

IN THE SUPREME COURT OF OHIO

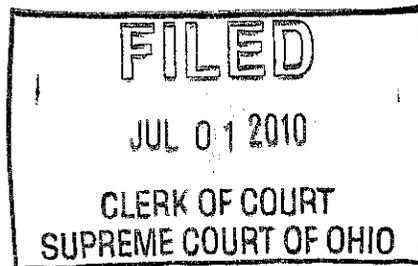
STATE OF OHIO,	:	Case No. 09-1997
	:	
Plaintiff-Appellee	:	
-vs-	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
	:	
KENNETH HODGE,	:	Court of Appeals Case No. C080968
	:	
Defendant-Appellant.	:	Trial Court No. B-0805818-A

Reply Brief of Appellant Kenneth Hodge

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I. *Ice* abrogated *Foster*.

Appellee and Amici argue that *Ice* did not abrogate *Foster*. They are mistaken.

Shepard's reports that *Ice* abrogated *Foster*, citing 129 S. Ct. at 716:

SHEPARD'S SUMMARY	HIDE
Unrestricted <i>Shepard's</i> Summary	
Subsequent appellate history contains possible negative analysis.	
Citing References:	
<input type="checkbox"/> Warning Analyses:	Abrogated (1). Abrogated as stated in (4)
<u>Abrogated in part by:</u>	
<u>Oregon v. Ice</u> , 129 S. Ct. 711, 172 L. Ed. 2d 517, 2009 U.S. LEXIS 582, 21 Fla. L. Weekly Fed. S 573 (U.S. 2009)	
129 S. Ct. 711 <u>p.716</u>	
172 L. Ed. 2d 517 <u>p.524</u>	

There are several reasons why *Shepard's* reports that *Ice* abrogated *Foster*. *Ice's* opening lines noted that “States, including Oregon, constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences.” 129 S. Ct. at 714 (emphasis added). Ohio is one of the “include[ed]” states.¹ Next, *Ice* identified that “The sole issue in dispute ... is whether the Sixth Amendment, as construed in *Apprendi* and *Blakely*, precludes the mode of proceeding chosen by Oregon and several of her sister States.” *Id.* (emphasis added). Again, Ohio is one of those “sister States.” Then the Court held that the

¹ R.C. 2929.41(A) (presumption favoring concurrent sentences); R.C. 2929.14(E)(4) (requiring fact-finding to overcome presumption favoring concurrent sentences); R.C. 2929.19(B)(2)(c) (requiring findings on the record); and R.C. 2953.08(G) (right to appeal sentencing decisions).

Sixth Amendment allows judicial fact-finding as a predicate for consecutive sentences. *Id.* at 714-715.

A few lines after *Ice* stated its holding, on the page pinpointed in the *Shepard's* report, *Ice* expressly placed *Foster* with the Oregon Supreme Court on the wrong side of the conflict over “the sole issue” at bar. First, *Ice* described the division between the Oregon Supreme Court’s majority and dissenting opinions. 129 S Ct. at 716. Then *Ice* described the jurisdictional divide: “State high courts have divided over whether the rule of *Apprendi* governs consecutive sentencing decisions.² **We granted review to resolve the question.**” *Id.* (emphasis added). Then, in footnote 7, the Court listed *Foster* as the only decision, other than the Oregon Supreme Court’s decision in *Ice*, to mistakenly hold that the Sixth Amendment forbids judicial fact-finding as the basis for consecutive sentencing. In that footnote, the Court expressly contrasted “e.g., *People v. Wagener*, * * * (holding that *Apprendi* does not apply) * * * ; with *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470 (holding *Apprendi* applicable).” *Id.* at n.7 (emphasis added, internal citations omitted).

After expressly linking *Foster* with the Oregon Supreme Court on the wrong side of the issue, *Ice* then reiterated the holding that the Sixth Amendment allows states to require judicial fact-finding before imposition of consecutive sentences. 129 S.Ct. at 716-720. *Ice* expressly invalidated the sole basis for *Foster's* severance of Ohio’s consecutive sentencing statutes. Therefore, *Ice* abrogated *Foster*.

Appellee’s attempt to distinguish *Ice* by recasting Oregon’s consecutive sentencing statute, and the Sixth Amendment issue, as involving merger of convictions under an “allied offenses rule” is meritless. (Appellee Br. 6-7). *Ice* addressed Oregon’s consecutive sentencing statute and the Sixth Amendment issue expressly, on their terms, and in detail. 129 S.Ct. at 716-

720. Appellee also fails in attempting to recast *State v. Elmore* (2009), 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, as holding that *Ice* did not abrogate *Foster*. (Appellee Br. at 4). This Court specifically declined to do so, stating “We will not address fully all ramifications of *Oregon v. Ice*” as neither party briefed the issue. *Elmore* at ¶ 35.

The fact that the United States Supreme Court denied certiorari in *Foster* is irrelevant. “The denial of certiorari imports no expression of opinion on the merits of a case.” *Brown v. Allen* (1953), 344 U.S. 443, 455, 73 S. Ct. 397, 97 L.Ed. 469 (internal citation and quotation marks omitted). The fact that *Ice* did not use the words, “We hereby overrule *Foster*” is also immaterial. *Limbach v. Hooven and Allison Co.* (1984), 466 U.S. 353, 104 S. Ct. 1837, 80 L.Ed.2d 356. *Limbach* arose after this Court held that a prior decision (*Hooven I*) remained good law, despite the fact that the United States Supreme Court had decided the underlying federal constitutional issue adversely in another case (*Michelin*). This Court reasoned that the United States Supreme Court had not expressly overruled *Hooven I* while deciding *Michelin*. The United States Supreme Court reversed, holding that “Although *Hooven I* was not expressly overruled in *Michelin*, it must be regarded as retaining no vitality since the *Michelin* decision. The conclusion of the Supreme Court of Ohio that *Hooven I* retains current validity in this respect is therefore in error.” *Limbach*, 466 U.S. at 361.

The United States Supreme Court has final authority to determine “the validity under the federal constitution of state action.” *Minnesota v. National Tea Co.* (1940), 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920. State courts are bound by the United States Supreme Court’s interpretation of the federal Constitution. *Id.*; U.S. Const. Art. VI, Cl. 2; see *Chesapeake & Ohio Railway Co. v. Martin* (1931), 283 U.S. 209, 220-21, 51 S. Ct. 453, 75 L. Ed. 93 (“In following its own prior decision, the [state court] ignored the decision of this court to the contrary. This

lawfully it could not do; the question, as we have shown, being a federal question to be determined by the application of federal law”).

Appellee and Amici invite this Court to ignore controlling precedent from a higher court. The invitation must be declined.

II. Stare Decisis Cannot Impede *Ice*'s Automatic, Retroactive Revival of Ohio's Consecutive Sentencing Statutes.

Appellee and Amicus Ohio Prosecuting Attorneys Association [OPAA] argue that stare decisis allows this Court to ignore *Ice*. They are mistaken. *Ice* applies to Mr. Hodge's case because his case was on direct appeal when *Ice* was decided. *Griffith v. Kentucky* (1987), 479 U.S. 314, 328, 107 S. Ct. 708, 93 L.Ed.2d 649. Neither Appellee nor Amici address *Griffith's* firmly established constitutional retroactivity principle. They do not, because they cannot. This Court has repeatedly acknowledged and applied *Griffith* retroactivity, including in *Foster* itself. *Foster* at ¶ 106. More recently, an opinion of this Court stated that stare decisis “is not controlling in cases presenting a constitutional question.” *State v. Bodyke*, 2010-Ohio-2424, at ¶ 37; cf. *City of Rocky River v. State Employment Relations Bd.* (1989), 43 Ohio St. 3d 1, 539 N.E.2d 103 (reversing prior decision that held statute unconstitutional).

Stare decisis does not permit a lower court to disregard a higher court's decision. Stare decisis does not apply to the issues in the instant case.

Appellee rightly does not argue that *Foster's* severance of Ohio's consecutive sentencing laws constituted judicial repeal or abolition of the statutes. However, Amici do offer that argument. They urge that *Ice* is irrelevant to the enforceability of Ohio's consecutive sentencing statutes. They argue that those statutes cannot be enforced unless and until the General Assembly reenacts them. Amici are mistaken. Judicial severance does not, and cannot, repeal or abolish a statute.

Under R.C. 1.50, severance simply means “held invalid[.]” The Ohio Constitution vests lawmaking authority in the General Assembly. Ohio Const. Art. II. Ohio statutes enjoy a strong presumption of constitutionality. *Rocky River*, 43 Ohio St. 3d at 10. In *Rocky River*, cited by Amicus OPAA at 4, this Court reversed its prior holding that a state statute violated the state Constitution. Nowhere in any of the majority or dissenting opinions was there any suggestion that the statute had to be reenacted to be enforceable. Nor has the General Assembly ever repealed Ohio’s consecutive sentencing statutes. To the contrary, those statutes were retained in eleven amendments to Ohio’s sentencing laws since *Foster*, including two since *Ice* was decided.² Because Ohio’s consecutive sentence statutes were never excised from the Code, the partial abrogation of *Foster* by *Ice* brings those provisions back into full effect. Amici’s own cited authorities support Mr. Hodge on this point: “Where an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment[.]”³

The United State Supreme Court gave full force to a statute incorrectly held to be unconstitutional when it reversed its own prior constitutional precedent. *Legal Tender Cases* (1871), 79 U.S. 457, 553-4, 12 Wall. 457. Other courts that have addressed the issue have “almost uniformly” held that a statute previously held unconstitutional is revived and

² Am.Sub.H.B. 95 (effective August 3, 2006), Am.Sub.H.B. 137 (effective July 11, 2006), Am.Sub.H.B. 137 (effective August 3, 2006), Am.Sub.S.B. 260 (effective January 2, 2007), Sub.S.B. 281 (effective January 4, 2007), Am.Sub.H.B. 461 (effective April 4, 2007), Am.Sub.S.B. 10 (effective January 1, 2008), Sub.S.B. 184 (effective September 9, 2008), Sub.S.B. 220 (effective September 30, 2008), Am.Sub.H.B. 280 (effective April 7, 2009), Am.Sub.H.B. 130 (effective April 7, 2009).

³ *Stevens v. Ackman*, 91 Ohio St.3d 182, 194-195, 2001-Ohio-249, 743 N.E.2d 901 (internal citations and quotation marks omitted) (case cited by Amicus Licking County Prosecutor at 12).

immediately enforceable when the invalidating decision is overturned.⁴ See also *Goodyear Tire & Rubber Co. v. Vinson* (Ala. 1999), 749 So.2d 393, 398 (Houston and Maddox, J.J., concurring) (concluding that a statute declared unconstitutional “is not repealed . . . and should the same, or a higher tribunal, subsequently determine it to be consistent with the constitution, it is subject to be enforced accordingly”⁵). Again, Appellee rightly does not dispute this clearly established rule.

Amici cite *Bd. Elections for Franklin Cty. v. State, ex rel. Schneider* (1934), 128 Ohio St. 273, 191 N.E. 115, for the proposition that Ohio’s consecutive sentencing laws are unenforceable unless they are reenacted. *Schneider* is inapposite. *Schneider* held that “[a]n act of the General Assembly, which was unconstitutional *at the time of enactment*, can be revived only by reenactment.” *Id.* at paragraph five of the syllabus (emphasis added). The statute in *Schneider* was unconstitutional when enacted. Ohio’s consecutive sentencing statutes were not unconstitutional when enacted. They were mistakenly severed based on a misapplication of United States Supreme Court Sixth Amendment case law. As Appellee notes, the mistake was understandable given the “mangled” state of Sixth Amendment sentencing law at the time.⁶ By a 5-4 vote, *Ice* corrected the mistake. Because Ohio’s consecutive sentencing laws have always

⁴ William Michael Treanor & Gene B. Sperling, *Prospective Overruling and The Revival of “Unconstitutional” Statutes*, 93 Colum. L. Rev. 1902, 1907 (1993).

⁵ Citing *State ex rel. Attorney General v. Paul* (Ala. 1833), 5 Stew. & P. 40, 49, overruled on other grounds but citing *Paul* with approval on these grounds, *State ex rel. Attorney General v. Porter* (1840), 1 Ala. 688, 701 (1840); *Legg’s Estate v. Commissioner* (C.A. 4, 1940), 114 F.2d 760, 764; *Jawish v. Morlet* (D.C. 1952), 86 A.2d 96, 97; *State ex rel. Badgett v. Lee* (1945), 156 Fla. 291, 294-95; *Christopher v. Mungen* (1911), 61 Fla. 513, 532-33; *McCullum v. McConaughy* (1909), 141 Iowa 172, 177; Treanor & Sperling, 93 Colum. L. Rev. 1902; Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 Mich. L. Rev. 645, 651-52 (1951); and Mark Graham, Note, *State v. Douglas: Judicial “Revival” of an Unconstitutional Statute*, 34 La. L. Rev. 851 (1974).

⁶ Appellee Br. 3 (citing Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. Chicago L. Rev. ____ (forthcoming 2010)). Like the United States Supreme Court in *Ice*, Professor Bowman’s essay describes the laudatory purposes of guided sentencing reform. Cf. *Ice*, 129 S.Ct. at 714-720.

been constitutional, they are distinguished from the statute at issue in *Schneider*. Moreover, both before and after *Ice*, the General Assembly consistently retained the consecutive sentence statutes while amending other aspects of Ohio's sentencing laws.

Amici's own cited authorities reiterate the fundamental principle that courts are required to presume the constitutionality of legislative enactments. *Rocky River*, 43 Ohio St.3d at 10 (case cited by Amicus OPAA Br. at 4). Thus, the United States Supreme Court reversed the Virginia Supreme Court's overreaching invalidation of a local trespass ordinance in *Virginia v. Hicks* (2003), 539 U.S. 113, 123 S. Ct. 2191, 156 L.Ed.2d 148 (cited by Amicus Licking County Prosecutor Br. at 8). The presumption of constitutionality can only be overcome by proof beyond a reasonable doubt that the legislation and the Constitution are clearly incompatible. *Rocky River*, 43 Ohio St.3d at 10. *Ice* established that Ohio's consecutive sentencing statutes are clearly compatible with the Sixth Amendment. 129 S.Ct. at 714-715, 719-20. Because these statutes have been repeatedly retained on the books following *Foster*, have never been repealed, and are constitutional beyond any doubt in light of *Ice*, the statutes must be enforced.

Finally, Amicus Licking County Prosecutor invokes the concededly "novel" notion of a law professor and a Clinton political appointee that this Court should disavow the "almost uniform" weight of case law and scholarship supporting the automatic revival rule.⁷ These authors candidly admit that their "novel" idea "runs counter to the weight of judicial and

⁷ Amicus Licking County Prosecutor Br. pp. 14-18, citing Treanor and Sperling, 93 Colum. L. Rev. 1902 (1993); see id. at 1905, 1912-13. Amicus fails to note that the authors themselves dismiss the one cited state Supreme Court exception to the automatic revival rule as "poorly reasoned." Id. at 1914, 1919 & n. 51 (dismissing *Johnson v. Johnson* (La. 1963), 153 So. 2d 368, aff'd (La. 1964), 163 So. 2d 74 as "poorly reasoned"). Both Amicus and the authors fail to note that the only other case cited (and quoted in Amicus' brief) as applying the proposed "novel" rule was itself overruled as overbroad by the Maryland Supreme Court. Id. at 1919 & n. 60 (quoting *Johnson v. State* (Md. 1974), 315 A.2d 524; failing to note that *Johnson* was overruled by *State v. Zitomer* (1975), 275 Md. 534, 341 A.2d 789).

scholarly opinion,” that it has antimajoritarian roots, and that it derives from National Abortion Rights Action League attacks on state pro-life statutes. 93 Colum. L. Rev. at 1902-03, 1907, 1912-14. The authors’ “prospective overruling” notion requires courts to flout the firmly established constitutional retroactivity rule of *Griffith v. Kentucky*. There is no evidence before this Court of any repudiation of Ohio’s consecutive sentencing statutes by the people of the state of Ohio or their elected legislators. To the contrary, all the evidence and authority cited to this Court documents the statutes’ revival and enforceability under *Ice*.

III. The State Cannot Prove the Constitutional Error Harmless.

Mr. Hodge argued that the state could not prove the constitutional error harmless – *i.e.*, the failure to apply Ohio’s consecutive sentencing statutes to his case – in part because his sentence is disproportional, inconsistent, and an unwarranted burden on taxpayers. R.C. 2929.11(A)-(B); R.C. 2929.13(A); R.C. 2929.14(E)(4); 2929.41(A). Mr. Hodge asks this Court to enforce the judgment of the General Assembly that consecutive sentences should be limited to the worst and most dangerous offenders. His presentence evaluation classified him at the low to moderate risk level.⁸ His sentence is inconsistent with those received in far more serious cases. Numerous defendants in Hamilton County who were sentenced for taking the life of another human being received shorter prison terms than Mr. Hodge. Nearly tripling his sentencing exposure to eighteen years exemplifies the excessive burden imposed upon ODRC by *Foster*’s severance of Ohio’s consecutive sentencing statutes.⁹

⁸ On June 21, 2010, this Court granted Mr. Hodge’s motion to supplement the record with a sealed copy of his presentence evaluation.

⁹ Diroll (2009), “Monitoring Sentencing Reform: Survey of Judges, Prosecutors, Defense Attorneys and Code Simplification,” at 27; Martin (2009), “Ohio Prison Population Projections and Intake Estimates: FY 2010 - FY 2018,” at 8-9.

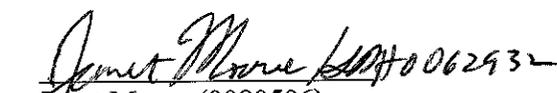
In response to Mr. Hodge's arguments, Appellee raises an Eighth Amendment straw man, citing *State v. Hairston* (2008), 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073. The Eighth Amendment does not determine whether Mr. Hodge's consecutive sentences violate the General Assembly's clear intent with respect to sentencing, as embodied in Revised Code sections 2929.11, 2929.13(A), 2929.14(E)(4), and 2929.41(A).

Hairston is relevant to Mr. Hodge's appeal, however. *Hairston* acknowledged the substantial deference due to the "broad authority that legislatures possess in determining the types and limits of punishments for crimes." *Hairston* at ¶ 22. Ohio's legislature established clear procedures for imposition of consecutive sentences. Those procedures must be enforced. The *Hairston* concurrence also issued a call to "repair the damage done to Ohio's criminal sentencing plan" by *Foster*. *Id.* at ¶ 28. *Ice* did so with respect to consecutive sentencing. Mr. Hodge must be resentenced in compliance with those statutes.

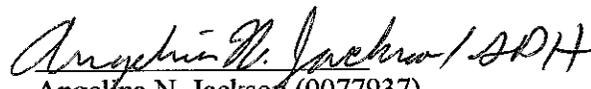
CONCLUSION

For the foregoing reasons, the judgment of the First Appellate District must be reversed and Mr. Hodge must receive a sentence in compliance with Ohio's consecutive sentencing laws.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify a copy of the foregoing Reply Brief was served on the office of the Hamilton County Prosecutor, the office of the Licking County Prosecutor, and the office of the Summit County Prosecutor, this 1st day of July, 2010.


Angelina N. Jackson (0877937)

APPENDIX

U.S. Const. Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.