

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JASON FROCK,

Defendant-Appellant.

Case No. **08-1917**

On Appeal from the Clark
County Court of Appeals
Second Appellate District

C.A. Case Nos. 07CA102 & 07CA103

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JASON FROCK**

STEPHEN A. SCHUMAKER #0014643
Clark County Prosecutor

ANDREW PICEK #0082121
Assistant Clark County Prosecutor
(COUNSEL OF RECORD)

Clark County Prosecutor's Office
50 E. Columbia Street
Springfield, Ohio 45502
(937) 521-1770
(937) 328-2657 – Fax

COUNSEL FOR STATE OF OHIO

THE OFFICE OF THE
OHIO PUBLIC DEFENDER

KATHERINE A. SZUDY #0076729
Assistant State Public Defender
(COUNSEL OF RECORD)

8 East Long Street - 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
E-mail: Kathy.Szudy@OPD.Ohio.gov

COUNSEL FOR JASON FROCK

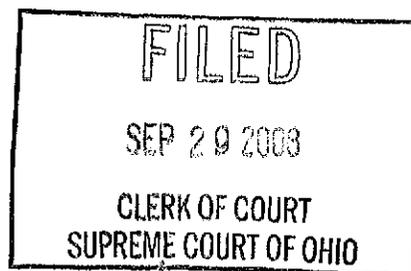


TABLE OF CONTENTS

	Page Number
EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	5
<u>PROPOSITION OF LAW I:</u> The remedy that this Court set forth in <i>State v. Foster</i> , 109 Ohio St.3d 1, 2006-Ohio-856 violates the Ex Post Facto and Due Process Clauses of the United States Constitution.....	5
<u>PROPOSITION OF LAW II:</u> Trial counsel provides ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to object to a trial court’s retroactive application of the remedy that this Court set forth in <i>Foster</i>	11
<u>PROPOSITION OF LAW III:</u> A trial court commits plain error and denies a defendant due process of law by retroactively applying this Court’s remedy as set forth in <i>Foster</i> . Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution.	12
CONCLUSION	13
CERTIFICATE OF SERVICE	14
APPENDIX	
<i>State v. Jason Frock</i> , Opinion and Final Entry, Clark County Court of Appeals, Case Nos. 07CA102 and 07CA103, September 5, 2008	A-1

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

Jason Frock is serving an unconstitutional sentence. When Mr. Frock was resentenced in the Clark County Court of Common Pleas, the trial court retroactively applied this Court's remedy that was set forth in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. And the trial court's retroactive application of the *Foster* remedy violated the Due Process and Ex Post Facto Clauses of the United States Constitution. The issue as to whether a court may retroactively apply the *Foster* remedy is currently before this Court in *State v. Elmore*, Case No. 2007-475. Therefore, Mr. Frock requests that this Court accept jurisdiction, and hold his case in abeyance until this Court decides the merits of *Elmore*. This Court may then render a decision in Mr. Frock's case based on its judgment in *Elmore*.

STATEMENT OF THE CASE AND FACTS

Mr. Frock was indicted in Clark County Case Number 04CR188 for aggravated burglary, aggravated robbery, safecracking, and two counts of receiving stolen property. The crimes were alleged to have occurred on or about March 5, 2004. Approximately four months later, Mr. Frock was indicted in Clark County Case Number 04CR547 for burglary. The crime was alleged to have occurred on or about March 3, 2004. Upon request by the State, the trial court consolidated the two cases for trial.

Mr. Frock proceeded to a jury trial, and was convicted of aggravated burglary, burglary, and safecracking. The trial court imposed a ten-year prison term for the aggravated-burglary conviction, an eight-year prison sentence for the burglary conviction, and an eighteen-month prison term for the safecracking conviction. The trial court then ordered that Mr. Frock pay restitution in the amounts of \$4,300.00 for damages caused in case 04CR188, and \$12,729.00 for damages caused in case 04CR547. All of the imposed sentences were ordered to be served

consecutively, making Mr. Frock's total sentence nineteen years and six months in prison, and \$17,029.00 in restitution.

Mr. Frock timely appealed. Among other issues, Mr. Frock made the following arguments:

1. Mr. Frock's conviction for burglary in Case No. 04CR547 must be reversed because the State failed to present sufficient evidence to prove that charge beyond a reasonable doubt; and
2. Mr. Frock was denied the effective assistance of counsel as guaranteed by the 6th Amendment to the United States Constitution when his counsel failed to object at the sentencing hearing where the trial court erred in imposing maximum and consecutive sentences in violation of Mr. Frock's Fourteenth Amendment right to due process and Mr. Frock's Sixth Amendment right to a trial by jury.

On March 20, 2006, the Second District Court of Appeals reversed Mr. Frock's burglary conviction in Case Number 04CR547 due to insufficient evidence. *State v. Frock*, 2nd Dist. No. 2004 CA 76, 2006-Ohio-1254, at ¶¶26-27. The court of appeals entered a judgment of conviction on the lesser-included offense of burglary, a third-degree felony, and remanded the case for resentencing. *Id.* at ¶68. Additionally, as required by this Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the court of appeals reversed and remanded Case Number 04CR188 for resentencing. *Id.* at ¶¶67-68. However, "in all other respects, the judgment in Case No. 04CR188 [was] affirmed." *Id.* at ¶68.

Mr. Frock filed a timely application to reopen his appeal. App.R. 26(B). In the application, Mr. Frock argued that appellate counsel was ineffective for failing to raise the following issues:

1. The trial court erred by ordering Mr. Frock to pay \$17,029.00 in restitution without considering Mr. Frock's present and future ability to pay as required by R.C. 2929.19(B)(6). (November 4, 2004 Sentencing Hearing, pp. 20-25; November 12, 2004 Judgment Entries);
2. Trial counsel provided ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to object to the trial court's imposition of \$17,029.00 in restitution without considering whether Mr. Frock had the present and future ability to pay. (November 4, 2004 Sentencing Hearing, pp. 20-25; November 12, 2004 Judgment Entries); and
3. The trial court committed plain error and denied Mr. Frock due process of law by imposing \$17,029.00 in restitution without considering whether Mr. Frock had the present and future ability to pay the amount. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution. (November 4, 2004 Sentencing Hearing, pp. 20-25; November 12, 2004 Judgment Entries).

The court of appeals granted Mr. Frock's application, stating that "Mr. Frock...established a 'colorable claim' that, had appellate counsel challenged the restitution award—or trial counsel's failure to do so—the result of the appeal would have been different." The issue regarding the trial court's imposition of the \$17,029.00 restitution order was briefed and the court sustained Mr. Frock's assignment of error, stating that:

Given the lengthy sentence imposed in this case—and the dearth of encouraging information about Frock in the PSI—we are constrained to conclude that the record fails to demonstrate that the court considered [Mr.] Frock's present or future ability to pay restitution.

State v. Frock, 2nd Dist. No. 2004 CA 76, 2007-Ohio-1026, at ¶9.

During Mr. Frock's resentencing hearing, the trial court imposed a ten-year prison term for the aggravated-burglary conviction, a five-year prison sentence for the burglary conviction,

and an eighteen-month prison term for the safecracking conviction. The trial court then ordered that Mr. Frock pay restitution in the amount of \$500.00 for damages caused in each case. All of the imposed sentences were ordered to be served consecutively, making Mr. Frock's total sentence sixteen years and six months in prison, and \$1,000.00 in restitution.

Mr. Frock timely appealed, and the court of appeals consolidated case numbers 07CA102 and 07CA103 for purposes of the appeal. Mr. Frock asserted the following assignments of error:

1. The resentencing court erred by imposing non-minimum, maximum, and consecutive sentences in violation of the Due Process and Ex Post Facto Clauses of the United States Constitution. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; *Blakely v. Washington* (2004), 542 U.S. 296; *United States v. Booker* (2005), 543 U.S. 220;
2. Trial counsel provided ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to object to the trial court's imposition of non-minimum, maximum, and consecutive sentences;
3. The trial court committed plain error and denied Mr. Frock due process of law by imposing non-minimum, maximum, and consecutive sentences. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution; and
4. The trial court did not have the authority to impose consecutive sentences.

State v. Frock, 2nd District Nos. 07CA102 and 07CA103, 2008-Ohio-4533, at ¶4-6. Relying on *State v. Nunez*, 2nd Dist. No. 22208, 2008-Ohio-3376; *State v. Hayes*, 2nd Dist. No. 21914, 2008-Ohio-16; and *State v. Smith*, 2nd Dist. No. 21004, 2006-Ohio-4405, the court of appeals affirmed the judgment of the trial court. *Frock* at ¶8-11.

PROPOSITION OF LAW I

The remedy that this Court set forth in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 violates the Ex Post Facto and Due Process Clauses of the United States Constitution.

On February 27, 2006, this Court found portions of R.C. 2929.14 and 2929.19 to be unconstitutional. *Foster* at paragraphs one, three, and five of the syllabus. In order to remedy the constitutional violations, this Court severed the portions of the statutes that were declared to be unconstitutional. *Id.* at paragraphs two, four, and six of the syllabus. Ohio Revised Code Sections 2929.14(B), 2929.14(C), and 2929.14(E)(4) were among the sections that were determined to be unconstitutional and therefore severed. *Id.* at ¶¶61, 64, and 67, respectively.

Revised Code Section 2929.14(B) previously stated that a minimum sentence must have been imposed unless a finding was made that the defendant previously served a prison term or that “the shortest prison term w[ould] demean the seriousness of the offender's conduct or w[ould] not adequately protect the public from future crime by the offender or others.” With some exceptions not relevant to this case, a maximum sentence was permitted to be imposed only when the trial court found that the defendant committed the worst form of the offense, or that he or she posed the greatest likelihood of committing future crimes. R.C. 2929.14(C).

Additionally, before *Foster* was decided, consecutive, non-mandatory sentences could be imposed on defendants only when:

- 1) Consecutive service [was] necessary to protect the public from future crime or to punish the offender; and
- 2) Consecutive sentences [were] not disproportionate to the seriousness of the offender's conduct and to the danger the offender pose[d] to the public; and
- 3) If court also [found] any of the following:

- (a) The offender committed one or more of the offenses while the offender [was] awaiting trial, sentencing, or while under supervision;
- (b) At least two of the offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflect[ed] the seriousness of the offender's conduct; or
- (c) The offender's history of criminal conduct demonstrate[d] that consecutive sentences [were] necessary to protect the public from future crime by the offender.

R.C. 2929.14(E)(4).

On March 3, and 5, 2004—the dates on which the alleged offenses occurred in this case—the factual findings mandated by R.C. 2929.14(B), R.C. 2929.14(C), and 2929.14(E)(4) were required to be made at a sentencing hearing and in a journal entry of conviction. R.C. 2929.14; R.C. 2929.19; *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-1110; *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. As such, during Mr. Frock's resentencing hearing, the trial court was required to sentence him under the Senate Bill 2 provisions that were in effect at the time of his purported crimes. And any sentence that included non-minimum, maximum, or consecutive prison terms—but omitted the findings required by R.C. 2929.14(B), 2929.14(C), and R.C. 2929.14(E)(4)—violated the Ex Post Facto and Due Process Clauses of the United States Constitution.

Due process prohibits the retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue. *Bowie v. Columbia* (1964), 378 U.S. 347, 354. As this Court has recognized, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively,

operates precisely like an *ex post facto* law...,” and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Garner* (1995), 74 Ohio St.3d 49, 57, quoting *Bouie v. Columbia*, 378 U.S. at 353 (internal citations omitted).

Accordingly, although the constitutional prohibition against *ex post facto* laws is applicable only to legislative enactments, judicial enlargement of a statute implicates the same concerns expressed by the *Ex Post Facto* Clause. *State v. Garner*, 74 Ohio St.3d at 57. The Clause provides simply that “no State shall . . . pass any . . . *ex post facto* Law.” Art. I, § 10, United States Constitution. The scope of the *Ex Post Facto* Clause’s protection includes “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull* (1798), 3 U.S. 386, 390 (seriatim opinion of Chase, J.).

A. When applied retroactively, the remedy that this Court adopted in *State v. Foster* operates as an unforeseeable judicial enlargement of Ohio’s statutes.

As illustrated by United States Supreme Court precedent, the retroactive application of the remedy that this Court mandated in *Foster* violates the *Ex Post Facto* and Due Process Clauses. An analogous situation occurred in *Miller v. Florida* (1987), 482 U.S. 423. In *Miller*, the United States Supreme Court vacated a defendant’s sentence based on the same basic constitutional concerns that invalidate the remedy put forth in *Foster*. *Id.* at 432. The Court determined that the *Ex Post Facto* and Due Process Clauses were violated when a trial court applied Florida’s revised sentencing guidelines to a defendant whose crimes occurred before the revisions took effect. *Id.*

At the time that the defendant committed the crime for which he was convicted, Florida’s sentencing guidelines would have resulted in a presumptive sentence of 3½-to-4½ years in prison. *Id.* at 424. But at the time that the petitioner was sentenced, the revised guidelines called

for a presumptive sentence of 5½-to-7 years in prison. *Id.* The trial court applied the guidelines in effect at the time of sentencing and imposed a seven-year sentence. *Id.* The revisions to Florida's state sentencing guidelines, which occurred after the defendant's offense transpired, raised the "presumptive" sentence that the defendant could have received by approximately three years. *Id.* at 430-433.

Florida's revision of its sentencing guidelines fell within the *ex post facto* prohibition because it met two critical elements: first, the law was retrospective, applying to events occurring before its enactment; and second, it disadvantaged the offender affected by it. *Id.* at 430. A law is retrospective if it "changes the legal consequences of acts completed before its effective date." *Id.* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31. As to the second element, the Court observed that it is "axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Id.* (internal citation omitted). Thus, the application of a state's revised sentencing guidelines to a defendant whose crimes occurred before such revisions took effect violates the Ex Post Facto Clause and the defendant's right to due process.

This Court's severance of the unconstitutional statutes operates retrospectively and disadvantages Mr. Frock. According to the sentencing statutes that were in effect on March 3, and 5, 2004, there was a presumption that Mr. Frock would be sentenced to minimum, concurrent sentences, unless a judge made the findings required by statute. R.C. 2929.14(A)-(E). By severing the statutes, this Court allowed Mr. Frock to be sentenced to non-minimum, maximum, and consecutive terms, without the trial court's having to make any of the findings on the record, as was required under R.C. 2929.14(B), R.C. 2929.14(C), and R.C. 2929.14(E)(4).

By eliminating the presumptive sentencing levels contained within the severed statutes and the judicial factfinding that attended the imposition of sentences exceeding the presumptive

range or of consecutive sentences, this Court has effectively foreclosed appellate review. In *Miller*, the Supreme Court found that eliminating appellate review was a second reason to find that the defendant had been “substantially disadvantaged” by the retrospective application of the revised guidelines to his crime. *Miller v. Florida*, 482 U.S. at 433.

Additionally, the remedy that was adopted by this Court in *Foster* was unexpected. On the dates that the alleged offenses occurred, Mr. Frock could not have foreseen that this Court would replace the portions of Senate Bill 2 that gave a trial court “guided discretion” with unfettered, unreviewable discretion. *Foster* at ¶89. Even after the United States Supreme Court issued its decision in *Blakely v. Washington* (2004), 542 U.S. 296, Ohio defendants could not have foreseen severance. See *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, at ¶17 (prior to issuing the *Foster* decision, this Court held that if the sentencing statutes were ultimately found to be unconstitutional, a trial court “should apply the pertinent sentencing statutes without any enhancement provisions found to be unconstitutional”).

B. The remedy that was adopted by this Court in *State v. Foster* is not analogous to the United States Supreme Court’s resolution in *United States v. Booker* (2005), 543 U.S. 220.

Although severance was constitutional in *United States v. Booker* (2005), 543 U.S. 220, the variances between the amended federal and state statutes evidence that severance as applied to the Ohio Revised Code was unconstitutional. In *Booker*, only a limited portion of the federal sentencing statute was severed, and the significant parts of the statute designed to effect Congressional intent were maintained. As *Foster* notes, the Court severed the subsection that “require[d] sentencing courts to impose a sentence within the applicable Guideline range...and the provision that set forth standards of review on appeal.” *Foster* at n. 97, quoting *United States v. Booker*, 543 U.S. at 259. But the *Foster* opinion failed to discuss the fact that the

majority of the federal sentencing statute was left intact in order to insure that the intent of the statute was preserved. *United States v. Booker*, 543 U.S. at 259-261.

The *Booker* majority explained that even without the mandatory provision, sentencing courts would still be required to consider the “Guidelines sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant.” *United States v. Booker*, 543 U.S. at 259-260, internal citations omitted. And the Court did not sever 18 U.S.C. § 3553(c)(2), which requires the sentencing court to state its reasons for departing from the guidelines. Consequently, although the four separate standards of appellate review were severed, the statute as amended set forth an implicit standard of review—i.e., whether the imposed sentence was reasonable. *United States v. Booker*, 543 U.S. at 260, 261.

By contrast, the severance employed in *Foster* cut a large portion of Ohio’s sentencing statutes. And by doing so, this Court eliminated the ability of an appellate court to effectively review a sentence. The severance also disposed of any real chance of accomplishing the legislature’s goal of establishing uniformity and proportionality in Ohio’s criminal sentencing scheme. R.C. 181.24(B)(1)-(3). See, also, Griffin & Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 Case W.Res.L.Rev. 1, 12 (Fall, 2002) (“[c]onsistency and proportionality are hallmarks of the new sentencing law”).

The purpose and intent of Senate Bill 2 was to reserve consecutive sentences for the worst offenses and offenders. *State v. Comer*, 2003-Ohio-4165, at ¶21, citing *State v. Boland*, 147 Ohio App.3d 151, 2002-Ohio-1163. And before imposing consecutive sentences, a trial court was required to state the findings in R.C. 2929.14(E)(4) and give supporting reasons for the sentence at the dispositional hearing. *Comer* at ¶21. Setting forth the findings at the sentencing hearing gave trial counsel the opportunity to correct obvious errors. It also required trial courts

to do what the legislature intended—to decide how the statutory sentencing factors applied to the facts of any given case instead of simply fitting the factors to the sentence after the sentence was imposed. *Id.*, internal citations omitted. And now, post-*Foster*, a trial court may impose consecutive sentences without considering consistency or proportionality, and without giving any reasons for the sentence.

Accordingly, on the dates of the offenses herein, Mr. Frock was entitled to receive minimum and concurrent prison terms. *Blakely v. Washington*, 542 U.S. 296; R.C. 2929.14(A)(1); 2929.14(A)(2); 2929.14(A)(4); R.C. 2929.14(B); R.C. 2929.14(C); and R.C. 2929.14(E)(4). His sentences must therefore be reversed, and these cases remanded for new sentencing hearings, at which the trial court may not impose a sentence exceeding a total of three years in prison.

PROPOSITION OF LAW II

Trial counsel provides ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, for failing to object to a trial court's retroactive application of the remedy that this Court set forth in *Foster*.

Mr. Frock's trial counsel was ineffective for failing to object when the trial court imposed non-minimum, maximum, and consecutive sentences in violation of the Ex Post Facto and Due Process Clauses of the United States Constitution. (See Proposition of Law I, *supra*). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceedings would have been different. *Strickland* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The court of appeals stated that “counsel did not perform deficiently by failing to raise issues that lack merit.” *Frock* at ¶10. However, had Mr. Frock’s trial attorney objected, the non-minimum, maximum, and consecutive sentences would not have been imposed. *Strickland* at 694-695. Alternatively, had Mr. Frock’s attorney objected to the non-minimum, maximum, and consecutive sentences, the issue regarding the constitutionality of the retroactive application of the remedy adopted in *Foster* would have been properly preserved for appeal. *Id.* See, also, *Nichols v. United States* (6th Cir. 2007), 501 F.3d 542, 548 (the Sixth Circuit determined that trial counsel was constitutionally ineffective for failing to challenge the defendant’s sentence under *Apprendi v. New Jersey* (2000), 530 U.S. 466), vacated by, rehearing en banc granted by *Nichols v. United States* (6th Cir. 2008), 2008 U.S. App. LEXIS 362. As such, Mr. Frock was denied the effective assistance of counsel.

PROPOSITION OF LAW III

A trial court commits plain error and denies a defendant due process of law by retroactively applying this Court’s remedy as set forth in *Foster*. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution.

By ordering Mr. Frock to serve non-minimum, maximum, and consecutive sentences, the trial court committed plain error and denied Mr. Frock due process of law. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution; Crim.R. 52(B); R.C. 2929.19(B)(6). The trial court exceeded its authority when it retroactively applied this Court’s remedy from *State v. Foster*. (See Proposition of Law I, *supra*). An action of a trial court that exceeds its authority qualifies as an instance of plain error because it affects

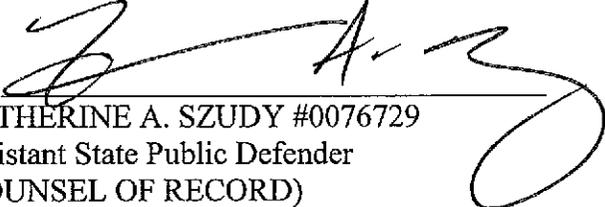
the substantial right of the defendant to have judicial proceedings conducted according to law. *State v. Richter* (1993), 92 Ohio App.3d 395, 399; *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, at ¶7-8. A trial court may not ignore the Ex Post Facto and Due Process Clauses, and the court in this case improperly exceeded its authority by doing so.

CONCLUSION

This case involves substantial constitutional questions, as well as questions of public or great general interest. This Court should grant jurisdiction, and stay the proceedings pending this Court's disposition of *State v. Elmore*, Case No. 2007-475.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BY: 

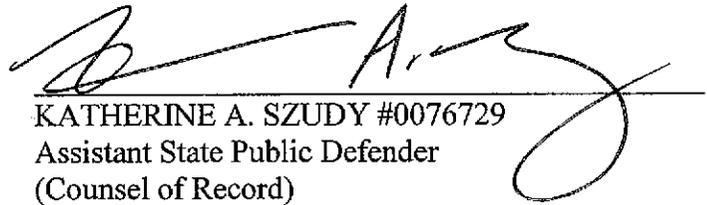
KATHERINE A. SZUDY #0076729
Assistant State Public Defender
(COUNSEL OF RECORD)

8 East Long Street - 11th floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
E-mail: Kathy.Szudy@OPD.Ohio.gov

COUNSEL FOR JASON FROCK

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Jason Frock** has been served upon Andrew Picek, Assistant Clark County Prosecutor, addressed to his office at 50 E. Columbia Street, Springfield, Ohio 45502, on this 29th day of September, 2008.


KATHERINE A. SZUDY #0076729
Assistant State Public Defender
(Counsel of Record)

COUNSEL FOR JASON FROCK

#285495

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Clark
vs.	:	County Court of Appeals
	:	Second Appellate District
JASON FROCK,	:	
	:	C.A. Case Nos. 07CA102 & 07CA103
Defendant-Appellant.	:	

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JASON FROCK

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NOS. 07CA102,
07CA103

vs. : T.C. CASE NOS. 04CR547
04CR188

JASON FROCK : (Criminal Appeal from
Common Pleas Court)

Defendant-Appellant :

CLARK COUNTY
COURT OF APPEALS

SEP 5 2008

Rendered on the 5th day of September, 2008.

FILED
RONALD E. VINCENT, CLERK

OPINION

Stephen Schumaker, Pros. Attorney; Andrew R. Picek, Atty. Reg. No. 0082121, Asst. Pros. Attorney, P.O. Box 1608, Springfield, OH 45501
Attorney for Plaintiff-Appellee

Katherine A. Szudy, Atty. Reg. No. 0076729, Asst. State Public Defender, 8 East Long Street, 11th Floor, Columbus, OH 43215
Attorney for Defendant-Appellant

GRADY, J.:

Defendant was found guilty following a jury trial, of the offenses of aggravated burglary, R.C. 2911.11, and safecracking, R.C. 2911.31, in Clark County Common Pleas Court Case No. 04CR188, and the offense of burglary, R.C. 2911.12(A) (2), in Case No. 04CR547. On direct appeal, we

SEP 5 2008

reversed Defendant's conviction for burglary as a felony of the second degree in Case No. 04CR547, due to insufficient evidence, and we entered a judgment of conviction on the lesser included offense of burglary, R.C. 2911.12(A)(3), a felony of the third degree. *State v. Frock*, Clark App. No. 2004CA76, 2006-Ohio-1254 at ¶13-26. Because the sentences the trial court had imposed were based upon judicial findings the trial court made, we also reversed Defendant's sentences in Case No. 04CR188 pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and we remanded both cases for resentencing. *Frock* at ¶67-68.

On July 25, 2007, the trial court resentenced Defendant. In Case No. 04-CR-188, the court imposed maximum prison terms of ten years for aggravated burglary, a first degree felony, and eighteen months for safecracking, a fourth degree felony. In Case No. 04CR547, the court imposed a maximum prison term of five years for burglary, a third degree felony, and ordered that all of the sentences in both cases 04CR188 and 04CR547 be served consecutively, for a total sentence of sixteen and one-half years in prison.

Defendant timely appealed to this court from his resentencing pursuant to *Foster*.

FIRST ASSIGNMENT OF ERROR

"THE RESENTENCING COURT ERRED BY IMPOSING NON-MINIMUM, MAXIMUM, AND CONSECUTIVE SENTENCES IN VIOLATION OF THE DUE PROCESS AND EX POST FACTO CLAUSES OF THE UNITED STATES CONSTITUTION. FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; *BLAKELY V. WASHINGTON* (2004), 542 U.S. 296; *UNITED STATES V. BOOKER* (2005), 543 U.S. 220."

SECOND ASSIGNMENT OF ERROR

"TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, FOR FAILING TO OBJECT TO THE RESENTENCING COURT'S RETROACTIVE APPLICATION OF THE OHIO SUPREME COURT'S REMEDY IN *STATE V. FOSTER*."

THIRD ASSIGNMENT OF ERROR

"THE RESENTENCING COURT COMMITTED PLAIN ERROR AND DENIED MR. FROCK DUE PROCESS OF LAW BY IMPOSING NON-MINIMUM, MAXIMUM, AND CONSECUTIVE SENTENCES. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

In these related assignments of error, Defendant argues that the Ohio Supreme Court's decision and mandate in *State v. Foster*, *supra*, is unconstitutional because it operates as an

ex post facto law and violates due process, that the trial court therefore erred in applying *Foster's* remedy retroactively to his case and in resentencing Defendant pursuant to *Foster*, and that Defendant's trial counsel performed deficiently by failing to object to the retroactive application of *Foster* during resentencing. All of these claims depend on Defendant's central argument, which is that application of *Foster's* remedy to cases such as Defendant's, where the crime occurred before *Foster* was decided, violates the Ex Post Facto Clause of the United States and Ohio Constitutions.

Defendant's argument that his resentencing pursuant to *Foster* operates as an ex post facto law and is therefore prohibited by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution, has been rejected by this court on numerous occasions. *State v. Nunez*, Montgomery App. No. 22208, 2008-Ohio-3376; *State v. Hayes*, Montgomery App. No. 21914, 2008-Ohio-16; *State v. Smith*, Montgomery App. No. 21004, 2006-Ohio-4405. Accordingly, the trial court did not err in resentencing Defendant pursuant to *Foster*.

Defendant's case was pending on direct review when *Foster* was decided. In that circumstance, trial courts have full

discretion to impose any sentence within the appropriate statutory range, and are no longer required to make any findings or give reasons before imposing maximum, consecutive, or more than minimum sentences. *Id.*, at ¶7 of the syllabus.

Defendant argues that his trial counsel provided ineffective representation at the July 25, 2007 resentencing hearing because he did not object that resentencing Defendant pursuant to *Foster* operates as an ex post facto law. That contention necessarily fails on our finding that the ex post facto argument Defendant makes lacks merit. Therefore, counsel did not perform deficiently by failing to raise issues that lack merit, *Nunez, supra*, and the showing of prejudice necessary for a claim of ineffective assistance of counsel has not been demonstrated. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

Defendant's first, second, and third assignments of error are overruled.

FOURTH ASSIGNMENT OF ERROR

"THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES."

Defendant argues that the trial court lacked the authority to impose consecutive sentences because *State v.*

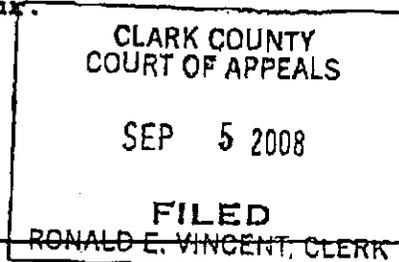
Foster, supra, as part of its remedy, excised in their entirety the statutory provisions authorizing consecutive sentences, R.C. 2929.14(E)(4) and 2929.41(A), and therefore nothing remains in the statutory provisions that gives the trial court authority to order sentences to be served consecutively. We have previously considered and rejected this same argument. *Nunez, supra; State v. Rigsbee*, Champaign App. No. 06CA41, 2007-Ohio-6267. In *Nunez*, at ¶8, this court stated:

"Pursuant to the Ohio Supreme Court's mandate in *Foster*, trial courts have the discretionary power to impose consecutive sentences. *Id.*, at 105; *Rigsbee*, at ¶ 42. This power to impose consecutive sentences derives from the common law. *Rigsbee*, at ¶ 44. In the absence of a statute, it is a matter solely within the discretion of the sentencing court whether sentences shall run consecutively or concurrently. *Stewart v. Maxwell* (1963), 174 Ohio St. 180, 181; *Rigsbee*, at ¶ 44."

Defendant's fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

WOLFF, P.J. And BROGAN, J., concur.

Copies mailed to:
 Andrew R. Picek, Esq.
 Katherine A. Szudy, Esq.
 Hon. Richard J. O'Neill



SEP 5 2008

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NOS. 07CA102,
 07CA103
 vs. : T.C. CASE NOS. 04CR547
 04CR188
 JASON FROCK :
 Defendant-Appellant : FINAL ENTRY

.....

Pursuant to the opinion of this court rendered on the
5th day of September, 2008, the judgment of the trial
 court is Affirmed. Costs are to be paid as provided in App.R.
 24.

CLARK COUNTY
 COURT OF APPEALS
 SEP 5 2008
 FILED
 RONALD E. VINCENT, CLERK

William H. Wolff, Jr.
 WILLIAM H. WOLFF, JR., PRESIDING JUDGE

James A. Brogan
 JAMES A. BROGAN, JUDGE

Thomas J. Grady
 THOMAS J. GRADY, JUDGE

18 Sep., 2008

Copies mailed to:

**Andrew R. Picek
Asst. Pros. Attorney
P.O. Box 1608
Springfield, OH 45501**

**Katherine A. Szudy
Asst. State Public Defender
8 East Long Street, 11th Floor
Columbus, OH 43215**

**Hon. Richard J. O'Neill
101 N. Limestone Street
Springfield, OH 45502**

17 Sep., 2008