IN THE SUPREME COURT OF OHIO

STATE OF OHIO Plaintiff-Appellant, v. SUSAN GWYNNE Defendant-Appellee.	Case No. 2017-1506 On Appeal from the Delaware County Court of Appeals, Fifth Appellate District Court of Appeals Case No. 16 CAA 12 0056

BRIEF OF AMICUS CURIAE THE CUYAHOGA COUNTY PROSECUTOR'S OFFICE ON BEHALF OF APPELLANT

Counsel for Amicus Curiae

MICHAEL C. O'MALLEY
CUYAHOGA COUNTY PROSECUTOR

CHRISTOPHER D. SCHROEDER (0089855)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7733
cschroeder@prosecutor.cuyahogacounty.us

Counsel for Defendant-Appellee

DAVID H. BIRCH (0030140)
286 South Liberty Street
Powell, Ohio 43065
(614) 785-9218
powelllawyers@gmail.com

Counsel for Plaintiff-Appellant

CAROL HAMILTON O'BRIEN (0026965)
DELAWARE COUNTY PROSECUTOR

AMELIA BEAN-DEFLUMER (0090629)
DOUGLAS N. DUMOLT (0080866)
Assistant Prosecuting Attorneys
140 North Sandusky Street, 3rd Floor
Delaware, Ohio 43015
(740) 833-2690
abean-deflumer@co.delaware.oh.us
ddumolt@co.delaware.oh.us

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Cuyahoga County Prosecutor's Office is responsible for all felony prosecutions in common pleas court in Cuyahoga County, Ohio. As such, the Cuyahoga County Prosecutor's Office has a special interest in this case because it represents the State of Ohio in all appeals from cases in which a prison sentence is imposed arising out of Cuyahoga County, including all cases in which consecutive prison sentences are imposed. The Fifth District's decision to vacate the imposition of consecutive sentences in this case by incorporating both (1) the purposes and principles of felony sentencing under R.C. 2929.11 and (2) the seriousness and recidivism factors under R.C. 2929.12, into the scope of an appellate court's review of felony sentences under R.C. 2953.08(G)(2), risks setting a precedent that would dramatically expand the number and scope of sentencing appeals in Ohio.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae the Cuyahoga County Prosecutor's Office hereby adopts and incorporates by reference the Statement of the Case and Statement of Facts as set forth by the Appellant, the State of Ohio, in its merit brief. Amicus Curiae hereby submits the following additional arguments in support of the Appellant's first proposition of law.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW #1: R.C. 2953.08(G)(2) DOES NOT ALLOW A COURT OF APPEALS TO REVIEW THE TRIAL COURT'S FINDINGS MADE PURSUANT TO R.C. 2929.11 AND R.C. 2929.12.

Amicus Curiae submits that an Ohio trial court is only required to consider R.C. 2929.11 and R.C. 2929.12 when imposing a sentence on each count, not when imposing consecutive sentences. Once the trial court has imposed a separate sentence on each count, the court then separately determines whether to order the defendant to serve more than one

of those sentences consecutively based solely on the factors contained in R.C. 2929.14(C)(4). Those consecutive sentencing findings do not require a court to consider either the purposes and principles of sentencing under R.C. 2929.11 or the seriousness and recidivism factors of R.C. 2929.12.

In this case, the Fifth District impermissibly lumped all of Susan Gwynne's sentences together into a single, aggregate 65-year sentence, and then applied R.C. 2929.11 and R.C. 2929.12 to the findings necessary to run those sentences consecutively. By doing so, the court resurrected the "sentencing-package" doctrine this Court has repeatedly held does not apply to Ohio law. It read R.C. 2929.11 and R.C. 2929.12 into the scope of an appellate court's review of felony sentences under R.C. 2953.08(G)(2), without statutory authority. It then went further and also read those statutes into the consecutive sentencing provisions of R.C. 2929.14(C)(4) – again, without any statutory authority allowing it to do so. For all of these reasons, this Court should reverse the Fifth District's decision in this case and hold that Ohio appellate courts may not consider a trial court's findings under R.C. 2929.11 and R.C. 2929.12 in reviewing the imposition of consecutive sentences.

1. This Court in *Saxon* disavowed the "sentencing-package" doctrine, requiring trial and appellate courts to consider the sentence for each offense individually.

The "sentencing-package doctrine" requires a court "to consider the sanctions imposed on multiple offenses as the components of a single, comprehensive sentencing plan." *State v. Saxon*, 109 Ohio St. 3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 5. In *Saxon*, this Court held that the "sentencing-package" doctrine has no application in Ohio. "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time." *Id.*, ¶ 10.

This Court found that the "sentencing-package" doctrine ignores the sentencing scheme set forth by the General Assembly in R.C. 2929.14. In Ohio, the potential sentence for each count depends upon the degree of that offense, and is therefore independent of any other counts in the indictment. "[T]he statute leaves the sentencing judge no option but to assign a particular sentence to *each* of the three offenses, *separately.* The statute makes no provision for grouping offenses together and imposing a single, 'lump' sentence for multiple felonies." *Id.*, ¶ 8 (emphasis in original).

In *Saxon*, this Court held that a trial court must therefore impose an individual sentence on each count, without regard for the overall length of a defendant's sentence. "Instead of considering multiple sentences as a whole and imposing one, overarching sentence to encompass the entirety of the offenses as in the federal sentencing regime, a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense." *Id.*, ¶ 9. "Under the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses." *Id.*

"Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively." *Id.* At that point, the judge may consider the total length of a defendant's incarceration to determine whether and how to impose consecutive sentences to craft the outcome the judge feels is most appropriate for that case.

Finally, and most significantly for purposes of this case, this Court held that this rule applies to both trial courts imposing a sentence and to appellate courts reviewing a sentence under R.C. 2953.08(G)(2). "The sentencing-package doctrine has no applicability to Ohio

sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant, **and appellate courts may not utilize the doctrine when reviewing a sentence or sentences**." *Saxon*, ¶ 10 (emphasis added).

This Court unanimously reaffirmed *Saxon's* rejection of the "sentencing-package" doctrine as recently as March of 2018. *See State v. Paige*, Slip Opinion No. 2018-Ohio-813, ¶ 8 ("We have been clear that the 'sentencing package' doctrine, by which federal courts may consider multiple offenses as a whole and impose an overarching sentence, is not applicable in Ohio's state courts, and 'appellate courts may not utilize the doctrine when reviewing a sentence or sentences'"), *quoting Saxon*, ¶ 10.

2. The Fifth District improperly relied upon the "sentencing-package" doctrine in this case, considering the aggregate length of Gwynn's sentences as a whole.

The longest sentence that Susan Gwynne received for any individual count in this case was three years. The trial court sentenced Gwynne to 3 years in prison for each of the 17 counts of second degree felony burglaries, 12 months in prison for each of the 4 counts of third degree felony thefts, 12 months in prison for each of the 10 counts of fourth degree felony thefts, and 180 days for each of the 15 counts of first degree misdemeanor receiving stolen property. *State v. Gwynne*, 5th Dist. Delaware No. 16 CAA 12 0056, 2017-Ohio-7570, ¶ 9; 12. It was only by running Gwynn's numerous sentences consecutively to one another that the trial court was able to impose a total aggregate prison term of 65 years.

It is obvious from the Fifth District's opinion that the court was troubled by the overall length of the 65-year prison term imposed in this case. But if the lower court was troubled by this, the court should have simply vacated the imposition of consecutive sentences. R.C. 2953.08(G)(2)(a) expressly empowers the court of appeals to review whether "the record does not support the sentencing court's findings under division * * * (C)(4) of section

2929.14[.]" The court of appeals could have accomplished this by finding that a 65-year prison term was not "necessary to protect the public from future crime or to punish the offender[,]" or that such prison term was "disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public[.]" R.C. 2929.14(C)(4).

Instead, however, the Fifth District chose to review the trial court's findings under R.C. 2929.11 and 2929.12. This was the wrong means by which to reach the end result in this case for three reasons.

3. The General Assembly excluded R.C. 2929.11 and 2929.12 from R.C. 2953.08(G)(2)(a), thereby excluding those statutes from the scope of an appellate court's review.

First, nothing in R.C. 2953.08 allows an appellate court to review a trial court's findings under either R.C. 2929.11 or 2929.12. In certain circumstances, Ohio appellate courts review a trial court's findings given in support of a particular prison sentence. The appellate court conducts this review under an extremely deferential standard, requiring the defendant to show by clear and convincing evidence that "the record does not support the sentencing court's findings[.]" R.C. 2953.08(G)(2)(a).

That review, however, is not open-ended or amorphous. R.C. 2953.08(G)(2)(a) contains a list of five statutes for which appellate courts review to determine whether the record supports the trial court's findings:

- R.C. 2929.13(B) (sentencing for fourth and fifth degree felonies),
- R.C. 2929.13(D) (community control sentence for first or second degree felonies),
- R.C. 2929.14(B)(2)(e) (repeat violent offender specifications),
- R.C. 2929.14(C)(4) (consecutive sentences), and
- R.C. 2929.20(I) (judicial release).

Notably absent from that list is R.C. 2929.11 (the purposes of felony sentencing), R.C. 2929.12 (the seriousness of crime and recidivism factors), or any language indicating that this list is intended to be non-exhaustive. In fact, the General Assembly did not include any reference to either R.C. 2929.11 or R.C. 2929.12 anywhere in R.C. 2953.08. In the absence of such language, "we have long recognized the principle of expressio unius est exclusio alterius – 'the expression of one thing implies the exclusion of another.'" *Maggiore v. Kovach*, 101 Ohio St.3d 184, 2004-Ohio-722, 803 N.E.2d 790, ¶ 18.

R.C. 2953.08(G)(2) does not provide for appellate review of a trial court's consideration of the purposes and principles of felony sentencing under R.C. 2929.11 or the sentencing factors under R.C. 2929.12. If the General Assembly intended to include R.C. 2929.11 and 2929.12 in the list of findings contained in R.C. 2953.08(G)(2)(a), it would have done so. The fact that it did not demonstrates a legislative intent to exclude the purposes and principles of felony sentencing, as well as the sentencing factors, from the jurisdiction of Ohio appellate courts to review. In construing an enactment of the General Assembly, a court "may not delete or insert words, but must give effect to the words the General Assembly has chosen." *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568, ¶ 12.

4. Appellate review of R.C. 2929.11 and R.C. 2929.12 would require appellate courts to review findings that the trial court is not required to make at all.

Second, because a trial court is not required to make any explicit findings under R.C. 2929.11 or 2929.12 in the first place, the court of appeals will, in most cases, have nothing to review. This Court has previously held that when considering R.C. 2929.11, "no specific findings need to be placed on the record by the trial court[.]" *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31. Similarly, trial courts are not required to make

specific findings under R.C. 2929.12. *See State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000) ("[t]he Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors. R.C. 2929.12").

If Ohio appellate courts are permitted to read R.C. 2929.11 and R.C. 2929.12 into R.C. 2953.08(G)(2)(a), they would then be required to review felony sentences to determine if the record does not support the sentencing court's findings under those statutes. R.C. 2953.08(G)(2)(a) limits the scope of the appellate court's review to "the sentencing court's findings[.]" But an appellate court review findings that the trial court is not required to make in the first place. There would be, in that circumstance, no findings to review, and no way to determine if the record does or does not support those non-existent findings. Ohio's appellate courts would thus be forced to either (1) create their own findings, affording no deference to findings that do not exist, or (2) require for the first time that trial courts make specific findings on the record under R.C. 2929.11 and 2929.12.

5. R.C. 2929.11 and 2929.12 are not incorporated as part of a court's consecutive sentences analysis under R.C. 2929.14(C)(4).

Third, the purposes and principles of felony sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12 are not part of a trial court's consecutive sentences analysis. R.C. 2929.14(C)(4) contains the findings that a trial court must make to impose consecutive sentences:

- "the consecutive service is necessary to protect the public from future crime or to punish the offender[,]"
- "that consecutive sentences are not disproportionate to the seriousness of the offender's conduct[,]"

- "that consecutive sentences are not disproportionate to * * * the danger the offender poses to the public,"
- and any one of the following:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual 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.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Nowhere in R.C. 2929.14(C)(4) did the General Assembly incorporate either the purposes and principles of felony sentencing in R.C. 2929.11 or the seriousness and recidivism factors in R.C. 2929.12.

To the extent that the trial court must consider R.C. 2929.11 and R.C. 2929.12, under *Saxon*, the court must do so when imposing a sentence on each individual count. "Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively." *Saxon*, ¶ 9. Once the trial court has proceeded to the consecutive sentences analysis, the court only considers the statutory requirements of R.C. 2929.14(C)(4).

Both R.C. 2929.11 and 2929.12 apply to the trial court's sentencing determination on an individual count, not to the court's subsequent decision as to whether to run multiple sentences consecutively to one another. This is evident from the fact that both R.C. 2929.11

and 2929.12 refer to a sentence as a sanction or combination of sanctions for a single felony. *See* R.C. 2929.11(A) ("A court that sentences an offender for a felony * * *); R.C. 2929.11(B) ("A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing * * *"); R.C. 2929.12(A) ("a court that imposes a sentence under this chapter upon an offender for a felony * * *").

In *State v. Holdcroft*, 137 Ohio St.3d 526, 2013-Ohio-5014, 1 N.E.3d 382, ¶ 6, this Court held that "a sentence is a sanction or combination of sanctions imposed for *an individual offense*[.]" (emphasis added). A reviewing court therefore cannot view a defendant's multiple, consecutive sentences in the aggregate as a single combined sentence. "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time." *Id*. "Therefore, *Holdcroft* holds that consecutive sentences are separate and distinct from one another and do not combine in the aggregate to form a 'sentencing package.'" *State v. Metcalf*, 12th Dist. Warren No. CA 2015-03-022, 2016-Ohio-4923, ¶ 11; *see also State v. Lyle*, 3d Dist. Allen Nos. 1-13-16 and 1-13-17, 2014-Ohio-751, ¶ 34 (same).

The Fifth District in this case impermissibly lumped all of Gwynne's numerous sentences together into a single, aggregate 65-year sentence, and then applied R.C. 2929.11 and R.C. 2929.12 to that single sentence. *See State v. Gwynne*, 5th Dist. Delaware No. 16 CAA 12 0056, 2017-Ohio-7570, ¶ 25 ("we find the stated prison term of 65 years does not comply with the purposes and principles of felony sentencing"). But there is no such thing as a single aggregate sentence composed of multiple, consecutive sentences. The correct way to approach a sentence such as Gwynne's is to say that Gwynne received 31 separate and individual felony sentences, the longest of which was three years in prison. None of those

sentences contravene either the purposes and principles of felony sentencing under R.C. 2929.11 or the seriousness and recidivism factors under R.C. 2929.12.

In fact, the Fifth District implicitly acknowledged this because it did not vacate or modify any of Gwynne's individual sentences. The court modified only the trial court's imposition of consecutive sentences, reducing the length of her prison term from 65 years to 15 years. *See Gwynne*, ¶¶ 32-37. By affirming Gwynne's sentences on each and every count, the Fifth District recognized that all of those sentences comported with R.C. 2929.11 and R.C. 2929.12.

If the court of appeals believed that the end result of the trial court's imposition of consecutive sentences was inappropriate in this case, R.C. 2953.08(G)(2)(a) expressly provided the appellate court the ability to modify the manner in which the trial court imposed those consecutive sentences under R.C. 2929.14(C)(4). The court could not, however, lump all of Gwynne's sentences together into a single aggregate sentence and then apply R.C. 2929.11 and R.C. 2929.12 to that aggregate sentence. Those statutes guide a trial court's sentencing determination as to each individual count. They are not part of the court's consecutive sentences analysis. Here, the Fifth District did not simply read R.C. 2929.11 and 2929.12 into R.C. 2953.08(G)(2); it also read them into the consecutive sentencing findings of 2929.14(C)(4). This was an error that necessitates reversal in this case.

6. The Eighth Amendment likewise focuses on individual sentences rather than on the cumulative impact of multiple consecutive sentences.

In the court below, Gwynne also raised a claim of cruel and unusual punishment under the Eighth Amendment. *See Gwynne*, ¶ 38. Because the Fifth District sustained Gwynne's first assignment of error and found that Gwynne's sentence violated R.C. 2929.11

and R.C. 2929.12, the court did not reach Gwynne's Eighth Amendment claim. *Id.* As a result, there is no Eighth Amendment issue before this Court.

In the event that either this Court or the lower court were to ever reach Gwynne's Eighth Amendment claim, the same argument would apply. The Eighth Amendment, just like Ohio's sentencing statutes, requires both the trial court and the appellate court to consider a defendant's sentences on each count individually, rather than as a single aggregate of multiple sentences run consecutively. In *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 20, this Court held that:

> "proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively. Where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment."

Id. This Court's Eighth Amendment jurisprudence thus lends further support to the proposition that the appellate court must review the length of each count individually, rather than cumulatively.

7. The narrow resolution of this case turns on the fact that R.C. 2929.11 and R.C. 2929.12 are not part of an appellate court's review of consecutive sentences.

This Court should therefore resolve this case simply by holding that the Fifth District erred by reading R.C. 2929.11 and R.C. 2929.12 into the consecutive sentencing findings of R.C. 2929.14(C)(4). This Court can decide this case upon that narrow ground without reaching the larger question of whether R.C. 2953.08(G)(2) empowers an appellate court to review a trial court's findings under R.C. 2929.11 and R.C. 2929.12. In the alternative, if this Court were to adopt the State's proposition of law in this case, the appellate court would be

prohibited from considering R.C. 2929.11 and R.C. 2929.12 at all – including in its review of any consecutive sentences.

This would leave unanswered the question of whether an appellate court can review a trial court's findings under R.C. 2929.11 and R.C. 2929.12 in a case in which there is no issue of consecutive sentences, and where none of the five sets of findings listed in R.C. 2953.08(G)(2)(a) apply. In other words, can an appellate court review a trial court's findings under R.C. 2929.11 and R.C. 2929.12 in a case involving a sentence on a single count, within the statutory range, with no specifications, and in which the court follows the statutory presumption in favor of either prison or community control? That question is before this Court in a separate appeal, *State v. Randy and Carissa Jones*, Case No. 2018-0444.

In that circumstance, unless a sentence is contrary to law, this Court has held that a sentencing court has "full discretion to impose a prison sentence within the statutory range." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus. Such a sentence within the statutory range is "unreviewable." *State v. Cole*, 8th Dist. Cuyahoga Nos. 103187, 103188, 103189, and 103190, 2016-Ohio-2936, ¶ 78. It follows from this that an appellate court has no authority upon which to vacate a sentence for which none of the findings specified in R.C. 2953.08(G)(2)(a) are required. This Court should reach that question in the *Jones* case, unencumbered by any issue of consecutive sentences.

CONCLUSION

Amicus Curiae the Cuyahoga County Prosecutor's Office respectfully asks this Honorable Court to reverse the Fifth District's decision in this case and hold that *Saxon* prohibits Ohio courts from applying R.C. 2929.11 and R.C. 2929.12 to an aggregate term of multiple consecutive sentences.

Respectfully submitted,

MICHAEL C. O'MALLEY
CUYAHOGA COUNTY PROSECUTOR

/s/ Christopher D. Schroeder
CHRISTOPHER D. SCHROEDER (0089855)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7733
cschroeder@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae the Cuyahoga County Prosecutor's Office on Behalf of Appellant* was served by email this 2d day of May, 2018 to David H. Birch (powelllawyers@gmail.com), counsel for Defendant-Appellee Susan Gwynne, and Amelia Bean-Deflumer (abean-deflumer@co.delaware.oh.us) and Douglas N. Dumolt (ddumolt@co.delaware.oh.us), counsel for Plaintiff-Appellant the State of Ohio.

/s/ Christopher D. Schroeder
CHRISTOPHER D. SCHROEDER (0089855)
Assistant Prosecuting Attorney