IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 2021-1033
Plaintiff/Appellee,	:	On Appeal From The Court Of Appeals for Delaware County, Fifth Appellate District, No. 16 CAA12 0056
v.	:	
Susan Gwynne,	:	
Defendant/Appellant.	:	

REPLY BRIEF OF *AMICUS CURIAE*, RION, RION & RION, IN FAVOR OF APPELLANT

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SUMMARY OF REPLY OF *AMICUS* TO APPELLEE AND OAG

Appellee State of Ohio

The Court should reject Appellee's argument that:

> There is no doubt that the record supports the trial court's imposition of consecutive sentences. * * * Taken as a whole, Gwynne's 65-year sentence is not grossly disproportionate to her total conduct. Brief of Appellee, at 3 and 13.

The Fifth District Court of Appeals concluded in its previous decision in this case:

> "A sentence of 65 [years] is plainly excessive. It can be affirmatively stated that a 65 year sentence is a life sentence for appellant." *State v. Gwynne,* 2017-Ohio-7570. ¶ 29.

Ohio Attorney General

The Court need not reach the OAG's argument that since the individual sentences are within the statutory range, the aggregate time of imprisonment cannot be "grossly disproportionate" and "shocking." This Court should make clear that the *obiter dictum* in *State v. Hairston,* 118 Ohio St. 3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, that "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time"; has no application to consecutive sentencing in R.C. 2929.14(C)(4) as an exception to the legislative judgment presuming that sentences run concurrently. *Hairston* was decided after *Foster* when R.C. 2929.41(A) and the exception to sentences running concurrently, had been severed. A proper finding under R.C. 2929.14(C)(4) means that consecutive sentences would not be "grossly disproportionate" to the criminal conduct. After H.B. 86 in 2011, the decision is based first on the finding that "consecutive service is necessary to protect the public from future

crime or to punish the offender *and* that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public". *Id.*, (emphasis added). The trial court's sentence, and the reluctant affirmance by the court of appeals, is clearly error because the Appellant, Susan Gwynne, does not meet the strict criteria of being a danger to the public and the consecutive sentence is grossly disproportionate to the seriousness of her conduct.

Reasons The Appellee and OAG arguments should be rejected

The capstone of the Ohio Plan is appellate review. The General Assembly's re-imposition of R.C. 2929.41(A), 2929.14(C)(4), and 2953.08(G)(2) in H.B. 86, limit consecutive sentences that would be "grossly disproportionate" to the criminal conduct. Unfortunately, the restrictive reading of appellate review to allow trial court's virtually "unfettered discretion" in imposing consecutive sentences without meaningful review eviscerates the legislature's presumption for concurrent sentences for shorter, not longer, terms of imprisonment. Meaningful appellate review is designed to produce shorter sentences, not disproportionally longer sentences, resulting from the adding or multiplying of terms for multiple convictions. To uphold "general findings" supporting longer imprisonment by running sentences consecutively, not concurrently, just because the individual sentences are within the statutory range, is to undermine the legislature's decision that in Ohio, consecutive sentencing will not mean "grossly disproportionate" imprisonment. "Prior to Senate Bill 2, [adoption of the Ohio Plan] it was within the trial court's discretion to impose consecutive or concurrent sentences." They were presumed correct. *State v. Martin,* 11th Dist. Lake No. 2002-L-110, 2004-Ohio-518, ¶ 20. **R.C. 2929.41(A) was a sea change in Ohio criminal law.**

ARGUMENT IN FAVOR OF REVERSAL

Interest of Rion, Rion & Rion

The law firm of Rion, Rion, & Rion has represented clients in defending criminal prosecutions since the firm was started in 1938. It continues that representation in the third generation, seeking justice and fairness for defendants charged with criminal conduct. It seeks to be vigilant and relentless in defending the rights, honor, and freedom of the criminally accused. Its attorneys are members of the Ohio Association of Criminal Defense Lawyers, ("OACDL"), that has over 700 member attorneys in Ohio.

The Court's decision in this case is likely to have a major impact on many criminal defendants in Ohio, including present and future clients of Rion, Rion, & Rion. It seeks to provide an input from the criminal defense bar to assist the Court in reaching its decision. As *amicus curiae,* it replies to the Appellee and *amicus* OAG.

Issue Before the Court

Whether the trial court's decision imposing an aggregate 65-year consecutive sentence on Appellant Susan Gwynne, is clearly and convincingly unsupported by the record.

General Considerations

"The capstone of the Ohio Plan is appellate review." Thus, the issue is the following: "R.C. 2953.08(G)(2) does not restrict an appellate court's review of a trial court's imposition of consecutive sentences by "an extremely deferential standard of review" before it can vacate (or modify) the consecutive sentences where the trial court has made the findings set forth in R.C. 2929.14(C)(4). To the contrary, it calls for de novo review, not abuse of discretion. Also, this Court's interpretations of R.C. 2954.08(G)(2) do not mean the appellate court only has "all or nothing" authority with regard to the R.C. 2929.14(C)(4) findings. The appellate court review is

to assure that the legislative mandate that multiple sentences be served concurrently, not consecutively, is not "swallowed" by the exception in R.C. 2929.14(C)(4).

"Anything that is written may present a problem of meaning, ... The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision." Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Columbia Law Review 527, 528 (1947).

"The capstone of the Ohio Plan is appellate review. * * * ensuring proportionality, uniformity, predictability, greater certainty and fairness." Griffin & Katz, "Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan," 53 Case W. Res. L. Rev. 1, 3, and 49-50. Consecutive sentences generate a large volume of appeals. OBCR reports that the rate of consecutive terms imposed with multiple offense convictions increased by almost 12 percentage points from 2006 to 2018. In 2015, the rate for fifth-degree felonies was greater than for felonies of the first degree.

THE DILEMMA FOR APPELLATE COURTS REVIEWING A "WHOLLY EXCESSIVE SENTENCE"

This Court's judgment in this case reversed "the Fifth District's judgment and remand(ed) this cause to that court with instructions to consider Gwynne's assignment of error on consecutive sentences using the standard of review set forth in R.C. 2953.08(G)(2)." *State v. Gwynne,* 158 Ohio St.3d 279, 2019-Ohio-4761, ¶ 20. On remand, the Fifth District *did not* analyze the 65-year consecutive sentences imposed on Gwynne under the R.C. 2953.08(G)(2) standard of whether it clearly and convincingly found the 65-year consecutive sentence to be unsupported by the record. Rather, the Fifth District changed its conclusion, stating:

> While we still disagree with what we view as a wholly excessive sentence for a non-violent first time felony offender, no authority exists for this court to vacate some, but not all of Gwynne's consecutive sentences. And, [since the trial court made the required findings] an appellate court may not review the trial court's imposition of consecutive sentences unless it first clearly and convincingly finds that the record does not support the trial court's findings ---

which the Fifth District thinks is a "very differential standard of review." It dramatically concluded that "we have no choice other than to overrule Gwynne's first assignment of error." 2021-Ohio-2378, ¶ 26. In other words, it cannot "correct" a "wholly excessive sentence." This cannot be the law.

This Court should not accept the perceived restriction on appellate review in R.C. 2953.08(G)(2) denying the authority to assure that consecutive sentences conform with the goals and objectives of S.B. 2 and H.B. 86, that prevents the Fifth District from vacating an unjust consecutive sentencing. The justification that other appellate courts have held shields the trial court with virtually "unfettered discretion" that must be deferred to, is simply wrong. It is not supported by the text or intent of R.C. 2953.08(G)(2). See discussion in, *State v. Roberts,* 8th Dist. Cuyahoga No. 104474, 2017-Ohio-9014, ¶¶ 22-60 (Boyle, J., dissenting); *State v. Beverly,* 2d Dist. Clark No. 2015-CA-71, 2016-Ohio-8078, 75 N.E.3d 847, ¶ 42 (Donovan, J., dissenting); "Consecutive Sentences in Ohio—'Reserved for the Worst' – Or Not: Trial Court Discretion And Appellate Review," 87 U. Cin. L. Rev. 473 (2018).

Neither the plurality opinion in this case, *State v. Gwynne,* 158 Ohio St.3d 279, 2019-Ohio-4761, nor the decision in *State v. Jones,* 163 Ohio St.3d 242, 2020-Ohio-6729, precluding appellate courts from applying the "purposes and principles" of sentencing set forth in R.C. 2929.11 and 2929.12 to the review of consecutive sentences and the aggregate length of the

sentence, prevent a reviewing appellate court from vacating or modifying a consecutive sentence after clearly and convincingly finding it is not supported by the record.

Amicus requests that this Court hold that the appellate courts have the authority to review the record *de novo* to assure that consecutive sentences, like the "wholly excessive" 65-year sentence imposed here on a non-violent first- time felony offender, may be vacated consistent with "a firm belief" ["clear and convincing evidence"] that such a sentence does not meet the requirements of R.C. 2929.14(C)(4), as properly interpreted. The straight forward answer to the Fifth District's perceived dilemma is the evidence of record has not overcome the *legislative presumption* that multiple offense sentences run concurrently. The presumption is one of the central components of the 1996 criminal code intending to reduce lengthy prison sentences. R.C. 2929.41(A); Am. Sub. S.B. No. 2, 146 Ohio Laws, Part IV, eff. 7-1-96. See Hon. B. Griffin and L.R. Katz, Ohio Felony Sentencing Law 376-377 (2008 Ed.); *State v. Comer,* 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.This purpose was reaffirmed in H.B. 86. *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 20.

The appellate courts are not handcuffed from determining, as a jury would, whether the record supports imposing consecutive sentences. Contrary to the Fifth District's perception, requiring the appellate courts to review the record and reach a "firm belief" that it fails to support the strict requirements for sentences to run consecutively, does not mean deferring to the trial court's findings, especially when they are simply conclusory in nature.

This Court's ruling in *State v. Bonnell, supra,* indicates that a long criminal record of low-level offenses is not sufficient to overcome the presumption for concurrent sentences. An "egregious" criminal record does not meet the requirements of R.C. 2929.14(C)(4). *Id.* Neither does non-violent criminal conduct that may be considered despicable. The appellate courts that

have endorsed a major handicap on appellate review of criminal sentences have unnecessarily ignored that the legislature has mandated the general rule that multiple sentences "shall be served concurrently with any other prison term." R.C. 2929.41(A). The exceptions to the general rule should be strictly construed. Granting broad discretion to the trial court's findings in an exception to the general mandate as these appellate courts have done, serves to swallow and defeat the general rule. That is precisely what is happening in the appellate courts throughout Ohio.

THE CHANGE TO R.C. 2953.08(G)(2) IN 2000 CLARIFYING THE STANDARD OF REVIEW WAS NOT INTENDED TO EVISCERATE MEANINGFUL REVIEW

The legislative intention was not to have broad trial court discretion control the length of sentences. The Court should again revisit the conclusion that the semantic change in language in Sub. H.B. 331 in 2000 was intended to substantially reduce the role of the appellate courts in assuring the objectives of S.B. 2, reconfirmed in H.B. 86 in 2011. The 2000 amendment specifically rejected the deferential abuse of discretion standard, and changed the language simply from "That the record does not support the sentence" to "That the record does not support the sentencing court's findings under [R.C. 2929.14(C)(4)]", *Jones, supra,* ¶¶34-42. This Court improperly applied a presumption of legislative intent to *change* the standard of review rather than seeing it as a clarification (or specification) of an ambiguous standard. See 85 Ohio Jur.3d, Statutes, §294; 1A Sands, Sutherland Statutory Constr., § 22.30, at 266. The Court assumed the purpose was to eviscerate the very "capstone of the Ohio Plan", the operation of the appellate courts; but, the rule of construction is "no such purpose is indicated by the mere fact of an amendment of an ambiguous provision." *Sands, supra.*

EXAMPLES FROM THE APPELLATE COURTS; PERCEIVED LACK OF AUTHORITY

In *State v. Adams,* 2d Dist. Clark No. 2014-CA-13, 2015-Ohio-1160, the Court of Appeals reversed the trial court's consecutive sentence of an aggregate of 20 years for a streak of burglaries. The trial court made all the findings required by R.C. 292914(C)(4) "using the statutory language." 2015-Ohio-1160, ¶ 18. The majority reviewed the record and held: "Adams's offenses do not reflect such seriousness and a danger to the public that 20 years in prison is necessary to protect the public from him. Indeed, such a sentence may demean the perceived seriousness of other crimes and the harm to other victims; for example, the sentence for murder is 15 to life and rape has a maximum sentence of 11 years." ¶ 29.

In the dissent in *Adams*, Judge Hall, "reluctantly" would have affirmed the 20-year prison sentence because he viewed the court of appeals as being hamstrung by the supposedly "extremely deferential" standard of review. ¶ 36, relying on that language in the Eighth District decision in *State v. Venes,* 8th Dist. Cuyahoga No.98682, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 20-21. *Id.* The language from *Venes* was a comment describing the standard of review. In part, the statement is the following:

> It is important to understand that the 'clear and convincing' standard applied in R.C. 2953.08(G)(2) is not discretionary. In fact, R.C. 2953.08(G)(2) makes clear that '(t)he appellate court's standard for review is not whether the sentencing court abused its discretion.' As a practical consideration, *this means that appellate courts are prohibited from substituting their judgment for that of the trial judge.*
> It is also important to understand that the clear and convincing standard used by R.C. 2953.08(G)(2) is written in the negative. *It does not say that the trial judgment must have clear and convincing evidence to support its findings.* Instead, it is the court of appeals that must clearly and convincingly find that the record does not support the court's findings. In other words, *the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review.* (all emphasis, added in the *Adams* quotation.)

The dissenting Judge Hall then lists the appellate courts that have taken this comment as a strict statement of law handcuffing the appellate courts in reviewing criminal sentences committing offenders to longer terms in prison by disregarding the general mandate from the legislature that sentences are to run concurrently.

In late 2021, Judge Hall wrote the opinion in *State v. Gibson,* 2d Dist. Montgomery No. 28769, 2021-Ohio-3614 (October 8, 2021). It involved the more serious crimes of rape of a child under age 13, and an aggregate "sentence of 160 years to life in prison." ¶ 1. Gibson had no criminal history, had not committed any criminal offenses during his 40 years of his life, maintained employment, a home, and a marriage." ¶ 50. The appellate court nominally recognized that "[t]he law presumes that multiple sentences will be served concurrently. *See* R.C. 2929.41(A). *But* R.C. 2929.14(C)(4) contains an exception that allows a trial court to require consecutive service * * *". ¶ 47 (emphasis added). Then, the Court demonstrate how the exception "swallows the rule" when the trial court repeats the statutory language in the exception. In fact, the Court acknowledges the same dilemma addressed by the Fifth District Court of Appeals in this case. It states:

> We agree that the sentence was extremely harsh. It is not the sentence that the judges on this panel would have imposed if initial sentencing were our responsibility. But what we might have done in the trial court's place is not the standard of review. ¶ 51.

It repeats "this means that appellate courts are prohibited from substituting their judgment for that of the trial judge." *Id.,* referencing that comment in *Venes, supra.* What had been a minority view on the Second District now became the rule, granting the trial court broad discretion and requiring extreme deference by the court of appeals. "Indeed, 'we must affirm the decision of the trial court even though we might be persuaded that the trial court's decision in this regard 'constitutes an absence of the exercise of discretion.'" *Id.*

In *State v. Polizzi,* 11th Dist. Lake Nos. 2020-L-016, 017, 2020-Ohio-244, 167 N.E. 3d 508, the Eleventh District heard an appeal of a 358-month sentence, on resentencing after it had previously vacated a 30-year sentence. The majority started with: "There is a statutory presumption that multiple prison terms are to be served concurrently. R.C. 2929.41(A)." 2021-Ohio-244, ¶ 42. The Court could not "clearly and convincingly find that the record does not support the trial court's finding that consecutive sentences are not disproportionate to appellant's conduct and the danger he poses to the public." ¶ 47. It did relent: "This is not to say there are no concerns with the overall length of the harsh sentence imposed here. It is, in fact, even a 10-year increase over what the state had recommended." 2021-Ohio-244, ¶ 48. The Eleventh District majority pleaded:

> Based on the pronouncement in *Gwynne* that the R.C. 2929.11 and 2929.12 factors only apply to *individual* sentences, what is there to guide a trial court and/or a reviewing court when confronted with such a broad range of potential sentencing? Felony sentencing statutes must be read as a whole. 2021-Ohio-244, ¶ 48.

It then states: "We are bound to follow the precedent of the Supreme Court of Ohio, however, which clearly provides that R.C. 2953.08(G)(2) does not permit an appellate court to substitute its judgment for that of trial court. *See Jones et al., supra,* at ¶ 30." 2021-Ohio-244, ¶ 50.

These appellate decisions indicate the erroneous belief that R.C. 2953.08(G)(2) prohibits a reviewing appellate court from taking authorized action to vacate or modify consecutive sentences imposed by the trial court because the aggregate length of the sentence is not supported by the record. That perception is starkly presented in this case where the trial court made general findings under R.C. 2929.14(C)(4), and then imposed a 65-year sentence on a first-time offender where there was no violent behavior. The Fifth District Court of Appeals interpreted this Court's ruling to mean that its authority under R.C. 2953.08(G)(2) is "all or

nothing." They apparently view this Court's strict reading of the language in R.C. 2953.08(G)(2), to prevent substituting its judgment for the trial court's judgment under any circumstances.

Amicus disagrees with the reasoning based on what appears to be hyper-technical distinctions in construing the R.C. 2929.11 and 2929.12 language, ("a felony" and "a sentence"; but see R.C. 1.43: "singular includes the plural, and the plural includes the singular"). Nevertheless, this Court's analysis carefully includes the words "under R.C. 2929.11 and 2929.12" in its discussion. *Jones, supra,* 2020-Ohio-6729, ¶ 29. Properly interpreted, R.C. 2953.08(G)(2), especially given the legislative presumption that multiple sentences be served concurrently, allows the reviewing court to vacate or modify the trial court's consecutive sentences if it clearly and convincingly finds the record does not support the imposition of consecutive sentences that mean an unnecessarily lengthy imprisonment. The findings under the R.C. 2929.14(C)(4) exception to the mandate for sentences to be served concurrently, are broad enough to include consideration of the aggregate length of the sentence in the findings. An example of the inconsistent sentencing of multiple sentences, based on this erroneous view is *State v. McDaniel,* 2d Dist. Darke No. 2020-CA-3, 2021-Ohio-1519, where the trial court sentences the defendant to the minimum sentence "on each of 14 counts of third-degree sexual battery" (presumably not indicative of imprisonment), but then ran those minimum sentences consecutively. ¶ 18-19. Minimums become maximum; longer imprisonment.

THE STANDARD OF REVIEW IS DE NOVO, NOT BROAD DEFERENCE

This Court must correct this unfortunate detour from the intentions and objectives of the 1996 criminal code enacted as S.B. 2, and the continuation in 2011 with H.B. 86. At least one "evil" the legislature sought to address was lengthy prison sentences based on indefinite and often consecutive sentences. It empowered appellate courts to help assure achievement of this

objective. The comments in *Venes* were *dictum* at best. Black's Law Dictionary, dictum, ("comment [in] a judicial opinion, but one that is unnecessary to the decision"). They were also inconsistent with the legislative mandate that sentences run concurrently. In fact, the statutory requirement that the appellate court vacate or modify consecutive sentences where it is "firmly convinced" or "clearly and convincingly" finds the record does not support the exception, says little or nothing about deferring to the trial court findings. See *State v. Roberts, supra,* (Boyle, J., dissenting). Appellate courts have no trouble finding "harmless error" by the standard of "beyond a reasonable doubt" by reviewing the record. Such a determination is made by the appellate court's independent review and determination. R.C. 2953.08(G)(2) merely limits the appellate court to whether it is firmly convinced of the lack of support. It is simply a record review.

As the Eleventh District pleads in *Polizzi, supra,* the Court should clarify that the role of the appellate courts is not diminished. The statutes must be construed as a whole. *Hauser v. City of Dayton Police Dept.,* 140 Ohio St.3d 268, 2004-Ohio-3636, 17 N.E.3d 554, ¶ 9. The text of the appellate review statute, R.C. 2953.08(G)(2), states: "The court hearing an appeal under division (A), (B), or (C) of this section *shall review the record, including the findings underlying the sentence or modification given by the sentencing court."* (emphasis added). The appellate court reviews the record in light of the general rule mandating that multiple sentences run concurrently. The appellate court is authorized to "increase, reduce, or otherwise modify a sentence . . . or may vacate the sentence and remand the matter to the sentencing court for resentencing." The action is based on a review of the record, as appellate courts normally do. See M. Painter, "Appellate Review Under the New Felony Sentencing Guidelines: Where Do We Stand?", 47 Cleve. St. L. Rev. 553 (1999).

Contrary to the substance of the comment in *Venes, supra*, the statutory language as a whole, demands that the trial court not be given broad discretion. It expressly states: "The standard of review is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2). There is no general dispute that the "abuse of discretion" standard provides the trial court judge with the broadest deference, since it would require totally unreasonable or illegal considerations, such as "perversity of will, passion, prejudice, partiality, or moral delinquency." *Graziano v. Amherst Exempted Village Bd. Of Edn.*, 32 Ohio State 3d 289, 294, 513 N.E. 2d 282 (1987); *see Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The quote from the Eighth District decision in *Venes* is that the "clear and convincing" standard "means that appellate courts are prohibited from substituting their judgment for that of the trial judge." And, in addition: "In other words, the restriction is on the appellate court, not the trial judge. This is an extremely deferential standard of review."

The statement of reasoning in *Venes, (obiter dictum)* describes the effect of the standard of review incorrectly. In fact, the well accepted rule of appellate review is that it is the "abuse of discretion" standard that limits the appellate court so it "cannot substitute [its] judgment for that of the trial court, *unless we find abuse of discretion.*" *Blakemore, supra,* 5 Ohio St.3d 217, 219 (emphasis added). See M. Painter, "Abuse of Discretion: What Should It Mean Under Ohio Law?", 29 Ohio N. L. Rev. 209 (2002). The legislature expressly rejected granting the trial court such broad discretion before the appellate court could act. The *dictum* in *Venes* erroneously applies the elements of the abuse of discretion standard of review. See *Roberts, supra,* 2017-Ohio-9014, ¶¶ 36-39 (Boyle, J., dissenting) (comments in *Venes* "are wrong").

Thus, the language repeatedly quoted by other appellate courts, turns generally accepted appellate rules on their head and deviates from the text read as a whole. These courts treat the

dictum as if it were a rule of law. The text of the statute simply requires that the appellate court reviewing the record and underlying findings be "firmly convinced" before it modifies or vacates the consecutive sentence. This does not mean deference. In fact, the textual language just limits the appellate authority to less than is required when it reviews the record for harmless error "beyond a reasonable doubt." *State v. Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 27-29. So, the use of "clearly and convincingly" is applying a standard less stringent than "beyond a reasonable doubt" as for harmless error, but more stringent than "more probable than not" or the greater weight of the evidence. It is submitted that the use of "clearly and convincingly" does not mean deferring to the trial court; it means being firmly convinced from the actual review of the record that it fails to support the trial court's imposition of the consecutive sentences. A trial court jury, called upon to review the evidence in a fraud case, or a trial judge in hearing an injunction case, *review the record* to determine whether the plaintiff has proven the case by "clear and convincing" evidence. That does not mean deferring to what the plaintiff says the evidence establishes. It is an independent and separate review after the record is complete as to whether the evidence meets the standard of proof by clear and convincing evidence.

There is no deference to the trial court's findings. It is a *de novo* review of the record and allows the appellate court to substitute its judgment by vacating or modifying the sentences after being firmly convinced that the record does not support the findings. It is the same standard of review used for Double Jeopardy based merger of allied offenses in R.C. 2941.25. *State v. Williams,* 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. It is conduct specific and "de novo review produces a more consistent jurisprudence." Id., ¶ 27. Not like abuse of discretion. Id.

CONCLUSION

This Court should hold that the record in this case does not support the imposition of consecutive sentences on Appellant, Susan Gwynne, under the requirements of the exception to concurrent sentences set forth in R.C. 2929.14(C)(4). It must reverse the Fifth District once again and vacate the consecutive sentences imposed on Appellant. Even though the court of appeals has the authority for de novo review of the trial court findings, this Court should remand to the trial court with instructions that any prison sentences must run concurrently, but the court should consider less severe punishment, due to probable mental illness, lack of violence, lack of a criminal record, lack of physical harm or danger of physical harm; including community control sanctions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service was made by ordinary mail on counsel of record and the e-filing upon counsel for the parties on the date of filing.

/s/ Catherine H. Breault
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