**IN THE SUPREME COURT OF OHIO**

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| CITY OF OLMSTED TOWNSHIP<br><br>Appellee/Plaintiff<br><br><br><br>vs.<br><br><br>DIANE DONNELLY<br><br>Appellant/Defendant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Supreme Court<br>Case No. 2023-1507<br><br><br><br>Appeal from the 8th District Ohio Court of Appeals – Cuyahoga County Case No. CA-23-112334<br><br>Berea Municipal Court Case No. 22CRB01331 |

**MEMORANDUM IN RESPONSE TO JURISDICTION**
**APPELLEE – STATE OF OHIO**

DANAMARIE K. PANNELLA (#0090221)
J. JEFFREY HOLLAND (#0040089)
Attorneys for Appellee State of Ohio
Holland & Muirden
1343 Sharon Copley Road
PO Box 345
Sharon Center, Ohio 44274
(330) 239-4480
Fax: (330) 239-6224
*dpannella@hmlawohio.com*

MICHELA HUTH (#0091353)
Attorney for Appellant
PO BOX 17
Bolivar, OH 44612
(330) 440-4027
*michelahuth.esq@gmail.com*

## TABLE OF CONTENTS

## APPELLEE'S STATEMENT IN OPPOSITION TO APPELLANT'S ASSERTION ABOUT WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Appellant claims that this case presents a question of great public or great general interest, and asks that this Court invoke its discretionary jurisdiction pursuant to Oh. Const. Art. IV, § 2. S.Ct. Prac. R. 2.1(A)(3). The sole issue is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties. *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). This Court does not accept jurisdiction of a discretionary appeal unless "a substantial constitutional question is involved" or the "case is of great public or general interest." S. Ct. Rule III, § (B)(2); see also, *Williams,* supra.

The instant case presents no unique legal issues that distinguish it from any other criminal defendant who is disappointed by an unsuccessful appeal. Appellant claims this case "has, and will continue to, create confusion about the breadth and application of the analysis and holding in *State v. Campbell*, 170 Ohio St.3d 278, 2022-Ohio-3626 and *State v. Turner*, 2019-Ohio-3378, 132 N.E.3d 766 (8th Dist.)," yet there is no confusion created by this case. (Appellant's Brief at 1). This case simply distinguishes the facts and rulings of *Campbell* and *Turner* to reach a different conclusion as appellate courts often do. In so doing, the Eighth District Court of Appeals broke no new legal ground. There is no discernible controversy. Invited error and waiver are long and well-established doctrines. Therefore, Appellant's prayer for granting jurisdiction should be denied.

## STATEMENT OF THE CASE AND FACTS

The case history and facts as they pertain to this appeal are as follows:

Defendant/Appellant was charged with four counts of companion animal cruelty in violation of Ohio Revised Code §959.131(D)(2) involving 15 dogs, each being misdemeanors of the second degree. The complaints alleged that "on or about July 1, 2022 through August 19, 2022 . . . Donnelly, who was the owner or caretaker of a companion animal, did negligently torture, torment, or commit an act of cruelty of [15 named dogs]." *City of Olmstead Twp. v. Donnelly, 8th Dist. Cuyahoga No. 112334, 2023-Ohio-3712.*

On December 1, 2022, Appellant entered into a negotiated plea agreement. Appellant and Appellee submitted a joint sentencing recommendation of five years' non-reporting probation. Conditions of probation, by agreement, were to include the following conditions:

1. Appellant "should not own, keep, nor reside with more than four spayed or neutered dogs;" *Id*. at P. 6.
2. "[D]ogs are to be kept inside of her residence in a humane, sanitary, and lawful manner." *Id*.
3. Appellant "shall undergo random inspections by the APL or other humane society to ensure compliance with that term." *Id*.
4. "The bond that was paid and the remaining animals will be forfeited. The four dogs that are currently housed at the APL shall be returned to [Appellant] once they are spayed or neutered." *Id*.

The trial court accepted the joint recommendation and issued a written sentencing order. Appellant filed a timely notice of appeal. The sentence was upheld by the Eighth District Court of Appeals.

## ARGUMENT AGAINST APPELLANT'S PROPOSITIONS OF LAW

**Appellant's First Proposition of Law: "A defendant has not invited the sentencing error when her sentence was imposed pursuant to a negotiated plea agreement, which included consenting to random and unannounced probation inspections of the defendant and her property."**

**Appellant's Second Proposition of Law: Ohio courts may not sentence a defendant to a community control condition which subjects the defendant to random and unannounced inspections, because that sentence is contrary to R.C. 2951.02.**

Appellant argues her first and second propositions of law together. Appellant entered into a requested plea agreement with Appellee in a companion animal cruelty case. Appellant's Counsel and the Prosecutor jointly submitted an agreed recommendation on sentencing to the trial court. The trial court accepted all recommendations. Appellant then had a change of heart and sought to overturn only one part of the negotiated and jointly requested sentencing order in the appellate court.

**1. The Appellate Court correctly held that Appellant cannot not overturn requested terms of sentencing pursuant to the doctrines of invited error and waiver.**

Invited error occurs when a party asks the court to take some action later claimed to be erroneous, or affirmatively consents to a procedure proposed by the trial judge. *State v. Campbell*, 90 Ohio St. 3d 320, 324 (2000). See also *State v. Murphy* (2001), 91 Ohio St. 3d 516, 535. "It is a well-established rule that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034 at ¶ 15; See also *In State ex rel. Bitter v. Missig, 72 Ohio St.3d 249, 254, 1995 Ohio 147, 648 N.E.2d 1355*. And more fundamentally, "'waiver is the "intentional relinquishment or abandonment of a known right."'" *Id.* quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). See also *Turner*, supra, (specifically noting that "absent a waiver to random warrantless searches" there are limitations on probationary searches). "Under the invited error doctrine, "a party is not entitled to take advantage of an error that he himself invited or induced." *State v. Doss*, 8th Dist. Cuyahoga No. 84433, 2005-Ohio-775, ¶ 5, internal citations omitted; See also *Lester v. Leuck*, 142 Ohio St. 91, 50 N.E.2d 145 (1943).

This case is not a situation where the Appellant merely acquiesced to the trial court's condition to order random inspections. The record shows a joint recommendation made by both Appellant and Appellee. The Appellant and her counsel actively participated in the plea negotiations, which contained an agreed, recommended sentence that included a probation condition of inspections to ensure compliance with the terms of probation.

In this case, Appellant did not merely fail to object. Appellant, with advice of counsel, affirmatively requested the sentence she received. There is no claim of ineffective assistance of counsel, nor did Appellant file a motion to have her plea withdrawn. Appellant plainly invited the "error" she now seeks to overturn.

Despite noting that "[a] defendant has not invited the sentencing error when her sentence was imposed pursuant to a negotiated plea agreement, which included consenting to random and unannounced probation inspections of the defendant and her property" as Appellant's First Proposition of Law, Appellant makes no argument as to why the negotiated plea was not an invited error as found by the Eighth District or why a defendant who regrets inviting an "error" is an issue of public or great general interest.

Appellee respectfully asks this Honorable Court to consider the public policy ramifications that would occur, and the injustice that would result if parties would be permitted to request that the trial court give certain sentencing conditions, and then attempt to remove only part of those conditions and/or appeal the decision of the trial court giving that condition after it was specifically asked for by that party. Allowing such would create a dangerous precedent of injustice. This is the exact reason why the invited error doctrine exists, and Appellant cannot attempt to now claim that it was error for the trial court to follow the what she requested. The

doctrines of invited error and waiver are long-established and Appellee respectfully requests this Honorable Court to deny jurisdiction as this is not a matter of public or great general interest.

2. **The Appellate Court correctly distinguished the holdings of *Campbell and Turner* from the instant case.**

Appellant argues that the holding in this case is inconsistent with *Campbell*, supra, and *Turner*, supra. However, the Eighth District correctly determined that the "procedural posture in *Campbell* and the facts in *Turner* are distinguishable." *Donnelly*, supra, at ¶ 17. The primary reason the procedural posture and facts are distinguishable from this case is because ***Appellant invited the error***. As noted in Donnelly "[b]ased on th[e]court's review of the record, even assuming that the trial court committed error in imposing random searches as part of her probation conditions, Donnelly invited the error." *Id.* at ¶ 20. In this case, Appellant was convicted of cruelty to companion animals. The joint recommendation allowed Appellant to regain possession of four dogs on condition that she abide by certain limitations on her right to own and possess these dogs. The appellate court did not need to further address the applicability of R.C. §2951.02 because Appellant invited the error.

Appellant suggests that this Court should look past the fact that she created the issue of which she now complains because *Campbell* addresses consent issues as it relates to RC §2951.02. In *Campbell*, this Court found that probation officers are not authorized by statute to perform searches without reasonable cause, but that such a search is a statutory violation only, not constitutional violation, thus the exclusionary rule does not apply. *Campbell* affirmed the general principal that a person subject to probation or community control "'does not possess the absolute liberty enjoyed by the general population, but rather finds his liberty dependent upon

the conditions and restrictions of his probation.'" *Id.* at ¶ 12, quoting *State v. Chapman*, 163 Ohio St.3d 290, 2020-Ohio-6730, 170 N.E.3d 6.

The fact remains that even if Appellant had not invited the error in this case, the case at bar is still distinguishable from *Campbell*. The defendant in *Campbell* was required to consent to searches without limitation of his residence and "property," including all of the contents of his cell phone, seemingly without any relation to the underlying offense for which he was convicted. In this case, the inspection is limited to ensuring that the four returned dogs are being kept in humane, sanitary, and lawful conditions inside the Appellant's residence. The humane agents would not be conducting the kind of broad search discussed by *Campbell*, which included inspecting the contents of a cell phone and any other property he possessed. A humane agent would not need to search a cell phone, refrigerator, or drawers to determine whether the dogs in this matter are being kept in compliance with the terms of probation. The burden on Appellant's liberty and privacy created by such a restricted search is extremely limited and far different than the search discussed in *Campbell*.

The instant case also does not involve inspections by probation officers, and thus there is no statutory violation of R.C. §2951.02(A). "Probation agency" is relevantly defined as "a municipal court department of probation established under section 1901.33 of the Revised Code." Probation officers are appointed by the Municipal Court and compensated by the city treasury. R.C. §1901.33. Humane agents are not probation officers. Humane agents are not appointed by the Municipal Court, nor are they paid by the city.

Appellant confuses the broad authority granted to sentencing courts under R.C. §2929.27 with R.C. §2951.02, which provides limitations on the probation authority from expanding the trial court's sentencing orders. The directive in R.C. §2951.02 is explicitly aimed at "authorized

probation officers." It does not prohibit or limit a sentencing court from fashioning the most appropriate program for addressing a particular offender's crime. In *City of Cleveland v. Gig6 L.L.C.*, 2021-Ohio-2684, the court upheld a similar program of rehabilitation in a housing case that required, amongst other terms, advising the housing specialist of all progress on a monthly basis, providing the housing specialist with all appropriate receipts, and permitting the housing specialist to inspect the interior of the property. Like the *Gig6* case, the goal in the instant case was "not to punish the defendant but to bring . . . [her] into compliance." See also *City of Cleveland v. Pentagon Realty, L.L.C.*, 2019-Ohio-3775, ¶ 9 , 133 N.E.3d 580,(8th Dist.), citing *City of Lakewood v. Krebs*, 150 Ohio Misc. 2d 1, 2008-Ohio-7083, ¶ 19, 901 N.E.2d 885 (M.C.). The "inspectors" were housing specialists, not probation officers.

Even if this case involved probation officers, the analysis by the Eighth District is not in error pursuant to *Campbell.* In *Campbell*, this Court stated that "probation officers are statutory creations, see R.C. 2301.27, they 'have no more authority than that conferred upon them by statute, or what is clearly implied therefrom.'" *Campbell*, 170 Ohio St.sd 278, 2O22-Ohio-3626, at 16, quoting *Hall v. Lakeview Local School Dist. Bd. of Edn.*, 63 Ohio St.3d 380, 383, 588 N.E.2d 785 (1992). Thus, Campbell's consent to random searches as a condition of his community-control sanctions limited his legitimate expectation of privacy but did not grant the probation officer additional authority. The probation officer needs "reasonable grounds to believe" that the probationer is violating the law or terms of community control.

Appellant similarly asserts that the sentence in this matter is inconsistent with the decision in *Turner*, supra, as it relates to RC §2951.02. This case is too distinguishable. The primary difference between Turner and the case at bar is that the sentence was imposed upon Turner after being convicted at trial, over Turner's specific objections. In *Turner*, the court

specifically noted that "absent a waiver to random warrantless searches, the statute provides limitations on authorized officers who conduct a search of a probationer's person or property in the course of their duties." Id. at ¶ 58. In the present case, Appellant not only failed to object; she requested the very terms of probation for which she now complains. This is certainly a waiver.

For the above reasons, Appellant's Propositions of Law do not support Appellant's claim that the one provision of her sentence was in error, that it was not an error she invited, or that it amounted to a substantial constitutional question, or a question of great public or great general interest.

**<u>Appellant's Third Proposition of Law</u>: A defendant, who has been sentenced as a result of a negotiated plea agreement to imposition of random and unannounced inspections, does not first have to subject herself to random and unannounced probation inspections before her case is ripe for review.**

Finally, Appellant argues that this case is ripe for review without an inspection contrary to the terms of probation ever occurring. Appellant notes "Donnelly has to worry every day about an invasion upon her and her property by the humane society." (Appellant's Brief at 13). As noted above, in this case, Appellant, with advice of counsel, affirmatively requested the sentence she received. Appellant in this case was not incarcerated, was represented by retained counsel, and negotiated a resolution that included the subject inspections when she had every right to instead proceed to trial. Appellant was not in a situation where her consent or misunderstanding was reasonably questionable. The Appellant apparently possessed no worry when she received benefit from the deal in the give and take of the plea negotiations. After securing the specific sentencing arrangement she wanted, Appellant now wishes to void a single part of the *quid pro* agreement that she requested, rather than requesting to withdraw her entire plea.

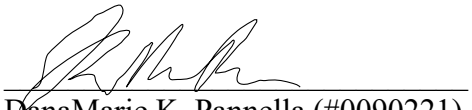
Moreover, Appellant's focus on ripeness is misguided. The Eighth's District's decision to uphold Appellant's sentence in this case was not based on a lack of ripeness; it was based on the error that the Appellant invited. The appellate court's commentary about "ripeness" was made *obiter dictum*. It had no legal bearing on the case before the court, which was ultimately decided on the issue of invited error. The appellate court noted that "the issue is ***arguably*** not ripe for review[,]" not that the issue *is not* ripe for review. *Donnelly*, supra, at ¶ 18 (emphasis added). This is similar to the court's commentary and observation that imposition of random searches in Appellant's case "was ***possible*** error." *Id.* at ¶ 17 (emphasis added). At no point did the court hold that it *was* error.

For the above reasons, Appellant's Proposition of Law does not support Appellant's claim that the one provision of her sentence was in error, that it was not an error she invited, or that it amounted to a substantial constitutional question, or a question of great public or great general interest.

## CONCLUSION

This case was decided on the issue of long-established doctrines of invited error and waiver, and simply distinguishes the facts and rulings of other cases to reach a different conclusion as appellate courts often do. WHEREFORE, Appellee, the State of Ohio, respectfully requests this Honorable Court deny jurisdiction as this is not a matter of public or great general interest.

Respectfully submitted,
HOLLAND & MUIRDEN



DanaMarie K. Pannella (#0090221)
J. Jeffrey Holland (#0040089)

1343 Sharon-Copley Road, P.O. Box 345
Sharon Center, Ohio 44274
(330) 239-4480; Fax (330) 239-6224
E-mail: dpannella@hmlawohio.com
Attorney for Appellee, State of Ohio

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Memorandum in Response was emailed on this date to:
Michela Huth
michelahuth.esq@gmail.com

12/27/23
Date

DanaMarie K. Pannella (#0090221)
Counsel for Appellee, State of Ohio