IN THE SUPREME COURT OF OHIO

State of Ohio, **Appellee,** **v.** **Robert W. Bates,** **Appellant.**	**On Appeal From The** **Second District Court Of Appeals** **Case Nos. 2007-0293 & 2007-0304**

REPLY BRIEF OF APPELLANT ROBERT W. BATES

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SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. R.C. § 2929.14(E)(4) APPLIES ONLY TO SENTENCES IMPOSED BY A SINGLE OHIO JUDGE IN A SINGLE PROCEEDING 1

- A. The Plain Language Of (E)(4) Provides No Basis For The Trial Court's Imposition Of A Consecutive Sentence. 1
- B. The Purposeful Omission Of Key Language From (E)(4) Should Be Enforced. 2
- C. The Excised Findings Provisions Of (E)(4) Do Not Support The State's Argument 3
- D. In Ohio, Ambiguous Criminal Statutes Are Construed Strictly Against The State, Not Against The Defendant 5
- E. Enforcement Of (E)(4) As It Is Written Does Not Create An "Absurdity" 5

II. THE TRIAL COURT HAD NO INHERENT AUTHORITY TO IMPOSE THE CONSECUTIVE SENTENCES ON BATES 7

CONCLUSION 10

TABLE OF AUTHORITIES

STATE CASES

Colegrove v. Burns (1964), 175 Ohio St. 437 5

Henderson v. James (1895), 52 Ohio St. 242 7

State ex rel. Stratton v. Maxwell (1963), 175 Ohio St. 65 7

State v. Anthony (2002), 96 Ohio St.3d 173 6

State v. Ascoine (5th Dist. July 28, 2003), 2003 Ohio App. LEXIS 3689, 2003-Ohio-4145 ..... 5, 7

State v. Bates (2d Dist. Dec. 29, 2006), 2006 Ohio App. LEXIS 7018, 2006-Ohio-7086 2

State v. Foster (2006), 109 Ohio St.3d 1, 2006-Ohio-856 ..... *passim*

State v. Geffeller (6th Dist. Dec. 23, 2005), 2005 Ohio App. LEXIS 6317 2005-Ohio-7008 4

State v. Gillman (10th Dist. Dec. 13, 2001), 2001 Ohio App. LEXIS 5571, 2001-Ohio-3968 2

State v. Gonzales (3d Dist. June 25, 2007), 2007 Ohio App. LEXIS 2902, 2007-Ohio-3132 8

State v. Mack (9th Dist. Nov. 30, 2005), 2005 Ohio App. LEXIS 5681, 2005-Ohio-6325 4

State v. Purnell (1st Dist. Nov. 22, 2006), 2006 Ohio App. LEXIS 6151, 2006-Ohio-6160 5

State v. Robb (1999), 88 Ohio St.3d 59 6

State v. Taylor (12th Dist. June 11, 2007), 2007 Ohio App. LEXIS 2655, 2007-Ohio-2850 8

State v. Whalen (2d Dist. Nov. 26, 2003), 2003 Ohio App. LEXIS 5845, 2003-Ohio-6539 7

State v. Worrell (10th Dist. May 3, 2007), 2007 Ohio App. LEXIS 2063, 2007-Ohio-2216 8

TABLE OF AUTHORITIES
(continued)

Stewart v. Maxwell (1963), 174 Ohio St. 1807

STATUTES

R.C. § 2901.04 5

R.C. § 2929.14 ..... *passim*

R.C. § 2929.41 6

R.C. § 2950.05 7

OTHER AUTHORITIES

146 Ohio Laws, Part IV, 7316 (eff. July 1, 1996) ("Senate Bill 2") 8

ARGUMENT

In response to Bates' argument that R.C. § 2929.14(E)(4) does not authorize his sentence, the State musters little more than conclusory statements and manages to turn basic principles of statutory interpretation on their head. On its face, the language of (E)(4) applies only to sentences that "are imposed" in a single proceeding. (*See* Appellant Br. at 4.) And unlike surrounding provisions, (E)(4) does not include language permitting an Ohio court to impose its sentence "consecutively to any other prison term . . . previously or subsequently imposed," a legislative omission that is presumed to be intentional and enforceable. (*See id.* at 5-6.) The State's argument simply ignores the plain meaning of (E)(4) and these fundamental principles of statutory construction and should be rejected. Nor can the State create "inherent" authority for Bates' sentence where none exists. Because the trial court had no authority to order that Bates' sentence run consecutively to a sentence previously imposed by a different Ohio court, that decision should be reversed and this matter remanded for concurrent sentencing.

I. R.C. § 2929.14(E)(4) APPLIES ONLY TO SENTENCES IMPOSED BY A SINGLE OHIO JUDGE IN A SINGLE PROCEEDING.

A. The Plain Language Of (E)(4) Provides No Basis For The Trial Court's Imposition Of A Consecutive Sentence.

The unexcised portion of (E)(4) states:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively.[1]

By its terms, (E)(4) does not refer to multiple courts, previous proceedings, or prison terms that "were" or "have been" imposed. Rather, (E)(4) expressly applies only to prison terms that "are imposed" by a court—that is, prison terms imposed at a single time.

[1] The State apparently does not dispute that (E)(4) provides the only possible statutory basis for Bates' consecutive sentences. Nor does the State dispute Bates' version of the authorization language of (E)(4), assuming that language survives *Foster*. (*See* Appellee Br. at 4.)

Yet in arguing that (E)(4) applies to sentences that have been issued by multiple courts in multiple proceedings (in short, the opposite of what (E)(4) actually says), the State repeatedly claims that the language of (E)(4) is "plain" and "clear." (Appellee Br. at 4-6.) Despite those assertions, it is hard to understand how (E)(4) "clearly" authorizes Bates' sentence, and the State barely bothers to explain its assertion.

First, the State points to the phrase "the court may require . . ." and argues that "the use of the word 'may' is permissive and clearly authorizes the court to exercise its discretion in determining whether to impose consecutive sentences." (*Id.* at 4.) However, although "may" is certainly permissive, that clause says nothing about ***what*** is permitted. Indeed, the scope of that permissive authority is supplied by the first part of (E)(4), which unambiguously limits such authority to cases where prison terms "are imposed" by a single judge in a single proceeding.

Moreover, although the State may believe its interpretation of the language of (E)(4) is "clear," courts of appeal have struggled to discern the meaning of the language—even those that have upheld consecutive sentences. *See, e.g.*, *State v. Bates* (2d Dist. Dec. 29, 2006), 2006 Ohio App. LEXIS 7018, 2006-Ohio-7086, ¶ 9 (noting that this "issue is not free from difficulty"); *State v. Gillman* (10th Dist. Dec. 13, 2001), 2001 Ohio App. LEXIS 5571, *7, 2001-Ohio-3968 (noting that (E)(4) "is not a model of clarity").

B. The Purposeful Omission Of Key Language From (E)(4) Should Be Enforced.

The State also argues, without support, that "[s]ubsection (E)(4) encompasses a broader spectrum than subsections (E)(1) through (E)(3)." (Appellee Br. at 5.) Though it does not explain this statement, the State apparently believes that the "broad spectrum" of (E)(4) excuses the General Assembly's decision to include the "previously or subsequently imposed" language in sections (E)(1) through (E)(3) but not in (E)(4). (*See* Appellant Br. at 4-6.)

Again, the opposite is true. Sections (E)(1) through (E)(3) require that certain sentences be imposed "consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender." Thus, (E)(1), (2) and (3)—***not*** (E)(4)—encompass the full "spectrum" of past and future sentences. Further, the General Assembly used the broad "previously or subsequently imposed" language five times in the provisions immediately preceding (E)(4). There is simply no principled reason why the General Assembly could not have included identical language in (E)(4), and the State has not attempted to provide one. Therefore, the Court should presume that the omission of this language was purposeful and should enforce it. (*See* Appellant Br. at 5-6.)

C. The Excised Findings Provisions Of (E)(4) Do Not Support The State's Argument.

Although it argues that some of the excised findings provisions of (E)(4) support a broad reading of that section, the State seriously misreads those provisions. (Appellee Br. at 6.) Prior to the *Foster* decision, (E)(4) required judges to make several findings before imposing consecutive sentences. *See* R.C. § 2929.14(E)(4)(a)-(c); *State v. Foster* (2006), 109 Ohio St.3d 1, 29; 2006-Ohio-856, ¶ 99 (excising findings provisions). However, those findings did not suggest categories of prior or subsequent sentences to which a term might run consecutively. Rather, the findings defined the circumstances in which it was appropriate to order that sentences imposed in a single proceeding run consecutively to each other.

For example, the former R.C. § 2929.14(E)(4)(a) authorized consecutive sentences if:

> The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16 ["Residential sanctions"], 2929.17 ["Nonresidential sanctions"], or 2929.18 ["Financial sanctions; restitution"] of the Revised Code, or was under post-release control for a prior offense.

Contrary to the State's apparent belief, this language did not authorize a judge to order the new

sentence to run consecutively to the sentence for the "prior offense." In fact, it does not say anything about the prior ***sentence*** at all. Rather, under (E)(4)(a), where a defendant was being sentenced for multiple crimes, and where at least one of those crimes was committed while the defendant was subject to post-release control, the sentences for those multiple crimes could run consecutively to each other, not to a previously imposed sentence. *See, e.g.*, *State v. Mack* (9th Dist. Nov. 30, 2005), 2005 Ohio App. LEXIS 5681, 2005-Ohio-6325, ¶ 24 (pre-*Foster* case upholding consecutive sentences for terms imposed in single proceeding where trial judge found that defendant committed the crimes while on post-release control).

The State also cites former (E)(4)(c), but this is similarly unavailing. That provision authorized consecutive sentences if "[t]he offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender." The State correctly points out that the "history of criminal conduct" was not limited to offenses committed in the sentencing county. (Appellee Br. at 6.) But consideration of a criminal history in sentencing is not the same as ordering that new terms run consecutively to terms imposed as a result of that history. Instead, (E)(4)(c) meant only that where a defendant was being sentenced for multiple offenses, the sentencing judge could consider the totality of the defendant's criminal history in deciding whether to order that the sentences for those multiple offenses run consecutively to each other. *See, e.g.*, *State v. Geffeller* (6th Dist. Dec. 23, 2005), 2005 Ohio App. LEXIS 6317, 2005-Ohio-7008, ¶ 8 (pre-*Foster* case concluding that defendant's "extensive" criminal history required that terms imposed in single proceeding run consecutively to each other).

D. In Ohio, Ambiguous Criminal Statutes Are Construed Strictly Against The State, Not Against The Defendant.

Recognizing that the plain language and structure of R.C. § 2929.14(E) are unhelpful to its position, the State resorts to arguing that (E)(4) is not limited to sentences imposed in single proceedings because, "[i]f the legislature had intended that result, it would have clearly stated so." (Appellee Br. at 6.) This argument has it backwards. The State seems to believe that so long as criminal penalties are not ***explicitly*** limited to certain situations, those penalties must be unlimited. But in Ohio, criminal defendants are not subjected to penalties unless the General Assembly has expressly provided for them. *See State v. Purnell* (1st Dist. Nov. 22, 2006), 2006 Ohio App. LEXIS 6151, 2006-Ohio-6160, ¶ 10; *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. For that reason, ambiguous statutes are construed against the State and in favor of the defendant. *See* R.C. § 2901.04(A).

As discussed above, (E)(4) in no way contains a "clear" or "plain" authorization to sentence Bates to the consecutive terms at issue. The State cannot place the burden of an ambiguity on Bates—where there is ambiguity, Ohio law requires judges to err on the side of the defendant. *State v. Ascoine* (5th Dist. July 28, 2003), 2003 Ohio App. LEXIS 3689, 2003-Ohio-4145, ¶ 20 (strictly construing sex offender reporting statute against state and reversing conviction). Because (E)(4) is ambiguous (at most), the consecutive sentences were unauthorized.

E. Enforcement Of (E)(4) As It Is Written Does Not Create An "Absurdity."

The State also argues that under Bates' interpretation of (E)(4), a defendant who had received a prior sentence or was out on bond could commit additional crimes without receiving additional punishment. (Appellee Br. at 5.) As an initial matter, the State does not point to a

single case that supports this concern or its unrealistic depiction of defendants poring over case law before committing crimes.

But more importantly, the State dramatically overstates the purported risk. Specifically, under the State's hypothetical, the imagined enterprising criminal must know that any alleged loophole in (E)(4) would ***not*** apply to defendants who:

- commit multiple crimes in each of several Ohio counties, since a judge is free to order that the sentences for the crimes in one county run consecutively to each other;
- commit both state and federal crimes, since an Ohio judge can impose a sentence to run consecutively to federal sentences pursuant to R.C. § 2929.41(B)(2);[2]
- commit crimes in multiple states, since Ohio sentences may run consecutively to sentences imposed by courts of other states pursuant to R.C. § 2929.41(B)(2); or
- commit a new crime that carries a greater sentence than the one the defendant is already serving, since the new sentence could not be "subsumed" within the lesser, pending sentence.

In fact, the concerns raised by the State could conceivably apply in only one situation: where a defendant commits one new crime in an Ohio county other than the sentencing county ***and*** where the maximum for the new crime does not exceed the sentence for the other crime. This narrow, theoretical possibility does not nearly rise to the level of an "absurdity" sufficient to disregard the plain language and construction of § 2929.14(E). *See, e.g.*, *State v. Anthony* (2002), 96 Ohio St.3d 173, 176-77 (refusing interpretation of statute, which authorized suspension of drivers' licenses for felony convictions, that would "lead to absurd results" by applying anytime a defendant was in or near a car); *State v. Robb* (1999), 88 Ohio St.3d 59, 66 (refusing to interpret statute to protect right to privacy of communications among rioting prisoners, where such interpretation would yield an absurd result).

[2] Although the *Foster* Court stated that this section was one of those "severed and excised in their entirety," the opinion does not discuss subsection (B)(2) and appears aimed only at § 2929.41(A). *See State v. Foster* (2006), 109 Ohio St.3d 1, 29; 2006-Ohio-856, ¶ 97.

More importantly, even if the Court finds a "loophole" in (E)(4), it should enforce the language of the statute as written and allow the General Assembly to fix it, if necessary. *See State v. Whalen* (2d Dist. Nov. 26, 2003), 2003 Ohio App. LEXIS 5845, 2003-Ohio-6539, ¶ 14 (explaining that General Assembly has "exclusive power to prescribe punishment for crimes committed within Ohio"). This is precisely what happened in *State v. Ascoine*. There, the defendant, a "sexually oriented offender," was found guilty of failing to give 20-days advance notice of a change of address to the local sheriff. *State v. Ascoine* (5th Dist. July 28, 2003), 2003 Ohio App. LEXIS 3689, 2003-Ohio-4145, ¶ 2. However, the defendant claimed that it was impossible for him to comply with this requirement because he was suddenly kicked-out of his in-laws' home. *Id.* at ¶ 17. On appeal, the court strictly construed the statute against the State and reversed the conviction, reasoning that the statute criminalized only a failure to give advance notice (not subsequent notice) and that such notice was impossible under the circumstances. *Id.* at ¶ 20. However, the court also "urge[d] the legislature to address the loophole created by this statute" by requiring subsequent notice of emergency address changes. *Id.* at ¶ 22. The statute was later amended to require subsequent notice. *See* R.C. § 2950.05(F). Similarly, the Court may invite a legislative solution to (E)(4) if necessary, but it should not impose one itself.

II. THE TRIAL COURT HAD NO INHERENT AUTHORITY TO IMPOSE THE CONSECUTIVE SENTENCES ON BATES.

The State also argues that even if this Court's decision in *Foster* excised the authorization language of (E)(4), the trial judge retained common law authority to impose consecutive sentences on Bates. (Appellee Br. at 7.) But the authorities cited by the State simply do not support this claim. The State cites three Ohio Supreme Court cases, but the precedential weight of those opinions is limited. (Appellee Br. at 7.) (citing *State ex rel. Stratton v. Maxwell* (1963), 175 Ohio St. 65; *Stewart v. Maxwell* (1963), 174 Ohio St. 180; *Henderson v. James* (1895), 52

Ohio St. 242.) First, these cases pre-date Ohio Senate Bill 2 and (E)(4) by at least 33 years. *See* 146 Ohio Laws, Part IV, 7136 (eff. July 1, 1996). Moreover, although the Courts in those cases adopted fairly expansive views of common law authority, they could not analyze the issue in the context of important sentencing statutes that exist today. In fact, this Court has noted that the 1996 legislation established a "comprehensive and complicated felony sentencing plan" that dramatically changed both the substance and process of criminal sentencing in Ohio. *See Foster*, 109 Ohio St.3d at 17, 2006-Ohio-856 at ¶ 49. Therefore, this Court should take a more restrictive view of common law authority in light of the passage of those statutes.

The State also cites three recent cases from various courts of appeal. *See State v. Gonzales* (3d Dist. June 25, 2007), 2007 Ohio App. LEXIS 2902, 2007-Ohio-3132; *State v. Taylor* (12th Dist. June 11, 2007), 2007 Ohio App. LEXIS 2655, 2007-Ohio-2850; *State v. Worrell* (10th Dist. May 3, 2007), 2007 Ohio App. LEXIS 2063, 2007-Ohio-2216. But in all of these cases, the consecutive sentences were imposed in a single proceeding. *See Gonzales*, 2007-Ohio-3132 at ¶ 2; *Taylor*, 2007-Ohio-2850 at ¶ 2; *Worrell*, 2007-Ohio-2216 at ¶ 2. Bates does not challenge a court's authority to order that the sentences it imposes run consecutively to each other, and these cases do not help to answer the question before this Court.

Also, in its discussion of "common law authority," the State completely ignores the implications of what it is asking the Court to do (and one of the main points of Bates' initial brief). Before *Foster*, (E)(4) authorized consecutive sentences only where they were imposed by a single judge in a single proceeding. And although the *Foster* Court observed that judges have "full discretion to impose a prison sentence within the statutory range," the Court did not note any expansion of sentencing authority beyond that provided in (E)(4). *See Foster*, 109 Ohio St.3d at 30, 2006-Ohio-856 at ¶ 100. The State now invites this Court to apply *Foster* to expand

significantly the authority for consecutive sentences, even though the *Foster* Court said nothing that reflected an intent to do so. The State cannot (and does not even try) to explain how (or why) this could be. Therefore, this Court should decline the State's invitation and should enforce the authorization language of (E)(4) to reverse Bates' consecutive sentences.

CONCLUSION

For the foregoing reasons, Appellant Robert W. Bates respectfully requests that this Court answer the certified question in the negative, reverse the decision of the Second District Court of Appeals and remand this matter for concurrent sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply Brief of Appellant Robert W. Bates was served via first class U.S. mail, postage prepaid, this 17th day of September, 2007, upon:

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