

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : On Appeal from the
Plaintiff-Appellee : Cuyahoga County Court of
 : Appeals, Eighth Appellate
 : District
-vs- :
LAWRENCE HENDERSON : Court of Appeals
 : Case No. 89809
Defendant-Appellant : **08-1004**

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT**

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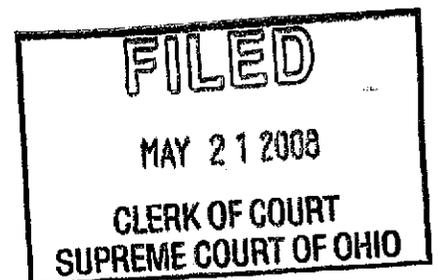


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**EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC INTEREST OR
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION.**

A defendant has an absolute right to be punished according to the laws which were in effect at the time he committed his crimes. He may not, under ex post facto principles, be subjected to a worse punishment, or be disadvantaged *in any way*, by the retroactive application of a new law or a judicial interpretation of an existing law which came into being after he committed his crime.

This Court's remedy in *State v. Foster* (2006) 109 Ohio St.3d 1, 2006-Ohio-856 does disadvantage defendants, as it strips them of presumptions of both minimum and concurrent sentences which they enjoyed before the *Foster* decision. It also deprives them of certain statutory appellate rights, which existed at the time they committed their crimes but were removed by the *Foster* opinion. As such, fundamental fairness requires that the *Foster* remedy cannot apply to defendants whose crimes predated *Foster*. As there are hundreds, perhaps thousands, of such defendants in Ohio, a decision in the case at bar will affect far more than simply Mr. Henderson. The case at bar presents this Court with the opportunity to affirm this fundamental principle of fairness and to block the retroactive application of *Foster*.

STATEMENT OF THE CASE AND FACTS

On Marcy 24, 2005, the Cuyahoga County Grand Jury indicted the defendant-appellant, Lawrence Henderson in a twenty-three count indictment. Twelve of these counts were dismissed during the trial. The remaining eleven counts were renumbered and went to the jury with these new numbers.

On September 20, 2005, a jury trial began. On September 26, 2005, the jury found Mr. Henderson not guilty of counts one through eight. The jury found Mr. Henderson guilty of gross sexual imposition in counts nine, ten, and eleven.

A timely appeal to the Ohio Court of Appeals for the Eighth Appellate District followed. On November 6, 2006, this Court affirmed Mr. Henderson's convictions but, pursuant to *State v. Foster*, reversed his sentence and remanded his matter for resentencing.

On March 29, 2007, the trial court presided over the re-sentencing which the Eighth District. At that hearing, trial counsel argued that it would be improper to apply the remedy of the case *State v. Foster* to Mr. Henderson's sentence, as his crimes occurred before the *Foster* mandate issued. The trial court did not agree with the defense argument. The court imposed three terms of two years to be run consecutively, for a total of six years. The trial court then found Mr. Henderson to be indigent and appointed the Cuyahoga County Public Defender Office to perfect an appeal.

A timely appeal to the Eighth District followed. On May 12, 2008, the Eighth District journalized its decision affirming Mr. Henderson's convictions and sentence. The within timely Notice of Appeal to this Court and Memorandum in Support of Jurisdiction now follows.

ARGUMENT

PROPOSITION OF LAW I:

THE RETROACTIVE APPLICATION OF THE SEVERANCE REMEDY CREATED IN STATE V. FOSTER (2006), 109 OHIO ST.3D 1 VIOLATES A DEFENDANT'S CONSTITUTIONAL RIGHTS OF DUE PROCESS AND NOT TO BE SUBJECTED TO EX POST FACTO LAWS.

In the case at bar, Lawrence Henderson received consecutive sentences and non-minimum sentences in counts nine, ten, and eleven. These sentences denied Mr. Henderson his liberty without due process of law as guaranteed him by both the Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 530, the Supreme Court of the United States ruled that, "Other 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." Two years later, the Supreme Court refined its *Apprendi* rule and held that the "statutory maximum" sentence for *Apprendi* purposes was not strictly limited to sentences created by the legislature. Rather, for *Apprendi* purposes, the "statutory maximum" sentence was the sentence which the judge could impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis in the original) *Blakely v. Washington* (2004) 542 U.S. 296.

In *State v. Foster* (2006) 109 Ohio St.3d 1, 2006-Ohio-856, this Court ruled that the findings that Ohio's new sentencing structure required to impose non-minimum and consecutive sentences were unconstitutional, because they violated defendants' right to a trial by jury. Thus, as the findings are no longer applicable, Mr. Henderson maintains that the only sentences which could be imposed on him were sentences authorized by the law without any findings: minimum and concurrent terms.

Foster crafted a remedy of severance, under which a trial court may sever out of Ohio's sentencing statute any requirement that it make findings. *Foster* ruled that henceforth, the court was free to impose any sentence that it wished to impose, as long as the sentence fell within the

statutorily created range of sentences. It is, however, improper to apply the *Foster* severance remedy to Mr. Henderson's case, as his crime preceded the release date of *Foster* and to apply *Foster*'s remedy to him retroactively violated the Ex Post Facto and Due Process Clauses of the United States Constitution.

The retroactive application of *Foster* to Mr. Henderson's sentencing substantially disadvantaged him. He was divested of the presumption of minimum and concurrent terms of imprisonment and he lost the meaningful appellate rights that existed prior to *Foster*. Therefore, both the Ex Post Facto Clause and the Due Process Clause of Fourteenth Amendment to the United States Constitution preclude the application of the *Foster* remedy to Mr. Henderson, whose criminal conduct pre-dated the release of the *Foster*.

The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution prohibits, among other things, any legislation that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." *Miller v. Florida* (1998) 482 U.S. 423 at 429. The Ex Post Facto Clause "looks to the *standard of punishment* proscribed by the statute, rather than to the sentence actually imposed." *Lindsey v. Washington* (1937), 301 U.S. 397, 401. Regardless of whether the change increased the punishment for the crime, the legislative enactment falls within the *ex post facto* prohibition if it is retrospective and disadvantages the offender affected by it. *Miller* at 430-32. Although *Foster* was not an example of a legislative enactment but a judicially-crafted remedy, the United States Supreme Court has recognized "that limitations on *ex post facto* judicial decision-making are inherent in the notion of due process." *Rogers v. Tennessee* (2001), 532 U.S. 451, 456. In *Bowie v. South Carolina* (1964), 378 U.S. 347, 356, the United States Supreme Court held that the South Carolina Supreme Court's retroactive application of its construction of the State's criminal trespass statute violated due process. *Bowie* explained that "an unforeseeable judicial enlargement of criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids." *Id.* at 353.

If a state legislature is barred by the Ex Post Facto Clause from passing [a retroactive law], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Id. Although *Bowie* involved a judicial attempt to expand the reach of a criminal statute, subsequent courts have held that the due process clause likewise proscribes “judicial enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing a criminal act.” *Dale*, 878 F.2d at 934; see also *Devine v. New Mexico Dep’t of Corrections* (C.A. 10 1989), 866 F.2d 339, 344-45.

Courts in Ohio are holding that the remedial holding of *Foster* does not violate a defendant’s due process rights or the ex post facto principles contained therein. See eg., *State v. Mallette* (Feb. 22, 2007) Cuyahoga App. No. 87984, 2007-Ohio-715. Indeed, in affirming Mr. Henderson’s convictions, the Eighth District specifically cited to *Mallette* and its progeny and noted that it had “repeatedly held that applying the remedial holding in *Foster* to a criminal defendant does not violate his due process rights or ex post facto principles.” *State v. Henderson* (Apr. 17, 2008) Cuyahoga App. No. 89823, 2008-Ohio-1831 at ¶8. Such holdings however ignore clearly-established federal case law and use an analysis specifically rejected by the Supreme Court of the United States.

In *Mallette*, which forms the analytical basis of the Eighth District’s ruling in all of its *Foster* retroactivity cases, the court held at ¶47:

In the instant case, Mallette had notice that the sentencing range was the same at the time he committed the offenses as when he was sentenced. *Foster* did not judicially *increase the range of his sentence*, nor did it retroactively apply a new statutory maximum to an earlier committed crime, nor did it create the possibility of consecutive sentences where none existed. (Emphasis added)

In this holding, the Eighth District misapplied clearly-established federal law in two ways.

The first manner in which the Eighth District misapplied clearly established federal-law is in its conclusion that the *Foster* severance remedy did not subject Mr. Henderson, or the hundreds of other defendants in Ohio, to harsher punishments than were possible under the law which existed at the time they committed their crimes. Under Ohio Revised Code 2929.14(B)

before *Foster*, all defendants enjoyed a presumption that they should receive the minimum sentence and concurrent sentences. The presumption could only be overcome by findings where were clearly unconstitutional under the holding of *Blakely*. In *Foster*, this Court agreed the findings used to overcome the presumption of minimum and concurrent sentences were unconstitutional and struck them from the statute. Because the findings were unconstitutional and could not be made, under the law as it existed at the time of the crimes, the statutory maximum sentence to which Mr. Henderson could have been sentenced—that is the harshest sentence the statutes permitted without additional findings—was minimum and concurrent sentences.

After *Foster* the sentencing exposure for defendants in Ohio increased dramatically, because *Foster* not only severed the judicial fact finding, it severed the mandatory presumptions placed in Ohio's sentencing statutes. This Court recognized, prior to *Foster*, that defendants enjoyed a presumption of minimum and concurrent sentences pursuant to Ohio Revised Code § 2929.14(B). *Foster*, at ¶¶ 60, 64, 97, 102. When *Foster's* over broad severance remedy is applied to Mr. Henderson, and the other defendants in Ohio whose crimes predated *Foster*, he, and they, are seriously disadvantaged. Trial courts are now free to impose any sentence on these defendants, instead of the minimum, concurrent sentences which the law that existed at the time they committed their crimes required.

Blakely established that the maximum sentence to which Mr. Henderson was subject at the time he committed his crimes was the harshest sentence which the court impose without making any additional findings. Under Ohio law at the time Mr. Henderson committed his crimes, the harshest sentence he could receive without any additional findings was minimum and concurrent sentences. Therefore, the retroactive application of *Foster* has subjected Mr. Henderson to a new and harsher statutory maximum, because, under *Blakely* the statutory maximum allowable in the case at bar was minimum and concurrent sentences. *Foster's* severance remedy, ignored the clearly-established federal law established in *Blakely* and should be reversed in so far as it is applied to persons who committed their crimes before *Foster's* release.

The second problem with the Eighth District's ruling in *Mallette* and its progeny is that *Mallette* not only ignored clearly-established some federal precedent, it also cited to other federal precedent and misapplied that precedent. The *Miller* case specifically rejected the exact analysis used in *Mallette*. In *Miller* at 432, the Court wrote, "one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." *Id.*; citing *Lindsey v. Washington*. Under *Miller*, the proper analysis for *ex post facto* and due process claims is not whether the retroactive change in the law increases the punishment for the crime, but whether the retroactive change *disadvantages* the offender.

Mallette addressed *only* the question of whether the change in *Foster* increased the range of sentences possible to defendants whose crimes predated *Foster*. As already noted, even if that were the issue before the court, the *Mallette* court failed to consider the actual holding of *Blakely* and incorrectly found that Mr. Henderson has not been subjected to an increase in the statutory maximum sentence. The question of whether the range in sentence has been increased is not, however, the question before the court in an *ex post facto* analysis. *Miller* specifically noted that such an analysis is not the proper analysis. The proper analysis is whether the defendants would be disadvantaged by the new sentence scheme created by *Foster's* mandate.

As noted, at the time Mr. Henderson committed his crimes, a presumption existed in Ohio's sentencing statutes that said he should receive minimum and concurrent sentences. The trial court could only overcome said presumption by making certain findings; findings where were properly ruled to be unconstitutional in *Foster*. The basic presumption, however, was never challenged and the *Foster* decision could not address the presumption directly.

Nevertheless, and even though the underlying presumption of minimum, concurrent sentences was not actually before it, this Court judicially removed the presumption in favor of minimum, concurrent sentences from Ohio's sentencing statutes at the same time it excised the findings required to overcome the presumption. When the *Foster* held that all sentencing options were available to trial courts when presiding over resentencing hearings pursuant to *Foster*, it

created legislation by judicial fiat which re-wrote Ohio's sentencing statutes and removed the presumption of minimum, concurrent sentences which the statutes had previously contained.

It is one thing to sever the presumption of minimum, concurrent sentences to crimes which occurred after *Foster*, it is another matter to apply severance to crimes which occurred before *Foster*, when defendants were protected by the presumption. Mr. Henderson has been disadvantaged by the retroactive application of *Foster*, because he received that would not have been possible, had this court not severed the presumptions of minimum, concurrent sentences from the Revised Code.

In the same way, before *Foster*, Mr. Henderson enjoyed certain statutorily-created appellate rights. Because the statutes created grounds upon which a trial court had to base any decision to deviate from the presumptive concurrent sentences, Mr. Henderson had the ability to appeal his sentence on the grounds that it did not satisfy the statutory grounds.

Now, *Foster* has not only removed the irrebuttable presumption of minimum sentences, it has also removed the statutory grounds upon which Mr. Henderson could appeal his sentence. Again, Lawrence Henderson has been disadvantaged by the *Foster* decision, because it has stripped him of certain appellate rights he once enjoyed. As Mr. Henderson has been disadvantaged by the retroactive application of *Foster*, then, under *Miller*, *Foster*'s application to his case does violate his due process and ex post facto rights and the Cuyahoga County Court of Appeals's analysis in *Mallette* and its progeny must fall.

CONCLUSION

WHEREFORE, for the foregoing reasons Lawrence Henderson prays this Court to accept jurisdiction over his appeal.

Respectfully submitted,


ROBERT M. INGERSOLL, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Brief and Assignments of Error was served by ordinary mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 19th day of May, 2008.


ROBERT M. INGERSOLL, ESQ.
Counsel for Appellant

APPENDIX

Attachment not scanned

MAY 1 2 2008

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89809

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAWRENCE HENDERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-463886

BEFORE: Kilbane, J., Cooney, P.J., and Boyle, J.

RELEASED: May 1, 2008

JOURNALIZED: MAY 1 2 2008

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

MAY 12 2008

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

MAY 1 - 2008

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

MARY EILEEN KILBANE, J.:

On March 24, 2005, a Cuyahoga County Grand Jury indicted defendant-appellant, Lawrence Henderson (Henderson), in a twenty-three count indictment, which included numerous counts of rape, gross sexual imposition, and kidnapping. Five counts were nolleed at the State's request, and seven counts were dismissed by the court. Eleven remaining counts were renumbered and were submitted to the jury. Finding no merit to this appeal, we affirm the judgment of the trial court.

On September 26, 2005, the jury found Henderson not guilty of renumbered counts one through eight. The jury found Henderson guilty of three counts of gross sexual imposition with specifications that the victim was under thirteen years of age in counts nine, ten, and eleven, during the time period of June 1 through July 31, 2004.

On September 27, 2005, the trial court judge imposed a three-year sentence on each of the three counts of gross sexual imposition, felonies of the third degree. The court ordered the sentences to run consecutively, for a total of nine years. On the same date, the court held a H.B. 180 hearing, and the court determined Henderson to be a sexually oriented offender. The court imposed a ten-year registration requirement.

Henderson's original appeal was addressed by this court in *State v. Henderson*, Cuyahoga App. No. 87236, 2006-Ohio-5567. This court affirmed the judgment, but vacated and remanded the case to the trial court for resentencing given the effect of the decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

On remand, the trial court held a second sentencing hearing for Henderson on March 29, 2007. Defense counsel argued that since Henderson's crimes predated the decision date of *Foster*, it would be a violation of both the ex post facto clause and the due process clause of the United States Constitution to apply the Ohio Supreme Court's remedy of *Foster* to cases such as appellant's that predated the *Foster* decision. Counsel for Henderson acknowledged that this court had previously rejected this argument, but was preserving the issue for the record.

On resentencing, the trial court imposed a sentence of two years on each count of gross sexual imposition, ordering the sentences to run consecutively for a total of six years. The trial court gave Henderson credit for time served and ordered him to resume his prison sentence.

In the instant appeal filed May 2, 2007, Henderson seeks to have his last sentence reversed and remanded, arguing that it was inappropriate to

retroactively apply the *Foster* remedy. He argues that he should be sentenced to the minimum, concurrent term upon a second remand, as it was inappropriate to impose consecutive sentences at his resentencing on March 29, 2007. This argument is set forth in the sole assignment of error herein:

“LAWRENCE HENDERSON WAS DENIED HIS LIBERTY WITHOUT DUE PROCESS AND HIS RIGHT NOT TO BE SUBJECTED TO PUNISHMENT IN VIOLATION OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION BY THE IMPOSITION OF CONSECUTIVE SENTENCES.”

Henderson argues that since he committed his crimes prior to the *Foster* decision, that his current sentence violates the ex post facto clause and the due process clause of the United States Constitution. We disagree.

Appellate courts review sentences de novo. *State v. Tish*, Cuyahoga App. No. 88247, 2007-Ohio-1836. “A defendant’s sentence will not be disturbed on appeal unless the reviewing court finds, by clear and convincing evidence, that the record does not support the sentence or that the sentence is contrary to law. Clear and convincing evidence is that ‘which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.’” *State v. Samuels*, Cuyahoga App. No. 88610, 2007-Ohio-3904. (Internal citations omitted.)

In *State v. King*, Cuyahoga App. No. 89475, 2008-Ohio-960, this court recently commented: “The felony sentencing ranges did not change in the wake of *Foster*. Rather, the Ohio Supreme Court excised the judicial fact-finding provisions that it found to be unconstitutional and directed ‘that 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.’” *Id.* at paragraph seven.

Both parties acknowledge that this court has already addressed and rejected the ex post facto claims as they apply to *Foster* in *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715, discretionary appeal not allowed, 115 Ohio St.3d 1439, 2007-Ohio-5567.¹ In *Mallette*, we held that *Foster* does not violate federal or state due process rights or the ex post facto principles contained therein. We specifically held:

“In the instant case, Mallette [defendant] had notice that the sentencing range was the same at the time he committed the offenses as when he was sentenced. *Foster* did not judicially increase the range of his sentence, nor did it

¹*State v. Reid*, Cuyahoga App. No. 89006, 2007-Ohio-5858; *State v. Van Le*, Cuyahoga App. No. 88799, 2007-Ohio-4045; *State v. Parks*, Cuyahoga App. No. 88671, 2007-Ohio-2518; *State v. Jones*, Cuyahoga App. No. 88134, 2007-Ohio-1301; *State v. Brito*, Cuyahoga App. No. 88223, 2007-Ohio-1311; *State v. Tenbrook*, Cuyahoga App. No. 89424, 2008-Ohio-53.

retroactively apply a new statutory maximum to an earlier committed crime, nor did it create the possibility of consecutive sentences where none existed. As a result, we conclude that the remedial holding of *Foster* does not violate Mallette's due process rights or the ex post facto principles contained therein." *Mallette*, at paragraph 47.

Henderson contends that he should be sentenced to the minimum, concurrent term on remand. However, he does not demonstrate that at his second sentencing hearing that the court judicially increased the range of his sentence, that it was retroactively applying a new statutory maximum to an earlier committed crime, or that the court created the possibility of consecutive sentences where none existed. We find that Henderson's sentence on remand, which was actually reduced by three years, does not violate due process rights or the ex post facto principles contained therein. Given that his ex post facto and due process arguments lack merit, we overrule his single assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Mary Eileen Kilbane
MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
MARY J. BOYLE, J., CONCUR