

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

vs.

Phillip E. Elmore,

Defendant-Appellant.

Case No. 2007-0475

[Death Penalty Case

On Appeal from the Licking

County Court of Common Pleas.]

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**PLAINTIFF-APPELLEE'S MOTION FOR  
POST-ARGUMENT SUPPLEMENTAL BRIEFING  
REGARDING IMPACT OF  
OREGON V. ICE**

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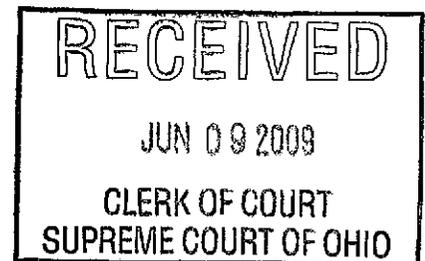
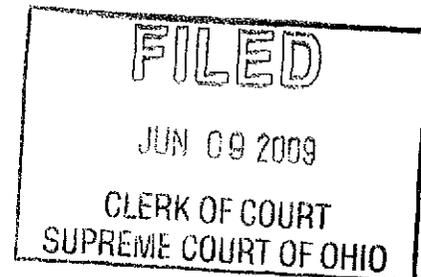
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**MOTION TO ALLOW POST-ARGUMENT  
SUPPLEMENTAL BRIEFING**

Now comes the State of Ohio, Plaintiff-Appellee herein, and hereby moves this Court to permit the parties to file supplemental briefs addressing what impact on this case, if any, the United States Supreme Court's decision in Oregon v. Ice (2009) \_\_\_ U.S. \_\_\_; 129 S.Ct. 711, 172 L.Ed.2d 517, may have on the proper outcome of the instant appeal. Ice was decided on January 14, 2009 – long after the parties had filed their initial briefs in this case. The decision in Ice calls into question whether this Court's decision in State v. Foster (2006), 109 Ohio St.3d 1, should be revisited **limited to the single issue** of whether or not those provisions of the Ohio Revised Code that address the need to make certain findings prior to a trial court imposing consecutive sentences (e.g. R.C. 2929.14(E)(4)) should remain severed.

Four Ohio courts of appeals have already observed that Ice may call into question whether Foster was correctly decided on this one issue. See, State v. Mickens (10<sup>th</sup> Dist.), 2009 WL 1526918, 2009-Ohio-2554, ¶¶ 22-25; State v. Reed (8<sup>th</sup> Dist.), 2009 WL 1348207, 2009-Ohio-2264, f.n.3; State v. Starett (4<sup>th</sup> Dist.), 2009 WL 405908, 2009-Ohio-744, f.n 2; and, State v. Jones (2<sup>nd</sup> Dist.), 2009 WL 377183; 2009-Ohio-694, ¶ 8. Indeed the court in Mickens went so far as to specifically note that in light of the Ice decision: “it may now be necessary to take another look at some of Ohio's current sentencing statutes, as well as some of those which immediately preceded the decision in Foster. However, **such a look could only be taken by the Ohio Supreme Court**, as we are bound to follow the law and decisions of the Ohio Supreme Court, unless or until they are reversed or overruled.” *Id.* at ¶ 25. (Emphasis added.)

At the oral argument in this matter on May 19, 2009, a member of this Court mentioned the possibility that this Court had accepted jurisdiction on a case involving the impact Ice might have

for Ohio. However, undersigned counsel can find no case where the Court has accepted jurisdiction on such an issue.

For the benefit of both the parties to this case, as well as a whole host of courts, prosecutors and defendants across this State, it is important that this Court address this matter sooner rather than later. Accordingly, the State requests that this Court allow the parties to brief this issue. See, *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.* (2007), 115 Ohio St.3d 337, ¶ 55, (Noting that when a Court considers a possible dispositive issue that was not briefed by the parties “[t]he preferable course is to request supplemental briefing”, citing, *State v. Drummond* (2006), 111 Ohio St.3d 14, ¶ 28; *Kish v. Akron* (2005), 106 Ohio St.3d 1402; and, *State v. Yarbrough* (2004), 104 Ohio St.3d 1, ¶ 4.) Unless requested by the Court, no additional oral argument would be necessary.

The State proposes the following possible propositions of law on this issue:

**THE UNITED STATES SUPREME COURT’S DECISION IN OREGON V. ICE ADDRESSING EFFECT OF BLAKELY V. WASHINGTON IN CONTEXT OF CONSECUTIVE SENTENCING DID NOT HAVE EFFECT OF “REVIVING” STATUTORY FINDING DEALING WITH IMPOSITION OF CONSECUTIVE SENTENCES THAT WAS SEVERED BY OHIO SUPREME COURT IN STATE V. FOSTER. [*State v. Foster* (2006), 109 Ohio St.3d 1, construed in light of *Oregon v. Ice* (2009) \_\_\_ U.S. \_\_\_; 129 S.Ct. 711, 172 L.Ed.2d 517.]**

If permitted to further brief this issue, the State would be in a position to convince this Court that the *Ice* decision has no effect on that part of the *Foster* opinion that severed those portions of R.C. 2929.14 (as well as others) that, in their statutory terms, would, but-for *Foster*, otherwise require findings by a trial court before that court could impose consecutive sentences. Simply put, the decision in *Ice* does not somehow automatically “revive” any of the statutes severed by *Foster*.

The reasons advanced for this position, briefly, include:

- (1) When the severance remedy is used by a court to address a constitutional violation, even portions of a statute that may themselves be constitutional may be severed if necessary to preserve overall legislative intent when severing those portions that are unconstitutional.**

Authorities that would be discussed in support of this point, if supplemental briefing permitted:

*State v. Foster* (2006), 109 Ohio St.3d 1

*Geiger v. Geiger* (1927) 117 Ohio St. 451

*Bd. of Elections v. State, ex rel. Schneider* (1934), 128 Ohio St. 273, 294, (“If it were not for the fact that the two sections when considered together do away with the election of 1934, tenable argument could be advanced favoring the constitutionality of section 2750, General Code; but the sections are so ‘inseparably connected’ that both must fall, and the repealing section must fall with them. To hold otherwise would be to create a hiatus or interregnum, as you please, in the office of county recorder for the term of two years and leave undisturbed the evil this action seeks to correct.”) (Emphasis added.) (Emphasis added.)

*United States v. Booker* (2005), 543 U.S. 220, 246. (“We answer the remedial question by looking to legislative intent. ... We seek to determine what ‘Congress would have intended’ in light of the Court’s constitutional holding. ... ‘Would Congress still have passed’ the valid sections ‘had it known’ about the constitutional invalidity of the other portions of the statute?”) (Internal citations omitted.)

*Virginia v. Hicks* (2003), 539 U.S. 113, 121 (“[w]hether these provisions are severable is of course a matter of state law”).

*R.C. § 1.50*

- (2) The severance remedy used in *State v. Foster* has an independent basis in the Ohio Constitution.**

Authorities that would be discussed in support of this point, if supplemental briefing permitted:

*Ohio Constitution, Article I, § 5*

*Ohio Constitution, Article I, § 10*

*Foster*, at ¶¶ 2, 28, 93, (Court citing to Ohio Constitution and, at one point, noting that defendant in companion case, Quinones, specifically raised claims under Ohio Constitution.)

*Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, (“Ohio’s Constitution is a document of independent force and significance.”)

*Gallimore v. Children’s Hosp. Medical Center* (1<sup>st</sup> Dist.), Slip opinion, 1992 WL 37742, p. 14, (“Arguably, the right to trial by jury in Ohio provides even greater protection than its federal counterpart because Section 5, Article I in declaring that this right ‘shall be inviolate’ (emphasis ours) seems to adopt an even higher degree of protection.”)

- (3) Once an Ohio statute is declared to be unconstitutional by either the Ohio Supreme Court, or by the United States Supreme Court, a subsequent determination by that court that the statute, after further consideration, is constitutional after all, does not have the legal effect of “reviving” that statute absent reenactment by the General Assembly.**

Authorities that would be discussed in support of this point, if supplemental briefing permitted:

*Ohio Constitution, Article II, § 15 (D)*, (“No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.”)(Emphasis added.)

*Ohio Constitution, Article II, § 1*, (“... The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.”)(Emphasis added.)

*Bd. of Elections v. State, ex rel. Schneider* (1934), 128 Ohio St. 273, ¶ 5 of syllabus, “An act of the General Assembly, which was unconstitutional at the time of enactment, can be revived only by re-enactment.”

*Treanor, and Sperling, “Prospective Overruling and the Revival of ‘Unconstitutional Statutes’”,* (1993), 93 *Columbia Law Review* 1902. (Discussing the reasons why a subsequent change in judicial construction regarding the constitutionality of a statute should not have the effect of “reviving” it.)

**CONCLUSION**

Based upon the foregoing the State of Ohio has shown that there is a very REAL need for this Court to address the impact of Oregon v. Ice on the Foster opinion. The State of Ohio submits that this case is as good as any other for this Court to decide the matter. In fact, because this case is currently before the Court it is the absolute *best* case in which to decide this issue due to the fact that all participants in Ohio's criminal justice system deserve to know – as soon as possible – what changes, if any, the Ice decision will cause for Ohio's legislators, judges, prosecutors, defense attorneys, and, of course, defendants.

As a result, this Court should grant the instant motion and set a supplemental briefing schedule (either without subsequent oral argument, or with oral argument upon an expedited basis).

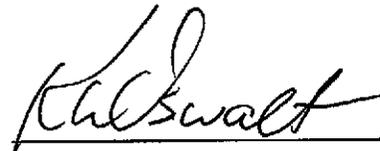
Respectfully submitted,



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Prosecuting Attorney

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been sent by regular U.S. Mail this 8<sup>th</sup> day of June, 2009, to Attorney for appellant at the address noted on the cover page hereto.



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