In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2017-1506
Plaintiff-Appellant,	}	
	}	ON APPEAL FROM THE DELAWARE
v.	}	COUNTY COURT OF APPEALS
	}	FIFTH APPELLATE DISTRICT
SUSAN L. GWYNNE,	}	
	}	COURT OF APPEALS CASE NO. 16 CAA 12
Defendant-Appellee.	}	0056

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLEE SUSAN L. GWYNNE

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

LAW AND ARGUMENT

Overview and Summary of Argument. Susan Gwynne committed acts that reasonable people would find reprehensible. For over a decade, either as a nurse or masquerading as one, she entered the rooms of residents in nursing homes and assisted living facilities and stole cash and personal items.

For that, at age 55 she was sentenced to serve a prison sentence which would not see her gain freedom until she had reached the age of 110 years, a most unlikely event.

The appellate court unanimously found the sentence to be objectively unreasonable. It

noted that the trial court had found that Gwynne's prior criminal history contained only a few "very minor" misdemeanors, and that she had fully accepted responsibility for her actions, not only entering a guilty plea to 46 counts, but providing information on other crimes for which she hadn't even been charged. It found that "[t]here is no indication in the record that any victim was physically harmed, threatened with harm, or even ever present during the offenses." ¶28. The risk assessment tool used in preparing the pre-sentence investigation report "put the Defendant in the low to moderate risk category of likelihood of reoffending." ¶27; Sent. Tr. 26.

Concluding that "[t]he imposition of a 65 year sentence for a series of non-violent offenses for a first-time felon shocks the conscience," the court found "by clear and convincing evidence that the record does not support the sentence." *State v. Gwynne,* 5th Dist. Delaware No. 16 CAA 12 0056, 2017-Ohio-7570, ¶30.

The State argues that this was improper, for two reasons. First, it contends, an appellate court cannot review the application of the sentencing factors set forth in R.C. §2929.12. Second, it asserts that the appellate court was without jurisdiction to hear the case because Gwynne waived her right to appeal her sentence.

Neither argument is valid. It is entirely appropriate for an appellate court, in determining whether the record clearly and convincingly does not support the sentence, to consider the sentencing statutes as enacted by the General Assembly, including 2929.12. Second, a waiver of a right to appeal a sentence, without any consideration gained by the defendant other than that provided by the normal plea-bargaining process – i.e., dismissal of some charges in return for a guilty plea to others – would essentially allow the State to eliminate the right of appeal of sentences for almost all criminal defendants.

STATE'S PROPOSITION OF LAW NO 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* OACDL'S PROPOSITION OF LAW NO. 1: In determining whether a sentence is clearly and convincingly unsupported by the record, an appellate court must consider the sentencing statutes as enacted by the General Assembly, with due deference to the trial court's role in fashioning a sentence.**

1. A system of sentencings. Justice Kennedy famously observed that "criminal justice today is for the most part a system of pleas, not of trials." *Lafler v. Cooper*, 566 U.S. 156, 158, 132 S.Ct. 1376, 182 L.Ed2d 398 (2012). Actually, it would be more accurate to state that criminal justice today is for the most part a system of sentencings. Adding pleas to those cases where trial results in conviction, sentencing is by far the most common event in the criminal justice system.

It is also by far the most critical. There was no event more significant to Susan Gwynne than the trial judge here sentencing her to die in prison. And even when no such Draconian sentence is imposed, going to prison *at all* is life-altering event.

2. A defendant is entitled to meaningful appellate review of her sentence. While a defendant may not have a constitutional right to appeal, the General Assembly has clearly provided a statutory right. That includes not only appeal from trial errors; R.C. §2953.08 sets forth a comprehensive scheme for appellate review of sentencing decisions.

As this Court, and virtually every district court of appeals, has recognized, that review must be "meaningful." *State v. Comer*, 99 Ohio St.3d 4165, 2003-Ohio-4165, ¶10, 793 N.E.2d 473; S*tate v. Bratton*, 6th Dist. Lucas No. L-12-1219, 2013-Ohio-3293, ¶8; *State v. Flick*, 3rd Dist. Crawford No. 03-07-18, 2008-Ohio-157, ¶7; *State v. Jones*, 10th Dist. Franklin No. 04AP-475, 2005-Ohio-3784, ¶9; *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, ¶49

(right to "effective and meaningful appellate" not affected by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470).

The right of review is not unlimited. As the court explained in *State v. Roberts*, 8th Dist. Cuyahoga No. 104474, 2017-Ohio-9014, ¶19, "'Meaningful review' of a sentence does not mean an appellate court reverses every sentence it disagrees with; it means the appellate panel considers the arguments advanced as applied through the lens of the law." The appellate court's review of consecutive sentences is guided by the sentencing statutes, specifically 2953.08(G)(2)(a); as *Comer* put it, "'Meaningful review' means that an appellate court hearing an appeal of a felony sentence may modify or vacate the sentence and remand the matter to the trial court for resentencing if the court clearly and convincingly finds that the record does not support the sentence or that the sentence is otherwise contrary to law." ¶10.

3. In reviewing a sentence, an appellate court must be guided by the statutory scheme for imposing sentences.

A. The trial court is required to follow the sentencing statutes. As this Court acknowledged in *Foster*, the General Assembly, in enacting the 1996 sentencing reforms, "provided a sentencing scheme of 'guided discretion' for judges." ¶89. That guidance was provided first by R.C. ¶2929.11, which articulated the goals of felony sentencing. Subsection (A) provides the "overriding purposes of felony sentencing":

> The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

Subsection (B) commands that

> A sentence imposed for a felony shall 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, and consistent with sentences imposed for similar crimes committed by similar offenders.

Further guidance is provided by R.C. §2929.12, which provides a non-exhaustive list of factors for a trial court to consider in determining whether the offense is more or less serious than the typical offense of that nature, and whether the offender is more or less likely to recidivate.

B. Meaningful appellate review of sentences requires an appellate court to ensure that the trial court complied with the sentencing statutes. If the General Assembly intended for the statutes to guide a trial court's discretion, it stands to reason that, in order to engage in meaningful appellate review of a sentence, the appeals court must look to the same statutes to ensure that the trial court did indeed follow the statutes' prescriptions. If there is no meaningful appellate review, the trial court is left with unfettered discretion to ignore them. As the court recognized in *State v. Morefield*, 2nd Dist. Clark No. 2015-CA-4, 2015-Ohio-4713, ¶7, had the legislature intended for trial courts to ignore the statutes, it wouldn't have passed them in the first place.

> Since appellate review of sentences is provided by R.C. 2953.08(G), a trial court is not endowed with unreviewable discretion to sentence within the statutory range. To exercise appellate review, we must be able to review the record to find what underlying facts were considered by the trial court relating to the applicable eight factors set forth in R.C. 2929.11, and the twenty-three factors set forth in R.C. 2929.12.

C. The trial court still retains broad discretion in sentencing. As *Roberts,*

supra, pointed out, this does not mean that an appellate court can reverse any sentence it disagrees with. Trial judges have historically been imbued with substantial discretion in sentencing. That is understandable. One of the key considerations in determining the appropriate sentence is the defendant himself. Only the trial court had the opportunity to view the defendant and gauge whether the defendant is being candid in his profession of remorse, or is simply regretful that he got caught. And while 2929.11(B) exhorts the trial court to impose a sentence "consistent with sentences imposed for similar crimes committed by similar offenders," the courts have consistently rejected the notion that this requires uniformity in sentencing. Some trial judges may punish certain crimes – drug offenses, say – more harshly, others more leniently. That is perfectly appropriate. Had the legislature intended to preclude that, it would have adopted the matrix system used in Federal courts, which produces a "guideline sentence" using the "base offense level" and the defendant's criminal history to calculate a sentencing range. The Ohio legislature specifically rejected that idea.

That does not mean that the trial court's discretion is unfettered. A cardinal principle of statutory construction is that when the legislature says something, it means it. As *Moreland*, *supra*, acknowledged, allowing a trial court unfettered discretion in sentencing would render the entire statutory sentencing scheme a nullity.

D. In engaging in review of consecutive sentences, the appellate court must follow the guidance provided by R.C. §2953.08. While 2929.11 and 2929.12 provide guidance to the trial courts in determining a sentence, R.C. §2953.08 provides the guidance for the appellate courts in engaging in a meaningful review of that sentence. As it pertains to consecutive sentences, in order to "increase, reduce, or otherwise modify" an appealed sentence, an appellate court must make one of two findings, by clear and convincing evidence: that the

sentence is contrary to law, or that the record does not support it.

The court of appeals precisely followed that mandate: it determined that a 65-year sentence for a non-violent first-time felony offender was clearly and convincingly unsupported by the record.

4. Nothing in R.C. §2953.08 prohibits an appellate court from considering the factors in R.C. §2929.12. The State begins by arguing that 2953.08(G)(2)(a) included a list of statutes that "an appellate court can substantively review": prison sentences for defendants who commit certain non-violent felonies, community control sanctions where a statutory presumption for imprisonment exists, imposition of a sentence for a repeat violent offender specification, and imposition of consecutive sentences. The State then concludes that, since these are the only statutes specified in 2953.08(G)(2)(a), an appellate court may not consider the sentencing factors under 2929.12.

But this is faulty logic. 2953.08(G)(2)(a) specifies *when* an appellate court may consider whether the sentence is clearly and convincingly unsupported by the record; it does not specify *what* the appellate court may consider in arriving at that determination.

Indeed, meaningful review of sentencing necessarily requires an appellate court to consider the sentencing statutes to determine whether the trial court has complied with the sentencing statutes, giving due deference to the discretion normally enjoyed by the trial court in that regard.[1] Consideration of the 2929.12 factors is necessary to achieve the principles and purposes of sentencing contained in 2929.11; in short, consideration of the 2929.12 factors are

[1] The use of the "clearly and convincingly" standard required for an appellate court to alter a sentence more than adequately preserves the trial court's proper exercise of discretion.

the means toward the end of achieving the goals of 2929.11. It is impossible to see how an appellate court could determine whether a sentence complies with 2929.11 without considering 2929.12.

This is fully in keeping with this Court's recent decision in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231:

> We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed *solely after consideration of the factors in R.C. 2929.11 and 2929.12* under a standard that is equally deferential to the sentencing court. That is, an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence. ¶23 [Emphasis supplied.]

The State devotes substantial effort to the argument that this is *dicta*, and this Court really did not mean what it said. That argument is beside the point, however; whatever may be said about the consideration of the 2929.11 and 2929.12 factors in sentencings outside those involving the statutes specified in 2953.08(G)(2)(a), one of those statutes is 2929.14(C)(4), which provides for imposition of consecutive sentences. That is precisely what the appellate court did here.

5. Adoption of the State's argument would eliminate meaningful appellate review of sentencing. As noted earlier, reasonable people would find Susan Gwynne's crimes reprehensible. But reasonable people could also find that condemning a 55-year-old defendant with no prior felony record to die in prison for a series of non-violent offenses was not consistent with the principles and purposes of sentencing articulated in 2929.11. The State's arguments beg the question: what can an appellate court do about that?

The State's answer is simple: nothing. The statute mandates that the appellate court

consider the record below, but the State's arguments would preclude that: without consideration of the 2929.11 and 2929.12 factors, the "record" is meaningless. The State's argument would indeed read "unsupported by the record" out of 2953.08(G)(2)(a); we would be left with the appellate court limited to determining whether a sentence is "contrary to law": that the judge didn't make the required findings for consecutive sentences, that the sentence was outside the limits established by the legislature – a determination that could be made by a computer program written by an eighth grader – or that the judge didn't consider the factors in 2929.11 and 2929.12, where nothing more is required than that the judge *say* she considered them.[2]

That is not the law, nor should it be. For appellate review of sentencing to be meaningful, an appellate court must follow the General Assembly's mandate and "increase, reduce, or modify" a sentence that is clearly and convincingly unsupported by the record. This was not a cavalier decision by the court of appeals: it thoroughly considered the record, and, with due deference to the trial court's decision, found it so excessive that it clearly and convincingly did not comply with the principles and purposes of sentencing.

The court here did not merely do what the statutes allowed it to do; it did what the statutes *required* it to do. The appellate court's decision should be affirmed.

6. This Court's decision in *State v. Saxon* does not preclude the appellate court from reviewing the trial court's findings under 2929.11 and 2929.12. *Amicus* Cuyahoga County

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[2] And not even that. Some courts have held that if the judge fails to mention the statutes at sentencing or in the journal entry, "an appellate court should accord the trial court the presumption that it considered the statutory mitigating criteria in the absence of an affirmative showing that it failed to do so." *State v. White*, 8th Dist. Cuyahoga No. 99681, 2013-Ohio-4925. One might argue that the best way of overcoming the presumption that the trial court considered the sentencing statutes is that she said nary a word about them, but that argument has yet to find favor in the appellate courts.

Prosecutor's Office provides an additional argument here: it contends that the appellate court's decision is precluded by *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.d 824. According to *amicus*, the appellate court came up with a total sentence it deemed reasonable, in violation of the "sentencing package doctrine" rejected by *Saxon.*

That argument is incorrect. *Saxon* concerned a situation totally distinguishable from that here. In *Saxon*, the defendant had pled guilty to two counts of gross sexual imposition, one a third-degree felony and the other a fourth-degree felony. The trial court imposed a four-year sentence on each count, and ordered them run concurrently. On appeal, the State conceded that the trial court's sentence of four years for an offense with a maximum penalty of eighteen months was contrary to law, but the appellate court reversed both sentences. The first paragraph of *Saxon* set forth the issue:

> The question before this court is whether an appellate court may modify or vacate the entire multiple-offense sentence when a defendant assigns as error the sentence as to only one or more of those offenses but not the entire multiple-offense sentence. We find that it may not.

The court explained that Ohio law clearly mandated that a judge in sentencing a defendant for multiple offenses had to consider each sentence individually; "[t]he [sentencing] statute makes no provision for grouping offenses together and imposing a single, 'lump' sentence for multiple felonies." ¶8. Thus, "a judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense." ¶9.

But *Saxon* does not hold that a trial court may not consider the overall sentence. It would strain credulity to believe that a judge would craft individual sentences, then impose them consecutively, blithely unaware until that point of what the total prison sentence is. As long as the judge imposes individual sentences for each offense, and does not "consider the offenses as a

group and [] impose[s] only an omnibus sentence for the group of offense," *id.*, *Saxon* is satisfied.

The appellate court here fully complied with *Saxon*. It did not merely state that a 15-year sentence was sufficient; in Paragraphs 34 through 37, the court painstakingly imposed a sentence on each offense, and then ordered certain of the sentences to be run consecutively, for a total of fifteen years. Had the trial court announced that a fifteen-year sentence was sufficient to comply with the principles and purposes of sentencing, and then crafted individual sentences and ordered them to be run consecutively to achieve that result, no one would argue that this violated *Saxon*. That is precisely what the appellate court did, and that is not a violation of *Saxon*, either.

STATE'S PROPOSITION OF LAW NO 2: When a defendant knowingly, intelligently, and voluntarily waives her right to appeal as part of her plea agreement, an appellate court is without authority to address the merits of the appeal.

***AMICUS CURIAE* OACDL'S PROPOSITION OF LAW NO. 2: A waiver of a right to appeal does not waive the right to appeal the resultant sentence if the only consideration received by the defendant for the waiver is that normally a part of the plea bargaining process, that is, the reduction or dismissal of certain charges.**

1. Where there is no agreement as to sentencing, other than the reduction or dismissal of certain charges as a normal incident to a plea bargain, the defendant has not received consideration for a waiver of an appeal of the sentence. Plea bargaining in not a recent phenomenon; it began in the United States in the later 18th century, and by the 19th century had become the "dominant means of resolving criminal cases." Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 9-10, 2003. And the trend toward plea bargaining as a means of resolving criminal cases has only been accelerating: the rate of trials in criminal cases declined from 12.6% in 1991 to less than 4.7% by 2002, and by the time the Court decided the companion cases of *Lafler v. Cooper, supra*, and *Missouri v. Frye*,

566 U.S. 134, 132 S.Ct. 1399, 182 L.Ed.2d 379, in 2012, plea bargaining accounted for as much as 97% of criminal case resolutions. It is not uncommon for some jurisdictions to go years without a trial. Marisa Gerber, *No Criminal Trials Held in Santa Cruz Since 2010*, NOGALES INTERNATIONAL (Feb. 8, 2012, 7:25 AM), http://www.nogalesinternational.com/scvsun/news/no-criminal-trials-held-in-santa-cruz-county-since/article_2651fbde-5269-llel-b903-0019bb2963f4.html.

While it is commonplace to cite *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), for the proposition that a plea bargain is a contract, a plea bargain differs substantially from what an ordinary civil contract might entail. First, it is not an arms-length transaction. One looking to purchase a home and unable or unwilling to agree to the contract terms has the option of seeking out other sellers. That is not an option for a criminal defendant: he cannot choose to deal with a different prosecutor.

His only real option, should he be dissatisfied with the proffered bargain, is to go to trial. That poses substantial risks: one study found that a "trial penalty" of 292% – in short, the typical sentence for the same defendant might be three times as high if he or she exercises their constitutional right to trial. U.S. Dep't of Justice, *State Court Sentencing of Convicted Felons* (2002), tbl. 4.5, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf. See also McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA*, in The Jury Trial in Criminal Justice 23, 27 (Douglas D. Koski Ed., 2003) (noting that trial penalty in most states averages 300%, and in some cases rises as high as 500%.)

This leads to the second difference between the plea bargain and the ordinary civil contract. The prospective purchaser of a home will take into consideration a wide variety of factors, in addition to the price: quality of the neighborhood, attractiveness of the property, ease

of commuting to and from work, among others. The defendant in virtually every criminal case is concerned with only one thing, punishment: whether he will go to prison, and for how long.[3] A defendant can achieve that in various ways – reduction in charges, agreement as to sentence, or agreement as to a sentencing recommendation by the prosecutor – but the goal remains the same: to avoid or limit the period of incarceration.

That was certainly Gwynne's motivation, and she sought to achieve that by accepting responsibility for her offenses and getting the prosecutor to dismiss a number of charges. The ephemeral nature of that effort is perhaps best indicated by the competing recommendations of the parties, and the eventual sentence: defense counsel urged a sentence of community control sanctions, the State proposed a 43-year sentence, and the trial court imposed a 65-year sentence. In short, Gwynne did not obtain the only real consideration she sought to achieve by her plea bargain: a meaningful reduction in her sentence. While the State is correct that "had appellee been convicted of the entirety of the indictment, she would have faced more than 320 years in prison," State's Brief at 17, it is little solace to Gwynne that by entering her plea she managed to secure her release from prison at age 110 instead of 375.

2. The State's cases on waiver of appeal demonstrate that reduction in the sentence is the only meaningful consideration for a defendant in a plea bargain. As part of her plea bargain, Gwynne agreed to waive her right of appeal. The court below found the waiver inapplicable to her right to appeal the sentence "[b]ecause there was no agreement as to the

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[3] Defendants in certain sex offense cases might also seek to plead to charges which do not require registration as a sex offender. This, of course, is simply an aspect of punishment. See *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, holding that Ohio's sex registration scheme under the Adam Walsh Act is punitive.

sentence." ¶9, fn. 1.

The State argues that the waiver was valid, and should have required dismissal of the appeal. It beings its argument here with the uncontestable contention that a defendant can waive a constitutional or statutory right. It then trots out a number of cases which hold that a defendant can validly waive appeal of a sentence.

But the cases cited by the State actually support the appellate court's conclusion, and Gwynne's argument that the lack of any meaningful sentencing reduction renders a waiver of the appeal of a sentence void for lack of consideration. In each of the cases cited by the State, the defendant obtained a meaningful reduction in sentencing by virtue of the plea bargain.

For example, in *State v. Butts*, 112 Ohio App.3d 683, 679 N.E.2d 1170 (8th Dist. Cuyahoga 1996), the defendant had gone to trial on a charge of felonious assault, with three specifications.[4] The parties had stipulated to the third specification prior to trial. The jury convicted the defendant of felonious assault, but acquitted him of the first two specifications. At sentencing, the parties arrived at a plea bargain in which the State dropped the third specification and agreed to the minimum sentence of three to fifteen years imprisonment. The court found that "this agreement is not illusory; the defendant received **sufficient consideration** for giving up the right to appeal when the state agreed to delete an aggravated felony specification, **which would have had a significant effect on defendant's sentencing**." 112 Ohio App.3d 687 (emphasis supplied).

The defendant in *State v. Mitchell*, 2d Dist. Montgomery No. 17763, 2000 Ohio App. LEXIS 1830, also obtained a significant sentence reduction. He filed a *pro se* appeal from his

[4] The case arose under the law as it existed prior to the passage of the reforms in S.B. 2.

convictions and sentences for aggravated murder and aggravated burglary, pursuant to a plea agreement in which he waived his right to appeal, and the prosecutor in return agreed not to include death penalty specifications in the indictment. The court upheld the waiver, finding that by eliminating the possibility of a death sentence, "Mitchell received more than adequate consideration for his pleas of guilty and his waiver of his rights to appeal."

The Federal cases cited by the State buttress the view that a sentence reduction is the required consideration for a valid waiver of the right to appeal a sentence. In *United States v. McGilvery,* 403 F.3d 361 (6th Cir. 2005), "McGilvery agreed, pursuant to a plea agreement, to waive his right to appellate review if the district court imposed a sentence equal to or less than twenty-four months. Here, the district court sentenced McGilvery to twenty-one months' imprisonment." 403 F.3d at 362-363.

While the State argues that the court in *United States v. Chavez-Marquez,* 407 F.App'x. 346 (10th Cir. 2011) upheld a "broad waiver as part of his plea agreement," the waiver was anything but broad: the defendant "agreed to waive all appeals of his sentence **within the guideline range** and in conformity with the plea agreement." (Emphais supplied.) The guideline range was 27 to 33 months, and the judge imposed a sentence of 27 months. The court found the waiver valid because "[d]efendant received the **specific sentence** he bargained for as a party of the guilty plea." (Emphasis supplied.)

3. Adoption of the State's position would result in the virtual elimination of the right to appeal a sentence after a plea. The approach of Federal prosecutors and courts to appeal waivers stands in stark contradistinction to what the State is seeking here. Yes, appellate waivers are commonplace in Federal criminal plea bargains, but the waiver is limited to a sentence within the guidelines; the parties retain the right to appeal if the judge sentences outside

the guidelines. While the sentencing guidelines are only advisory, a defendant will still know as part of his plea bargain what those guidelines, and his expected sentence, will be. If he receives the consideration that he sought by entering into the plea – a sentence within the guidelines – he has understandably given up his right to appeal that sentence: he got precisely what he sought. But he still retains the right to appeal his sentence if the judge chooses a sentence outside that range.

Unlike the defendants in Federal cases, and the defendants in *Butts* and *Mitchell*, Gwynne received no benefit from her plea bargain in terms of the only consideration she sought: a reduction in sentence. The "consideration" Gwynne received for her plea was completely illusory: it did nothing to shield her from the Draconian sentence the trial court could, and did, impose.

This Court's acceptance of the State's argument on waiver would have a dramatic effect: simply put, there would be no reason for a prosecutor *not* to insist on a waiver of appeal as part of *every* plea bargain. And unlike the situation in Federal court, or in the Ohio courts which have sustained appellate waivers, that waiver would be completely unmoored from any considerations with regard to sentencing. Adoption of the State's position would not result merely in the end of *meaningful* review of sentencing; it would result in the elimination of any sentencing review at all.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to affirm the decision of the Delaware County Court of Appeals.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was sent by ordinary U.S. mail, postage prepaid, to Counsel for the State of Ohio, Amelia Bean-Deflumer and Douglas N. Dumolt Assistant Prosecuting Attorneys, 140 North Sandusky St., 3rd Floor, Delaware, OH 43015; Counsel for Defendant-Appellant., David H. Birch, 286 South Liberty Street, Powell, OH 43065; and to counsel for the various *Amici.*

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