

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	Case No. 2017-1506
	:	
Appellant,	:	On Appeal from the
	:	Franklin County Court of Appeals,
vs.	:	Tenth Appellate District
	:	
SUSAN GWYNNE,	:	Court of Appeals
	:	Case No.16 CAA 12 0056
Appellee.	:	

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**BRIEF OF AMICUS CURIAE COLUMBUS CITY ATTORNEY,  
ZACH KLEIN, IN SUPPORT OF APPELLANT, STATE OF OHIO**

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CITY OF COLUMBUS, DEPARTMENT OF LAW  
ZACH KLEIN (0078222), CITY ATTORNEY  
LARA N. BAKER-MORRISH (0063721),  
SOLICITOR GENERAL  
77 North Front Street, 4th Floor  
Columbus, Ohio 43215  
(614) 645-7385 Phone  
(614) 645-6949 Fax  
lrbaker-morrish@columbus.gov

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

COUNSEL FOR APPELLEE

COUNSEL FOR AMICUS CURIAE,  
COLUMBUS CITY ATTORNEY, ZACH KLEIN

CAROL HAMILTON O'BRIEN (0026965)  
Delaware County Prosecuting Attorney  
AMELIA BEAN-DEFLUMER (0090629)  
Assistant Prosecuting Attorney  
140 North Sandusky Street, 3rd Floor  
Delaware, Ohio 43015  
(740) 833-2690 Phone  
(740) 833-2689 Fax

COUNSEL FOR APPELLANT,  
STATE OF OHIO

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## **STATEMENT OF *AMICUS* INTEREST**

The office of the Columbus City Attorney, through its Prosecutor Division, prosecutes misdemeanor offenses on behalf of the City of Columbus and the unincorporated townships of Franklin County in the Franklin County Municipal Court. The Franklin County Municipal Court is one of the busiest in the nation, initiating roughly 135,000 misdemeanor criminal/traffic cases per year. The Columbus City Attorney's Office, Prosecutor Division prosecutes approximately 89% of the misdemeanor criminal cases filed in the Franklin County Municipal Court. Given the high volume of cases, the City Attorney's Office has an interest in ensuring the efficient, just, and final disposition of criminal cases.

Finality in a criminal case is of particular benefit to the prosecution of misdemeanor violations. While appeals pursuant to O.R.C. §2953.08 do not apply to misdemeanor sentencing, it is not uncommon for municipal prosecutors to seek to obtain a waiver of the right of appeal as a condition of a negotiated plea. For municipal prosecutors, the practice arises out of the necessity of resolving a high volume of cases with limited resources. For instance, municipal courts process thousands of minor misdemeanor traffic violations, a high percentage of which involve crashes. If each of these cases were to go to trial, the resulting backlog in the municipal courts would effectively shut the courthouse down. It is not uncommon, then, to offer a plea bargain to resolve these cases short of trial. However, defendants are hesitant to enter a guilty plea to the bargained for resolution where a crash is involved as there may be parallel civil litigation that could seek to use the admission against them. As a result, prosecutors will routinely secure an affirmative waiver of the defendant's right of appeal in exchange for accepting a no contest plea to the bargained-for resolution. This express waiver of the right of appeal secures for the prosecution finality in the proceeding which, in turn, conserves city

resources. For this reason, preserving the ability to negotiate a resolution that encompasses waiver of the right of appeal is of importance to the Office of the Columbus City Attorney.

## STATEMENT OF THE CASE AND FACTS

On June 15, 2016, Appellee, a former nursing home employee, was indicted on 101 separate counts including burglary, theft, and receiving stolen property - ranging from first degree misdemeanor to second degree felony offenses - in connection with a string of thefts from elderly nursing home patients throughout Central Ohio. *State v Gwynne*, 5<sup>th</sup> Dist. Delaware No. 16 CAA 12-0056, 2017-Ohio-7570, ¶8. On September 23, 2016, in accordance with the terms of a written plea agreement, Appellee entered guilty pleas to 46 of the 101 charges including seventeen counts of burglary and, in exchange for said plea, the State dismissed the remaining 55 counts and recommended a pre-sentence investigation. *Id.* The written Crim. R. 11(F) agreement executed by the Appellee included the following language regarding the right of appeal:

X C. To waive her rights to appeal, including, but not limited to the grounds listed in Ohio Revised Code §2953.08<sup>1</sup>

<sup>1</sup>*U.S. v. Navarro-Botello* (C.A.9, 1990), 912 F.2d 318; *State v. Butts* (1996), 112 Ohio App.3d 683 at 686.

(Rec. 5).

The Appellee, who was represented by counsel, had executed this written agreement on September 21, 2016, further acknowledging:

**I understand that this Agreement is a binding contract between me and the State of Ohio. I have reviewed this Agreement with my lawyer, understand what it says, and agree to it.**

(*Id.*, emphasis contained in original).

Appellee was sentenced to 65 years in prison on November 8, 2016, and promptly filed a notice of appeal on December 6, 2016. *Gwynne*, ¶11-12. On appeal, Appellee argued that her sentence was in contravention of felony sentencing statutes. Appellee raised this claim pursuant

to ORC §2953.08 - the very appeal right which she had specifically waived, in writing, at the time of entering her plea. *Id.*, ¶15.

Despite Appellee's express, counselled waiver of the right to appeal her sentence pursuant to ORC §2953.08, the Fifth District Court of Appeals, in a decision issued September 11, 2017, confined its discussion of the waiver to a mere footnote. The Court stated:

[Appellee] agreed to pay restitution and waive her right to appeal the outcome of the matter.<sup>1</sup>

<sup>1</sup>Because there was no agreement as to sentence in this matter, we find appellant has not waived her right to appeal her sentence. *State v Fry*, 5<sup>th</sup> Dist. Delaware No. 10CAA090068, 2011-Ohio-2022 ¶8-13.

*Id.*, ¶9.

The Fifth Circuit proceeded to analyze the sentence pursuant to ORC §2953.08, reducing the Appellee's prison term by fifty years. *Id.*, ¶¶33-37. The State of Ohio petitioned for certiorari on October 26, 2017, challenging in its Second Proposition of Law the Court of Appeals' disregard of the express waiver of Appellee's right to appeal her sentence. This Court accepted the appeal on March 14, 2018.

## ARGUMENT

### **Amicus Curia Columbus City Attorney's Office Proposition of Law:**

*When a defendant knowingly, intelligently, and voluntarily agrees to a plea bargain wherein the defendant acknowledges that the terms of the sentence to be imposed are to be determined by the trial court following a pre-sentence investigation and wherein the defendant specifically waives her ORC 2953.08 right to appeal that as-yet to be determined sentence, can a Court of Appeals disregard the express waiver and address the merits of the Appeal?*

Plea bargaining “is an essential component of the administration of justice. Properly administered, it is to be encouraged.” *Santobello v. New York*, 404 U.S. 257, 260, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). “Furthermore, ‘a plea bargain itself is contractual in nature and ‘subject to contract-law standards.’” *Baker v United States*, 781 F.2d 85, 90 (6th Cir. 1986) quoting *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980), quoting *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979). As this Honorable Court stated, “[p]rinciples of contract law are generally applicable to the interpretation and enforcement of plea agreements.” *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶50. “Thus, an interpretation that would render a provision meaningless...‘is neither acceptable nor desirable under the normal rules of contract construction.’” *Id.* ¶51 citing *Hybud Equip. Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St.3d 657, 666, 597 N.E.2d 1096.

“[U]nder Ohio law a right to appeal is created by statute, see R.C. 2953.02; *State v. Butts*, 112 Ohio App. 3d 683, 686, 679 N.E.2d 1170 (8th Dist.1996), and...this statutorily-created right of appeal may be waived.” *State v Horton*, 10<sup>th</sup> Dist. Franklin No. 17AP-266, 2017-Ohio-8549, ¶17 citing *Butts* at 686, citing *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir.1990); *United States v. Wiggins*, 905 F.2d 51 (4th Cir.1990) (“Courts which have examined this issue have reasoned that since a constitutional right may be waived, the statutorily-created right to appeal may also be waived”).



In the case at hand, Appellee contracted to enter into a plea agreement with the State of Ohio wherein she expressly waived her ORC §2953.08 right to appeal the terms of her as yet to be determined sentence. In exchange for her guilty plea and her express waiver, the State agreed to dismiss 55 counts and both parties agreed to the completion of a pre-sentence investigation, with no specific sentencing recommendation from the State at the time of the agreement. In agreeing to give up her appeal right, Appellee gained the dismissal of more than half of the counts she was facing, thereby minimizing her exposure to an even longer prison term. For its part, the State gave up the possibility of a lengthier prison term but gained finality in the conviction by securing the waiver of the right of appeal.

The value to the prosecution of finality in a conviction cannot be understated. The underlying facts of this case serve to elucidate the point. The victims in this case are elderly, they were residing in nursing homes at the time of the offenses – it is fair to say that protracted litigation could lead not only to potential loss of memory on the part of the witnesses/victims but also to the inability to secure their potential future testimony should the conviction be overturned. Advancing age and the passage of time may result in debilitating mental/physical impairment - or even death – to key prosecution witnesses. Likewise, subsequent appellate review serves to delay restitution payments to the victims and the families who care for them.

Appellee's express waiver of her right to appeal pursuant to ORC §2953.08 was a term of the written contractual agreement reached between the Appellee and the State of Ohio. By disregarding the express nature of the waiver and proceeding instead to review the sentence pursuant to the provisions of ORC §2953.08, the Fifth Circuit rendered that term of the agreement meaningless in contravention of this Court's holding in *State v. Bethel*, 110 Ohio

St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶51. The decision of the Fifth Circuit must be reversed and the case referred back to the trial court for imposition of sentence.

### CONCLUSION

By disregarding the express waiver of the right to appeal Appellee's sentence – without providing a legal basis for doing so – the Fifth District has called into question the ability of the prosecution to bargain for finality as a condition of a plea. In so doing, the Appellate Court violated established principles of contract law: it rendered the express waiver of Appellee's ORC §2953.08 appeal right meaningless. The decision must be overturned and the case remanded to the trial court for imposition of the original sentence.

Respectfully submitted,

CITY OF COLUMBUS, DEPARTMENT OF LAW  
ZACH KLEIN, CITY ATTORNEY

/s Lara N. Baker-Morrish

Lara N. Baker-Morrish (0063721), Solicitor General  
77 North Front Street, 4th Floor  
Columbus, Ohio 43215  
(614) 645-7385 Phone  
(614) 645-6949 Fax  
*Counsel for Amicus Curiae,  
Columbus City Attorney, Zach Klein*

**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing Brief of Amicus Curiae Columbus City Attorney, Zach Klein, in Support of Appellant, State of Ohio has been served by First Class U.S. Mail, postage paid, this 2nd day of May 2018 on the following:

David H. Birch  
286 South Liberty Street  
Powell, Ohio 43065

*Counsel for Appellee*

Carol Hamilton O'Brien  
Delaware County Prosecuting Attorney  
Amelia Bean-Deflumer  
Assistant Prosecuting Attorney  
140 North Sandusky Street, 3rd Floor  
Delaware, Ohio 43015

*Counsel for Appellant, State of Ohio*

/s/ Lara N. Baker-Morrish  
Lara N. Baker-Morrish  
Solicitor General