

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Case No. 13-821

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

DAMON L. BEVLY,

Court of Appeals
Case No. 12AP-471

Defendant-Appellant

**AMENDED MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION
TO JURISDICTION**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: staylor@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

YEURA R. VENTERS 0014879
Franklin County Public Defender
373 South High Street, 12th Floor
Columbus, Ohio 43215
Phone: 614-525-8872

and

DAVID L. STRAIT 0024103
Assistant Public Defender

COUNSEL FOR DEFENDANT-APPELLANT

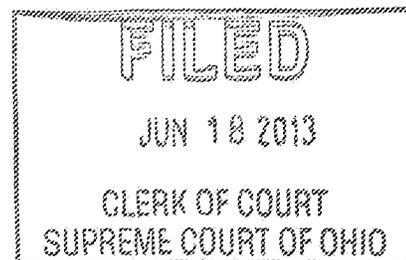


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant does not provide any compelling reason for this Court to expend its scarce judicial resources to review the constitutionality of the corroborating-evidence provision in R.C. 2907.05(C)(2)(a). There is no conflict amongst the appellate districts that would warrant granting review. The flawed decision of the trial court now stands reversed, and so there is no imperative to grant review here to correct those flaws.

The recent decision in *Alleyne v. United States*, ___ U.S. ___ (2013), does not require that this Court accept review, as defendant's jury-trial argument *still* fails. In *Alleyne*, the five-justice majority held that a defendant's jury-trial right is violated when a "fact" is not submitted to the jury and that same fact is used to require the imposition of a higher minimum sentence. Under *Harris v. United States*, 536 U.S. 545, 568, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), such mandatory-minimum sentences were upheld, as the *Apprendi-Blakely* principle only applied when a fact was used to increase the prescribed statutory *maximum*. Now, *Alleyne* has overruled *Harris*.

But, as explained in pages 13-15 *infra*, not even *Alleyne* aids defendant because no assessment of "fact" is involved in the corroborating-evidence requirement under R.C. 2907.05(C)(2)(a). Defendant still loses under *Alleyne*.

This Court should decline jurisdiction in all respects.

STATEMENT OF FACTS

The State incorporates paragraphs 2 through 6 of the Tenth District decision.

ARGUMENT

Response to Proposition of Law No. 1: A party challenging the rationality of a statutory provision bears the burden of negating all conceivable rational bases for the provision.

In a case involving gross sexual imposition against a child under age 13, when “[e]vidence other than the testimony of the victim was admitted in the case corroborating the violation”, the sentencing court “shall impose” on such an offender a prison sentence as a mandatory sentence. R.C. 2907.05(C)(2)(a). The trial court refused to follow this provision, and the Tenth District correctly reversed.

A.

Mandatory sentencing falls well within the General Assembly’s prerogatives. “Pursuant to its police powers, the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment.” *State v. Thompkins*, 75 Ohio St.3d 558, 560, 664 N.E.2d 926 (1996). The legislature has broad, plenary discretion in prescribing crimes and fixing punishments. *State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978). “[A]t all times it is the power of the General Assembly to establish crimes and penalties.” *Id.* at 112-13.

“Mandatory sentencing laws enacted pursuant to this authority do not usurp the judiciary’s power to determine the sentence of individual offenders.” *State v. Campa*, 1st Dist. No. C-010254, 2002-Ohio-1932. Mandatory-sentencing requirements are constitutional. *State, ex rel. Owens, v. McClure*, 48 Ohio St.2d 1, 354 N.E.2d 921 (1976). They serve the goal of punishing offenders. *Thompkins*, 75 Ohio St.3d at 561.

The General Assembly also has the authority to create and impose corroborating-

evidence requirements. Although such requirements are rare, they are not new to Ohio criminal law. For many years, a defendant could not be convicted of complicity based on the testimony of an accomplice alone. See *State v. Pearson*, 62 Ohio St.2d 291, 295, 405 N.E.2d 296 (1980) (discussing former R.C. 2923.03(D)). Even today, proof of the crime of sexual imposition requires corroborating evidence beyond just the victim's testimony. *State v. Economo*, 76 Ohio St.3d 56, 666 N.E.2d 225 (1996) (discussing R.C. 2907.06(B)); see, also, R.C. 2923.01(H)(1).

Such requirements are not demanding. In relation to the crime of sexual imposition, this Court held that “[t]he corroborating evidence * * * need not be independently sufficient to convict the accused, and it need not go to every essential element of the crime charged. Slight circumstances or evidence which tends to support the victim’s testimony is satisfactory.” *Id.* at syllabus.

B.

The applicability of this statutory provision is clear enough. If “[e]vidence other than the testimony of the victim was admitted in the case corroborating the violation”, then the court must impose a prison sentence. The State in fact had presented evidence other than the testimony of the victim, i.e., the evidence of defendant’s confession, both through the admission of the detective’s testimony and through the admission of the CD recording of the confession. The confession was “corroborating” of the violations, and it was from a source “other than the testimony of the victim.” The trial court at one point even agreed that the provision applied, stating that “the statute, indeed as represented by the state, is mandatory * * *.” (5-9-12 Tr. 2)

In its written decision, however, the court contended “there is a question” whether the provision applied. This suggestion was flawed.

1.

The court pointed to the fact that the defense did not cross-examine the detective. But there is no “actual cross-examination” requirement in the statutory language. The statutory text only requires corroborating evidence, not evidence that the defense has chosen to cross-examine. “In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969).

The court’s observation about lack of cross-examination was upside-down. Advocates often choose not to cross-examine *because* the evidence is undisputed. If anything, the defense decision not to cross-examine would be an additional reason to apply the corroborating-evidence provision, not a reason to disregard it.

In addition, the General Assembly would not have made the applicability of this mandatory-sentence provision depend on whether *the defense* chose to cross-examine. Such an approach wrongly would place the operation of this sentencing provision solely in the strategic control of the defense.

2.

The trial court next questioned whether the detective’s testimony was “evidence” that was “admitted”, contending that the Evidence Rules do not apply to miscellaneous criminal proceedings like sentencing. But the General Assembly would

have known that the Evidence Rules did not apply at sentencing, and yet it adopted this *sentencing* provision, to be applied at sentencing, thereby demonstrating that the status of the Evidence Rules should make no difference. Indeed, the provision only requires that the “evidence” be “admitted *in the case*.” It does not require that the evidence be admitted “in the trial” or that the issue of guilt be contested in some way requiring testimony in a contested hearing. An item does not stop being “evidence” merely because the rules governing its admissibility are substantially loosened in whatever hearing the evidence is offered and admitted.

3.

Purporting to “strictly construe” the statutory language, the trial court concluded that the mandatory-sentencing provision did not apply. But the court was not construing any particular statutory language. Instead, it was citing “good policy,” contending that its reading of the statute made more sense because it encouraged defendants to accept responsibility. Otherwise, the court contended, “the defendant ends up being more severely punished because of his cooperation.”

The court’s analysis amounted to thinly-veiled policy-making that was second-guessing the General Assembly’s own policy judgment on this sentencing matter. The overriding policy underlying this statutory provision is to mandate prison as to those offenders for whom there is evidence corroborating the violation. The statutory text makes no distinction between the various sources of corroborating evidence. There is no “cooperation” exception.

The statutory policy of mandatory punishment based on corroboration would

especially apply to a defendant's confessions and admissions. The legislature would have known that the GSI offense perpetrated on children often leaves no physical evidence and often occurs outside the presence of other witnesses. In many cases, the words of the offender would be the lone available corroborating evidence, and, of course, such confessions and admissions can often provide the most damning evidence of guilt. The General Assembly gave no indication that it was exempting this entire class of damning evidence from the reach of the corroboration requirement.

Corroboration and punishment were the legislative goal, not an exemption for offenders who are most clearly guilty because they made damning admissions or fully confessed.

The trial court's policy-making analysis also went far afield in contending that the corroborating-evidence provision would not apply when the defendant pleads guilty. Evidence is often the strongest in cases in which the defendant pleads guilty; the strength of the evidence is often the main reason why the defendant pleads guilty. Nothing in the statutory language would exempt plea-based convictions. It merely requires the admission of corroborating evidence "in the case," not the admission of evidence admitted "at the trial."

The statutory text is fairly clear and should be applied. "[T]he intent of the law-makers is to be sought first of all in the language employed * * *. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact." *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so * * *." *Brogan v. United States*, 522

U.S. 398, 408, 118 S.Ct. 805, 139 L.Ed.2d 830 (1998).

Nor does the concept of “strict construction” allow a rewriting of the statute based on “good policy.” Strict construction is not necessary “merely because it [is] possible to articulate a construction more narrow than that urged by the Government.” *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). The rule of strict construction, also known as the rule of lenity, “is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.” *Chapman v. United States*, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (quotation marks and brackets omitted); *State v. Sway*, 15 Ohio St.3d 112, 472 N.E.2d 1065 (1984).

The legislative intent here was to require prison when there is evidence corroborating the violation. The provision’s text makes no distinction based on the nature of the corroborating evidence, based on the nature of the defendant’s “cooperation,” or based on the way in which guilt was established. “Strict construction” cannot be used to insert such distinctions into the statutory language.

C.

The trial court also committed several errors in finding that R.C. 2907.05(C)(2)(a) is irrational under substantive-due-process review.

It is rational for the General Assembly to impose a corroboration requirement in

relation to a “sexual contact” crime. The General Assembly could rationally believe that sexual-contact crimes should be prosecuted with greater caution because of a greater danger of accidental touching and a greater danger of misinterpretation by the victim. *State v. Fawn*, 12 Ohio App.3d 25, 27-28, 465 N.E.2d 896 (10th Dist. 1983).

The General Assembly had a rational basis for applying this approach to the mandatory penalty it was creating for the sexual-contact crime of GSI under 13. To be sure, a defendant can be prosecuted and convicted for GSI under 13 based on the uncorroborated testimony of the victim alone. The General Assembly could impose a mandatory sentence on such offenses committed against a child. But the General Assembly wanted confirmation from other evidence before it would mandate a prison sentence. It is rational to impose a corroborating-evidence requirement.

Under substantive due process, the threshold question is whether the defendant has invoked a liberty interest that is deemed “fundamental.” *Washington v. Glucksberg*, 521 U.S. 702, 720-22, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Although defendant might argue that mandatory imprisonment involves a “fundamental” liberty interest, the United States Supreme Court has expressly declined to adopt “this sort of truncated analysis.” *Chapman*, 500 U.S. at 465. In accordance with *Chapman*, the mere fact that a statute imposes imprisonment will not justify strict judicial scrutiny. The only “liberty” that can be deemed “fundamental” is the “liberty” supposedly directly infringed by the statute itself, rather than the imprisonment that flows from a violation of the statute. Of course, a defendant had no cognizable liberty interest to commit GSI.

In the absence of a fundamental liberty interest being at stake, defendant is left to

contend that the statutory scheme is not “rationally related to legitimate governmental interests.” *Glucksberg*, 521 U.S. at 722, 728; *Thompkins*, 75 Ohio St.3d at 560, 561; *Adkins v. McFaul*, 76 Ohio St.3d 350, 351, 667 N.E.2d 1171 (1996). A substantially equivalent test for substantive due process is found in Ohio case law: “[A]n exercise of the police power * * * will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.” *Benjamin v. Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957).

The “rational basis” standard of review is the paradigm of judicial restraint. *FCC v. Beach Communications*, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). A court will not invalidate the judgment of the General Assembly as to whether an exercise of the police power bears a real and substantial relation to the public health, safety, morals, or general welfare of the public unless that judgment appears to be clearly erroneous. *Benjamin*, at paragraph six of the syllabus; *DeMoise v. Dowell*, 10 Ohio St.3d 92, 96-97, 461 N.E.2d 1286 (1984).

Under rational-basis review, courts are poorly situated to second-guess the lines drawn by the legislature. Rational-basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices” or “authorize ‘the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.’” *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Am. Assoc.*

of *Univ. Professors v. Central State University*, 87 Ohio St.3d 55, 58, 717 N.E.2d 286 (1999), quoting *Beach*, 508 U.S. at 315. “[A] state has no obligation whatsoever ‘to produce evidence to sustain the rationality of a statutory classification.’” *Id.* at 58, quoting *Heller*, 509 U.S. at 320. “A legislature is allowed to focus on what it perceives to be the greatest danger. *Beach*, 508 U.S. at 316. “[T]he fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.” *Id.* at 315-16, quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980).

Perfection and mathematical nicety are not required in drawing classifications, as a law can make rough accommodations in light of practical considerations. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

A criminal-law procedure will be overturned on due process grounds only if it violates some “fundamental principle of justice.” *Montana v. Egelhoff*, 518 U.S. 37, 43, 58-59, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality and concurrence); *Herrera v. Collins*, 506 U.S. 390, 407-408, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

Under these standards, the General Assembly could conclude that it is rational to distinguish between cases not having corroborating evidence and cases having such evidence. Just as the prosecutor could consider the amount of evidence in deciding whether to prosecute, see *United States v. Lovasco*, 431 U.S. 783, 794, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), the General Assembly could decide, as a matter of practical accommodation, that imposing a mandatory sentence should turn on whether there was corroborating evidence, thereby focusing the mandatory sentence on the offenders

about whom there is more evidence.

Defendant has not shown beyond a reasonable doubt that the mandatory-sentencing provision is unconstitutional. It does not violate a fundamental principle of justice to impose a corroborating-evidence requirement, especially when that requirement *favors* many defendants.

D.

The trial court stated that it did “not believe there is any rational basis for the distinction between cases where there is corroborating evidence from those where there is no corroborating evidence.” But, in fact, the court was aware of the General Assembly’s rational basis, i.e., the desire to have evidence corroborating the violation before mandating prison. The court merely disagreed with that rational basis.

The court conceded that it was disagreeing with the General Assembly’s approach, stating that it did not “accept this rationale” of requiring corroborating evidence. But mere disagreement with the General Assembly’s sentencing policy choice is not a basis for courts to find that policy unconstitutional.

The court contended that “there is only one standard and that is proof beyond a reasonable doubt. There is no such thing as an enhancement of this standard.” But these statements amounted to the court imposing its own judgment on how the sentencing scheme should be constructed. Even if the General Assembly was “enhancing” the beyond-reasonable-doubt standard, it was the General Assembly’s prerogative to do so in setting up this mandatory-sentencing provision. A corroborating-evidence provision is easily “rational” given the policy-maker’s interest in having such corroboration. It only

became “irrational” here because the trial court categorically refused to entertain the idea of requiring corroboration in any way.

The trial court next contended that “the court is unaware of any other criminal offense where the penalty is enhanced based on the amount of evidence.” But a corroborating-evidence requirement is not new to Ohio criminal law. Moreover, the novel or rare nature of a provision does not make it unconstitutional. *Martin v. Ohio*, 480 U.S. 228, 236, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987).

The court was also critical of the corroborating-evidence provision because it “could be counterproductive” by deterring sex offenders from confessing and/or pleading guilty. But, again, the court was engaged in mere second-guessing of policy choices. *Any* mandatory-sentencing provision could deter the offender from confessing or pleading guilty. But such provisions easily pass constitutional muster because the nature of the sentence is a matter for the General Assembly and is rationally related to the legislature’s nuanced policy goal of mandating prison when there is corroboration. The General Assembly can make the policy choice that certain offenses warrant certain punishment under certain circumstances despite whatever downsides such a mandatory-sentencing provision creates. As stated above, rational-basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices” and does not “authorize ‘the judiciary [to] sit as a superlegislature * * *.’” *Heller*, 509 U.S. at 319. Being “counterproductive” is not a basis to find a provision unconstitutional.

The trial court noted that it “could find no rationale for this new sentencing requirement” in Am.Sub.H.B. 95. But there is no legislative history in Ohio, and a

legislative body is not required to state its grounds for passing a law. Rather, the burden is on the challenger to negate every conceivable rational basis for the law.

Discount Cellular, Inc., v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 33. Defendant fell far short of negating every conceivable rational basis for the law. The first proposition of law does not warrant review.

Response to Proposition of Law No. 2: A mandatory-minimum sentencing provision does not violate the *Apprendi-Blakely* line of cases, especially when the issue that triggers the provision presents a question of law for the court.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. *Apprendi* was reaffirmed in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which held “that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (Emphasis *sic*).

On their face, these holdings in *Apprendi* and *Blakely* did not aid defendant. Based on conviction for the elements of GSI under 13 alone, defendant faced a maximum five-year prison term for each of his offenses as a third-degree felony. The mandatory-sentencing provision in R.C. 2907.05(C)(2)(a) does not increase the maximum penalty but rather only increased the minimum sentence to require prison. Mandatory-minimum sentences were constitutional even if based on a finding of “fact” that was not submitted to the jury. *Harris*, 536 U.S. at 568; *Apprendi*, 530 U.S. at 487;

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

As stated above, the Court in *Alleyne* has now overruled this line of cases upholding mandatory-minimum sentencing. Given the sparse attention to stare decisis by the five-justice majority, it is difficult to determine whether *Alleyne* will be a short-term or long-term precedent. For now at least, the State hereby preserves its position that mandatory-minimum sentences do not violate the right to a jury trial.

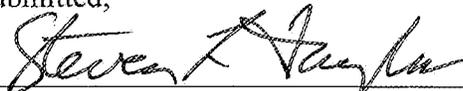
In any event, defendant's jury-trial-right claim *still* fails because no assessment of "fact" is involved in the corroborating-evidence requirement. "*Apprendi* does not apply to every 'determination' that increases a defendant's maximum sentence. Instead it applies only to findings of 'fact' that have that effect." *United States v. Gabrion*, ___ F.3d ___ (6th Cir. 2013). The *Alleyne* majority reiterates, over and over again, that the jury-trial right is implicated when a "fact" is used to increase the penalty floor or penalty ceiling. A corroboration requirement does not present an issue of "fact." As stated by the plurality in *Economo*, a "corroboration requirement * * * is a threshold inquiry of legal sufficiency to be determined by the trial judge, not a question of proof, which is the province of the factfinder." *Economo*, 76 Ohio St.3d at 60. Once the court determines that the additional evidence is legally sufficient to corroborate, the evidence satisfies the corroboration requirement regardless of what weight the jury as factfinder would actually give such evidence. As a question of law, the issue of whether other evidence corroborates the violation need not be submitted to a jury.

The trial court found an "*Apprendi* issue" by conjuring up a scenario in which the jury in a trial was presented with corroborating evidence but the jury disbelieved

that evidence and yet still convicted the defendant based on the testimony of the victim alone. The court asserted that the additional evidence in such a circumstance would not “corroborate” and that “[w]ithout a special finding by the jury the Court would be making a finding which in effect enhances the sentence from a possible prison term to a mandatory term.” But not even *Alleyne* prohibits “sentence enhancement” as such; rather, it only prevents reliance on a “fact” to increase the statutory-penalty floor or ceiling, and no such “fact” is involved in deciding whether corroboration is present.

The trial court also wrongly believed that the *Apprendi-Blakely* line of cases requires a special jury finding. There is no constitutional right to a special jury verdict reciting the elements of the offense, as general verdicts are the norm, and they have been accepted since the time of English common law. *Griffin v. United States*, 502 U.S. 46, 49-51, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); *Schad v. Arizona*, 501 U.S. 624, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality); *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995. *Apprendi-Blakely* are satisfied by a general verdict so long as the elements of the crime were submitted to the jury and the jury was instructed that it could only find defendant guilty if every element was proven beyond a reasonable doubt. A general verdict of guilty demonstrates that the jury has found every essential element beyond a reasonable doubt. No special verdict is required. The second proposition of law does not warrant review.

Respectfully submitted,


STEVEN L. TAYLOR 0043876
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 18th
day of June, 2013, to the office of David L. Strait, 373 South High Street,
12th Floor, Columbus, Ohio 43215, Counsel for Defendant-Appellee.



STEVEN L. TAYLOR