

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO

Plaintiff-Appellee

vs.

JOSHUA D. CURTIS

Defendant-Appellant

\* Case No.: 2010-2135  
\*  
\* On Appeal from the Twelfth District  
\* Court of Appeals for Brown County,  
\* Ohio  
\*  
\* Case No. CA2010-02-002  
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**MEMORANDUM IN OPPOSITION TO JURISDICTION  
ON BEHALF OF APPELLEE STATE OF OHIO**

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**EXPLANATION WHY THIS CASE DOES NOT PRESENT  
A SUBSTANTIAL CONSTITUTIONAL QUESTION  
AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

This case does not present a substantial constitutional question and is not of public or great general interest. Although the Appellant received a longer prison term upon resentencing after a successful appeal, there was no presumption of vindictiveness nor was there any actual vindictiveness shown toward the Appellant. The Appellant was resentenced by a different judge who assured the Appellant that animosity played no part in his sentencing decision. Further, the new sentence was supported by objective, non-vindictive reasons.

This court should deny jurisdiction in this case because the Appellant's constitutional rights were not violated and the case is not of public or great general interest.

**COMBINED STATEMENT OF THE CASE AND STATEMENT OF FACTS**

The Brown County Grand Jury indicted the Appellant on one count of robbery, in violation of R.C. 2911.02(A)(2), and one count of theft, in violation of R.C. 2913.02(A)(1). He was found guilty on both counts and sentenced to an aggregate prison term of five years.

The Appellant appealed that his convictions for robbery and theft should have been merged because they were allied offenses of similar import committed with a single animus. The State and the 12<sup>th</sup> District Court of Appeals agreed and the case was remanded for resentencing.

On remand, a new judge was on the bench of the Brown County Court of

Common Pleas. He reviewed the presentence investigation from the original trial and determined that a seven year prison sentence was appropriate. The trial court specifically looked at the Appellant's multiple convictions, many of which were for violent offenses, and determined that the likelihood of recidivism was high. The court also stated several times that it protects the Appellant's appeal rights and would not consider the successful appeal negatively when rendering its sentence.

## ARGUMENT

### PROPOSITION OF LAW

A HARSHER SENTENCE IMPOSED BY A DIFFERENT SENTENCING JUDGE AFTER A SUCCESSFUL APPEAL IS NOT PRESUMPTIVELY VINDICTIVE AND WHERE NO ACTUAL VINDICTIVENESS WAS ESTABLISHED BY THE APPELLANT, THE APPELLANT'S CONSTITUTIONAL RIGHTS ARE NOT VIOLATED.

Due process does not forbid all enhanced sentences, only those motivated by vindictiveness toward the defendant for exercising his right to appeal. *Lodi v. McMasters* (1986), 31 Ohio App.3d 275, 276-77, citing *Wasman v. U.S.* (1984), 468 U.S. 559. When a defendant, in a resentencing hearing after a remand, receives a harsher penalty from the same judge, there is a presumption of vindictiveness. *North Carolina v. Pearce* (1969), 395 U.S. 771. However, when two different sentencers are involved, there is no presumption of vindictiveness. See *Texas v. McCullough* (1986), 475 U.S. 134, 140; *Lodi v. McMasters*, 31 Ohio App.3d at 277; *State v. Chandler*, 8<sup>th</sup> App. No. 83629, 2004-Ohio-2988, ¶20; *State v. Goodell*, 6<sup>th</sup> App. No. L-07-1016, 2007-Ohio-5318, ¶18; *State v. Johnson*, 2<sup>nd</sup> App. No. 23297, 2010-Ohio-2010. And when there is no

presumption of vindictiveness, the court is not obligated to state the reasons for a harsher sentence on remand. *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, ¶65. *State v. Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334, ¶20.

The Appellant was originally sentenced by Judge Corbin. On remand, Judge Corbin had retired and Judge Gusweiler sentenced the Appellant. Because two different sentencers were involved, there is no presumption of vindictiveness.

If there is no presumption of vindictiveness, then the burden is on the defendant to affirmatively prove actual vindictiveness. *Lodi*, 31 Ohio App.3d at 277, citing *Wasman*, 468 U.S. 559. Actual vindictiveness implies an animus against a defendant on account of the defendant's appeal which reversed the defendant's prior conviction or sentence because of an error made by the sentencing judge. *Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334, ¶17. The sentencing judge's personal motivation is at issue when determining actual vindictiveness. *Id.* Further, it is not the specific sentence is at issue, "but the setting in which the second, harsher sentence is imposed." *Id.* at ¶22.

When two different sentencers are involved, the second sentencer usually imposes a sentence harsher than the first. However, it does not necessarily mean that the second sentencer is acting vindictively for achieving a remand. It is just as likely that the first sentence was too lenient. *Id.*, ¶18, citing *Colten v. Kentucky* (1972), 407 U.S. 104. Further, it does not follow that the second sentencer would have a reason to act vindictively toward the defendant. *McCullough*, 475 U.S. 134.

In *State v. Chandler*, the defendant was unable to prove actual vindictiveness when the trial court properly considered the presentence investigation and sentenced the defendant within the proper statutory framework. *State v. Chandler*, 8<sup>th</sup> App. No.

83629, 2004-Ohio-2988, ¶14. Here as well, Judge Gusweiler conducted a de novo sentencing hearing, considered the presentence investigation and sentenced the Appellant within applicable statutory range.

This case is on point with *State v. Howard*, 174 Ohio App.3d 562, 2007-Ohio-4334. There the Second District upheld a harsher sentence after remand in front of a different sentencing judge. There, as in this case, no additional information was in the record that the second judge relied on to enhance the original sentence. In both cases it appears that the second judge simply viewed the same information and determined that the original sentence was too lenient.

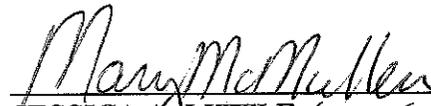
There is nothing in the record to indicate that the second judge, in this case, Judge Gusweiler, had an animus against the defendant. In fact, Judge Gusweiler specifically stated that the Appellant's "appellate right – is something that we all protect very closely" and "the Court doesn't take that – into account whatsoever." (T.p. 5-6, Resentencing Hrg.) The court reiterated to the Appellant that his "rights are being protected all the way. \* \* \* There is no offense and there's no problem. Those are your rights." (T.p. 7.)

Judge Gusweiler appeared to be aware of the issues in this case, but made the record clear that he was not acting vindictively, only that he viewed the case differently than Judge Corbin. See *State v. Johnson*, 2<sup>nd</sup> App. No. 23297, 2010-Ohio-2010 (trial court "went out of its way to assure the parties that animosity played not part in its sentencing decision").

**CONCLUSION**

The new sentence was supported by objective, non-vindictive reasons. Further, the court went out of its way to assure the Appellant that it protected his right to appeal and that animosity played no part in the sentencing decision. The State respectfully requests that this court deny jurisdiction in this case.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the State-Appellee's Brief has been served on Joshua D. Curtis, Inmate No. 596-649, Lebanon Correction Facility, P.O. Box 56, Lebanon, Ohio 45036, by regular U.S. Mail, postage prepaid, on this 22<sup>nd</sup> day of March, 2011.

  
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