

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)	Case No. 07-1254
)	
Appellee)	On Appeal from the
)	Geauga County Court of Appeals,
vs.)	Eleventh Appellate District
)	
)	
WILLIAM J. SILSBY)	Court of Appeals
)	Case No. 2006-G-2725
Appellant)	
)	

MERIT BRIEF OF APPELLEE STATE OF OHIO

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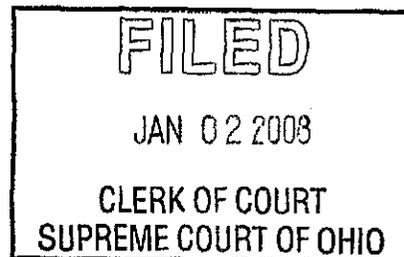


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STATEMENT OF THE CASE AND FACTS

On October 19, 2004, William J. Silsby, (hereinafter "Appellant"), was indicted on one count of Domestic Violence, a felony of the third degree in violation of R.C. 2919.25, and one count of Obstructing Official Business, a felony of the fifth degree in violation of R.C. 2921.31. (T.d. 1). Nearly one year later on October 6, 2005, Appellant, being represented by the Geauga County Public Defender, pled guilty to the Obstructing Official Business Charge and was sentenced to twelve months in prison. (T.d. 38). Said sentence was ordered to be run consecutively to a prison term imposed in Lake County for an unrelated offense. (T.d. 38).

Then on March 14, 2006, Appellant filed a Motion to Modify Sentence and/or Withdrawal of Guilty Plea which was later denied by the trial court. (T.d. 45, 47). Appellant then effectively filed a delayed appeal with the Eleventh District Court of Appeals on August 2, 2006. (T.d. 49). After consideration of all the arguments presented by Appellant, the Eleventh District affirmed all of the decisions made by the trial court in *State v. Silsby*, 11th Dist No. 2006-G-2725, 2007-Ohio-2308. (T.d. 18). After this decision was rendered, On May 21, 2007, Appellant filed a Motion to Certify a Conflict which the Eleventh District subsequently granted on July 9, 2006. (T.d. 20, 25). Then the Eleventh District certified the present issues at bar to this Honorable Court for review, and on October 1, 2007, an entry from this Court was filed ordering that a conflict exists. (T.d. 24, 26-27). Appellant then filed his Merit Brief on December 3, 2007, and the State now files this timely response.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

CERTIFIED CONFLICT QUESTION NO. 1: “Whether a delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*.”

APPELLEE STATE OF OHIO’S PROPOSITION OF LAW: No. A delayed appeal under Ohio Rules of Appellate Procedure 4(A) is not identical to a direct appeal under Ohio Rule of Appellate Procedure 5(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*.

I. OHIO’S APP.R. 3 AND APP.R. 4 APPEAL AS A MATTER OF RIGHT

Ohio’s court structure has its roots from the Ohio Constitution and is designed, at a minimum, to provide every litigant with one trial and one review. This Court recognized in *State v. Nickles* (1953), 159 Ohio St. 353, 357, 112 N.E.2d 531, that

[a] reading of Article IV of the Constitution of Ohio is convincing that it is the spirit of our fundamental law that a litigant shall be entitled not only to a fair and impartial trial but shall have at least one review if he so desires. Naturally, in order to expedite justice, the General Assembly must legislate in order that an appellate review may be orderly and without delay, and the General Assembly has the authority to fix the terms upon which the review may be had. When, however, courts come to determine the meaning of the terms fixed by the legislative branch of the government, that meaning must, if possible, be consistent with justice and fair play and must avoid ridiculous and grotesque results.

Section 3(B)(2), Article IV of the Ohio Constitution provides that courts of appeals have appellate jurisdiction as may be provided by law over the judgments and final orders of courts of record inferior to the court of appeals in the district, and over the final orders or actions of administrative agencies. Ohio’s statutes and the Ohio Rules of Appellate Procedure further flesh out this constitutional provision and provide the appellate courts of Ohio with broad appellate jurisdiction. While the Ohio Constitution is the sole source of appellate court jurisdiction, the legislature has the authority to determine the method of exercising that jurisdiction. The

requirements prescribed of the Ohio Revised Code, as well as those in the Rules of Appellate and Criminal Procedure, are mandatory.

Ohio's right to an appellate review is provided by an appeal "as of right" which is encompassed in Ohio App.R. 3 and App.R. 4. Ohio courts of appeals have no discretion to refuse to accept a timely appeal properly before it under these particular appellate rules. "A defendant in a criminal case is assured an appeal, as a matter of right, if prosecuted within the prescribed by the Code, viz.: within thirty days from sentence and judgment." *State v. Kramer* (1953), 127 N.E.2d 61, 62. An appeal as of right may be taken by the filing of a timely notice of appeal with the clerk of the trial court in which the judgment was entered. App.R. 3(A). The only jurisdictional requirement for an appeal as of right is the filing of the notice of appeal in a timely manner. A notice of appeal must be filed within thirty (30) days of the judgment of the trial court. App.R. 4(A). The filing of a timely notice of appeal is a prerequisite to establishing jurisdiction in a court of appeals. Therefore, while in the general sense, appellate courts in Ohio have jurisdiction to hear appeals in criminal cases, that jurisdiction must be invoked by the timely filing of a notice of appeal. The failure to file a timely notice of appeal is a jurisdictional requirement that cannot be ignored. *Nickles*, 159 Ohio St. at 359.

II. OHIO'S RIGHT TO FILE AN APPEAL BY LEAVE OF COURT (A DELAYED APPEAL) PURSUANT TO APP.R. 5

"In a criminal case, where the defendant has failed to meet the time requirements of App.R. 4(A), the unqualified right to an appeal set out in App.R. 3(A) is extinguished and an appeal may be taken only by leave of court in compliance with App.R. 5." *State v. Alexander*, 10th Dist. Nos. 05AP-192, 05AP-245, 2005-Ohio-5997, at ¶21. A delayed review by the appellate court "is not in furtherance of any constitutional right of [a] defendant but is a privilege granted by legislative action." *Kramer*, 127 N.E.2d at 62 citing *State v. Edwards* (1952), 157

Ohio St. 175, 105 N.E.2d 259. There is no time limit specified for requesting a delayed appeal; however, the court of appeals may only grant a delayed appeal if the defendant has failed to file an appeal as of right.

In order to satisfactorily comply with App.R. 5 a defendant must file a motion for leave to appeal with the proper appellate court and that motion “shall set forth the reasons for the failure of the appellant to perfect an appeal as of right.” App.R. 5(A)(2). Generally, this motion will be determined on the documents filed with the appellate court unless the appellate court otherwise sets a hearing or oral argument. App.R. 5(D). In this motion a defendant must sufficiently demonstrate that there was a substantial reason or unavoidable circumstances for failing to prosecute his appeal as a matter of right. *State v. Brabant* (Apr. 7, 1998), 7th Dist. No. 98 C.A. 37, at *1 citing *State v. Murphy* (1959), 108 Ohio App. 539, 162 N.E.2d 869; *State v. Campbell* (Aug. 4, 1982), 7th Dist. No. 82-C-10, at *1 citing *State v. Steel* (1964), 199 N.E.2d 24. The court of appeals will also take into consideration the defendant’s rights as well as public policy concerns such as the “interest of justice” and the preservation of the “regularity and validity of the proceedings” under which a defendant is sentenced. *Steel*, 199 N.E.2d at 26; *Brabant*, No. 98 C.A. at *1.

And finally, if a motion for leave to appeal is granted, the clerk of the court of appeals then journalizes the ruling of the court of appeals and certifies a copy of the order and mails/forwards it to the clerk of the applicable trial court. App.R. 5(F). Once granted, the delayed appeal is considered pending exactly like an appeal as of right and usually proceeds upon the regular docket of the appellate court. *Id.*

III. A REVIEW OF THE CURRENT STATE OF APPELLATE LAW ON THE FIRST CERTIFIED QUESTION

As this Honorable Court is well aware, since the issuance of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 645 N.E.2d 470, Ohio appellate districts have been given the responsibility of determining how to interpret the *Foster* decision in light of the cases they receive on review. Clearly, because these districts are not consistent in their application of this Court's decision in *Foster* that is why we are now before this Court on a Certification of a Conflict. As this Court recognized, amongst the dissension in the Ohio Appellate Courts is whether to apply the *Foster* remedy to cases that are on delayed appeal/appeal by leave of court. Now let's look a little more closely at some of these cases and the reasoning behind them. The following districts have held that delayed appeals/appeals by leave of court are not "direct appeals" as contemplated by *Foster*:

Fourth District Court of Appeals:

- *State v. Hall*, 4th Dist. No. 06CA17, 2007-Ohio-947, at ¶15 (held that *Foster* did not apply to Defendant because his "case was not on Direct review when the Ohio Supreme Court decided *Foster*. His conviction and sentence became final when the time for filing his direct appeal lapsed.")

Sixth District Court of Appeals:

- *State v. French*, 6th Dist. No. S-06-033, at ¶4 (held that "[i]n the present case, appellant was sentenced on October 21, 2005. He did not initially appeal that judgment and his case was not pending on direct review when the Supreme Court of Ohio released its decision in *Foster* on February 27, 2006. Rather, appellant filed a motion for delayed appeal on July 28, 2006. 'Delayed appeal is not [universally] the same as a direct appeal. *State v. Bird* (2000), 138 Ohio App.3d 400. Because appellant's case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court.' *State v. Lewis*, 10th Dist. No. 2006-G-2752, ¶10. See also *State v. Silsby*, 11th Dist. No. 2006-G-2725, 2007-Ohio-2308. The sole assignment of error is therefore not well-taken.")

Eighth District Court of Appeals:

- *State v. Pinkney*, 8th Dist. No. 88357, 2007-Ohio-1721, at ¶16 (held that [i]n the instant case, Pinkney filed his motion for delayed appeal and notice of delayed appeal on June 27, 2006, approximately four months after *Foster* was decided, and this court granted the motion for delayed appeal on July 24, 2006. Thus, Pinkney’s case was final and not pending on direct review when *Foster* was decided. Accordingly, Pinkney is not entitled to have the *Foster* ruling retroactively to his case.”)

Tenth District Court of Appeals:

- *State v. Lewis*, 10th Dist. No. 05AP-327, 2006-Ohio-2752, at ¶10 (held that “even if appellant had a claim under *Foster*, that decision applies only to cases pending on direct appeal at the time the decision was announced. *Foster*, at ¶32, 104-105. Appellant did not appeal his conviction and sentence. Therefore, the conviction and sentence had become final long before *Foster* was announced. Appellant’s attempt to file a delayed appeal is not the same as direct appeal. *State v. Bird* (2000), 138 Ohio App.3d 400. Because appellant’s case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court.”)

Eleventh District Court of Appeals

- *State v. Silsby*, 11th Dist. No. 2006-G-2725, 2007-Ohio-2308, at ¶¶13-14 (held that “[w]hen a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing.” Id. at ¶103. However, the remedy of vacating a sentence following the *Foster* decision applies only to those cases pending on direct review. Id. at ¶104, 845 N.E.2d 470.

Here appellant’s case was not pending on direct review at the time of the *Foster* decision, which was decided on February 27, 2006. Appellant’s August 2, 2006 filing of his delayed appeal, does not change the fact that the conviction and sentence had become final long before *Foster* was announced. ‘Delayed appeal is not the same as direct appeal.’ *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752, at ¶10, citing *State v. Bird* (2000), 138 Ohio App.3d 400, 741 N.E.2d 560. ‘Because appellant’s case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court.’ *Lewis*, at ¶10.”)

- *State v. Nicol*, 11th Dist. No. 2006-A-0078, 2007-Ohio-4962, at ¶23 (held that “*Foster* was decided on February 27, 2006. In the case sub judice, the trial court sentenced appellant on August 29, 2001, more than four years prior to the announcement of the *Foster* decision. Consequently, contrary to appellant’s argument, his case was not pending on direct review at the time *Foster* was decided. The filing of appellant’s delayed appeal does not change the fact that his conviction and sentence has become final long before *Foster* was decided. This court has previously held that a ‘[d]elayed appeal is not the same as direct appeal.’ *State v. Silsby*, 11th Dist. No. 2006-G-2725, 2007-Ohio-2308, at ¶14, citing *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752, at ¶10. As a result, ‘[b]ecause appellant’s case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court.’ *Id.*”)

In addition to the above-cited post-*Foster* cases, there are a couple of Ohio appellate districts pre-*Foster* that have discussed the meaning of a “direct appeal” or “appeal as of right” and differentiated it from other types of appeals:

Fifth District Court of Appeals:

- *State v. Godfrey* (Feb. 28, 2000), 5th Dist. No. 99 CA 95, at *2-3 (held that a “direct appeal” or “appeal as of right” pursuant to App.R. 4(A) differs greatly from a “reopened appeal” which is provided by App.R. 26(B). Thus, because R.C. 2953.21(A)(2) only refers to a “direct appeal” an App.R. 26(B) “reopened appeal” does not apply to that subsection.)

Tenth District Court of Appeals:

- *State v. Price* (Sept. 29, 1998), 10th Dist. No. 98AP-80, at *2 (held that R.C. 2953.21(A)(2) only contemplates the filing of a “direct appeal,” and, thus, in no way can a filing of a delayed appeal be taken to indefinitely extend the period for filing a motion for post-conviction relief under that subsection.)
- *State v. Bird* (June 1, 2000), 138 Ohio App.3d 400, 404, 741 N.E.2d 560 (held that “[t]he term ‘direct appeal,’ however, does not universally include delayed appeals. Rather, language in some cases specifically limits the term to include only those appeals taken as of right and/or otherwise distinguishes between direct appeals and delayed appeals.” (Citations omitted).)

And in contrast to the three holdings above, only the First District Court of Appeals in *State v. Fuller*, 1st Dist. No. C-060533, 2007-Ohio-2018, has come to a different conclusion. In *Fuller*, the court held that the phrase “direct appeal” under R.C. 2953.21 does, in fact, encompass an appeal by leave of court under App.R. 5(A). *Id.* at ¶11.

And finally, the following appellate districts have held that cases on delayed appeal/appeal by leave of court are still considered to be on direct appeal as contemplated by *Foster*:

Second District Court of Appeals:

- *State v. Jenkins*, 2nd Dist. No. 2006 CA 37, 2007-Ohio-1742, at ¶¶3-4, 10 (held that “[i]n response, the State questions whether Jenkins’s case was pending on direct appeal at the time *Foster* was decided, because he did not timely appeal and he was not granted a delayed appeal until after *Foster*. Although the State does not concede that Jenkins’s argument on appeal is meritorious, it does not oppose a remand for resentencing.

Although Jenkins’s notice of appeal was not filed until after *Foster* was decided, we consider his case to be pending on direct appeal within the meaning of *Foster*. See *State v. January*, Clark App. No. 2006-CA-21, 2007-Ohio-435; *State v. Corbin*, Allen App. No. 1-06-23, 2006-Ohio-6902.

In accordance with *Foster* and *Mathis*, we must reverse Jenkins’s sentence and remand this case for a new sentencing hearing. *Foster* at ¶104-105; see *State v. Caver*, Montgomery App. No. 21241, 2006-Ohio-4278.”)

- *State v. Johnson*, 2nd Dist. No. 06-CA-43, 2007-Ohio-1743, at ¶¶25-26 (held that “[i]n this assignment of error, Johnson asserts that his sentence must be reversed upon the authority of *State v. Foster*, supra. ¶104 of *State v. Foster* mandates that sentences in cases pending on direct appellate review must be reversed, and those causes must be remanded for re-sentencing in accordance with *Foster*. We have applied that mandate in a case in which a sentence was imposed before *Foster* was decided, but the appeal,

although timely, was not filed until after *Foster* was decided. *State v. Lynn*, 2007-Ohio-438, Montgomery App. No. 21484.

The only distinction between *State v. Lynn*, supra, and the case before us is that in this case the sentence was imposed in 2004, long before *Foster* was decided, but we granted a motion for leave to file a delayed appeal. In our view, the principle is the same. When we granted the motion for leave to file a delayed appeal, Johnson's appeal became, in effect, timely, because we concluded that he had a sufficient reason for the delay in his filing of the notice of appeal. That renders his case indistinguishable from *State v. Lynn*, supra. Another way of looking at it is that the finality of Johnson's conviction and sentence, when his original, thirty-day appeal time expired, was subject to the contingency of our granting a motion for leave to file a delayed appeal, and when we granted his motion for leave, his conviction and sentence were no longer final. This put him in the same category as the defendant in *State v. Lynn*, supra, whose judgment of conviction and sentence was not final when *State v. Foster*, supra, was decided.")

Third District Court of Appeals:

- *State v. Corbin*, 3rd Dist. No. 1-06-23, 2006-Ohio-6092, at ¶¶4-7 (held that Appellant's delayed appeal which raised a *Foster* issue regarding his sentence was considered to be on direct review, and, therefore his case was remanded for resentencing.)

Thus, in summary, currently the 4th, 6th, 8th, 10th, and 11th District Court's of Appeals have held that a delayed appeal/appeal by leave of court is not considered to be on "direct review" as required by the *Foster* in order to be remanded for a resentencing hearing. In conflict with these courts are the 2nd and 3rd District Courts of Appeals which have held that the *Foster* remedy can and should be provided to cases that are on delayed appeal/appeal by leave of court.

On a side note, Appellant pointed out in his merit brief, that this Court in *State v. Ishmail* (1981) 67 Ohio St.2d 16, 16, 423 N.E.2d 1068, made the statement "[n]o direct appeal was taken either as a matter of right or as a delayed appeal." Appellant suggests that this statement automatically means that this Court has already implicitly recognized that there is equivalence

between a direct appeal/appeal as of right and a delayed appeal/appeal by leave of court. In response, the State submits that by virtue of the fact that this Court has asked Appellant and the State to answer the certified questions in the case at bar, this Court has not yet found that such appeals are functionally equivalent for purposes of appellate review under *Foster*.

IV. ***FOSTER'S GLARING INTENT: LIMITED RETROACTIVITY***

One thing that this Court made very clear in *State v. Foster* is who was entitled to its remedy: “[t]hese cases and those pending on direct review must be remanded to trial courts for new sentencing hearings not inconsistent with this opinion.” 109 Ohio St.3d, 845 N.E.2d 470, 2006-Ohio-856, at ¶104. This Court could have possibly extended the remedy in *Foster* to defendants who were sentenced after right after Senate Bill 2 became effective on July 1, 1996; however, it plainly chose not to do so. In light of this conspicuous intent of this Court to have a very restricted retroactive application of this remedy, it is the State’s belief that this court should hold as a general rule that an App.R. 5 delayed appeal/appeal by leave of court is not on “direct review” as contemplated by *Foster*. The reasons for this suggested general rule will be detailed below.

Firstly, the United States Court of Appeals for the Sixth Circuit provided some guidance as to when a case becomes final on direct review in the federal context. In *U.S. v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005), the court held that a case became final when “a decision has been rendered on direct appeal and the 90-day period for seeking a writ of certiorari***[has] expired.” If we were to apply this holding to our own state scheme, then in Ohio a case would become final after a decision has been rendered on direct appeal and the time to file a notice of appeal and memorandum of jurisdiction to this Court had expired. However, that can’t be the only way for a case to become final because clearly not every case gets taken up on appeal. Thus, the

State asserts that this court should adopt the reasoning of the 4th, 6th, 8th, 10th, and 11th District Courts of Appeals that a case in the trial court becomes final when the thirty (30) days to file a notice of appeal lapses. Moreover, if this Court were to hold as the 2nd District did in *Jenkins* and *Johnson* and as the 3rd District did in *Corbin*, this Court's decision in *Foster* could become frustrated in that its retroactive extension could be greatly broadened to cases no longer on direct review.

The second reason for this general rule, is that to hold otherwise would possibly open up the floodgates to thousands upon thousands of resentencing hearings for cases dating all the way back to the mid 1990's. This Court recognized how much time, money, and effort the *Foster* remedy placed on the trial courts within the counties, to extend that remedy to include those defendant's who file an App.R. 5 delayed appeal/appeal by leave of court would really create an undue burden. And while this Court stated in *Foster* that at the resentencing hearing that defendants may argue for reductions in their sentences and the State can seek greater penalties, it is common knowledge in Ohio that at these *Foster* resentencing hearings the trial courts are typically imposing the same sentence that they imposed pre-*Foster*. 2006-Ohio-856, at ¶105.

A third reason is that this Court has further demonstrated a desire to limit the scope of the *Foster* remedy when it issued its opinions in *State v. Payne*, 114 Ohio St.3d 502, 873 N.E.2d 306, 2007-Ohio-4642, and *State v. Frazier*, 115 Ohio St.3d, 873 N.E.2d 1263, 2007-Ohio-5048. In *Payne* this Court held that "a lack of an objection in the trial court forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the announcement of *Blakely*." 2007-Ohio-4642 at ¶31; *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 621. This Court further reaffirmed the *Payne* decision in *Frazier* when it stated that "[w]e recently resolved this issue in *State v. Payne****[citation omitted], and we therefore conclude that defense

counsel's failure to challenge Frazier's noncapital sentencing waived his present claim." 2007-Ohio-5048 at ¶59. Thus, now the *Foster* remedy only applies to defendants who objected in the trial court on the basis of *Blakely* as to their sentence, and their case was pending on direct review at the time the *Foster* decision was rendered.

And finally, there is something to be said for the plurality of appellate districts that support this general rule. While being only persuasive authority for this court, the fact that five of the seven appellate courts that have confronted this issue have determined that an App.R. 5 delayed appeal/appeal by leave of court is not on "direct review" as contemplated by *Foster* is quite noteworthy. And the State asks this Court to hold correspondingly.

V. A POSSIBLE EXCEPTION TO THE STATE'S SUGGESTED GENERAL RULE

Although an App.R. 5 delayed appeal/appeal by leave of court is not identical to an App.R. 4 appeal as of right for purposes of appellate review under *Foster*, this should not mean that *Foster* should never apply to an appeal filed pursuant to App.R. 5. A rigid, bright-line rule may do more harm than good here. Ultimately, the judicial system needs to, and generally does, account for the human error that exists within it. Not all attorneys are perfect and we often make mistakes, and that is where judicial discretion can come in. In instances where there are truly excusable circumstances under which a defendant files a delayed appeal (i.e., the trial court failed to appoint appellate counsel; appellate counsel becomes terminally ill), that particular defendant's case was on direct review or was not yet final at the time *Foster* was released, and a *Blakely* issue was raised in the trial court, the *Foster* remedy should still be available to him/her. Having this exception would enable justice to be served by ensuring that defendants who deserve the *Foster* remedy but fail to appeal their sentence through no fault of their own, still can avail themselves of the remedy by filing a delayed appeal under App.R. 5.

CERTIFIED CONFLICT QUESTION NO. 2: “Whether a defendant’s sentence must be reversed on the basis of *State v. Foster* when: a) the defendant’s was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be constitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal.”

APPELLEE STATE OF OHIO’S PROPOSITION OF LAW: No. A defendant’s sentence does not always have to be reversed on the basis of *State v. Foster* when: a) the defendant’s was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be constitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal.

I. PAYNE AND FRAZIER ARE NOT UNCONSTITUTIONAL AND APPLY TO ALL CASES WHERE THERE IS A BLAKELY-TYPE ERROR RAISED FOR THE FIRST TIME ON APPEAL

In Appellant’s Answer and Proposition of Law No. II he asserts a three-fold basis for this Court to find that its opinions in *Payne* and *Frazier* are unconstitutional. More specifically, he alleges that both of these opinions violate (1) the Ex Post Facto Clause of the U.S. Constitution; (2) the Equal Protection Clauses of the U.S. and Ohio Constitution; and (3) federal notions of due process. For the reasons detailed below, Appellant’s arguments are without merit.

Appellant’s arguments assume that he was entitled to an automatic right to a resentencing hearing based upon this Court’s decision in *Foster*. This assumption is completely false. As this Court is aware, the defendants in *Foster* were in a different position than the defendants in *Payne* and *Frazier* as well as the Appellant in the case at bar. In *Foster*, when this Court rejected the State’s waiver argument regarding the defendants in *Foster*, it focused on the fact that Foster had been sentenced before *Blakely* had been decided. 2006-Ohio-856 at ¶¶30-31. This Court also made the same observation regarding the defendant Quinones in footnote 35 of the opinion. Clearly, this Court felt that making these notations was significant to the extent that it was possible that this issue could be revisited at another point in time with a different fact pattern. In

further support of this position is the fact that this Court cited to *Smylie v. State* (Ind. 2005), 823 N.E.2d 679, which held that the waiver/forfeiture rules due to a lack of objection applied to the *Blakely* issue generally but that as to pre-*Blakely* trial court proceedings, defendants were not expected to have anticipated *Blakely*. *Id.* at 31; *Smylie*, 823 N.E.2d at 687-89. Thus, it is evident that the timing of Foster's and Quinones's sentencing hearings was something that was of significance to this Court when it issued its opinion.

Furthermore, in addition to noting that the timing of the sentencing hearings is important in light of *Blakely*, the *Foster* opinion indicated how important it is for this Court to follow precedent from the United States Supreme Court. This Court emphasized in paragraph 104 that "we must follow the dictates of the United States Supreme Court," and, later in paragraph 106, this Court stated that it was ordering resentencing hearings as mandated by the United States Supreme Court:

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

This language surely evidences the fact that this Court felt directed to some extent by United States Supreme Court precedent.

The notion of being directed by the United States Supreme Court was later reaffirmed by this Court in *Payne* when it stated:

We are guided by *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621. *Booker*, like *Foster*, applied to every case that was in the appellate stated. *Id.* at 268, 125 S.Ct. 738, 160 L.Ed.2d 621. The United States Supreme Court, however, noted that not every case would be entitled to a resentencing hearing. Instead, *Booker* instructed courts "to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Id.*

In heeding the dictates of *Booker*, we will address for the first time whether *Blakely* error can be forfeited.

As a result of following this precedent, this Court went on to hold in *Payne*:

Our ruling today adheres to the Supreme Court's growing line of jurisprudence in this area of law. In prior cases, we have applied *Blakely* and *Booker* in holding portions of Ohio's sentencing statutes unconstitutional and in subsequently providing a remedy for those statutory provisions deemed violative of the Sixth Amendment. Using *Booker* and *Recuenco* as our constitutional guideposts in addressing the issue of forfeiture is consistent with the recent developments of jurisprudence pertaining to Ohio's sentencing scheme. For the foregoing reasons, we hold that a lack of an objection in the trial court forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the announcement of *Blakely*.

2007-Ohio-4642 at ¶31.

Thus, in short, *Payne* and *Frazier* (which simply follows *Payne*) are essentially predicted sequels to *Foster* which continue to follow the guidance of the United States Supreme Court. As has been the case for over four decades with *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, the *Foster* opinion is likely to be revisited and redefined numerous times by this court in order to make it apply correctly with each and every case it touches. This is how we expect common law to develop. Accordingly, in no way are the *Payne* and *Frazier* opinions constitutionally infirm. And because they apply to the case at bar Appellant's case needs to be treated under the plain-error test.

II. DELAYED APPEALS ARE NOT ON DIRECT REVIEW AS REQUIRED BY FOSTER, BUT APPELLATE COURTS SHOULD CONSIDER APPLYING THE FOSTER REMEDY ON DELAYED APPEAL WHEN FUNDAMENTAL FAIRNESS REQUIRES IT

The State fully incorporates by reference the argument to the first certified question as if rewritten herein. As argued under that section, it is the State's position that App.R. 5 delayed appeals/appeals by leave of court are not on "direct review" as contemplated by *Foster* and, thus, do not necessitate a reversal unless a defendant who qualifies for the *Foster* remedy fails to file an App.R. 4 appeal as of right through no fault of his/her own.

CONCLUSION

For the reasons discussed above, the State respectfully requests this Honorable Court to uphold the decision of the Eleventh District Court of Appeals.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was forwarded by regular U.S. mail, postage prepaid, to Derek Cek, Esq., 2725 Abington Road, Suite 102, Fairlawn, Ohio, 44333, on this 31st day of December 2007.



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