

ORIGINAL

IN THE OHIO SUPREME COURT

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

Case No. 2009-1997

KENNETH HODGE,

Defendant-Appellant.

[On appeal from the Hamilton County Court of Appeals, 1st Appellate District]

Court of Appeals Case No. C080968
Trial Court Case No. B-0805818

**Merit Brief of *Amicus Curiae*, Licking County Prosecuting Attorney,
In Support of Position of State of Ohio, Plaintiff-Appellee**

Appearances:

*For Amicus Curiae,
Licking County Prosecutor:*

Kenneth W. Oswalt, (0037208)
Licking County Prosecuting Attorney
Counsel of Record
20 S. Second Street
Fourth Floor
Newark, Ohio 43055
(740) 670-5255
(740) 670-5241 [Fax]

For Plaintiff-Appellee:

Joseph T. Deter (0012084)
Hamilton County Prosecuting Attorney
Ronald W. Springman Jr. (0041413)
Counsel of Record, and
Rachel Lipman Curran (0078850)
Ass't. Hamilton County Prosecuting Attorneys
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3178
(513) 946-3021 [fax]

For Defendant-Appellant:

Janet Moore (0080506)
Attorney at Law
Counsel of Record
205 Worthington Avenue
Wyoming, Ohio 45215
(513) 600-4757
and
David A Singleton (0074556)
Angelina N. Jackson (0077937)
Peter C. Link
The Indigent Defense Clinic
Ohio Justice & Policy Center
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202
(513) 421-1108 Ext. 12
(513) 562-3200 [Fax]

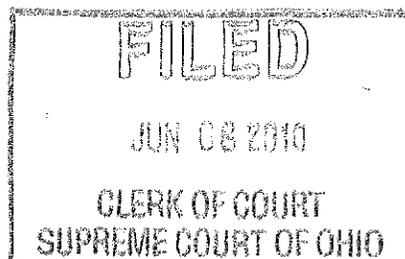


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PROSECUTING ATTORNEY
KENNETH W. OSWALT
20 SOUTH SECOND ST.
NEWARK, OH 43055

FELONY AND CIVIL
DIVISIONS
670-5255

JUVENILE COURT
DIVISION
670-5264

TAX FORECLOSURES
670-5021

FAX 670-5241

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PROSECUTING ATTORNEY
KENNETH W. OSWALT
20 SOUTH SECOND ST.
NEWARK, OH 43055

FELONY AND CIVIL
DIVISIONS
670-5255

JUVENILE COURT
DIVISION
670-5264

TAX FORECLOSURES
670-5021

FAX 670-5241

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PROSECUTING ATTORNEY
 KENNETH W. OSWALT
 20 SOUTH SECOND ST.
 NEWARK, OH 43055

FELONY AND CIVIL
 DIVISIONS
 670-5255

JUVENILE COURT
 DIVISION
 670-5264

TAX FORECLOSURES
 670-5021

FAX 670-5241

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PROSECUTING ATTORNEY
KENNETH W. OSWALT
20 SOUTH SECOND ST.
NEWARK, OH 43055

FELONY AND CIVIL
DIVISIONS
670-5255

JUVENILE COURT
DIVISION
670-5264

TAX FORECLOSURES
670-5021

FAX 670-5241

**INTEREST OF AMICUS CURIAE IN
DISPOSITION OF CURRENT APPEAL**

Amicus Curiae, Kenneth W. Oswalt, is the duly elected Prosecuting Attorney for Licking County, Ohio. In that capacity, he has several interests in the proper outcome of the instant appeal. First, his office, like 87 other County Prosecutors, will be charged with a primary role (if not THE primary role) of seeing to it that this Court's decision is carried into effect in the tens of thousands of felony prosecutions to occur in the future and, should Appellant Hodge prevail, the tens of thousands of cases that could be ordered to undergo resentencing.

Second, this Court has accepted jurisdiction of an appeal from Licking County that addresses the same issues as the instant appeal – and in which the undersigned was appellate counsel. Indeed, this Court stayed briefing in that matter pending the decision in the instant appeal. See, *State v. Smith* (2010), 124 Ohio St.3d 1538.

Finally, undersigned counsel has prior familiarity with the legal issues present in this case. As a starting point, undersigned counsel was both trial counsel as well as appellate counsel in *State v. Foster* (2006), 109 Ohio St.3d 1 – the understanding and construction of which is obviously integral to the current appeal. In addition, undersigned counsel was counsel of record before this Court in *State v. Elmore* (2009), 122 Ohio St.3d 472, f.n. 2, when the Court declined to entertain the State's motion for supplemental briefing as to the effect of the *Oregon v. Ice* decision as the trial court in that case had never been given an opportunity to address the issue. Thus, undersigned counsel is well versed in the issues at play in this case.

STATEMENT OF CASE AND FACTS

Amicus has no comments, suggested additions or modifications, nor objections to the Statement of Facts or the Statement of the Case presented by Defendant-Appellant, except to the extent, if at all, the State of Ohio registers objections thereto.

Proposition of Law

THE UNITED STATES SUPREME COURT'S DECISION IN OREGON V. ICE ADDRESSING THE EFFECT OF BLAKELY V. WASHINGTON IN THE CONTEXT OF CONSECUTIVE SENTENCING DID NOT HAVE THE EFFECT OF "REVIVING" THE NECESSITY FOR THE STATUTORY FINDINGS WHEN DEALING WITH THE IMPOSITION OF CONSECUTIVE SENTENCES THAT WERE SEVERED BY THE OHIO SUPREME COURT IN STATE V. FOSTER.

A. Introductory Comments

The Appellant asserts that the continued adherence to the holding in *State v. Foster* (2006), 109 Ohio St. 3d 1, at least in the context of consecutive sentencing, runs afoul of the United States Supreme Court's ruling in *Oregon v. Ice* (2009), 555 ___ U.S. ___, 129 S. Ct. 711, 172 L.Ed.2d 517. He is wrong.

Prior to the ruling in *Foster*, sentencing courts were governed by various provisions of the Revised Code that set out, in general terms, certain required factors a court must consider and certain specific findings a court must make before imposing various sentences. See generally, R.C. 2929.11, R.C. 2929.12, R.C. 2929.13, and R.C. 2929.14. (For purposes

relevant to this appeal the Court is called upon to address only those that involve findings that purportedly are necessary prior to the imposition of consecutive sentences.)

With respect to consecutive sentences, pre-*Foster* the sentencing court was required to make certain findings under R.C. 2929.14(E)(4)(a) thru (c). Without these findings, Ohio's statute carried a presumption of concurrent sentences. The *Foster* decision, utilizing the severance doctrine, excised this portion of R.C. 2929.14. *Id.* at 25, 31. Thereafter, this Court found that "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Id.* at 31.

In contrast, in a post-*Foster* world, when an appellate court reviews a felony sentence it was to apply a two-step approach. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard." *State v. Kalish* (2008), 120 Ohio St.3d 23, ¶ 4.

On January 14, 2009 the United States Supreme Court handed down the decision in *Ice*. In that case the court held that the Sixth Amendment of the Federal Constitution does not preclude judges from following statutes that enumerate sentencing factors before imposing consecutive sentences for multiple crimes. The Appellant herein extrapolates from that holding a conclusion that *Foster* was wrongly decided as it applies to consecutive sentencing, and thus is no longer good law on this point. As noted, he is wrong.

B. Treatment of the Issue by the Courts of Appeals

As a starting point, it should be observed that all appellate districts that have considered the impact of the *Ice* decision, save for the Fifth District, still continue to adhere to *Foster* in all respects (at least unless and until the Ohio Supreme Court addresses *Ice* and specifically over-rules *Foster*). See, *State v. Long* (1st Dist.), 2010 WL 989899, ¶ 36; *State v. Jones* (2nd Dist.), 2009 WL 377183, ¶ 8; *State v. Sabo* (3rd Dist.), 2010 WL 1173088, ¶¶ 35-42; *State v. Starett* (4th Dist.), 2009 WL 405908, f.n 2; *State v. Finn* (6th Dist.), 2010 WL 1818895, ¶¶ 9-10; *State v. Dillard* (7th Dist.), 2010 WL 1237102, ¶27; *State v. Rosa* (8th Dist.), 2010 WL 2007199, ¶¶ 18-19; *State v. Nieves* (9th Dist.), 2009 WL 4547627, ¶¶ 50-52; *State v. Anderson* (10th Dist.), 2010 WL 629312, ¶¶ 6-8; *State v. Dunford* (11th Dist.), 2010 WL 1176581, ¶ 4; and, *State v. Fitzhugh* (12th Dist.), 2010 WL 703247, ¶¶ 10-14. None of these districts used the *Ice* decision as a vehicle for ignoring the holding in *Foster*.

The Fifth District has on the other hand given, at best, conflicting signals on its ultimate position on the issue. For instance, in *State v. Vandriest* (5th Dist.), 2010 WL 893627, the court held that in light of *Ice* “the trial court was required to make the requisite statutory findings before imposing consecutive sentences on [a criminal defendant.]” *Id.* at ¶9. The *Vandriest* opinion seems to rely upon the passage of an amendment to R.C. 2929.14 which took effect on April 7, 2009¹ for some form of “cut-off” by which *Foster*’s holding is, or is not, applicable, depending upon whether the sentencing took place before or after this date. *Id.*

¹ Actually *two* amendments took effect on that day: Am. Sub. H.B. 130, 2008 Ohio Laws File 173; and, Am. Sub. H.B. 280, 2008 Ohio Laws File 155. The former was passed on December 17, 2008, while the latter was passed on December 17, 2008. Both were thereafter approved on January 6, 2009.

However, the decision in *Vandriest*, quite inexplicably fails to explain its divergent holding from that of two other cases decided by the very same court. For instance in *State v. Kvintus* (5th Dist.), 2010 WL 454991, decided only one month earlier (February 8, 2010), that court specifically held that *Ice* did not constitute an overruling of *Foster*. *Id.* at ¶ 47.

Nor did the Fifth District in *Vandriest* explain how it arrived at deciding to apply such a rule when it clearly did not apply the very same “sentencing before-versus-after April 7, 2009” rule to a sentencing that took place on July 27, 2009. See, *State v. Argyle* (5th Dist.), 2010 WL 326322, ¶ 27. In *Argyle* that Court refused to apply the supposed newly effective versions of R.C. 2929.14. *Id.* at ¶ 25, (“At this juncture, we find that *Ice* represents a refusal to extend the impact of the *Apprendi* and *Blakely* line of cases, rather than an overruling of them as suggested by Appellant. We will thus herein adhere to the Ohio Supreme Court’s decision in *Foster*, ...”). Why the different result? With all due respect to the Fifth District, the use of April 7, 2009 as some “cut-off” date by which *Foster*’s reach is defined is legally indefensible.²

² Which probably explains why other courts have not arrived at such a “before-versus-after” rule despite any of the amendments passed by the legislature post-*Foster*. Indeed, one court specifically declined to apply the amendments. See, *Sabo*, at ¶ 41. This might also explain why even the members of the Fifth District are having difficulty in consistently applying the rule. See, contrary ruling in *Vandriest* and *Argyle*.

As an aside, it should be observed that the Appellant herein would have this Court go even further and make the *Ice* decision affect an even broader range of sentences, namely those “pending” at the time *Ice* was decided. (Brief of Appellant, f.n. 14.)

C. Ice Has No Effect On Foster

Contrary to the claims of the Appellant, and simply put, the decision in *Ice* does not somehow automatically “revive” any of the statutes severed by *Foster*. There are several reasons for this.³

(1) Severing “Constitutional” Provisions. When the severance remedy is used by a court to address a constitutional violation, even portions of a statute that would be constitutional, if independently considered, may be severed if severance of those additional constitutionally valid provisions is necessary to preserve overall legislative intent when severing those portions that are not constitutional.

Ohio’s jurisprudence relating to severance appears to have had its beginning with the case of *Geiger v. Geiger* (1927) 117 Ohio St. 451. Indeed it was that case that the court in

³ Aside from the reasons that will be discussed below in some detail, another arguable basis for continuing to follow *Foster* exists, namely that it has an independent *State* constitutional basis. “The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.” *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, ¶ 1 of syllabus. See also, *Gallimore v. Children’s Hosp. Medical Center* (1st Dist.), 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.”)

Although it has been little noticed, the *Foster* opinion actually addressed the issues present in those combined cases by also noting that a companion defendant, Jason Quinones, actually raised the very same claims under “Section 5, Article I of the Ohio Constitution”. 109 Ohio St. 3d 1 at ¶ 28. Moreover, the court observed: “We presume that compliance with the United States and *Ohio* Constitutions is intended ...” *Id.* at 93. (Emphasis added.). Thus, it is imminently reasonable to conclude that the *Foster* opinion is independently grounded in Ohio Constitutional jurisprudence, and accordingly immune to any effect that the *Ice* decision would have on its result. For this additional reason, Appellant’s claim could be rejected, although *Amicus* feels that it is unnecessary to reach this constitutional issue in order to decide the issue.

Foster applied to reach the result it did. A thorough reading of the *Geiger* opinion demonstrates that the severance remedy is not employed to sever only constitutionally infirm provisions of law. It can also sever provisions that, when viewed in isolation, might be constitutional, but which are so “inseparable” from the unconstitutional provisions that to leave them would run afoul of legislative intent. Indeed, one of the questions posed by the court was: “Is the provision as to appeal in section 10496 so inseparably united with sections 10494, 10495, and 10497, that those sections must be held to be unconstitutional?” *Id.* at 468. Thus the question when determining application of the severance remedy is not simply whether each and every provision severed is itself unconstitutional, but instead whether other provisions become unconstitutional simply because they are “inseparable” from those provisions that are unconstitutional.

This view of the severance doctrine is further bolstered by the Ohio Supreme Court’s decision in *Bd. of Elections v. State, ex rel. Schneider* (1934), 128 Ohio St. 273, 294. In that case the court was confronted with determining if changes in elections law were constitutional, and after concluding that some were not, proceeded to apply the rule of severance. In applying that rule the court had to determine whether certain provisions of the changes were to be severed simply because they had to be “considered together” with the other, clearly unconstitutional, provisions. The court wrote: “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.” (Italics added.)

Similarly, in *United States v. Booker* (2005), 543 U.S. 220, the case that *Foster* relied upon in invoking the severance remedy in the first place, the court defined the severance doctrine in the following manner: “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?”) *Id.* at 246. (Italics added. Internal citations omitted.)⁴

Thus, for purposes of severance analysis, the question is simple: regardless of whether the provisions of Ohio law which purport to require findings prior to imposing consecutive sentence may themselves be constitutional in the abstract, were they nonetheless properly severed as they are inseparable (in terms of legislative intent) from the provisions that must be severed because they were unconstitutional? The answer is yes they are inseparable!

As a starting point, it should be noted that severance analysis as it relates to interpretation of state law is not a decision within the domain of federal courts, that is to say that *Ice* is not the final word as it relates to the severance issue. See, *Virginia v. Hicks* (2003), 539 U.S. 113, 121 (“[w]hether these provisions are severable is of course a matter of state law”), citing, *Leavitt v. Jane L.* (1996), 518 U.S. 137, 139, (“Severability is of course a matter of state law.”) Thus, the decision in *Ice* is not controlling on whether *Foster* should remain as controlling authority.

⁴ See also, *Legal Services Corp. v. Velazquez* (2001), 531 U.S. 533, quoting, *Warren v. Mayor and Aldermen of Charlestown* (1854), 68 Mass. 84, 99, (“[I]f [a statute’s provisions] are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which as thus dependent, conditional or connected, must fall with them.”). (Emphasis added.)

The only question then – in terms of a severability analysis – is whether or not the General Assembly would have enacted the required findings for consecutive sentences, if it had known at that time that most of the other required findings to override presumptions were unconstitutional? More specifically, would the General Assembly have enacted just the provisions that required findings before a trial court imposed consecutive sentences had it at the same time known that they could not also require the trial court to make certain findings for a single-offense offender?

In light of *Blakely v. Washington* (2004), 542 U.S. 296, the *Foster* court determined that the legislature could not validly require a trial court to make certain factual findings before deviating from the minimum sentence for a first-time offender, (109 Ohio St.3d 1, at 56-62), and it could not require the trial court to make certain factual findings before imposing the maximum sentence (109 Ohio St.3d 1, at 62-64). These two conclusions are not at issue as a result of *Ice*. However, the question remains whether the General Assembly would have realistically given a multi-offense serial offender protections by way of insisting upon the trial court making mandatory findings before the imposition of consecutive sentences, when it could not do the same – or even similar – with a first-time single-offense offender?

Consider, for example, this: One trial court is confronted with a defendant who has committed *one* felony offense. That trial court could not only deviate from a minimum sentence for the offense, but it could actually impose the maximum sentence without making any findings whatsoever! Conversely, if the decision in *Ice* had the effect of un-doing *Foster's* severance of the findings relating to consecutive sentences, a second trial court, confronted with a defendant who has committed literally a score of criminal offenses, that

serial-offender would be blessed with the right to require that the trial court make findings related to its decision to impose consecutive sentences. Can anyone realistically think that General Assembly would have intended such an “upside-down” balancing of which of these two offenders should be more easily sent to prison for the longest possible time?

Severance is an issue of legislative intent. *Geiger, Schneider, and, Booker, supra*. This Court has told us that the provisions of Senate Bill 2 – including the provisions related to consecutive sentencing – were intended by the General Assembly as a “comprehensive” revision of Ohio’s sentencing statutes. *Foster*, 109 Ohio St. 2d 1, at 34, 49. See also, *State v. Bates* (2008), 118 Ohio St.3d 174, ¶ 5. It is unfathomable to think that the General Assembly would have intended such an incongruent result between the single-offense offender and the serial-offense offender in a revision of Ohio law that was intended to be “comprehensive” in nature.

In this regard, it is noteworthy that many of the sections of the sentencing statutes, including those dealing with consecutive sentences, share common terminology – yet another indication that the General Assembly meant for all of Senate Bill 2’s sentencing findings to be, in essence, a “package deal”. For example, division (E)(4) of R.C. 2929.14 provides:

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public, ... and if the court also finds ... that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct., ... [or] that consecutive sentences are necessary to protect the public from future crime by the offender. (Internal paragraphs designations omitted.)

Similarly, R.C. 2929.11(A) and (B) which address the overriding principles for sentencing requires a court to fashion a sentence that is designed to "... protect the public from future crime by the offender and others and to punish the offender [and to] deterring the offender and others from future crime" and that any sentence imposed for a felony should be "... reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim."

Likewise, R.C. 2929.12, which addresses general sentencing factors, also speaks in terms of the overriding principles in 2929.11 and speaks to assessing the "seriousness of the [defendant's] conduct and the factors provided in divisions (D) and (E) of this section relating to the "likelihood of the offender's recidivism".

Further still, R.C. 2929.13 (B)(2) speaks to a court determining "... that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code."

And under former R.C. 2929.14(B)(2), which addresses the former presumption for the shortest prison term, the court was required to determine "...that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

This common legislative use of similar language can mean only one thing: that these various findings are inseparable parts of an overall legislative intent. For these reasons, notwithstanding the decision in *Ice*, the *Foster* decision properly invalidated the provisions that required findings before imposing consecutive sentences because that course of action

was the truest to the overall intent of the General Assembly, and this is a *state* law matter. *Hicks*, and, *Leavitt*.

(2) General Assembly Did Not Intend to Re-enact Former Provisions. The Appellant's reliance upon certain post-*Foster* "enactments" of amendments to R.C. 2929.14 to support his argument is misplaced. Contrary to the Appellant's apparent belief, the passage of legislation by the General Assembly⁵ which continues to include provisions that have previously been held invalid (but may now be able to be validly passed) does not have the legal result of truly enacting or reenacting those provisions unless it is clearly the intention of the legislature that they have that effect. *Stevens v. Ackman* (2001), 91 Ohio St.3d 182. See, also, *United Auto Workers, Local Union 1112 v. Brunner* (2009), 182 Ohio App.3d 1.

In *Stevens* this Court addressed the passage of legislation by the General Assembly that contained the same language that had been in an early version of the statute and had been simply repeated in a new enactment. The Court stated that for the General Assembly "to successfully enact or reenact [a statutory provision], the General Assembly must have intended the act to have that effect." *Id.* at 193. The Court proceeded to demonstrate how the General Assembly did not have the intent to reenact the questioned provisions by observing:

The editor's comment in Baldwin'[s Ohio Revised Code Annotated to Section 15, Article II of the Ohio Constitution makes some relevant comments regarding R.C. 101.53, and indicates a relationship between that statute and Section 15(D), Article II:

"When amending a law or reviving a law previously repealed many legislative bodies include in the act only the desired amending language or words of revivor, which can be confusing because the language does not appear in context with the law amended or revived. The General Assembly is

⁵For our purposes here, the amendments to R.C. 2929.14 that were effective on April 7, 2009 (i.e. post-*Ice*).

prohibited from this practice by division (D) of this section, which also requires that the act repeal the amended section. R.C. 101.52 (now R.C. 101.53) provides devices for showing changes in context in the printed bill or act: matter to be deleted is shown struck through, and new matter to be inserted is shown in capital letters.”

The printing format of Am.Sub.H.B. No. 215 indicates no intent to reenact or enact R.C. 2744.02(C). R.C. 2744.02(C) appears in the printed act in regular type, without the capitalization that would indicate new material pursuant to R.C. 101.53.

Id.

In a similar vein, the supposed enacted modifications to R.C. 2929.14 which took effect on April 7, 2009 made absolutely NO changes to the provisions of divisions (E)(4)(a-c) – the provisions dealing with consecutive sentences that *Foster* addressed. Indeed those divisions/subsections have the exact same provisions they did when *Foster* was decided. They were not substantively changed either post-*Foster*, or post-*Ice*. See, *Sabo*, ¶ 41 (“... R.C. 2929.14 has been amended by the General Assembly eleven times since the *Foster* decision, but yet in each of its amendments, the statute has maintained the original language pertaining to judicial fact-finding and consecutive sentences.”)

Indeed the provisions of law that took effect on April 7, 2009 didn’t even so much as remove the provisions that remain unconstitutional under *Foster* and *Ice* even today. (i.e. factual findings necessary to override presumptions for community control, and minimum sentences, and to impose maximum sentences.) Said differently, the code books still have provisions in them that continue to be invalid under *Foster*, notwithstanding *Ice*.

Simply put, the two legislative enactments that took effect on April 7, 2009 show no clear indication that the General Assembly contemplated the prospect of *Ice* being decided so as to free their proverbial hands from the constitutional holding of *Foster*. Indeed the General Assembly could not have considered the effect of the *Ice* decision on their crafting of those

enactments as those enactments were passed on December, 17th and 18th, 2008 – nearly a MONTH before *Ice* was even decided; and they were both thereafter approved on January 6, 2009 – some EIGHT days before *Ice* was even decided!

What the post-*Foster* amendments to R.C. 2929.14(E) constitute is statutory form of “litter”, as one court has referred to it, while discussing the issue in the context of an injunction suit having to do with a flag-desecration statute:

The statute books are littered with provisions that if read literally and without regard to their interpretive history would prohibit innocuous or even privileged conduct * * *. Do state legislatures have a duty to conform their statute books to authoritative judicial interpretations? After [two definitive Supreme Court rulings in flag-burning cases] should every state have been obligated, on pain of seeing its prosecutors enjoined, to rewrite its flag-desecration statute to create an express privilege for the conduct held privileged in those cases? There is no such obligation.

Lawson v. Hill (7th Cir. 2004), 368 F.3d 955, ¶ 8.

Indeed, simply legislative “inertia” can keep legislatures from acting to remove provisions from code books that have been previously declared invalid. *Treanor, and Sperling*, “*Prospective Overruling and the Revival of ‘Unconstitutional Statutes’*”, (1993), 93 Columbia Law Review 1902, citing, *Johnson v. State* (Md. 1974), 315 A.2d 524. As noted by the Maryland Supreme Court:

[A]n unconstitutional act is not a law for any purpose, cannot confer any right, cannot be relied upon as a manifestation of legislative intent, and “is, in legal contemplation, as inoperative as though it had never been passed.” * * *

* Because of this principle, legislative bodies often fail to repeal unconstitutional statutes, deeming them obsolete matter which can be later deleted in the course of a general revision or modification of the law on a particular subject.

Johnson, at 528.

Simply put, the amendments that the General Assembly passed with an effective date of April 7, 2009, were nothing more than the General Assembly making minor changes in other sections, with absolutely no intent whatsoever of somehow hoping to “revive” the operation of any provisions severed by *Foster*, for if they had that intent, the provisions that continue to be unconstitutional today would have been removed as part of those amendments.

(3) Ohio Law Does Not Sanction the “Revival” of a Statute. Finally, the Appellant’s argument lacks merit because its effect would be to have the United States Supreme Court’s decision in *Ice* serve to “revive” a statute that the Ohio Supreme Court, applying state law severance principles, found to be properly severed. Ohio law does not countenance the “revival” of a statute in such a fashion.

Ohio Constitution, Article II, § 15 (D), provides as follows:

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.)

Although Article II of the Ohio Constitution speaks, generally, to the power of the legislative branch of government, it is not exclusively a limitation on the legislative branch as Article II, §1 makes clear:

... 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.)

If the General Assembly can't revive a law; and if the people can't revive a law; why would the judiciary be permitted to do so?

The Ohio Supreme Court has had occasion to address Ohio law on the matter of whether or not a law can be revived (or in their terminology, "revivified"). In the *Schneider* case the Ohio Supreme Court stated: "An act of the General Assembly, which was unconstitutional at the time of enactment, can be revived only by re-enactment." 128 Ohio St. 273, ¶ 5 of syllabus. Thus, until *Foster* is overruled, all efforts by the General Assembly (past or future) directed toward re-enacting a provision of law that was deemed to be unconstitutional by *Foster*, constitutes a nullity. Further still, even if *Foster* were to be overruled, the General Assembly would still have to *thereafter* re-enact the provisions of R.C. 2929.14(E)(4)(a-c) before they would become enforceable. Both events would have to occur, and in that order (i.e. the Ohio Supreme Court overruling *Foster*, and then re-enactment by the General Assembly).

There are excellent public policy considerations that support the position that a judicial change of opinion on the constitutionality of a statute should not result in the "revival" of the statute. See, *Treanor and Sperling*, supra. In Treanor and Sperling's article, the authors cite to *Newberry v. United States* (1921), 256 U.S. 232, for the legal principle that a statute that is not constitutional when first enacted does not thereafter simply become constitutional, even if the constitution is formally amended, absent a post-amendment re-enactment of the statute because "[a]n after-acquired power can not *ex proprio vigore* validate a statute void when enacted." 256 U.S. at 254. The authors then observe: "[T]he same principle would be applied when it is the meaning of the Constitution, rather than one of its component elements, that changes: the legislature cannot pass a statute that exceeds its

powers; if the meaning of the Constitution changes so that the powers of the legislature expand, legislation once beyond the legislature's scope but now permissible must be repassed to be enforceable." 93 Columbia Law Review at 1934.

In addition, Treanor and Sperling address the significant "reliance" interests that legislatures place on court rulings that invalidate statutes and how they serve to support the need to formally re-enact previously voided statutes. For example, in the instant matter, the General Assembly has relied upon the Foster decision since 2006 when it was handed down. In the interim it has passed repeated versions of the relevant statutes, and it must clearly be presumed that they expected these nearly identical new enactments to be interpreted exactly as they were interpreted in *Foster*. Indeed, had they wanted a different interpretation placed upon these statutes, they could have – indeed would have – made an effort to legislatively "overrule" *Foster* on any relevant points where they could and where they felt the *Foster* court "got it wrong".

Appellant's reliance on cases from other jurisdictions that adopt a view that a "now-constitutional" provision is automatically revived is misplaced. See, Brief of Appellant p. 5, citing, among other cases, *Jawish v. Morlet* (D.C. App. 1952), 86 A.2d 96). First, none of the cases cited by the Appellant are Ohio cases. Thus they, by definition, do not apply Ohio constitutional or case precedence in addressing the issue. For instance, they had no occasion to apply this Court's holding in *Schneider*, nor to interpret or apply the provisions of Ohio Constitution, Article II, §1, and, Article II, § 15 (D) that counsel against revival.

Second, the *Jawish* court's observation of the then-existing legal landscape is actually wrong! As quoted by the Appellant, the *Jawish* court – in 1952 – makes the observation that courts are "unanimous" in holding that revival of a statute is the rule of the day. (Quoted at

Brief of Appellant, p. 5.) However, *Schneider*, where this Court rejected revival principles, was decided in 1934 – some 18 years before *Jawish* was decided.

Third, none of the cases cited by the Appellant address a situation like *Foster*. In *Foster* this Court not only found a section of a statute unconstitutional, but that same court took steps to judicially sever the offending provisions. Said differently, *Foster* did not merely hold certain provisions unconstitutional, period! It found those provisions unconstitutional, **and thereafter specifically judicially severed them**. What the Appellant would have this Court do is to newly mint a line of legal jurisprudence essentially the effective equivalent of a “*un-severance*” doctrine.

Whatever effect *Ice* may ultimately have on Ohio’s sentencing statutes, it is clear that it does not have the effect of abrogating any portion of *Foster*, nor does it serve to somehow “revive” some unspecified versions of one or more of the statutes severed by *Foster*.

(4) Decision of Ohio Supreme Court Continues to Control. Even *if* the General Assembly had intended any one or more the amendments to R.C. 2929.14 to have the result of “overruling” any portion of *Foster*, it would have been an invalid exercise of legislative authority. On this point the court in *Sabo* observed:

Finally, *Sabo* points out that R.C. 2929.14 has been amended by the General Assembly eleven times since the *Foster* decision, but yet in each of its amendments, the statute has maintained the original language pertaining to judicial fact-finding and consecutive sentences. *Sabo* claims that given the existence of the original language in R.C. 2929.14, the United States Supreme Court’s decision in *Oregon v. Ice* nullified the *Foster* decision pertaining to that language and brought it back into full effect. We disagree. Regardless of whether the original language has remained part of the statute since *Foster*, it is clear that under the separation of powers doctrine the Ohio Supreme Court’s role is not only to apply the enactments of the General Assembly but also to determine the statute’s constitutionality. * * * Moreover, it is also clear that

when the Court declares a statute unconstitutional, severing the unconstitutional portions of the statute is a remedy within the Court's power. * * * Here, severing the unconstitutional portions of R.C. 2929.14(E)(4), which pertained to judicial fact-finding, is exactly what the Ohio Supreme Court choose to do; therefore, regardless of the existence of the language over the past few years, it is clear that the Court's declaration of the unconstitutionality and consequential severance of mandatory judicial fact-finding was a valid excision of the language and still remains binding upon this Court.

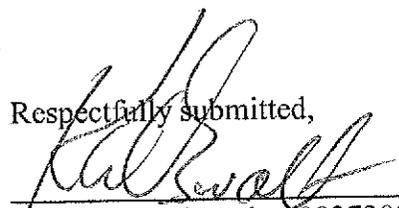
2010 WL 1173088, at ¶ 41. (Internal citations omitted.)

Accordingly, the legislature simply could not "undo" *Foster*, even if that had been their intention to do so as a result of the constitutional separation of powers. Until this Court speaks to formally "undo" the decision in *Foster*, the legislature is limited by it.

D. Conclusion

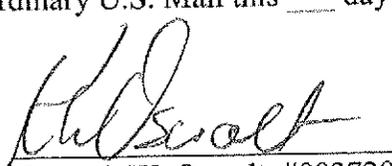
For all of these reasons the Appellant's claims of error should be overruled. There is simply no basis for concluding that the *Ice* decision had any effect on the decision in *Foster*. Accordingly the decision below should be affirmed.

Respectfully submitted,


Kenneth W. Oswalt #0037208
Licking County Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served upon all parties noted on the coversheet hereto by ordinary U.S. Mail this 8th day of June 2010.


Kenneth W. Oswalt #0037208
Licking County Prosecuting Attorney