

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,

Plaintiff,

vs.

MICHAEL GUNNER,

Defendant.

ON APPEAL FROM THE MEDINA  
COUNTY COURT OF APPEALS,  
NINTH JUDICIAL DISTRICT

SUPREME COURT OF OHIO  
CASE NO. 2008-2202

COURT OF APPEALS CASE  
NO. 07CA0074-M

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STATE'S MEMORANDUM OPPOSING JURISDICTION

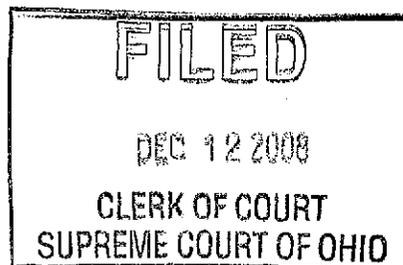
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### **Explanation of Why Leave To Appeal Should Be Denied**

The case at bar does not involve any substantial constitutional question nor is it an appeal from a capital sentence. There is no issue here of public or great general importance. The Supreme Court should decline to accept jurisdiction because the instant case was completely and properly adjudicated in the Ninth District Court of Appeals and in the Medina County Court of Common Pleas. There is nothing in the instant appeal that is of such statewide importance to be worthy of the Supreme Court's attention.

### **Statement of the Case and of the Facts**

On May 19, 2005, Appellant, Michael J. Gunner, was indicted by the Medina County grand jury on seven counts each of sexual battery in violation of R.C. 2907.03(A)(5) and unlawful sexual conduct with a minor in violation of R.C. 2907.04(A)(B)(3). Both offenses are felonies of the third degree. On November 8, 2005, Mr. Gunner plead guilty to the seven counts of sexual battery in exchange for dismissal of the seven counts of unlawful sexual conduct with a minor. Gunner was sentenced to two years in prison each on counts I, III and V. Gunner was further sentenced to one year each on counts VII, IX, XI and XIII. All terms were to be served consecutively amounting to ten years in prison. Mr. Gunner was found to be a sexual predator for registration purposes.

On appeal, this Court affirmed the convictions and the sexual predator findings, but remanded for resentencing pursuant to State v.

Foster (2006), 109 Ohio St.3d 1. State v. Gunner (9<sup>th</sup> Dist.), No. 05CA0111-M, 2006 Ohio 5808, \*P23. On remand, Appellant Gunner was sentenced to concurrent five-year terms in prison for each of Counts I, III, V and VII. The trial court also sentence Gunner to concurrent five-year terms for counts IX, XI and XIII to run consecutive to the sentence for I, III, V and VII for a total of ten years in prison.

On December 5, 2007, the appeal was dismissed for Gunner's failure to file a brief. The appeal was reopened pursuant to App.R. 26(B) on March 12, 2008. This appeal follows.

The victim in this case is "CG", Gunner's step-daughter who was fourteen years old on the date of the most recent offense, April 27, 2005. Gunner himself was forty-one years old at the time. CG's mother married Michael Gunner when the victim was seven years old. At some time between then and when the victim was twelve years old, Mr. Gunner began to condition CG for sexual abuse. When she was twelve or thirteen, Mr. Gunner began to give her massages. He would keep her in the house when the other children were not present for this purpose and told the mother that he and CG were spending "quality time" together. During these message sessions, CG was always naked and Mr. Gunner was often so. These activities occurred every Wednesday and every other weekend and often happened at Gunner's previous house which had not yet been sold.

Prior to October 2004, Mr. Gunner's activities with CG included

digital and lingual contact with her vaginal area. After October 2004, Gunner also used a vibrator. This happened every second weekend from Oct. 2004 through February 2005. During that time, Appellant Gunner also exposed CG to pornographic movies. While watching he indicated sexual activities on screen he wanted to try. One day when she came home from school CG found her bed wrapped in Saran Wrap with Gunner stating he wanted to use honey on her. CG refused to acquiesce. Once CG relented to Mr. Gunner's request for oral sex and sometimes she masturbated him. Mr. Gunner admitted to having anal sex with CG twice. The last incident occurred on April 27, 2005 when Gunner performed oral sex on CG, but stopped when other children came home.

When CG resisted Mr. Gunner's efforts to molest her, he retaliated by sulking for hours, yelling at the other children and by trying to make CG feel responsible for any legal repercussions of his behavior. Generally, he made it intolerable to be around him. Sometimes, Gunner manipulated CG by telling her he would cut himself if she did not cooperate. He also tried to bargain with CG, presumably for sexual favors, whenever she wanted something normal such as permission to go somewhere.

As a result of being molested, CG feels damaged, is unable to trust anyone, has changed her religious beliefs, is generally uncomfortable and suffers from migraines and mental problems. She feels that people now view her differently. As a result of this offense, CG's family has been

rendered homeless and suffered other financial hardships, presumably because of the loss of Gunner's income. For his own part, Mr. Gunner is apparently availing himself of counseling services, something he did not bother to do until he got caught. During the presentence investigation, Gunner made the ridiculous claim that he thought he was in love with the victim despite the fact that he is twenty-seven years her senior, was married to her mother and the fact that CG was in junior high school during most of his criminal conduct. Mr. Gunner displayed or effected to display remorse, but not until after he was arrested.

The trial court found that the age difference between Gunner and the victim as well as the fact that Gunner was forty-one made weighed in favor of a sexual predator finding. Also, that the offenses occurred repeatedly and the psychological manipulation used by Mr. Gunner also weighed in favor of a predator finding. Consequently, Gunner was found to be a sexual predator.

At resentencing on December 29, 2006, the trial court made it clear that it would in no way penalize Gunner for exercising his right to appeal. The court then continued the hearing until it had a chance to review Gunner's prison file to see if it supported the State's prior claim that Gunner uses psychological manipulation to acquire victims. Defense counsel agree with the court's desire to obtain additional information. At the continued hearing on February 9, 2007, the trial court again summarized the basic facts of the case. The trial court

reviewed new information about Appellant Gunner from his prison record. The trial court did not believe there was enough new information for a lenient sentence considering the severity of the offenses.

At sentencing, the trial court asked the assistant prosecutor if he was aware that Mr. Gunner had been grooming a new victim for sexual abuse. The asst. prosecutor answered, "Probably this springtime." The trial court then noted that it was not sure if that information was relevant to the case *sub judice*. No other mention of other possible victims is made in during the sentencing. Of course even if Gunner was in jail during "this springtime," it would not preclude his skillful psychological manipulation by letter, telephone or in person visits to the jail.

The trial court made sure that Gunner was sentenced to no more than ten years because the trial court wanted to make sure the possibility of judicial release pursuant to R.C. 2929.20 existed. Defense counsel did not object to the sentence at the resentencing on either state law or constitutional grounds.

**Appellee's first proposition of law: Failure to raise the issue of an alleged *ex post facto* violation precludes it from being raised in the Supreme Court.**

By failing to assign as error alleged *ex post facto* violations, Appellant has forfeited those issues. This Court has consistently held that an appellate court need not consider an error which 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. Payne, 114 Ohio St. 3d 502, 506, 2007 Ohio 4642, P.21; State v. Williams (1977), 51 Ohio St. 2d 112, 117.

Even if this Supreme Court finds that the issue is not precluded, numerous Ohio Courts of Appeals have ruled that applying this Court's ruling in State v. Foster (2006), 109 Ohio St. 3d 1, 30; *cert. denied* 127 S. Ct. 442 does not violate the *Ex Post Facto* Clause. State v. Hilbreth (9<sup>th</sup> Dist.), 2006 Ohio 5058, P10, followed by State v. Steward (4<sup>th</sup> Dist.), 2007 Ohio 5523, P19, State v. Smith (2<sup>nd</sup> Dist.), 2006 Ohio 4405,\*P 33.

**Appellee's second proposition of law: The trial court commits no error at sentencing when following a rule established by the Supreme Court of Ohio and ordered by the Court of Appeals.**

**A. Issue preclusion.**

Appellant Gunner does not claim to have objected to his sentence at trial. A review of the record demonstrates that there was no objection to the sentence on the basis of the Sixth amendment or any other basis. State v. Payne, 114 Ohio St. 3d 502, 506, 2007 Ohio 4642, P.21. Further, assuming *arguendo* the sentence was erroneous, it was not plain error. *Payne* at 507, P.25.

**B. Appellant was properly sentenced.**

The remedy for a *Foster* violation is to vacate the original sentence and to resentence the defendant. *Foster*, 109 Ohio St. 3d at 31, 2006 Ohio 856, P.103. The order of the Court of Appeals on direct appeal was as follows.

Appellant's first assignment of error is overruled. Appellant's second assignment of error is sustained. Appellant's adjudication as a sexual predator in the Medina County Court of Common Pleas is affirmed, and Appellant's sentence is reversed. This cause is remanded for further proceedings consistent with this decision.

*Gunner*, 2006 Ohio 5808, P.29. The Court of Appeals reversed the judgment of the trial court on the matter of sentencing. The sentence of the trial court was rendered a nullity and an entirely new sentencing procedure was necessitated. *Foster*, 109 Ohio St. 3d at 31. The remedy for a *Foster* violation is a complete resentencing. See e.g., State v. Latham (2<sup>nd</sup> Dist.), 2007 Ohio 2599, P.1. A void sentence necessitates a complete resentencing. State v. Holmes (9<sup>th</sup> Dist.), 2008 Ohio 1321, P.10.

Further, the Court of Appeals ordered a completely new sentence in response to Mr. Gunner's second assignment of error on direct appeal. *Gunner*, 2006 Ohio 5808, P.27. Having prevailed on that assignment of error, the defense cannot now claim that the Court of Appeals exceeded its authority in ordering what the defense requested. The trial court in no way exceeded the mandate of the reviewing court.

State v. Lilly (2<sup>nd</sup> Dist. 2000), 139 Ohio App. 3d 560, 563, for

example, is not relevant to Gunner's assignment of error. In that case, a conviction was vacated by the Court of Appeals and then reinstated by the Supreme Court of Ohio. On remand, the trial court altered the sentence. The Court of Appeals held that when a conviction is reinstated by the Supreme Court, the trial court on remand may not alter that reinstated judgment. Of course in the appeal *sub judice*, the Court of Appeals specifically vacated the sentence.

State v. Goodell (6<sup>th</sup> Dist.), 2006 Ohio 3386, cited by the defense, involves a case where a fraction of a sentence was vacated. In that case consecutive sentences were assigned as error, but not the specific sentences themselves. Consequently, the Court of Appeals declined to address the issue of the specific sentences. With respect, this seems contrary to the ruling in *Foster* which requires that the whole sentence be vacated for any *Foster* violation. Likewise, other cases cited by the defense do not speak to the issue *sub judice*.

There is no "sentencing package doctrine" in Ohio. State v. Evans (2007), 113 Ohio St. 3d 100, 102, 103, 2007 Ohio 861, P.11; State v. Saxon (2006), 109 Ohio St. 3d 176, 179, 2006 Ohio 1245, P.7. Under the sentencing package doctrine in jurisdictions that use it, if some counts in a conviction are reversed on appeal, the trial court may augment the sentences for the remaining counts in order to effect the original sentence. *Evans* does not prohibit Gunner's sentence because *Evans* pertained to specific offenses and not merely whether they were

consecutive or not.

In the instant appeal on the other hand, Gunner's conviction was affirmed but the sentence only was vacated. Gunner's direct appeal was decided on November 6, 2006 while *Saxon* was decided on June 20, 2006. As with *Foster*, the law concerning aggregate sentences changed while the appeal was pending. *Foster*, 109 Ohio St. 3d at 31.

On remand, the trial court was no longer constrained in its discretion. In particular there is no longer any presumption against maximum sentences. The court was, therefore, free to impose maximum sentences when it was not free to do so prior to *Foster*. Likewise, the court was not required to be sure that the aggregate prison terms were the same as or less than the previous sentence. Besides, the trial court gave the same aggregate sentence as it had previously because it wanted to make sure Gunner was able to apply for judicial release pursuant to R.C. 2929.20. (2/9/07, T.16) Appellant can hardly complain about that. A sentence in excess of ten years would preclude judicial release. The mere fact that the trial court asked what the vacated sentence had been does not demonstrate any improper purpose. It may simply be that the trial court wished to avoid a disproportionate sentence.

For these reasons, the trial court was justified in increasing the sentence on each count.

**Appellee's third proposition of law: Defense counsel at trial is not ineffective for declining to object when there is no error.**

Counsel had no basis for objection. The trial court had resentenced Mr. Gunner based on the remand order from this Court of Appeals and on the ruling in *Foster*. As explained in response for Mr. Gunner's assignments of error concerning sentencing, *Foster* left the trial court free to increase the sentence on individual counts and to impose maximum sentences. There was no reasonable basis for an objection. Appellee's Statement of Facts illustrates the egregious nature of Mr. Gunner's offenses and is more than a sufficient basis for the sentence imposed.

The suggestion that the trial court was biased because it asked counsel for the State what the remand order required is speculative and baseless. The defense cites no authority to support its view that merely asking the assistant prosecutor for an opinion is bias. This Court of Appeals vacated the original sentence pursuant to *Foster*. Consequently, as previously explained, the trial court was not bound by the previous, unconstitutional sentence it imposed.

**Appellee's fourth proposition of law: The trial court does not abuse its discretion when imposing maximum sentences for an egregious crime.**

*Foster* has essentially overturned the Supreme Court of Ohio's earlier ruling in State v. Comer (2003), 99 Ohio St. 3d 463. See e.g.,

State v. Coleman (6<sup>th</sup> Dist.), 2007 Ohio 448, \*P6; State v. Balwanz (7<sup>th</sup> Dist.), 2006 Ohio 4616, \*P3. Instead, the remaining parts of R.C. 2929.14 give the trial court broad discretion in imposing sentence within the sentencing range authorized by the statute and by the verdict or plea. This puts Ohio on footing similar to other states that have legislatively enacted sentencing statutes that give the trial court discretion in choosing a sentence from within a statutory range. *See e.g., Cunningham v. California* (1/22/07), \_\_ U.S. \_\_, 127 S. Ct. 856, \*45, n.17. As in United States v. Booker (2005), 543 U.S. 220, the requirements for judicial findings in R.C. 2929.14 are now merely advisory in nature. *Cunningham* at \*41.

As noted in the facts, Appellant imposed himself sexually on a young girl under his care. He used psychological manipulation and his position as a parental figure in order to gratify himself repeatedly at the expense of the well being of the victim. The trial court did not abuse its discretion in imposing a severe sentence.

### **Conclusion**

For all these reasons, Appellant's Memorandum in Support of Jurisdiction should be denied. The instant matter has been thoroughly adjudicated by the Court of Appeals and there is nothing of such statewide importance to warrant the attention of the Supreme Court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing objection was sent by ordinary U.S. mail, postage prepaid, on this ~~10<sup>th</sup>~~<sup>11<sup>th</sup></sup> day of December, 2008 to Michael A. Partlow, Morganstern, MacAdams, & DeVito, Co., 623 W. St. Clair Ave., Cleveland, Ohio 44113.

