

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

STATE OF OHIO)	OHIO SUPREME COURT CASE
)	No. 08-2202
Appellee)	
)	ON APPEAL FROM THE
-vs-)	NINTH JUDICIAL DISTRICT
)	APPEALS CASE NO. 07CA0074-M
MICHAEL GUNNER)	
)	MEDINA COUNTY COMMON
Appellant)	PLEAS CASE NO. 05CR0235

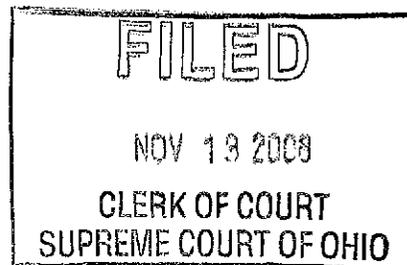
NOTICE OF PENDING MOTION TO CERTIFY A CONFLICT

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Counsel for Appellee



Appellant, Michael Gunner, hereby gives Notice of a Pending Motion to Certify a Conflict to the Supreme Court of Ohio from the judgment of the Medina County Court of Appeals, Ninth Judicial District, entered in **State v. Gunner**, Court of Appeals Case No. 07CA0074-M, on June September 29, 2008. Appellant filed a Motion to Certify a Conflict with the Ninth District Court of Appeals on October 9, 2008.

Respectfully submitted,



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Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing, **Notice of Pending Motion to Certify a Conflict**, has been served via regular U.S. Mail, postage pre-paid this 14th day of November, 2008, upon:

Dean Holman
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Counsel for Appellee



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However, in **State v. Goodell** (June 30, 2006), Lucas County App. No. L-05-1262, unreported, 2006-Ohio-3386, faced with the same question of law the Sixth District Court of Appeals held:

While **Foster** noted that 'nothing prevents the state from seeking greater penalties' (citing **United States v. DiFrancesco** (1980), 449 U.S. 117, 134-136), the Trial Court is still constrained to resentencing only that part of Appellant's judgment of conviction impacted by **Foster**, that is, the consecutive aspect of Appellant's sentence.

Identical to Goodell, Appellant appealed only the consecutive nature of his sentence based on the Ohio Supreme Court's decision in **Foster**, not the term of each sentence. However, upon remand Appellant's actual term of incarceration for each offense was increased. Unlike the Sixth District Court of Appeals, this Court found the Trial Court did not exceed its authority by resentencing Appellant to an increased term of incarceration for each offense.

This Court's decision is also conflicted by the Twelfth District Court of Appeals decision in **State v. Johnson** (April 17, 2006) Butler Co. App. No. CA2005-06-134, unreported, 2006-Ohio-1896. In **Johnson**, the Twelfth District Court of Appeals held,

While Defendant appealed her consecutive sentences, she did not appeal the nonminimum prison terms imposed for the three felonies.

The Supreme Court thus held that an 'appellate court may only modify or vacate a sentence that's appealed by the defendant and may not modify or vacate the entire multiple offense sentence based upon an appealed error in the sentence of a single offense.' (Citing **State v. Saxon**, 109 Ohio St.3d 176, 2006-Ohio-1245).

Like **Johnson**, Appellant appealed only the consecutive nature of his sentence. However, unlike the Twelfth District, this Court found the Trial Court did not exceed its authority

by changing Appellant's individual sentences when all that was appealed by Appellant was the consecutive portion of his sentence.

Finally, this Court's decision regarding Appellant's Assignment of Error regarding whether the Trial Court on remand may use the "sentencing-package doctrine" stands in conflict with at least one other district. This court declined to address this Assignment of Error, but did note that the Trial Court specifically chose these sentences so that Appellant would be eligible for judicial release. Such reasoning is strong support that the Trial Court used the "sentencing-package doctrine" when resentencing Appellant.

The Second District Court of Appeals in *State v. Bradley* (Feb. 11, 2008), Champaign Co. App. No. 06CA31, slip copy, 2008-Ohio-720, found that a Trial Court may not use the "sentencing-package doctrine" to increase a Defendant's individual sentences to achieve a greater aggregate sentence. In *Bradley*, the Defendant was originally sentenced to twenty-seven and one-half years incarceration for fourteen felonies. The Second District reversed and remanded the decision leaving only four convictions for resentencing. The Trial Court subsequently increased the original sentences that were imposed based solely on the fact that at the resentencing the Appellant was subject to far fewer convictions. *Bradley* appealed the resentencing and the Second District Court of Appeals found:

The Trial Court erred when it imposed harsher sentences in order to serve the purposes and principles of sentencing with respect to the aggregate of the four separate offenses the court imposed, because in doing so the court applied the sentence package doctrine, which Ohio courts may not employ.

While the reasoning for the original remand in *Bradley* differs from the case at bar the use of the "sentence package doctrine" is nevertheless a conflict.

The Appellant respectfully submits that Article IV, Section 3(B)(4) of the Constitution of the State of Ohio requires an appellate court to certify the record of the case to the Supreme Court of Ohio if the decision in that case is in conflict with the judgment of another court of appeals on the same question. In the case at bar, the two issues discussed above clearly present conflicts between the decision in the case at bar and at least decisions by three other appellate districts.

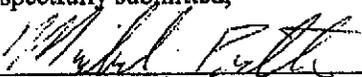
While the Appellant recognizes that this Court has discretion to interpret Ohio statutory law and case law, the Appellant respectfully submits that when a conflict of authority exists, it is then incumbent upon this Court, as an obligation pursuant to the Ohio Constitution, to certify the conflict to the Supreme Court of Ohio. Neither law nor logic permit conflicting applications of the same rule to exist within the State of Ohio and one of the primary functions of the Supreme Court of Ohio is to resolve any such conflicts.

In consideration thereof, the Appellants respectfully request that the following questions of law be certified: (1) Whether a trial court exceeds its authority by changing a defendant's individual sentences on a Foster remand when defendant only appeals the consecutive portions of his sentence; and (2) Whether a trial court on remand may use the "sentencing-package doctrine" to increase a defendant's individual sentences, where the record revealed that the only portion of his original sentence appealed by the defendant concerned the imposition of consecutive sentences.

CONCLUSION

In light of the foregoing, the Appellant respectfully submits that his Motion must be granted.

Respectfully submitted,



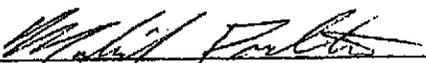
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CERTIFICATE OF SERVICE

A copy of the foregoing, **Motion to Certify Conflict**, has been served via regular
U.S. Mail, postage pre-paid this 8th day of October, 2008, upon:

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