

IN THE SUPREME COURT OF THE UNITED STATES

State of Ohio,

Plaintiff-Appellee,

vs.

Case No. 2007-0475

Phillip Elmore,

Defendant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE

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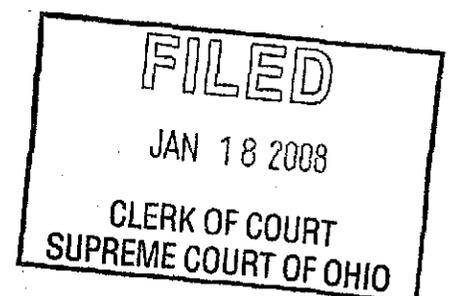


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STATEMENT OF THE CASE AND FACTS

The State of Ohio has no objection to the Statement of the Case, nor the Statement of the Facts presented by the Defendant-Appellant, except to the extent, if at all, there are additional or different facts set forth in the argument to follow.

Proposition of Law

*[In response to all assignments of error]*¹

THE *EX POST FACTO* CLAUSE, NOR THE DUE PROCESS CLAUSE, NOR ANY PROVISION OF STATE LAW, PROHIBIT THE RE-SENTENCING OF THE APPELLANT WHEN HE WAS GIVEN FAIR NOTICE OF THE POSSIBLE SENTENCES HE COULD FACE AT THE TIME OF HIS TRIAL.

Although the dynamics of the jurisprudence regarding retroactive laws has changed over the years, the United States Supreme Court has nonetheless long held that the Constitution neither prohibits, nor requires, the retroactive application of judicial decisions. See, generally, *Linkletter v. Walker* (1965), 381 U.S. 618, 629.² Indeed, as this Court has itself noted, the *Ex Post Facto* Clause “does not of its own force apply to the Judicial Branch,” of government. *State v. Webb* (1994), 70 Ohio St.3d 325, 331, citing, *Marks v. United States* (1977), 430 U.S. 188, 191. It is the Due Process Clause, not the *ex post facto* clause, which has been interpreted to place certain constraints on the judiciary’s power to make judicial decisions retrospective in their application. See, *Rogers v. Tennessee* (2001), 532 U.S. 451, 456-60, limiting, as dicta, any language to the contrary in, *Bouie v. City of Columbia* (1964), 378 U.S. 347.³

¹ Although the appellee does not address all of the arguments raised by Amicus Curiae, Ohio Prosecuting Attorneys Association (OPAA), the appellee nonetheless endorses the arguments advanced by the OPAA in its merit brief.

² The standard for deciding when a judicial decision would be made retroactive enunciated in this case was later disapproved of by *Griffith v. Kentucky* (1987), 479 U.S. 314. However, as far as undersigned counsel can find, this general proposition of constitution law has never been rejected. See, also *Tehan v. United States* (1966), 382 U.S. 406, 410, for similar language.

³ *Bouie* is easily distinguishable from the instant case. In that case the court interpretation was of a statutory provision and the change in the court’s interpretation of the statute was not compelled by anything but for a change of judicial opinion. In *United States v. Booker* (2005), 543 U.S. 220, and, *State v. Foster* (2006), 109 Ohio St. 3d 1, however, the changes in the law were the result of the Court fashioning a remedy to address another constitutional defect. See, further discussion *infra*.

Understood in these terms, the touchstone for determining whether a Due Process violation results from the retrospective application of a judicial decision is one of “fair notice”. Rogers. In the instant case, the appellant (as well as all other defendants similarly situated) had “fair notice” of what their potential sentences were. That fact has not changed at all in light of this Court’s opinion in State v. Foster (2006), 109 Ohio St. 3d 1. Moreover, at all times appellant was on “fair notice” that all findings that went into the matter of sentencing set out in Chapter 2929 would be determined by a judge, not a jury!⁴

That fact that the appellant may be disadvantaged by the fact that he faced re-sentencing without the protections of necessary findings being made prior to imposition of an enhanced sentence is not dispositive. Indeed, this would be so even if one were to *strictly* apply the *ex post facto* clause to the facts of this case. “Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.” Dobbert v. Florida (1977), 432 U.S. 282, 292-93, *f.n. 7*, citing Beazell v. Ohio (1925), 269 U.S. 167. See, also, Collins v. Youngblood (1990), 497 U.S. 37.

In essence, the appellant suggests that the remedial aspects of this Court’s Foster decision effected a change in the “substantive” law applicable to his case. However, his argument that under Blakely v. Washington (2004), 542 U.S. 296, he was entitled to have a jury determine all facts relevant to an enhanced sentence, but that the remedial aspects of this Court’s Foster decision took away that “substantive” right and therefore ran afoul of the *ex post facto* clause, is meritless. As Collins makes clear, the right to a jury determination of certain facts “is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *ex post facto* clause.” Collins, at 51-52. The *ex post facto* clause simply does not prohibit “any change

⁴ As an aside, appellant was also put on “fair notice” that should there be a Constitutional infirmity with the statutes under which he was convicted, the State of Ohio intended this Court to consider the use of severance as a remedy. See, R.C. 1.50.

‘which alters the situation of the party to his disadvantage.’” *Id.* at 50. (Italics added.) As previously noted, for instance, a procedural change is not covered by the *ex post facto* clause. *Dobbert, Collins, Beazell, supra.* A change is “procedural” when the change refers to “changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes”. *Collins, at 45.*

Further support for the conclusion that the issue herein is one of procedure (and therefore not subject to *ex post facto* concerns) can be found in *Schriro v. Summerlin* (2004), 542 U.S. 348. In that case the United States Supreme Court held that its prior decision in *Ring v. Arizona* (2002), 536 U.S. 584, which like the instant case involved the issue of whether a jury had to make a determination of certain sentencing factors, concerned a matter of *procedure*, not a matter of substantive law.⁵

In addition, it is at least questionable as to whether the *ex post facto* limitations embodied in the Due Process Clause would ever be applied to a change in law that was the direct result of a judicial decision when that decision is imposing the change as a specific remedy for another constitutional defect. Indeed, undersigned counsel can find no cases that find either an *ex post facto* clause violation, or a Due Process Clause violation stemming from a court’s use of severance as a remedy for another Constitutional violation.

A. Re-sentencing Is Not Prohibited by *Miller v. Florida*

The appellant’s reliance on *Miller v. Florida* (1987), 482 U.S. 423, is misplaced for several reasons. First, that case addressed the actions of the *legislature* in modifying sentencing guidelines that served to increase the presumptive sentence. It did not address the impact of a *judicial* decision.

⁵ Thus, the Court ordered it to be applied to all cases on direct review when it was decided, but not to cases that had become final prior to its announcement – just as this Court did in *Foster*.

Instead, it applied the stricter rules of *ex post facto* clause jurisprudence applicable to legislative enactments, rather than to “fair notice” due process standard applicable to judicial decisions.

Second, that case also made a distinction between a “substantive” versus a “procedural” change, the latter not being an *ex post facto* clause concern. *Id.* at 430-31. In light of the holdings in *Collins* and *Schriro*, it is clear that a modification that serves only to change the identity of the fact finder (e.g. from a judge to a jury, or vice versa) is a change in procedure and therefore not one that implicates *ex post facto* clause concerns. Thus, the *Miller* case actually supports this Court’s prior decision to order the remand for re-sentencing on this purely “procedural” ground.

Third, *Miller* is factually different in its underlying effect. In that case the newly enacted legislation served to increase a presumptive sentence range of 3 ½ to 4 ½ years, up to a presumptive sentence range of 5 ½ to 7 years. In the instant case, the opinion in *Foster* as applied in this Court’s earlier remand in *State v. Elmore* (2006), 111 Ohio St.3d 515, merely erased the existence of most presumptive sentences. It did not thereafter replace it with a new, higher, presumptive range. See, also, *United States v. Duncan* (11th Cir. 2005), 400 F.3d 1297, f.n. 13, (distinguishing *Miller* on similar grounds.)

Fourth, since the decision in *Miller*, the United States Supreme Court has “refined” its jurisprudence as to what constitutes a “procedural” versus a “substantive” change, and therefore what is, and what is not, covered by the Clause. In *Collins*, Chief Justice Rehnquist, writing for the Court, repudiated any notion that the *ex post facto* clause covered all changes in the law simply because they were seen as “substantial protections” a party had before the change. *Collins* at 46. However, this very type of language was central to the *Miller* court’s holding. *Miller* at 432-33, (defendant was “substantially disadvantaged” by change.) Thus, it is at least questionable whether *Miller* would be decided the same today.

B. Federal Circuit Court Decisions, Post-Booker

The Federal Circuit Courts of Appeals that have addressed this same issue in light of the United State's Supreme Court's imposition of a similar remedy in United States v. Booker (2005), 543 U.S. 220, have unanimously rejected an *Ex Post Facto*/Due Process Clause attack to re-sentencing. See, for example, Duncan, *supra*; United States v. Scroggins (5th Cir. 2005), 411 F.3d 572; United States v. Lata (1st Cir. 2005), 415 F.3d 107; United States v. Dupas (9th Cir. 2005), 419 F.3d 916; United States v. Jamison (7th Cir. 2005), 416 F.3d 538; United States v. Rines (10th Cir. 2005), 419 F.3d 1104; United States v. Wade (8th Cir. 2006), 435 F.3d 829; and, United States v. Vaughn (2nd Cir. 2005), 430 F.3d 518.

In fact, the Sixth Circuit Court of Appeals has rejected such an argument as recently as January 2008. See, U.S. v. Sexton (6th Cir. 2008), ___ F.3d ___, 2008 WL 104324, citing, United States v. Hill (6th Cir. 2006), 209 F. App'x 467, 468); United States v. Barton (6th Cir. 2006), 455 F.3d 649, 652-57; and, United States v. Shepherd (6th Cir. 2006), 453 F.3d 702, 705-06.

What the appellant in this case seeks, in essence, is the retroactive application of only *one* portion of the respective holdings (i.e. Booker as it relates to Federal sentencing, Foster as it relates to Ohio sentencing). Said differently, the appellant herein seeks to apply to his case this Court's conclusion in Foster that Blakely applies to Ohio's sentencing laws, but at the same time he does not want application of this Court's chosen remedy. Thus, what he seeks is a partial retroactive application. Cf. Duncan at 1306-1307.

This Court in Foster and the companion case of State v. Mathis (2006), 109 Ohio St.3d 54, made it clear that sentencing courts in this state must still consider all of the remaining sentencing factors contained in several sections of Chapter 2929. Foster, ¶105, ("Courts shall consider those

portions of the sentencing code that are unaffected by today's decision ...") Indeed, the entire thrust of *Booker*, and now *Foster*, is that only the "mandatory" finding aspects are excised, not all sentencing guidelines that favor a sentence higher than the minimum. ("Although after *Foster*, the trial court is no longer compelled to make findings and give reasons at the sentencing hearing since R.C. 2929.19(B)(2) has been excised, nevertheless, in exercising its discretion the court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purpose of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *Mathis*, at ¶ 38.)

C. Application of a New Remedial Rule to All Cases On Direct Review Is Constitutionally Required

Perhaps one of the most problematic aspects of the appellant's request to this Court that it *not* apply the remedial aspects of *Foster* to his case (and other cases that were pending direct review at the time of its pronouncement) is that applying this rule to all such cases is likely to be constitutionally required. "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication. ... [A]fter we have decided a new rule in [a specific case], the integrity of judicial review requires that we apply that rule to all similar cases pending upon direct review." *Griffith v. Kentucky* (1987), 479 U.S. 314, 322-23. The *Griffith* court continued: "As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* This viewpoint was expressed in subsequent cases, noting that to do otherwise would lead to disparate treatment of similarly situated defendants in cases that are not yet final. See, *Teague v. Lane* (1989)

489 U.S. 288, 303-305; and, *James Beam Distilling Co. v. Georgia* (1991), 501 U.S. 529, 537-538. As if this were not clear enough, the United States Supreme Court has further stated: “When this Court applies a rule of federal law to the parties before it, the rule is the controlling interpretation of federal law and *must* be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or postdate our announcement of the rule. . . . In both civil and criminal cases, we can scarcely permit ‘the substantive law [to] shift and spring’ according to ‘the particular equities of [individual parties’] claims’ of actual reliance on an old rule and of harm from a retroactive application of the new rule.” *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. 86, 97, (italics added), citing *Griffith*.

**D. The Appellant Has Forfeited His Rights To Raise An Attack
On His Original Sentencing, Absent Plain Error,
Which Has Not Been Demonstrated.**

In *Foster*, this Court rejected the state’s claim that a *Blakely* error had been “waived”. See, 109 Ohio St.3d. at 11-12. Accordingly, this Court in *Elmore* remanded this matter for resentencing on the non-capital sentences. 111 Ohio St.3d at 536. However, since that time, this Court has accepted that a *Blakely* error may be “forfeited” if not raised at the time of the initial sentencing. See, *State v. Payne* (2007), 114 Ohio St.3d 502.⁶ *Blakely* issues do not involve “structural” errors. *Id.* citing *Washington v. Recuenco* (2006), ___ U.S. ___, 126 S.Ct. 2546.

While *Blakely* was decided after the appellant was initially sentenced on the non-capital offenses, the appellant was nonetheless able to raise a claim under *Blakely*’s precursor case, *Apprendi v. New Jersey* (2000), 530 U.S. 466, at that time. See, *State v. Hill* (4th Dist.), 2007 WL

⁶ The “law of the case doctrine” is not applicable when in intervening decision of the Ohio Supreme Court is announced. See, *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, syllabus by the Court.

2897422, *f.n. 1*. He did not. Thus, while not “waived”, the issue was nonetheless “forfeited”. See, Payne (distinguishing “waiver” from “forfeiture”.) See, also, U.S. v. Cotton (2002), 535 U.S. 625, (Apprendi claim forfeited if not raised, absent plain error, even though Apprendi decided while case pending on appeal.)

Indeed, many of the issues that the appellant raised at the trial court and in the instant appeal are forfeited for a different reason: he did not raise them during his prior appeal to this Court. In light of Foster, the appellant should have known that a remand for resentencing on the non-capital offenses was a probable outcome as a result of his earlier appeal to this Court. Nonetheless, the appellant failed to raise in **that** appeal the issues now being argued in the instant appeal, although he certainly could have raised them as part of his efforts to get this Court to order a resentencing.

E. The “Rule of Lenity” Does Not Apply To A Remand Under *Foster*.

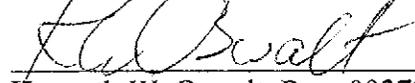
“The rule of lenity ‘applies where there is ambiguity in or conflict between the statutes’ at issue.” State v. Coleman (6th Dist.), 2007 WL 293171, ¶ 22, citing, State v. Arnold (1991), 61 Ohio St.3d 175, 178. As noted by the court in Coleman, “the rule has no application here since there is no ambiguity or conflict between statutes.” Foster merely severed the portions of the sentencing statutes which violated the Sixth Amendment. Coleman, at ¶ 23. See, also State v. Tanner (5th Dist.), 2007 WL 4638062, citing, United States v. Johnson (2000), 529 U.S. 53. (“Absent ambiguity, the rule of lenity is not applicable to guide statutory interpretation.”) See, also, State v. Bruce (2007), 170 Ohio App.3d 92, ¶¶ 12-13.

Conclusion

The appellant's claimed errors lack merit. There is no reasoned basis for applying to all cases on direct review this Court's determination that *Blakely* is applicable to Ohio's sentencing structure, while simultaneously saying that the chosen remedy (severance) is *in*applicable to the same cases. Moreover, since the appellant has received precisely the same sentences on the non-capital offenses prior to *Foster*, as he did in the post-*Foster* re-sentencing, he can show no basis to support any claim of prejudicial error.⁷

For the reasons stated above, all of the appellant's assignments of error should be denied in all respects.

Respectfully submitted,

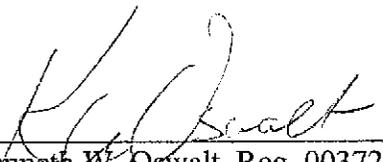


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⁷ In addition, in light of this Court's affirmance of the death penalty, the appellee stands by the argument it advanced in the earlier appeal that the issue herein is moot. See Supplemental Merit Brief of Appellee in *State v. Elmore* (2006), 111 Ohio St.3d 515. As long as the sentence of death exists, the sentences on the non-capital offenses involve merely an academic discussion.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the forgoing was sent this 16th day of Jan, 2008 by regular U.S. Mail to those parties listed on the cover-page hereto.


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Prosecuting Attorney