IN THE SUPREME COURT OF OHIO

07 - 0865

STATE OF OHIO,	:	Case No._____
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Logan County Court of Appeals Third Appellate District
JOHN DUNN III,	:	
Defendant-Appellant.	:	Court of Appeals Case No. 8-06-20

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOHN DUNN III

DAVID H. BODIKER #0016590
Ohio Public Defender

THERESA G. HAIRE #0020012
Assistant State Public Defender
COUNSEL OF RECORD

Office of the Ohio Public Defender
8 East Long Street – 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - FAX
t.g.haire@opd.state.oh.us

COUNSEL FOR APPELLANT, JOHN DUNN III

FILED
MAY 10 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

GERALD L. HEATON #0022094
Logan County Prosecutor

ERIC C. STEWART #0071094
Assistant Logan County Prosecutor
COUNSEL OF RECORD

117 E. Columbus Avenue
Suite 200
Bellefontaine, Ohio 43311
(937) 599-7272
(937) 599-7271 - FAX

COUNSEL FOR APPELLEE, STATE OF OHIO

TABLE OF CONTENTS

Page No.

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

STATEMENT OF THE CASE AND THE FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW 4

Proposition of Law No. I: The imposition of nonminimum, maximum, or consecutive prison terms for multiple felony convictions contravenes the Sixth Amendment to the United States Constitution. *Blakely v. Washing*ton (2004), 542 U.S. 296; *United States v. Booker* (2005), 543 U.S.220. 4

Proposition of Law No. II: The remedy that this Court set forth in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, violates the Ex Post Facto and Due Process Clauses of the United States Constitution. 5

CONCLUSION 8

CERTIFICATE OF SERVICE 9

APPENDIX:

Judgment Entry and Opinion, Court of Appeals, Logan County Case No. 8-06-20 (March 26, 2007) A-1

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

This case presents questions substantial constitutional questions regarding the imposition of non-minimum, maximum or consecutive prison terms for multiple felony convictions. Specifically, the appellate decision in this case addresses whether the Court's remedy in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, operates as ex post facto law and thus violates the due process rights of those individuals whose offenses occurred prior to *Foster*. The constitutionality of the *Foster* remedy is an issue that is repeatedly arising in the courts below. Accordingly, the Court should accept jurisdiction over this case.

STATEMENT OF THE CASE AND THE FACTS

On March 2, 2004, Charlotte Tudor accompanied her two cousins for an evening of drinking at John Dunn's trailer. Tudor was a mildly retarded fifty-five year-old; one of her two cousins, Alice Predmore, was Dunn's girlfriend. As the evening wore on, Predmore and Dunn argued. Predmore left the trailer, but Tudor and her other cousin remained. During Predmore's absence, Dunn took Tudor into his bedroom. According to Dunn, the subsequent sexual conduct with Tudor was consensual. Tudor later told her boyfriend that she had been raped.

Tudor's boyfriend took her to the hospital, where examiners noted that she had suffered bruises and tears from the sexual activity. Hospital staff summoned police, who subsequently confronted Dunn with Tudor's rape allegation. Dunn stated that he had consensual sex with Tudor and allowed the police to search his trailer without a warrant. Based upon their investigation, police arrested Dunn on March 2, 2004.

A Logan County grand jury returned an indictment against Dunn charging him with one count of Rape in violation of R.C. 2907.02(A)(2). The indictment included a repeat violent offender specification pursuant to R.C. 2929.01(D)(D). Dunn pled not guilty, and a jury trial was conducted on the rape charge on November 9 and 10, 2004. After the jury returned a verdict of guilty, it considered additional evidence as to whether Dunn was a repeat violent offender. The jury found Dunn to be a repeat violent offender.

At sentencing, the trial court imposed a sentence of eight years. Finding that Dunn was on parole for aggravated robbery, the trial court ordered the sentence to be served consecutively to Dunn's aggravated robbery sentence. Dunn filed a timely notice of appeal.

On July 25, 2005, the Logan County Court of Appeals affirmed the trial court's judgment. *State v. Dunn*, Logan App. No. 8-05-03, 2005-Ohio-3762. Dunn then filed a timely

notice of appeal to this Court. The Court accepted Dunn's appeal, reversed the appellate court's decision in part, and remanded the case for re-sentencing in accordance with the Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Dunn*, 109 Ohio St.3d 313, 2006-Ohio-2109, ¶111.

The trial court re-sentenced Dunn on July 17, 2006. At the sentencing hearing, Dunn objected to the application of the *Foster* remedy to him as a violation of due process. The trial court imposed the same sentence as it imposed prior to the *Foster* decision.

Dunn again appealed to the Logan County Court of Appeals. The appellate court affirmed the trial court's judgment on March 26, 2007. *State v. Dunn*, Logan App. No. 8-06-20, 2007-Ohio-1358.

Proposition of Law No. I:

The imposition of nonminimum, maximum, or consecutive prison terms for multiple felony convictions contravenes the Sixth Amendment to the United States Constitution. *Blakely v. Washing*ton (2004), 542 U.S. 296; *United States v. Booker* (2005), 543 U.S.220.

At Dunn's first sentencing hearing, the trial court recited the statutory criteria for imposing consecutive sentences and then stated that Dunn met those criteria. Accordingly, the trial court ordered Dunn's sentence to be served consecutively to the aggravated robbery sentence.

Dunn's sentence was based upon statutory criteria that were not proven to a jury beyond a reasonable doubt. After Dunn was sentenced, this Court determined that the various statutory provisions which required judicial fact finding before imposition of an enhanced sentence were unconstitutional. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Specifically, the judicial fact-finding required by R.C. 2929.14(B), (C), and (E)(4), to support the imposition of nonminimum, maximum, and consecutive prison terms for an individual were found to contravene a defendant's Sixth Amendment right to have any fact that increases the penalty for a crime beyond the prescribed statutory maximum proved to a jury beyond a reasonable doubt. Id., relying upon *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531. The Court's remedy was to excise the unconstitutional portions from the statute, a remedy fashioned from *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d. 621. *Foster* at ¶90.

In Dunn's appeal to this Court, the Court found that Dunn's sentence was imposed in violation of the Sixth Amendment rights upheld in *Foster*. *State v. Dunn*, 109 Ohio St.3d 313, 2006-Ohio-2109, ¶111. Upon Dunn's return to the trial court, however, the trial court imposed that same sentence that was imposed based upon factual findings made by the court at the first sentencing hearing. According to *Foster*, however, the state was required to prove the facts

relied upon by the trial court to impose a sentence beyond the statutory maximum to a jury beyond a reasonable doubt. Accordingly, the trial court's imposition of nonminimum, consecutive prison terms contravened Dunn's Sixth Amendment rights and must be reversed.

Proposition of Law No. II:

The remedy that this Court set forth in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, violates the Ex Post Facto and Due Process Clauses of the United States Constitution.

As noted above, after finding portions of Ohio's sentencing statutes to be unconstitutional, this Court excised the unconstitutional portions from the statute, a remedy fashioned from *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d. 621. *Foster* at ¶90. The incidents charged in Dunn's indictment occurred before *Foster* was decided. At his second sentencing hearing, Dunn argued that *Foster*'s remedy could not be applied to his case without violating Dunn's constitutional right to due process.

The appellate court rejected Dunn's claim in part because it found that *Foster* did not change the maximum sentence applicable to Dunn. *Dunn*, 2007-Ohio-1358, at ¶12. The court of appeals also rejected Dunn's claim by opining that Dunn did have notice of the impending *Blakely* decision as his offense occurred after *Aprendi v. New Jersey* (2000), 530 U.S. 466 U.S. 466, 490, which purportedly signaled a "major shift" in sentencing.

These reasons are contrary to this Court's analysis in *Foster*. *Foster* expressly rejected the argument that the top of the sentencing range for each crime pre-*Foster* was the statutory maximum. Foster at ¶¶51, 53. As the Court observed, "[u]nlimited judicial discretion to sentence within a range is not currently authorized by statute. If required judicial facts are not found, certain sentences may not be imposed. These limitations create presumed statutory maximums that implicate Sixth Amendment protection. As Foster argues, his 'statutory

maximum' sentence was limited to two years because the jury did not make the findings of fact required to sentence him to consecutive sentences or to sentence him to more than the minimum." Id. at ¶51. *Foster* also dismissed the theory that *Apprendi* gave notice to criminal defendants of a major shift in sentencing by explicitly rejecting the state's argument that Foster's sentencing claims had been waived because *Apprendi* provided notice of the *Blakely* decision. Id. at ¶¶30-31.

In Dunn's case, the statutory maximum did not include consecutive sentences, but rather minimum concurrent sentences. See former R.C. 2929.14(B),(E). Contrary to the appellate court's conclusion, Dunn did not have notice of the statutory maximums for the offenses charged.

The *Foster* remedy is unconstitutional because it effectively raises the presumptive maximum sentences, in part by eliminating the presumption in favor of concurrent rather than consecutive sentences. See, *Miller v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446, 96 L. Ed. 2d 351. As a result, the remedy violates the Ex Post Facto and Due Process Clauses of the United States Constitution. The *Foster* remedy also directly conflicts with the Legislature's intent when it enacted the "truth-in-sentencing" reforms embodied in the severed statutes.

Due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue. *Bouie v. City of Columbia* (1964), 378 U.S. 347, 354, 12 L. Ed. 2d 894, 84 S. Ct. 1697. As this Court has recognized, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law * * *," and thus violates the Due Process Clause of the Fourteenth Amendment to the United States

Constitution. *State v. Garner* (1995), 74 Ohio St.3d 49, 57, 656 N.E.2d 623, quoting *Bouie v. Columbia*, 378 U.S. at 353 (internal citations omitted).

Accordingly, although the constitutional prohibition against ex post facto laws is applicable only to legislative enactments, judicial enlargement of a statute implicates the same concerns expressed by the Ex Post Facto Clause. *State v. Garner*, at 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* (1798), 3 U.S. 386, 3 Dallas 386, 390, 1 L. Ed. 648, 3 Dall. 386 (seriatim opinion of Chase, J.).

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 v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446, 96 L. Ed. 2d 351. In *Miller*, revisions to Florida's sentencing guidelines, made after the defendant's offense transpired, raised the "presumptive" sentence that the defendant could receive when he was finally sentenced. 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 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31, 101 S. Ct. 960, 67 L. Ed. 2d 17. 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. (internal citation omitted).

Additionally, in *Bouie v. South Carolina*, the United States Supreme Court observed that due process demands that a defendant have fair warning of what constitutes a crime. Id. at 350. Fair warning is denied, 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).

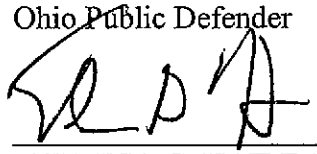
Foster's severance remedy contravenes fundamental ex post facto provisions guaranteed by the Due Process Clauses of the state and federal constitutions and therefore cannot be applied to Dunn and other defendants whose crimes occurred prior to the *Foster* decision. Accordingly, the Court should accept jurisdiction over this case to enforce the due process rights of those individuals whose crimes predated *State v. Foster*.

CONCLUSION

This Court should accept Dunn's case because it presents a constitutional question regarding the validity of the *Foster* severance remedy.

Respectfully submitted,

DAVID H. BODIKER #0016590
Ohio Public Defender



THERESA G. HAIRE #0020012
Assistant State Public Defender
COUNSEL OF RECORD

Office of the Ohio Public Defender
8 East Long Street – 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - FAX

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JOHN DUNN III was forwarded by regular U.S. Mail, postage prepaid to the office of Eric C. Stewart, Assistant Logan County Prosecutor, 117 E. Columbus Avenue, Suite 200, Bellefontaine, Ohio 43311 this 10th day of May, 2007.

THERESA G. HAIRE #0020012
Assistant State Public Defender
COUNSEL OF RECORD

COUNSEL FOR APPELLANT

#256527

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. _____
Plaintiff-Appellee,	:	
		On Appeal from the Logan
v.	:	County Court of Appeals
		Third Appellate District
JOHN DUNN III,	:	
		Court of Appeals
Defendant-Appellant.	:	Case No. 8-06-20

APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JOHN DUNN III

FILED
COURT OF APPEALS
MAR 26 2007
DOTTIE TUTTLE
CLERK, LOGAN COUNTY, OHIO

CA06-08-0020

COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

JOHN DUNN III,

DEFENDANT-APPELLANT.

CASE NUMBER 8-06-20

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: March 26, 2007

ATTORNEYS:

MARC S. TRIPLETT
Attorney at Law
Reg. #0021222
332 South Main Street
Bellefontaine, OH 43311
For Appellant.

GERALD E. HEATON
Prosecuting Attorney
Reg. # 0022094
Eric C. Stewart
Reg. #0071094
117 E. Columbus Avenue, Suite 200
Bellefontaine, OH 43311
For Appellee.

Case No. 8-06-20

Shaw, J.

{¶1} The defendant-appellant, John Dunn III ("Dunn"), appeals the July 24, 2006 Judgment entry regarding orders of re-sentencing entered in the Common Pleas Court of Logan County, Ohio.

{¶2} On March 2, 2004, Dunn was arrested for rape. On April 9, 2004, Dunn was indicted by the Logan County Grand Jury on one count of Rape, a first degree felony in violation of R.C. 2907.02(A)(2) and a Repeat Violent Offender Specification, in violation of R.C. 2929.01. On November 9th and 10th, 2004, a jury trial was held. At the conclusion of the trial, the jury found Dunn guilty beyond a reasonable doubt of the crime of Rape. On November 11, 2004, the trial court submitted to the jury the issue concerning the sentencing specification and the jury found Dunn guilty of the Repeat Violent Offender Specification.

{¶3} On November 29, 2004, the trial court sentenced Dunn to eight years in prison on the Rape charge. The trial court also ordered that this sentence be served consecutive to any parole violation that may later be imposed. Dunn appealed his sentence with this Court in *State v. Dunn*, Logan App. No. 8-05-03, 2005-Ohio-3762. On July 25, 2005, this Court affirmed his conviction and sentence.

{¶4} On September 7, 2005, the Supreme Court of Ohio accepted jurisdiction to hear Dunn's case. On May 3, 2006, the Supreme Court of Ohio

reversed this Court's decision in *State v. Dunn*, 107 Ohio St.3d 1681, 2005-Ohio-6480, and ordered that Dunn's case be remanded for re-sentencing consistent with their decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶5} On July 17, 2006, the trial court re-sentenced Dunn. Dunn argued that because the prior sentencing scheme had been found unconstitutional, the trial court could only impose the minimum sentence. However, the trial court imposed a sentence identical to the first sentence.

{¶6} On August 23, 2006, Dunn filed a notice of appeal raising the following assignment of error:

> **The trial court erred, as a matter of law, when it applied a sentencing scheme which was not in effect at the time of the commission of the offense contained in the indictment.**

{¶7} Dunn asserts in his sole assignment of error that the trial court erred when it applied a sentencing scheme which was not in effect at the time of the crime. Specifically, he argues four issues in support of his sole assignment of error. In essence, he is arguing that the Supreme Court of Ohio erred in its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 because it ordered trial courts to violate the United States and Ohio Constitutions.

{¶8} The Supreme Court of Ohio recently addressed constitutional issues concerning felony sentencing in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Supreme Court of Ohio held that portions of Ohio's felony

sentencing framework was unconstitutional and void, including R.C. 2929.14(B) requiring judicial findings that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes by the offender. *Foster*, 2006-Ohio-856, at ¶ 97, 103. Regarding new sentences and resentences, the Supreme Court of Ohio stated, "we have concluded that trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster,* 2006-Ohio-856, at ¶ 100.

{¶9} As this Court is required to follow precedent, as set forth by the Supreme Court of Ohio and the United States Supreme Court, we find no error in the trial court's decision to sentence Dunn to an eight year prison term. Dunn was found guilty beyond a reasonable doubt of the crime of Rape, a felony of the first degree.

{¶10} Pursuant to R.C. 2929.14(A),

> **[t]he court shall impose a definite prison term that shall be one of the following:**
> ***
> **(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.**

Dunn could have been sentenced to as little as three years or as much as ten years for the count of Rape that he was found guilty of. In this case, Dunn was sentenced to eight years.

{¶11} In addition, for the reasons articulated in *State v. McGhee,* 3rd Dist. No. 17-06-05, 2006-Ohio-5162, we find no merit in his argument that his sentence violates the Ex Post Facto and Due Process Clauses. Dunn was found guilty beyond a reasonable doubt of the crime of Rape on November 10, 2004. He was sentenced to an eight year prison term on November 29, 2004. He filed a notice of appeal with this Court which affirmed his conviction and sentence. He appealed his case to the Supreme Court of Ohio which granted a discretionary appeal on issues relating to his sentence on December 14, 2005. The Supreme Court of Ohio announced its decision in *Foster* on February 27, 2006. On May 3, 2006, the Supreme Court of Ohio reversed this Court's decision and ordered Dunn's case be remanded for re-sentencing consistent with their decision in *Foster*. On July 17, 2006, the trial court re-sentenced Dunn to the same eight year prison term.

{¶12} We note, as to this case, that the offense occurred subsequent to the United States Supreme Court's holding in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435, which provided notice that a major shift in sentencing was likely to occur and supports our conclusion in *McGhee* that the remedy announced in *Foster* does not violate due process.

Likewise, the sentencing range for his felonies has remained unchanged, so Dunn had notice of the potential sentence for his offenses.

{¶13} Furthermore, the Ohio State Public Defender attempted to appeal the unanimous *Foster* decision to the United States Supreme Court. On October 16, 2006, the United States Supreme Court denied the Petition for Writ of Certiorari. *Foster v. Ohio* (2006), 127 S.Ct. 442, 166 L.Ed.2d 314.

{¶14} Accordingly, we find Dunn's sole assignment of error is overruled and the July 24, 2006 Judgment entry regarding orders of re-sentencing entered in the Common Pleas Court of Logan County, Ohio is affirmed.

Judgment affirmed.

ROGERS, P.J., and PRESTON, J., concur.

r

24-304

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

LOGAN COUNTY

CA06-08-0020

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

JOHN DUNN III,

DEFENDANT-APPELLANT.

CASE NUMBER 8-06-20

JOURNAL ENTRY

FILED
COURT OF APPEALS
MAR 26 2007
DOTTIE TUTTLE
CLERK, LOGAN COUNTY, OHIO

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellant for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

DATED: March 26, 2007

JUDGES