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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE  
A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A  
QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

On April 9, 2007, appellant William R. Spicuzza filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court, appealing the judgment of the Eleventh District Court of Appeals in *State v. Spicuzza*, 11<sup>th</sup> Dist. No. 2006-L-141, 2007-Ohio-783. In *Spicuzza*, the appellate court addressed appellant's arguments pertaining to this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Specifically, the Eleventh District held: (1) *Foster* does not violate federal or state notions of due process and prohibition against ex post facto laws; (2) this Court did not violate the separation of powers doctrine by severing the statutes it found incompatible with the Ohio and United States Constitutions; (3) the trial court's application of *Foster* to him, resulting in a more-than-the-minimum sentence, did not violate the "rule of lenity;" and (4) *Foster's* severance remedy does not run contrary to the intent of the Ohio General Assembly when it enacted Senate Bill 2.

In this appeal, appellant challenges each of the appellate court's holdings. While his appeal involves constitutional questions pertaining to due process, this Court has already denied a reconsideration motion in *Foster*, which motion urged that the holding in *Foster* was violative of the ex post facto clause. *State v. Foster*, 109 Ohio St.3d 1408, 2006-Ohio-1703. Further, appellate courts across the State of Ohio have joined the Eleventh District in rejecting similar ex post facto and due process arguments regarding *Foster*.<sup>1</sup> And on February 28, 2007, this Court declined to

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<sup>1</sup> See *State v. Lockett*, 1<sup>st</sup> Dist. No. C-060404, 2007-Ohio-308; *State v. Smith*, 2<sup>nd</sup> Dist. No. 21004, 2006-Ohio-4405; *State v. McGhee*, 3<sup>rd</sup> Dist. No. 17-06-05, 2006-Ohio-5162 (recently rejected by this Court in Case No. 2006-2088); *State v. Grimes*, 4<sup>th</sup> Dist. No. 04CA17, 2006-Ohio-6360 (Ohio Supreme Court Case No. 2007-0032, rejected by this Court in 03/28/2007,

accept jurisdiction and dismissed the appeal filed in *State v. McGhee*, 2006-2088, wherein the appellant argued *Foster* violated due process and the rule against ex post facto laws, as well as the “rule of lenity.” *02/28/2007 Case Announcements*, 2007-Ohio-724.<sup>2</sup>

The Eleventh District properly rejected appellant’s arguments challenging this Court’s ruling in *Foster*. For the reasons discussed below, this Court should decline to accept jurisdiction.

**STATEMENT OF THE CASE AND FACTS**

Appellee is not dissatisfied with appellant’s statement of the case and facts. A review can also be found in *Spicuzza*, 2007-Ohio-783, at ¶1-7.

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*Case Announcements*, 2007-Ohio-1266); *State v. Paynter*, 5<sup>th</sup> Dist. No. CT2006-0034, 2006-Ohio-5542; *State v. Coleman*, 6<sup>th</sup> Dist. No. S-06-023, 2007-Ohio-448; *State v. Stroud*, 7<sup>th</sup> Dist. No. 05 MA 179, 2006-Ohio-7079; *State v. Mallette*, 8<sup>th</sup> Dist. No. 87984, 2007-Ohio-715; *State v. Hildreth*, 9<sup>th</sup> Dist. No. 06CA008879, 2006-Ohio-5058; *State v. Newman*, 9<sup>th</sup> Dist. No. 23038, 2006-Ohio-4082; *State v. Satterwhite*, 10<sup>th</sup> Dist. Nos. 06AP-666, 06AP-667, 2007-Ohio-798; *State v. Doyle*, 12<sup>th</sup> Dist. No. CA2005-11-020, 2006-Ohio-5373.

<sup>2</sup> A Motion for Reconsideration is currently pending before this Court in Case No. 2006-2088.

## ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

### APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. I

A trial court does not violate the defendant-appellant's rights to Due Process and the Ex Post Facto Clauses guaranteed by the Ohio and United States Constitutions by sentencing the defendant-appellant to more-than-the-minimum prison terms.

### APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. II

A trial court does not violate the defendant-appellant's rights to Due Process when sentencing the defendant-appellant to more-than-the-minimum prison terms with no additional findings made by a jury and with no actual or constructive notice of those possible sentences.

Appellant's first two propositions of law are interrelated because each is premised on alleged violations of ex post facto principles embedded in the notion of due process. Below, the Eleventh District properly considered them in a consolidated fashion. *Spicuzza*, at ¶13-25. Appellant argues, as he did below, that because he engaged in his criminal activity before this Court announced its decision in *Foster*, the trial court's application of *Foster* to his sentence violated his due process rights and the rule against ex post facto laws. He asserts that the application of *Foster* to his sentence exposed him to an increased penalty by unconstitutionally stripping him of the expectation of the presumptive minimum and concurrent terms of imprisonment that were in effect at the time he committed his crimes. The Eleventh District properly rejected appellant's argument, and there is no need for this Court to revisit the matter.

In *Spicuzza*, the appellate court, relying on its decision in *State v. Elswick*, 11<sup>th</sup> Dist. No. 2006-L-075, 2006-Ohio-7011, determined that *Foster* did not violate either federal or state

constitutional notions of due process, and prohibition against ex post facto laws.<sup>3</sup> *Id.* at ¶13-25. The court 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. \*\*\* There was no legislative alteration of Ohio’s sentencing code post *Foster* and the range of sentences available for \*\*\* felonies remained unchanged.” *Spicuzza*, at ¶20, citing *Elswick*, at ¶23,24; R.C. 2929.14(A). Here, R.C. 2929.14(A)(2), the statute governing sentencing for a second degree felony provided a prison term ranging from two to eight years both before and after *Foster*. *Spicuzza*, at ¶20.

Appellant committed the offenses in this case on February 14, 2005 and February 27, 2005, before *Foster* 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. *Spicuzza*, at ¶20. The Eleventh District noted that “[t]he 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.’ \*\*\* 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.’” *Spicuzza*, at ¶22, quoting *Elswick*, at ¶38 and *State v. Green*, 11<sup>th</sup> Dist. Nos. 2005-A-0069 and 2005-A-0070, 2006-Ohio-6695, at ¶22.

The Eleventh District properly determined that appellant “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.” *Spicuzza*, at ¶23, quoting

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<sup>3</sup> A Notice of Appeal, Memorandum in Support of Jurisdiction, and Memorandum in Response addressing identical issues are currently pending before this Court in Case No. 2007-0241, *State v. Elswick*.

*Elswick*, at ¶25. The court also properly noted that it could not grant appellant the relief he sought, to wit: to have the appellate court remand his case with instructions for the trial court to violate the Constitution in resentencing him. *Spicuzza*, at ¶24. “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.* (Citations omitted). See *State v. Gibson*, 10<sup>th</sup> Dist. No. 06AP-509, 2006-Ohio-6899, at ¶15, citing *State v. Hildreth*, 9<sup>th</sup> Dist. No. 06CA8879, 2006-Ohio-5058, at ¶10 (“[I]nferior courts are bound by the Supreme Court of Ohio directives.”); *State v. Durbin*, 2<sup>nd</sup> Dist. No. 2005-CA134, 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.”).

Lastly, appellant’s reliance on *Miller v. Florida* (1987), 482 U.S. 423, is misplaced because there was no legislative alteration of Ohio’s sentencing code. (Appellant’s Memorandum, 3-5). The *Miller* court concluded that Florida’s use of legislatively enhanced sentencing guidelines relative to a defendant who committed a crime prior to the enactment was a prohibited ex post facto application of the new law. Thus, *Miller* involved the legislature’s alteration of its sentencing guidelines, whereas *Foster* involved the efforts of a state supreme court to bring its sentencing statutes in line with constitutional mandates. Moreover, the revised guidelines at issue in *Miller* actually made the punishment more onerous for crimes committed prior to its enactment, whereas *Foster* did no such thing, as discussed above.

Appellant’s arguments have already been properly addressed and rejected by the Eleventh District Court of Appeals, several other Ohio appellate courts, and this Honorable Court. Therefore, jurisdiction should be declined.

### APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. III

A trial court does not violate the principle of Separation of Powers provided in the United States Constitution by sentencing the defendant-appellant to more-than-the-minimum prison terms based on the Ohio Supreme Court's severance of the offending statute provisions under *Foster*.

### APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. V

The trial court's decision to sentence the defendant-appellant to more-than-the-minimum prison terms is not contrary to the intent of the Ohio legislature.

Similar to propositions of law one and two, the Eleventh District Court of Appeals addressed the arguments raised in appellant's third and fifth propositions of law in a consolidated fashion below "since both argue, in effect, that the *Foster* decision impermissibly encroached upon legislative prerogatives." *Spicuzza*, at ¶26. Specifically, in appellant's third proposition of law, he argues that the severance remedy used in *Foster* was an act in violation of the Separation of Powers doctrine. And in appellant's fifth proposition of law, he contends that by severing the offending statutes in *Foster*, this Court failed to uphold the intent of the Ohio General Assembly when it enacted Senate Bill 2. Neither argument has merit.

The Eleventh District Court of Appeals rejected appellant's contention that this Court's act of severing the offending provisions in *Foster* was a violation of the principle of separation of powers. "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." *Spicuzza*, at ¶30. Accordingly, "pursuant to [R.C. 1.50], the legislature granted courts a 'specific remedy \*\*\* the judicial branch may use when [determining] a statute's constitutionality.'" *Spicuzza*, at ¶30, quoting *Elswick*, at ¶38. Thus, nothing indicates that this Court exceeded its power or infringed on that of the legislature by severing the statutes it found incompatible with the Ohio and United States

Constitutions. Instead, this Court acted within its statutory authority and fulfilled its duty by finding certain sentencing provisions unconstitutional, and implementing the appropriate remedy to cure a constitutionally-infirm statute.

The Eleventh District also properly rejected appellant's contention that this Court's opinion in *Foster* failed to preserve the intent of the General Assembly when it enacted S.B. 2. The Eleventh District discussed this Court's interpretation of presumptive minimum terms and concluded that "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." *Spicuzza*, at ¶31.

Additionally, the Eleventh District noted that "[t]he Supreme Court proceeded to outline the 'overwhelming majority' of S.B. 2 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 \*\*\*.'" *Spicuzza*, at ¶33, quoting, *Elswick*, at ¶51, citing *Foster*, at ¶¶101-102, 105. Those sections include R.C. 2929.11 and R.C. 2929.12, which require trial courts to consider the purposes and principles of sentencing and the seriousness and recidivism factors, respectively, prior to imposing a sentence within the authorized statutory range. *Id.* The Eleventh District aptly recognized that "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.'" *Spicuzza*, at ¶33, quoting *Elswick*, at ¶52, quoting *Foster*, at ¶98.

The Eleventh District Court of Appeals properly ruled on these issues and there is no need for this Court to revisit the matter. Jurisdiction should be declined.

#### APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. IV

A trial court does not violate the Rule of Lenity when it imposes more-than-the-minimum prison terms upon defendant-appellant.

In appellant's fourth proposition of law, he contends that the trial court violated the rule of lenity when sentencing him to a more-than-the-minimum sentence. This Court and the Eleventh District Court of Appeals have properly rejected this argument.

In *Spicuzza*, the appellate court determined that the rule of lenity, as codified in R.C. 2901.04(A), provides that "sections of the Revised Code defining \*\*\* penalties shall be strictly construed against the state, and liberally construed in favor of the accused." *Id.* at ¶34. The Eleventh District went on to note that, "[a]s we have previously stated, '[t]he principle of lenity applies to the construction of ambiguous statutes, not to determinations of a statute's unconstitutionality or to the law regarding the retroactive effect of Supreme Court decisions.'" *Spicuzza*, at ¶35, quoting *Green*, 2006-Ohio-6695, at ¶24, citing *United State v. Johnson* (2000), 529 U.S. 53, 59. Since there was nothing ambiguous about R.C. 2929.14(B), the rule of lenity does not apply. *Id.*

Moreover, this Court declined jurisdiction in *McGhee* (Ohio Supreme Court Case No. 2006-2088), wherein appellant argued *Foster's* application to his sentence violated the rule of lenity. Because the Eleventh District and this Honorable Court have already properly rejected appellant's argument, jurisdiction should be declined.

CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

By: Alana A. Rezaee

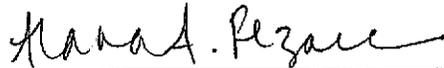
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**PROOF OF SERVICE**

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Vanessa R. Clapp, Esquire, Supervising Attorney-Appellate Division, Lake County Public Defender's Office, 125 East Erie Street, Painesville, OH 44077, on this 12<sup>th</sup> day of April, 2007.



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AAR/klb