

NO. 12-0724

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 96557

STATE OF OHIO,

Plaintiff-Appellant

-vs-

ROBERT BONNESS,

Defendant-Appellee

**MEMORANDUM IN SUPPORT OF JURISDICTION**

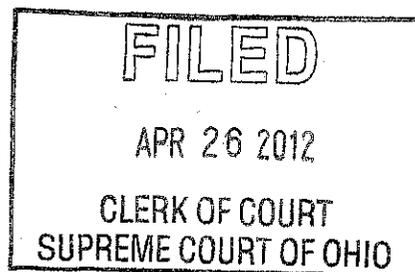
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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

The court of appeals held that the trial court erred in sentencing Appellee Robert Bonness by considering that he was a former Cleveland Police Officer and finding that his knowledge and skill in that capacity were not relevant as aggravating factors when imposing sentence. Thus, the appellate court vacated a sentence imposed on Bonness for attempted rape of a minor and multiple counts of pandering sexual-oriented matter involving a minor, pandering sexually oriented matter involving a minor, and eight counts of the illegal use of a minor in nudity-oriented material or performance, as well as two counts of possession of criminal tools

Robert Bonness pled guilty to one count of attempted rape; eight counts of pandering sexual-oriented matter involving a minor; six counts of pandering sexually oriented matter involving a minor; eight counts of the illegal use of a minor in nudity-oriented material or performance; and two counts of possession of criminal tools. The trial court imposed consecutive five-year terms on the eight illegal use of a minor in nudity-oriented material or performance counts (child pornography sentences). When added to the sentence imposed on the other counts, including an eight-year term for attempted rape, Bonness received a total prison term of 52 years and six months. The Eighth District reversed Bonness's child pornography sentences, finding that the trial court improperly considered his status as a retired police officer and that his sentence was inconsistent with other similarly situated offenders.<sup>1</sup>

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<sup>1</sup> The Eighth District's decision incorrectly references R.C. 2929.14(B)(3)-(5) in its opinion; the factors that the court referenced are in R.C. 2929.12(B)(3)-(5). *State v. Bonness*, 8<sup>th</sup> Dist. No. 96557, 2012-Ohio-474, ¶ 21.

Ohio law requires a court to consider certain factors when imposing a sentence. R.C. 2929.12(A) states that “in addition, [the court] may consider any other factors that are relevant to achieving those purposes and principles of sentencing.” Similarly, R.C. 2929.12(B) also states that trial court shall consider “any other relevant factors, as indicating that the offender’s conduct is more serious than conduct normally constituting the offense.” Once a lawful sentence has been fashioned, it will not be disturbed absent an abuse of discretion.

At the time of the offense, Bonness had been retired from the police force for approximately sixteen (16) months. (State’s Sentencing Memorandum, pg. 7). During his interview with police, Bonness indicated that he learned how to access child pornography while assisting in the execution of a search warrant. (State’s Sentencing Memorandum, pg. 9). Additionally, Bonness used his skills in counter-surveillance to avoid detection as he arrived at a hotel to meet a twelve year old girl for a sexual encounter. *State v. Bonness*, 8<sup>th</sup> Dist. No. 96557, 2012-Ohio-474, ¶ 21. Bonness, therefore, used information obtained from his training as a police officer as a means to facilitate his crimes. Such a gross misuse of his position is a relevant sentencing factor pursuant to R.C. 2929.12.

Despite the clear intent of the statute to allow the trial court to consider all relevant factors, the Eighth District held that “[T]he court should not have considered Bonness’s prior service as a police officer as a factor for imposing sentences consecutively.” *State v. Bonness*, supra at ¶ 22. Further, the appellate court compared Bonness’s sentence to sentences received for Canadian offenders when finding the sentence disproportionate. The trial court was within its statutory authority to consider such a relevant factor in determining Bonness’s sentence. The Eighth District incorrectly

limited a trial court's ability to consider relevant factors during sentencing and erroneously relied on foreign law to diminish the severity of Bonness's offenses.

This Court should accept jurisdiction in this matter, summarily reverse the Eighth District's decision, and hold:

PROPOSITION OF LAW I: A Defendant's particularized knowledge and skills are relevant Aggravating Factors for a trial court to consider under R.C. 2929.12 when sentencing felony offenses.

PROPOSITION OF LAW II: An appellate court may not rely on foreign law to determine whether offenders are similarly situated under R.C. 2929.11(B) when reviewing sentencing upon felony offenses.

### **STATEMENT OF THE CASE AND FACTS**

On January 19, 2011 Bonness entered a plea of guilty to the following charges: one count of Attempted Rape; eight counts of pandering sexual-oriented matter involving a minor; six counts of pandering sexually oriented matter involving a minor; eight counts of the illegal use of a minor in nudity-oriented material or performance (child pornography counts); and two counts of possession of criminal tools. As relevant here, the court imposed consecutive five-year terms on the child pornography counts.

The Eighth District vacated the sentences on the child pornography counts and remanded the matter for sentencing. It found that the trial court improperly considered Bonness's status as a retired police officer and that his sentence was inconsistent with other similarly situated offenders. In reaching its decision, the Eighth District did not apply the appropriate standard of review and also relied on foreign law to diminish the sentence imposed.

On March 3, 2011, the State of Ohio filed its Sentencing Memorandum and provided copies both to the trial court and Appellant. Within that pleading, the State set forth the following Statement of Facts as they took place in this case:

“An investigation was conducted by Investigator Rick McGinnis of the Ohio Internet Crimes Against Children Task Force (ICAC) (hereinafter referred to as “McGinnis”).

On July 8, 2010, McGinnis, in an undercover capacity, posted an advertisement on Craigslist.com using the undercover profile “Cliff Barton” ([dadndau12@gmail.com](mailto:dadndau12@gmail.com)) which stated: *“Looking for something you can’t have – m4mm-49 (Cleveland) – “Dad n Daughter looking for the right person in the Cleveland area for things that may interest that special person. Experience preferred and confidentiality is of the utmost importance. If interested please contact me for details if interested in something different and for travelers visiting the Cleveland area well you know..Only the interested please. Dadndau12.*

On July 11, 2010, McGinnis was contacted by a person using the email address of [harpinbob@yahoo.com](mailto:harpinbob@yahoo.com), (also identified as Bob Bonness in the email), and that he was interested. On July 11, 2010, McGinnis responded to Bonness via e-mail stating “my daughter is 12 does that matter?” Bonness replies **“does she swallow?”** The emails that were sent back and forth between Investigator McGinnis via Gmail, [dadndau12@gmail.com](mailto:dadndau12@gmail.com), and Bonness’ email address, [harpinbob@yahoo.com](mailto:harpinbob@yahoo.com), clearly identify the offender as “Bob Bonness.”

On July 12, 2010, McGinnis continued the e-mail exchange and stated “I...can over see as she is 12 years old.” Bonness responded, stating **“I’d love for her to swallow cum. I want to taste her also. Where and when would you like to meet?”**

On July 14, 2010, Bonness provided his cellular telephone number, 216-376-6781.

On July 22, 2010, a face-to-face meeting was arranged at Great Northern Mall. At the meeting, Bonness asked McGinnis **if his daughter swallowed**. McGinnis again informed Bonness that his daughter is 12 years old. This face-to-face meeting was video and audio taped.

On September 22, 2010, two months after the meeting at Great Northern Mall, Bonness again contacted McGinnis via e-mail and stated **“Still looking for some fun?” I am still interested.**”

On October 1, 2010, Bonness again emails McGinnis and stated **“I really would love to eat her and make her scream while cumming. And I also love a good bj. I would like to have her dressed nice and innocently. I want to do some seduction with her and convince her that this will be a lot of fun.”**

On October 1, 2010, Bonness emailed McGinnis that he wanted McGinnis’ “daughter” to dress in a cheerleader outfit or costume. On October 2, 2010, McGinnis responded, stating “ok cool let me see what I can find since she is 12 and so petite it maybe kinda hard to find one. There might be a Disney princess outfit.”

On October 22, 2010, Bonness emailed that he wanted to meet McGinnis and his “daughter.” Bonness stated **“Next week almost anytime is good for me. Sorry I haven’t gotten back to you I have been busy finishing up my outdoor kitchen. So it is really up to you and her for when and where.”** On October 27, 2010, McGinnis responds to Bonness via e-mail: “I’m thinking tomorrow or Friday early afternoon. How does that sound? I will get with my friend at a [hotel] in North Olmsted if this is good for you. How long do you think we need the room for. Anything special you need me to have there?” Bonness made plans to meet with McGinnis and his “daughter” on October 28, 2010 at 1:30 pm at a hotel, room 103, in North Olmsted.

On October 28, 2010, ICAC investigators maintained e-mail communication with Defendant. At one point, Defendant wanted to speak with the 12 year old girl, at which time there was a telephone conversation between Bonness and an undercover agent posing as McGinnis’ 12 year old daughter. Officers set up surveillance at the hotel in North Olmsted and observed Bonness drive into the parking lot in a black Kia four-door hatchback vehicle with the VIN number and Ohio license plate registered to Robert Bonness at 1703 Staunton Dr., Parma, Ohio. **Bonness was conducting counter-surveillance and drove in and out of the lot several times.** Bonness also went to other surrounding lots for a period of time. At one point Bonness got back on the freeway. McGinnis called Bonness’ cellular phone and asked if Bonness was still coming. Bonness stated he would turn around and come back. Officers observed the car come back, proceed to the back of the building, park on the west side of the hotel, and then subsequently leave the parking lot. McGinnis called Bonness and offered to meet him inside the lobby. Bonness then drove back into the hotel parking lot and parked his car. Bonness entered the hotel where McGinnis mistakenly went to the wrong room. Bonness asked if it was the right room and McGinnis then walked to the correct hotel room. Bonness was arrested as he was entering hotel room number 103.” (emphasis added).

## LAW AND ARGUMENT

A. ***PROPOSITION OF LAW I: A Defendant's particularized knowledge and skills are relevant Aggravating Factors for a trial court to consider under R.C. 2929.12 when sentencing felony offenses.***

1. **The Eighth District Did Not Discuss or Apply the Appropriate Standard of Review.**

At the sentencing hearing the trial court expressed its displeasure with the fact that Bonness not only traveled in his vehicle to have sex with a 12-year old girl, but also had downloaded and saved at least 94 images of children either being raped or in states of nudity. Bonness brought items such as condoms, sex toys, dessert sauces and a lead-filled billy club to the meet location, and he also suggested the specific sexual acts he hoped to engage in with the minor victim. Bonness was able to commit his crimes not despite the fact that he was a retired Cleveland police officer, but because he was a police officer. The trial court fairly considered this and provided its reasoning. Even worse, Bonness used his police training as a means to ensure the meeting with his victim would take place and take place smoothly, and also in an attempt to conceal his crimes. This was inexcusable.

As the trial court stated at sentencing:

“These are innocent victims horribly abused against their will . . . It would be very difficult for a victim to have to go up to another police officer and report this, and I think that is what aggravates the situation and your position in society.” (May 4, 2012, TR. 72-74)

The reasons the trial court sentenced Bonness as it did were valid, and were reasonable under the circumstances of this case. The crimes Bonness committed were various, and especially repugnant. Bonness, a former police officer who knew better, committed over 95 crimes, including driving to a hotel to have sex with a 12-year old girl as well as collecting images and videos of children being raped. Bonness was prolific in

his crimes, and his sexual appetite for young children was affirmatively demonstrated. Bonness is a sexual predator in the truest sense of the word, and as the trial court stated at sentencing, “But for the police being there, (the rape of the 12-year old girl) would have happened.” (May 4, 2012. TR, 75)

The sentence is unequivocally not contrary to law. The consecutive sentence imposed by the trial court is within the statutory range for the offense, which makes Bonness’s sentence legal, and appropriate under the specific circumstances of this case. In reversing the sentence, the Eighth District did not use the appropriate standard of review. This Court established a two-step procedure for Ohio courts to follow in reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008 - Ohio- 4912, ¶4. “First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to the law. If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse of discretion standard.” *Id.*

A trial court possesses broad discretion to impose a prison sentence within the statutory range. *State v. Gatson*, 8<sup>th</sup> Dist. No. 94668, 2011-Ohio-460, ¶ 15. In order to find an abuse of discretion, a reviewing court must find that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. This Court recently affirmed an aggregate prison term of 134 years which resulted from the consecutive imposition of maximum sentences following the defendant’s guilty pleas to three aggravated robberies where no life threatening injuries resulted. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073. In doing so, this Court reasoned “Although *Foster* eliminated judicial fact-

finding, courts have not been relieved of the obligation to consider the overriding purposes of felony sentencing, the seriousness and recidivism factors, or other relevant considerations set forth in R.C. 2929.11, 2929.12, and 2929.13.” *Id.* at 296.

Bonness’s sentencing journal entry states the trial court considered all required factors of law, and found that prison was consistent with the purposes of R.C. 2929.11. (See, March 9, 2011, Sentencing Journal Entry for Cuyahoga County Court of Common Pleas, Case No. CR 543662). This alone was enough to fulfill its obligations under R.C. 2929.11 and 2929.12. See *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793; *State v. Woodward*, 8<sup>th</sup> Dist. Nos. 94672, 94673, 2011-Ohio-104, ¶ 6. Even so, the trial expressly mentioned the sentencing factors it utilized, stating:

“The Court understands the law. In fact, I have considered the principles and purposes of Senate Bill 2 felony sentencing, all the appropriate recidivism and seriousness factors, and all the other statutory requirements of the law.”

Moreover, the trial court considered Bonness’s pre-sentence investigation report, as well as the sentencing memoranda filed by Bonness and the State. (TR, 39-40) After considering all of the above materials and the applicable statutes, the trial court determined that Bonness deserved a serious punishment, which was unquestionably within its discretion. The sentencing statutes are in place to guide trial courts when they sentence criminal defendants, but as long as trial courts follow the rules they have been given, the sentences they hand down should not be disturbed.

The reasons the trial court sentenced Bonness as it did were valid and were reasonable under the circumstances of this case. Recently, in *State v. Phillips*, 8<sup>th</sup> Dist. No. 92560, 2009-Ohio-5564, the Eighth District upheld a 21-year old first-time felon’s 24-year prison sentence in a child pornography case where the defendant claimed the trial

court erred by imposing consecutive prison sentences without making factual findings. In *Phillips*, supra, the Eighth District found that, “[T]he trial court is still required to carefully consider the statutes that apply to every felony case. These include 2929.11, which specifies the purposes of sentencing, R.C. 2929.12 which provides guidance in considering the factors relating to the seriousness of the offense and recidivism of the offender, and any statute that is specific to the case itself.” The trial court considered all of the required and relevant statutory sentencing factors and because Bonness’s child pornography sentence fell within the statutory minimums and maximums for the crimes he was convicted of, there is absolutely no evidence that the sentence is contrary to law or that the trial court abused its discretion. Had the Eighth District followed the procedure this Court set forth in *Kalish*, supra, it would not have vacated the trial court’s sentence.

**2. The Eight District Reversed the Trial Court’s Sentence by Relying on Case Law with Dissimilar Offenders and Mischaracterizing the Severity of the Crime and Sentence.**

Rather than properly analyzing the trial court’s decision according to this Court’s precedent, the Eighth district simply asserted that the sentence was inconsistent with those given to similar offenders. Under R.C. 2929.11(B) a felony sentence shall be “consistent with sentences imposed for similar crimes committed by similar offenders.” As the court itself noted, however, “each case stands on its own unique facts, so we have concluded that “[a] list of child pornography cases is of questionable value in determining whether the sentences imposed are consistent for similar crimes committed by similar offenders since it does not take into account all the unique factors that may distinguish one case from another.” *State v. Bonness*, supra at ¶ 27, citing *State v. Siber*, 8<sup>th</sup> Dist. No. 94882, 2011-Ohio-109, ¶ 15.

To justify its conclusion that the sentence was inconsistent with similar offenders, the court attempted to analogize *State v. Geddes*, 8<sup>th</sup> Dist. No. 88186, 2007-Ohio-2626. In *Geddes*, the court reversed a 30-year sentence on six counts of pandering sexually oriented materials when the defendant pleaded guilty to printing images of child pornography from a public library while on parole. *Id.* at ¶ 9. The court concluded that the lengthy sentence was disproportionate to the defendant's conduct. *Id.* at ¶ 11. However, *Geddes* is distinguishable because there, the defendant never attempted to molest a child. In contrast, Bonness went beyond collecting child pornography and attempted to rape a child. As the court noted, "He has taken substantial, concrete steps to consummate an encounter with a 12-year-old and was stopped from doing so by his arrest." *State v. Bonness*, supra at ¶ 16. Therefore, Bonness and the offender in *Geddes* are not similar offenders, any comparisons drawn are irrelevant. Moreover, in the cases that the court cites to support that the sentence was inconsistent, none of the offenders was a former police officer who used his unique training and skills to facilitate the crime. This is clearly an aggravating factor. As the trial court recognized, victims of crimes committed by police will be reluctant to report the crime. (May 4, 2012, TR. 72-74).

The Eighth District also mischaracterized possession of child pornography as a non-violent crime. It stated, "we find it difficult on this record to justify 40 consecutive years in prison for the nonviolent crime of possession child pornography." *State v. Bonness*, supra at ¶ 29. This proposition flies in the face of the mainstream of legal opinion as well as the court's own reasoning. Earlier in its opinion, the court specifically found that the trial court did not abuse its discretion by relying on the re-victimization of the children shown in pornography as a sentencing factor. *Id.* at 19-20. The court

discussed the amending of 18 U.S.C. 2252, where the United States Congress found that “[c]hild pornography is a permanent record of a child’s abuse and the distribution imaged re-victimizes the child each time the image is viewed.” It also cited Leary, *Self-produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 Va.J.Soc.Policy&L. 1, 9-11 (2007) (arguing that an image of child pornography is a permanent record that “uniquely affects victims are into the future” and that “creates a continual cycle of abuse”). *Id.* Therefore, possession of child pornography is a violent crime as it re-victimizes the children shown. The Eighth District incorrectly and unjustifiably diminished the severity of Bonness’s offenses and wrongly concluded that consecutive sentences were inappropriate.

In addition, the Eighth District made up its own actuarial tables without any evidence of Bonness’s health or risk assessment. The court stated, “This is a de facto life sentence because it extends will beyond Bonness’s current life expectation. The sentence would thus place an undue burden on the state’s resources as the prison system would be forced to pay for all of Bonness’s medical care as he enters the final stages of his life.” *Id.* at ¶ 29. The court presented no evidence to demonstrate that Bonness is not expected to live a normal life or that he will place an undue financial burden on the state. The trial court’s lawful sentence should not be disturbed because of such an unsupported consideration by the appellate court.

**3. The Eighth District Failed to Consider that Bonness Asked the Court to Consider his Status as a Retired Police Officer for Mitigation.**

Bonness asked the trial court consider his status as a retired police officer for mitigation. (Defendant’s Sentencing Memorandum, pgs. 2-3, 14). His attorney also brought his prior employment up for mitigation purposes at sentencing. “I believe this is

the first time that I can ever remember this, the maximum penalty should be assessed against Mr. Bonness for a man....who spent 28 years in service in his community.” (May 2, 2011. TR, 45). Bonness cannot object to the trial court’s consideration of this factor as aggravating and yet ask that the court consider this fact as mitigation. The use of a relevant factor during sentencing is not erroneous. However even if it was, under the invited error doctrine, a party is not entitled to take advantage of an error that he himself invited or induced. *State v. Bey* (1999), 85 Ohio St.3d 487, 492-493, 709 N.E.2d 484.

**B. *PROPOSITION OF LAW II: An appellate court may not rely on foreign law to determine whether offenders are similarly situated under R.C. 2929.11(B) when reviewing sentencing upon felony offenses.***

The Eighth District stated “...ordering consecutive sentences on the eight counts of child pornography goes beyond punishment especially when similar offenders have been given significantly lower sentences.” *State v. Bonness*, supra at ¶ 29. The court then stated in a footnote:

We note with some interest that child pornography laws in other countries are far less severe than in the United States. For example, a Canadian man in possession of the largest stash of child pornography ever found in that country- more than 4.5 million pornographic images- was sentenced to concurrent prison terms of five years for distribution, four and one half years for accessing, and four and one half years for possession. Interestingly, the Crown has only sought a prison term of five to seven years.”

Sentences imposed in Canada are completely irrelevant to this case. The Eighth District’s reliance on foreign law diminishes the severity of Bonness’s crimes. Bonness’s crimes are repugnant and reprehensible. The Ohio Legislature created sentencing guidelines to ensure an appropriate punishment is fashioned. The trial court’s sentence was within these guidelines. The sentence should not be vacated because of sentencing in other countries under other laws. While a legislature may wish to consider the actions of

other nations on any issue it likes, courts should not impose “foreign moods, fads, or fashions on Americans.” *Foster v. Florida*, 537 U.S. 990, n., 123 S.Ct. 470, 154 L.Ed.2d 359 (2002) (THOMAS, J., concurring in denial of certiorari). The Eighth District’s assessment of foreign law more resembles a post hoc rationalization for its subjectively preferred conclusion that the sentence is too harsh for the offenses, rather than any objective effort to decide whether the sentence was actually contrary to our law.

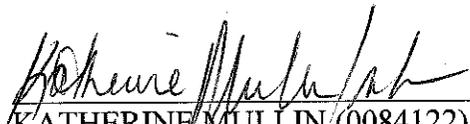
### CONCLUSION

The State respectfully submits that Supreme Court Review is necessary to summarily reverse the Eighth District in this matter on the authority of R.C. 2929.12 and R.C. 2929.11. The State therefore submits that this case is worthy of Supreme Court review and respectfully requests that this Honorable Court accept jurisdiction to hear this case on its merits.

Respectfully submitted,

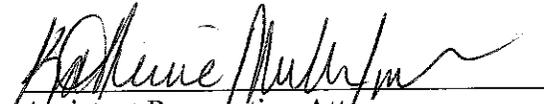
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**SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 25<sup>th</sup> day of April, 2012, to Edward LaRue, 75 Public Square #800, Cleveland, Ohio 44113.

  
Assistant Prosecuting Attorney



# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 96557

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ROBERT BONNESS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REVERSED AND REMANDED  
FOR RESENTENCING**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-543662

**BEFORE:** Stewart, J., Kilbane, P.J., and E. Gallagher, J.

**RELEASED AND JOURNALIZED:** February 9, 2012

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Robert Bonness, pleaded guilty to one count of attempted rape; eight counts of pandering sexually-oriented matter involving a minor in violation of R.C. 2907.322(A)(1); six counts of pandering sexually-oriented matter involving a minor in violation of R.C. 2907.322(A)(5); eight counts of the illegal use of a minor in nudity-oriented material or

performance in violation of R.C. 2907.323(A)(3); and two counts of possession of criminal tools. As relevant here, the court imposed consecutive five-year terms on the eight illegal use of a minor in nudity-oriented material or performance counts. When added to the sentences imposed on the other counts, including an eight-year term for attempted rape, Bonness received a total prison term of 52 years and six months.

{¶ 2} In this appeal, Bonness asserts two assignments of error: (1) that the court abused its discretion by ordering the maximum sentence on the attempted rape count, and (2) that the court abused its discretion by ordering him to serve the eight counts of illegal use of a minor in nudity-oriented material or performance (we will refer to these as the “child pornography” counts) consecutively because the sentence constituted a de facto life sentence. We find that the court did not abuse its discretion by ordering a maximum sentence for the attempted rape count, but agree that consecutive sentences in this case were disproportionate to those rendered in similar cases, so we reverse and remand for resentencing.

## I

{¶ 3} Bonness was a 53-year-old retired police officer with no prior criminal record. He was caught in a police sting that involved his answering an anonymous internet posting from a fictitious father and daughter who were “looking for the right person in the Cleveland area” to do things “that

may interest that special person.” Bonness was undeterred when he learned from the poster that the daughter was only 12 years old, and even asked the poster, “does she swallow?” He exchanged several emails with the poster, each growing more graphic in its description of the sex acts that he hoped he and the daughter might mutually perform. These exchanges went on for several months and Bonness, satisfying himself that the 12-year-old would be a willing participant, actually spoke on the telephone with an undercover officer pretending to be the fictitious 12-year-old. Bonness finally arranged to meet the father and daughter at a hotel and, when he arrived, was arrested.

{¶ 4} Upon arrest, Bonness waived his right to remain silent. He confessed that had there been a young girl present in the hotel room, he would have engaged in sexual activity with her, but allowed that he would only have done so after satisfying himself that she was not being forced to submit. The police searched Bonness’s car and found condoms, lubricants, and vibrators. Bonness told the police that he had a sexual addiction and kept child pornography at his house. A search of his computer uncovered 94 pornographic files, some of which were videos showing children under the age of 13 engaging in deviant sexual acts. The court described one of the videos as showing a child being digitally and anally penetrated, forced to perform oral sex, defecated upon, handcuffed, and restrained in a dog kennel.

{¶ 5} As previously noted, the court imposed an eight-year sentence on the attempted rape count and consecutive five-year terms on the eight illegal use of a minor in nudity-oriented material or performance (child pornography) counts. It also imposed concurrent 18-month terms on the six pandering sexually-oriented matter involving a minor counts; concurrent 12-month terms on the eight pandering sexually-oriented matter involving a minor counts; and consecutive 12-month terms on the two criminal tools counts.

## II

### A

{¶ 6} At one time, Ohio law created presumptions that offenders be given minimum, concurrent terms of incarceration. See former R.C. 2929.14(B), 2929.14(E)(4), 2919.19(B)(2), and 2929.41. These presumptions could be overcome if the court made specific factual findings regarding the nature of the offense and the need to protect the public. This judicial fact-finding was called into question by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), in which the United States Supreme Court held that judicial fact-finding could infringe upon a defendant's Sixth Amendment right to a jury trial because it invaded the fact-finding function of the jury. In *State v. Foster*, 109 Ohio St.3d 1,

2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held that under *Apprendi* and *Blakely*, Ohio's sentencing statutes that required a judge to make factual findings in order to increase a sentence beyond presumptive minimum or concurrent terms unconstitutionally infringed upon the jury's fact-finding function in violation of the Sixth Amendment. It, therefore, severed those sections and held that courts have full discretion to sentence within the applicable statutory range and likewise have discretion to order sentences to be served consecutively. *Id.* at ¶ 99-100.

{¶ 7} *Foster* was partially called into question by *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), in which the United States Supreme Court later ruled that neither *Apprendi* nor *Blakely* implicated a sentencing judge's long-understood authority to order sentences to be served consecutively. The Ohio Supreme Court later acknowledged that *Foster* erroneously applied *Apprendi* and *Blakely* to ban judicial fact-finding in support of consecutive sentences, but ruled that *Ice* could not revive that which had previously been severed as unconstitutional in *Foster*. See *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, paragraph two of the syllabus. In other words, R.C. 2929.14(E)(4), which had been declared unconstitutional and severed in *Foster*, remained severed.<sup>1</sup> Thus, *Ice* had no

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<sup>1</sup>The General Assembly reenacted the consecutive sentencing provisions formerly contained in R.C. 2929.14(E)(4) in R.C. 2929.14(C)(4), effective September 30, 2011. The court sentenced

practical effect on *Foster*, meaning that the court still has “the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently \* \* \*.” *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶ 19.

B

{¶ 8} Even though there are no longer any express factors for the court to consider before imposing sentences consecutively, the sentencing judge’s discretion must nonetheless be guided by a consideration of the statutory policies that apply to every felony offense, including those set forth in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶ 37. The sentencing factors apply to decisions to impose sentences consecutively. *See State v. Freeman*, 8th Dist. No. 95608, 2011-Ohio-5651, 2011 WL 5222669, ¶ 25.

{¶ 9} One of the “overriding” purposes of felony sentencing is “to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.” R.C. 2929.11(A). To achieve that overriding purpose, a felony sentence must be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim,

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Bonness on March 9, 2011, so the reenacted provisions do not apply to him.

and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.11(B).

{¶ 10} While the sentencing judge has discretion to determine the most effective way to comply with R.C. 2929.11, the sentencing judge may only exercise that discretion after considering the seriousness, recidivism, and mitigating factors set forth in R.C. 2929.12. A separate finding on each statutory factor is not required — the duty is satisfied merely by noting that the sentencing factors were considered. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 18; *State v. Wright*, 8th Dist. No. 95096, 2011-Ohio-733, 2011 WL 550095, ¶ 4.

### III

{¶ 11} Bonness first argues that the court erred by imposing the maximum eight-year sentence on the attempted rape count. While conceding that a minimum sentence would not have been appropriate, he claims that the maximum term was inappropriate because he was a first-time offender who cooperated with the police, that there was no actual victim given that he was the subject of a police sting, and that even had there been an actual victim, there was still the potential that he could abandon the plan before committing any crime.

{¶ 12} The court stated that it considered the relevant statutory factors, so that statement by itself was enough to fulfill its obligations under R.C.

2929.11 and 2929.12. See *State v. Arnett*, 88 Ohio St.3d 208, 215, 2000-Ohio-302, 724 N.E.2d 793; *State v. Woodward*, 8th Dist. Nos. 94672 and 94673, 2011-Ohio-104, 2011 WL 198594, ¶ 6. Nevertheless, a rote statement that the statutory factors have been considered should not be examined in a vacuum — it must be considered in the context of facts brought out during sentencing as applied to the relevant sentencing factors. The court had a presentence investigation report, along with sentencing memoranda submitted by the parties. It also heard from Bonness, his attorney, and the assistant prosecuting attorney.

{¶ 13} Cooperation with authorities is not a stated factor for consideration under R.C. 2929.12. In capital cases, “[a] defendant’s confession and cooperation with law enforcement are mitigating factors.” *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶191. However, the Supreme Court has made it clear that in capital cases, mitigation applies only to sentencing and does not necessarily excuse a defendant’s culpability. *State v. Holloway*, 38 Ohio St.3d 239, 527 N.E.2d 831 (1988), paragraph one of the syllabus. R.C. 2929.12(C)(4) takes the opposite approach — it allows the sentencing judge to consider whether there were “substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.”

{¶ 14} While it is true that Bonness immediately confessed his involvement in seeking a sexual liaison with a 12-year-old girl, that confession did not mitigate his conduct leading up to his arrest. Perhaps his quick confession, cooperation with the investigation, and guilty plea made the case easier to prosecute, but there is little doubt on the record before us that the state possessed overwhelming evidence of Bonness's guilt and would not likely have encountered difficulty in presenting and winning its case at trial. The court rationally could have found that the cooperation of a defendant who was caught in the act of committing a crime was entitled to little, if any, weight.

{¶ 15} Bonness's claim that he was entitled to favorable treatment because he might still have abandoned the crime before committing it is not supported by the record. He admitted to the police upon his arrest that had there been an actual and willing father and child available for a liaison, he would have engaged in sexual activity with the child. He pursued a sexual liaison for several months, sending graphic email messages. He even spoke with an undercover police officer, posing as the fictitious 12-year-old, in order to satisfy himself that the child would be a willing participant. Finally, the police found sex paraphernalia and female stimulant gel in Bonness's car. Bonness was fully prepared to go forward with an illicit liaison. His

suggestion that he might have backed out of the liaison had the police not intervened is not worthy of serious consideration.

{¶ 16} Finally, while it is true that there was no actual victim of the attempted rape, we fail to see how this mitigates the seriousness of Bonness's actions. He was ready and willing to have sex with a 12-year-old, demonstrated by his arrival at the hotel with a car trunk containing sex toys.

Although there was no actual victim, Bonness thought there would be, as demonstrated by his insistence that he first speak to the child to ensure her willingness to have sex with him. He had taken substantial, concrete steps to consummate an encounter with a 12-year-old and was stopped from doing so by his arrest.

{¶ 17} We thus see nothing in the record that would mitigate Bonness's conduct leading up to his arrest. On the other hand, the court could rationally consider the seriousness of the attempted rape of a 12-year-old and the very substantial steps Bonness took to make that rape happen. The court did not abuse its discretion by finding that Bonness's conduct went so far beyond mere "curiosity" that it was deserving of the most severe penalty allowed by law.

#### IV

{¶ 18} The next issue raised by Bonness is whether the court abused its discretion by running the eight child pornography counts consecutively. He

argues that the court erroneously gave weight to the fact that Bonness was a police officer despite knowing that Bonness had been retired from the police force at the time of his offenses; that the court neglected to consider that Bonness was a first-time offender who cooperated with the police and showed great remorse for his actions; and that the total sentence was disproportionate to his conduct and inconsistent with those given to similar offenders.

A

{¶ 19} R.C. 2929.12(B)(1) and (2) require the court to consider the “physical and mental injury” suffered by the victim of the offense and whether that injury was “exacerbated” because of the victim’s physical or mental condition or age. The court found that the victims were the children used to make the child pornography Bonness had in his possession. It found that every viewing of the images and films constituting the child pornography constituted a revictimization of the children. It noted that many of the children depicted in the pornography had been identified and that the abuses perpetrated upon them were essentially a “life sentence” because they know that “as they get older and start to understand the breadth and scope \* \* \* of their abuse, their victimization continues.”

{¶ 20} While Bonness disagrees with the court’s conclusion about the continued revictimization of children shown in child pornography, that

conclusion is within the mainstream of legal opinion. For example, when amending 18 U.S.C. 2252, the United States Congress found that “[c]hild pornography is a permanent record of a child’s abuse and the distribution of child pornography images revictimizes the child each time the image is viewed.” See *Effective Child Pornography Prosecution Act of 2007*, Pub. L. No. 110-358, Section 102(3), 122 Stat. 4001 (2008). See also Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 Va.J.Soc.Policy&L. 1, 9-11 (2007) (arguing that an image of child pornography is a permanent record that “uniquely affects victims far into the future” and that “creates a continual cycle of abuse”). It follows that the court did not abuse its discretion by relying on the revictimization of the children shown in the pornography as a sentencing factor.

{¶ 21} R.C. 2929.14(B)(3)-(5) focus on the offender’s occupation, whether he held a position of trust in the community, whether the offender’s occupation or profession obliged him to prevent the offense and bring others to justice, and whether the offender used his profession or occupation to facilitate the offense. The court found that Bonness was a retired police officer whose former position “aggravates the situation” and noted that Bonness used his skills in counter surveillance to avoid being watched by the

police as he arrived at the hotel. The court stated that “your duty, the integrity you are supposed to espouse was certainly lacking.”

{¶ 22} Bonness argues that he was no longer a police officer and should not be held to the same standard as a currently-serving police officer. This is a valid point. Had Bonness been an active member of the police department, the court could rationally conclude that he violated a position of trust or authority within the community. But there is no question that he had retired as a police officer well before he committed these offenses. Therefore, he held no position of trust or authority at the time he committed the crimes. The oath of service he swore to uphold as a police officer no longer applied to him, making him no different than any other member of the public. The court should not have considered Bonness’s prior service as a police officer as a factor for imposing sentences consecutively. *See State v. Bradford*, 11th Dist. No. 2001-L-175, 2003-Ohio-3495, 2003 WL 21511159, ¶ 30.

{¶ 23} R.C. 2929.14(C) contains factors indicating that the offender’s conduct is less serious than conduct normally constituting the offense. These include whether the victim induced or facilitated the offense, whether the offender acted under strong provocation, whether the offender did not cause or expect to cause physical harm, and whether there are grounds for mitigation.

{¶ 24} In mitigation, Bonness again claims that he was a first-time offender and, given the length of sentence, unlikely to reoffend. He also argues that his acts of possessing child pornography did not constitute the worst form of the offense.

{¶ 25} The argument that his lack of a prior record and the lengthy sentence given to him act as insurance that he is unlikely to reoffend is questionable. Given the pervasiveness of the internet, it would be naive to assume that Bonness will be completely insulated from child pornography while in prison. Bonness's long-term pursuit of a sexual liaison with a 12-year-old was indicative of a deeper pathology. According to his email correspondences, he appeared to believe, or at least engaged in the fantasy, that a prepubescent girl would be sexually gratified by him. He tried to explain this by saying that his "rotten curiosity" got the better of him, but the court was unconvinced, noting that Bonness's attitude "is the terrible fallacy of these crimes, and that is the disconnect, the problem in your personality with respect to taking those steps to make this happen." The court could rationally find that Bonness's curiosity had moved far beyond being a person who merely looked at images of children to being a person who physically assaulted those children.

B

{¶ 26} Finally, we must determine whether, under R.C. 2929.11(A), the sentence achieved the overriding purpose of punishing Bonness by using “the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources” and whether, under R.C. 2929.11(B), Bonness’s sentence was “consistent with sentences imposed for similar crimes committed by similar offenders.”

{¶ 27} The goal of “consistency” in sentencing as stated in R.C. 2929.11(B) does not mean uniformity. *State v. Klepatzki*, 8th Dist. No. 81676, 2003-Ohio-1529, 2003 WL 1564323, ¶ 32. Each case stands on its own unique facts, so we have concluded that “[a] list of child pornography cases is of questionable value in determining whether the sentences imposed are consistent for similar crimes committed by similar offenders since it does not take into account all the unique factors that may distinguish one case from another.” *State v. Siber*, 8th Dist. No. 94882, 2011-Ohio-109, 2011 WL 198670, ¶ 15.

{¶ 28} Nevertheless, the comparison of one sentence against other sentences given for similar crimes is a useful guide for determining if the court abused its discretion in a particular case. Obviously, a survey of cases issued from this appellate district will tend to show only the worst sentences — we presume that defendants who are given much shorter sentences are not

appealing on that basis so any list of opinions from this court will necessarily be skewed to longer sentences. With this caveat in mind, we note that the most recent cases from this appellate district have affirmed lengthy sentences for possession of child pornography, but none that were as remotely lengthy as the sentence given to appellant. In *State v. Geddes*, 8th Dist. No. 88186, 2007-Ohio-2626, 2007 WL 1559544, we reversed a 30-year sentence on six counts of pandering sexually oriented materials when Geddes pleaded guilty to printing images of child pornography from a public library while on parole. While acknowledging that Geddes's actions were reproachable, we nonetheless concluded that the lengthy sentence was disproportionate to his conduct. On remand for resentencing, Geddes was given an 18-year sentence, which was affirmed on appeal. That sentence was broadly consistent with those given to similar offenders. See, e.g., *State v. Mahan*, 8th Dist. No. 95696, 2011-Ohio-5154, 2011 WL 4600044 (16 years consecutive on 81 counts); *State v. Corrao*, 8th Dist. No. 95167, 2011-Ohio-2517, 2011 WL 2112721 (ten years on 23 counts); *State v. Carney*, 8th Dist. No. 95343, 2011-Ohio-2280, 2011 WL 1842257 (24 years on 21 counts); *Siber*, 8th Dist. No. 94882, 2011-Ohio-109, 2011 WL 198670 (three years, nine months on 14 fourth and fifth degree felony counts); *State v. Moon*, 8th Dist. No. 93673, 2010-Ohio-4483, 2010 WL 3721872 (20 years on 49 counts).

{¶ 29} Given these cases, we conclude that the 40-year sentence imposed on Bonness for eight child pornography counts was inconsistent with sentences imposed for similar crimes committed by similar offenders. The inconsistency arises because the court ran the child pornography counts consecutive to one another. While there is no question that Bonness committed very serious crimes that deserve punishment, we find it difficult on this record to justify 40 consecutive years in prison for the nonviolent crime of possessing child pornography. This is a de facto life sentence because it extends well beyond Bonness's current life expectancy. The sentence would thus place an undue burden on the state's resources as the prison system would be forced to pay for all of Bonness's medical care as he enters the final stages of his life. The court plainly intended to punish Bonness because he was a police officer, but as we explained, that is not a valid consideration because he was retired from the police force at the time he committed his crimes. The court's need to punish Bonness is understandable. But ordering consecutive sentences on the eight child pornography counts went beyond punishment, especially when similar offenders have been given significantly lower sentences.<sup>2</sup>

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<sup>2</sup>We note with some interest that the child pornography laws in other countries are far less severe than in the United States. For example, a Canadian man in possession of the largest stash of child pornography ever found in that country — more than 4.5 *million* pornographic images — was sentenced to concurrent prison terms of five years for distribution, four and one half years

{¶ 30} This cause is reversed and remanded for resentencing.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and  
EILEEN A. GALLAGHER, J., CONCUR

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for accessing, and four and one half years for possession. Interesting, the Crown had only sought a prison term of five to seven years. *See* <http://www.cbc.ca/news/canada/new-brunswick/story/2011/11/14/nb-douglas-stewart-child-pornography-sentencing-612.html?cmp=rss> (last visited January 30, 2012).