

IN THE OHIO SUPREME COURT

S.CT. NO: 2008-0661

STATE OF OHIO : On Appeal from the Eighth District
 : Court of Appeals CA 89456
 Plaintiff-Appellee :
 vs. :
 HUGH HUNTER :
 Defendant-Appellant :

APPELLANT'S REPLY BRIEF

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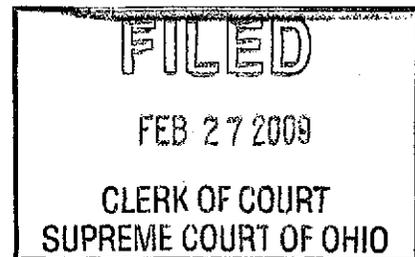


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INTRODUCTION

This case presents the question of whether a trial court can impose a repeat violent offender (“RVO”) penalty-enhancement under former R.C. 2929.14(D)(2)(b). As explained in Hunter’s original brief, a trial court cannot impose an RVO enhancement under former R.C. 2929.14(D)(2)(b) for one of two reasons: (1) such an enhancement was severed by this Court in *State v. Foster* (2006), 109 Ohio St.3d 1; or, (2) if *Foster* did not completely sever this provision, then it remains unconstitutional.

In its response, the State argues that trial courts may impose RVO penalty enhancements because *Foster* only severed part of the RVO penalty-enhancement provision in former 2929.14(D)(2)(b), and because the remaining judicial fact-finding necessary to the imposition of a RVO penalty enhancement does not violate the Sixth Amendment.

With this reply brief, Hunter addresses each of the State’s arguments and explains why the RVO penalty enhancements in former R.C. 2929.14(D)(2)(b), assuming that they were not already severed by this Court in *Foster*, run afoul of the Sixth Amendment.

LAW AND ARGUMENT

Proposition of Law I: The RVO-enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury.

In this case, based on judicial fact-finding, the trial court rendered a verdict that Hunter was a repeat violent offender *and* imposed two additional years in prison based on that verdict. Hunter maintains that the trial court erred in imposing the two-year penalty enhancement because the RVO penalty enhancements *either* were severed by this Court in *State v. Foster* (2006), 109 Ohio St.3d 1 *or* remain unconstitutional as they are predicated on judicial fact-finding. Because the statutory basis for the two-year penalty enhancement no longer exists or is unconstitutional,

this Court must vacate the RVO penalty enhancement imposed upon Hunter.

A. *Foster* severed former R.C. 2929.14(D)(2)(b) in its entirety to remedy the Sixth Amendment violation.

One of the questions presented here is whether this Court, in *Foster*, eliminated RVO penalty enhancements by completely excising former R.C. 2929.14 (D)(2)(b), *or* whether it merely severed former 2929.14(D)(2)(b) in mid-sentence (as concluded by the Eighth District and as argued by the State) and thus kept the penalty enhancements for repeat violent offenders.

Hunter acknowledges that *Foster* is somewhat ambiguous on this question. As emphasized by the State, this Court held, in paragraph six of the *Foster* syllabus, that:

R.C. 2929.14(D)(2)(b) [RVO penalty enhancement provision] and (D)(3)(b) [MDO penalty enhancement provision] are capable of being severed. After the severance, judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender specifications. (*United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621, followed.)

Read in isolation, paragraph six of the *Foster* syllabus suggests that both the RVO and MDO penalty enhancements survived *Foster*. However, as explained in detail in Hunter's initial brief, this interpretation is ultimately incorrect given: (1) the context of the remainder of the decision; (2) this Court's subsequent decision in *State v. Chandler* (2006), 109 Ohio St. 3d 223; (3) the legislative action taken post-*Foster*; and, (4) the constitutional problems with such an interpretation.

1. Broader context of the *Foster* decision

In articulating its remedy to the constitutional problems raised by the MDO and RVO penalty enhancements, this Court simply stated that it "excised" the penalty enhancement provisions and did not parse the provisions as suggested by the State. 109 Ohio St. 3d at 29. Moreover, in summarizing the effect of its severance remedy, this Court explained that courts

were left with “full discretion to impose a prison term *within the basic ranges of R.C. 2929.14(A)* based upon a jury verdict or admission of the defendant without the mandated judicial findings that *Blakely* prohibits.” *Id.* at 30 (emphasis added). In other words, *Foster* excised the RVO and MDO enhancements in their entirety, and, post-*Foster*, trial courts can only impose the sentence authorized on the underlying felony offense.

2. Post-*Foster* MDO decision (*Chandler*)

Foster was not this Court’s last word on the RVO and MDO penalty enhancements. Three months later, in *State v. Chandler*, this Court made clear that *Foster* excised the MDO penalty enhancement in its entirety:

As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed.

(2006), 109 Ohio St. 3d 223, 228. *Chandler*’s discussion of MDO penalty enhancements is instructive for this case because *Foster* treated the MDO and RVO penalty enhancements in an identical fashion. If, as made clear by *Chandler*, *Foster* severed the MDO penalty enhancement in its entirety, it necessarily severed the RVO penalty enhancement in its entirety as well. The State objects to Hunter’s reliance on *Chandler* because it “did not overrule the syllabus law in *Foster*.” (State’s Br. at 6). However, the State misunderstands the significance of *Chandler*. Hunter does not rely on *Chandler* because it *overrules Foster* but rather because it *clarifies* precisely what this Court did in *Foster*.

For its part, the State relies on this Court’s decisions in *State v. Mathis* (2006), 109 Ohio St. 3d 54 and *State v. Evans* (2007), 113 Ohio St. 3d 100 as supporting its interpretation of *Foster*. Neither case, however, provides any further insight into the *Foster* decision. Both cases simply quote the *Foster* decision, including paragraph six of the *Foster* syllabus, in the course of

addressing unrelated questions. Neither case squarely addressed the viability of RVO or MDO penalty enhancements post-*Foster*. Thus, the State's reliance on these two cases is misplaced.

3. Enactment of House Bill 95

The State argues that if “this Court adopts Hunter’s proposition” then “trial court judges lose the ability to impose enhanced sentences upon those criminals who repeatedly commit violent offenses” thereby defeating the General Assembly’s intent. (State’s Br. at 7-8). That is simply not the case. Rather the General Assembly would simply need to adopt an RVO penalty enhancement provision that is consistent with the Sixth Amendment by making the enhancement depend *solely* on prior convictions or by having a jury make the requisite findings. Indeed, the General Assembly has already done just that, at least in part, by enacting House Bill 95 approximately one month after this Court decided *Foster*.

House Bill 95 amended several RVO provisions and established a constitutionally-sound RVO penalty enhancement provision in amended R.C. 2929.14(D)(2)(b).¹ Amended R.C. 2929.14(D)(2)(b) requires a trial court to impose an RVO penalty enhancement if:

- The offender is convicted or pleads guilty to an RVO specification;
- The offender has been convicted of three or more specific offenses (aggravated murder, murder, or first or second-degree offense of violence) in the last 20 years;²
- The current offense is a specific offense (aggravated murder, murder, terrorism, first-degree offense of violence, or second-degree offense of violence if the *trier of fact* makes a specific finding that it involved serious physical harm).

Unlike former R.C. 2929.14(D)(2)(b), the amended version depends on the mere fact of prior

¹ The discretionary RVO penalty enhancement provision in R.C. 2929.14(D)(2)(a), on the other hand, violates the Sixth Amendment because, like former R.C. 2929.14(D)(2)(b), it depends on judicial fact-finding.

² “Offense of violence” is defined as including specific statutory offenses. R.C. 2901.01(A)(9).

convictions with a single exception which *must* be found by a trier of fact. Moreover, House Bill 95 removed the constitutionally problematic judicial fact-finding that was previously required in order to make a determination on the RVO specification itself. Unlike the RVO determination at issue in this case, which includes judicial fact-finding, the new RVO definition in amended R.C. 2929.01(CC) has eliminated the judicial fact-finding and made the RVO determination itself dependent solely on the commission of specific offenses.³ In short, assuming the United States Supreme Court does not revisit the prior conviction exception to the Sixth Amendment’s jury trial right, the RVO penalty enhancement in amended R.C. 2929.14(D)(2)(b) is *Blakely* compliant. See fn.4, *infra*.

Given that the General Assembly enacted an RVO penalty enhancement provision that was compatible with the Sixth Amendment *one month* after *Foster* was decided, the State’s concern about the ability of trial courts “to impose enhanced sentences upon those criminals who repeatedly commit violent offenses” is unfounded. (State’s Br. at 8). The General Assembly can enact, and indeed already has enacted, penalty enhancement provisions that do not violate a

³ Amended R.C. 2929.01(CC) defines “[r]epeat violent offender” as a person about whom both of the following apply:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (CC)(1)(a) of this section.

(2) The person previously was convicted of or pleaded guilty to an offense described in division (CC)(1)(a) or (b) of this section.

defendant's constitutional rights.

4. Partial severance of former R.C. 2929.14(D)(2)(b) would not have cured the Sixth Amendment violation

The State's interpretation of *Foster*, as severing only part of former R.C. 2929.14(D)(2)(b), must be rejected because severance of the RVO penalty enhancement in its entirety was necessary to avoid two separate constitutional violations which are discussed in detail below.

B. The failure to completely sever the RVO penalty enhancement would violate Hunter's constitutional rights.

The interpretation of *Foster*, urged by the State, not only fails to cure the Sixth Amendment violation resulting from the RVO penalty enhancement in former R.C. 2929.14(D)(2)(b) *but also* creates a new due process violation. Thus, the State's interpretation should be rejected.

1. Partial severance of R.C. 2929.14(D)(2)(b) would not have cured the Sixth Amendment violation.

Foster cannot be interpreted as merely excising a portion of subsection (D)(2)(b) because, under such a reading, the RVO penalty enhancements would still depend on judicial fact-finding and would thus continue to violate the Sixth Amendment. In this case, the trial court made explicit findings of fact that the victim in the prior case "suffered physical harm at the hand of Mr. Hugh Hunter for which Mr. Hugh Hunter was convicted and I believe served a prison sentence." (Tr. at 254). Such judicial fact-finding, which served as a prerequisite for enhancing Mr. Hunter's sentence by two additional years, is unconstitutional.

It is by now well-established that *any fact* "[o]ther than the fact of a prior conviction" that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey* (2000), 530 U.S. 466,

489; *see also* *Cunningham v. California* (2007), 549 U.S. 270, 288-89 (explaining that *Apprendi* creates a “bright-line rule” to which there is but one exception (existence of a prior conviction)); *Ring v. Arizona* (2002), 536 U.S. 584.⁴

Under former R.C. 2929.01(DD) and R.C. 2941.149, the trial court was required to find certain facts to determine that an individual was a repeat violent offender and thus eligible for the RVO penalty enhancement in former R.C. 2929.14(D)(2)(b). Specifically, the trial court must determine that the defendant’s prior conviction “resulted in death or physical harm”⁵ and that defendant served a prison term for that prior conviction. Former R.C. 2929.01(DD)(2)(a). Such judicial fact-finding, which is necessary to impose RVO penalty enhancements, clearly violates *Apprendi*’s bright-line rule.

As it did before the Eighth District below, the State acknowledges that the trial court “found facts” in order to impose the RVO enhancement.⁶ (State’s Br. at 7). It argues, however, that the RVO penalty enhancement did not violate Hunter’s right to a jury trial *in this case* because Hunter elected to try the RVO specification to the judge and waived his right to try the

⁴ The continued viability of this sole exception for prior convictions is in doubt. A majority of the United States Supreme Court now recognizes that the decision establishing the prior conviction exception was wrongly decided. *Shepard v. United States* (2005), 544 U.S. 13, 27-28 (Thomas, J., *concurring* and noting that five current members of the Court, including himself, would hold that the Sixth Amendment requires juries to determine if the defendant has a prior conviction if the prior conviction increases maximum possible sentence); *see also Apprendi*, 530 U.S. at 489-90.

⁵ This fact does not need to be found if the prior conviction was for aggravated murder, murder, involuntary manslaughter, rape or felonious sexual penetration. R.C. 2929.01(DD)(2)(a)(i).

⁶ In its response brief in the Eighth District, the State recognized that the trial court engaged in fact-finding in order to determine that Hunter was a repeat violent offender and that the RVO penalty enhancements depend on that determination. (State’s Eighth Dist. Br. at 11). The State noted that the trial court “was satisfied that the physical harm specification was proved beyond a reasonable doubt” on the prior offense and that the trial court found “that appellant served a

RVO specification to a jury. (State's Br. at 7 and 8). The State's argument is misplaced because Hunter does **not** have a right to a jury trial on the RVO specification. R.C. 2941.149 is quite clear that "[t]he court shall determine the issue of whether an offender is repeat violent offender." As explained by this Court in *Foster*, it is the trial court that must make "the necessary factual findings for convicting the offender of being a repeat violent offender. . . ." 109 Ohio St. 3d at 23. Because the RVO statute does not permit a jury trial on RVO specifications, Hunter never had the right to a jury trial and any attempt to waive a jury trial on the RVO specification was superfluous and had no legal effect. There is nothing to waive. Accordingly, the State's jury waiver argument lacks merit.

The State also argues, in the alternative and without citing a single authority, that "the findings required for the [RVO] definition are within the realm of traditional facts that are to be considered by a sentencing court and are not inexorably bound to the right to trial by jury." (State's Br. at 8). That precise argument has been repeatedly made and repeatedly rejected by the United States Supreme Court in *Apprendi*, *Ring*, *Blakely v. Washington* (2004), 542 U.S. 296, *United States v. Booker* (2005), 543 U.S. 220, and *Cunningham*.

For instance, in *Apprendi*, the Supreme Court dismissed the State's attempt to evade the Sixth Amendment's application by creating a "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.'" 542 U.S. at 494. The Court rejected such distinctions and explained that the "relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to greater punishment than that authorized by the jury's guilty verdict?" *Id.* In *Ring*, the Court explained that "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how

prison sentence" on that offense. (State's Eighth Dist. Br. at 10).

the State labels it -- must be found by a jury beyond a reasonable doubt.” 536 U.S. at 602. Finally, in *Cunningham*, the Supreme Court squarely rejected the argument that California’s sentencing system, of permitting an upper level sentence only upon a finding of some aggravating circumstance, was constitutional because it involved the “type of factfinding that traditionally has been incident to the judge’s selection of an appropriate sentence within a statutorily prescribed sentencing range.” 549 U.S. at 289. The United States Supreme Court held that its precedent “leaves no room” for artificial distinctions between facts that would implicate the Sixth Amendment and those that would not. *Id.* Thus, the State’s attempt to avoid the Sixth Amendment by characterizing the fact-finding as “traditional facts that are to be considered by the sentencing court” necessarily fails.

In short, the determination of whether or not an individual is a repeat violent offender, as defined by former R.C. 2929.01(DD), requires judicial fact-finding. Because this Court in *Foster* did not sever the statutory requirement that a judge determine whether a defendant is a repeat violent offender, R.C. 2941.149, or the judicial fact-finding attendant to that determination, it must have excised the RVO penalty enhancements in their entirety. If this Court had only severed a portion of R.C. 2929.14(D)(2)(b), leaving the penalty enhancements intact, the RVO penalty enhancements would remain unconstitutional because they would still depend on the judicial fact-finding required by former R.C. 2929.01(DD).

2. The imposition of an RVO penalty enhancement, without the findings previously required by R.C. 2929.14(D)(2)(b), violates appellant’s due process rights.

The retroactive application of a *partially* severed RVO penalty enhancement provision (as urged by the State) violates appellant’s state and federal due process rights because it effectively changes appellant’s presumptive sentence to his detriment.

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* (1987), 482 U.S. 423, 429 (quoting *Calder v. Bull* (1798), 3 Dall. 386, 390). 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 “technically” increased the punishment for the crime, the legislative enactment falls within the *ex post facto* prohibition if it: 1) is retrospective; and 2) disadvantages the offender affected by it. *Miller*, 482 U.S. at 432-33. Although the *Ex Post Facto* Clause “does not of its own force apply to the Judicial Branch of government,” the United States Supreme Court has recognized “that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” *Rogers v. Tennessee* (2001), 532 U.S. 451, 456. Given the similar impact of judicial decisionmaking and legislation on the rights of criminal defendants, the fundamental principle that “the required criminal law must have existed when the conduct in issue occurred” must be applied to restrict the retroactive application of both. *Bouie v. South Carolina* (1964), 378 U.S. 347, 354. In short, the Court explained:

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. at 353. This Court has recognized the validity of *Bouie*’s limitations on the retroactive application of judicial decisions. *State v. Garner* (1995), 74 Ohio St. 3d 49, 57.

The retroactive application of a partially severed RVO penalty enhancement substantially disadvantaged Hunter in two critical ways. First, it removed the presumption against an RVO penalty enhancement and permitted the trial court to impose an RVO penalty enhancement on Hunter without making the findings required by former R.C. 2929.14 (D)(2)(b). In other words,

the trial court was able to impose the RVO add-on without finding that an eight-year sentence was both “inadequate to punish the offender and protect the public from future crime” and was “demeaning to the seriousness of the offense.” By removing the factors which previously limited the imposition of an RVO add-on, partial severance of former R.C. 2929.14(D)(2)(b) permits trial courts to impose RVO add-on’s in situations in which they would previously have been unable. Second, partial severance of R.C. 2929.14 (D)(2)(b) would cause Hunter to lose significant appellate rights which previously existed. Before partial severance, Hunter could be assured a new sentencing hearing if, as occurred here, the trial court failed to make the necessary findings or made unreasoned findings. *Cf State v. Mathis* (2006), 2006 Ohio 855, ¶ 34 and 37 (explaining that “pre-*Foster*, R.C. 2953.08(G)(1) provided an opportunity for remand to the trial court if required findings were missing” for a *de novo* sentencing hearing).

The State responds that there is no due process problem caused by retroactively applying an RVO penalty enhancement provision that was judicially-modified to the detriment of criminal defendants. The State argues that Hunter’s due process argument fails because his “potential penalties remain[ed] unchanged” by *Foster* which, the State contends, is quite unlike the change to the sentencing guidelines in *Miller* that the United States Supreme Court struck down as “expos[ing] the defendant to greater punishment.” (State’s Br. at 10-11). The State’s argument is based on a misunderstanding of the *Miller* decision.

In *Miller*, the Florida Legislature increased the presumptive sentence for certain offense conduct but left unchanged the statutory penalties. 482 U.S. 423. When Miller received a sentence inconsistent with the presumptive sentence in effect at the time of his offense conduct, *but well within the original statutory range*, he challenged the retroactive increase in his presumptive sentence as an *ex post facto* violation. *Id.* at 427-28. The Florida Supreme Court,

based on the very same logic employed by the State, rejected Miller's constitutional claim because "the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense." *Id.* at 428. The United States Supreme Court unanimously reversed, however, making clear that the *Ex Post Facto* Clause prevented the retroactive application of a higher presumptive sentence *even if* the potential statutory penalties remained unchanged. 482 U.S. at 426-27, 428, and 435-36. The core holding of *Miller* is that notice of the statutory penalties does *not* render the retroactive application of detrimental changes in sentencing presumptions constitutional. The practical effect of the change in the presumptive sentence in *Miller* is indistinguishable from the change to the presumptive sentence in this case. Accordingly, *Miller* dictates that the retroactive application of a partially severed RVO penalty enhancement violates Hunter's due process rights.

The State also relies heavily on federal decisions that rejected constitutional challenges to the retroactive application of the *Booker* remedy to the Federal Sentencing Guidelines. These cases, even if correctly decided, provide little guidance for assessing the due process implications of retroactively applying the changes to Ohio's sentencing structure. Although the *Foster* Court suggested that it was "applying the *Booker* remedy" to address the Sixth Amendment violations contained within Ohio's felony sentencing code, *Foster*, 109 Ohio St. 3d at 27-28, the only similarity between the two remedies is the manner in which they were applied (i.e. severance of an offending statutory provision). Beyond this superficial similarity, the *Booker* and *Foster* remedies are, as a matter of substance, radically different in their respective effects on criminal defendants.

By simply changing the Federal Sentencing Guidelines from mandatory to advisory, the *Booker* remedy did not radically alter the expectations of criminal defendants or abolish their

anticipated sentence. Before and after *Booker*, trial courts are required to consider the Federal Sentencing Guidelines – federal trial courts still begin at the same base offense level and must still determine whether certain upward adjustments are warranted. *Booker*, 125 S.Ct. at 767 (explaining that “[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”) Before and after *Booker*, federal courts could depart from the guideline range. Post-*Booker* criminal defendants still have the same ability to challenge the propriety of a particular upward adjustment at the trial court and even on appeal. *See Gall v. United States* (2008), ___ U.S. ___, 128 S.Ct. 586, 597 (“After settling on the appropriate sentence, [the trial court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.”) The only significant difference for federal criminal defendants is that pre-*Booker* sentences within the Federal Sentencing Guidelines range, absent a departure, were mandatory, and post-*Booker* sentences within the Guidelines range are presumptively reasonable. *See Rita v. United States* (2007), 551 U.S. _____, 127 S. Ct. 2456, 2465.

In contrast, the remedy in the instant case constitutes a significantly more severe departure from Ohio’s previous sentencing regime and the settled expectations of criminal defendants. Pre-*Foster*, Ohio trial courts started with a presumption of minimum and concurrent terms with no RVO penalty enhancement (Ohio’s equivalent of the “base offense level” found in the Federal Sentencing Guidelines) and could only enhance the sentence if they found the presence of certain statutory factors (Ohio’s equivalent of the “upward adjustments” found in the Federal Sentencing Guidelines). After the decision in the instant case, there is no presumptive base level -- trial courts do not need to make any findings to impose a sentence above the minimum. This Court has excised Ohio’s version of the “base offense level,” its version of

“upward adjustments,” and any requirement that trial court demonstrate a consideration of either. Had the United States Supreme Court in *Booker* applied a remedy akin to the remedy applied in *Foster*, there would be no Federal Sentencing Guidelines in existence today.

Given the significant differences between the tangible effects of the *Foster* and *Booker* remedies on criminal defendants, federal case law concluding that *Booker* does not violate the ex post facto principles inherent in the due process clause,⁷ is inapposite.

Additionally, the federal case law on which the State relies is particularly inapposite in that Article II, Section 28 of the Ohio Constitution affords Ohio citizens greater protection than does the *Ex Post Facto* Clause of the United States Constitution. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 105. Ohio’s constitutional bar on retroactive laws extends beyond merely punitive laws to any law affecting substantive (as opposed to procedural) rights. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. In *Miller*, the United States Supreme Court emphasized that the increase of a presumptive sentence “appears to have little about it that could be deemed procedural.” 482 U.S. at 433-34. It explained that changes to a presumptive sentence are substantive in nature because the presumptions create “a high hurdle that must be cleared” before a trial court can impose a sentence higher than the presumption. *Id.* at 435. As in *Miller*, the elimination of presumptions beneficial to criminal defendants constitutes a substantive change such that the Ohio Constitution precludes its retroactive application.

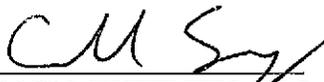
⁷ E.g., *United States v. Duncan* (C.A.11 2005), 400 F.3d 1297, 1306-1308; *United States v. Scroggins* (C.A.5 2005), 411 F.3d 572, 575-77; *United States v. Lata* (C.A.1 2005), 415 F.3d 107, 110-12; *United States v. Jamison* (C.A.7, 2005), 416 F.3d 538, 539; *United States v. Dupas* (C.A. 9 2005), 419 F.3d 916, 919-21; *United States v. Rines* (C.A.10, 2005), 419 F.3d 1104, 1106-1107; *United States v. Vaughn* (C.A.2 2005), 430 F.3d 518, 524-25; *United States v. Wade* (C.A. 8 2006), 435 F. 3d 829; *United States v. Alston-Graves* (C.A. D.C. 2006), 2006 U.S. App. LEXIS 2001, *31-35.

In sum, the retroactive application of a partially severed RVO penalty enhancement provision would violate the ex post facto and retroactivity implications in the state and federal due process clauses.

CONCLUSION

For the reasons set forth above and in appellant's initial brief, Defendant-Appellant Hugh Hunter respectfully asks this Court to adopt his first proposition of law, reverse the decision of the Eighth District Court of Appeals, and vacate his two-year RVO penalty enhancement.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Reply Brief was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 27 day of February, 2009.


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