In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2024-0312
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE LAKE
v.	}	COUNTY COURT OF APPEALS
	}	ELEVENTH APPELLATE DISTRICT
ANTHONY J. POLIZZI,	}	
	}	COURT OF APPEALS CASE NO. 2020-L-016
Defendant-Appelland.	}	and 2020-L-017

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

RUSSELL S. BENSING (0010602)
377B Lear Rd., Suite 121
Avon Lake, OH 44012
(216) 241-6650
rbensing@ameritech.net

COUNSEL FOR *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

MARK R. DEVAN (0003339) (counsel of record) mdevan@bgmdlaw.com
WILLIAM C. LIVINGSTON (0089538)
Wlivingston@bgmdlaw.com
BERKMAN, GORDAN, MURRAY & DeVAN
55 Public Square, Suite 2200
Cleveland, OH 44113
(216) 781-5245

COUNSEL FOR APPELLANT

CHARLES E. COULSON (0008667)
Lake County Prosecuting Attorney

TERI DANIEL (0082157) (counsel of record)
teri.daniel@lakecounty.gov
Assistant Prosecuting Attorney
Administration Building
105 Main Street, P.O. Box 490
Painesville, OH 44077
(440) 350-2683
COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to promote the rights of criminal defendants through the legislative and judicial process.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellee.

LAW AND ARGUMENT

PROPOSITION OF LAW NO 1: Trial and appellate courts must consider the overall number of consecutive sentences and the aggregate sentence while imposing or reviewing consecutive sentences.

Overview of Argument. In the twenty-two years since this Court declared in *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, ¶10, that a defendant is entitled to "meaningful" appellate review of his sentence, those words remain more an aspiration than a reflection of reality. As the Brief of Appellant and the *Amicus* Brief of the Public Defenders recount in detail, defendants in Ohio are subject to wildly disparate sentences for virtually the same conduct,

depending upon what county they committed the crime in or what judge they drew in the arraignment room.

Much of that is due to the imposition of consecutive sentences. While there is a four-fold variance in the penalty range for a second-degree felony, for example, that is still a difference of only six years. But the situation with consecutive sentences is an entirely different matter. "Maxing and stacking" of sentences can lead to egregiously excessive prison terms.

This case presents the Court with the opportunity to provide clear guidance for both trial and appellate courts in imposing and reviewing consecutive sentences. While the issue here is a narrow one – whether an appellate court may consider the aggregate sentence in determining whether a trial court's consecutive sentences are clearly and convincingly unsupported by the record – resolution of that issue necessarily involves a consideration of the broader aspects of sentencing.

Your *Amicus* asserts that a rational sentencing scheme would involve the following precepts. First, while the defendant is entitled to a meaningful review of a sentence, the trial court should retain a broad discretion in sentencing, and its decision in that regard should be given substantial deference by the appellate court. Second, the legislature has limited the trial court's discretion in imposing consecutive sentences, and an appellate court's function in reviewing those sentences should be consistent with the legislature's expressed policy. Third, while uniformity in sentences is not necessary, consistency in sentencing is, and the appellate courts serve a valuable function in ensuring that. Finally, in determining whether a consecutive sentence is consistent with those handed down in similar cases, the aggregate length of the sentence must be considered.

1. The trial court's discretion in sentencing. *Comer, supra*, is not alone in articulating

the view that a defendant is entitled to "meaningful" review of his sentence; that position has been echoed by virtually every district court of appeals. S*tate v. Bratton*, 2013-Ohio-3293, ¶8 (6th Dist.); *State v. Flick,* 2008-Ohio-157, ¶7 (3rd Dist.); *State v. Jones,* 2005-Ohio-3784, ¶9 (10th Dist.); *State v. Elswick*, 2006-Ohio-7011, ¶49 (11th Dist.) (right to "effective and meaningful appellate" not affected by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470).

But that right of review is not unlimited. As the court explained in *State v. Roberts*, 2017-Ohio-9014 (8th Dist.), ¶19, "'Meaningful review' of a sentence does not mean an appellate court reverses every sentence it disagrees with; it means the appellate panel considers the arguments advanced as applied through the lens of the law." The appellate court's review of consecutive sentences is guided by the statutes, specifically 2953.08(G)(2)(a); as *Comer* put it, "'Meaningful review' means that an appellate court hearing an appeal of a felony sentence may modify or vacate the sentence and remand the matter to the trial court for resentencing if the court clearly and convincingly finds that the record does not support the sentence or that the sentence is otherwise contrary to law." ¶10.

Indeed, trial courts have historically enjoyed broad discretion in sentencing, for good reason. Judges have always considered two main factors – the nature of the offense and the nature of the offender – in determining a sentence. Those factors are codified in R.C. §2929.12: subsections (A) and (B) deal with whether the harm is greater or less than the normal case; subsections (C) and (D) pertain to whether the defendant is more or less likely to recidivate.

Whether through hearing the witnesses and evidence at trial or through sentencing impact statements and appearances by the victim, the trial judge is in a unique position to gauge the harm done to the victims and whether the defendant expresses genuine remorse for his crime.

Those determinations cannot be second-guessed by an appellate court, and this Court has been careful to safeguard the judge's discretion in that respect, holding that appellate courts may not consider those factors in reviewing a sentence. *Gwynne, supra* at ¶¶17-18; *State v. Jones,* 163 Ohio St.3d 242, 2020-Ohio-6729, ¶28.

2. Concurrent sentences are favored. While a trial court enjoys broad discretion in imposing a sentence for a single offense or concurrent ones for multiple offenses, that discretion is substantially curtailed for consecutive sentences. As this Court recognized in *State v. Bonnell,* 140 Ohio St.3d 209, 2014-Ohio-3177, ¶16, R.C. §2929.41 creates a presumption in favor of concurrent sentences. The legislature, through its enactment of R.C. §2929.14(C), requires a trial court to make certain findings before imposing consecutive sentences:

> **(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.

The legislature has also provided in R.C. §2953.08(G)(2) two methods of reviewing

consecutive sentences:

> 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.

On several occasions, this Court has noted that this section "provides the sole basis for an appellate court's review of consecutive sentences." *State v. Glover*, 2024-Ohio-5195 (S.Ct.), ¶40; *Gwynne, supra* at ¶16.

In the context of consecutive sentences, failure to make any of the three findings renders the sentence contrary to law.[1] *State v. Harris*, 2024-Ohio-5807 (8th Dist.); *State v. Halbert*, 2024-Ohio-2534 (12th Dist.); *State v. Mills*, 2022-Ohio-3866 (11th Dist.) (while court made first two findings, failure to make the third rendered the sentence contrary to law).

Theoretically, this would allow the appellate court to change the sentences to concurrent ones; R.C. §2953.08(G)(2), which provides that an appellate court may "increase, vacate, or *modify*"[2] a sentence that is "contrary to law," the membership of *Amicus* finds that such a result is a legal unicorn. Moreover, the same sentence usually results on remand; the customary

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[1] Obviously, "contrary to law" applies well beyond consecutive sentencing. Imposition of a prison sentence in excess of that permitted by statute would be one example.

[2] Although the section speaks of the appellate court's power to "increase" the sentence, the writer can say with great confidence that this has never happened.

response of trial judges is to impose consecutive sentences again, having been helpfully reminded by the appellate court of the steps they must take to do so.

But R.C. §2953.08(G)(2)(a) provides another method by which an appellate court may "increase, vacate, or modify" a sentence: if it "clearly and convincingly" finds that "the record does not support the sentencing court's findings." The wording is notable: the issue before the appellate court is not whether the findings are unsupported by the record, but whether the defendant has "clearly and convincingly" demonstrated that they are. The imposition of this burden of proof, the second highest known in the law, adequately safeguards the trial judge's ample discretion in sentencing, and precludes an appellate court from simply substituting its judgment for that of the lower court.

The legislature has declared a presumption in favor of concurrent sentences in R.C. §2929.41, and prescribed a method by which a trial judge can overcome that presumption in R.C. §2929.14(C)(4). Finally, it created a method for appellate courts to review consecutive sentences imposed by trial courts with R.C. §2953.08 if it finds that such a sentence is "clearly and convincingly… unsupported by the record."

And that is no easy task, given the nature of the findings. The first, whether consecutive sentences are necessary to protect the public or punish the offender, is exceedingly vague and comes close to entrenching upon the trial judge's superior ability to make those determinations. The (b) finding suffers the same infirmity: judging the severity of the harm is again generally entrusted to the trial judge. The two other findings there are factual: either a defendant is on parole, probation, or other judicial sanction when he commits the crime or he isn't, and much the same can be said for his criminal history.

3. The appellate courts serve a key function in determining whether consecutive

sentences are disproportionate. The second finding, whether consecutive sentences are not disproportionate to the seriousness of the offender's conduct *and* to the danger the offender poses to the public, is different.[3] We submit that the chief purpose of review of consecutive sentences is to allow the appellate courts to act as a "leveler" – to vacate or modify a sentence when it is clearly excessive. This is based not only on concerns about fairness, but also is in the societal interest. As the Supreme Court noted in *Gall v. United States*, 552 U.S. 38, 54 (2007), "a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."

This can be readily seen by the cases recounted by Appellant and *Amicus* Public Defenders. Anthony Polizzi is certainly not a sympathetic figure, but one has a hard time explaining why he should serve over three decades in prison while Barry Valentine, a music teacher who pleaded guilty to sixteen counts of sexual battery involving a fifteen-year-old student, should serve only one-tenth of the 80 years of imprisonment he faced. https://www.clevelan d.com/metro/2009/04/teacher_charged_with_sexual_as.html (last accessed 2/12/2025). And as the *Amicus* Public Defenders point out, the notion of proportionality in sentencing goes back thousands of years.

This presents another problem, though. Uniformity is not an attainable, or desirable, goal here: there are simply too many variables to allow courts to determine precisely what

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[3] Note an important distinction here. The first required finding is in the disjunctive: consecutive sentences may be imposed if the trial judge determines *either* that consecutive sentences are necessary to protect the public *or* to punish the offender. The second finding requires the trial judge to determine *both* that the sentence is not disproportionate to the offender's conduct *and* to the danger he poses to the public.

sentence should be meted out for a particular offense. Instead, the courts have held that "consistency in sentencing does not mean uniformity. Consistency accepts divergence within a range of sentences and takes into consideration the trial court's discretion to weigh statutory factors." *State v. Johnson*, 2024-Ohio-3237 (12th Dist.), ¶11.

Johnson and other cases then go on to hold that "a defendant claiming inconsistent sentencing must demonstrate that the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12." *Id. State v. Hoffman*, 2023-Ohio-2645 (11th Dist.), ¶11 ("consistency is accomplished by the trial court's application of the statutory sentencing guidelines"); *State v. Johnson*, 2024-Ohio-3237 (12th Dist.), ¶11 ("A consistent sentence is not derived from a case-by-case comparison, but from the trial court's proper application of the statutory sentencing guidelines").

This is problematic, because this Court in *Jones* and *Gwynne*, both *supra*, held that an appellate court cannot consider R.C. §2929.11 and §2929.12, which of course are the "statutory sentencing guidelines."

So what is an appellate court to do in reviewing the consistency of consecutive sentences in determining whether the sentences are clearly and convincingly unsupported by the record? *Amicus* respectfully suggests that the Court should revisit its conclusion with regard to the appellate court's application of R.C. §2929.11.

As we have noted, the trial court is in a superior position to gauge harm to the victim and the defendant's remorse or lack thereof and should not be second-guessed in its weighing of those facts. But the same does not apply to R.C. §2929.11: that section espouses broad principles of law that an appellate court is in just as good a position to analyze as a trial court. Moreover, it is in a better position to apply subsection (B)'s prescription that a sentence be

"consistent with sentences imposed for similar crimes upon similar offenders." A trial court may have a frame of reference of only the sentences it customarily imposes. An appellate court, on the other hand, possesses the institutional knowledge of the sentencing decisions of trial courts throughout the district.

The legislature has prescribed that an appellate court can review consecutive sentences to determine if they are "clearly and convincingly unsupported by the record." Gauging whether the sentence is consistent with others is critical to that determination.

4. In determining whether consecutive sentences are disproportionate, the aggregate sentence must be considered. In *State v. Glover*, *supra* at ¶44, a plurality of this Court held that "[n]owhere does the appellate-review statute direct an appellate court to consider the defendant's aggregate sentence." But the plurality's statement can be fairly read as a criticism of *how* the appellate court considered the aggregate sentence, rather than a bald declaration that a court can never do so. The Court noted that numerous failings of the lower court: it had determined that the victims were not *physically* harmed, ignoring the psychological trauma that normally flows from being held up at gunpoint, and it considered the State's plea offer before trial and sentencing recommendation after it, neither of which had any place in the determination of whether the sentence was "clearly and convincingly unsupported by the record."

Consecutive sentencing should not be viewed as a binary process, that once an appellate court determines that *some* consecutive sentence is warranted, *any* total consecutive sentence is permissible. Moreover, this is how the trial judge determines a sentence: by deciding what sentence he wishes to impose, then configuring the individual sentences to achieve that result. It would strain credulity to believe that a judge would craft individual sentences, then impose them consecutively, blithely unaware until that point of what the total prison sentence was. The

question here should not be whether consecutive sentences are clearly and convincingly unsupported by the record, but whether consecutive sentences totaling nearly thirty years in prison for Polizzi are clearly and convincingly unsupported by the record.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully prays the Court to vacate Appellant's sentence and to remand the case to the trial court for resentencing.

Respectfully submitted,

/s/Russell S. Bensing
Russell S. Bensing (0010602)
377B Lear Rd.
Suite 121
Avon Lake, OH 44012
(216) 241-6650
rbensing@ameritech.net

ATTORNEY FOR *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email.

/s/Russell S. Bensing
Russell S. Bensing