *Foster*, 2006-Ohio-856, at ¶60. After the severance remedy, the court stated that “[a]ll references to mandatory judicial fact-finding properly may be eliminated \*\*\* [and]

[w]ithout the mandatory judicial fact-finding there is nothing to suggest a 'presumptive term.'" *Id.* at ¶96. As the Fifth District Court of Appeals explained, "the Court in *Foster* \*\*\* found that the presumption \*\*\* only existed if the trial courts were free to overcome the presumption based upon the offender's history or the particular facts of the case. The natural corollary to this finding is that the legislature never mandated a mandatory minimum sentence upon every offender who had not previously served a prison term." *State v. Paynter*, 5th Dist. No. CT2006-0034, 2006-Ohio-5542, at ¶38. Thus, once the judicially mandated findings, as found unconstitutional in *Foster*, *Apprendi*, *Blakely*, and *Booker* were excised, the presumptive minimum term, absent the unconstitutional findings could *not be given* effect. In other words, the presumption was superfluous when taken out of the context of the judicially-mandated findings which were found to offend the Constitution.

{¶32} In addition, the Supreme Court proceeded to outline "the 'overwhelming majority' of S.B. 2s reforms that survive [*Foster's*] holding, and noted that trial courts must still 'consider those portions of the sentencing code that are unaffected by its decision \*\*\*.'" *Elswick*, 2006-Ohio-7011, at ¶51, citing *Foster*, at ¶¶101, 105. These include the requirements that trial courts consider the purposes and principles of sentencing found in R.C. 2929.11 and the seriousness and recidivism factors found in R.C. 2929.12 prior to imposing a felony sentence within the authorized statutory range. *Id.* (citations omitted).

{¶33} Thus, excising the unconstitutional provisions, and those which logically could not survive, does not "detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender." *Id.*

at ¶52, quoting *Foster*, 2006-Ohio-856, at ¶98. Accordingly, we find Spicuzza's third and fifth assignments of error to be without merit.

{¶34} Finally, in his fourth assignment of error, Spicuzza argues that the trial court's application of *Foster* violated the principle of "lenity," in construing criminal statutes, as codified in R.C. 2901.04(A), which states that "sections of the Revised Code defining \*\*\* penalties shall be strictly construed against the state, and liberally construed in favor of the accused." We disagree.

{¶35} As we have previously stated, "[t]he principle of lenity applies to the construction of ambiguous statutes, not to determinations of a statute's constitutionality or to the law regarding the retroactive effect of Supreme Court decisions." *Green*, 2006-Ohio-6695, at ¶24, citing *United States v. Johnson* (2000), 529.U.S. 53, 59. "Because the R.C. 2929.14(B) is not ambiguous, the rule of lenity does not apply." *Elswick*, 2006-Ohio-7011, at ¶43 (citations omitted).

{¶36} Spicuzza's fourth assignment of error is without merit.

{¶37} For the foregoing reasons, we affirm the judgment of the Lake County Court of Common Pleas.

CYNTHIA WESTCOTT RICE, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.