

IN THE SUPREME COURT OF OHIO  
COLUMBUS, OHIO

STATE OF OHIO

Appellee-Plaintiff

-vs-

MICHAEL J. GUNNER

Appellant-Defendant

OHIO SUPREME COURT CASE  
CASE NO: 08-2202

ON APPEAL FROM THE  
NINTH JUDICIAL DISTRICT  
APPEALS CASE NO: 07CA0074-M

MEDINA COUNTY COMMON PLEAS  
CASE NO: 05CR0235

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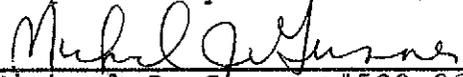
MOTION TO RECONSIDER DECISION  
DENYING JURISDICTION IN OHIO SUPREME COURT CASE NO: 08-2202

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Michael J. Gunner, Appellant pro se, pursuant to SCT R XI, moves this Court to reconsider its decision to deny jurisdiction in Ohio Supreme Court case no. 08-2202.

Gunner states that to deny jurisdiction is to deny his Constitutionally protected rights to Due Process and Equal Protection of the Law. Additionally, denying jurisdiction also denies Gunner the benefit of the well settled legal principle of stare decisis; as Gunner's argument is supported by numerous Ohio Supreme Court precedents. All of which is more fully set forth in the attached Memorandum in Support.

Respectfully Submitted,

  
Michael J. Gunner #500-064  
Appellant, pro se  
Grafton Correctional Inst.  
2500 S. Avon-Belden Rd.  
Grafton, Ohio 44044

Dean Holman  
Medina County Prosecutor  
72 Public Square  
Medina, Ohio 44256

COUNSEL FOR APPELLEE

FILED

APR 02 2009

CLERK OF COURT  
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT

Gunner respectfully submits that this Court reconsider its decision to deny jurisdiction in Ohio Supreme Court case number 08-2202. Gunner states that should this Court hold to its decision, it is in effect "rubber stamping" the Ninth District Court of Appeals, in Gunner's case, violating Ohio Law, Ohio Sentencing and Appellate Review Statutes, his constitutionally protected rights to Due Process and Equal Protection of the Law, as well as the long standing legal principle of stare decisis. Gunner further states that this Court is in error for not following its previous holdings in **Saxon, Evans, Webb, Moore, Stevens, Payne, and Simpkins**. All of these holdings came after **Foster** and apply directly to Gunner's Proposition of Law II.

This Court has consistently held that it follows the doctrine of stare decisis and will only abandon a previous holding after the Court finds special justification to do so. So strong is the principle of stare decisis that this Court in **Westfield Ins. Co. v. Galatis**, 100 Ohio St.3d 216, 797 N.E.2d 1256 (2003), developed a test to determine when a prior decision of the Ohio Supreme Court may be overruled. This Court held:

"Thus in Ohio, a prior decision of the Ohio Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would create an undue hardship for those who have relied upon it."

Denying Gunner the opportunity to argue the merits of his Proposition of Law II arbitrarily determines that "special justification" is present to warrant a reversal of precedent. In his appeal, Gunner specifically challenged the ability of both the

appellate court and the court of common pleas to modify a sentence not appealed. Gunner used this Court's holdings in *Saxon*, *Payne*, and *Simpkins*. To deny Gunner jurisdiction is to deny Gunner Due Process and Equal protection of the Law.

#### PROPOSITION OF LAW II

**A trial court commits plain error when it increases a defendant's stated prison terms on remand, where the only issue previously appealed by the defendant concerns whether the sentences initially imposed should run consecutively or concurrently.**

In order for the Ninth District Court of Appeals to affirm the trial court's modification of Gunner's individual sentences, as appealed in *Gunner II*, the Ninth had to rely on its ruling in *Gunner I*. As stated earlier, Gunner, in his first appeal, only challenged his consecutive sentences. Therefore, pursuant to Ohio Sentencing Statutes, that is all the Ninth had the authority to vacate and remand.

Gunner specifically did not challenge his two year "voidable" sentence for Counts I, III, and V, thereby waiving appellate review of those sentences. Gunner received one year sentences for Counts VII, IX, XI, and XIII. Since the trial court imposed the statutory minimum sentences on these counts, the sentences were constitutional and could not be disturbed on appeal.

In fact, the Ninth District specifically held:

**"In the instant case, ... During the sentencing hearing, appellant timely raised and preserved his constitutional challenge to the consecutive sentences based upon *Blakely*. Based upon the holding in *Foster and Dudukovich*, we find the imposition of consecutive sentences in accordance with R.C. 2929.14(E)(4), in this case, was unconstitutional and appellant properly preserved the error for appeal. Accordingly, we remand the case to trial court for a new sentencing hearing, consistent with this decision." State v Gunner, 2006-Ohio-5808.**

No where in the original remand did the Ninth District mention it had vacated Gunner's entire sentence or his individual prison

sentences. However, in Gunner II, the Ninth District expanded their original mandate and held that it had vacated Gunner's entire sentence. This holding is contrary to Ohio law, ignores Ohio sentencing statutes, abrogates the doctrine of res judicata, and violated Gunner's constitutional right to Due Process of Law.

By refusing jurisdiction, this Court is allowing the Ninth District and the Medina County Court of Common Pleas, to not only violate Ohio law and Gunner's constitutional rights, but to also ignore the rules of law set forth by this Court. Because no judge has the authority to disregard the law, Gunner's constitutional rights are severely prejudiced by a judge or judges that do.

In **State v. Saxon**, 109 Ohio St.3d 176, 2066-Ohio-1245, this Court held:

"The sentencing-package doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant, and appellate courts may not utilize the doctrine when reviewing a sentence or sentences."

"An appellate court may modify, remand, or vacate only a sentence for an offense that is appealed by the defendant and may not modify, remand, or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense."

"This court's interpretation is not only in accord with the legal principles of res judicata and finality of judgements, but it is faithful to the language of the \*182 statute and the General Assembly's intent in promulgating a comprehensive sentencing scheme. The legislature crafted the sentencing statutes in a manner **that mandate individual consideration of each offense individually on appeal.** R.C. 2929.11 through 2929.19; R.C. 2953.08; Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶23-24, 35-36, 38." (emphasis added).

A rule of law that has been upheld by this Court in subsequent decisions in; **State v. Evans**, 113 Ohio St 3d. 100, 2007-Ohio-861, 863 N.E.2d 113; **State v. Webb**, 113 Ohio St.3d 254, 864 N.E.2d 629, Ohio 2007; **State v. Moore**, 113 Ohio St.3d 254, 864 N.E.2d 629 Ohio 2007; **State v. Stevens**, 109 Ohio St.3d 1210, 847 N.E.2d 1220 Ohio

2006. Gunner is denied Equal Protection Under the Law when one rule of law is applied to him and a different rule of law is applied to Saxon, Evans, Webb, Stevens, and Moore. Since no state can deny any person equal protection of the law; How can an appellate court?

Further violation, of Gunner's Equal protection under the law, is shown by the fact that when other appellate court's were faced with the same question of law. Namely; Can an appellate court modify, remand, or vacate a sentence not appealed? They all followed the doctrine of stare decisis and applied the rule of law set forth by this Court in **Saxon**. See:

**State v. Goodell**, 2006-Ohio-3428, (Ohio App.6 Dist.); **State v. Dach**, 2006-Ohio-4328, (Ohio App.11 Dist.); **State v. Johnson**, 2006-Ohio-1896, (Ohio App.12 Dist.); **State v. Harrington**, 2006-Ohio-1874, (Ohio App.11 Dist.); **State v. Zieffle**, 2006-Ohio-2007, (Ohio App.11 Dist.); **State v. Kirkland**, 2006-Ohio-2006, (Ohio App.11 Dist.); **State v. Boyd**, 2008-Ohio-1229, (Ohio App.6 Dist.); **State v. King**, 2007-Ohio-5404, (Ohio App.10 Dist.); **State v. Stoneburner**, 2007-Ohio-4775, (Ohio App.11 Dist.); **State v. McKinley**, 2007-Ohio-3512, (Ohio App.5 Dist.); **State v. Stillwell**, 2007-Ohio-3190, (Ohio App.11 Dist.); **State v. Hefferman**, 2006-Ohio-5659, (Ohio App.12 Dist.); **State v. Dubois**, 2006-Ohio-3025, (Ohio App.8 Dist.); **State v. Carpenter**, 2006-Ohio-3048, (Ohio App.6 Dist.); **State v. Flynn**, 2006-Ohio-2798, (Ohio App.12 Dist.); **State v. Williams**, 2006-Ohio-2008, (Ohio App.11 Dist.); **State v. Jordan**, 2006-Ohio-5208, (Ohio App.10 Dist.); **State v. Pruitt**, 2006-Ohio-4106, (Ohio App.8 Dist.); **State v. Perrin**, 2006-Ohio-3801, (Ohio App.6 Dist.); **State v. Bradley**, 2006-Ohio-3360, (Ohio App.8 Dist.); **State v. Marino**, 2006-Ohio-3223, (Ohio App.11 Dist.); **State v. Barringer**, 2006-Ohio-2649, (Ohio App.11 Dist.); **State v. Bentley**, 2006-Ohio-2503, (Ohio App.11 Dist.); **State v. McDonald**, 2006-Ohio-2495, (Ohio App.11 Dist.); **State v. Kincer**, 2006-Ohio-2249, (Ohio App.12 Dist.); **State v. Fichock**, 2006-Ohio-2242, (Ohio App.11 Dist.); **State v. Santoriella**, 2006-Ohio-2010, (Ohio App.11 Dist.); **State v. Keifer**, 2006-Ohio 2009, (Ohio App.11 Dist.); **State v. Ward**, 2006-Ohio-1662, (Ohio App.12 Dist.); and **State v. Hairston**, 2007-Ohio-5928, (Ohio App.10 Dist.).

Gunner firmly believes that the violations of his constitutional rights as outlined in this motion are sufficient cause for this Court to grant his reconsideration. However, what is equally important is the fact that this country is founded on

the rule of law and in Ohio, when the Ohio Supreme Court lays down the rule of law, such law is binding on the Court of Appeals. Also, a court of appeals is bound by the Ohio Supreme Court's most recent decision, regardless of its previous decision. Shouldn't this well settled legal principle apply to the Ninth District Court of Appeals and the Medina County Court of Common Pleas as well?

In Gunner's case the Ninth is relying solely on this Court's decision in **Foster** and ignoring the more recent Supreme Court decisions in **Saxon, Evans, Moore, Stephens,** and **Webb**, which all held that an appellate court is without authority to modify, vacate or remand a sentence not appealed. The decision in **State v. Payne**, 114 Ohio St.3d 502, 873 N.E.2d 306, which held that pre-Foster sentences imposed after judicial fact finding and falling within the statutory range are voidable; and **State v. Simpkins**, 2008 WL 751750 (Ohio), 2008-Ohio-1197, in which this Court reaffirmed its holding in **Payne** and further held that res judicata applies to a voidable sentence.

In sum allowing the Ninth District Court of Appeals to ignore the precedents set by this Court, undermines the authority of this Court and deteriorates the rules of law which govern this state. The Ninth District Court of Appeals cannot be allowed to undermine the Ohio Supreme Court by ruling contrary to Ohio law, constitutional law, and the well settled legal principles of res judicata, stare decisis, and the law of the case doctrine. Because to do so, opens the door for other appellate courts to follow and if that happens the ramifications to defendants all over Ohio would be dyer.

Additionally, in his appeal to the Ninth District, Gunner specifically asked the question, "Did the trial court commit plain error by illegally employing the 'sentencing package doctrine' which was rejected by the Ohio Supreme Court in **Saxon**?" (Gunner II appellate brief p. 15-19). The Ninth District refused to answer the question. Gunner is denied Due Process and Equal Protection of the Law when a court of appeals fails to litigate all questions of law placed before it. For this reason, it is incumbent on this Court to protect Gunner's constitutional rights and fully litigate the forgoing question of law.

In Gunner's case, both the State and the Ninth District acknowledge that the trial court imposed the maximum five year sentence on each count so that Gunner would be eligible for judicial release after five years. (Gunner II at ¶21). While the court of appeals may feel that the trial court did not act unreasonable in sentencing Gunner this way. ~~It does not~~ change the fact that the court, in violation of Ohio Law, used the "sentencing package doctrine" to do so.

This Court in **Saxon** clearly, unequivocally, and repeatedly instructed trial and appellate courts to view criminal sentences on a count-by-count basis. The appellate court violated Ohio Law when it used the "sentencing package doctrine" to vacate Gunner's entire sentence. The trial court also violated Ohio Law when it arbitrarily changed Gunner's one and two years sentences on each count to the maximum of five years specifically to allow Gunner to be eligible for judicial release in five years. Gunner is entitled to be sentenced under Ohio Law and in accordance with Ohio Sentencing Statutes. When this does not happen Gunner is denied his

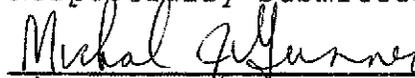
right to Due Process and Equal Protection of the Law protected by both the United States and Ohio Constitutions.

Equally important is the fact that other state courts that reject the "Sentencing Package Doctrine" also look at constitutional violations on a count-by count basis. In Georgia, a state which rejects the "sentencing package doctrine", the court of appeals held that, "a due process violation under **North Carolina v. Pearce**, (1931), 282 U.S. 304, occurs when a trial court increases a sentence on remand for one count even though the aggregate sentence as a whole was reduced on remand." See also, **New Hampshire v. Abram**, (2008), 941 A.2d 576, 581-2 (rejecting sentencing package doctrine and holding that **Pearce** applied to individual counts increased on remand even though the aggregate sentence stayed the same). Further, in Nevada, a state that also rejects the sentence package doctrine. Held that, "double jeopardy protections hold when a appellate court vacates a portion of a sentence as unlawful, the court may not on remand increase the lawful sentence, in other words double jeopardy protections apply to resentencing mandated on appeal." **Wilson v. Nevada**, (2007), 170 P.3d 975, Nevada Supreme Court.

When the trial court made the decision to modify Gunner's sentence outside what was allowable under Ohio Law it violated his Constitutional rights. If the trial court wanted to avoid this violation it should have required Gunner to waive his **Saxon** rights. This Court cannot allow the trial court to use the "sentencing package doctrine" to illegally modify Gunner's sentence. Further, this Court cannot allow the appellate court to vacate Gunner's entire sentence using the "sentencing package doctrine" when all that properly appealed was his consecutive sentences.

For the forgoing reasons, Gunner prays this Court will reverse its decision to deny jurisdiction and grant him the opportunity to brief his case on the merits. Because to do so, is consistent with previous holdings by this Court, complies with Ohio law, holds to the well settled legal principles of stare decisis and res judicata. Finally, a decision to allow Gunner to brief the merits of his case upholds his constitutional rights to Due Process and Equal Protection of the Law which are protected by both the United States and Ohio Constitutions.

Respectfully Submitted,



Michael J. Gunner #500-064  
Appellant, pro se  
Grafton Correctional Inst.  
2500 S. Avon-Belden Rd.  
Grafton, Ohio 44044

**CERTIFICATE OF SERVICE**

I, Michael J. Gunner, do hereby certify that a true copy of the forgoing motion to reconsider decision denying jurisdiction in Ohio Supreme Court case no. 08-2202, was sent via regular mail to the Medina County Prosecutor's office at 72 Public Square, Medina, Ohio 44256 on this the 30 day of March, 2009.

  
Michael J. Gunner