IN THE
SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff- Appellant,	:	Case No. 2023-0654
	:	
v.	:	Appeal from the Hamilton
	:	County Court of Appeals,
TOMMY GLOVER,	:	First Appellate District
	:	Case No. C-220088
Defendant-Appellee.	:	

BRIEF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER, *ET AL.*, IN SUPPORT OF DEFENDANT-APPELLEE TOMMY GLOVER

Melissa A. Powers (0055409P)
Hamilton County Prosecuting

Attorney Paula E. Adams (0069036P)
Assistant Prosecuting Attorney
(Counsel of Record)
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3228
Fax No. (513) 946-3021
paula.adams@hcpros.org

Counsel for Plaintiff-Appellant the State of Ohio

Kimberly E. Burroughs (0095694)
Assistant State Public Defender
Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
Fax (614) 752-5167
Kimberly.Burroughs@opd.ohio.gov

Counsel for Defendant-Appellee Tommy Glover

CULLEN SWEENEY
Cuyahoga County Public Defender

By: Robert McCaleb (0094005)
Erika B. Cunliffe (0074480)
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland Ohio 44113
(216) 698-3207
rmccaleb@cuyahogacounty.us
ecunliffe@cuyahogacounty.us

Counsel for Amicus Curiae the Cuyahoga County Public Defender's Office in support of Appellee Tommy Glover

RUSSELL S. BENSING (0010602)
1360 East Ninth Street
600 IMG Building
Cleveland, Ohio 44114
(216) 241-6650 (telephone)
(216) 241-5464 (facsimile)
rbensing@ameritech.net

Counsel for Amicus Curiae Ohio Association of Criminal Defense Attorneys in support of Appellee Tommy Glover

Dave Yost
Attorney General of Ohio
Michael J. Hendershot (0081842)
Chief Deputy Solicitor General
Stephen P. Carney (0063460)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
Fax (614) 466-5087
Stephen.carney@ohioago.gov

Counsel for amicus curiae Attorney General Dave Yost

David H. Hoffmann
Appellate Trial Counsel
Hamilton County Public Defender
230 E 9th St, 2nd Floor
Cincinnati, Ohio 45202
Phone: (513) 946-3876
dhhoffmann@hamiltoncountypd.org

Counsel for Amicus Curiae the Hamilton County Public Defender's Office in support of Appellee Tommy Glover

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STATEMENT OF INTEREST OF AMICI CURIAE

The Offices of the Cuyahoga and Hamilton County Public Defenders were established to provide legal services to indigent adults and children charged with violations of the Ohio Revised Code. Between them they represent almost half of all indigent felony defendants in the State of Ohio. Under the circumstances, the Offices constitute the largest sources of criminal legal representation in this State. The Offices see the issues discussed herein too frequently in their respective counties and anticipate that this Court's scrutiny of Mr. Glover's case will help rectify the concerns discussed herein.

The Ohio Association of Criminal Defense Lawyers (OACDL), founded in 1986, is a professional association with more than five hundred members in the State of Ohio. OACDL is among the largest professional organizations of criminal practitioners in Ohio, and advocates for criminal laws and policies that are consistent with constitutional principles, limited governmental intrusion into the lives of Americans, and a free society.

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts as articulated in Appellee's brief.

ARGUMENT

When determining whether the record clearly and convincingly does or does not support the trial court's imposition of consecutive sentences under R.C. 2929.14(C)(4), the reviewing court must consider the total length of the sentence imposed.

A. Introduction.

In R.C. 2929.14, the General Assembly instructs judges to *think* about consecutive sentences, to determine—based on enumerated statutory criteria—whether their imposition is warranted and to what extent, and then to announce their decisions through findings that can be reviewed. It does *not* instruct judges to ask their bailiffs to automatically populate an electronically generated form journal entry with the push of a button.

And yet, all too often, that appears to be what happens. Experience on the ground, in your Amici's experience anyway, amply demonstrates that trial judges frequently parrot the statutory language, print out a technically compliant journal entry, and call it a day. Many times, in fact, "findings" are announced in a journal entry—especially findings under the three prongs in R.C. 2929.14(C)(4)(a) through (c), which provide all three independently sufficient requisite (C)(4) elements—even when one, two, or all of them have no discernible basis in the record. But the form JE has the findings, and so out they go. With judging like that, who needs ChatGPT?

What this suggests is that trial courts are robotically obeying the letter of the law while ignoring its rational, sensible (and, by the way, unambiguous) spirit. What it reveals is the need for a failsafe, in the form of appellate review—real, meaningful appellate review. Too narrow an interpretation of R.C. 2929.14(C)(4)—like what the government seeks here—would do just the opposite.

Requiring careful, iterative consideration of proportionality at each subsequent addition of a consecutive term would ensure that the punishment fits the crime(s)—that it was "not disproportionate to the seriousness of the * * * conduct and to the danger * * * to the public," to borrow the statute's parlance. Accordingly, no one is saying that trial court must impose all sentences concurrently. There may be circumstances where an offender's conduct warrants the imposition of some consecutive sentences. But proportionality principles need to guide the court so that it is forced to contemplate the significance of multiple terms that may aggregate to something akin to a sentence of life without parole.

Allowing trial courts to exercise virtually unbounded discretion—so long, that is, as the proper incantations are pronounced—clearly what the government is asking for—betrays both the broader principle of just deserts and the specific, unambiguous requirement from the General Assembly that consecutive sentences be "not disproportionate." In short, it would be bad for society, with no apparent payoff; a bad investment. We explain further herein why that is the case.

B. The imposition of consecutive sentences should be legitimately reviewable.

Adopting a standard such as what the government proposes would effectively make the imposition of consecutive sentences unreviewable on appeal. That is to say, if trial courts are not required to consider the proportionality of an aggregate sentence when imposing consecutive terms, there is no practicable or even intelligible way to satisfy the General Assembly's direction to determine whether a sentence is or is "not disproportionate." This alone provides reason to reject the government's proposition of law.

Of course, if a given sentence or determination is effectively unreviewable, then a trial court's violation of the statute mandating the determination or circumscribing the sentence can be ignored or misapplied with impunity. This, it need hardly be said, is bad for the rule of law and the public's perceptions of the courts specifically or the legal system broadly.

It is also implausible to imagine that the General Assembly intended this result when it wrote R.C. 2929.14. *See* Model Penal Code ("MPC") Section 1.02 (2)(c)-(e) (the general purposes of sentencing include avoiding "disproportionate * * * punishment," giving "fair warning of the nature of sentences that may be imposed," and "differentiat[ing] among offenders"); MPC Section 7.06, Explanatory Note (referring to "two basic principles: that the choice between consecutive and concurrent sentences is one that should be left to the court, *and* that a reasonable limit should be set on the extent to which multiple sentences can be cumulated" (emphasis supplied)); *State v. Brooks*, 44 Ohio St.3d 185, 190-191, 542 N.E.2d 636 (1989) (Model Penal Code served as the basis for the Ohio Revised Code).

As one scholar put it, sentencing structures should always be "justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials, judges or others." Marvin Frankel, *Criminal Sentencing: Law without Order*, 5 (1973); *see also id*. at 9-11, 17-23, 98-102. According to Judge Frankel, "[t]he evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete out widely divergent sentences where the divergences are explainable only by the variations among the judges[.]" *Id*. at 17-23.

This concern is not new—Blackstone worried about it in the 1760s. *See* Blackstone, *Commentaries on the Lawes of England*, Vol. IV, "Of Public Wrongs," § 29.371 (Among the "glories of our English law" is that sentences are not "the private opinions of the judge," since that would make "men * * * slaves to their magistrates."). The common law indeed did not countenance consecutive sentences at all. *See, e.g.*, *Rex v. Benfield*, 97 Eng. Rep. 664 (K.B. 1760) (sentences naturally ran concurrently when defendant was convicted of singing various bawdy, libelous songs about the prosecutor). This stemmed from the proportionality requirement in Magna Charta in 1215. ("A free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense; and for a serious offense he shall be amerced according to its gravity.").

The idea of appellate review is to prevent arbitrary sentencing practices. The government's proposition of law in this case, on the other hand, apparently seeks to nurture it. But "a regime of substantially limitless discretion is by definition arbitrary, capricious, and antithetical to the rule of law." *Frankel,* at 102. Vagaries and unpredictable outcomes—like those permitted by an unreviewable standard for the imposition of consecutive sentences—work to "seriously affect the deterrent value of criminal sanctions." Twentieth Century Fund, Task Force on Criminal Sentencing, *Fair and Certain Punishment*, 33 (Dershowitz, Alan, 1976).

C. Ensuring sentencing review will preserve R.C. 2929.14(C)(4)'s proportionality consideration requirement.

R.C. 2929.14(C)(4) tells the sentencing court to balance a case's aggravating and mitigating circumstances and to impose a prison term that is both proportionate to the severity of the underlying misconduct and consistent with the sentences imposed on similarly situation offenders. Rendering that balancing act unreviewable allows for

improbable, shocking outcomes in which defendants who have caused no physical injuries receive sentences that are effectively longer than those imposed on cold-blooded murderers or child molesters. Sentences in cases like this one, or *Gwynne*, or *State v. Polizzi*, 166 Ohio St.3d 1504, 2022-Ohio-0164, 187 N.E.3d 552, are longer than the average non-death sentences meted out at *Nuremberg* for war atrocities. But "a civilized society locks up [seriously dangerous or unrepentant criminals] until age makes them harmless, but it does not keep them in prison until they die." *United States v. Jackson*, 835 F.2d 1195 (1987) (Easterbook, J.).

Plus, treating crimes—even crime sprees—that result in no physical injury more severely than the agreed worst offenses—purposeful homicide and child sexual abuse—serves to cheapen those latter, worst offenses. At bottom, if we sentence a child molester to 15-years-to-life but a spree carjacker who physically hurts nobody to more than sixty years without the possibility of parole at any point, are we not suggesting that serial carjackings are worse than child rape or other cases involving serious physical harm? And, in so suggesting, are we not deeply, terribly mistaken?

CONCLUSION

For the foregoing reasons *amici curiae* the Offices of the Cuyahoga and Hamilton County Public Defender and the Ohio Association of Criminal Defense Lawyers respectfully urge this Court to reject the government's proposition of law and affirm the decision of the court of appeals.

Respectfully submitted,

/s/ Robert B. McCaleb
ROBERT B. McCALEB

/s/ Erika B. Cunliffe
ERIKA B. CUNLIFFE

Assistant Public Defenders
Counsel for *amicus* the Cuyahoga County
Public Defender's Office

/s/*Russell S. Bensing*
Counsel for *amicus* the Ohio Association of
Criminal Defense Lawyers

/s/ *David H. Hoffmann*
Appellate Trial Counsel
Hamilton County Public Defender
Counsel for *amicus* the Hamilton County
Public Defender's Office

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2023, the foregoing Brief of *Amici Curiae* the Offices of the Cuyahoga and Hamilton County Public Defenders and the Ohio Association of Criminal Defense Lawyers in Support of Appellee Tommy Glover was served by email to counsel for the parties and *amici* at the email addresses indicated on the cover of this document.

/s/ *Erika B. Cunliffe*
ERIKA B. CUNLIFFE
Assistant Public Defender