Supreme Court of Ohio Clerk of Court - Filed January 03, 2023 - Case No. 2021-1033

NO. 2021-1033

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR DELAWARE COUNTY
FIFTH APPELLATE DISTRICT
NO. 16 CAA12 0056

STATE OF OHIO
Plaintiff-Appellee

-vs-

SUSAN GWYNNE
Defendant-Appellant

MEMORANDUM OF CUYAHOGA COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF APPELLEE'S MOTION FOR RECONSIDERATION

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INTRODUCTION & STATEMENT OF AMICUS INTEREST

The Cuyahoga County Prosecutor's Office supports the State of Ohio's motion for reconsideration under Sup. Ct. Prac. R. 18.02(C) and joins in the State's request for reconsideration.

The proposition of law offered by Appellant and accepted for review by this Court was far from novel, did little to offer syllabus law that would guide future litigants, and from a practitioner's glance appeared to be nothing more than error correction. Indeed, Appellant's proposition of law restated the statutory language of R.C. 2953.08(G)(2):

> A trial court errs when it sentences a defendant to consecutive terms of imprisonment, when such sentence is clearly and convincingly not supported by the record.

This case was a poor vehicle to craft a rule of law for a court of appeals standard of review in reviewing consecutive sentences as Appellant did little in the adversarial process to advance the discourse as to what the standard or review should be and why. In addition, Appellant did not advance arguments that a court of appeals under R.C. 2953.08(G)(2) has the authority to review the imposition of some but not all consecutive sentences. Appellant only argued that the facts did not support consecutive sentences but did not argue why.

It was a missed opportunity for Appellant to discuss how some appellate courts have addressed and applied the standard of review in other cases and why Appellant's view should be the rule of law across the State of Ohio going forward. Certainly, however, the application of any case law from this case has far reaching implications. But in resolving this case, the majority opinion crafted a standard of review as if it were addressing an unbriefed issue since it deprived the State of Ohio from addressing the Court's concerns or responding to the standard of review

that was set forth by the Court, as opposed to the Appellant, in *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607.

As such, amicus curiae urges the Court to grant reconsideration in this case.

STATEMENT OF AMICUS INTEREST

The Cuyahoga County Prosecutor as with all elected county prosecutors are statutorily charged with prosecuting cases in the Ohio Supreme Court. Although, the Cuyahoga County Prosecutor's Office did not offer an amicus curiae brief on the merits it does so now, not to address any particular argument raised by the Appellant but to address the majority opinion and to express amicus curiae's concern given amicus curiae's own experience with inconsistent consecutive sentence analysis in the Eighth District. For instance, the Eighth District reversed consecutive-sentences in *State v. Johnson*, 8th Dist. Cuyahoga No. 102449, 2016-Ohio-1536, appeal denied at 147 Ohio St.3d 1412, 2016-Ohio-7455, where the Eighth District found that a defendant's sexual assault of a three-year-old and a five-year-old did not warrant two life sentences to run consecutively because there was nothing about the facts that resulted in harm more egregious or unusual than harms resulting in other similar offense. *Id.* at ¶58. Certainly reasonable minds could disagree as to whether the rape of a three-year-old and a five-year old is more egregious or unusual than other forms of rape. But when a decision like *Johnson* is released it becomes binding precedent. As such, there is now binding precedence in the Eighth District that the sexual assault of a three-year-old and a five-year old was not egregious or unusual. Nevertheless, there are other instances where the Eighth District affirmed the imposition of consecutive sentences where the defendant failed to demonstrate that the trial court's findings relied on demonstrably wrong facts. See *State v. Franklin*, 8th Dist. Cuyahoga No. 107454, 2019-Ohio-3759, ¶ 17, *State v. Perkins*, 8th

Dist. Cuyahoga Nos. 106877 and 107155, 2019-Ohio-88, ¶ 18*; State v. Williams*, 8th Dist. Cuyahoga No. 100488, 2014-Ohio-3138, ¶ 13.

Before this Court granted jurisdiction in this case or in *State v. Bunch,* Sup. Ct. Case No. 2021-0579, this Court granted review in *State v. Metz, et. al.,* 8th Dist. Cuyahoga Nos. 107212, 107246, 107259, 107261, 2019-Ohio-4054 on the following proposition of law:

> Review of consecutive sentences under R.C. 2953.08(G)(2) is deferential to the trial court. A court of appeals cannot clearly and convincingly find that the record does not support the sentencing court's findings by substituting its judgment for that of the trial court on finding that reasonable minds could disagree on.

Days before oral argument were to be held in *Metz,* oral argument was cancelled over the opposition of dissenting justices. See *05/07/2021, Case Announcements #2,* 2021-Ohio-1598. The Cuyahoga County Prosecutor's Office appealed the *Metz* decision because in its view, the Eighth District improperly substituted its own value judgment for that of the sentencing court. But the experience in the Eighth District is not unique.

Amicus curiae argued that the he majority's analysis in *Metz* was a clear substitution of judgment that is indicative of a departure from a deferential standard of review. *Metz*, at ¶98-109. This analysis is at odds with the self-evident proposition that trial courts are in the best position to make the fact-intensive determinations required by sentencing statutes. *State v. Benvenuto*, 3d Dist. Allen No. 1-17-39, 2018-Ohio-2242, ¶51 citing *State v. McLemore,* 136 Ohio App. 3d 550, 554, 2000-Ohio-1619, 737 N.E.2d 125 (3rd Dist.) and *State v. Martin,* 136 Ohio App. 3d. 355, 361, 1999-Ohio-814, 736 N.E.2d 907 (3rd Dist.). See also *State v. Morris,* 73 N.E.3d 1010, 2016-Ohio-7614, ¶33 (8th Dist.) citing *State v. Elmore,* 7th Dist. Jefferson No. 14 JE 0021, 201-Ohio-890, 60 N.E.3d 794. A court of appeals on the other hand does not have the benefit of receiving in person victim impact and any proportionality review is inherently limited to the appellate record.

While consecutive sentences were reversed *State v. Kay*, 2d Dist. Montgomery No. 26344, 2015-Ohio-4403, appeal denied at 145 Ohio St.3d 1410, 2016-Ohio-899, the dissenting opinion offered the view that the consecutive nature of sentencing should stand unless the record overwhelmingly supports a contrary result. *Id.* at ¶26-27 (Hall, J. dissenting). The dissent in *State v. Overholser*, 2d Dist. Clark No. 2014-CA-42, 2015-Ohio-1980, affirmed at 147 Ohio St. 3d 165, 2016-Ohio-2969 shared the reasoning of the dissent in *Kay*. *Id.* at ¶39-41 (Welbaum, J. dissenting).[1] In *State v. Hicks,* 2nd Dist. Greene No. 2015-CA-20, 2016-Ohio-1420, appeal denied at 146 Ohio St. 3d 1502, 2016-Ohio-5792, the dissenting judge found that the majority's conclusion that the decision to impose consecutive sentences should be reversed was a case in which the outcomes differs based upon how the standard of review in R.C. 2953.08(G)(2) is to be applied and reiterated the opinion that the consecutive nature of the court's sentencing should stand unless the record overwhelmingly supports a contrary result and further found that while the trial court's findings were debatable, were not wrong. *Id.* at ¶31-34 (Welbaum, J. dissenting). And while the dissenting opinion in *Kay* became a majority in *State v. Withrow,* 2nd Dist. Clark No. 2015-CA-24, 2016-Ohio-2884, it too had a dissenting view. *Id.* at ¶38 and ¶58 (Donovan, J. dissenting). What is striking about the body of cases in the Second District is an acknowledgment that there are competing standards in applying R.C. 2953.08(G)(2) and that how the statute applies affects outcomes in a consecutive sentencing review. Here the reasonable minds could disagree as to the consecutive sentence findings as evidence by not only the trial court's findings but also that of the dissenting judge. See generally, *State v. Metz*, 8th Dist. Cuyahoga Nos. 107212, 107246,

[1] This Court affirmed the consecutive sentence reversal on the authority of *State v. Marcum,* 146 Ohio St. 3d 516, 2016-Ohio-1002, 59 N.E.3d 1231; however, the State takes the position that *Marcum* does not resolve the issue in this case.

107259, 107261, 2019-Ohio-4054, ¶117 (Gallagher, E., J. dissenting in part and finding that the gang rape compounded the harm).

The point is that there are opportunities for litigants to fully develop a consecutive sentence argument, which was not done in this case. A full discussion by the parties through the adversarial process and considering the body of case law that has developed in the court of appeals throughout Ohio can only further the Court's jurisprudence on consecutive sentence analysis.

RECONSIDERATION STANDARD

This Court has stated the following standard as it applies to its reconsideration authority. First, reconsideration is not an opportunity reargue the case at hand. *State ex rel. Huebner v. W. Jefferson Village Council* 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). Second, the Court can use its reconsideration authority to "correct decisions which upon reflection, are deemed to have been made in error." *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9. Finally, reconsideration is appropriate where it raises a material issue that was not fully considered when it should have been. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883.

Here, the State's motion for reconsideration meets all these criteria. First, the State of Ohio does not seek to reargue the case at hand because it is not seeking reargue the propositions of law to the extent that the State is not rearguing a point made by Appellant. Instead, the State's motion for reconsideration responds to the Court's analysis. Second, with the benefit of the argument of the parties, the Court can further reflect upon the arguments and reverse the portions of the opinion in error. Finally, by addressing the unbriefed issues, the motion for reconsideration meets the criteria of raising material issues that were not even considered when it should have been.

Certainly there have been recent instances in which this Court has considered a motion for reconsideration at the beginning of a new term. See *State v. Braden*, 158 Ohio St.3d 452, 2018-Ohio-5079, 145 N.E.3d 226, *State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419, *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883. The legitimacy of the Court is not threatened by the grant of the State's motion for reconsideration to the extent that the rigid reconsideration standards are met. More specifically, the State's motion for reconsideration responds to the analysis set forth in the majority opinion of *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607 (which were not articulated by Appellant). Under such circumstances, reconsideration is appropriate to this Court as an entity.

ARGUMENT

I. Appellant's Underdeveloped Argument Warrants Its Denial

As stated above, Appellant did not advance significant arguments to support his claim that consecutive sentences were in error. This Court has previously held that the failure to develop a claim is sufficient grounds to reject them:

> Ohiotelnet's sole theory is that the commission willfully disregarded its duty by failing to conduct a complete and thorough review of Ohiotelnet's evidence. But Ohiotelnet does not support this theory with even a single legal authority that addresses the commission's alleged error. That is, Ohiotelnet fails to identify which statute or case law imposes such a duty on the commission or explain what that legal standard entails.
>
> Ohiotelnet's failure to develop an authority-based argument provides sufficient grounds to deny its claim that the commission's decision was unlawful. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 14 (the appellant's failure to "cite a single legal authority" or "present an argument that a legal authority applies on these facts and was violated * * * alone is grounds to reject [a] claim"). *See also Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 39 ("unsupported legal conclusions" do not establish error) and ¶ 53 (rejecting a claim when "[n]o argument [was] supplied regarding whether the relevant case law, applied to the facts of this case, justifies a decision in [appellant's] favor").

Ohiotelnet.com, Inc. v. Windstream Ohio, Inc., 137 Ohio St.3d 339, 2013-Ohio-4721, 999 N.E.2d 586, ¶ 16-17.

Appellate courts share in this view. See *State v. Bruce*, 10th Dist. Franklin No. 21AP-376, 2022-Ohio-909, ¶31 ("it is not the duty of an appellate court to create an argument on an appellant's behalf"). '"If an argument exists that can support this assigned error, it is not this court's duty to root it out."' *State v. Torres*, 8th Dist. Cuyahoga No. 111037, 2022-Ohio-3230, ¶ 21.

While Appellant's failure to develop his consecutive sentence argument to the level of the analysis contained in *Gwynne*, Slip Opinion No. 2022-Ohio-4607 is grounds for reconsideration it is also grounds to deny that proposition of law or dismiss it as improvidently allowed.

II. Review of Consecutive Sentence Findings are Deferential to Trial Courts

Amicus curiae offers to this Court the arguments it made in *Metz* to the extent that the Court does consider the merits of Appellant's consecutive sentence argument. Appellate courts often cite review of consecutive sentences as being deferential and one that prohibits appellate courts from substituting their judgment for that of the trial court. *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 19-21 (8th Dist.). It has also been described that consecutive sentence review is, "not an invitation to determine or criticize how well the record supports the findings." *State v. Jones,* 8th Dist. Cuyahoga No. 104152, 2016-Ohio-8145 Six other appellate districts have referred to the standard of review of consecutive sentences as being deferential. See *State v. Rodeffer,* 2d Dist. Montgomery Nos. 25574, 25575, 25576, 2013-Ohio-5759, *State v. Losey,* 4th Dist. Washington No. 14CA11, 2015-Ohio-285, *State v. Gooding,* 5th Dist. Holmes No. 13CA006, 2013-Ohio-5148, *State v. Thompson*, 9th Dist. Wayne No. 15AP0016, 2016-Ohio-4689, *State v. Hargrove*, 10th Dist. Franklin No. 15AP-102, 2015-Ohio-3125, *State v. Lane,* 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, and *State v. Lee,* 12th Dist. Butler No. 2012-09-182, 2013-

Ohio-3404. In *State v. Ladson*, 8th Dist. Cuyahoga No. 104091, 2016-Ohio-7781, the court cautioned against the appellate court becoming a second-tier sentencing court. *Id.* at ¶9. See also *State v. Jones*, 2018-Ohio-498, 105 N.E.3d 702 (8th Dist.) at ¶55. (S. Gallagher, J. dissenting).

As the Tenth District recently reiterated:

> In an appeal of a judgment imposing consecutive sentences, we are required to review the record, including the underlying findings given by the sentencing court, and may "increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing" if we clearly and convincingly find the record does not support the sentencing court's findings under R.C. 2929.14(C)(4) or the sentence is otherwise contrary to law. R.C. 2953.08(G)(2). The "clearly and convincingly" standard under R.C. 2953.08(G)(2) is an extremely deferential standard of review. *State v. Higginbotham*, 10th Dist. No. 17AP-147, 2017-Ohio-7618, ¶ 11.
>
> "[I]n determining compliance with R.C. 2929.14(C)(4), we examine whether: (1) the trial court engaged in the correct analysis, and (2) the record contains evidence to support the findings of the trial court." *State v. Knowles*, 10th Dist. No. 16AP-345, 2016-Ohio-8540, ¶ 41. "[T]he record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 28, 16 N.E.3d 659. The trial court must state the required findings as part of the sentencing hearing and incorporate those findings into the sentencing entry. *Id.* at ¶ 29. However, a trial court "has no obligation to state reasons to support its findings. Nor is it required to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *Id.* at ¶ 37.

State v. Bland, 10th Dist. Franklin Nos. 19AP-826, 19AP-827, 2020-Ohio-4662, ¶ 16-17

A deferential standard of review is proper due to the self-evident proposition that a trial court is in the best position to make fact-intensive sentencing findings. *State v. Benvenuto*, 3d Dist. Allen No. 1-17-39, 2018-Ohio-2242, ¶51 citing *State v. McLemore,* 136 Ohio App. 3d 550, 554, 2000-Ohio-1619, 737 N.E.2d 125 (3rd Dist.) and *State v. Martin,* 136 Ohio App. 3d. 355, 361, 1999-Ohio-814, 736 N.E.2d 907 (3rd Dist.). See also *State v. Morris,* 73 N.E.3d 1010, 2016-Ohio-

7614, ¶33 (8th Dist.) citing *State v. Elmore,* 7th Dist. Jefferson No. 14 JE 0021, 201-Ohio-890, 60 N.E.3d 794**.**

III. Consecutive Sentences Are Not Improper in the Absence of Demonstrably Incorrect Facts

Legal precedence from the appellate courts demonstrate that deference should be given to a trial court's consecutive sentence findings. In addition, legal precedence from the appellate courts indicate circumstances in which an appellate court may reverse the imposition of consecutive sentences.

One way an appellate court can find by clear and convincing evidence that the record does not support the findings is to show the court relied on demonstrably wrong facts. See, e.g., *State v. Perkins*, 8th Dist. Cuyahoga Nos. 106877 and 107155, 2019-Ohio-88, ¶ 18, applying a "clearly erroneous" standard for clear and convincing evidence under R.C. 2953.08(G)(2) and finding "nothing demonstrating that in imposing consecutive 11 sentences, the trial court relied on a fact that was demonstrably wrong . . ."; *State v. Williams*, 8th Dist. Cuyahoga No. 100488, 2014-Ohio-3138, ¶¶ 8, 13, finding that the reviewing court's obligation under R.C. 2953.08(G)(2) is "akin to the 'clearly erroneous' factual standard of review employed in federal courts" and that "this is not a case where the court claims to rely on a fact that the record on appeal shows to be demonstrably wrong . . . [i]n that case, the court's findings would be clearly erroneous."; *State v. Franklin*, 8th Dist. Cuyahoga No. 107454, 2019-Ohio-3759, ¶¶ 14, 17, affirming consecutive sentences and citing to *Perkins* and *Williams* as providing the standard for clear and convincing evidence under R.C. 2953.08(G)(2). This position was also followed by the Second District in *State v. Withrow*, 2016-Ohio-2884, 64 N.E.3d 553 (2d Dist.), ¶40-41. Stated another way, the clear and convincing evidence standard under R.C. 2953.08(G)(2) should be considered a "clearly erroneous" standard or a review where the appellate court considers whether the trial court relied on a fact that was

demonstrably wrong. This is consistent with the notion that, "if the record supporting individual findings is debatable or the trial court could reasonably have made the findings based on its consideration of the record, it cannot be concluded that the record clearly and convincingly does not support the findings […] disagreement over debatable issues, such as the weight or importance of any one factor or finding, is not grounds to reverse the consecutively imposed sentence. *Jones,* 8th Dist. Cuyahoga No. 104152, 2016-Ohio-8145 at ¶6-13. This is consistent with the notion that legal questions are reviewed de novo but appellate courts defer to factual findings. See *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶37.

Here it can be said that one might disagree with the trial court's imposition of consecutive sentences but that does not make it legally incorrect. One might disagree with the significance of Appellant's lack of a criminal record when it is considered that Appellant engaged in a crime spree that went unpunished for several years. One might recognize the intangible value the stolen items might have to the victims that goes beyond any monetary value.

IV. R.C. 2953.08(G)(2) does not permit review of the aggregate sentence and is apposite to State v. Saxon.

In *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, 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.
>
> *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 1

Yet, the decision in *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607 holds that a trial court must consider the aggregate sentence or sentencing package when imposing consecutive

sentences. *Gwynee,* at ¶1. The plain language of the statutes at issue do not support the conclusion in *Gwynne*.

First, R.C. 2929.14(C)(4) allows a trial court to impose consecutive sentences if the following findings are made:

> **(4)** If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> > **(a)** The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
> >
> > **(b)** At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
> >
> > **(c)** The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

While a sentencing court is not required to impose all multiple counts consecutively if the findings are made, nothing in the statute caps the number of consecutive terms that may be imposed. Nor does the statute require the same findings be made each time a prison term is imposed consecutively.

The second statutory provision involved concerns the standard of review a court of appeals must apply in reviewing the imposition of consecutive sentences:

> **(2)** The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

> **(a)** That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> **(b)** That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2).

Therefore, the same standard used to review findings under R.C. 2929.13(B) or (D) is the same standard to review findings under R.C. 2929.14(C)(4). Consider R.C. 2929.13(B) which states:

> (B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction or combination of community control sanctions if all of the following apply:
>
> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense.
>
> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
>
> (iii) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.
>
> (b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an

offense of violence or that is a qualifying assault offense if any of the following apply:

(i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

(ii) If the offense is a qualifying assault offense, the offender caused serious physical harm to another person while committing the offense, and, if the offense is not a qualifying assault offense, the offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The offense is a sex offense that is a fourth or fifth degree felony violation of any provision of Chapter 2907. of the Revised Code.

(v) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(vi) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(vii) The offender held a public office or position of trust, and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(viii) The offender committed the offense for hire or as part of an organized criminal activity.

(ix) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(x) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(c) A sentencing court may impose an additional penalty under division (B) of section 2929.15 of the Revised Code upon an offender sentenced to a community control sanction under division (B)(1)(a) of this section if the offender violates the conditions of the community control sanction, violates a law, or leaves the state without the permission of the court or the offender's probation officer.

> (2) If division (B)(1) of this section does not apply, except as provided in division (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

These findings are either affirmatively contained within the record or they are not. The difference with R.C. 2929.14(C)(4) are that some of those factual findings are intangible and can stem from differing personal values as opposed to legal grounding. Specifically one might reasonably expect the findings, "consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public" and " At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct," or "the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender," to be debatable.

Trial courts are better equipped to make these sentencing decisions when considering that appellate courts are not necessarily fact finding courts and because trial court's have first hand observations of victim impact statements and any statement offered by a defendant (if any). And if the holding in *Gwynne* is based upon the text of R.C. 2953.08 then that would lead to a conclusion that a de novo review is applied to the other types of findings listed under R.C. 2953.08(G)(2).

Again, the decision in *State v. Johnson*, 8th Dist. Cuyahoga No. 102449, 2016-Ohio-1536 should serve as an example as to how different jurists might view a defendant's sexual assault of

a three-year old and five-year old child. It is not necessarily that in *Johnson* that the imposition of two life sentences for the rape of young children was legally wrong, it was just debatable. And here, while the Fifth District might have disagreed with the imposition of consecutive sentences, it applied the correct standard when it held:

> While we still disagree with what we view as a wholly excessive sentence for a non-violent first time felony offender, no authority exists for this court to vacate some, but not all of Gwynne's consecutive sentences. And, "where a trial court properly makes the findings mandated by R.C. 2929.14(C)(4), an appellate court may not reverse the trial court's imposition of consecutive sentences unless it first clearly and convincingly finds that the record does not support the trial court's findings." *State v. Withrow*, 2016-Ohio-2884, 64 N.E.3d 553, ¶ 38 (2d Dist.). This is a very deferential standard of review, prohibiting appellate courts from substituting their judgment for that of trial judges. *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, ¶ 21, 992 N.E.2d 453. "[T]he question is not whether the trial court had clear and convincing evidence to support its findings, but rather, whether we clearly and convincingly find that the record fails to support the trial court's findings." *Id.*
>
> Because we find the record supports the imposition of consecutive sentences, and because the trial court made the appropriate findings both on the record and in its sentencing judgment entry, we have no choice other than to overrule Gwynne's first assignment of error.

State v. Gwynne, 2021-Ohio-2378, 173 N.E.3d 603, ¶ 25-26 (5th Dist.)

V. The decision in *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607 is detrimental to the view that appellate courts are institutional.

Finally, amicus curiae expresses its concern how the decision in *Gwynne* might be applied going forward.

> A court's identity is wholly independent from the specific individuals who make up its personnel. Thus, a "court as an entity remains the same, regardless of any change in personnel." *Cincinnati v. Alcorn*, 122 Ohio St. 294, 297, 8 Ohio Law Abs. 273, 171 N.E. 330 (1930).
>
> The independent existence of courts and panels separate and apart from their particular members is crucial to the continuity of the judiciary itself. A judge exercises judicial authority only by virtue of the office he occupies during his active tenure on the bench. When a judge retires or dies, he is incapable of exercising judicial authority. *Holland*, 27 Ohio St.2d 77, 271 N.E.2d 819. The

> judicial authority belongs to the office, not the judge. *Jezerinac v. Dioun*, 168 Ohio St.3d 286, 2022-Ohio-509, 198 N.E.3d 792.

Jezerinac v. Dioun, 168 Ohio St.3d 286, 2022-Ohio-509, 198 N.E.3d 792, ¶ 17, 19.

It is unclear how a court as an entity may consistently review consecutive sentences when under the opinion in *Gwynne*, the appropriateness of any given consecutive sentence may depend on the individual judges that comprise an appellate panel. This becomes problematic when one panel can bind future panels because when one panel issues a decision, that decision becomes precedence within the district. Simply put, "Appellate panels cannot be transformed into second-tier sentencing courts, reconsidering the weight given to any one factor in order to arrive at a different decision on whether to impose consecutive sentences." *State v. Ladson*, 8th Dist. Cuyahoga No. 104091, 2016-Ohio-7781, ¶ 1

CONCLUSION

For these reasons, the Cuyahoga County Prosecutor's Office supports the State of Ohio's motion for reconsideration in this case and joins the State of Ohio's request to reconsider.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

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