IN THE SUPREME COURT OF OHIO
2022

STATE OF OHIO, Plaintiff-Appellee, -vs- MICHAEL P. ASHCRAFT, Defendant-Appellant.	Case No. 21-1491 On Appeal from the Knox County Court of Appeals, Fifth Appellate District Court of Appeals No. 21CA000002

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, OPAA sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA offers this briefing on the sentencing of recidivist violators of the sex offender registration and notification (SORN) laws. This case addresses a category of offenders who already have at least two strikes against them. They have been convicted of one or more sex offenses that prompt the need for registration. Then they were convicted of violating registration requirements. Sex offenders involved in these cases will have already demonstrated an inability to follow these laws. So when the sex offender is found guilty of yet another SORN violation, the General Assembly has naturally provided for a mandatory three-year sentence.

The General Assembly has specifically indicated that this mandatory sentence is *in addition to* any other penalty provided by law. Under the "[i]n addition to" language, the General Assembly is indicating in plain language that the penalties otherwise applicable to third-degree felonies remain applicable and can be imposed.

In the interest of aiding this Court's review, amicus curiae OPAA offers the present brief in support of the appellee and in support of the Fifth District's decision.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history set forth in the State's brief and in paragraphs two through eight of the Fifth District's decision.

ARGUMENT

Amicus Proposition of Law: When a statutory provision imposes a mandatory penalty "in addition to" penalties created by other provisions, the mandatory penalty is supplemental to, and additional to, the other penalties.

Under the plain text of these statutory provisions, the three-year mandatory sentence is "in addition to" the range of penalties available as to third-degree felonies generally. As a result, the sentencing court was authorized to impose the mandatory three-year sentence *and* to impose the additional sentence of nine months as selected from the range of available terms for the third-degree felony.

A.

It is undisputed that the defendant's duty to register arose from his prior third-degree felony conviction for unlawful sexual conduct with a minor. It is also undisputed that the defendant had been previously convicted for a SORN violation.

With the prior SORN conviction, the defendant was subject to R.C. 2950.99(A)(1)(b)(ii), which placed his current SORN violation at the same felony degree as the most-serious sexually oriented offense underlying the duty to register.

> (b) If the offender previously has been convicted of or pleaded guilty to, or previously has been adjudicated a delinquent child for committing, a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code, whoever violates a

> prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code shall be punished as follows:
>
> * * *
> (ii) If the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is a felony of the first, second, or third degree if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address, or address verification requirement that was violated under the prohibition * * *.

By this provision alone, the defendant's current SORN-violation conviction was subject to sentencing as a third-degree felony, given that the most-serious sexually oriented offense underlying his duty to register was a third-degree felony for unlawful sexual conduct. Paragraph (A)(1)(b)(ii) specifies that the defendant "shall be punished" for the third-degree felony. This designation triggered the applicability of R.C. 2929.14(A)(3)(b), under which "a definite term of nine, twelve, eighteen, twenty-four, thirty, or thirty-six months" may be imposed. In the present case, the sentencing court imposed a nine-month term pursuant to this provision.

R.C. 2950.99 nevertheless goes on to impose an additional mandatory penalty of three years, which is stated to be "[i]n addition to" what is already provided in paragraph (A)(1)(b)(ii). As stated in R.C. 2950.99(A)(2)(b):

> (b) In addition to any penalty or sanction imposed under division (A)(1)(b)(i), (ii), or (iii) of this section or any other provision of law for a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code, if the offender previously has been convicted of or

> pleaded guilty to, or previously has been adjudicated a delinquent child for committing, a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code when the most serious sexually oriented offense or child-victim oriented offense that was the basis of the requirement that was violated under the prohibition is a felony if committed by an adult or a comparable category of offense committed in another jurisdiction, the court imposing a sentence upon the offender shall impose a definite prison term of no less than three years. The definite prison term imposed under this section, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, shall not be reduced to less than three years pursuant to any provision of Chapter 2967. or any other provision of the Revised Code.

As can be seen, the three-year term provided in paragraph (A)(2)(b) is expressly stated to be "[i]n addition to" paragraph (A)(1)(b)(ii) and "*any* penalty or sanction imposed" thereunder, and, likewise, is expressly stated to be "[i]n addition to" any penalty or sanction imposed under "*any* other provision of law". (Emphasis added). Under these terms, the mandatory definite term of three years is readily understood to be an additional penalty over and above what paragraph (A)(1)(b)(ii) already provided for in terms of the range of third-degree felony prison terms.

By itself, the phrase "[i]n addition to" signals that the three-year term is additional or supplemental to what is elsewhere provided. See *Colonial Mtge. Serv. Co. v. Southard*, 56 Ohio St.2d 347, 349 (1978) ("the two conditions are joined by an 'and,' meaning 'in addition to'"). For example, when a statute provides that a forfeiture can be ordered in addition to any other punishment under R.C. Chapter 2929, then such language "means that a verdict of forfeiture can be imposed in addition to any sentence authorized as punishment for a criminal offense pursuant to R.C. Chapter 2929." *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908, ¶ 31. The phrase "in addition to" means

"over and above; besides", and, when discussing a penalty, "in addition to" means that the described penalty applies "over and above" the penalty provided in another provision. *Heritage Farms, Inc. v. Markel Ins. Co.*, 316 Wis.2d 47, 762 N.W.2d 652, ¶19 (2009).

The phrase "any penalty or sanction" also gives this provision an expansive meaning and broad reach as well. "Any" means "all", i.e., "without limitation". *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40 (1948). "The word *any* excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904).

In *Risner v. Ohio Dept. of Natural Resources*, 144 Ohio St.3d 278, 2015-Ohio-3731, ¶ 18, this Court addressed the statutory phrase "any other section of the Revised Code" and emphasized that the word "'[a]ny' means 'all'" and that such "broad, sweeping language" must be accorded "broad sweeping application."

In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 33, the Court addressed the phrase "any criminal offense" and recognized that, "Given the General Assembly's use of the term 'any' in the phrase 'any criminal offense,' we presume that it intended to encompass 'every' and 'all' criminal offenses recognized by Ohio."

In *Wachendorf*, the Court addressed the phrase "any territory" and held that "'any territory' as used in the statute means any or all territory, and that the Legislature intended to include not only unplatted but platted lands as well * * *. To hold otherwise would be usurping the prerogative of the legislative branch of government. In other words, we would be compelled to delete the word 'any' before the word 'territory' and substitute therefor the word 'unplatted.'" *Wachendorf*, 149 Ohio St. at 240. Placement of such a limitation would be for "the legislative and not the judicial branch of government." Id.

The defendant posits that "any penalty or sanction" may have been referring to only non-prison penalties and sanctions available for third-degree felonies generally. But the word "any" negates any such reading, as the prison penalty for third-degree felonies under R.C. 2929.14(A)(3)(b) would also qualify as "any penalty or sanction", making the three-year mandatory term "[i]n addition to" the range of third-degree felony prison terms available generally.

In combination, the phrases "[i]n addition to" and "any penalty or sanction" are deployed to give the mandatory three-year definite term the widest possible reach as a *supplemental* penalty. It must be considered additional to, i.e., over and above, *any* other penalty provided in *any* other law for the offense.

"Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so * * *." *Brogan v. United States*, 522 U.S. 398, 408 (1998). Criminal statutes must be "read as broadly as they are written * * *." Id. at 406-407. "[I]t is not the role of the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 61.

B.

The defendant would likely argue that this penalty provision must be strictly construed. To be sure, R.C. 2901.04(A) provides that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." But the meaning of a particular provision is often plain so that no construction is needed in the context in which it would be applied.

Moreover, the existence of ambiguity requiring construction does not mean that

the defense automatically prevails. The rule of strict construction, otherwise known as the rule of lenity, does not require that the defendant prevail in every instance of statutory ambiguity.

C.

"Strict construction" is inappropriate here because no construction is needed. The rule of lenity does not apply when the statute is unambiguous. *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, ¶ 35.

"It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent." *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105 (1973). "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. * * * The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact." *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraphs one and two of the syllabus.

"[I]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Lingle v. State*, 164 Ohio St.3d 340, 2020-Ohio-6788, ¶ 15 (quoting another case). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *State v. Reed*, 162 Ohio St.3d 554, 2020-Ohio-4255, ¶ 17 (internal quote marks omitted).

"Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the

syllabus. "An unambiguous statute is to be applied, not interpreted." Id. "We apply a statute as it is written when its meaning is unambiguous and definite. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 9 (citations omitted).

"We have held that a court may not add words to an unambiguous statute, but must apply the statute as written." Id. at ¶ 15. If "[t]he statute does not limit its reach," then courts should not do so. Id. at ¶¶ 10, 15. "In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127 (1969). "We have long recognized that neither administrative agencies nor this court 'may legislate to add a requirement to a statute enacted by the General Assembly.'" *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, ¶ 15. "[C]ourts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347 (1994).

The General Assembly's combined use of "[i]n addition to" and "any" language precludes the narrow reading that the defendant would pursue here. Defendant's three-year mandatory term is "in addition to" *any* other penalty provided in *any* other statute.

D.

Even when a potential or actual ambiguity exists, the concept of "strict construction" still does not require that the provision be construed in favor of the criminal defendant.

The mere existence of real or possible "ambiguity" does not mean that the defendant prevails. "[T]his Court has never held that the rule of lenity automatically permits a defendant to win." *Muscarello v. United States*, 524 U.S. 125, 139 (1998). Even when the statutory language is "ambiguous," the statutory text still must be *fully* analyzed in the effort to construe it.

Strict construction is not necessary "merely because it [is] possible to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 498 U.S. 103, 108 (1990). "[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute * * *." *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012).

Strict construction "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Chapman v. United States*, 500 U.S. 453, 463 (1991) (internal quotation marks and brackets omitted).

"[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what [the legislature] intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013) (quoting another case). "Only where the language or history of [the statute] is uncertain after looking to the particular statutory language, the design of the statute as a whole and to its object and policy, does the rule of lenity serve to give further

guidance." Id. at 76 (quoting in part another case; ellipses omitted).

"We have used the lenity principle to resolve ambiguity in favor of the defendant only 'at the end of the process of construing what [the legislature] has expressed' when the ordinary canons of statutory construction have revealed no satisfactory construction." *Lockhart v. United States*, 577 U.S. 347, 361 (2016). Only a grievous ambiguity or uncertainty that remains at the end of the interpretive process would trigger the application of the rule of lenity. *Salman v. United States*, 137 S.Ct. 420, 429 (2016). The mere "arguable" application of a canon of statutory construction does not create a grievous ambiguity. *Lockhart*, 577 U.S. at 361 ("the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity").

As this Court likewise has emphasized, the rule of lenity "comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers". *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 40 (quoting another case). "The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly." *State v. Sway*, 15 Ohio St.3d 112, 116 (1984). "[A]lthough criminal statutes are strictly construed against the state, they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 20 (citation omitted). "[S]trict construction is subordinate to the rule of reasonable, sensible and fair construction according to the expressed

legislative intent, having due regard to the plain, ordinary and natural meaning." *In re Clemons*, 168 Ohio St. 83, 87-88 (1958).

As discussed above, a fair reading of the "[i]n addition to" and "any" language of R.C. 2950.99(A)(2)(b) leads to the conclusion that the General Assembly intended to provide for an additional, cumulative punishment for recidivist felony SORN offenders for whom this would be their "third strike". The offender failed to learn from earlier violations and punishments, and now, having committed yet another violation, they warrant such punishment in addition to what is imposed pursuant to other provisions. The imposition of this mandatory penalty as an additional penalty aligns perfectly with the evident legislative purpose of punishing these recidivist offenders.

E.

Under the defendant's argument, the three-year mandatory sentence under R.C. 2950.99(A)(2)(b) is merely a sentence that is selected from amongst the options otherwise applicable for third-degree felonies. The defendant is apparently arguing that, when the court imposes the three-year mandatory term, it already is imposing a term from the range applicable to third-degree felonies so that there is no room to impose a second term from that range. But the General Assembly knows how to reference the otherwise-applicable sentencing range as being the source for a mandatory sentence. It has done so in various statutes, most notably in mandatory drug sentencing, specifying that the mandatory sentence is selected from the otherwise-applicable sentencing range. See, e.g., R.C. 2925.03(C) (multiple instances); R.C. 2925.03(C)(1)(d) ("court shall impose as a mandatory prison term a first degree felony mandatory prison term."); R.C. 2925.11(C) (multiple instances); R.C. 2925.11(C)(1)(c) ("court shall impose as a

mandatory prison term a second degree felony mandatory prison term."); R.C. 2925.11(C)(11)(d) ("court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree."); see, also, R.C. 2903.04(D)(2) ("court shall impose a mandatory prison term for the violation of division (A) or (B) of this section from the range of prison terms authorized for the level of the offense under section 2929.14 of the Revised Code."); R.C. 2907.05(C)(3) ("A mandatory prison term required under division (C)(2) of this section shall be a definite term from the range of prison terms provided in division (A)(3)(a) of section 2929.14 of the Revised Code for a felony of the third degree."); R.C. 2921.36(G)(1) & (G)(2) ("court shall impose a mandatory prison term from the range of definite prison terms prescribed in division (A)(3)(b) of section 2929.14 of the Revised Code for a felony of the third degree.").

In addressing the sentencing of recidivist SORN offenders in R.C. 2950.99(A)(1)(b)(ii) and (A)(2)(b), the General Assembly very easily could have indicated that the mandatory definite three-year sentence set forth in paragraph (A)(2)(b) was merely its selection from the otherwise-applicable sentencing range and was not a sentence that was additional to that range. "It is apparent that the General Assembly knows how to use these words when it so chooses." *Indep. Ins. Agents v. Fabe*, 63 Ohio St.3d 310, 314 (1992). But here the General Assembly failed to use such language, and the failure to use that common legislative device in providing for this mandatory sentence confirms that it was setting forth an additional term that was over and above the otherwise-existing range, not a part of it.

F.

Moreover, if these phrases – "[i]n addition to" and "*any* penalty or sanction" – are

not given their fair meaning, then they fail to have operative effect in allowing an *additional* penalty over and above what was otherwise already provided. It must be kept in mind that "[a] basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.'" *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26, quoting *E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 299 (1988). The statute "must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 372-73 (1917). Because it is presumed that "every word in a statute is designed to have *some* effect," every part of the statute "shall be regarded." *Ford Motor Co. v. Ohio Bureau of Employment Services*, 59 Ohio St.3d 188, 190 (1991) (emphasis sic). "[I]t is the duty of courts to accord meaning to each word of a legislative enactment if it is reasonably possible so to do. It is to be presumed that each word in a statute was placed there for a purpose." *State ex rel. Bohan v. Indus. Comm.*, 147 Ohio St. 249, 251 (1946).

Under the defendant's logic, the "addition[al]" three-year term under paragraph (A)(2)(b) is not "additional" at all, and not over and above. Instead, it is merely a part of the range for third-degree felonies.

G.

While the defendant cites appellate cases in contending that R.C. 2950.99(A)(2)(b) is limited to setting forth a "mandatory minimum", most of these cases

did not address – and had no reason to address – the issue of additional punishment presented here. *State v. Harris*, 2020-Ohio-154, 141 N.E.3d 996 (12th Dist.) (defendant challenging imposition of mandatory three-year term; no claim that additional punishment allowed beyond that term); *State v. Smithhisler*, 2017-Ohio-5725, 93 N.E.3d 1274, ¶ 21 (5th Dist.) (same); *State v. Koch*, 5th Dist. No. 16-CA-16, 2016-Ohio-7926 (same); see, also, *State v. Barnes*, 9th Dist. No. 13CA010502, 2014-Ohio-2721 (State's appeal; no claim that additional punishment allowed beyond mandatory three-year term); *State v. Ashford*, 2d Dist. No. 23311, 2010-Ohio-1681 (mandatory term inapplicable to first-time F-1 SORN violator); *State v. Littlejohn*, 8th Dist. No. 103234, 2016-Ohio-1125, ¶ 19 (mandatory term inapplicable).

These decisions have no bearing on the issue presented here. Appellate courts decide only what they *expressly* decide. A decision does not constitute firm precedent on a particular issue unless it "squarely addresses" that issue. See *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, ¶ 17 (plurality – "because *Genaro* did not squarely address the immunity question at issue here, it is not binding authority"). "When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises." *O'Keeffe v. McClain*, 166 Ohio St.3d 25, 2021-Ohio-2186, ¶ 14 n. 2 (quoting another case). When "certain claims were not actually litigated and determined by this court in earlier decisions, those decisions [are] not binding precedent as to those claims". Id.

An appellate decision does not necessarily address every possible issue, since issues often lurk in the record and are not necessarily decided by the court. *Webster v.*

Fall, 266 U.S. 507, 511 (1925). Mere implicit assumptions are not binding precedent. *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 146 Ohio St.3d 356, 2016-Ohio-2806, ¶ 39. The "perceived implications" of an earlier decision are not precedential when the court in question did not "definitively resolve" the issue that is now directly presented in a later case. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶¶ 10-12; see, also, *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, ¶ 6 (earlier decision "never addressed the discrete issue presented here"); *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129 (1952), paragraph one of the syllabus; *B.F. Goodrich v. Peck*, 161 Ohio St. 202 (1954), paragraph four of the syllabus.

One appellate court did mention the issue now being presented here, contending that the sentence for a third-degree-felony recidivist SORN offender would be limited to the three-year mandatory sentence. *State v. Prisby*, 11th Dist. No. 2017-P-0012, 2017-Ohio-9340, ¶¶ 22-30. But, as the Fifth District recognized below, the *Prisby* discussion was dicta, especially when coupled with the *Prisby* court's further recognition that the prosecutor had not cross-appealed on that issue. *Ashcraft*, ¶ 29. Absent a cross-appeal by the State, there would have been no appellate jurisdiction to address the failure to impose an additional sentence from the third-degree felony sentencing range.

The *Prisby* court mentioned that the three-year mandatory term in R.C. 2950.99(A)(2)(b) is a specific sentencing provision that would control over the otherwise-applicable range for third-degree felony sentences. *Prisby*, ¶ 23. To be sure, the mandatory three-year sentencing provision would be considered specific. But it is also true that the "specific" versus "general" analysis only matters if the legislature has not otherwise indicated how the specific provision can be harmonized with the general

provision. "[W]here a general and a special provision cover the same conduct, the legislature may expressly mandate that such provisions are to run coextensively." *State v. Chippendale*, 52 Ohio St.3d 118, 122 (1990). Specific and general provisions "shall be construed, if possible, so that effect is given to both." R.C. 1.51. "When we construe statutes relating to the same subject matter, we consider them together to determine the General Assembly's intent – even when the various provisions were enacted separately and make no reference to each other." *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, ¶ 8. "This requires us to harmonize provisions unless they irreconcilably conflict." Id. "In doing so, 'we must arrive at a reasonable construction giving the proper force and effect, if possible, to each statute.'" Id. "This court in the interpretation of related and co-existing statutes must harmonize and give full application to all statutes concerning the same subject matter unless they are irreconcilable and in hopeless conflict." *State v. Pribble*, 158 Ohio St.3d 490, 2019-Ohio-4808, ¶ 12 (plurality; internal quote marks, ellipses, and brackets omitted).

In the present case, the General Assembly has provided that the specific provision is supplemental to, and additional to, the general provisions governing third-degree felonies. As a result, the specific and general provisions can be harmonized, and there is no conflict in applying both. It would violate the legislative intent to conclude that the "specific" has a controlling effect over the "general", when both are meant to apply pursuant to the "[i]n addition to" language of the statutory scheme. "[W]e can harmonize the statutes; no one provision need prevail over the others." *South*, ¶ 7.

H.

Finally, a plain-error standard of review hampers the defendant's efforts here. As

the Fifth District recognized, the defense had not objected to the sentencing.

"The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review. The rule is of long standing, and it goes to the heart of an adversary system of justice." *State v. Murphy*, 91 Ohio St.3d 516, 532 (2001). The longstanding waiver rule is "strict." *State v. Long*, 53 Ohio St.2d 91, 96 (1978).

The plain-error standard applies to claims of unobjected-to sentencing error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶ 22.

"In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings." *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶19; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶9. Although an issue is forfeited through lack of objection, Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). But "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long*, paragraph three of the syllabus.

"The power afforded to notice plain error, whether on a court's own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then." Id. at 94. As stated in *State v. Campbell*, 69 Ohio St.3d 38, 41 n. 2 (1994), "[o]ur cases make clear that we will not *overturn* a conviction for alleged error not raised below, unless it amounts to plain error." (Emphasis *sic*). "[T]he lack of a 'plain' error within the meaning of Crim.R. 52(B) ends the inquiry and *prevents recognition of the defect*." *State v. Barnes*, 94 Ohio St.3d 21, 28 (2002) (emphasis added).

In *Barnes*, this Court stated that the plain-error analysis begins with three criteria: (1) there must be "a deviation from a legal rule"; (2) the defect must be "'obvious'"; and (3) the error "must have affected the outcome of the trial." To be "obvious", the error must have been "'plain' at the time that the trial court committed it." *Barnes*, 94 Ohio St.3d at 28; *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, ¶ 112.

Even if the error satisfies the first three prongs, there is still discretion for the appellate court to decline to afford relief.

> Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. Crim.R. 52(B) states only that a reviewing court "may" notice plain forfeited errors; a court is not obliged to correct them. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

Barnes, 94 Ohio St.3d at 27-28 (citations omitted).

This defendant's forfeited claim of a sentencing error would fail under the first two prongs of the test. As indicated, the defendant cannot show that the sentencing here deviated from law, as the statutory language authorized the three-year mandatory sentence "[i]n addition to" a term that would be imposed pursuant to the sentencing range for third-degree felonies. Even more so, the defendant falls far short of demonstrating the kind of error that was "obvious" at the time it was committed so as to warrant relief under the plain-error standard of review. The plain meaning of "in addition to" stands in diametric opposition to the notion that there was any "obvious" error here.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court affirm the judgment of the Fifth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on May 24, 2022, to the following counsel of record: Charles T. McConville, Knox County Prosecuting Attorney, 117 East High Street, Suite 234, Mount Vernon, Ohio 43050, prosecutor@co.knox.oh.us, counsel for plaintiff-appellee; Todd W. Barstow, 261 West Johnstown Road, Ste. 204, Columbus, Ohio 43230, toddbarstowatty@att.net, counsel for defendant-appellant.

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