

IN THE SUPREME COURT OF OHIO

Ontrayis Keith, :  
 :  
 Appellant, :  
 :  
 v. :  
 :  
 State of Ohio, :  
 :  
 Appellee. :

On appeal from the Allen  
County Court of Appeals,  
Third Appellate District  
  
Court of Appeals  
Case No. 1-06-53

08-0577

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ONTRAYIS KEITH

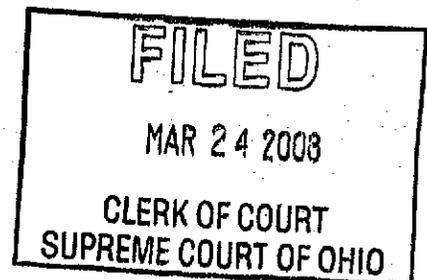
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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST AND  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

These two propositions of law have widespread application for the reason that it will affect thousands of inmates. Admittedly, countless appeals to this Honorable Court have raised this issue unsuccessfully. However, it is also well-known that failure to raise this issue before the Ohio Supreme Court eliminates any ability for the accused to complain by way of habeas relief before any federal court. Thus, this issue must again be raised.

Ohio appellate courts have routinely declined to apply the remedial holding from the *Foster* decision to cases that were not pending on direct review or pending before Ohio trial courts at the time of the issuance of the decision in *Foster*.

In *Foster*, this Court cited the *Booker* decision as approval for the principle that this type of a remedy must be applied retroactively to all cases pending on direct review, which is an accurate statement. However, that pronouncement does not answer whether further retroactive application would be required in the circumstance of a case that reaches the appellate courts by way of allowance of a delayed appeal. A “yes” to one group does not automatically operate as a “no” to others, as it is plausible to have both.

The *Booker* decision cited *Griffith v. Kentucky* (1987), 479 U.S. 314, as authority concerning retroactivity. *Griffith* did establish that a procedural rule applies to all criminal cases pending on direct review. However, *Griffith* very specifically did not rule that retroactivity automatically does not apply retroactively to cases that are already final. New substantive rules always apply retroactively. Further, a procedural rule *may* apply retroactively to sentences that have become final. As will be cited below, the United

States Supreme Court determined that retroactive effect is given to criminal procedural rules in a “small set” of cases, a “small set” not being the same as “in no cases.”

The critical analysis for the United States Supreme Court is whether the new procedural rule is a “watershed rule,” one that implicates the “fundamental fairness and accuracy of the criminal proceeding.”

It appears that the *Foster* decision has left one matter unresolved, namely whether the remedy in *Foster* is procedural or substantive and, if procedural, whether the remedy was one that would ensure fundamental fairness and accuracy of the criminal proceeding.

The United States Supreme Court did consider this very problem with respect to a post-*Blakely* remedy in *Schriro v. Summerlin* (2004), \_\_\_ U.S. \_\_\_. In *Schriro*, the Supreme Court addressed the requirement from *Ring v. Arizona* (\_\_\_\_), 536 U.S. 584, that factors relevant to imposition must be found by a jury. The United States Supreme Court noted that the *Ring* decision did not change the necessary facts but merely mandated a different procedure – a jury trial.

*Foster* is different from *Ring* because in *Foster* the procedure does not change. Rather, the mandatory factors are now merely advisory. Had this Honorable Court applied the remedy suggested by Judge Griffin in *State ex rel. Mason v. Griffin* (2004), 104 Ohio St.3d 279, then the retroactivity question would seem to parallel the issue in *Ring* and *Schriro*. The factors would have been mandatory, but the procedure to find those factors would have changed.

The *Foster* remedy removed the factors entirely, thereby appearing to be more substantive than procedural, in light of the discussion from *Schriro*. The United States Supreme Court has not considered the retroactivity question precisely as to the *Blakely*

line of cases. As with in *Foster*, the United States Supreme Court in *Booker* applied the *Booker* decision retroactively to the cases pending on direct review but did not clarify whether the *Booker* decision applied under the *Schriro* analysis retroactively to other cases. Further, the United States Supreme Court has not yet answered the retroactivity question precisely as to *Blakely*, *Cunningham*, or other similar State decisions.

It is the position of this appellant that *Foster* retroactivity is still not decided and must be pronounced by this Honorable Court. Mr. Keith will claim that *Foster* is substantive. In the alternative, Mr. Keith will claim that *Foster*, if procedural, implicates fundamental fairness and accuracy sufficiently for retroactivity to be applicable.

#### **STATEMENT OF THE CASE AND FACTS**

In January of 2005, the Allen County Grand Jury indicted Mr. Keith for Aggravated Robbery with a Firearm Specification for the December 1, 2004, robbery of Crazy's Wings & Things, in Allen County, Ohio.

Mr. Keith appealed his conviction after trial by jury for several reasons. Having lost that appeal, he filed a Notice of Appeal with this Honorable Court, appealing the decision of the Third District affirming the Trial Court.

Mr. Keith also timely filed a petition to reopen his appeal to raise sentencing issues that were not raised by appellate counsel. The Third District denied his request. Despite the plain fact that almost every felony appeal concerning conduct committed prior to the *Foster* decision, the original appellate counsel declined to address sentencing at all, which would have the effect of waiver should the matter ever be litigated in federal court for habeas relief. The Third District denied this request. This appeal followed.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law 1:** The Sentence imposed in this case, being a maximum sentence run consecutively to another sentence imposed in a different case on the same date, was imposed in violation of his State and federal right of the accused to a trial by jury on any fact necessary for enhancement to maximum and/or consecutive sentencing.

The United States Supreme Court, in *Blakely v. Washington* (June 24, 2004), No. 02-1632, addressed the impact of *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, wherein the Court had 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.” The import of *Blakely* was to define the term “statutory maximum.” In *Blakely*, the Court addressed a statutory scheme where the statute referred to a range of up to ten (10) years in prison but where additional statutory provisions limit the discretion of the judge further within that limit to a smaller actual limit unless the sentencing court makes additional findings. The Court ruled that “the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” Whenever the statute, as in *Washington*, calls for one range, and yet requires some lesser range but for additional findings not made by a jury, then sentencing above that lesser range violates the *Apprendi* rule. “When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment \* \* \* and the judge exceeds his proper authority.” *Blakely*. Ultimately, the holding was that “because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury.” *Blakely*, at Syllabus.

The *Foster* decision (*State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470), provided a procedure for getting beyond Ohio presumptions, to enable the Trial Court to impose a greater sentence than minimum and to impose consecutive sentences. The Ohio Supreme Court was compelled by the decision in *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, to recognize that the procedure enacted in Ohio to overcome the presumptions benefiting the accused violated the right of the accused to trial by jury. Therefore, the provision of law establishing this procedure was struck down and invalidated.

Had this appeal been litigated properly, the Third District would have been compelled to acknowledge this fact but would likely have been compelled to not remand Mr. Keith's case for a new sentencing hearing, but the issue would be preserved for review. It is not simply the likelihood of success at the specific level that dictates whether counsel has fulfilled his duties. It is also incumbent upon counsel to preserve legitimate issues for later review by this Honorable Court and possibly for federal review.

The Third District should have granted the petition to reopen, perhaps denying the appeal but at least allowing the issue to be properly preserved.

**Proposition of Law #2: The Sentence imposed in this case, being a maximum sentence run consecutively to another sentence imposed in a different case on the same date, was imposed in violation of the State and federal right of the accused to due process of law, because the Trial Court employed a sentencing law created by the Ohio Supreme Court after the commission of his offenses.**

The Ohio Supreme Court struck down much of the Ohio Revised Code applicable to Mr. Keith and his sentence in the *Foster* decision. The remedy applied was a parallel remedy to the remedy applied in dealing with similar problems in the federal system,

applied by the United States Supreme Court in *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621.

In *Foster*, this Honorable Court declared that the remedy in *Foster* of remand for resentencing under the remainder of the sentencing statutes would be applied in all pending cases and in all cases pending on direct appeal. This Court did not, however, state whether the *Foster* remedy would or would not be applied retroactively.

When a major decision of this type is issued, retroactivity is often left unresolved until cases that may be affected by retroactive application are reassessed. That has occurred in many Ohio appellate jurisdictions, but this Court has not yet resolved the degree of retroactivity of the *Foster* decision. The appellate courts, without any real analysis of the jurisprudence on retroactivity analysis, have been using faulty logic to determine that the *Foster* decision should have no retroactive application to cases brought as delayed appeals. The logic is apparently that the failure of this Court to specifically state that retroactive application was contemplated means that retroactive application was not contemplated. The same problem and same faulty analysis by federal district and appellate courts has occurred in the parallel federal aftermath of the *Booker* decision, without any pronouncement as of yet by the United States Supreme Court on that parallel issue.

The United States Supreme Court, in *Schriro v. Summerlin* (2004), \_\_\_\_ U.S. \_\_\_\_, addressed the jurisprudence of retroactivity in the context of the decision in *Ring v. Arizona* (\_\_\_\_), 536 U.S. 584. *Ring* was an *Apprendi*-based decision that required a jury trial prior to imposition of the death penalty, the jury trial being as to the elements forming the basis of the enhancement to a death penalty sentence.

*Schriro* noted that the decision of the United States Supreme Court that established a new rule applies to all criminal cases pending on direct review. *Schriro*, Id., citing *Griffith v. Kentucky* (1987), 479 U.S. 314, 328. That basic principle was followed precisely in the *Booker* decision and also followed in the Ohio parallel *Foster* decision.

However, *Schriro* dealt with the circumstance of retroactive application as well, application beyond the “pending cases” application from *Griffith*. In determination of retroactivity to cases not pending on direct review, the analysis requires determination first as to whether the new rule is a procedural rule or a substantive rule.

New substantive rules generally apply retroactively. *Schriro*. Retroactive application of a new substantive rule is necessary because substantive rule changes “carry a significant risk that a defendant \* \* \* faces a punishment that the law cannot impose upon him.” *Schriro*, citing *Bousley v. United States* (1998), 523 U.S. 614, 620, quoting *Davis v. United States* (1974), 417 U.S. 333, 346.

In contrast, new procedural rules generally do not apply retroactively, unless the new procedural rule is a “watershed rule of criminal procedure” that implicates “fundamental fairness and accuracy of the criminal proceeding.” *Schriro*, Id., citing *Saffle v. Parks* (1990), 494 U.S. 484, 495.

In *Schriro*, the United States Supreme Court, as mentioned, assessed the impact of the *Ring* decision, which had mandated a jury trial in death penalty cases as to factors relevant to imposition of the death penalty. The Supreme Court logic in *Schriro* is important. Because the factors were not removed in *Ring*, but rather because the

procedure for contesting the existence of those factors was changed (requirement of trial by jury), the substance of the law did not change. Instead, the procedure changed.

When the Ohio Supreme Court addressed the constitutional challenge raised in *Foster*, this Court faced a difficult problem. In *State ex rel. Mason v. Griffin* (2004), 104 Ohio St.3d 279, this Court rejected the procedural fix to Ohio's unconstitutional sentencing law. Judge Griffin wanted to use the *Ring* remedy of establishing a jury trial to consider the sentencing factors. Had that occurred, then one might have claimed that the *Schriro* analysis would have been as to whether this new procedure implicated fundamental fairness and accuracy of the decisions rendered in cases prior to establishment of what could have been called the Griffin-Ring remedy. However, this Court rejected that remedy because this Court felt that the Ohio Constitution barred consideration of that remedy.

Instead, this Court applied the *Foster* remedy that seemed to parallel the *Booker* remedy. In doing so, however, this Court did not create a new procedural rule. Unlike in *Ring*, where the factors still had to be proven, *Booker* and *Foster* each removed the requirement to even prove these facts. This did carry a significant risk that Ohio defendants would face punishment that the law did not authorize prior to the application of the *Foster* remedy.

Furthermore, it seems clear that the *Foster* decision, even if accepted as merely procedural, was in fact a watershed rule change. Structurally, *Foster* established three matters. First, *Foster* established that Ohio law was, in fact, unconstitutional. Second, *Foster* established a severed version of the law that could be applied in the future. Third,

*Foster* established a remedy for those who had already been sentenced under the prior, unconstitutional scheme.

If one looks merely at the remedy and the new procedures alone, then *Foster* seemed to establish a procedural change. However, if one looks at the finding of unconstitutionality, that aspect of *Foster* was a substantive finding. Thus, the *Foster* decision had both substantive and procedural aspects.

A new procedural rule established to correct a substantive constitutionality problem is more substantial than a new procedural rule to correct a procedural constitutionality problem. For, if the procedural constitutionality problem did not necessarily create a risk of fundamentally unfair rulings, then the jurisprudence seems to support non-retroactivity. However, imposition of sentence according to a law that is unconstitutional is fundamentally unfair. The fact that a sentence imposed under a law that is unconstitutional might be the same sentence imposed under a constitutional law is not relevant. The substantive constitutional defect has not been cured.

This issue was not litigated at the Third District because appellate counsel declined to address sentencing issues. The application to reopen raised these issues but was denied unjustly. For these reasons, to be argued more completely should jurisdiction be accepted, Mr. Keith request that this Court hear his appeal.

**CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

Respectfully submitted,



\_\_\_\_\_  
Kenneth J. Rexford

**Counsel for Ontrayis Keith**

**Proof of Service**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee,

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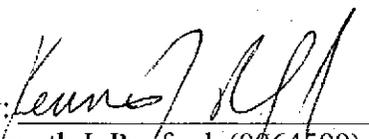
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on the 21<sup>st</sup> day of March, 2008.

By: 

\_\_\_\_\_  
Kenneth J. Rexford (0064599)

**COUNSEL FOR APPELLANT,  
ONTRAYIS KEITH**

COURT OF APPEALS  
FILED

2008 FEB 11 PM 12:57

HON. C. STALEY-BURL  
JUDICIAL DISTRICT  
ALLEN COUNTY, OHIO

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

ALLEN COUNTY

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STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 1-06-53

v.

ONTRAYIS KEITH,

JOURNAL  
ENTRY

DEFENDANT-APPELLANT.

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This matter comes before the court upon appellant's application to reopen direct appeal pursuant to App.R. 26(B).

Review of an application to reopen a direct appeal involves a two step process. The court is required to first determine whether appellant has set forth a colorable claim of ineffective assistance of appellate counsel and, if so, whether the ineffective assistance of counsel prejudicially affected the outcome of appellant's direct appeal. *State v. Ayala* (1996), 111 Ohio App.3d 627, at 630, citing *State v. Murnahan* (1992) 63 Ohio St. 3d 60, and *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

To show ineffective assistance, the appellant must prove that his counsel was deficient for failing to raise the issues that he now presents and that there was a reasonable probability of success had he presented those claims on appeal. *State*

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*v. Tenace* (2006), 109 Ohio St.3d 451, 2006-Ohio-2989, citing *State v. Bradley* (1989), 42 Ohio St.3d 136. See, also, *State v. Sanders* (2002), 94 Ohio St.3d 150, 2002-Ohio-350.

The instant action involved two cases that were consolidated for briefing and oral argument. In a single opinion, this court dismissed case No. 1-06-46 for lacking any assignments of error relating to that conviction and sentence, and the trial court's judgment of conviction and sentence in case no. 1-06-53 was affirmed upon review of appellant's three assignments of error.

In regard to reopening case no. 1-06-46, we find that appellate counsel's failure to file any assignment of error does set forth a colorable claim of ineffective assistance of counsel. See *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821. If appellate counsel found no assignments of error to advance in good faith, a brief and motion to withdraw should have been filed pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Nevertheless, we find that the application fails as to the second prong. Based upon our review of the issues that appellant claims his counsel should have presented on appeal, we find that appellate counsel's ineffectiveness did not prejudicially affect the outcome of appellant's appeal.

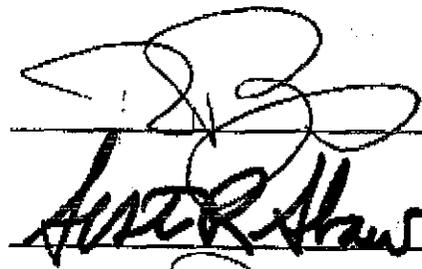
The proposed assignments of error challenging the constitutionality of appellant's maximum/consecutive sentences are entirely without merit under binding precedent. As appellant concedes in the application, the Ohio Supreme Court resolved the proposed issues and ruled upon the constitutionality of Ohio's sentencing laws. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855. Asserting that a meritless assignment of error should have been raised merely to preserve the issue for the possibility of a habeas corpus proceeding in federal court does not show any prejudicial affect to the "outcome" of the appeal. In sum, there was no reasonable probability of success had counsel raised the sentencing claims on appeal. *Tenace, supra*.

In regard to reopening case no. 1-06-53, the application fails as to the first prong. We find no colorable claim that the representation provided by appellate counsel was ineffective. Appellate counsel set forth and argued three assignments of error that reasonably and capably challenged the admission of allegedly suggestive and prejudicial identification testimony. As in the consolidated case, appellant now asserts that the maximum/consecutive sentences should have been challenged as unconstitutional. We disagree. Appellate counsel was not "ineffective" for failing to include an assignment of error that lacks merit under binding precedent of the Ohio Supreme Court. Appellate counsel could

reasonably have decided as a matter of tactic not to bury his good arguments “in a verbal mound made up of strong and weak contentions.” See *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, citing *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987.

Accordingly, we find no genuine issue as to whether appellant was deprived of the effective assistance of counsel on appeal based upon appellant’s allegation that counsel failed to advance assignments of error that had no reasonable probability of success. The application is not well taken. App.R. 26(B)(5).

It is therefore **ORDERED** that appellant’s application to reopen direct appeal be, and the same hereby is, **DENIED** at the costs of the appellant for which judgment is hereby rendered.

  
\_\_\_\_\_  
Andrew R. Shaw  
  
\_\_\_\_\_  
Weston  
JUDGES

DATED: February 11, 2008

/jlr

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