

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
INTRODUCTION.....	1
STATEMENT OF AMICUS INTEREST.....	2
STATEMENT OF THE CASE AND FACTS.....	2
A. The Attorney General assisted the Preble County Prosecutor in responding to Schleiger’s petition for certiorari in the U.S. Supreme Court.....	2
B. The prosecutor and the Attorney General promised the U.S. Supreme Court that the State waived any res judicata objection, so that Schleiger could raise any issues in his appeal from his resentencing hearing.	4
C. After the Attorney General’s involvement ended, the prosecutor said that the waiver was invalid, and it urged the courts to limit the scope of issues Schleiger could raise.	5
SCHLEIGER’S FIRST PROPOSITION OF LAW DOES NOT WARRANT REVIEW.....	7
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	unnumbered

INTRODUCTION

The Attorney General files this jurisdictional amicus to clarify the facts of his earlier, limited role in this case, and to explain why the Attorney General's role is *not* at issue here. The Court should reject the attempt to drag the Attorney General into a dispute between a criminal defendant and a county prosecutor.

Defendant-Appellant Curtis Schleiger, in his first Proposition of Law, asks the Court to review the assertion that the Attorney General is "authorized to make binding promises to the United States Supreme Court on behalf of the State of Ohio." Jur. Mem. at 6. Schleiger notes that the Attorney General filed a brief in the U.S. Supreme Court on the State's behalf, waiving a *res judicata* defense and promising that Schleiger could raise any issues he wished in a then-upcoming appeal from his resentencing hearing. *Id.* at 5. But the Preble County Prosecuting Attorney later reneged on the State's waiver, after the Attorney General's involvement ended. The prosecutor successfully urged the appeals court to set aside the waiver and to limit the scope of Schleiger's second appeal to a narrow issue of correcting a ministerial error in imposing post-release control. *Id.* at 3. Schleiger says the Court should now address whether to bind the county prosecutor to the Attorney General's promise, because, he says, the Attorney General speaks for the State.

But Schleiger's first Proposition of Law turns on the false premise that the Attorney General somehow spoke differently from the prosecutor before the U.S. Supreme Court, when in fact, the Attorney General and the prosecutor *co-signed* the brief in the U.S. Supreme Court. In other words, the prosecutor made the promise of waiver, as much as the Attorney General did, so the Attorney General's role (and therefore the first Proposition of Law) is irrelevant. The only issue is whether the prosecutor should be bound by its own promise, and at this point, that fight is between Schleiger and the county prosecutor.

Because the Attorney General's role is not at issue, the Court should decline review of Schleiger's first Proposition of Law.

STATEMENT OF AMICUS INTEREST

The Attorney General, as Ohio's chief law officer, R.C. 109.02, has a substantial interest in the correct interpretation of Ohio's criminal laws and procedure. To promote that interest, the Attorney General frequently assists county prosecutors in performing their duties, such as by providing advice and resources. The Attorney General often files amici briefs in this Court and other courts, supporting prosecutors. In addition, if asked, the Attorney General sometimes co-authors briefs with prosecutors before the U.S. Supreme Court, where a prosecutor might have more limited experience. The Attorney General has a strong interest in ensuring that such joint efforts are properly understood.

In addition, and important here, the Attorney General has a deep interest in the value of his word as an officer of the court. The Attorney General needs to ensure that no one doubts the reliability of his word in this Court, the U.S. Supreme Court, or any court.

STATEMENT OF THE CASE AND FACTS

The Attorney General summarizes here only the facts relevant to his limited involvement in the case, and does not detail the underlying facts of Schleiger's conviction or Schleiger's other legal disputes with the prosecutor.

A. The Attorney General assisted the Preble County Prosecutor in responding to Schleiger's petition for certiorari in the U.S. Supreme Court.

The Attorney General's involvement in this case began and ended (until now) with assisting the Preble County Prosecutor in opposing Schleiger's attempt to have the U.S. Supreme Court hear his case. Schleiger had been convicted and sentenced in the Preble County Common Pleas Court for felonious assault and carrying a concealed weapon. *State v. Schleiger*, 2013

Ohio App. Lexis 995, 2013-Ohio-1110 (Twelfth District) (“App. Op. 2013”), ¶ 2; *State v. Schleiger*, 2010 Ohio App. Lexis 3454, 2010-Ohio-4080 (Twelfth District) (“App. Op. 2010”), ¶ 4. On appeal, his counsel filed an “*Anders* brief,” pursuant to the process established in *Anders v. California*, 386 U.S. 738 (1967), explaining that he could identify no non-frivolous issue to appeal and asking to be released from representing Schleiger. App. Op. 2010 ¶ 2. The appeals court agreed with the *Anders* brief, concluding that no issues existed to justify finding a new lawyer for Schleiger. *Id.* ¶ 6.

However, the appeals court discovered that Schleiger had been improperly sentenced to five years of post-release control, but should have been given only three years. *Id.* ¶ 4. Further, the trial court had not adequately explained to him the consequences for violating his post-release control. *Id.* Therefore, the appeals court remanded and ordered resentencing, with the hearing limited only to correcting the post-release control, pursuant to R.C. 2929.191 and *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434. App. Op. ¶¶ 5-6; *see also State v Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238.

Schleiger then unsuccessfully sought discretionary review in this Court. *See* Case No. 2010-1708. He argued that the appeals court, having identified the post-release control error, was obliged to reject the *Anders* request and to appoint new counsel to re-do his first appeal. The prosecutor argued that the case did not warrant review, and argued on the merits that the appeals court’s identification of the post-release control error did not amount to an actual “issue” needing further adversarial process. It explained that the resentencing already fixed the problem, and that the error being fixed was a ministerial one, so there was no need for another appeal to debate the point. This Court declined review.

Schleiger then filed a Petition for Certiorari in the U.S. Supreme Court, asking that Court to review the same *Anders* issue that this Court declined to review. See U.S. Supreme Court Case No. 2011-6533 (filed Sept. 20, 2011).

The prosecutor asked the Ohio Attorney General to help oppose the certiorari petition, as the Attorney General's office frequently practices before the U.S. Supreme Court.

The Attorney General agreed to assist with the brief and to file it *jointly*, with the Solicitor General appearing as Counsel of Record (because she is admitted to practice before the U.S. Supreme Court), and with the county prosecutor and an assistant prosecutor as co-counsel, all representing the State of Ohio together. The Attorney General's office and the county prosecutor collaborated on the brief. All agreed as to the brief's contents and representations. The prosecutor and assistant prosecutor appear on the brief's cover, and again in the signature block at the end of the brief. See Brief in Opposition ("BIO"), Case No. 2011-6533, available at <http://www.ohioattorneygeneral.gov/Files/About/Departments-and-Offices/Appeals/Schleiger-State-Brief-in-Opp-to-Cert-US-Supreme-Ct.aspx> (last visited July 29, 2013).

B. The prosecutor and the Attorney General promised the U.S. Supreme Court that the State waived any res judicata objection, so that Schleiger could raise any issues in his appeal from his resentencing hearing.

In opposing review in the U.S. Supreme Court, the prosecutor and the Attorney General offered several reasons why review was not needed. For example, the brief argued that errors regarding post-release control are ministerial, so the appeals court's identification of such errors did not warrant a new appeal. See BIO at 3-17. It also explained why the issue was not worthy of review, and why Schleiger's case would be a poor vehicle to address any possible issues. *Id.* at 17-23.

As an alternative, the brief also offered to allow Schleiger to expand the scope of his then-upcoming appeal from his resentencing to allow him to raise other issues. The brief did so

to moot any concerns about whether Schleiger should have had new counsel, after the *Anders* procedure, to re-do his first appeal. The idea was that the second appeal could serve the same purpose, by allowing him to expand the issues to raise anything that would otherwise be raised in a do-over of the first appeal. He would get the same benefit in effect; the Court would not have to consume resources addressing the *Anders* issue; and the State (both prosecutor and Attorney General) would not have to litigate the issue by proceeding to the merits. In sum, it was a strong reason for why the petition should be denied.

The joint brief explained that the second appeal, absent the waiver, would be legally restricted to the same scope as the resentencing hearing, namely, the ministerial task of correcting his post-release control. “[U]nder the terms of the appeals court’s remand, under R.C. 2929.191, and under *Fischer*, the resentencing, and thus the appeal, should be limited to” post-release control issues. BIO at 25. But, the brief said, enforcement of that narrow scope was based on res judicata (as any other issues were to be raised in the first appeal), and that was waivable. Thus, the Attorney General and county prosecutor said, “the State hereby waives any objection to [Schleiger’s] expanding that appeal to cover his broader sentencing objections, or even any guilt-phase issues that he seeks to raise again.” *Id.*

The U.S. Supreme Court denied Schleiger’s Petition on January 23, 2012. The Attorney General’s involvement in the case then ended, until now.

C. After the Attorney General’s involvement ended, the prosecutor said that the waiver was invalid, and it urged the courts to limit the scope of issues Schleiger could raise.

After the U.S. Supreme Court denied review, the Attorney General was no longer involved in the case, and the prosecutor resumed sole representation of the State. On the other side, the Ohio Public Defender apparently ended his representation of Schleiger, and appointed

counsel took over the case. Schleiger's resentencing hearing had already occurred on October 20, 2011, so the next step was his appeal from that resentencing.

His new counsel, unsure of the scope of the appeal, asked the appeals court, before full briefing, to clarify that scope. *See* Schleiger's Motion to Clarify Scope of Appeal (filed Apr. 18, 2012, in CA2011-11-012). The Motion and accompanying Memorandum noted the State's waiver in the U.S. Supreme Court, and also noted that the appeal would ordinarily be limited by res judicata to raising only post-release control issues. *See* Motion at 2; Mem. at 1. It specifically noted that counsel did not uncover any authority regarding a party's "ability . . . to waive res judicata and thus open up" an appeal's scope. Mem. at 1. Counsel therefore asked the court to "clarify the scope of the appeal presently pending given the State of Ohio's willingness to waive res judicata and allow the present appeal to serve as a vehicle for any issues which could have been raised in the direct appeal." Motion at 2.

The county prosecutor, in response, said that his earlier waiver was invalid. *See* Motion in Response to Appellant's Motion to Clarify Scope of Appeal (filed Apr. 30, 2012), at 3-4. The prosecutor said: "The State concedes that in the brief filed with the United States Supreme Court that it stated it would waive res judicata as to any issues [Schleiger] wished to raise from his initial trial. However, the law does not clearly provide the State with authority to waive these issues." *Id.* at 3. The prosecutor argued that res judicata was waivable only in civil cases, not in criminal cases. *Id.* at 3-4. The prosecutor concluded by again "conced[ing] that it stated it would waive" objection to broader issues, but stating again that "Appellee now believes that it actually had no right to offer any such waiver." *Id.* at 5. Thus, the prosecutor asked the court "to find that the State may not waive res judicata." *Id.*

Two facts are critical regarding the prosecutor's response, as to the issue Schleiger now seeks to raise in his first Proposition of Law. First, the Attorney General had no involvement in that briefing, and only just discovered in recent weeks that any of this happened. Second, the prosecutor acknowledged the waiver as his own, and his argument for setting it aside had nothing to do with the Attorney General's co-authorship. As the quotes above show, the prosecutor identified himself as the waiving party, e.g., "Appellee concedes that it stated it would waive." *Id.* at 5; *see also id.* at 3 ("the State concedes that . . . it stated that it would waive"). His argument against waiver involved solely the question of whether the State *could waive*, not who did the waiving on the State's behalf.

SCHLEIGER'S FIRST PROPOSITION OF LAW DOES NOT WARRANT REVIEW

Schleiger now asks this Court to review, among other issues, a Proposition asserting that the Attorney General is "authorized to make binding promises to the United States Supreme Court on behalf of the State of Ohio." *Jur. Mem.* at 6. The Court should decline to review that Proposition, as it is of no moment here.

This case raises no issue regarding the Attorney General's power to speak for the State, as the county prosecutor fully signed the U.S. Supreme Court brief promising waiver (and repeatedly has conceded that). The real issue is whether the State's promise to waive can be enforced, and that has nothing to do with who authored or co-authored that promise.

First, the prosecutor's filings leave no doubt that he accepts that he promised waiver himself. As noted above, the prosecutor said that the State "concedes that it stated it would waive" and would allow broader issues in the appeal from resentencing. The prosecutor's decision to renege on that position had nothing to do with the Attorney General's co-authorship.

Second, Schleiger's jurisdictional memorandum does nothing to explain how the Attorney General's role made a difference. He never denies that the waiver came equally from

the prosecutor's pen. Schleiger says only that the Attorney General's Solicitor, "representing the State of Ohio, informed the United States Supreme Court that the State would waive" res judicata. Jur. Mem. at 5. If Schleiger's statement is meant to imply that the Attorney General spoke alone, that is untrue, as the prosecutor co-filed the brief. In describing his Proposition, Schleiger repeatedly states that the Attorney General, through the Solicitor, may "bind the State." But he never explains how that connects to the real question here, which is whether the State's explicit waiver should be enforced.

Third, the irrelevance of Schleiger's first Proposition of Law is shown by considering how the outcome of that Proposition neither helps nor hurts Schleiger in his true quest, which is to hold the prosecutor to the prosecutor's own promise. On one hand, if this Court agrees with the Proposition, and holds that the Attorney General did bind the State, that would not help Schleiger unless he *also* persuades the Court that the prosecutor is wrong about the issue being non-waivable. On the other hand, if this Court disagreed with the Proposition, and somehow (mistakenly) denied the Attorney General's power to speak for the State, this would not hurt Schleiger. Because the prosecutor expressly waived, too, Schleiger needs only to show that the promise is indeed binding, and he could succeed on that even if he "lost" on adding the Attorney General as a co-speaker. Thus, the Proposition is irrelevant.

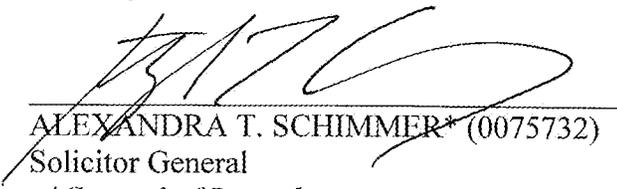
In sum, the Attorney General urges the Court to deny review of the irrelevant first Proposition of Law. It is the second Proposition that would resolve the issue of whether the prosecutor can be held to the promise of waiver. For its part, the Attorney General's office stands by the commitment to that waiver and has never suggested that the waiver is invalid.

CONCLUSION

For the reasons above, the Court should deny review of Schleiger's first Proposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

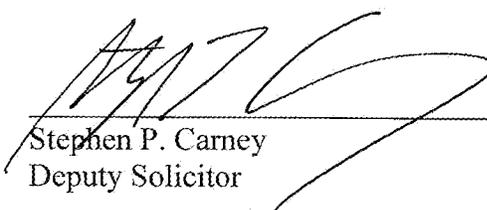
I certify that a copy of the foregoing Response of *Amicus Curiae* Ohio Attorney General Michael DeWine Regarding Jurisdictional Memorandum was served by U.S. mail this 29th day of July, 2013, upon the following counsel:

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