IN THE SUPREME COURT OF OHIO

Andrea Beasley,	:	Case No. 2016-1020
	:	
Appellant,	:	On Appeal from the Hamilton County
	:	
	:	Court of Appeals
vs.	:	First Appellate District
	:	
STATE OF OHIO,	:	Court of Appeals Case No. C150431
	:	
	:	
	:	
Appellee.	:	

BRIEF OF AMICI CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER, OHIO JUSTICE & POLICY CENTER, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NATIONAL DEFENDER TRAINING PROJECT, AND GIDEON'S PROMISE
IN SUPPORT OF ANDREA BEASLEY, APPELLANT

David A. Singleton (0074556)
Ohio Justice & Policy Center
215 East 9th Street, Suite 601
Cincinnati, Ohio 45202
Phone: (513) 421-1108, ext. 17
Fax: (513) 562-3200
E-mail: dsingleton@ohiojpc.org
Counsel for Amici Curiae
Office of the Ohio Public Defender et al.

Raymond T. Faller (0013328)
Hamilton County Public Defender
Marguerite Slagle (0082217)
(Counsel of Record)
Law Office of the Hamilton County
Public Defender
230 East Ninth Street, Second Floor
Cincinnati, Ohio 45202
Phone: (513) 946-3838
Fax: (513) 946-3808
Email: mslagle@cms.hamilton-co.org
Counsel for Appellant Andrea Beasley

Joseph T. Deters (0012084)
Hamilton County Prosecutor
Sean Donovan (0086528)
Assistant Hamilton County Prosecutor
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3000
Fax: (513) 946-3017
Email: sean.donovan@hcpros.org
Counsel for Appellee State of Ohio

TABLE OF CONTENTS

Page No.

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Every day in courts across the nation, including in Ohio, opposing lawyers meet in judges' chambers to discuss case-related matters. Often during these routine, informal meetings no court reporter is present to record what is said. Accordingly, when something of consequence occurs that needs to be preserved for appellate review, the universally accepted practice is for the lawyer or trial judge to state, at the first opportunity and in the presence of a court reporter, what was discussed off-the-record. This practice allows the other parties to the conversation to agree with or dispute the representations of the person making the record. Until the First District Court of Appeals' decision in *State v. Beasley*, no appellate court, to amici's knowledge, had ever held that a lawyer who seeks to preserve for appellate review an off-the-record in-chambers discussion must do more than simply repeat the details of the conversation in the presence of a court reporter.

In *Beasley,* however, the First District effectively foreclosed a litigant's ability to preserve an issue arising during an off-the-record meeting with the court by summarizing for the record what occurred during the unrecorded discussion. In this case, Beasley wished to plead no contest to possession of cocaine so she could later appeal the denial of her motion to suppress the evidence. Before the case was called, defense counsel and the prosecutor had an off-the-record conversation with the judge, during which defense counsel expressed Beasley's desire to plead no contest to the charge with the state's consent. During the ensuing conversation, the court indicated that it had a blanket policy of not accepting no-contest pleas.

Once the case was called in open court, defense counsel, in accordance with universally accepted practice, sought to preserve the in-chambers conversation by summarizing it in detail in the presence of the court reporter, the prosecutor, and the judge. When given the opportunity neither the trial judge nor the prosecutor objected to or disagreed with defense counsel's recitation

of the conversation; in fact, as the dissent pointed out in its opinion, the trial judge "concurred" with defense counsel's representations. Yet the appellate court held that defense counsel failed to preserve the issue of the trial judge's blanket policy of refusing to accept no-contest pleas because the in-chambers conference was "not part of the record on appeal." Additionally, the court of appeals concluded that despite defense counsel's recitation on the record of the trial judge's blanket policy, "there is no other indication in the record of what occurred." Furthermore, the appellate court held that in order to preserve the issue, Beasley should have attempted to plead no contest in open court, an act that would have clearly been futile given the trial judge's announcement in chambers of the blanket policy of refusing such pleas, and her subsequent acknowledgement of her policy on the record.

The First District Court of Appeals erred as a matter of law when it held that defense counsel failed to preserve the issue of the trial court's blanket policy of refusing to accept no-contest pleas. The rationale underlying the preservation rule is that litigants cannot raise issues on appeal without first giving the trial court an opportunity to address the objection. Here, the trial transcript shows defense counsel did preserve the issue by putting on the record the existence of the trial judge's blanket policy of refusing to accept no-contest pleas, thereby giving the judge an opportunity to disavow the policy and allow Beasley to plead no contest.

This Court should accept Beasley's discretionary appeal because it raises important questions about what lawyers must do to preserve issues that arise during off-the-record discussions in chambers. *Beasley*, if followed by other courts, will return Ohio to the days when courts required magic words to preserve an issue for appellate review, elevating form over substance. *Beasley* also jeopardizes the routine practice of opposing counsel meeting in chambers to engage in informal case-related discussions with the trial judge. If there is no way for counsel

to make a near contemporaneous record in open court of off-the-record conversations with judges in chambers, then counsel should never engage in such informal discussions.

Additionally, this Court should accept jurisdiction of Beasley's appeal because it involves a substantial constitutional question. As a result of the First District's holding, Beasley was deprived of her opportunity to appeal. While there is no constitutional right to appeal, if a state makes appellate review available it cannot take it away arbitrarily. *See Douglas v. People of State of Cal.*, 372 U.S. 353, 356-357, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (citations omitted) ("[A] State can, consistently with the Fourteenth Amendment, provide for differences [in appellate review] so long as the result does not amount to a denial of due process or an 'invidious discrimination.'"). In sum, *Beasley's* holding, and its implications if followed by other courts, are troubling.

STATEMENT OF INTEREST OF AMICI CURIAE

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants and coordinate criminal defense efforts throughout Ohio. OPD attorneys handle cases at the trial level and during the post-trial phase of criminal cases, including direct appeals and collateral attacks. As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle complex criminal cases in Ohio's appellate districts, including the First District Court of Appeals. Here, the First District's majority decision created sweeping, undue precedent about the detail necessary to preserve an issue for appellate review. And in doing so, it swept away a meritorious issue involving the trial court's blanket policy of *never* accepting no-contest pleas, an unequivocal abuse of discretion and derogation of the criminal rules. The OPD has an interest in this case insofar as this Court has the opportunity to correct the First District's holding in this case, which forecloses the ability of counsel to preserve

an unrecorded in-chambers conversation by summarizing for the record what the litigants discussed with the judge in chambers.

The Ohio Justice & Policy Center (OJPC) is a public interest non-profit law firm that works for smart reform of the criminal justice system, and provides free legal representation to current and former prisoners. Additionally OJPC's executive director David A. Singleton is very involved in training public defenders in Ohio and nationally through the National Public Defender Training Project and Gideon's Promise. As a former trial and appellate public defender, Singleton teaches law students and public defenders how to preserve issues for appellate review. OJPC has an interest in this case because the First District's majority decision cannot be squared with Ohio law on what is necessary to preserve an issue for appellate review.

The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators and other support staff who are responsible for ensuring the constitutional right to effective assistance of counsel for eligible adults and juveniles who are accused of crime. NAPD represents Ohio defenders through the organizational memberships of the Hamilton County Public Defender's Office (Cincinnati), Montgomery County Public Defender's Office (Dayton), Clermont County Public Defender's Office (Batavia), and the Office of the Public Defender based in Columbus, Ohio. NAPD's collective expertise represents state, county and local systems through full-time, contract, and assigned counsel delivery mechanisms; dedicated juvenile, capital and appellate offices; and, through a diversity of practice models. NAPD provides webinar-based training to its members, including the importance of, and how to, preserve issues for appellate review. Accordingly, NAPD is interested in the preservation issue Beasley seeks to raise in this appeal.

The National Defender Training Project is a not-for-profit corporation that provides skills training to public defenders across the United States. Each June, NDTP holds a six-day trial advocacy school in Dayton, Ohio that is attended by more than forty Ohio public defenders and assigned counsel. At every trial school, experienced faculty teach defenders about the importance and mechanics of preserving issues for appellate review. Should *Beasley* become established law for the state of Ohio, our trial school would have no alternative but to teach Ohio defenders that they should never have in-chambers conversations that might concern potential appellate issues. Rather, they should insist that all such conversations be held in open court and on the record. NDTP and its faculty recognize that this would eliminate a good, traditional way for a judge and counsel to resolve problems, but given the holding in *Beasley*, it would be the only way to preserve a client's right to appeal an adverse ruling.

Gideon's Promise works to transform the criminal justice system by working to build a community of public defenders who provide equal justice for marginalized communities. Each year, Gideon's Promise selects a new class to join its growing community of committed, passionate public defenders. The class comes together initially at Summer Institute, an intensive, fourteen-day training session, and meets one weekend every six months over the course of the three-year program. Each participant learns the techniques to represent clients effectively in all aspects of trial level representation, including how to preserve issues for appeal. Gideon's Promise is interested in cases that could set bad precedent. Accordingly, Gideon's Promise has an interest in this case because the court of appeals' holding upsets well-settled law on what a lawyer must do to preserve an issue for appeal.

STATEMENT OF THE CASE AND FACTS

At trial, after her motion to suppress the evidence was denied, defense counsel informed the court that Beasley wanted to plead no contest to the charge. Defense counsel began by saying "I do have a few things I need to put on the record," to which the judge responded "Okay, we will add it to the record. Do you want to go ahead and put it on now?" Following this exchange, defense counsel said "Judge, we had a conversation in chambers. My client wishes to plead no contest. But as this Court explained, the Court has a blanket policy of not accepting no contest pleas, and the Court will only accept guilty or not guilty." Counsel continued summarizing the discussion, stating Beasley wanted to plead no contest to maintain her right to appeal and that the State agreed to allow her to plead no contest. However, the Court reiterated its policy of refusing to accept no- contest pleas. Responding to defense counsel's recollection of the discussion, the trial judge said, "I see what you're saying. Okay. All right. Anything from the State regarding that?" The state replied "No, Judge." With the option of a no-contest plea eliminated, Beasley pled guilty, thereby losing her right to appeal the denial of her motion to suppress.

On appeal, Beasley argued that the trial judge abused her discretion by adhering to a uniform policy of refusing to accept no-contest pleas. The First District Court of Appeals found that "there is little doubt that a trial court's blanket policy to refuse to accept no-contest pleas is error." *State v. Beasley*, 1st Dist. Hamilton No. C-150431, 2016-Ohio-1603 at ¶ 12. However, the court held that Beasley forfeited the issue for appeal. *Id.* at ¶ 13. Specifically, the court noted that defense counsel "referred to a conference in chambers that is not part of the record on appeal, and there is no other indication in the record of what occurred." *Id.* at ¶ 12. Furthermore, "despite Beasley's statement for the record, Beasley never attempted to plead no contest," and "it is

incumbent on the defendant to enter the no-contest plea and have the trial court refuse to accept the plea on the record." *Id*. at ¶ 13.

In dissent, Judge Fischer disagreed with the majority's conclusion that Beasley failed to preserve the error for appeal. *Id*. at ¶ 14 (Fischer, P.J., dissenting). He first observed that "Beasley's counsel noted twice *on the record* that she wished to plead no contest . . . but that in chambers the court had stated it had a blanket policy against accepting no-contest pleas." *Id*. at ¶ 15 (emphasis added). Judge Fischer also pointed out that, after defense counsel finished summarizing the conference on the record, "the trial court not only did not contradict the statement, it concurred" and "if the counsel's assertion was incorrect, the trial court would have so stated." *Id.* Additionally, Judge Fischer observed that "the state then did not contradict Beasley's statement." *Id.* at ¶ 16. Finally, in disagreeing with the majority's conclusion that Beasley had to attempt to plead no contest in order to preserve the issue for appellate review, Judge Fischer stated there was "no valid reason to require Beasley to enter a no-contest plea on the record when it is clear that doing so would be futile. The law does not require a vain or useless act." *Id.* at ¶ 19.

ARGUMENT

Proposition of Law:

> A trial counsel's unrefuted proffer summarizing an unrecorded conference is sufficient to preserve an error for appeal.

A. The universally accepted practice for making a record of an event that occurs off the record is to proffer, at the earliest opportunity, the facts of the occurrence on the record.

In-chambers discussions between attorneys and judges occur routinely in courtrooms across the country, and can be beneficial to litigants and the court. *See* Oh. Workers' Comp. L. § 14:162 (2009) ("In many instances counsel for the parties will meet in chambers to discuss stipulations, admissions, settlement possibilities . . ."); *see also* Noreen L. Slank & Michael J.

Cook, *Appellate Counsels' Tips for Navigating Trial and Post-Trial Practice*, 93 Mich. B.J. 52 (2014); Andrea Westerfeld, *Get it in the record!*, The Prosecutor, July-Aug. 2008, http://www.tdcaa.com/node/2860 (accessed July 1, 2016).

When something of consequence occurs during these off-the-record conversations, counsel must make a record of the discussion in order to preserve the issue for appellate review. *See* L. Steven Emmert, *Preserving Issues for Appeal*, 19 No. 5 Pract. Litigator 15 (2008) (stating "it's impossible to preserve for appeal any objections, arguments, or legal issues that occur [off the record]" unless counsel takes steps to "ensure any dialogue . . . is on the record."); Sylvia H. Walbolt & Susan L. Landy, *Pointers on Preserving the Record*, 25 Litigation 31 (1999) ("If you, your opponent, or the court has gone 'off the record,' make sure you memorialize any requests and/or rulings when you go back 'on.'"). The way to do so is for counsel—or even the court—to proffer or summarize the unrecorded discussion for the record. *See* 1 Soc. Sec. Disab. Claims Prac. & Proc. § 16:84 (2d ed.) (stating when discussions and resolution of issues happen off the record "the [Administrative Law Judge] must summarize on the record the content and conclusion of any off-the-record discussion"); 9 Immigr. L. Serv. 2d PSD EOIR Mem. 03-06 (2003) ("When the off-record discussion is completed . . . the Immigration Judge shall summarize the off-record discussion immediately upon returning to the record."); Emmert, *supra* ("When you're in chambers or in an off-the-record bench conference, ask the judge to recite the arguments and ruling on the record once you're done . . . [or] ask him for leave to summarize these matters yourself, again, on the record."); Alex Wilson Albright & Susan Vance, *Ten Practical Tips for Making Your Case Appealable*, 35 No. 2 Litig. 41 (2009) ("If you go off the record for conversation and sidebar discussions, make sure you request to be put back on the record when ready."); Dale Harris, *A judge's view: What goes on in judges' chambers*, Duluth News Tribune (Feb. 2, 2015),

http://www.duluthnewstribune.com/opinion/local-view/3670138-judges-view-what-goes-judges-chambers ("Judges will summarize in open court whatever was discussed during any previous chambers conferences and give the attorneys the opportunity to put their arguments on the record.").

Courts in Ohio have similarly found that this method is sufficient to preserve an issue for appeal when it originates off the record. *See State v. Panella* 2d Dist. Montgomery No. 23628, 2010-Ohio-3354 ¶ 21 (stating "[T]he prosecutor placed [the] issue on the record by referencing the earlier discussion in chambers."); *Martin v. Nguyen* 8th Dist. Cuyahoga No. 8477, 2005-Ohio-1011, ¶¶ 11 (finding proffer by plaintiff's attorney "is sufficient to preserve the issue for appeal"), 16 (stating "[t]he purpose of a proffer is to make a record for appellate purposes"); *see also* Jennings, Baldwin's Ohio Practice, Ohio Domestic Relations Law, § 32.37 (Dec. 2015) (specifically directing attorneys to either record rulings made during discussions in chambers or repeat them for the record).

Here, Beasley's attorney did exactly what well-trained litigators would do. After the off-the-record conversation with the prosecuting attorney and trial judge, defense counsel made a record in open court of the conversation that occurred in chambers, during which the trial judge announced her blanket policy of refusing to accept no-contest pleas. Neither the trial judge nor the prosecutor objected to defense counsel's proffer. In fact, as Judge Fischer's dissent notes, the trial judge "concurred with" defense counsel's recitation of the facts. *Beasley* at ¶ 15.

The First District stated defense counsel "referred to a conference in chambers that is not part of the record on appeal, and there is no other indication in the record of what occurred." *Beasley* at ¶ 12. This is simply wrong. As defined by the Ohio Rules of Appellate Procedure, the record consists of "the original papers and exhibits thereto filed in the trial court, the transcript of

proceedings, if any, including exhibits, and a certified copy of the docket and journal entries." Ohio Rev. Code. Ann. App. R. 9 (West 2016) (emphasis added). By definition, defense counsel's summary of what occurred in chambers is part of the record on appeal because it appears on the trial transcript. *Id*. Thus, the First District need not speculate about what occurred in chambers; the record itself provides a detailed account of what occurred, an account that was unrefuted by the same judge and prosecutor who were present for the in-chambers discussion.

The implication of the First District's ruling is that a litigant can never put on the record a conversation that occurs off the record in chambers by proffering a summary in court. This Court should accept jurisdiction and then reverse to correct this obvious misstatement of the law.

B. The First District's decision threatens a return to the era of requiring magic words in order to preserve an issue for appeal.

The primary purpose of lodging a contemporaneous—or near contemporaneous—objection at trial is to give the trial court an opportunity to correct the error before the case goes up on appeal. *See Puckett v. United States*, 556 U.S. 129, 134, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (explaining the purpose of a timely objection is to "give[ ] the district court the opportunity to consider and resolve them."); *United States v. Walters*, 638 F.2d 947, 949 (6th Cir. 1981) ("The filing of objections provides the district court with the opportunity to consider the specific contentions of the parties and to correct any errors immediately."); *Williams v. Parker Hannifin Corp.* 188 Ohio App.3d 715, 2010-Ohio-1719, 936 N.E.2d 972 , at ¶ 15 (12th Dist.) (citation omitted) ("The purposes of the contemporaneous objection rule include allowing the questioner to correct his or her mistake or inadvertence as well as allowing the trial court to avoid error by taking corrective action."); Michael Catalano, *Making and Preserving the Record—Objection*s, 6 Am. Jur. Trials 605 (2016) ("An adequate objection to an asserted error allows the trial court a meaningful chance to prevent or correct the error and creates a record for appellate review.").

Courts in Ohio and elsewhere have held that no magic words are required to preserve an issue for appeal. *See, e.g., State v. Clinkscale*, 122 Ohio St.3d 351, 2009-Ohio-2746, 911 N.E.2d 862 at ¶ 16 (finding that while defense counsel did not use the words "I object," his statement that he wanted to put something on the record "amounted to an objection to the failure of the trial court to record the proceedings . . . [and] was sufficient to alert the trial court that the record was inadequate."); *see also U.S. v. Johnson*, 715 F. 3d 179, 184 (6th Cir. 2013) (citation omitted) ("We have also warned that '[t]he preservation of constitutional objections should not rest on magic words.'"); *United States v. Essex*, 734 F.2d 832, 842 (D.C. Cir. 1984) ("No magic words are required to constitute an objection."); *Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009) ("A party need not spout "magic words" or recite a specific statute to make a valid objection."); *In re Baby Girl T.*, 2012 UT 78, ¶ 38, 298 P.3d 1251 ("Whether a party has properly preserved an argument, however, cannot turn on the use of magic words or phrases.").

Here, defense counsel alerted the trial judge to the substance of Beasley's objection to the court's uniform policy of never accepting no-contest pleas. Defense counsel did so by stating, "My client wishes to plead no contest," followed by an explanation that she was unable to do so because of the court's policy of not accepting such pleas. Defense counsel's statement on the record was sufficient to alert the trial judge that Beasley's plea did not reflect her true intentions, and that Beasley took issue with the court's blanket policy. If defense counsel's summary of the in-chambers conference was inaccurate, the trial judge had ample opportunity to deny that such a policy existed. The summary also presented an occasion for the judge to take corrective action and indicate that she would in fact accept a no-contest plea, or would at least conduct an individualized assessment of whether such a plea was appropriate in this case.

By holding that Beasley "forfeited her right to raise the issue [of the trial judge's blanket policy] on appeal," *Beasley* at ¶ 13, the First District has elevated form over substance. All that defense counsel needed to do was provide fair notice of Beasley's objection to the trial judge's blanket policy, which is precisely what he did. There was no need for Beasley to attempt to plead no contest. This Court should accept jurisdiction of Ms. Beasley's appeal to underscore that litigants need not use magic words to preserve an issue for appellate review, so long as they give fair notice to the trial court of the nature of the objection.

C. The First District's conclusion that Beasley should have attempted to plead no contest ignores a well-established legal principle: the law does not require the doing of a futile act.

The maxim *ex non cogit ad inutilia*, or "the law does not know useless acts," has been followed by American courts for decades. *See N.Y., New Haven & Hartford R.R. Co. v. Iannoti*, 567 F.2d 166, 180 (2d Cir. 1977) ("The law does not require that one act in vain."); *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, 707 (8th Cir. 1971) ("The law does not and should not require the doing of useless acts."); *Bohnen v. Harrison*, 127 F. Supp. 232, 234 (N.D. Ill. 1955) ("It is fundamental that the law does not require the performance of useless acts."); *In re Anthony B.*, 735 A.2d 893, 901 (Conn. 1999) ("It is axiomatic that the law does not require a useless and futile act."); *Wilmette Partners v. Hamel*, 594 N.E.2d 1177, 1187 (Ill. App. Ct. 1992) ("[I]t is a basic legal tenet that the law never requires a useless act."). Accordingly, courts, consistent with this principle and common sense, should not require litigants to do useless acts.

However, by stating that it was "incumbent" on Beasley to attempt to plead no contest and then be refused permission to do so in order to preserve the issue, *Beasley* at ¶ 13, the First District Court required Beasley to undertake a futile act. After defense counsel summarized for the record what counsel discussed with the judge in chambers, a summary the trial court and the prosecutor did not dispute, one thing was crystal clear: the trial judge was not going to allow Beasley to plead

no contest because of the court's blanket policy of refusing to accept such pleas. Thus, as Judge Fischer pointed out in his dissenting opinion, there is "no valid reason to require Beasley to enter a no-contest plea on the record" when the trial judge made it clear that such a plea would not be accepted. *Beasley* at ¶ 19. Indeed, as the United States Supreme Court explained, "[g]ood judicial administration is not furthered by insistence on futile procedure." *Wade v. Mayo*, 334 U.S. 672, 681, 68 S.Ct. 1270, 92 L.Ed. 1647 (1948).

Moreover, in addition to requiring Beasley's lawyer to do a futile act, the First District's reasoning would have compelled defense counsel to risk contempt. When a trial judge tells counsel in chambers that it will not permit a no-contest plea, it would seem a direct affront to the court's ruling for the defense to proffer such a plea as soon as they go back into the courtroom. It would invite, at best, an admonition from the court, and at worst, a threat of contempt. *See Denovcheck v. Board of Trumbull County Comm'rs*, 36 Ohio St.3d 14, 15, 520 N.E.2d 1362 (1988) (citation omitted) ("We have defined 'contempt of court' as 'disobedience of an order of a court. It is conduct which brings the administration of justice into disrespect . . . '"); *State v. Kitchen*, 128 Ohio App.3d 335, 342, 714 N.E.2d 976 (2d Dist. 1998) (finding that when an appellant disregards a trial judge's instruction, even if his behavior is in response to an order "constituting reversible error," he may be held in contempt).

This Court should accept jurisdiction of Beasley's appeal to make clear that a litigant need not engage in a useless—and in Beasley's case a potentially contemptuous—act in order to preserve an issue for appeal.

D. *Beasley* threatens to end the valued practice of litigants and judges meeting in chambers to facilitate case resolution.

During trial-level proceedings, the judge and opposing parties often meet at sidebar or in chambers to have off-the-record conversations. These discussions offer many benefits to both

judges and attorneys, and some even consider them to be "essential." *See* Slank and Cook, *supra* ("Sidebars and in-chambers discussions are essential. There are some things juries shouldn't or can't hear, and some discussions are better had without on-the-record formality."). *See also* Westerfeld, *supra* ("There are definitely benefits to having informal conversations without having to drag the court reporter in or dismiss the jury to have a recorded hearing."); Harris, *supra* (stating judges appreciate having discussions in chambers so they are not blindsided by something unusual on the record). Topics that arise in off-the-record conversations may include a controversial plea agreement that the lawyers want to run past the judge, notice that a victim will be providing a statement at sentencing, or simply matters relating to logistics and scheduling. *Id*. A forum for discussion away from the presence of the entire courtroom is an integral part of a well-functioning and efficient court. *See, e.g.*, Peter N. Thompson, *Confidentiality in Chambers: Is Private Judicial Action the Public's Business?*, 62 Bench & B. Minn. 14 (2005) (stating confidential, in-chambers discussions are important "to maintain the integrity and efficiency of the judicial system in Minnesota").

If followed by other courts, *Beasley* could very well end the practice of opposing counsel meeting informally off the record to discuss case-related matters. Under *Beasley*, if an appellate issue arises during such a meeting, counsel's summary of the meeting in open court on the record would be deemed insufficient to preserve the issue for appeal. As a result, no reasonably prudent attorney in Hamilton County should ever meet in chambers without a court reporter present. It is better for counsel to forgo informal, unrecorded conversations with opposing counsel and the court than to risk being unable to preserve an issue for appeal that comes up during the meeting.

Although counsel could insist on having a court reporter present during the meeting, doing so routinely would likely discourage judges from speaking frankly with the parties about the case,

as "judges need some assurance that their in-chambers discussions will remain confidential." Thompson, *supra*. Yet, if attorneys can no longer preserve issues raised in chambers by proffering a summary on the record, they will have no choice but to insist that every discussion be recorded, which could discourage judges from meeting with the parties informally. This is an additional reason why the Court should accept jurisdiction of this appeal.

CONCLUSION

This Court should grant jurisdiction and eventually hold that litigants in Ohio courts need not use magic words or engage in futile acts in order to preserve an issue for appellate review where they have alerted the trial court to the substance of their objection, as Beasley did in this case.

Respectfully submitted,

/s/: *David A. Singleton*
David A. Singleton (0074556)
Ohio Justice & Policy Center
215 East 9th Street, Suite 601
Cincinnati, Ohio 45202
(513) 421-1108, ext. 17
(513) 562-3200 – Fax
dsingleton@ohiojpc.org

Counsel for Amici Curiae
Office of the Ohio Public Defender et al.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **AMICUS BRIEF IN SUPPORT OF APPELLANT ANDREA BEASLEY'S MEMORANDUM IN SUPPORT OF JURISDICTION ON BEHALF OF AMICI CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER *ET AL.*,** was sent by electronic mail to Marguerite Slagle, Hamilton County Public Defender at mslagle@cms.hamilton-co.org, and Sean Donovan, Hamilton County Assistant Prosecuting Attorney at sean.donovan@hcpros.org, on this 11th day of July, 2016.

/s/: *David A. Singleton*
David A. Singleton (0074556)