IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2019-1282
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Hamilton County Court of Appeals
	:	First Appellate District
ADAM BOWERS,	:	
	:	COA Case No. C180317
Defendant-Appellee.	:	

BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE ADAM BOWERS

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INTRODUCTION

The State takes two distinct positions in its Amended Merit Brief. Each is fundamentally flawed. First, they contend that if both force and an under-ten-years-of-age victim are determined to be present in a given rape case, then the trial court can sentence an offender to 15 years to life, 25 years to life, or life without parole. But as Mr. Bowers' Merit Brief demonstrates, once force is found, the 15 years to life option is no longer available, and the sentencing floor is raised to 25 years to life. Thus, if the force finding is not properly made by the finder of fact, and a 25-years-to-life sentence is imposed, a clear violation of *Alleyne v. United States* occurs.

Second, the State asserts that the force finding in R.C. 2971.03(B)(1)(c) is not a finding at all, and that force can essentially be presumed to exist in every rape case involving a victim under 13 years of age. But while it is axiomatic that the showing of force is not a difficult hurdle for the prosecution, the General Assembly specifically anticipates that not every rape case involving an under-13 victim is an offense involving force. Thus, the State's attempt to eliminate the statutorily required finding of force necessary to trigger an enhanced penalty is improper and must be rejected.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is Ohio's agency created to represent indigent criminal defendants, coordinate criminal defense efforts throughout Ohio, promote the proper administration of criminal justice, ensure equal treatment under the law, and protect the individual rights guaranteed by the state and federal constitutions. Accordingly, OPD has an interest in ensuring that the imposition of criminal sentences comports with all applicable constitutional and statutory requirements.

STATEMENT OF CASE AND FACTS

OPD adopts the Statement of Case and Facts as articulated in the brief of Adam Bowers.

ARGUMENT

Appellee's First Proposition of Law

A court does engage in unconstitutional fact-finding when it finds that force was used during the rape of a child under the age of ten and imposes a sentence of 25 years to life because the finding of force does raise the statutory minimum sentence.

The state attempts to distinguish *Alleyne v. United States* by claiming that there were three sentencing options available here for the trial court—15 years to life, 25 years to life, and life without parole—and a finding of force did not act to eliminate the lowest sentencing option, 15 years to life, and thus did not raise the mandatory minimum sentence. (State's Amended Merit Brief at 6.) But this contention, as explained in Mr. Bowers' Merit Brief, would require this Court to conclude that the General Assembly intended an absurd result: that an offender who used force to commit a rape of an under-age-13 victim would be better off if the victim were found to be under ten years old, than if the victim were 11 or 12 years old. That is because if no further age finding is made below age 13, then a finding of force inarguably leads to only two sentencing options: 25 years to life, or life without parole. R.C. 2971.03(B)(1) & (B)(1)(c). It would defy logic for the legislature to intend that an offender specifically found to have raped an under-age-ten victim with force would be eligible for a 15-years-to-life sentence, when a different offender who committed a similar act against a 12-year-old would necessarily face a sentence of at least 25 years to life. *See, e.g.*, *State v. Austin*, 11th Dist. Trumbull No. 2018-T-0058, 2019-Ohio-3060, ¶ 25 (Where defendant was initially indicted for rape with under-age-ten and force specifications, he received a significant benefit by pleading guilty, "with a nolle prosequi being entered on the element of force, pursuant to R.C. 2971.03(B)(1)(c), for all three Rape offenses, which element *requires* a minimum sentence of 25 years to life rather than 15 to life for an offense committed with the factual finding pursuant to R.C. 2971.03(B)(1)(b)." (Emphasis added.)

Once it is established that the 15-years-to-life option is eliminated by a finding of force when the victim is under 13 years of age—regardless of whether a further finding is also made that the victim was under ten years old—then it is inarguable that the protections afforded by the United States Constitution and by *Alleyne* are triggered if the finding of force is improperly made. *Alleyne v. United States*, 570 U.S. 99, 108, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) ("Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.") Here, the jury was not asked to determine whether Mr. Bowers used force in the commission of rape. Thus, when the trial court separately made that finding after the jury verdicts, and that finding resulted in an increase in the minimum sentence to 25 years to life from 15 years to life, the trial court acted in direct contravention of *Alleyne*. And, therefore, the only proper sentencing options for Mr. Bowers were 15 years to life and life without the possibility of parole.

Appellee's Second Proposition of Law

> **A court that sentences an offender convicted of raping a child under the age of ten to a term of 25 years to life must make an express finding of force even if the record contains evidence of force.**

The State asserts that the "force" finding is not actually a finding at all, and that the "use of force to compel the victim to submit is implicit in the imposition of this sentence." (State's Amended Merit Brief at 8-10.) But this claim effectively asks this Court to ignore the fact that "[t]he primary goal of statutory construction is to give effect to the legislature's intent, and in determining the legislature's intent, we first look to the plain language of the statute." *Ayers v. City of Cleveland*, Slip Opinion No. 2020-Ohio-1047, ¶ 17, citing *State v. Gordon*, 153 Ohio St.3d 601, 2018-Ohio-1975, 109 N.E.3d 1201, ¶ 8. The statutory subsection in question here sets forth three possible determinations, any one of which leads to the requirement of a more serious

minimum punishment in a rape case with a victim under the age of thirteen: 1) force, 2) a prior sex-offense conviction, or 3) the causing of serious physical harm. R.C. 2971.03(B)(1)(c). Because the existence of one or more of these three factors is required to impose a more serious minimum sentence, this necessarily means that they may or may not be present in a given case, and that a finding needs to be made whether any of the three factors exists. And it is well established that *only* the fact of a prior conviction may properly be made by a sentencing court—as opposed to the jury—when an increased sentence is at stake. ("And as the Supreme Court noted in *Apprendi*, the Sixth Amendment does not bar judicial consideration of a defendant's prior convictions at sentencing because '"recidivism * * * is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."'" *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, ¶ 35 (2009) (Citations omitted.)

In contrast to a determination of whether a defendant has relevant prior convictions, the determinations of whether force was used, or whether serious physical harm resulted, are factual matters related to the evidence adduced at trial. The State effectively acknowledges as much when it discusses the "evidence of force" that was present in this case. (State's Amended Merit Brief at 10.) In cases involving similar charges, juries are commonly asked to decide whether force was used and/or whether serious physical harm resulted. *See, e.g., State v. Dye*, 82 Ohio St.3d 323, 325, 1998-Ohio-234, 695 N.E.2d 763 (1998) ("The jury returned guilty verdicts on all five counts of rape and the three remaining counts of felonious sexual penetration, with a force specification on each count."); *State v. Wright*, 7th Dist. Columbiana No. 97 CO 35, 2001 WL 1685275, * 1 (Sept. 27, 2001) (defendant "appeals a jury verdict finding him guilty on one count of corruption of a minor, two counts of gross sexual imposition, and three counts of rape, with one of the rape counts carrying a force specification."). The State correctly notes that this Court has held that the

showing of force by the prosecution need only be minimal. (State's Amended Merit Brief at 10.) But this Court has never said that *no* showing of force needs to be made to reach a more severe sentence.

Here, the prosecution seeks to be able to avoid submitting the force question (and presumably also the serious-physical-harm question, when relevant) to the jury. But because the General Assembly specifically anticipates that not every rape case involving a victim under the age of 13 is an offense involving force, and because force is a finding of fact that must be made by a jury, the State's argument must fail. *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 2365, 147 L.Ed.2d 435 (2000) ("the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

CONCLUSION

Based on well-established constitutional principles and numerous holdings by this Court and the Supreme Court of the United States, this Court should hold that the "force" finding contemplated by R.C. 2971.03(B)(1)(c) must be made by a jury, not the sentencing court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of this Brief was filed electronically and served via electronic mail on Judith Anton Lapp, judi.lapp@hcpros.org, and Michaela Stagnaro, mstagnaro@shkfamilylaw.com, on this 1st day of April, 2020.

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