IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2019-1103
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Belmont County Court of Appeals
	:	Seventh Appellate District
DAVID C. KINNEY, JR.,	:	
	:	COA Case No. 18 BE 11
Defendant-Appellant.	:	

REPLY BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT DAVID C. KINNEY, JR.

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES:

CONSTITUTIONAL PROVISIONS:

TABLE OF AUTHORITIES (Cont'd)

Page No.

STATUTES:

OTHER AUTHORITY:

INTRODUCTION

Fundamental, big-picture principles apply to this case despite the Attorney General's strenuous efforts to avoid them. Those evasion efforts are significant, because here Ohio's top legal advocate holds David Kinney and *Amici Curiae* to a standard that it does not demand from itself in another case currently before the Court.[1] In that case, the Attorney General maintained that getting the issue before the Court correct was more important than traditional default rules that may apply in due course.

Under the Attorney General's substantive position in this case, there would be no way to challenge the following scenario in Ohio: A sentencing judge determines and explicitly states on the record that despite meaningful mitigation that strongly favors a lesser sentence, an offender convicted of aggravated murder will be sentenced to life without the possibility of parole because the offender is African-American, or a woman, or left handed, or wears glasses. The Attorney General bases this stance on the premise that there is no federal constitutional right to state appellate review of criminal convictions and sentences, which is true generally. But that general truth comes with an overriding caveat: it presumes that the system in which the conviction and sentence were obtained and imposed operated constitutionally. Indeed, sentences must be constitutional, and because government cannot legislate away constitutional rights, there must be a mechanism to ensure constitutionality. For all other felony sentences that involve a single sentencing judge with more than one sentencing option from which to choose, the mechanism to ensure constitutional and lawful sentences is a statutory right to appeal the sentence.

[1] Notably, the Attorney General's brief in this case and the other case, *Lingle v. State*, S.Ct. Nos. 2019-1247 and 2019-1309, were filed on the same day.

Despite this milieu, the Attorney General insists that the Court cannot provide a remedy for those sentenced for aggravated murder and denied any review of their sentences.

To support its untenable position and, in effect, distract the Court's attention from the substantial issues at hand, the Attorney General reconfigures these wider perspectives. Nonetheless, two indisputable truths remain: (1) Ohio is alone in its categorical prohibition of appellate review for aggravated murder sentences; and (2) that once Ohio statutorily creates an appellate review system, that system must operate constitutionally. Using a derivative rerouting tactic, the Attorney General mislabels constitutional and statutory arguments from Mr. Kinney and *Amici Curiae* as policy. The Attorney General's final diversion effort is to present what it characterizes as an interesting and unanswered statutory-interpretation question that warrants neither of those portrayals.

The Court accepted this case to determine whether Ohio must provide meaningful appellate review for aggravated murder sentences. Given that every other state offers such a right, and that Ohio grants that right to every other felony sentence for which a sentencing court must choose from more than one option, *Amici Curiae* again urge the Court to determine that meaningful appellate review of sentences for aggravated murder is required in Ohio.

RESPONSE TO ATTORNEY GENERAL

I. The prohibition on appellate review of aggravated murder sentences is irrational and unconstitutional in the larger appellate-review context.

The Attorney General does not address, let alone dispute, that: (1) Ohio is the only state in the country to categorically prohibit appellate review of aggravated murder sentences, and (2) there is no clear legislative indication that Ohio's General Assembly intended the categorical prohibition to apply to the current, four-option sentencing scheme

for aggravated murder. *See* Brief of Amicus Curiae, at 4-9; *see also* Attorney General Brief, at 8-27. Yet that backdrop is the undeniable reality associated with the issue accepted by the Court in this case. Ohio is alone in, and its General Assembly has not clearly indicated an intent for, the prohibition presented to the Court for good reason. It is irrational and unconstitutional in the larger appellate-review landscape.

A. Non-constitutional grounds.

Initially, an interrelated—but alternative and non-constitutional—ground for resolving this case is whether the Ohio General Assembly intended for the prohibition to apply to the current sentencing scheme for aggravated murder, which includes four sentencing options. The Court has consistently recognized that "'when a case can be decided on other than a constitutional basis, we are bound to do so.'" *State v. Swidas*, 133 Ohio St.3d 460, 2012-Ohio-4638, 979 N.E.2d 254, ¶ 14, quoting *State ex rel. Crabtree v. Ohio Bur. of Workers' Comp.*, 71 Ohio St.3d 504, 507, 644 N.E.2d 361 (1994).

This Court has also explained that its "role, in the exercise of the judicial power granted to [it] by the Constitution, is to interpret the law that the General Assembly enacts, and the primary goal in construing a statute is to ascertain and give effect to the intent of the legislature." *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 14. It is axiomatic that there is a presumption that in enacting a statute, "[a] just and reasonable result is intended." R.C. 1.47(C). Therefore, "statutes will be construed to avoid unreasonable or absurd consequences." *State v. Wells*, 91 Ohio St.3d 32, 34, 740 N.E.2d 1097 (2001).

Applying these principles, this Court has determined that Ohio's firearm specification was not intended to apply to police officers who use their law-enforcement-

issued weapon in the line of duty. *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 31, 34. Similarly, this Court has held that the General Assembly could not have intended that a "change of venue be continued indefinitely." *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 371, 92 N.E.2d 390 (1950).

As previously explained, added sentencing options negated the original logic, purpose, intent, and context of the appellate-review prohibition challenged in this case. Brief of Amicus Curiae, at 5-9. Applying the prohibition to the new scheme appears unintended, and precludes the review and potential remediation of unjust and unreasonable sentences. As such, the Court could excise the prohibition on appellate review in order to provide the just and reasonable result that is patently required here. *See Wells*, 91 Ohio St.3d at 34; R.C. 1.47(C).

B. Constitutional grounds.

Although it is true that there is no federal constitutional right to appellate review of state criminal convictions and sentences, a mechanism must exist to ensure that convictions and sentences are obtained and imposed constitutionally. *See State v. Smith*, 80 Ohio St.3d 89, 97-98, 684 N.E.2d 668 (1997); *Estelle v. Dorrough*, 420 U.S. 534, 536, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975); *State ex rel. Bryant v. Akron Metro. Park Dist.* (1930), 281 U.S. 74, 80, 50 S.Ct. 228, 74 L.Ed. 710 (1930); *Ross v. Moffitt*, 417 U.S. 600, 610–611, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

It is equally true, however, that once a State establishes a right to direct appeal it "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S.Ct. 1818, 1819 L.Ed.2d 440 (1969). In a rather similar context, where capital litigants were deprived of a non-

discretionary means to review DNA-postconviction rulings, while all other felony defendants were not, this Court—in *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, 75 N.E.3d 141—held that that "two-track appellate process" violated "both state and federal principles of equal protection." *Noling* at ¶ 31. To avoid the straightforward application of that holding in this case, the Attorney General asserts waiver and/or forfeiture. *See* Attorney General Brief, at 24-25.

It may be, as demonstrated above, that equal protection is the strongest constitutional ground for determining that appellate review of aggravated murder sentences must be provided in this state. Under the circumstances before the Court, the equal protection challenge is an argument that is appropriate for the Court to consider in this case.[2] Notably, the Attorney General's stance on this topic in another case before the Court is that since review has been granted, "getting the law right is more important than limiting the litigants to the precise arguments advanced in the [appellate court]." Attorney General Brief in *Lingle v. State*, S.Ct. Case Nos. 2019-1247 and 2019-1309, at 8.[3]

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[2] The appellate brief in the lower court cited both the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2 of the Ohio Constitution in the assignment of error challenging R.C. 2953.08(D)(3). Moreover, Mr. Kinney argued equal protection through his Eighth Amendment challenge to this Court: "There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments. A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." *Furman v. Georgia*, 408 U.S. 238, 250, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972) (Douglas, J. concurring).

[3] In *Lingle*, the Attorney General argues for the first time to this Court that the Adam Walsh Act, not Megan's Law, is the governing law in that case. That argument comes after the Attorney General itself advised local sheriff offices to classify out-of-state registrants, such as the registrants in *Lingle*, under Megan's Law for the factual circumstances presented in that case. *See* Ohio Attorney General's *Guide to Ohio's Sex Offender Registration and Notification Laws* manual as of 2008.

As the Attorney General argued to this Court in *Lingle*:

> In general, a "party can make any argument in support of" a claim made below; "parties are not limited to the precise arguments they made below." *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, ___ Ohio St. 3d __, 2020-Ohio-1056 ¶ 21 (internal quotation omitted). Indeed, "[o]ffering a new argument or case citation in support of a position advanced [below] … is permissible—and often advisable." *Id*. (internal quotation and citation omitted); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Besides, parties normally cannot waive the relevant law. *See, e.g., Langley v. Prince*, 926 F.3d 145, 162–63 (5th Cir. 2019) (en banc) (no waiver of governing law); *United States v. Williams*, 641 F.3d 758, 773 (6th Cir. 2011) (Thapar, J., concurring) (no waiver of standard of review) (collecting cases).

Applying the Attorney General's own framework, the claim presented throughout this case is that the appellate-review prohibition for aggravated murder sentences is unconstitutional and unlawful. If the equal protection piece is new, it is a "new argument … in support of a position advanced" below. *Phoenix Lighting Group, L.L.C.* at ¶ 21. It is, therefore, properly before the Court.[4]

II. The arguments presented in favor of Mr. Kinney are not policy based.

The Attorney General characterizes the arguments of Mr. Kinney and *Amici Curiae* as policy based. That characterization overstates the manner in which policy considerations have been addressed herein. Mr. Kinney and *Amici Curiae* simply contend that it seems an illogical, and thus unintended, legislative policy "choice" to bar those convicted of aggravated murder from challenging their sentences in the manner that every other felony defendant may do so. The Attorney General's attempt to view the contentions as policy

[4] The constitutional prohibitions against cruel and unusual punishments, as argued by Mr. Kinney, also forbid Ohio's prohibition on appellate review of aggravated murder sentences.

arguments seems designed to avoid directly confronting the disconnect between the prohibition at issue here and the larger appellate-review landscape for felony cases. The arguments of Mr. Kinney and *Amicus Curiae* are grounded in the federal and state constitutions and statutory interpretation, and are wholly appropriate for this Court's consideration.

III. There is no other mechanism to appeal aggravated murder sentences.

The Attorney General answers its own "logically antecedent, difficult question" regarding an alternative appellate review path for aggravated murder sentences. As the Attorney General concluded, there simply isn't one.

CONCLUSION

For the reasons explained above, as well as those provided in all the briefs filed by Mr. Kinney and his support in this case, *Amici Curiae* again urge the Court to hold that there must be meaningful appellate review of sentences for aggravated murder in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of this **Brief** was filed electronically and served via electronic mail on Kevin Flanagan, kevin.flanagan@co.belmont.oh.us, Benjamin Flowers, benjamin.flowers@ohioattorneygeneral.gov, and Chris Gagin, chris.gagin@gaginlegal.com, on this 23d day of April, 2020.

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