

To: Judges and Other Interested Parties
From: David Diroll & Scott Anderson
Re: Felony Sentencing after *Foster*
Date: March 28, 2006

Did you hear the one about the defendant whose right to a jury trial was vindicated by giving judges more power? Welcome to the sentencing world wrought by the United States Supreme Court's decisions in *Apprendi v. New Jersey*, *Blakely v. Washington*, and *U.S. v. Booker* and the Ohio Supreme Court's recent effort to make sense of them in *State v. Foster* and *State v. Mathis*.

Several people asked for our thoughts on the implications of these cases on Ohio's felony sentencing statutes. This memo briefly recaps the cases that culminate in *Foster* and *Mathis*. It notes where the sentencing statutes now stand and speculates on what might happen next.

***Booker* Comes to Ohio**

In *Apprendi* and *Blakely*, the U.S. Supreme Court found state statutes unconstitutional because they required judges to make sentencing-related findings after a conviction. The statutes violated the defendant's Sixth Amendment right to have a jury determine the critical facts, unless admitted by the defendant. The vote was 5-4 in each case.

In the *Booker* case, the U.S. Supreme Court was asked to apply the same logic to the Federal Sentencing Guidelines. The same 5-4 majority found the Guidelines deficient on Sixth Amendment grounds. But a funny thing happened on the road to a remedy. One judge switched sides and a new 5-4 majority found that the Guidelines could be made constitutional if they are voluntary rather than mandatory. That is, judicial fact-finding under the Federal Guidelines was saved by permitting rather than mandating fact-finding. As we noted last year, the irony is that Mr. Apprendi and Mr. Blakely would have lost if the *Booker* remedy were applied to the state statutes that they successfully challenged.

Juries weren't mentioned much in the *Booker* remedy. Perhaps that is because the dissenters in *Apprendi*, *Blakely*, and substantive *Booker* wrote that remedy, providing four of the five votes needed.

Such was the confused state of Federal constitutional law when the Ohio Supreme Court heard *Foster*. The Court elected not to split hairs about which facts are appropriate for judges and juries. A unanimous Court instead cut the Gordian knot with remarkable efficiency. Statutes that *required* judges to make particular findings before imposing certain sentences were found to violate the Sixth Amendment under the U.S. Supreme Court's *Apprendi* line. Those statutes were severed from the Revised Code.

The Ohio Supreme Court then applied the *Booker* remedy to find that the remaining sentencing statutes are constitutional so long as judges have *discretion* to sentence from the whole range available for each offense. Judicial discretion under *Foster* includes imposing "above the minimum," maximum, and consecutive sentences without the need to state reasons justifying those terms. Thus, Mr. Foster won the Sixth Amendment battle but lost the sentencing war.

Rather than belabor a Sixth Amendment analysis here, it may be useful to think of *Foster* as a tacit separation of powers case. After all, the role of juries doesn't change under *Foster* and judges will still engage in post-conviction fact-finding. Rather, the decision makes clear that sentencing is a traditional role of courts, that certain findings should not be mandated by the General Assembly, and that judges have broad discretion in sentencing matters.

***Mathis* and Sentencing Appeals**

State v. Mathis, a companion to *Foster*, significantly altered appellate review of criminal sentences. Defendants no longer have an appeal of right for sentences imposed by judges who did not follow the statutory guidance. Only the State may appeal when it appears that the lower court inappropriately overrode the presumption in favor of prison for F-1s and F-2s (or shortened an F-1 or F-2 sentence under the judicial release statute). If either of these "downward departures" is determined to be contrary to law, the appellate court may vacate the sentence and remand the case for a hearing *de novo*. If the sentence is not contrary to law, the appellate court must remand the case to the sentencing court to make the required findings of fact.

S.B. 2 after *Foster*

The package of sentencing reforms enacted as S.B. 2 in 1996 was based on Sentencing Commission proposals. While most of those provisions remain after *Foster* and *Mathis*, these things changed:

- Judges now have broader discretion within the felony ranges to impose a definite sentence. That is:
 - Judges are no longer encouraged to use minimum sentences for persons who haven't previously been to prison;
 - Judges are no longer encouraged to reserve maximum sentences for the worst offenses and offenders;
 - Judges no longer need to give reasons why a particular sentence was imposed.
- Judges also have broader discretion to impose consecutive sentences. That is:
 - Judges are no longer guided to give concurrent sentences unless circumstances argue that consecutive sentences are more appropriate;
 - Defendants no longer have the right to appeal a judge's decision to impose consecutive sentences.
- As before, judges may give the maximum sentence for so-called "major drug offenders" and "repeat violent offenders" if the charge has been specified in the indictment.
 - The judge may impose the additional 1 to 10 year sentence on each specification without any additional factual finding.

Of course, *Foster* does not eviscerate S.B. 2. These provisions were not changed:

- The five classes of felonies (v. the 12 permutations in prior law);
- The ranges of definite sentences (v. wider indefinite ranges);
- "Truth in sentencing" with the virtual elimination of parole releases, other administrative adjustments such as good time, and the caps on consecutive sentences;
- Judges must consider statutory sentencing purposes, principles, lists of factors indicating that the offense is more or less serious, and lists of factors indicating that recidivism is more or less likely;
- The presumption in favor of prison terms for F-1s and F-2s and the guidance against prison terms for certain F-4s and F-5s remain (although the judge need not give reasons for departing from the guidelines);
- The continuum of community sanctions;
- Making every offender eligible for supervision after serving a prison term; and

- Consolidated victims' rights.

Retroactivity

Foster and *Mathis* affect all cases pending on direct review. Whether the scope of the holding extends retroactively to all cases sentenced under the now unconstitutional statutes is an open question. However, under federal case law, the *Booker* decision (which the *Foster* case follows) has not been applied retroactively. And given that *Foster* was a Pyrrhic victory for the defense, it is unclear how many appellants will seek retroactive application.

Mr. Foster has filed a motion for the Ohio Supreme Court to reconsider its ruling on this issue. He contends that applying the *Foster* and *Mathis* remedies would unconstitutionally impose punishment *ex post facto*, since he could receive a harsher sentence under the statutes rewritten by the Court's decisions. Stay tuned.

What's Next?

Cleanup. Our initial recommendation to the General Assembly is to remove the offending provisions from the sentencing code so that people are not confused when they read the sentencing statutes, particularly §2929.14 and §2929.19. Rep. Bob Latta is having language drafted to that end.

Mandatory and/or Indeterminate Sentencing. The long term prognosis is unclear. Many judges find the *Foster* decision to be liberating. But chinks in S.B. 2's armor also encourage renewed legislative interest in sentencing, with consequences not quite as favorable to judges.

Foster eliminates guidance from the statutes designed to assure adequate prison space for the worse offenders and to make sentences more consistent statewide. Does that mean that prisons will become more expensive or that sentencing consistency will suffer? These issues have not generated much legislative discussion to date, but there are several other proposals percolating in the General Assembly:

- Many legislators favor expanding mandatory prison terms, which can increase prison populations, but also provide greater certainty and consistency. Significant new limits on judicial discretion are likely this year, particularly regarding sex offender penalties.
- For non-mandatory sentences, there is legislative interest in narrowing sentencing options by pushing the minimum terms in the statutory sentence ranges higher.

- The Ohio Prosecuting Attorneys Association has hinted at a desire to return to indeterminate sentences.

Fostering Other Changes

The Sentencing Commission may look at topics including: purely voluntary guidelines; developing more felony levels with narrower sentence ranges; redefining certain offenses (as was done with robbery and burglary in S.B. 2); using specifications to add aggravating elements to certain offenses; etc. The Commission welcomes input from practitioners as it weighs its next steps.