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BRIEF

Appellant State of Ohio respectfully submits its Reply Brief pursuant to S. Ct. Prac. R. 6.4 to the Merit Brief of Appellee Joseph Wilson.

Wilson's position is contrary to this Honorable Court's established precedent in *State v. Whitfield* (2010), 124 Ohio St. 3d 319, 201-Ohio-2, *State v. Saxon* (2006), 109 Ohio St.3d 176, 2006-Ohio-1245, *State v. Hairston* (2008), 118 Ohio St.3d 289, 2008-Ohio-2338 and *State v. Fischer* Slip Opinion No. 2010-Ohio-6238.

Adoption of Wilson's proposition is contrary to *Saxton* in which this Court rejected the sentencing package doctrine; that an error in one sentence permeates each other individual sentence requiring resentencing on all counts. Wilson would also expand *Whitfield* to permit a *de novo* sentencing hearing to include litigation of unrelated sentencing issues raised for the first time on direct appeal. Upon resentencing on matters unrelated to allied offenses, an appeal may be treated as an entirely new direct appeal from the conviction, contrary to *Fischer*. The result is resentencing on counts that have a valid sentence and a lack of finality in judgments.

Wilson's proposition is not only contrary to established precedent, it is unnecessary. The Eighth District Court of Appeals should have resolved the sentence proportionality and judicial bias claims presented, and limited remand pursuant to *Whitfield* for the proper, narrow remedy authorized by this Court.

I. Sentence Proportionality

Wilson incorrectly argues that the State asserts that Wilson raised the issue of sentence proportionality only now and for the first time before this Court. Wilson raised sentence proportionality for the first time on appeal to the Eighth District. Unlike *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510, Wilson argued proportionality

to the Eighth District. As such, the Eighth District should have addressed sentence proportionality pursuant to *Saxon* and *Hairston*. Instead, the Eighth District expanded *Whitfield* to provide Wilson an opportunity to raise issues he could have, but failed to, raise in the trial court. The Eighth District's expansion of *Whitfield* is contrary to this Court's narrow remedy provided in *Whitfield*, and established precedent in *Saxon* and *Hairston*.

Wilson argues that he did not raise sentence proportionality to the trial court, because only three of his five co-defendants were convicted before his sentencing. These co-defendants testified at Wilson's trial, and the trial court had the opportunity to evaluate Wilson's criminal conduct and other factors with that of his co-defendants. As such, Wilson had the opportunity to raise this issue to the trial court, but failed to do so. The Eighth District's failure to resolve the issue of proportionality is contrary to *Saxon*, as it permits resentencing on counts that have a valid sentence, under the guise of *Whitfield*.

II. Judicial Bias

Wilson argues that the statements upon which he bases his claim of bias did not become evident until sentencing. As such, Wilson was aware of this claim and had the opportunity to raise it at sentencing, but failed to do so. Wilson points out that the Eighth District did not pass on whether the trial court judge was biased. The Eighth District had the record before it, and should have resolved this issue.

Wilson argues that the trial court ultimately recused himself from a co-defendant's trial, attaching a copy of the affidavit of disqualification in support. This is an improper argument and should not be considered. Wilson had already been convicted; therefore, the material submitted by Wilson is not part of this record.

CONCLUSION

The Eighth District's unauthorized expansion of *Whitfield* to require *de novo* sentencing hearings at which defendants must be given a second opportunity to raise unrelated sentencing issues is contrary to this Court's established precedent, warranting summary reversal. Wilson had the opportunity to raise sentence proportionality and judicial bias at the trial court level, but failed to do so. Wilson raised these issues for the first time on direct appeal but the Eighth District failed to address the issues, instead remanding them to the trial court under the guise of *Whitfield*.

The State of Ohio respectfully requests that the Eighth District's opinion be summarily reversed, and this matter remanded to the Eighth District for resolution of sentencing proportionality and judicial bias prior to remand to the trial court for the narrow remedy provided in *Whitfield*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of foregoing Reply Brief of Appellant has been sent by regular U.S. Mail this 4TH day of February, 2011, to Terrence K. Scott, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.


Assistant Prosecuting Attorney