IN THE SUPREME COURT OF OHIO
SCT NO. 2024-0312

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	On Appeal from the Lake County Court of Appeals, Eleventh Appellate District Court of Appeals
v.	:	
ANTHONY J. POLIZZI, JR,	:	Court of Appeals Case Nos.: 2020-L-016, 2020-L-017
Defendant-Appellant.		

MERIT BRIEF OF *AMICI CURIAE* CUYAHOGA COUNTY PUBLIC DEFENDER, HAMILTON COUNTY PUBLIC DEFENDER, MONTGOMERY COUNTY PUBLIC DEFENDER, OHIO PUBLIC DEFENDER, & SUMMIT LEGAL DEFENDERS IN SUPPORT OF DEFENDANT-APPELLANT ANTHONY J. POLIZZI, JR.

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STATEMENT OF INTEREST OF AMICI CURIAE

The Cuyahoga, Hamilton, and Montgomery County Public Defender Offices were established to provide legal services to indigent adults and children charged with violations of the Ohio Revised Code. Summit Legal Defenders is a non-profit legal agency that serves as the public defender for Summit County. These localized agencies represent individuals from the charging stage through trial, conviction, appeal, and post-conviction.

The Office of the Ohio Public Defender (OPD) is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The primary mission of the OPD is to protect and defend the rights of indigent people in the criminal and juvenile justice systems. As amicus curiae, the OPD offers this court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts, at both the trial and appellate levels. The OPD has an interest in the present case because it involves a significant issue, which will foreseeably affect great numbers of indigent defendant-appellants.

Collectively these agencies represent the majority of indigent felony defendants in the State of Ohio. Under the circumstances, the Offices constitute the largest sources of criminal legal representation in this State. They see circumstances similar to those reflected in Mr. Polizzi's case too frequently in their respective practices and anticipate that this Court's scrutiny of the matter will help rectify concerns stemming therefrom.

STATEMENT OF THE CASE AND FACTS

Amici adopt the Statement of the Case and Facts as articulated in Appellant's opening brief on the merits.

LAW AND ARGUMENT

Appellant's Proposition of Law: Trial courts and appellate courts must consider the overall number of consecutive sentences and the aggregate sentence when imposing or reviewing consecutive sentences.

In R.C. 2929.14, the General Assembly instructs judges actually to *think* about consecutive sentences, to determine—based on enumerated statutory criteria—whether their imposition is warranted and *to what extent*. A central criterion to be judged is whether the sentence imposed is proportionate to the wrong committed. R.C. 2929.14(C)(4). And yet all too often trial judges simply parrot the statutory language, sign a technically compliant journal entry, and call it a day. Many times, in fact, "findings" are announced in a journal entry even when some or even all of them have no discernible basis in the record.

What this suggests is that trial courts are mechanically obeying the letter of the law while ignoring its rational, ancient, and unambiguous spirit. What it reveals is the need for a more meaningful consideration of the actual length of the sentence imposed. Requiring careful, iterative consideration 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." Too narrow an interpretation of R.C. 2929.14(C)(4) would do just the opposite, thus straying from venerable principles and also creating real practical problems.

Let us be clear. Nobody is saying that trial courts must impose all sentences concurrently in every case. *Of course,* there will be circumstances where an offender's conduct warrants the imposition of some consecutive sentences. There will occasionally be circumstances where the offender's conduct warrants imposition of maximum consecutive sentences for every count. But proportionality principles need to guide the courts—trial and appellate alike—so that they are

forced to contemplate the significance of multiple consecutive terms that can quickly become something akin to a sentence of life without parole. Here, for instance, Mr. Polizzi's sentence aggregated to three decades—on *third-and fourth-degree felonies*; virtually the maximum sentence available.

But we know that, in addition to punishing the offender and protecting the public, among other concerns, Ohio's sentencing scheme is designed to ensure that sentences are commensurate with, and not demeaning to, the seriousness of offender's conduct. That proportionality aim extends to the offense's impact on the victim and consistent with sentences for similar crimes by similar offenders.[1] These guidelines offer predictability and encourage proportionality in the sentencing context. Such a structure serves many interests, including those of the accused, who need to know the range of punishment they potentially face; their counsel, whose duty it is to advise them; the courts, who need to further the statutory interest in sentencing consistency; and, finally, the institutions who must budget for feeding, caring for, and rehabilitating the inmates they house.

Allowing trial courts to exercise virtually unbounded discretion—at least, so long as the requisite incantations are uttered—undermines predictability, which allows parties and court to resolve cases effectively, betrays the broader principle of just deserts and the specific, unambiguous requirement from the General Assembly that consecutive sentences be "not disproportionate." Your *amici* explain further below why that is so, focusing on two major points: first, the timeless, cross-cultural notion of sentence proportionality and second, the

[1] A. Mark Segreti, Jr., *Consecutive Sentences in Ohio – "Reserved for the Worst – Or Not: Trial Court Discretion and Appellate Review*, 87 U Cin. L. Rev. 473 (2018).

practical issues that arise when we permit trial courts unbridled discretion in this area against the wishes of the General Assembly and the dictates of common sense.

A. The idea that a punishment should be proportionate to the crime is truly ancient and is a "cornerstone" of our criminal justice system.[2]

The Ohio General Assembly did not invent the idea that a malefactor's punishment should be proportionate to his misdeeds. In fact, the concept is more or less as old as civilization itself. Naturally, *what* is proportionate to what has changed with the times—before mass incarceration was a realistic option for governments, crimes were punished with amercements, corporal punishment, or simply execution. But the underlying principle—that the punishment should "fit" the crime—is about as old as a jurisprudential concept can be, and as widely spread as other basic human moral ideas like "help your family," "return favors," or "do unto others as you would have them do unto you."

The Code of Hammurabi is the oldest surviving instance we have of the proportionality principle in punishment. Thus, Hammurabi declared that "[i]f a man has destroyed the eye of another man, they shall destroy his eye," and "[i]f he has broken another man's bone, they shall break his bone." Code of Hammurabi, Lines 196-197 (tr. L.W. King). Meanwhile, halfway across the world and at around the same time, King Mu of Zhou, one of the most important rulers of ancient China, ordered his subject princes when resolving criminal matters to "[l]et the punishment be in just proportion to the offense, neither insufficient nor excessive." John Wu,

[2] Quoted word from Virginia Governor Glenn Youngkin's statement in support of his decision to commute the sentence of police Sergeant Wesley Shifflett, in which he correctly observed that the Shifflett's "sentence of incarceration is unjust and violates the cornerstone of our justice system—that similarly situated individuals receive proportionate sentences." *See* Governor's Statement, at https://www.governor.virginia.gov/newsroom/news-releases/2025/march/name-1042094-en.html.

Reading from Ancient Chinese Codes and Other Sources of Chinese Law and Legal Ideas, 19 Mich. L. Rev. 502, 509, 506 n.1 (1921).

The ancient Romans—not exactly known for their humane penal laws—also held at least in theory to the maxim *culpa poena par esto*: "let the punishment fit the crime." Marcus Tullis Cicero, *De Legibus*, Book 3, ch. 4, sec. 11 (51 B.C.). Justinian's *Institutes* similarly provided among other things that "[t]he maxims of law are these: to live honestly, to hurt no one, to give every one [*sic*] his due." *Institutes*, Book I, "Of Persons," ¶ 3 (clearly, from context, referring to penal "dues").

Elsewhere, an old Yoruba proverb states that *ika to to simu, ni a fi n re imu*: "one uses the correct finger to pick his nose," meaning, in turn, that punishment for an offense must be proportionate in order to be just, *see* Jacob O. Arowosegbe, *Indigenous African Jurisprudential Thoughts on the Concept of Justice*, 61 J. of African L. 155, 166 (2017), while ancient India recognized the necessity of a graded or proportionate response to crime, *see, e.g.*, Paripurnanand Varma, *Ancient Indian Administration and Penology*, 95 (Vishwavidyalaya Prakashan, Varanasi, 1st ed., 1993).

Even the Bible takes a position on the matter. Mosaic Law prescribed the so-called *lex talionis*—that is, "an eye for an eye." Leviticus 24:17-22; *see also* Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 Oxford J. of Legal Studies 57-71 (2008). Jesus, too, in the parable of the dissolute servants related in the Gospels of Matthew and Luke declared that God, as a just and fair judge, like the master in the parable, assigns punishments to the wayward proportionate to their transgressions in life—no more, and no less. Matthew 24:45-51; Luke 12:35-48.

Coming comparatively closer to our own day, the Magna Carta contains a proportionality principle, providing in three different chapters that a criminal penalty or civil amercement should not exceed "the degree of the offense," at least for free men. *Magna Carta Libertatum*, Chs. 20-22 ("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."); *see also* Craig Lerner, *Does the Magna Carta Embody a Proportionality Principle*, 25 George Mason Univ. Civil Rights L. J. 271-299 (2015).

Indeed, 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 ribald, calumnious songs about the prosecutor).

In early modern Italy, the great criminologist Cesare Bonesana di Beccaria, Marquess of Baldrasco and Villareggio, whose thought influenced the views of the Founders in this area and others, declared in his magisterial *Of Crimes and Punishments* (1764) that "there ought to be a fixed proportion between crimes and punishments." *Id*. at Ch. 6, "Of the Proportion between Crimes and Punishments;" *see also, e.g.*, Clay S. Jenkinson, *Jefferson, Beccaria, and Incarceration*, The Thomas Jefferson Hour, Jan. 4, 2020 (available at https://shorturl.at/nIqVf); Ronald J. Pestritto, *The Founding Fathers on Crime and Punishment*, Ashbrook, Feb. 1, 1996 (available at https://shorturl.at/dFDYN) (discussing the influence of Beccaria on Benjamin Franklin).

Speaking of the Founders, Thomas Jefferson offered a bill in 1778 (in some places copied almost word-for-word from Beccaria) in which he included the following admonition: "it appears . . . deducible from the purposes of society that a member thereof, committing an inferior injury, does not wholly forfeit the protection of his fellow citizens, but, after suffering a punishment in

proportion to his offence is entitled to their protection from all greater pain, so that it becomes a duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments." Thomas Jefferson, "A Bill for Proportioning Crimes and Punishments," *Papers*, 2:492-504 (1778) (available at https://shorturl.at/aRGGd).

Some might call this a hodge podge of motheaten antiquities. But it is not. In fact, this collection of sources indicates quite clearly—over a period stretching back 4,000 years—that proportionality in punishment is a universal ideal that crosses cultural and temporal divisions. It is basic to our nature and our inherent sense of fairness and just deserts. But there is no realistic way to adhere to this basic norm—nor to avoid betraying it—without requiring judges to examine, at each successive stage of the sentence stacking process, whether the aggregate punishment remains proportionate or has gone too far.

Plus, treating crimes 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. When we sentence a murderer to 15-years-to-life – experience before the parole board demonstrates that on average, that sentence caps out at about 25 years.[3] But are we doing a disservice to that punishment by sentencing a teacher who engages in sexual contact with two teenaged students to three decades in prison, without the possibility of parole at any point? Are we not suggesting that those convicted of murder are, somehow, less culpable? At bottom, not

[3]In 2016, the average parole release for an inmate convicted of murder in Ohio was 24.46 years. *See Average Time Served Among Ohio Prison Releases, Calendar Year 2016*, Ohio Department of Rehabilitation and Correction, available at https://shorturl.at/lSA7p.

every offense is the worst form of that offense.[4] Properly considering the entire sentence imposed in its aggregate preserves this invaluable and inviolable proportionality principle.

B. In the absence of reasonable predictability, which Appellant's proposition of law will necessarily further, advising clients on potential sentencing jeopardy is akin to purchasing a house without knowing its price.

The Ohio General Assembly has adopted these ancient principles by requiring proportionality in sentencing. R.C. 2929.11(A) establishes that the overriding goals of felony sentencing are to protect the public from future crime, and to punish an offender through minimum sanctions without imposing an unneeded burden on state and local resources. All felony sentences must reasonably achieve those two goals without demeaning the offender's conduct and its impact on the victim, while remaining consistent with sentences for similarly situated offenders.

Moreover, Ohio law presumes that multiple sentences are to be served concurrently. R.C. 2929.41(A); *State v. Bonnell*, 2014-Ohio-3177, ¶ 23. To that end, felony sentences can be

[4]Other jurisdictions have crafted sentencing structures that encourage the thoughtful imposition of prison terms and prevent excessive sentences. See, for example: Tex. Penal Code § 1.02 ("[T]he provisions of this code are intended . . . to achieve the following objectives: . . . (3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders[.]"); Alaska Stat. § 12.55.005 ("In imposing sentence, the court shall consider (1) the seriousness of the defendant's present offense in relation to other offenses[.]"); Mont. Code Ann. 46-18-101 ("(2) The correctional and sentencing policy of the state of Montana is to: (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable; . . . (3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles: (a) Sentencing and punishment must be certain, timely, consistent, and understandable. (b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses."); N.C. Gen. Stat. § 15A-1340.12 ("The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused. . . ."); Michigan's sentencing structure, likewise, permits for departures from the applicable guideline range where a reviewing court finds a within-guideline sentence to be unreasonable because it is not "proportionate to the seriousness of the matter." *See People v. Posey*, 512 Mich 317, 352 (2023) (analyzing Mich. Comp. Laws § 769.34).

imposed consecutively only if the sentencing court makes factual findings enumerated in R.C. 2929.14(C)(4). Otherwise, the sentences must be concurrent:

> With exceptions not relevant here, if the trial court does not make the factual findings required by R.C. 2929.14(C)(4), then "a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States." R.C. 2929.41(A).

Id.

Under R.C. 2929.14(C)(4), a court may not impose consecutive terms unless it makes, based on the record, several factual findings. It must find that the consecutive service is necessary to either protect the public from future crime or to punish the offender. It must also find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct or the danger the offender poses to the public. In addition, the court must also find one 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[;] or
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

The whole point of this structure and these findings requirements, in particular the one directing the court to determine any consecutive sentences imposed "are not disproportionate to the seriousness of the offender's conduct and the danger he poses to the public," is to force the trial court to meaningfully think about the actual length of the sentence it is imposing. That is because "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, 1199 (7th Cir. 1987) (Posner, J., concurring).

Moreover, the Ohio Felony Sentencing Commission favored basing the harshest terms on any actual or threatened harm the offender may have caused during the commission of a crime. It emphasized the need to reserve the harshest prison sentences for offenders who are repeat offenders of felonies "that resulted in actual or attempted serious physical harm to a person." *A Plan for Felony Sentencing in Ohio: A Formal Report of the Ohio Criminal Sentencing Commission* (July 1, 1993), at 29.

Your *amici* collectively represent a majority of those accused of criminal misconduct in counties all over the State of Ohio. In undersigned's experience, the accused's primary source of information about anything related to his criminal case is his attorney. Often the first question counsel receives from a client facing criminal charges is about his potential sentencing exposure. Sentencing exposure is often the only concern driving the decision to plead guilty or to go to trial. Accurate information about that exposure is essential. And in the first instance, it is counsel's duty to provide it. But counsel's duty to provide accurate information necessarily depends on sentencing predictability.

There was nothing predictable about the sentence imposed in Polizzi's case. The sentence aggregates to nearly three decades—close to the maximum available—for a first-time offender

who resolved his case by pleading guilty to third-and fourth-degree felonies. The sentence was more than an outlier and the comparable data does not lie. In his appendix (A-211-217), Appellant has submitted to this Court a table reflecting 25 cases that had scenarios not unlike those in Mr. Polizzi's case – i.e., sex offenses committed by teachers against students. Those matters were prosecuted in the State of Ohio over the last 15 years.[5]

What this information shows is that, even for the worst of the offenses, the sentences imposed were nowhere near the maximum. Yet in Mr. Polizzi's case, a case which factually does not deviate substantially from, or seem inherently worse than, those listed above, his 30-year aggregate sentence amounted to nearly the maximum sentence that could be imposed. Even the most seasoned attorney could not have predicted such an outcome.

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[5]These cases were found through media reports obtained through a Google Search. Undersigned ran similar searches and located several additional cases all involving sexual contact between teachers and their students – *State v. Patrick Janson,* 2010 CR 536645, pleaded guilty to 5 counts of GSI and 1 count of sexual imposition. Sentenced to 3-1/2 years in prison; *State v. John Bocko,* 2008 CR 510100, convicted of two counts of sexual battery. Sentenced him to 3 years in prison; *State v. Christine Scarlett*, 2006 CR 481451, pleaded guilty to 3 counts of sexual battery and 2 counts of disseminating harmful material to minors. Sentenced to 3 days in jail and 5 years of community control; *State v. Kristen Ross*, 2010 CR 538647, pleaded guilty to one count of felonious assault, all sexual contact charges were dismissed. Sentenced her to 2 years in prison and released after one year; *State v. Christopher Thomas*, 2010 CR 535943, pleaded guilty to one count of sexual battery, 22 counts of illegal use of a minor in nudity-oriented material, 7 counts of importuning, 6 counts of child endangering. Eventually sentenced to 21 years – concurrent to a sentence imposed for similar crimes in Lake County; In 2008, Maggie Laughlin, a teacher in Mentor, pleaded guilty to 8 counts of unlawful sexual conduct involving a 15-years-old student. A Lake County Judge imposed a 3-year prison sentence; In 2012, Constance Yacobozzi, a teacher in North Ridgeville, pleaded guilty to two counts of sexual battery. A Lorain County Judge imposed three years of probation; and in 2011, Kelly Covic, a teacher in Brunswick, was found guilty of sexual battery involving a 14-year-old student. The court imposed a prison sentence of 3-½ years.

This may not be the entire universe of cases involving teachers taking sexual advantage of students, but it comes reasonably close. None of these sentences, however, comes reasonably close to the prison term Mr. Polizzi received consequent to the maximum/consecutive sentencing the trial court undertook. We challenge the State of Ohio and its amici, if any, to demonstrate otherwise.

And that result shows that when it imposed this sentence, the trial court had lost sight of any thought to the sentence's proportionality or predictability; something that is entirely preventable if our trial courts follow what the General Assembly has dictated and what the Sentencing Commission recommends: That, in imposing consecutive sentences, courts must consider the overall number of consecutive sentences and the sentence to which those terms aggregate.

CONCLUSION

For the foregoing reasons *amici curiae* the Offices of the Cuyahoga, Montgomery, and Hamilton County Public Defenders, Summit Legal Defenders, and the Ohio Public Defender respectfully urge this Court to adopt Appellant's proposed rule and reverse the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2025, the foregoing Brief of *Amici Curiae* the Offices of the Cuyahoga, Montgomery, and Hamilton County Public Defenders, Summit Legal Defenders, and the Ohio Public Defender, in Support of Appellant Anthony Polizzi, was served by email to counsel for the parties and *amici* at the email addresses indicated on the cover of this document.

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