

IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Case No. 2007-0475

Plaintiff-Appellee,

-vs-

On Appeal from the
Licking County Court of Common Pleas
Case No. 02 CR 275

PHILLIP ELMORE,

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS
ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
SETH L. GILBERT 0072929
(Counsel of Record)
STEVEN L. TAYLOR 0043876
Assistant Prosecuting Attorneys
373 South High Street—13th Floor
Columbus, Ohio 43215
Phone: 614/462-3555
Fax: 614/462-6103
E-mail:
slgilber@franklincountyohio.gov

Counsel for Amicus Curiae Ohio
Prosecuting Attorneys Association

KENNETH W. OSWALT 0037208
Licking County Prosecuting
Attorney
20 South Second Street, Suite 201
Newark, Ohio 43055
Phone: 740/349-6195

Counsel for Plaintiff-Appellee

KEITH A. YEAZEL 0041274
(Counsel of Record)
5354 North High Street
Columbus, Ohio 43214
Phone: 614/885-2900
Fax: 614/885-1900

W. JOSEPH EDWARDS 0030048
523 South Third Street
Columbus, Ohio 43215
Phone: 614/228-0523
Fax: 614/228-0520

Counsel for Defendant-Appellant

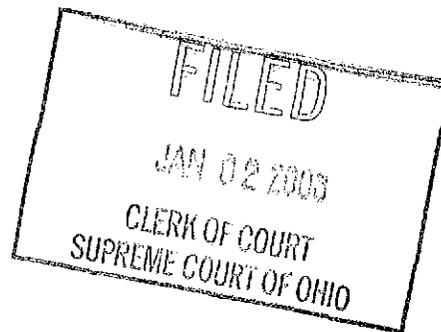


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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (“OPAA”) offers this amicus brief in support of plaintiff-appellee State of Ohio. The OPAA is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice.

Justice would not be furthered by declaring unconstitutional the application of the severance remedy announced in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to non-final cases involving pre-*Foster* crimes. Such a holding would unreasonably extend due-process limits on retroactive decision-making. Moreover, such a holding would require that all offenders who committed crimes prior to *Foster* receive minimum, concurrent prison terms—regardless of the seriousness of the offense, and regardless of the likelihood that the offender will recidivate. This would severely threaten the ability of OPAA member prosecutors to seek adequate sentences for criminal offenders. Furthermore, holding that *Foster* deprives trial courts of jurisdiction to impose consecutive sentences would ignore the plain language of *Foster* itself and would likewise threaten the ability of prosecutors to seek adequate sentences.

Nor would justice be furthered by finding that *Foster*’s severance remedy violates the rule of lenity. The rule of lenity applies only to statutes that define offenses or penalties, and even then, the rule applies only if the statute is ambiguous. Thus, the rule of lenity was a non-issue in this Court’s selection of severance as the proper remedy in *Foster*. To hold otherwise would be to transform the rule of lenity from a narrow rule of

statutory construction to a broad policy of being lenient to criminal offenders.

Interpreting the rule of lenity in this fashion would prevent OPAA member prosecutors from adequately enforcing the criminal laws of this State.

STATEMENT OF THE FACTS

As reflected in this Court's opinion in *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, defendant-appellant Phillip Elmore was convicted of the June 2002 aggravated murder of Pamela Annarino and was sentenced to death. *Id.* at ¶3. Defendant was also convicted of murder, kidnapping, aggravated robbery, aggravated burglary, and grand theft. *Id.* at ¶29. On the non-capital counts, defendant was sentenced to ten years on the kidnapping count, ten years on the aggravated-robbery count, ten years on the aggravated-burglary count, and 18 months on the grand-theft count. *Id.* at ¶131. The trial court ordered defendant to serve the kidnapping count concurrently with all other counts, which are to be served consecutively to each other and consecutively to the death sentence. *Id.* at ¶131. Accordingly, defendant was sentenced to a total of 21 ½ years on the non-capital counts.¹

This Court affirmed defendant's convictions and death sentence. *Id.* at ¶169. This Court, however, reversed defendant's non-capital sentences, finding that the maximum, consecutive sentences were based on judicial fact-finding in violation of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Elmore*, at ¶139. Accordingly, this Court remanded for resentencing on the non-capital counts. *Id.* at ¶140.

¹ Evidently, the trial court merged the murder count with the aggravated-murder count.

On remand, the trial court imposed the same 21 ½ year total sentence on the non-capital counts. (Judgment Entry, page 3 of appendix to defendant’s brief) Defendant appealed the non-capital sentences directly to this Court.

ARGUMENT

Response to First, Second, and Third Propositions of

Law: The application of the severance remedy announced in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to non-final cases involving pre-*Foster* crimes comports with due process.

Defendant’s first, second, and third propositions of law all challenge the constitutionality of *Foster*’s severance remedy as applied to non-final cases involving pre-*Foster* crimes. Specifically, defendant argues that the retroactive application of *Foster*’s severance remedy to such cases violates the Sixth Amendment, the Ex Post Facto Clause, and the Due Process Clause. Because offenders had fair notice that severance of the various sentence-finding provisions was a possible remedy if those provisions were found unconstitutional, these propositions of law should be rejected.

I. Overview of *Foster*’s Severance Remedy

In *Apprendi v. New Jersey* (2000), 530 U.S. 466, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. The Court applied the *Apprendi* principle to state sentencing guidelines in *Blakely v. Washington* (2004), 542 U.S. 296, and to the federal sentencing guidelines in *United States v. Booker* (2005), 543 U.S. 220.

In *Foster*, this Court held that *Apprendi* and *Blakely* required the invalidation of the Ohio statutory sentence-finding provisions that applied to non-minimum, maximum,

and consecutive sentences, as well as those sentence-finding provisions that applied to the imposition of an additional one-to-ten years on repeat violent offenders and major drug offenders. *Foster*, 109 Ohio St.3d 1, paragraphs one, three, and five of the syllabus.

As its remedy for such unconstitutionality, *Foster* followed the blueprint set forth in *Booker* and severed the unconstitutional sentence-finding provisions from the statutory scheme. *Id.* at paragraphs two, four, and six of the syllabus. As a result, trial courts now have full discretion to impose non-minimum, maximum, and consecutive sentences without making statutory findings. *Id.* at paragraph seven of the syllabus. *Foster* also ordered new sentencing hearings for cases pending on direct appeal and emphasized that trial courts on remand could impose any sentence within the appropriate felony range, including consecutive sentences for multiple counts. *Id.* at ¶¶103-06.

Defendant is wrong in arguing that *Foster*'s severance remedy "cuts a wide swath" through the sentencing statutes. (Brief, 13) As explained in *Foster* itself, "the severance remedy preserves 'truth in sentencing,' a fundamental element of S.B. 2." *Id.* at ¶101. Senate Bill 2 did much more than just require sentence findings, and the "overwhelming majority" of the Bill's reforms survive after *Foster*. *Id.* "Severance is also the remedy that will best preserve the paramount goals of community safety and appropriate punishment and the major elements of our sentencing code." *Id.* at ¶102.

Thus, even after *Foster*, trial courts must still be guided by the overriding purposes of felony sentencing, R.C. 2929.11(A), and must still consider the various factors relating to the seriousness of the offense and the likelihood of recidivism, R.C. 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶38. In contrast, defendant's proposed remedy of requiring minimum, concurrent sentences—regardless of

the seriousness of the offense or the likelihood the offender will recidivate—would have *eliminated* the ability of trial courts to comply with R.C. 2929.11 and R.C. 2929.12. “We do not believe that the General Assembly would have limited so greatly the sentencing court’s ability to impose an appropriate penalty.” *Foster*, at ¶89.

Although defendants may no longer appeal felony sentences on the basis of inadequate sentence findings, the State and defendants still may pursue appeals of right when the sentence is contrary to law. *Mathis*, at ¶23. Of course, Ohio’s felony sentencing scheme after *Foster* differs in some respects from the post-*Booker* federal sentencing guidelines. But this does not mean that *Foster*’s severance remedy is somehow deficient. Rather, it reflects the simple fact that Ohio’s felony sentencing scheme and the federal sentencing guidelines were different to start with. After all, when two statutes are different before severance, they will be necessarily be different after severance as well (even if they are severed for the same reason). In any event, just as *Booker*’s severance remedy upheld significant portions of the federal sentencing guidelines, so too did *Foster* leave intact significant portions of Senate Bill 2.

II. The Application of *Foster*’s Severance Remedy to Non-Final Cases Involving Pre-*Foster* Crimes Is Constitutional

A. Offenders Had Fair Warning of *Foster*’s Severance Remedy

In *Bouie v. City of Columbia* (1964), 378 U.S. 347, the United States Supreme Court held as a matter of due process 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,’ it must not be given retroactive effect.” *Id.* at 354, quoting Hall, *General Principles of Criminal Law* (2d ed. 1960), at 61. Although *Bouie* referenced general *ex post facto* principles, the Court later refused to incorporate “jot-for-jot” the Ex

Post Facto Clause into due process limitations on judicial decisionmaking. *Rogers v. Tennessee* (2001), 532 U.S. 451, 459. The Court explained that *Bowie* was “rooted firmly in well established notions of *due process*” and that “[i]ts rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.” *Id.* (emphasis sic).

Thus, although defendant relies also on the Sixth Amendment and the Ex Post Facto Clause, his constitutional challenge to the application of *Foster*’s severance remedy to pre-*Foster* crimes is in substance a *due process* argument. Indeed, defendant’s Sixth Amendment argument is particularly inappropriate here. The Sixth Amendment merely allocates fact-finding power between trial courts and juries. *Blakely*, 542 U.S. at 308. It has no internal non-retroactivity component. In light of *Foster*, the trial court on remand did not need to make any factual findings at all in order to impose maximum, consecutive sentences on the non-capital counts. Thus, defendant’s claim that the non-capital sentences violate the Sixth Amendment is a non-starter. *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶5 (rejecting claim that application of *Foster* severance remedy violated Sixth Amendment, because “[t]he trial court did not resentence appellant based upon any additional factual findings not found by a jury, and appellant did not receive greater than the statutory maximum based upon factual findings the jury did make, as prohibited by *Blakely*.”).

Under the proper due-process framework, defendant fails to show that *Foster*’s severance remedy is improperly retroactive. To start, defendant’s retroactivity argument suffers from a fundamental flaw—*Foster*’s severance of the various sentencing-finding

provisions was not the result of a “judicial construction” of a criminal statute. Instead of being a “judicial construction,” *Foster*’s severance remedy was a result of constitutional challenges to the statutory scheme. *Foster* did not expand the statutes as a matter of judicial construction, but rather severed the sentence-finding provisions deemed unconstitutional. Whether foreseeable or not, the question of severance arises as an imperative flowing from a constitutional issue and is not “judicial construction” as understood in *Bowie*.

In any event, *Foster*’s severance remedy was a foreseeable result if the constitutional challenges to the various sentence-finding provisions were successful. R.C. 1.50, the severability statute, has been in effect since 1972 and provides that *any* statutory provision that is held unconstitutional may be severed. And *Geiger v. Geiger* (1927), 117 Ohio St. 451, a leading case on severability, has been on the books for 80 years. Thus, any party who wishes to benefit from a finding that a statute is unconstitutional is on notice that severance is possible.

Indeed, this Court has on numerous occasions severed unconstitutional statutes. See, e.g., *City of Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, ¶39; *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1, 17; *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 464-65; *Geiger*, 117 Ohio St. at 466. Consequently, offenders could hardly have been surprised that *Foster* invoked R.C. 1.50 and severed the various sentence-finding provisions.

This Court’s decision in *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, does nothing to diminish the foreseeability of *Foster*’s severance remedy. To start, *Griffin* was decided well *after* defendant’s criminal conduct and thus had no effect

on defendant's reasonable expectations. *Bradshaw v. Richey* (2005), 546 U.S. 74, 78 (appellate decision released after defendant's criminal conduct "has no bearing on whether the law at the time of the charged *conduct* was clear enough to provide fair notice") (emphasis sic). Moreover, this Court's remark in *Griffin* that, if the respondent trial judge in that case found any sentencing statutes unconstitutional, "he should apply the pertinent sentencing statutes without any [unconstitutional] enhancement provisions," *id.* at ¶17, actually *foreshadowed Foster's* severance remedy. The remark warned offenders that the unconstitutionality of any sentencing statutes would have no effect on the viability of the remaining "pertinent" statutes.

Regardless, due process does not require that offenders have perfect notice of the exact outcome of any case. Even if *Griffin* did not foreshadow *Foster*, R.C. 1.50 and this Court's numerous decisions severing unconstitutional statutes gave offenders fair warning that any unconstitutional sentence-finding provisions could be severed. Accordingly, *Foster's* remedy was far from "unexpected and indefensible," *Bouie*, 438 U.S. at 354, and its application to cases involving pre-*Foster* crimes does not violate due process.

B. Defendant's "Element" Characterization is Misplaced

Defendant contends that *Foster's* severance of the sentence-finding requirements amounts to the retroactive elimination of an element of the offense. (Brief, 11-13) But the same could have been said in *Booker*, and yet the *Booker* majority applied a severance remedy there.

The chief flaw in defendant's "elements" argument is that he assumes that the sentence-findings requirements were part of the statutory scheme at the time he

committed his offenses. For cases not yet final, the rule is that a finding of unconstitutionality invalidates the statutory provision ab initio. *Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 80 (“an unconstitutional law must be treated as having no effect whatsoever from the date of its enactment.”). An unconstitutional provision confers no right or protections. *Id.* at 80. “[O]nce a statute has been found unconstitutional, it no longer applies to cases pending thereunder.” *Roberts v. Treasurer* (2001), 147 Ohio App.3d 403, 410.

Under this principle, the sentence-finding provisions were unconstitutional and severable from the beginning and never were the law. If one imagines defendant anticipating that he would commit these crimes and asking this Court on that very day to decide whether he would be entitled to non-minimum, concurrent sentencing, the law assumes that the result would have been that the findings would be severed, just as in *Foster* on February 27, 2006.

Of course, criminal defendants do not obtain appellate rulings on the very day they commit their crimes. And they do not consult the criminal code or the rulings of the United States Supreme Court either. But the law nevertheless employs a standard of foreseeability in assessing whether judicial constructions of a statute will be applicable in pending and new cases. Defendant wants the benefits of the *Foster* ruling as if it were made on the day of his crimes, but he does not want the burden of the *Foster* remedy as if it were made on the day of crimes. Unconstitutionality and severance go hand in hand. As the New Jersey Supreme Court aptly stated, a “[d]efendant does not have the right to a windfall sentence under an unconstitutional scheme, but only the right to a new sentencing proceeding under a constitutional one.” *State v. Natale* (2005), 184 N.J. 458,

492, 878 A.2d 724, 743; see, also, *State v. Brewer*, 5th Dist. No. 06-COA-46, 2007-Ohio-5682, ¶23 (citing *Natale*).

Defendant also errs in treating the sentence-finding provisions as “elements.” Although the *Apprendi-Blakely* line of cases may treat them as the equivalent of elements to be proven to a jury for Sixth Amendment purposes, those cases do not control the issue of severance because severance is a state-law question. *Virginia v. Hicks* (2003), 539 U.S. 113, 121 (“[w]hether these provisions are severable is of course a matter of state law”). As a matter of severance, which focuses on the legislative intent, these sentence-finding provisions clearly are not “elements” because the General Assembly did not intend them to be elements, as shown by its requirement that they would be decided by a judge rather than a jury. This legislative intent is further shown by the structure of the criminal code, which defines the crimes in Chapters 2903 et seq. but sets forth these sentence-finding provisions separately in Chapter 2929.

Thus, this is not an instance of *Foster* severing an “element” from the statute defining the offense and leaving in place a de facto lesser-included offense that the General Assembly never intended to be prosecuted with the higher penalty. Cf. *Long v. State* (Tex. Crim. App. 1996), 931 S.W.2d 285, 296 (refusing to excise element because “[s]uch a result was clearly not intended by the legislature”). Rather, *Foster* severed the sentence-finding provisions because the General Assembly clearly *did* intend that the crimes defined in Chapters 2903 et seq. be prosecutable and did intend that non-minimum, maximum, and consecutive sentences would be available. The overriding legislative purpose is to protect the public and punish the offender, see R.C. 2929.11(A), and a mandatory cap requiring minimum, concurrent sentencing simply was not within

that legislative intent. Treating the sentence-finding provisions as “elements” would violate the legislative intent.

C. General Ex Post Facto Principles Lend No Support to Defendant’s Due-Process Argument

Defendant’s attempt to equate *Foster*’s severance remedy with an ex post facto statute is unconvincing. As noted above, ex post facto principles do not apply to judicial decisionmaking. *Rogers*, 532 U.S. at 459. Moreover, *Dobbert v. Florida* (1977), 432 U.S. 282, is instructive. The defendant in that case argued that subjecting him to Florida’s new death-penalty statute violated ex post facto principles because there was no “valid” death-penalty statute in effect at the time of his crimes. The Court rejected this argument, stating that the old statute, regardless of whether it was constitutional, “provided fair warning as to the degree of culpability which the State ascribed to the act of murder.” *Id.* at 297. The existence of the old statute was an “‘operative fact’ to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution.” *Id.* at 298.

Likewise, Ohio’s sentencing statutes have long served as an “operative fact” warning offenders of the potential penalties that may be imposed for various crimes. See R.C. 2929.14(A) (setting forth available sentencing ranges); R.C. 2929.14(E)(4) (setting forth availability of consecutive sentencing). Thus, regardless of the procedure a trial court must follow to impose a particular sentence, offenders were fairly warned that certain crimes carried the possibility of certain penalties. *State v. McGhee*, 3rd Dist. No. 17-06-05, 2006-Ohio-5162, ¶16 (following *Dobbert*, stating that “prior to *Foster*, people

who decided to commit crimes were aware of what the potential sentences could be for the offense committed.”).

To this end, federal circuit courts have consistently rejected arguments that the remedy fashioned in *Booker*, 543 U.S. 220, violates ex post facto or *Bouie* due-process principles. See, e.g., *United States v. Barton* (C.A. 6, 2006), 455 F.3d 649, 657 (“Defendant’s ex post facto and due process arguments lack merit.”); *United States v. Alston-Graves* (C.A.D.C., 2006), 435 F.3d 331, 343 (“Alston-Graves therefore had ample warning of the potential sentence that could be imposed when she committed her crimes and had no reason to expect a lesser sentence.”); *United States v. Jamison* (C.A. 7, 2005), 416 F.3d 538, 539 (“Jamison also had fair warning that distributing cocaine base was punishable by a prison term of up to twenty years, as spelled out in the United States Code.”); *United States v. Lata* (C.A. 1, 2005), 415 F.3d 107, 112 (“Before committing the crime, Lata would have known only one thing for certain, namely, the 20-year maximum statutory sentence for bank robbery.”); *United States v. Duncan* (C.A. 11, 2005), 400 F.3d 1297, 1307 (“Duncan, therefore, had ample warning at the time he committed his crime that life imprisonment was a potential consequence of his actions.”).

Ohio cases have reached the same conclusion regarding *Foster*. “[E]very Ohio Appellate District has * * * ruled that *Foster* did not violate the ex post facto clause or a defendant’s due process rights.” *State v. Keeton*, 5th Dist. No. 2007-CA-13, 2007-Ohio-6342, ¶17 (collecting cases).

Moreover, defendant’s reliance on *Miller v. Florida* (1987), 482 U.S. 423, is misplaced. In that case, when the defendant committed his crime, the presumptive sentence range was 3 ½ to 4 ½ years; by the time of his sentencing, the state legislature

had increased the presumptive sentence range to 5 ½ to 7 years. In finding that the increase in the presumptive range violated the Ex Post Facto Clause, the Court explained that there was no statute in effect at the time the defendant committed his crime warning him that the presumptive range would be 5 ½ to 7 years. *Id.* at 431. In this regard, a general rule that sentencing statutes were “subject to revision” was insufficient warning. *Id.* The Court also concluded that the new law was substantive in that it increased the “quantum of punishment.” *Id.* at 433-34.

Unlike the defendant in *Miller*, who had no notice that Florida would increase the presumptive range for his crime to 5 ½ to 7 years, offenders in Ohio had ample notice that courts could sever unconstitutional sentencing statutes. Ohio offenders also had fair warning (1) that they would be subject to the maximum penalties set forth in R.C. 2929.14(A), and (2) that the commission of multiple crimes could result in consecutive sentences. Thus, even after the release of the *Foster* Court’s opinion, the “widely recognized potential sentence remain[s] unchanged from the time of the criminal conduct.” *Duncan*, 400 F.3d at 1308, n. 13 (distinguishing *Miller*).

Miller is inapposite for other reasons. First, the legislative change in *Miller* was not prompted by a constitutional imperative calling for severance. Changes resulting from constitutional adjudication need not be foreseeable.

Second, the presumptive range in *Miller* constituted a substantial disadvantage to the defendant, representing a “high hurdle” that would allow upward departure only for “clear and convincing reasons” based on facts proven beyond a reasonable doubt and only based on facts not already weighed in arriving at the presumptive range. No such “high hurdle” was involved in Ohio’s sentencing findings, which were more easily

satisfied under a preponderance standard and could be satisfied by facts internal to the offense.

Third, *Miller* is inapplicable because the increase in the presumptive range in *Miller* served to substantially hinder the defendant's ability to receive the lesser sentence of 3 ½ to 4 ½ years that had been within the former presumptive range. In contrast, the *Foster* severance of the Ohio sentencing findings still allows defendants to receive minimum, concurrent sentences in the judge's discretion.

Essentially, defendant wants it both ways—he seeks the benefit of the retroactive application of *Foster*'s merit holding while simultaneously claiming that the same degree of retroactivity of the severance remedy is unconstitutional. As stated before, such a result is not required. *Foster*'s severance remedy comports with due process.

For the foregoing reasons, defendant's first, second, and third propositions of law should be rejected.

Response to Fourth Proposition of Law: Trial courts retain jurisdiction after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, to impose consecutive sentences.

Defendant's fourth proposition of law claims that *Foster* severed the trial court's statutory authority to impose consecutive sentences. Defendant, however, ignores the plain language of *Foster* itself, which makes clear that trial courts retain jurisdiction to impose consecutive sentences. Trial courts also have inherent authority to impose consecutive sentences. Defendant's sentencing-authority argument lacks merit. This proposition of law should therefore be rejected.

I. *Foster* Retained Trial Courts' Authority to Impose Consecutive Sentences

While *Foster* severed certain sentence-finding requirements vis-à-vis consecutive sentencing, *Foster* expressly held in the syllabus that trial courts retain the ability to impose consecutive sentences:

3. Because R.C. 2929.14(E)(4) and 2929.41(A) require judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before the imposition of consecutive sentences, they are unconstitutional.

4. R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. *After the severance, judicial factfinding is not required before imposition of consecutive prison terms.*

* * *

7. 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, at paragraphs three, four, and seven of the syllabus (emphasis added; citations omitted). “If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively.” *Id.* at ¶105.

As can be seen, after severance, *Foster* expressly approves “imposing maximum, consecutive or more than minimum sentences.” Defendant is essentially contending that *Foster* unintentionally severed the authority of trial courts to impose such sentences, but, given the syllabus, it is plain that that authority was not severed.

A fair reading of *Foster* as a whole supports the view that this Court severed the sentence-finding requirements pertinent to consecutive sentencing. “The excised portions remove *only the presumptive and judicial findings* that relate to ‘upward departures,’ that

is *the findings* necessary to increase the potential prison penalty.” Id. at ¶98 (emphasis added). Read as a whole, *Foster* left in place the first part of R.C. 2929.14(E)(4), which provides that “[i]f 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 * * *.”

Indeed, Ohio appellate courts have consistently rejected the idea that *Foster* severed trial courts’ authority to impose consecutive sentences. *State v. Rigsbee*, 2nd Dist. No. 06-CA-41, 2007-Ohio-6267, ¶38, citing *State v. Worrell*, 10th Dist. No. 06AP-706, 2007-Ohio-2216, and *State v. Gonzales*, 3rd Dist. No. 5-06-43, 2007-Ohio-3132; see, also, *State v. Hall*, 4th Dist. No. 07CA837, 2007-Ohio-6091, ¶13; *State v. Fulton*, 6th Dist. No. E-07-12, 2007-Ohio-4608, ¶15.

II. Trial Courts Have Inherent Authority to Impose Consecutive Sentences

Even in the absence of statutory authority, Ohio trial courts would retain inherent authority to impose sentences in a consecutive fashion. In *Henderson v. James* (1895), 52 Ohio St. 242, 254-255, this Court endorsed consecutive sentencing as an inherent power of a sentencing court:

As we have no statute authorizing cumulative sentences for crime, it would seem at first blush, that such sentences should not be permitted in this state; but this court, with the courts of most of the other states, as well as England, has sustained cumulative sentences without the aid of a statute.

The great weight of authority is in favor of cumulative sentences, and they should be upheld on principle. The severe punishments which induced judges to invent technicalities to aid the acquittal of those on trial, on criminal charges, no longer exist, and under our just and humane statutes, those who violate the law should be duly punished for each offense.

In *Sherman v. United States* (C.A. 9, 1957), 241 F.2d 329, the court was confronted with a similar challenge as defendant brings, albeit in the federal context. There, the court also found that the authority to issue consecutive sentences is inherent:

The power to impose consecutive sentences has been discussed in so many cases little good would be accomplished to repeat here. Suffice it to say that the practice long predates Section 3568, U.S.C. 18. The power to impose consecutive sentences is inherent in the court. It has been said that by enacting former Section 709a, et seq. of Title 18, relating to penalties and sentences Congress did not abolish the long sanctioned practice of imposing consecutive sentences, or sentences to begin in the future. Sentences for separate crimes may be consecutive.

Id. at 336-37 (citations omitted); see, also, *State v. Jones* (Ore. 1968), 440 P.2d 371, 372 (statute authorizing consecutive sentences repealed; consecutive sentences imposed pursuant to inherent power of court).

The Tenth District recently rejected the “lack of authority” argument that defendant is now raising. The Court concluded that it “would be contrary to the *Foster* decision” to conclude that a trial court cannot impose consecutive sentences. *Worrell*, at ¶10. The Court also “note[d] that previous Ohio Supreme Court decisions expressly endorsed the idea that the authority of a court to impose consecutive sentences derives from the common law.” *Id.* at ¶11. The Court quoted extensively from *Henderson v. James* and also cited *State ex rel. Stratton v. Maxwell* (1963), 175 Ohio St. 65, 67, in which this Court stated, as follows:

It is clear that a court has the power to impose consecutive sentences. *Henderson v. James, Warden*, 52 Ohio St., 242. In fact it is well settled that in the absence of an affirmative act by the court multiple sentences run consecutively and not concurrently. A provision that sentences shall run concurrently is actually in the nature of a reward.

The *Worrell* Court also cited *Stewart v. Maxwell* (1963), 174 Ohio St. 180, 181, in which

this Court stated that “in the absence of statute, it is a matter solely within the discretion of the sentencing court as to whether sentences shall run consecutively or concurrently.” See also, *State v. Taylor*, 12th Dist. No. CA2006-09-039, 2007-Ohio-2850, ¶¶6-7 (discussing *Henderson*, *Stewart*, and *Stratton*).

Some have argued that the foregoing case law is outdated because it precedes the adoption of R.C. 2901.03(A), which recognizes that Ohio does not have common-law crimes or common-law penalties. But this statute does not detract from a trial court’s inherent ability to decide whether penalties will be served consecutively or concurrently.

All of defendant’s sentences are for statutory offenses carrying statutory penalties. The issue is not whether these statutes provided a penalty; rather, the issue is when the statutory penalty will be enforced. By deciding that one penalty will follow another on a consecutive basis, a trial court is merely determining when the statutory penalties will be served; it is not adding a new penalty to defendant’s crimes.

While the case law cited by *Worrell* predated R.C. 2901.03, Ohio’s rejection of common-law crimes and common-law penalties occurred long before R.C. 2901.03. The absence of common-law crimes and common-law penalties was recognized even before *Henderson v. James. Mitchell v. State* (1884), 42 Ohio St. 383, 385 (collecting cases – “we have no common law offenses”). Even with this doctrine against common-law crimes in place, this Court has long recognized that consecutive sentencing is an inherent power. Since R.C. 2901.03 did not change Ohio law, it provides no basis to distinguish *Henderson v. James* and its progeny.

For the foregoing reasons, defendant’s fourth proposition of law should be rejected.

Response to Fifth Proposition of Law: The severance remedy announced in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, does not violate the rule of lenity.

Defendant's fifth proposition of law claims that *Foster's* severance remedy violates the rule of lenity codified in R.C. 2901.04(A). Specifically, defendant argues that the rule of lenity required this Court in *Foster* to adopt as its remedy the imposition of minimum, concurrent sentences on all offenders. The rule of lenity, however, is a narrow rule of statutory construction and was a non-issue in this Court's selection of severance as the proper remedy in *Foster*. This proposition of law should therefore be rejected.

I. The Severance Remedy Adheres to the General Assembly's Intent

Defendant is wrong in contending that the severance remedy undermines the General Assembly's intent. This Court in *Foster* carefully considered the General Assembly's intent in determining the appropriate remedy. In particular, this Court stated that it was mindful that "the overriding goals of Ohio's sentencing scheme are to protect the public and punish the offender" and that the General Assembly "delegated the role of determining the applicability of sentencing factors to judges rather than to juries to meet these overriding goals." *Foster*, at ¶86.

Contrary to defendant's assertion, *Foster's* severance remedy adheres to the General Assembly's intent. As explained in *Foster*, "[e]xcising the unconstitutional provisions does not detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender." *Id.* at ¶98, citing

R.C. 2929.11(A). In contrast, this Court explained that adopting a remedy requiring minimum, concurrent sentences would defy the General Assembly's intent:

The General Assembly provided a sentencing scheme of "guided discretion," for judges, intending that the required findings guide trial courts to select sentences within a range rather than to mandate specific sentences within that range. When mandatory sentences are intended, they are expressed. We, therefore, reject the criminal defendants' proposed remedy of presumptive minimum sentences, for we do not believe that the General Assembly would have limited so greatly the sentencing court's ability to impose an appropriate penalty.

Id. at ¶89 (footnote omitted). Put differently, requiring trial courts to impose minimum, concurrent sentences on all offenders would effectively prohibit trial courts from considering the seriousness of offenders' conduct and the danger offenders pose to the public. The General Assembly would have never intended such a result.

II. Nothing in R.C. 2901.04(A) Required this Court in *Foster* to Adopt the Remedy Most Lenient to Defendants

Defendant's rule-of-lenity argument also suffers from a misunderstanding of R.C. 2901.04(A). R.C. 2901.04(A) is a rule of statutory construction, and the only statute this Court in *Foster* arguably "construed" in determining the appropriate remedy was R.C. 1.50. R.C. 2901.04(A), however, applies only to statutes "defining offenses or penalties." Since R.C. 1.50 defines no offenses or penalties, R.C. 2901.04(A) was a non-issue in *Foster*. C.f. *State v. Goist*, 11th Dist. No. 2002-T-136, 2003-Ohio-3549, ¶23 (rule of lenity does not apply to R.C. 2953.21, because postconviction relief is a civil remedy).

Even if it could potentially apply to a statute that defines no offenses or penalties, R.C. 2901.04(A) is pertinent only when a criminal statute is ambiguous. *State v. Rush* (1998), 83 Ohio St.3d 53, 58, n. 5; *State v. Arnold* (1991), 61 Ohio St.3d 175, 178.

“Absent ambiguity, the rule of lenity is not applicable to guide statutory interpretation.” *United States v. Johnson* (2000), 529 U.S. 53, 59. But there is no ambiguity in R.C. 1.50. R.C. 1.50 plainly states that unconstitutional provisions are severable and that the remaining provisions remain viable to the extent they can be given effect without the unconstitutional provisions. R.C. 1.50 is clear, and there was no need for the Court in *Foster* to invoke R.C. 2901.04(A) to “construe” it.

To this end, this Court has stressed that R.C. 2901.04(A) does not allow courts to “ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized.” *State v. Snowden* (1999), 87 Ohio St.3d 335, 336, quoting *Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, 347. “The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly.” *State v. Sway* (1984), 15 Ohio St.3d 112, 116, citing *United States v. Moore* (1975), 423 U.S. 122, 145, and *United States v. Brown* (1948), 333 U.S. 18, 25-26.

Similarly, the United States Supreme Court has observed that “[t]he rule of lenity [] is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute.” *Chapman v. United States* (1991), 500 U.S. 453, 463 (internal quotation marks, citations, and brackets omitted). Thus, the rule “comes into operation at the end of the process of construing what [the

legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.” *Id.* (internal quotation marks, citations, and brackets omitted).

In the final analysis, nothing in R.C. 2901.04(A) required this Court in *Foster* to tip the scales toward defendants in determining the appropriate remedy. Rather, this Court needed only to apply the plain language of R.C. 1.50 and its own precedents on severability to conclude that severance of the various sentence-finding statutes was the proper remedy.

Notably, defendant does not contend that the trial court violated the rule of lenity in its *application* of the post-*Foster* sentencing scheme. Indeed, any such argument would be wholly without merit. Again, R.C. 2901.04(A) is only pertinent when a statute is ambiguous. *Rush*, 83 Ohio St.3d at 58, n. 5. There is nothing ambiguous about the post-*Foster* version of the sentencing statutes, which merely requires trial courts to impose sentences within clearly defined ranges. *State v. Zwelling*, 5th Dist. Nos. CT2006-0055, CT2006-0051, 2007-Ohio-3691, ¶34. (“There exists no ambiguity in the Ohio sentencing statutes following *Foster*.”). If anything, *Foster* made the sentencing statutes *more* clear.

For the foregoing reasons, defendant’s fifth proposition of law should be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that defendant’s propositions of law should be rejected. Although mindful of *Foster*, undersigned counsel for amicus wish to preserve the contention that many of the sentence-finding provisions did not violate *Apprendi* or *Blakely*. Many of these findings were not findings of *fact*, but rather, at best, only findings that certain penological goals were being considered, i.e.,

adequate punishment of the offender and adequate protection of the public. These penological benchmarks were not matters of fact, and neither *Apprendi* nor *Blakely* would require “proof” of such matters to a jury. Moreover, many of these findings were permissible under *Apprendi*’s “prior conviction exception.” Also, *Apprendi* and *Blakely* by their own terms do not apply to consecutive sentencing, as a number of courts have so held.

If the *Foster* severance remedy were to be re-examined and invalidated, then a similar re-examination of *Foster*’s invalidation of the sentencing-finding provisions would also be warranted.

Respectfully submitted,

RON O’BRIEN 0017245
Prosecuting Attorney



SETH L. GILBERT 0072929
(Counsel of Record)

STEVEN L. TAYLOR 0043876
Assistant Prosecuting Attorneys
Counsel for Amicus Curiae Ohio
Prosecuting Attorneys Association

CERTIFICATE OF SERVICE

^{2nd} This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this
day of January, 2008, to:

KEITH A. YEAZEL
5354 North High Street
Columbus, Ohio 43214

W. JOSEPH EDWARDS
523 South Third Street
Columbus, Ohio 43215

Counsel for Defendant-Appellant

KENNETH W. OSWALT
Licking County Prosecutor
20 South Second Street, Suite 201
Newark, Ohio 45055

Counsel for Plaintiff-Appellee



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney

APPENDIX

R.C. 1.50.....A-1

R.C. 2901.03A-2

R.C. 2929.11A-3

R.C. 2929.12.....A-4

R.C. 2953.21A-7

§ 1.50. Severability of Code section provisions.

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

History

HISTORY: 134 v H 607. Eff 1-3-72.

Analogous to former RC § 1.13 (GC § 26-2; 122 v 239; Bureau of Code Revision, 10-1-53), repealed, 134 v H 607, eff 1-3-72.

§ 2901.03. Common law offenses abrogated.

(A) No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.

(B) An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.

(C) This section does not affect any power of the general assembly under section 8 of Article II, Ohio Constitution, nor does it affect the power of a court to punish for contempt or to employ any sanction authorized by law to enforce an order, civil judgment, or decree.

History

HISTORY: 134 v H 511. Eff 1-1-74.

Not analogous to former RC § 2901.03 (RS § 7388-52; 98 v 180; GC § 12402; Bureau of Code Revision, 10-1-53; 126 v 575), repealed 134 v H 511, § 2, eff 1-1-74.

§ 2929.11. Purposes of felony sentencing; discrimination prohibited.

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

History

HISTORY: 146 v S 2. Eff 7-1-96.

Not analogous to former RC § 2929.11 (134 v H 511; 137 v S 119; 139 v S 199; 140 v S 210; 140 v H 265; 140 v S 4; 141 v H 284; 143 v H 51; 143 v S 258), repealed 146 v S 2, § 2, eff 7-1-96.

§ 2929.12. Seriousness and recidivism factors.

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

- (1) The victim induced or facilitated the offense.
- (2) In committing the offense, the offender acted under strong provocation.
- (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
- (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

- (1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 [2929.14.1] of the Revised Code.
- (2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.
- (3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.
- (4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.
- (5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

History

HISTORY: 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.

Analogous to former RC § 2929.12 (134 v H 511; 137 v S 119; 138 v S 384; 139 v S 199; 143 v S 258; 145 v S 186), repealed 146 v S 2, § 2, eff 7-1-96.

§ 2953.21. Petition for postconviction relief.

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

History

HISTORY: 131 v 684 (Eff 7-21-65); 132 v H 742 (Eff 12-9-67); 141 v H 412 (Eff 3-17-87); 145 v H 571 (Eff 10-6-94); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 258 (Eff 10-16-96); 149 v H 94. Eff 9-5-2001; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06.