IN THE SUPREME COURT OF OHIO
2025

State of Ohio, Plaintiff-Appellee, -vs- Anthony J. Polizzi, Jr., Defendant-Appellant.	Case No. 24-312 On Appeal from the Lake County Court of Appeals Eleventh Appellate District Court of Appeals Nos. 2020-L-016 & -017

MERIT BRIEF
OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission includes assisting prosecuting attorneys in the pursuit of truth and justice and advocating for public policies that promote public safety and help secure justice for victims.

Consecutive sentencing is an important tool in the sentencing judge's arsenal, and one can expect that, in the vast majority of cases, it is deployed under circumstances that are highly appropriate. To be sure, there is a presumption of concurrent sentencing, and the sentencing court must make findings to support consecutive sentencing, but the findings are readily made in most situations in which the sentencing court would be moved to impose consecutive time. Under R.C. 2953.08(G)(2), the appellate court is only allowed to reverse or modify the court's consecutive sentencing if the appellate court clearly and convincingly concludes that "the record" "does not support" the findings. In *State v. Glover*, 2024-Ohio-5195, the three-justice plurality and the single-justice concurrence agreed that this standard of review is deferential and *not* de novo. *Glover* at ¶ 44-46, 62, 70-71.

The present case would address a question left open by *Glover* as to whether the number of the consecutive sentences and their aggregate length plays a role in appellate review of consecutive sentencing. This is a legal point worth deciding, but, in the end, the vast majority of consecutive sentences would be affirmed even if the appellate court would take the aggregate sentence into account in determining whether there is record support for the consecutive-sentence findings.

The sentencing court's making of the consecutive-sentence findings often will be

supported and grounded in an assessment of the historical facts regarding the defendant's current multiple crimes, his prior crimes, his history under parole and probation supervision, his overall character, the existence or absence of remorse, and on and on. R.C. 2953.08(G)(2) only allows reversal or modification if the appellate court clearly and convincingly concludes that "the record" "does not support" the findings. This standard necessarily requires that the appellate court indulge factual conclusions and inferences when they are supported by the record, even if the appellate court might not have reached those conclusions or drawn those inferences itself.

Beyond this plainly-applicable form of deference involved when reviewing the "the record" for "support," Ohio statutory law gives the sentencing judge wide discretion – as a matter of law – in assessing what sentence to impose. Ohio law does *not* mandate the adoption of any one penological theory to the exclusion of others, and judges are allowed under Ohio law to apply varying weights in various cases to the penological goals of retribution, deterrence, incapacitation, and rehabilitation. For example, Ohio law does *not* require that "rehabilitation" be given a controlling sway over other goals, and Ohio law expressly requires the consideration of "punishment" and "deterrence" as goals. Likewise, the goals of consecutive sentencing include protecting the public from future crime, *see* R.C. 2929.14(C)(4), which would include setting an example to deter others. *See* R.C. 2929.11(A) ("protect the public from future crime by the offender *or others*"; "deterring the offender *and others* from future crime"; emphasis added). The goals of consecutive sentencing also include punishing the offender in light of the seriousness of the offender's conduct, the danger the offender poses to the public, and/or the harm(s) caused by the offenses. R.C. 2929.14(C)(4). Reviewing for "support" in

"the record" would necessarily acknowledge the matters of record that implicate sentencing considerations that "support" a longer aggregate sentence.

In cases in which the sentencing court would be inclined to impose these kinds of long aggregate sentences, the sentencing court is very likely going to have in front of it the factual predicates and penological justifications that can justify those sentences, including the egregious factual details underlying the offender's crimes that are prompting the court's response. In the vast majority of cases, an appellate court reviewing such a factual record will be unable to *clearly and convincingly* conclude that the record fails to support the findings when the prosecution and sentencing court are relying on the very kinds of factual predicates and penological justifications that Ohio law allows the trial court to consider.

It must also be kept in mind that there can be penological considerations weighing *against* concurrent sentencing. This is because imposing a large number of concurrent sentences can send exactly the wrong message as to punishment and deterrence and protecting the public. Such concurrent sentencing can appear to be "a reward to the convict." *State v. Bates*, 2008-Ohio-1983, ¶ 13 (quoting another case: "making sentences for different crimes run concurrently is in the nature of a reward to the convict"). "Concurrent sentencing on these crimes would only amount to a multiple offense 'discount' that would not reflect the seriousness of [the defendant's] criminal conduct." *State v. Tatum*, 2001 Ohio App. LEXIS 810, at *31 (10th Dist.).

On the question of whether the total aggregate sentence must enter into the calculation as to whether consecutive sentencing is "not disproportionate," one struggles to envision cases in which this issue might actually make a difference. The same factual

predicates and penological justifications that justify consecutive sentencing to some degree will very likely also "support" the length of consecutive sentencing actually imposed and will very likely prevent the appellate court from concluding that the trial court clearly and convincingly got it wrong in making the findings, especially when it is considered that the appellate court is not allowed to substitute its judgment for that of the sentencing court.

This Court has the benefit of having already reviewed this defendant's criminal conduct in *Disciplinary Counsel v. Polizzi*, 2021-Ohio-1136, in which this Court permanently disbarred defendant. The Board of Professional Conduct did not pull its punches, and neither did this Court. According to the Board, "Polizzi violated his position of trust and authority as a teacher by committing abhorrent and illegal sexual offenses against the minor students who had been entrusted to his care." *Id*. at ¶ 19. As paraphrased by this Court, the Board emphasized that:

> [E]ven after his sexual crimes ended, Polizzi continued to abuse both of his victims by engaging in inappropriate, and in at least one instance, obscene, communications with them. In fact, the victim-impact statements at his sentencing hearing demonstrate that his e-mails, texts, and in-person attempts to communicate with his victims – even years after the physical abuse ceased – caused them additional pain and trauma.

Id. at ¶ 19. The Board also referenced defendant's statement during the criminal case "that he wanted [the victims] to experience misery for the harm they had caused him by reporting his crimes." *Id*. at ¶ 19.

This Court recognized that "Polizzi's continued communication with his victims is just one of many factors that demonstrate his ongoing lack of remorse and failure to

accept responsibility for his crimes." *Id*. at ¶ 22. As this Court further stated:

> {¶ 23} In addition, the record demonstrates that Polizzi did not truly acknowledge responsibility for his criminal conduct when he entered a guilty plea. By pleading guilty to two counts of gross sexual imposition, he admitted that he had purposely compelled both of his victims to submit to sexual contact by force or threat of force. Yet at his sentencing hearing, Polizzi contradicted those facts when he claimed that the sexual contact had been completely consensual.

Id. at ¶ 23. This Court summarized the criminal conduct, as follows:

> {¶ 31} In this case, for more than two years, Polizzi used his authority as a teacher to compel two of his students to engage in sexual conduct with him and threatened at least one victim with discipline or expulsion to keep her from reporting his conduct. In pleading guilty to two counts of gross sexual imposition, Polizzi also admitted that he had used force or the threat of force to compel both victims to submit to his sexual demands. Not only did he harm these young women and their families, he also betrayed the public's trust in him as a licensed teacher.

Id. at ¶ 31. "Having considered Polizzi's reprehensible criminal sexual conduct of two of high school students," this Court found that permanent disbarment was "necessary in this case to protect the public . . .." *Id*. at ¶ 34.

While the defense might attempt to distinguish these observations as having arisen in the disciplinary case, these observations directly relate to the criminal conduct underlying the convictions too and flow from events in the criminal cases. The appellate record shows that defendant *did* engage in repeated sexual misconduct against these two student victims over long time periods. Defendant *did* plead guilty to his use of force or the threat of force during the GSIs. Defendant *did* threaten at least one of the victims with consequences and potential expulsion from school if the victim told anyone.

Defendant *did* contact one of the victims in an obscene communication in 2012. Defendant *did* state that he wanted the victims to suffer misery. The sentencing court had access to this same information, and it could reach the same "abhorrent" and "reprehensible" conclusions as this Court and the Board in *Polizzi*.

The sentencing court had ample record support for the consecutive-sentence findings, and, unless defendant is to be rewarded with a multiple-offense discount, consecutive sentencing totaling almost 30 years is proportionate to the seriousness of defendant's repeated sexual misconduct.

In the interest of aiding this Court's review herein, amicus OPAA offers the present brief in support of the State.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's brief.

OPAA notes that, at the time of the plea, defendant was specifically advised of the possibility of maximum and consecutive sentencing potentially adding up to 396 months, and he acknowledged his understanding of that fact. (3-26-18 Tr. 20-21) Defendant also acknowledged that no one had made any promises as to sentencing. (*Id*. 24)

ARGUMENT

> **Proposition Accepted for Review by this Court**: Trial courts and appellate courts must consider the overall number of consecutive sentences and the aggregate sentence when imposing or reviewing consecutive sentences.

Part of the proposition of law to be reviewed here is a non sequitur. A sentencing court *necessarily* "considers" the number of consecutive sentences and the aggregate length when it imposes such sentences. The sentencing court, itself, sets those parameters when it acts and therefore "considers" them, as the sentencing court did here.

One supposes that, when the defense drafted this proposition of law, the defense was attempting to drive home the point that the sentencing court must consider these matters as a necessary part of the consecutive-sentence findings under R.C. 2929.14(C)(4). But the proposition itself includes no statutory reference and no other textual "hook" connecting the proposition to the statutory findings. The proposition as drafted is incomplete, and, as a result, is a poor candidate for adoption as a rule of law to be contained in a syllabus as required by this Court's rules. Rule 16.02(B)(4).

Assuming the proposition of law will not be dismissed as improvidently allowed, amicus OPAA respectfully submits that this Court should reject the proposition of law.

A. *Glover* not Precedential on Total-Aggregate-Sentence Issue

At pages 13 and 14 of defendant's brief, defendant devotes substantial attention to the analysis in *State v. Gwynne*, 2022-Ohio-4607. The 4-3 majority therein had concluded that, in assessing the extent to which consecutive sentencing is "necessary," and in assessing whether consecutive sentencing is disproportionate, the sentencing court must consider the total length of the consecutive sentences that it would be imposing.

The defense brief concedes that this analysis was later reconsidered and vacated in *State v. Gwynne*, 2023-Ohio-3851, but the brief fails to acknowledge an important point. As the four-justice majority granting reconsideration in *Gwynne* (2023) recognized, one of the reasons for reconsideration was that the defendant had not even properly raised the total-aggregate-sentence issue and so the issue had not been briefed. *Gwynne*, 2023-Ohio-3851, at ¶ 4 (three-justice plurality) ("Gwynne did not raise a proposition of law asserting that R.C. 2929.14(C)(4) requires both trial and appellate courts to consider a defendant's aggregate prison term when imposing or reviewing consecutive sentences. That issue also was not addressed by Gwynne in her briefs or at oral argument."); *Gwynne*, 2023-Ohio-3851, at ¶ 34, 35 (Fischer, J., concurring) ("We should not be addressing issues that were not presented in the proposition of law."; "The majority in *Gwynne IV* . . . answered an unbriefed question that neither party asked this court to answer."; "went far beyond what the parties argued or presented for review"). The discussion of the total-aggregate-sentence issue in *Gwynne* (2022) is not only a dead letter because it was vacated; it is also a dead letter because it was ill considered at the time due to the lack of briefing.

The total-aggregate-sentence issue was in play more recently in *State v. Glover*, 2024-Ohio-5195, but, again, the issue was not resolved by the splintered Court.

The three-justice plurality in *Glover* criticized the appellate court for having focused on the defendant's overall aggregate sentence, but it lacked a fourth vote for that conclusion. *Id*. at ¶ 43.

The single-justice concurrence in *Glover* concluded that the overall aggregate sentence plays a role in appellate review and in the sentencing court's decision to impose

consecutive sentences because the sentencing court must find that the consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. The *Glover* concurrence contended that, "when determining whether 'consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public' under R.C. 2929.14(C)(4), courts should look to the aggregate of all the prison terms the offender will serve consecutively." *Glover* at ¶ 67 (Fischer, J., concurring). "[T]his factor requires courts to consider the aggregate of all terms the offender will be required to serve consecutively, because otherwise there is no other way to conduct a proportionality analysis." *Id*. at ¶ 68. Nevertheless, even when factoring in the total-aggregate-sentence issue, and after agreeing that appellate review is deferential, the concurrence agreed that the consecutive sentences imposed on the serial armed robber in *Glover* must be reinstated. *Id.* at ¶ 71.

Insofar as the *Glover* concurrence would consider the aggregate sentence in assessing the "not disproportionate" prong under R.C. 2929.14(C)(4), the concurrence would have agreed with the three justices who dissented. The dissenters attempted to capitalize on the single concurrence's partial agreement with the dissent. According to the dissent: "while today's decision is by no means a paragon of clarity, lower courts can be sure that there are four members of this court who believe that trial courts must consider whether the aggregate sentence imposed is disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, see opinion concurring in judgment and concurring in part at ¶ 67 * * *." *Glover* at ¶ 73 (Stewart, J., dissenting). "Again, a majority of the members of this court agree that the trial court

must consider the aggregate sentence, at least with respect to the proportionality prong." *Id.* at ¶ 79. The defense brief appears to adopt this analysis in discussing *Glover*, contending that "four justices adopted the view that the aggregate term of imprisonment must be considered when imposing and reviewing consecutive sentences." (Defendant's Brief, at 15-17)

It bears emphasis, however, that the partial agreement between the *Glover* concurrence and dissent yields no binding precedent. To be sure, a "rule of four" governs this Court's decision-making. *See Kraly v. Vannewirk*, 69 Ohio St.3d 627, 633 (1994); *Ignazio v. Clear Channel*, 2007-Ohio-1947, ¶ 10. But a dissenting opinion does not count in this calculus, since a "dissenting opinion does not carry the full force of law or precedential value." *Doe v. Contemporary Servs. Corp.*, 2019-Ohio-635, ¶ 30 (8th Dist.). It would be improper to cobble together the single concurrence and the dissent from *Glover* to somehow arrive at a would-be "binding" precedent in that case, since the views of those dissenting from the judgment "are not counted in trying to discern a governing holding from divided opinions." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014); *Ballinger v. City of Oakland*, 24 F.4th 1287, 1295 (9th Cir. 2022) ("Dissenting opinions cannot be considered when determining the holding of a fractured Supreme Court decision – only the opinions of those who concurred in the judgments can be considered.").

While it is proper for the defense to espouse the position stated in the *Glover* concurrence, the total-aggregate-sentence issue was not decided by the confluence of the one-justice concurrence and three-justice dissent in *Glover*, and that issue remains an open question.

B. *Gwynne* (2023) Plurality and *Glover* (2024) Plurality Correctly State the Rule of Law

The three-justice plurality in *Gwynne* (2023) set forth the correct analysis. The total length of the aggregate sentence does not figure in the analysis of whether the sentencing court can make the findings under R.C. 2929.14(C)(4), and those findings are reviewed on appeal deferentially:

> {¶ 21} The terms "consecutive service" and "consecutive sentences" each have only one relevant meaning: the running of two or more sentences one right after the other. *See Black's Law Dictionary* 1569 (10th Ed.2014) (defining "consecutive sentences" to mean "[t]wo or more sentences of jail time to be served in sequence"). Neither of these terms is synonymous with the term "aggregate sentence," which means "[t]he total sentence imposed for multiple convictions * * *," *id.* R.C. 2929.14(C)(4) therefore is not ambiguous, and the first dissent simply reads words into the statute when it suggests that the trial court's consecutive-sentence findings must be made and reviewed in consideration of the aggregate sentence to be imposed. So, even if the first dissent were correct that determining the meaning of "consecutive service" and "consecutive sentences" is a threshold question that must be decided before addressing the arguments actually briefed by the parties, it would not affect the outcome here.
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> {¶ 22} . . . R.C. 2953.08(G)(2)(a) precludes an appellate court from substituting its judgment for that of the trial court, and instead, the statute allows an appellate court to modify or vacate consecutive sentences if it *clearly and convincingly* finds that the record does not support the sentencing court's consecutive-sentence findings. By imposing this limitation on appellate review of consecutive sentences, the statute denies appellate courts the unfettered power to modify or vacate the imposition of consecutive sentences that is posited by the first dissent.
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> {¶ 23} Third, the first dissent traces the legislative history of R.C. 2929.14(C)(4) and 2953.08(G)(2) and argues that the General Assembly intended to eliminate deference on appeal following a trial court's imposition of consecutive sentences. However, the legislature limited the discretion

> of trial courts to impose consecutive sentences in a specific way: by requiring them to make certain findings before they can impose consecutive sentences. R.C. 2929.14(C)(4). The General Assembly could also have eliminated the deference traditionally owed to a trial court's sentencing decisions. *See Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, at ¶ 23. But it did not.

Gwynne, 2023-Ohio-3851, at ¶ 21-23 (plurality).

The plurality in *Glover* adds to the correct analysis, emphasizing that the consecutive-sentence findings do not call for an assessment of proportionality in relation to a comparison with the entire Criminal Code. The findings likewise do not call for a consideration of sentencing as to other offenders in other cases. The findings focus on proportionality in relation to *this* defendant's conduct.

> {¶ 43} Nowhere does the appellate-review statute direct an appellate court to consider the defendant's aggregate sentence. Rather, the appellate court must limit its review to the trial court's R.C. 2929.14(C)(4) consecutive-sentencing findings. In this case, the court of appeals purported to review the trial court's findings. But much of its analysis focused on its disagreement with the aggregate sentence. The appellate court emphasized that Glover's aggregate sentence was "tantamount to a life sentence," 2023-Ohio-1153, ¶ 59 (1st Dist.), and determined that it was too harsh when compared with the sentences that the legislature has prescribed for what the court considered more serious crimes, *id*. at ¶ 97-98. To the extent that the court of appeals premised its holding on its disagreement with Glover's aggregate sentence rather than its review of the trial court's findings, it erred in doing so.
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> {¶ 44} The statute does not permit an appellate court to simply substitute its view of an appropriate sentence for that of the trial court. An appellate court's inquiry is limited to a review of the trial court's R.C. 2929.14(C) findings. R.C. 2953.08(G)(2). Only when the court of appeals concludes that the record clearly and convincingly does not support the trial court's findings or it clearly and

convincingly finds that the sentence is contrary to law is it permitted to modify the trial court's sentence. *Id.*

{¶ 45} Thus, an appellate court may not reverse or modify a trial court's sentence based on its subjective disagreement with the trial court. And it may not modify or vacate a sentence on the basis that the trial court abused its discretion. Rather, the appellate court's review under R.C. 2953.08(G)(2)(a) is limited. It must examine the evidence in the record that supports the trial court's findings. And it may modify or vacate the sentence only if it "clearly and convincingly" finds that the evidence does not support the trial court's R.C. 2929.14(C)(4) findings. R.C. 2953.08(G)(2)(a).

. . .

{¶ 51} The other finding that the court of appeals concluded was clearly and convincingly not supported by the record was the trial court's finding under R.C. 2929.14(C) that consecutive sentences are "not disproportionate to the seriousness of the defendant's conduct and the danger the defendant poses to the public." *See* 2023-Ohio-1153 at ¶ 101 (1st Dist.). The trial court cited substantial evidence in the record to support this finding, including the terror that Glover inflicted on his multiple victims, the lasting psychological harm to these victims, Glover's lack of remorse, and Glover's failure to take responsibility for his actions.

{¶ 52} The statutory scheme circumscribes an appellate court's review of a trial court's proportionality finding. The proportionality requirement is phrased in the negative; R.C. 2929.14(C) does not require that the trial court find that consecutive sentences are proportionate to the seriousness of the defendant's conduct and the danger he poses to the public before it may impose consecutive sentences. Instead, it requires that the trial court find that consecutive sentences "are not disproportionate" to the defendant's conduct and the danger he poses. *Id.* The appellate-review statute then adds another negative. The appellate court may not reverse simply because it determines that a trial court's proportionality finding is not supported by the record. Rather, it may modify or vacate only when it finds that the record "clearly and convincingly" "does *not* support" the

trial court's finding that consecutive sentences are not disproportionate. (Emphasis added.) R.C. 2953.08(G)(2)(a). The negative constructions in both statutes combined with the clear-and-convincing standard constrain the appellate court's review of a trial court's proportionality finding.

{¶ 53} . . . The proportionality prong . . . focuses on the defendant's current conduct: the court must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." R.C. 2929.14(C)(4). The reference to the "offender's conduct" is to the conduct for which the defendant is being sentenced. . . .

{¶ 54} Other than its disagreement with the trial court's consideration of Glover's juvenile adjudication, the court of appeals did not conclude that any of the considerations relied upon by the trial court were unsupported by the record. Rather, it placed less significance on the harms inflicted by Glover than did the trial court. It did so primarily on the basis that Glover did not inflict physical harm on any of his victims. 2023-Ohio-1153 at ¶ 101 (1st Dist.).

{¶ 55} There is no requirement in law, however, that consecutive sentences are only appropriate when an offender inflicts physical harm on his victims. The legislature could have prescribed such a scheme, but it did not. As the sentencing court explained, Glover inflicted lasting harm on his victims – harm that may well last longer and have more profound effects than a temporary physical injury. The court of appeals may have disagreed with the trial court's assessment of the magnitude of the harm inflicted by Glover, but this disagreement with the trial court's assessment is far different from concluding that the record clearly and convincingly does not support the trial court's consecutive-sentence findings.

. . .

{¶ 59} The court of appeals also strayed from its role when it compared Glover's sentence to the sentences imposed under other statutes and in other cases. The court offered a "selection" of cases in which it found that courts

> had imposed lesser sentences for "crimes that caused both physical and emotional harm." 2023-Ohio-1153 at ¶ 77 (1st Dist.). But the appellate-review statute asks a court of appeals to review whether the record clearly and convincingly does not support the trial court's findings, R.C. 2953.08(G)(2); it does not ask the court of appeals to engage in a comparative analysis of other cases. In addition to being inconsistent with the appellate-review statute, such an analysis is problematic for at least two other reasons. First, there is no indication that the sample of cases selected by the court of appeals was in any way representative. And second, it fails to account for the myriad of case-specific factors that influence a trial court's sentencing decision in a particular case. . . .
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> {¶ 60} The court of appeals' comparison of Glover's sentence with the sentences imposed for crimes that involved physical harm – such as rape, assault, and murder – also overlooks the fact that it is the legislature that defines the penalties available for particular crimes. The General Assembly deliberately made aggravated robbery a first-degree felony – along with crimes like aggravated burglary, trafficking in persons, rape, and trafficking more than 50 grams of certain controlled substances. *See* R.C. 2911.01(A)(3) (aggravated robbery); R.C. 2911.11 (aggravated burglary); R.C. 2905.32 (trafficking in persons); 2907.02(A) (rape); R.C. 2925.03(C) (trafficking and aggravated trafficking in drugs). Many of these crimes, such as kidnapping and aggravated robbery, do not necessarily involve physical harm. *See* R.C. 2911.01; R.C. 2905.01. In suggesting that Glover's first-degree felony should be treated more leniently than other first-degree felonies, the court of appeals is second-guessing the General Assembly as much as it is the trial court.

Glover, 2024-Ohio-5195, at ¶ 43-46 (plurality).

The consecutive-sentencing findings are not designed to assess whether any particular count is worthy of consecutive sentencing. The court is assessing how to sentence *multiple* offenses. The findings require a threshold showing that some consecutive sentencing is appropriate in connection with the multiple offenses. Once the

defendant is found to qualify, that is enough to pierce the presumption of concurrency, and the court thereupon has the discretion to order consecutive sentencing to the extent it thinks best. The language of the findings in paragraph (C)(4) confirms this, emphasizing matters that reflect a global assessment of the defendant and *all* of his multiple crimes, as opposed to a count-by-count assessment.

C. "Not Disproportionate" Finding – Seriousness is Enough – Danger not Absolutely Required

In the second required consecutive-sentencing finding, the sentencing court must find under R.C. 2929.14(C)(4) "that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public . . .." Some of the briefing in this case so far has contended or assumed that the "not disproportionate" finding must be a dual finding, i.e., that the consecutive sentences are "not disproportionate" to both the "the seriousness of the offender's conduct" and "the danger the offender poses to the public." Under this theory, if one or the other is lacking, then this consecutive-sentencing finding cannot be made.

This theory ties into the attempt by the defense to portray the danger of reoffense posed by defendant as being a low risk. That argument is questionable, since "[a] demonstrated pattern of abuse is highly probative in determining whether an individual is likely to re-offend." *State v. Messer*, 2004-Ohio-2127, ¶ 14 (10th Dist.); *State v. Tressler*, 2020-Ohio-1164, ¶ 15 (6th Dist.) (demonstrated pattern showed need to protect public). Defendant engaged in a long pattern of abuse in targeting two victims, and this pattern reflects more than a "low" risk. There was also some indication that defendant is a moderate risk. (1-30-20 Tr. 48) The sentencing court could reach that conclusion,

especially in light of information that he had made repeated sexual overtures toward a third female student named C.K. as well. (1-2-18 Supplemental Motion in Limine; 5-14-18 Tr. 48-49; 1-24-20 State's Sentencing Memorandum, Attachment 1; 1-30-20 Tr. 38) While defendant would not be able to exploit a teacher's license in a future situation, the sentencing court viewed defendant's conduct as predatory and believed the conduct would recur, (5-14-18 Tr. 60-62), since defendant would not be cut off from non-teaching opportunities in which he might seek to exploit a teenage-girl-victim population. "While [defendant] gave up his teaching license and therefore might not commit this specific offense again (sex with a student), he certainly could commit a sexual offense again, particularly with a younger person, posing a danger to the public." *State v. Ryan*, 2022-Ohio-1888, ¶ 33 (6th Dist.).

Even if there were only a "low" danger or "no" danger at all, the "not disproportionate" finding does not require that a court justify consecutive sentencing in relation to both "seriousness" and "danger." To be sure, there is some case law supporting the view that the "not disproportionate" finding must be made as to both "seriousness" and "danger." *See, e.g.*, *State v. McCoy*, 2022-Ohio-995, ¶ 22 (12th Dist.). Nevertheless, it is fair to question that conclusion.

The combination of "not disproportionate" with "seriousness" *and* "danger" here reflects a process of addition, whereby the criteria of "seriousness" and "danger" can be added together to justify consecutive sentencing. The word "and" means "along with or together with" or "in addition to." *Pulsifer v. United States*, 601 U.S. 124, 133 (2024); *Colonial Mtge. Serv. Co. v. Southard*, 56 Ohio St.2d 347, 349 (1978). Moreover, the concept of judging what is proportionate, or here what is "not disproportionate,"

connotes a process in which the interests supporting consecutive sentencing should be assessed cumulatively as if on a set of scales.

In assessing proportionality of a sentence for constitutional purposes, it is recognized that legislatures and courts are allowed to consider the defendant's criminal record in setting the sentence. They are allowed to conclude that "individuals who have repeatedly engaged in serious or violent criminal behavior and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." *Ewing v. California*, 538 U.S. 11, 24 (2003) (controlling plurality). The States "have a valid interest in deterring and segregating habitual criminals." *Id*. at 25 (quoting another case). "Recidivism has long been recognized as a legitimate basis for increased punishment." *Id*. "In weighing the gravity of [the offender's] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." *Id*. at 29. Legislatures and courts are allowed to conclude "that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Id*. at 30. Criminal history often would signal a danger to the public, and, for constitutional purposes, this would be weighed as an *added* consideration supporting the sentence, not as a separate and independent consideration in relation to proportionality.

Equally so here, "seriousness" and "danger" would be weighed cumulatively in judging the proportionality of consecutive sentencing under R.C. 2929.14(C)(4). Even if "seriousness" and "danger" do not individually support such sentencing, they can, added together, support it. And even if one or the other is entirely absent, the other criterion can still support such sentencing. "Seriousness" alone can support the consecutive sentencing, and, likewise, "danger" alone can support consecutive sentencing. The

phrasing of "not disproportionate" in relation to "seriousness" and "danger" allows the two criteria to be added together so that one or the other, or the two in combination, will allow the sentence without requiring justification on both fronts.

Even if there is no danger or a low danger, defendant's repeated crimes have heightened seriousness involving predatory targeting of multiple student victims who plainly have suffered and continue to suffer serious psychological harm as a result. As recognized in *Disciplinary Counsel v. Polizzi*, the words "abhorrent" and "reprehensible" come to mind in addressing defendant's long-term sexual victimization of these students. There is plenty of "seriousness" involved here, including defendant's blackmailing threats to at least one of the victims to keep quiet. (5-4-18 Tr. 38-39 – victim N.M. stating, "He told me it was my fault for going with him and if I said anything I would get in trouble and be expelled."; "I was afraid and felt blackmailed by you.") Defendant's misconduct is more than enough to make consecutive sentencing "not disproportionate," even when the total aggregate sentence is taken into account. The "seriousness" criterion on its own supports the imposition of these consecutive sentences.

The defense seems to contend that consecutive sentencing must be based on "aggravating factors" under R.C. 2929.12(B) that make the case "atypical" and that "remove [the case] from the mine run of similar underlying offenses." (Defendant's Brief, at 13) But consecutive sentencing does *not* require that the offense(s) be judged under sentencing factors in R.C. 2929.12(B) as "more serious" than conduct normally constituting the offense. Those factors are not mentioned in the findings in R.C. 2929.14(C)(4) as being a required predicate for consecutive sentencing, and their presence or absence would provide no basis for appellate reversal anyway. *State v.*

Jones, 2020-Ohio-6729, ¶ 42. There is some question as to whether the factors in R.C. 2929.12(B) are even relevant to consecutive sentencing. *State v. Gwynne*, 2019-Ohio-4761, ¶ 17 (plurality). Moreover, even in its "normal" form, the crime of sexual battery is serious enough to warrant consecutive sentencing. *Repeatedly* committing the same "normal" form of the offense, and doing so against different victims, would be aggravating factors as well, adding to the seriousness of the offenses. *State v. Amero*, 2024-Ohio-1007, ¶ 47 (11th Dist.) (repetition augments seriousness).

Amici supporting the defense contend that defendant's conduct was not as serious as other crimes. He did not murder anyone, which carries a 15-life sentence. He was not convicted of rape, which could carry substantial first-degree felony time. But being able to point to other offenses that can be considered more serious does not mean that the crime of sexual battery is not serious in its own right. The finding of "not disproportionate" does not require that the judge arrive at some grading of the offense in comparison to other offenses in the Criminal Code. *See Glover*, 2024-Ohio-5195, at ¶ 60 (plurality). The sentencing court need not develop some perfectly-graduated spreadsheet of more-serious and less-serious crimes into which the crime(s) being sentenced must be precisely placed.

The asserted comparison to other offenses fails for other reasons. It is apples and oranges to compare the sentencing of a defendant convicted of multiple felonies with the sentence that would be available if he had only committed a single more-serious offense. To be sure, a person committing murder would face a single 15-life prison term. But life in prison is the maximum sentence to begin with, and if he combines murder with other felonies, he no doubt faces consecutive sentencing for the 15-life sentence and the other

felony sentences too. For some accompanying felonies, the murder would become aggravated murder subject to the death penalty. Likewise, the rapist will not face just one F-1 sentence if he commits multiple acts of rape; he very likely would face a long aggregate sentence. Citing what sentence others might receive for a single more-serious offense makes no sense when the issue is what sentences defendant should receive for multiple offenses.

For someone like this defendant, who stands convicted of eight felonies, the comparison, if any, would be to whether he is being punished more severely than a defendant who has committed *eight* murders or *eight* rapes. Given the great likelihood that such offenders would receive far more than the consecutive sentencing this defendant received, the comparison to other offenses falls far short of exposing any "disproportionate" treatment of this defendant, even when such other offenses are considered as part of the analysis.

D. No Cross-Case Proportionality Analysis

As is plain from the language in R.C. 2929.14(C)(4), the "not disproportionate" provision does not engage the sentencing court in a cross-case proportionality inquiry in regard to the sentencing of other offenders. The "not disproportionate" inquiry assesses the seriousness of *this* offender's conduct and the danger posed by *this* offender. *Glover* at ¶ 53, 59 (plurality). Likewise, the appellate-review statute "does not ask the court of appeals to engage in a comparative analysis of other cases." *Id.* at ¶ 59. Given the myriad of factors that can be involved in any particular sentencing, *see id.* at ¶ 59, finding cases that are on all fours with the case being sentenced would be difficult.

Defendant provides a list describing the sentencing of other offenders in the appendix to his brief at pages A-211 through A-215. But the list appears to be largely sourced on media reports, which can be unreliable and incomplete in relation to providing the kind of robust detail that would be needed to allow a true comparison of the sentencing of such offenders.

Even so, accepting at face value the accuracy of the descriptions of the listed cases, one is struck by the non-comparability of most of the listed cases. One of the "significant factual differences" for sentencing purposes can be the number and nature of the counts on which the defendants were convicted. *State v. Anderson,* 2017-Ohio-5656, ¶ 24 ("Boyd pled to three felony offenses"; "Anderson was found guilty by a jury of four felonies"). Defendant stands convicted, inter alia, on six counts of sexual battery, and only two of the listed cases are described as involving a defendant convicted of as many such counts.

As to the two listed cases, the descriptions do not fill out the entirety of all of the sentencing considerations that might have been involved in those cases. Even assuming these two listed cases are comparable, however, nothing in R.C. 2929.14(C)(4) would make the sentencing imposed in those cases binding on the discretion of the court sentencing this defendant. All that the list shows is that these two sentencings occurred earlier, not that the cases are a fair or representative bellwether of how such cases *should* be sentenced. Being first does not equate to being right, and later judges are statutorily afforded the discretion to arrive at their own conclusions as to the relative weights to be given to the penological goals of retribution, deterrence, incapacitation, and rehabilitation in a given case. Other courts going first do not create a sentencing straight-jacket that

limits future sentencing courts. And if, in fact, the later court would determine that the earlier courts were being unduly lenient in their sentencing of similar offenders, there would be no requirement, constitutional or otherwise, that such an error "should redound to the benefit" of this defendant. *See Harris v. Rivera*, 454 U.S. 339, 347 (1981). Uniformity of judicial decisions is not constitutionally required. *Beck v. Washington*, 369 U.S. 541, 554-55 (1962); *see also McQueary v. Blodgett*, 924 F.2d 829, 835 (9th Cir. 1991) (as to sentencing).

While R.C. 2929.11(B) provides that a felony sentence should be "consistent with sentences imposed for similar crimes committed by similar offenders," defendant's proposition of law notably does not reference that provision as a basis for overturning his consecutive sentencing. There is some question as to whether the provisions in R.C. 2929.11 even apply to consecutive sentencing. *Gwynne*, 2019-Ohio-4761, at ¶ 17 (plurality). Moreover, the consecutive-sentencing findings do not themselves impose a cross-case "consistency" requirement that would bind one sentencing court's discretion to another sentencing court's earlier decisionmaking. Indeed, the language in R.C. 2929.11(B) itself appears to be directed only at consistency by the individual judge. Such language does not require that a judge's sentence be consistent with sentences imposed by other judges.

Even as to the "consistency" provision in R.C. 2929.11(B), and even as to codefendants sentenced by the same judge in the same fact pattern, courts have recognized that "[t]here is no requirement that codefendants receive equal sentences." *State v. Pierce*, 2024-Ohio-82, ¶ 59 (4th Dist.). The goal is consistency, not uniformity, and consistency does not mean equal punishment for co-defendants. *State v. Runnion*,

2019-Ohio-189, ¶ 23 (4th Dist.). "Each defendant is different and nothing prohibits a trial court from imposing two different sentences upon individuals convicted of similar crimes." *State v. Aguirre*, 2003-Ohio-4909, ¶ 50 (4th Dist.). "R.C. 2929.11(B) does not create a requirement that similarly situated offenders receive sentences equal to another offender's sentence or in lockstep with the defendant's own sense of culpability as it related to a codefendant. Nor does it require a court to singularly review a codefendant's sentence imposed upon a plea deal to determine consistency." *State v. Lavette*, 2019-Ohio-145, ¶ 76 (8th Dist.) (citation omitted); *see also State v. Williamson*, 2024-Ohio-1599, ¶ 22 (10th Dist.).

Even assuming that R.C. 2929.11 could have some dispositive or controlling effect on consecutive sentencing, it must be emphasized that each sentencing judge is afforded discretion in imposing sentence that is guided by the consideration of a broad array of penological goals. Under R.C. 2929.11(A) and (B), the list of things to be considered is expansive:

> (1) The overriding purpose of protecting the public from future crime by the offender and others
>
> (2) The overriding purpose of punishing the offender
>
> (3) The overriding purpose of promoting the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish the purposes of protection, punishment, and effective rehabilitation without imposing an unnecessary burden on state or local government resources

(4) The need for incapacitating the offender

(5) The need for deterring the offender and others from future crime

(6) The need for rehabilitating the offender

(7) The need for making restitution to the victim of the offense, the public, or both

(8) The seriousness of the offense and the need to avoid demeaning the seriousness

(9) The impact on the victim and the need to avoid demeaning that impact

(10) Consistency with sentences imposed on similar crimes committed by similar offenders

"Consistency" is *not* an overriding purpose. Moreover, as a value involved in a court's sentencing calculation, "consistency" is far from controlling, and it is simply not required that sentences be consistent when so many other sentencing values are being considered and weighed as well. Cases and facts and defendants are almost always bound to be different in material ways, but, even as to identical crimes by identical offenders, judges are afforded sentencing discretion under which they are not required to march in lockstep in deciding what sentence is appropriate on a given set of facts, and the judge sentencing first does not create any binding benchmark.

In the end, pointing to other cases, and claiming that the sentencing in the present case is an "outlier," represents a talking point that leads nowhere in reviewing the legality of this defendant's consecutive sentencing. Even if the other cases would be on all fours

with the present case, the fact remains that the present sentencing judge would not have been legally required to agree with the sentences imposed in those other cases.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA respectfully urges that this Court affirm the Eleventh District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on April 21, 2025, to the following counsel of record: Teri R. Daniel, Assistant Prosecuting Attorney, Administration Building, 105 Main Street, P.O. Box 490, Painesville, Ohio 44077, Teri.Daniel@lakecountyohio.gov, counsel for State of Ohio; Mark R. DeVan, Berkman, Gordon, Murray & DeVan, 55 Public Square, Suite 2200, Cleveland, Ohio 44113, mdevan@bgmdlaw.com, counsel for defendant-appellant; Russell S. Bensing, 377B Lear Road, Suite 121, Avon Lake, Ohio 44012, rbensing@ameritech.net, counsel for amicus Ohio Association of Criminal Defense Lawyers; Erika B. Cunliffe, 310 Lakeside Avenue, Suite 200, Cleveland, Ohio 44113, ecunliffe@cuyahogacounty.gov, counsel for amicus Cuyahoga County Public Defender; Patrick Clark, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Patrick.Clark@opd.ohio.gov, counsel for amicus Ohio Public Defender; David H. Hoffmann, 230 East 9th Street, 2nd Floor, Cincinnati, Ohio 45202, dhhoffmann@hamiltoncountypd.org, counsel for amicus Hamilton County Public Defender; Theresa G. Haire, 117 South Main Street, Reibold Building, 4th Floor, hairet@mcohio.org, counsel for amicus Montgomery County Public Defender; Joseph Shell, Summit Legal Defenders, 80 South Summit Street, Suite 100, Akron, Ohio 44308, jshell@legaldefenders.org, counsel for amicus Summit Legal Defenders.

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