

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MICHAEL J. DODGENS,

Defendant-Appellant.

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Case No.

**08-1486**

5th Dist, No. 08-CA-54

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MEMORANDUM IN SUPPORT OF JURISDICTION

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FOR APPELLANT:

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Appellant, in pro se

FOR APPELLEE:

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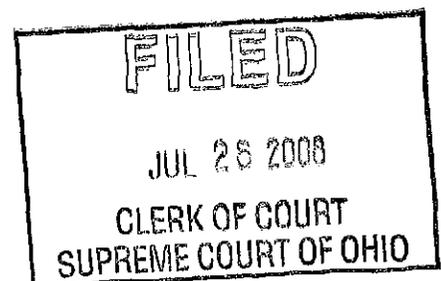


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## JURISDICTIONAL STATEMENT

This case presents several substantial constitutional questions including an examination of the due process and equal protection right to access available appellate remedies, as well as the right to effective assistance of counsel to file a timely appeal and the access of effective counsel for the direct appeal process. These questions have recently been addressed by the Sixth Circuit and the United States Supreme Court and have been firmly entrenched in favor of the litigant for decades, as set forth in the accompanying arguments.

In addition, the case presents constitutional questions relative to the constitutionality of Ohio's sentencing provisions when viewed in light of *Blakely v. Washington* (2004) 542 U.S. 296, and this Court's recent decision in *State v. Foster* (2006) 109 Ohio St.3d 1.

The state and trial court's failure to properly establish jurisdiction of the elements increasing the defendant's sentence and defense counsel's failure to defend against structural defects prejudice the defendant, violating his most basic constitutional rights. Furthermore, this Court's decision in *Foster* is unlawful and violates the Ex Post Facto Clause of the Federal Constitution. This Court should accept jurisdiction to cure a manifest injustice.

This Court should accept jurisdiction over this case independent of the *Blakely* issue and interpret Ohio Court of Appeals' treatment of delayed appeals in light of the recent higher court decisions.

### STATEMENT OF THE CASE

Appellant was charged with a variety of offense and on June 5, 2007, Appellant entered a plea of guilty to six counts of rape and one count of gross sexual imposition.

Appellant was immediately sentenced to concurrent ten year sentences for counts one through six, but consecutive to the five year sentence in count seven for a total stated prison term of fifteen years.

Appellant filed a delayed appeal on April 28, 2008 and the Fifth District Court of Appeal summarily dismissed the application for leave to file a delayed appeal on June 12, 2008. And this timely appeal follows.

### STATEMENT OF THE FACTS

At the change of plea hearing, the court allowed the Appellant to change his plea from not guilty to guilty without the full knowledge of the maximum penalty that could be imposed upon him, a violation of Criminal Rule 11 and his right to effective assistance of trial counsel.

The court then imposed a phenomenal sentence upon the Appellant and failed to fully inform Appellant of his appellate rights or to appoint counsel to ensure that a timely appeal was in fact filed, pursuant to Criminal Rule 32. This coupled with the misleading of his trial counsel that he would file the appeal, prevented the Appellant from timely filing the appeal and created a manifest injustice.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. I:

WHERE A TRIAL COURT FAILS TO INFORM A DEFENDANT OF HIS APPELLATE RIGHTS AND APPOINT COUNSEL TO FILE A TIMELY APPEAL PURSUANT TO CRIMINAL RULE 32, DUE PROCESS IS VIOLATED, FOURTEENTH AMENDMENT.

LAW AND ARGUMENT

Ohio Criminal Rule 32 (B), Notification of Right to Appeal; provides in pertinent part that:

- 2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.
- 3) ..., the court shall also advise the defendant of all of the following:
  - b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;
  - d) That the defendant has the right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

Ohio Criminal Rule 32 requires a sentencing court to provide specific and direct notice to a defendant of all relevant rights to appeal, as well as the right to have counsel appointed and a timely appeal filed. The trial court's obligation to so advise the defendant is mandatory and the failure to do so, violates the defendant's due process rights. *Wolfe v. Randle* (S.D. Ohio 2003) 267 F. Supp.2d 743, *Deitz v. Money* (CA 6. 2004) 391 F.3d 804. *Peguero v. U.S* (1999) 526 U.S. 23,24.

In this case, the trial court did not obtain a valid waiver of appeal rights pursuant to *State v. Sims*, 27 Ohio St.3d 79, nor did the court properly advise the defendant of his appellate rights under Crim. R. 32 or appoint counsel to timely file an appeal. Therefore, the defendant's due process rights were violated and this case must

be reversed and a proper appeal taken.

PROPOSITION OF LAW NO. II:

WHERE A TRIAL COURT VIOLATES CRIMINAL RULE 32, IT IS AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS FOR AN APPEALS COURT NOT TO GRANT LEAVE TO FILE A DELAYED APPEAL.

LAW AND ARGUMENT

It is well settled that all persons are entitled to meaningful access to the courts. **Bounds v. Smith** (1977) 430 U.S. 817. This includes the right to access appellate remedies where there is an established appeals process in a state court. **Douglas v. California** (1963) 372 U.S. 335. Where a state court provides appellate remedies, both the remedies and access thereto, must comport with the requirements of due process and equal protection. **Griffin v. Illinois** (1956) 351 U.S. 12.

As noted above, Ohio Criminal Rule 32 requires that a sentencing court to notify a defendant of his right to appeal and appoint counsel to file a timely appeal.

The decision to grant or deny an application for leave to file a delayed appeal pursuant to Ohio App. R. 5(A) is within the discretion of the appellate court. However it is an abuse of that discretion for an appellate court not to grant leave to a defendant when a state created impediment prevented the defendant from timely filing the appeal.

An abuse of discretion connotes more than an error of law or judgment; instead, it implies that the court's attitude was unreasonable, arbitrary or unconscionable. **State v. Adams** (1980) 62 Ohio St.2d 151.

Whether it is the trial court's failure to follow the guidelines of Crim. R. 32; trial counsel's failure to file a timely appeal; or his ineffectiveness for misleading the defendant as to his appellate

filings, the impediment to the timely filing of the appeal is credited to the state. *Ludwig v. U.S* (CA 6, 1998) 162 F.3d 465, *Wolfe v. Randle*, supra, *Roe v. Flores-Ortega* (2000) 528 U.S. 470, *Pennsylvania v. Finely* (1987) 481 U.S. 551.

In this case, the Fifth District Court of Appeals was advised in the Motion for Leave to File a Delayed Appeal, that the defendant advised his trial counsel that he wished to file an appeal and that trial counsel informed defendant that he would in fact file the appeal and that it would take about a year for the process of the appeal. The Court was also notified that upon the discovery by the defendant that the appeal had not been filed the defendant immediately filed leave to file a delayed appeal. Therefore, it is an abuse of the Court of Appeals discretion for the Court not to grant the defendant leave to file a delayed appeal and this case must be reversed and an appeal taken.

**PROPOSITION OF LAW NO. III:**

WHERE TRIAL COUNSEL FAILS TO TIMELY FILE A NOTICE OF APPEAL UPON THE DEFENDANT'S REQUEST, HE IS INEFFECTIVE, VIOLATING THE DEFENDANT'S SIXTH AMENDMENT RIGHT.

**LAW AND ARGUMENT**

A criminal defense attorney's failure to file a notice of appeal upon the request of his client constitutes his ineffectiveness as counsel and deprives the defendant of his Sixth Amendment right to counsel, regardless of the potential efficacy of the appeal. See e.g. *Strickland v. Washington* (1984) 466 U.S. 668, *U.S. v. Peak* (CA 4, 1993) 992 F.2d 39, (citing *Rodrigues v. U.S.* (1969) 395 U.S. 327 (upheld in *Lozada v. Deeds* (1991) 498 U.S. 430)). Even where it cannot be established that the defendant made a specific request, counsel

is still required to at the least, consult with his client is there is any reasonable belief that an appeal might be warranted, desired or warranted. *Roe v. Flores-Ortega*, supra.

As noted above, trial counsel was ineffective for failing to file a timely notice of appeal after the defendant requested that he file an appeal, violating his Sixth and Fourteenth Amendment rights.

Therefore, this case should be remanded to the Fifth District Court of Appeals with instructions to grant leave to file a delayed appeal.

#### PROPOSITION OF LAW NO IV:

DUE PROCESS AT A MINIMUM REQUIRES NOTICE OF ALL THE ELEMENTS; THE RIGHT TO BE FOUND GUILTY BEYOND A REASONABLE DOUBT BY A JURY; AND WHEN THE TRIAL COURT LACKED JURISDICTION TO EXCEED THE STATUTORY MAXIMUM SENTENCE MANDATED BY O.R.C. §2929.14, THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS ARE OFFENDED.

#### LAW AND ARGUMENT

The sentence rendered by the Court of Common Pleas in this case under the guise of *State v. Foster* (2006) 109 Ohio St.3d 1, which purportedly authorizes the sentence, violates the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution and is incompatible with the controlling precedent of the United States Supreme Court. The decision of the Court of Common Pleas must be reversed and this case must be remanded with instructions to enter minimum and concurrent term of incarceration.

Due process requires, at a minimum, "Notice" of all the elements and the Opportunity to be heard. *LaChance v. Erickson* (1998) 522 U.S. 262. The Fifth and Sixth Amendment require that any facts used to enhance a sentence in a criminal case beyond the statutory maximum, must be set forth in the charging instrument and proven to a jury

beyond a reasonable doubt. See Ohio Constitution Sec. §10, Art. I, *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, *Cunningham v. California* (2007) 549 U.S. \_\_\_\_.

The result of the failure to allege the additional elements, (removing subject matter jurisdiction) or to require the elements to be proven beyond a reasonable doubt is tantamount to insufficient evidence, requiring relief and barring any redetermination of the issue. *Jackson v. Virginia* (1979) 443 U.S. 307, *Tibbs v. Florida* (1982) 457 U.S. 31.

Absent the notification of the enhancement elements and a finding of guilt by a jury, the Ohio Constitution; O.R.C. §2929.14(B); and the Federal Constitution prohibit the imposition of non-minimum and consecutive sentences in Defendant Dodgens' case. Dodgens was convicted of six counts of rape and one count of gross sexual imposition carrying a maximum sentence of three years consecutive.

The *Foster* Court held that the statutory presumption which require judicial fact-findings to depart from minimum and concurrent sentences were unconstitutional. *Id.* Rather than to hold to the requirement of judicial fact-finding unconstitutional, the Court instead severed the statutory presumptions from the statute and held that judges are now free to impose any sentence regardless of whether or not the penalty imposed exceeded that which would have been permissible under the Ohio and Federal Constitution, *Blakely*, *supra*.

For the reasons that follow, the decision of this Court in *Foster* is incompatible with the controlling precedent of the United States Supreme Court as it relates to unconstitutional criminal sentencing in Ohio.

The holding of *Apprendi* and the subsequent decisions enforcing

its requirements result from the constitutionally-mandated balance of power between legislature, judge, and jury. As recognized in **Apprendi** the Sixth Amendment not only prohibits the legislature from removing predicate factual findings from the jury, but also forbids the judiciary from circumventing the limitations which the legislature has placed on the availability of criminal punishments which correspond to varying degrees of criminal culpability. **Apprendi**, 530 U.S. at 483-85 (citing **Mullaney v. Wilbur** (1975) 421 U.S. 684), see **Blakely**, 542 U.S. at 305-06.

With these considerations in mind, it is evident that the decision of this Court in **Foster** cannot stand against the controlling authority of the United States Supreme Court. It is beyond dispute that when a sentencing scheme incorporates a statutory maximum prohibiting the imposition of specified punishments except upon proof of certain facts, the facts which must be alleged in the charging instrument and demonstrated in order to exceed the statutory maximum, are to be treated as elements of a criminal offense. **Washington v. Recuenco** (2006) 126 S. Ct. 2546, 2552, see also **Cunningham/Blakely/Apprendi**, supra. Under **Apprendi**, "elements and sentencing enhancements must be treated the same for Sixth Amendment purposes." **Recuenco**, 126 S. Ct. at 2552. Any other rule would permit the states to "manipulate their way out of **In re: Winship** (1970) 397 U.S. 298" merely by claiming that a criminal offense is actually nothing more than a sentencing enhancement attached to a less-serious conviction. **Jones v. United States** (1999) 526 U.S. 243.

This Court obviously cannot cure an unconstitutional sentence by unilaterally eliminating the Sixth Amendment statutory maximum.

If a defendant violates a statute that is subsequently held to be unconstitutional, a court cannot salvage the conviction by severing the unconstitutional elements; doing so would violate the Federal Constitution by retroactively criminalizing a broader range of conduct than that which the statute had originally prohibited. *Long v. State* (Tex. Crim. App. 1996) 931 S.W.2d 285,295. Because elements and sentencing enhancements are indistinguishable for Sixth Amendment purposes, it necessarily follows that severing an unconstitutional sentencing enhancement is also impermissible because it retroactively extends the range of criminal conduct to which a criminal penalty can attach.

Therefore, permitting a defendant to be sentenced without the statutory maximum at the time of the offense is no different than salvaging the unconstitutional conviction by severing an unlawful element. Cf. *Long*, supra. Because the Ohio Constitution gives a criminal defendant the right to "Notice and Opportunity" to be heard, and to demand that a jury find him guilty of all the elements of the crime with which he is charged, the unilateral elimination of the controlling statutory maximum by this Court in *Foster* cannot be reconciled with the guarantees of the Fifth, Sixth and Fourteenth Amendments.

As a result the sentencing framework established in *Foster* violates the Federal and State Constitutions, and Defendant Dodgens may be sentenced to no more than the statutory maximum of three years, concurrently.

**PROPOSITION OF LAW NO V:**

WHERE THE SENTENCING TO A TERM OF INCARCERATION EXCEEDS THE MAXIMUM PENALTY AVAILABLE UNDER THE STATUTORY FRAMEWORK AT THE TIME OF THE OFFENSE, THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION IS VIOLATED.

**LAW AND ARGUMENT**

The Ex Post Facto Clause prohibits the Ohio General Assembly from retroactively increasing the penalty for a crime which has already been committed. **Stronger v. California** (2003) 539 U.S. 607,612 (quoting **Calder v. Bull** (1798) 3 U.S. 386,391). If the Ohio General Assembly had passed a law repealing the statutory maximum which were held unconstitutional and severed in **Foster**, the Ex Post Facto Clause would have prohibited the application of any increased penalty upon the Defendant. Id.

The Ex Post Facto Clause clearly does not permit a patently unlawful penalty to be imposed merely because the increased statutory maximum resulted from judicial severance instead of legislative action. See e.g. **Rogers v. Tennessee** (2001) 532 U.S. 451, **Miller v. Florida** (1987) 482 U.S. 423.

In contrast, the unilateral judicial severance of a statute has nothing to do with "the incremental and reasoned development of precedent that is the foundation of the common law system." Retroactive judicial severance of a statute places the accused in exactly the same circumstance that he would be in if the legislature enacted an unlawful ex post facto law. The mere fact that the statute is changed by judicial decree rather than legislative act is irrelevant; the statute itself is what has been changed, not merely the prevailing judicial interpretation of the meaning of the statute. See **State v. Waddel** (N.C. 1973) 194 S.E.2d 19,29-30. abrogated on other grounds, **Woodson v. North Carolina** (1976) 428 U.S. 280. Because judicial severance changes the actual terms of the statute, the Ex Post Facto Clause prohibits the State of Ohio from retroactively increasing a criminal penalty, Appellant can be sentenced to no more than three years, concurrently, and this Court should accept jurisdiction of this novel issue.

PROPOSITION OF LAW NO. VI:

IN THE ABSENCE OF STATUTORY AUTHORITY, THE TRIAL COURT LACKED JURISDICTION AND ERRED BY IMPOSING CONSECUTIVE TERMS OF INCARCERATION, VIOLATING APPELLANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

LAW AND ARGUMENT

In *State v. Foster* (2006) 109 Ohio St.3d 1, this Court specifically stated:

Because R.C. 2929.14(E) and 2929.41(A) require judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant before imposition of consecutive sentences, they are unconstitutional. (*id.* at §83).

This Court Further held:

The following sections... have no meaning... and 2929.41. These sections are severed and excised in their entirety, as is... 2929.14(E)(4).... (*id.* at ¶97).

This Court determined that these sections are capable of being severed, (*id.* ¶99) and severed and excised both of these statutes, in their entirety. (*id.*).

Although this Court later went on to suggest that judges can now impose consecutive terms of incarceration at will, the fact is that this Court has excised all statutory provisions that enable the imposition of consecutive sentences, at all. (Firearm and other specifications are enabled under other statutes, not relevant to this argument).

As there is now no statute that authorize the imposition of consecutive sentences, the trial court was without authority and lacked subject matter jurisdiction to impose any sentence other than a concurrent sentence, rendering the consecutive sentence void ab initio, a nullity and, requiring vacation of the consecutive sentence in this case. See *State v. Cimpritz* (1953) 158 Ohio St. 490, Art. I, Sec. 10,

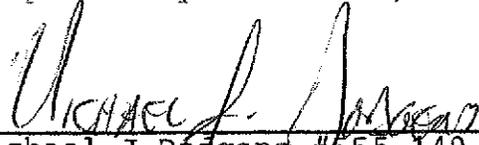
Ohio Constitution and this Court should accept jurisdiction to correct the manifest injustice.

CONCLUSION

The Appellant was impeded by the state of his statutory and constitutional right to a meaningful and effective appeal process, to appeal his judgment of conviction and sentence. The Appellant was unlawfully given an excessive and unauthorized consecutive sentence by a trial court that lacked jurisdiction, violating his constitutional right to due process, equal protection, notice of the charges, trial by jury, and the burdens of proof.

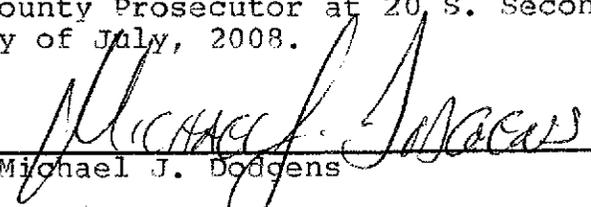
Therefore, Appellant's sentence must be reduced to a single three year term of incarceration. In the alternative, this case should be remanded to the Fifth District Court of Appeals with instructions to grant leave to file a delayed appeal and counsel appointed to brief and argue the issues he was denied the right to appeal by the state created impediment.

Respectfully submitted,

  
\_\_\_\_\_  
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Appellant, in pro se

SERVICE

I certify that a true copy of the foregoing was sent via regular U.S. Mail to the office of the Licking County Prosecutor at 20 S. Second St., Newark, Ohio 43055, on this 22 day of July, 2008.

  
\_\_\_\_\_  
Michael J. Dodgens

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED  
JUN 12 11 01 AM  
CLERK OF COURT  
OF APPEALS  
LICKING COUNTY, OHIO  
GARY B. ...

STATE OF OHIO  
Plaintiff-Appellee

-vs-

MICHAEL J. DODGENS  
Defendant-Appellant

CASE NO. 08-CA-54

JUDGMENT ENTRY

This matter came before the Court for consideration of Appellant's pro se motion for leave to file a delayed appeal pursuant to App.R. 5(A). No response has been filed.

It appears from Appellant's memorandum in support that Appellant seeks to file a delayed appeal from a conviction and sentence entered on June 5, 2007. Appellant asserts this request is made due to his belief his trial counsel was pursuing an appeal on Appellant's behalf.

Whether to grant or deny leave to file a delayed appeal is in the sound discretion of the appellate court. *State v. McGahan* (1949), 86 Ohio App. 283, 88 N.E.2d 613. A delayed appeal should be granted where it appears on the face of the record the overruling of such motion would result in a miscarriage of justice. *State v. Bendnark* (1954), 101 Ohio App. 339, 123 N.E.2d 31. "Lack of effort or imagination, and ignorance of the law, are not such circumstances and do not

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automatically establish good cause for failure to seek timely relief". *State v. Reddick* (1995), 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

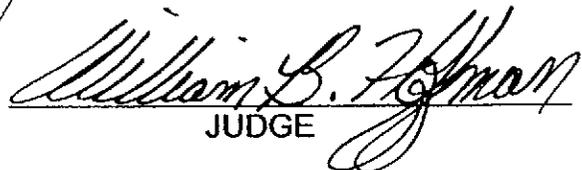
Upon review of Appellant's "Memorandum in Support", the Court finds that Appellant has failed to establish good cause for delay in filing a timely appeal. Appellant has further failed to show that the denial of a delayed appeal would result in a manifest miscarriage of justice. Accordingly, Appellant's application for leave to file a delayed appeal is hereby denied. Appellant's motion for the appointment of counsel, motion to waive pre-payment of costs, and motion for transcripts at the State's expense are denied as being moot.

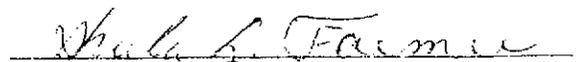
APPEAL DISMISSED.

COSTS TAXED TO APPELLANT.

IT IS SO ORDERED.

  
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JUDGE

  
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JUDGE

  
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JUDGE