

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

DAMON L. BEVLY,

Appellant

Case No.: 13-821

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

Court of Appeals  
Case No. 12AP-471

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BRIEF OF APPELLANT DAMON L. BEVLY

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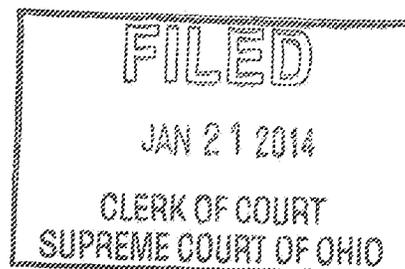
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## STATEMENT OF THE CASE

On August 5, 2011, Damon L. Bevly, was indicted on four counts of gross sexual imposition in the Franklin County Court of Common Pleas. The charges were third degree felonies because the indictment alleged violations of R.C. 2907.05(A)(4) which applies when the victim is less than 13 years old. The indictment alleged that the victim was aged 10-11 at the time of the offenses.

On March 9, 2012, Bevly pled guilty to Counts 1 and 2 of the indictment as charged, both third degree felonies. On March 19, 2012, trial counsel for Bevly filed a sentencing memorandum asserting two constitutional challenges to the mandatory sentencing requirement of R.C. 2907.05(c)(2)(a).

On April 26, 2012, the court issued a decision sustaining the defense challenges and rejecting the application of the mandatory sentencing provision. By Journal Entry filed May 11, 2012, the trial court imposed a three year sentence on each count, and ordered that they be served concurrently.

On June 4, 2012, the State filed a notice of appeal to the Franklin County Court of Appeals, Tenth Appellate District. On March 28, 2013, the Court of Appeals rendered an opinion and judgment reversing the trial court's judgment. This Decision was journalized by Entry filed April 11, 2013.

On May, 23, 2013, Bevly filed a notice of appeal to this court. By Journal Entry filed September 4, 2013, the Court dismissed the appeal. Bevly filed a motion for reconsideration on September 16, 2013. By Journal Entry filed November 6, 2013, the Court granted the motion for reconsideration and accepted Bevly's appeal.

## STATEMENT OF FACTS

R.C. 2907.05(A)(4) provides that the charge of gross sexual imposition is a third degree felony when the victim is less than 13 years old. Bevly's indictment alleged that the victim was aged 10-11 at the time of the offenses.

The crime of gross sexual imposition under 13 generally carries a presumption of prison. R.C. 2907.05(C)(2). But when "evidence other than the testimony of the victim was admitted in the case corroborating the violation" the general assembly has provided that a court "shall impose" on such offender "a *mandatory* prison term equal to one of the prison terms described in section 2929.14 of the Revised Code for a felony of the third degree." R.C. 2907.05(C)(2)(a). (Emphasis added.)

After Bevly pleaded guilty to Counts 1 and 2 of the indictment as charged, the State sought a determination that a prison term was mandatory. To accomplish this, the state introduced the testimony of Detective Brian Sheline at the plea hearing. Sheline testified that defendant confessed to the offenses by admitting that he had fondled the girl's vaginal area and then touched his penis to her vaginal area on at least two occasions as well. In addition to Sheline's testimony regarding defendant's confession, the state introduced as exhibit A the compact disc recording of the confession.

On March 19, 2012, trial counsel for Bevly filed a sentencing memorandum asserting two constitutional challenges to the mandatory sentencing requirement. Bevly claimed that the factor making a prison sentence mandatory bore no rational relationship to making the crime more serious. Further, Bevly claimed that by entrusting the issue of the existence of this factor to the trial court instead of the jury, the statute violated his rights under the Sixth Amendment.

The trial court agreed. On April 26, 2012, the court issued a decision rejecting the application of the mandatory sentencing provision. In the court's analysis:

First, there is a question as to whether this is evidence "admitted" in a case as anticipated by the statute. Defense counsel did not even cross-examine the witness. Admittedly, he was given the opportunity to do so but did not. It is reasonable to assume that he saw no need as his client was going to enter a plea of guilty. Clearly, this would not have happened at a trial. Second, a serious question can be raised as to whether the testimony of Det. Sheline is evidence as anticipated in R.C. 2907.05(C)(2)(a). Rule 101(C)(3) of the Rules of Evidence specifically provides that the Rules of Evidence do not apply to miscellaneous criminal proceedings, including sentencing. This is a plausible conclusion when read in conjunction with Evid.R. 102, which provides that the purpose of the rules is to provide procedures for the "adjudication of causes."

Construing R.C. 2907.05(C)(2)(a) strictly against the State, and liberally in favor of the accused, as required by R.C. 2901.04(A), it is the opinion of this Court that the mandatory sentencing provision at issue does not apply. This makes good policy as it recognizes the importance of a defendant accepting responsibility for his actions and not putting the system and the victims through an expensive and emotional trial. To read the statute differently, the defendant ends up being more severely punished because of his cooperation. In addition to the Court's statutory interpretation of the relevant section of the Revised Code, the Court finds the same to be unconstitutional for two reasons. First, the Court does 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. Second, the Court finds that the distinction violates the Defendant's right to have the fact decided by a jury as guaranteed by the Sixth Amendment.

*(April 26, 2012 Decision Finding That the Prison Term Is Not Mandatory.)*

The Court of Appeals reversed this decision, and found that the statute was constitutional. As the following establishes, however, the trial court's analysis was correct and in accord with recent precedent from the United States Supreme Court.

## ARGUMENT

### First Proposition of Law

R.C. 2907.05(C)(2)(a) treats cases where there is corroborating evidence differently from those where there is none. Because there is no rational basis for this distinction, the statute violates the due process protections of the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

In its Decision, the trial court articulated well-reasoned grounds for the determination that the “corroborating evidence” provision of R.C. 2907.05(C)(2)(a) should not apply in this case. The statute in question provides:

(C) Whoever violates this section is guilty of gross sexual imposition.

\* \* \*

(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. *The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:*

*(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;*

(Emphasis added.)

On its face, the statute requires a trial court to sentence an offender to prison if evidence “other than the testimony of the victim was admitted in the case corroborating the violation”. This raises several legal and constitutional issues that the trial court addressed in its Decision. These issues require application of principles of statutory interpretation as well as constitutional analysis.

**A. Principles of Statutory Interpretation Support the Trial Court’s Ruling**

First, the statute discusses corroborating evidence that was “admitted in the case”, but offers no further discussion of what that phrase means. The provision must be read in light of R.C. 2901.04(A), which provides that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” There is at least a question whether R.C. 2907.05(C)(2)(a), when construed in accordance with R.C. 2901.04(A), encompasses testimony presented at a non-statutory post-plea hearing of the sort used below.

The trial court deemed that it did not:

“ . . . it is the opinion of the Court that the mandatory sentencing provision at issue does not apply. This makes good policy as it recognizes the important of a defendant accepting responsibility for his actions and not putting the system and the victims through an expensive and emotional trial. To read the statute differently, the defendant ends up being more severely punished because of his cooperation.”

(Decision, 3-4)

**B. The Absence of a Rational Basis for the Statutory Classification Leads to the Conclusion that the Provision is Unconstitutional**

The trial court went on to find that R.C. 2907.05(C)(2)(a) was unconstitutional. The court first found that there was no rational basis for the distinction between cases where there is corroborating evidence from those where there is none. The court pointed out that when a statute creates a distinction that is without any rational basis, the courts will step in to set aside the classification. *State v. Babcock*, 7 Ohio App.3d 104, 106, 454 N.E.2d 556 (1982), in which this Court held in syllabus: “Only

where it is clear beyond doubt that the legislative classification is without any rational basis should courts step in to set aside the classification.”

In reaching its Decision, the court below found that the “corroborating evidence” provision did not survive this analysis. The court pointed out that it was unaware of any other criminal offense where the penalty is enhanced based upon the amount of evidence, and, further, no sentencing provision directs a trial court to consider the amount of evidence in imposing sentence. In the court’s view, the mandatory sentence provision could be counterproductive, for “...if the defendant had not cooperated and confessed, a young victim could have been put through the trauma of having to testify.” (Decision, 5)

The court’s analysis of this issue is persuasive:

If a case was tried to the jury and the defendant was found guilty and there was evidence offered to “corroborate” the testimony of the victim, how would the court know if indeed it did corroborate the violation? What if the victim testified and another witness was called to corroborate the victim’s testimony but the jury did not believe the witness? The jury could have concluded that the witness lied but still believe the victim. Without a special finding by the jury the Court would make a finding which in effect enhances the sentence from a possible prison term to a mandatory term. This violates the Sixth Amendment and is therefore unconstitutional.

(Decision, 6)

Without the special finding mentioned here, it is impossible to determine whether the factfinder actually believed the evidence. There is also an issue as to how much corroboration is required. Is it sufficient that the evidence corroborates some, but not all, of the victim’s testimony? Must the trial court, in imposing sentence, accept the offered evidence without making an independent assessment of its credibility and weight? The statute is silent on these issues.

## Second Proposition of Law

R.C. 2907.05(C)(2)(a) violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

Under the Sixth Amendment, a criminal conviction must “rest upon a jury determination that the defendant is guilty of every element of the crime” in question beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 6115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) The nature and extent of this guarantee has evolved significantly in recent decades as the United States Supreme Court issued a series of decisions that have strengthened the role of the jury in this process.

Trial counsel for Bevly argued that R.C. 2907.05(C)(2)(a) was unconstitutional under the Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); and *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 656 (2007). These cases stand for the proposition that the guarantees of the Sixth Amendment require jury determination of any fact that increases the maximum punishment authorized for the offense. The trial court agreed with the defense argument that this line of cases required the determination that R.C. 2907.05(C)(2)(a) is unconstitutional.

But the Court of Appeals rejected the defense argument, finding that that the *Apprendi* line of cases was inapplicable. In the court’s view the statutory provision does not increase *the maximum prison sentence* that could have been applied without the corroboration provision and is therefore a sentencing factor, rather than an element of the offense. *State v. Bevly*, 10th Dist. No. 12AP-471, 2012-Ohio-1352, ¶¶ 14-15.

After the court ruled in *Bevly*, and after Appellant perfected the within appeal, the United States Supreme Court issued its decision in *Alleyne v. United States*, 570 U.S. \_\_\_\_, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). *Alleyne* significantly extends the *Apprendi* analysis to a case involving an increase in *minimum prison sentences* based upon a factual finding by a court rather than a jury.

A review of some of Supreme Court precedent on these issues illustrates the development of the *Apprendi-Alleyne* analysis.

### **The Rule of *Apprendi* and Its Progeny: The Jury Must Determine Facts That Increase Penalties**

In *Apprendi v. New Jersey*, Defendant Charles Apprendi pled guilty to possession of a firearm for an unlawful purpose (among other crimes), which ordinarily carries a 10-year maximum sentence under New Jersey law. However, at sentencing, the judge found that Apprendi possessed the firearm with a “biased purpose”—in other words, as a hate crime. This finding doubled the statutory maximum sentence under state law, even though no jury ever found this fact beyond a reasonable doubt and Apprendi did not admit to any bias in his guilty plea. Apprendi ultimately received a sentence of 12 years for that firearms charge, two years greater than what he could have received absent the judge’s hate crime finding.

On appeal, the Supreme Court overturned Apprendi’s enhanced sentence. The court ruled that all facts that raise the statutory maximum sentence constitute elements of the charged crime. The Constitution requires a prosecutor to prove such facts to a jury beyond a reasonable doubt. It was, therefore, a violation of Apprendi’s rights for the judge to enhance his sentence beyond the otherwise applicable maximum term based only on the judge’s finding by a preponderance of the evidence that Apprendi had acted with a

“biased purpose.” The Court held that “facts that increase the prescribed range of penalties to which a criminal defendant is exposed” must be submitted to a jury and established by proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. at 490.

*Apprendi v. New Jersey* signaled an expansion of the jury’s role. *Apprendi* holds that any facts which increase a criminal defendant’s maximum possible sentence are considered “elements” of the criminal offense that must be proved to a jury beyond a reasonable doubt. For example, if a statute makes it illegal to sell a drug and authorizes a ten-year maximum sentence for such an offense, but provides for a twenty-year maximum sentence for a sale of a larger quantity of the same drug, the jury rather than the judge must make a finding about the quantity before the twenty-year maximum may be imposed.

The Court’s subsequent decisions in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 253, 1159 L.Ed.2d 403 (2004) and *United States v. Booker*, *supra*, reaffirmed and expanded *Apprendi*. In *Blakely*, the Court considered the constitutionality of Washington’s state sentencing guidelines in a prosecution for second-degree kidnapping, a “class B felony. Under Washington law, any class B felony carried a general sentence range of zero to ten years. However, Washington’s guidelines statute further constrained the sentence by creating a narrower “standard range” for each particular offense from which the judge could deviate only by making additional factual findings at sentencing. The Court held that allowing upward departures from the standard range based on such factfinding violated the Sixth Amendment in light of *Apprendi*. Less than a year later, the Court extended this reasoning to cover the Federal Guidelines in *Booker*. The Court held

that those guidelines, which mirrored the Washington guidelines in all material respects, similarly violated the Sixth Amendment.

The Court steadily built upon *Apprendi* in the years that followed. See *Southern Union Co. v. United States*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012) (applying *Apprendi* to the imposition of criminal fines); *Cunningham v. California*, *supra* (striking down California’s determinate sentencing law); *Ring v. Arizona*, *supra* (applying *Apprendi* to aggravating factors required to impose the death penalty).

### ***McMillan, Harris and the Offense Element/Sentencing Factor Distinction***

*McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 241, 191 L.Ed.2d 6754 (1986), seemed to limit the role of the Sixth Amendment. A majority of the Court used the term “sentencing factor” to refer to a fact that was not charged in an indictment or proved to a jury beyond a reasonable doubt but that, once found by a judge by a preponderance of the evidence at sentencing, mandates a minimum sentence more severe than the judge otherwise could impose. See *McMillan v. Pennsylvania*, 477 U.S. at 81-82, 86.

In 2002, the Court relied on *McMillan* in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 240, 153 L.Ed.2d 524 (2002). In *Harris*, the Court held that *Apprendi* did not apply to facts that would increase a defendant’s mandatory *minimum* sentence, and therefore that a judge could constitutionally decide to apply a mandatory minimum sentence on the basis of facts not proven to a jury.

The Court in *Harris* deemed that *McMillan* and *Apprendi* could be read together so that “facts setting the outer limits of a sentence” would be *elements* of the offense. By contrast, “[w]ithin the range authorized by the jury’s verdict. . . the political system may channel judicial discretion--and rely upon judicial expertise” by permitting judges to find

the facts establishing *minimum* sentences.” *McMillan v. Pennsylvania*. 536 U.S. at 567. (Emphasis added.)

***Alleyne v. United States: The Apprendi Rule Applies to Minimum Sentences***

In *Alleyne*, the Court expressly overruled *Harris*, holding that its “distinction between facts that increase the statutory maximum and facts that increase only the mandatory minimum” is untenable in light of the Court’s decision in *Apprendi* and the Sixth Amendment’s original meaning. Under *Apprendi*, any fact that necessarily raises the defendant’s “penalty” is an element for the jury. According to the Court, an increase in the minimum sentence is such a penalty increase; therefore, any fact that leads to that increase is an element for the jury. *Alleyne v. United States*, 133 S. Ct. at 2155.

At issue in *Alleyne* was a seven-year sentence imposed on a defendant for having “brandished” a firearm while “using or carrying [it] during and in relation to a crime of violence.” *Alleyne* was charged with using or carrying a firearm in relation to a crime of violence, which carries a 5–year mandatory minimum sentence. Federal statutes increase the sentence to a 7–year minimum “if the firearm is brandished. At trial, the jury found only that the defendant used or carried the firearm, which carries a five-year mandatory minimum sentence. The judge, relying on *Harris*, found that the defendant had “brandished” the firearm, and thereby increased the defendant’s mandatory minimum sentence to seven years. In a five-to-four decision by Justice Thomas (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan), the Court held that the defendant’s seven-year mandatory minimum sentence violated his Sixth Amendment right to trial by jury because the question of brandishing was never submitted to the jury.

The Court's opinion explains that the logic of *Apprendi* requires a jury to find all facts that fix the penalty range of a crime. According to the Court, the mandatory minimum is just as important to the statutory range as is the statutory maximum. According to the Court:

It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed \* \*  
\* And because the legally prescribed range is the penalty affixed to the crime, *infra*, this page, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.

Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. *Harris, supra*, at 579 (THOMAS, J., dissenting); *O'Brien*, 560 U. S., at \_\_\_ (THOMAS, J., concurring in judgment) (slip op., at 2). Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's "expected punishment has increased as a result of the narrowed range" and "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Apprendi, supra*, at 522 (THOMAS, J., concurring). Why else would Congress link an increased mandatory minimum to a particular aggravating fact other than to heighten the consequences for that behavior? See *McMillan*, 477 U. S., at 88, 89 (twice noting that a mandatory minimum "ups the ante" for a criminal defendant); *Harris, supra*, at 580 (THOMAS, J., dissenting). This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

*Alleyne v. United States*, 133 S. Ct. at 2160.

### **R.C. 2907.05(C)(2)(a) Is Unconstitutional Under *Apprendi* and *Alleyne***

R.C. 2907.05(C)(2)(a) likewise runs afoul of the Sixth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution. The statute elevates a non-mandatory sentence to a mandatory sentence (and thereby increases the minimum penalty) when the court, and not a jury, finds "corroborating evidence." The determination deprives the defendant of any opportunity for a community based sanction either at the time of imposition of sentence or on a motion for judicial release. The determination "raises the floor" of the minimum sentence.

The determination whether "evidence other than the testimony of the victim was admitted in the case corroborating the violation", then, is an "element" under this analysis. Interestingly, the General Assembly has enacted certain offenses which include a "corroborative evidence" element which the trier of fact---not the sentencing judge---is tasked with finding in order to convict. See R.C. 2923.01 (H) (1) (conspiracy) and R.C. 2907.06(B) (sexual imposition). The existence of "corroborative evidence" has been endowed with the status of "element" in other related contexts.

R.C. 2907.05(C)(2)(a) does not treat the imposition of a mandatory term of prison as a matter of judicial discretion. Rather, once the trial court makes the factual finding that other evidence corroborated the victim, the sentence is mandatory. The plain language of R.C. 2907.05(C)(2)(a) limits sentencing discretion if facts independent of the victim's testimony corroborate the allegations. See R.C. 2907.05(C)(2)(a) ("The court *shall impose* on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a *mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a\_\_felony of the third degree* if either of the following applies: (a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation") (emphasis added). For this reason the corroboration requirement of R.C. 2907.05(C)(2)(a) comprises an *element* of the offense, as opposed to the *sentencing factors* like those found in R.C. 2929.12(A)-(F). In applying the factors in 2929.12(A)-(F) courts have "discretion to determine the most effective way to comply with the purposes and principles" of felony sentencing and can assign whatever weight they wish to these factors. See R.C. 2929.12(A); *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000) ("This court has held that the individual decision

maker has the discretion to determine the weight to assign a particular statutory factor").

Weight cannot be assigned to an element; it either exists or doesn't. R.C.

2907.05(C)(2)(a) is not a statute that allows the court to assign whatever weight it wishes to the presence of corroboration. Nor can it choose from an array of sentencing sanctions one of which includes the option of imposing a mandatory sentence if it finds corroborating evidence of the violation. *It is statutorily required to impose a period of mandatory incarceration thus transforming the, judicial fact finding of R.C.*

*2907.05(C)(2) (a) from a sentencing factor into an element.*

The statute, then, is unconstitutional and void. The Court in *Apprendi* discussed constitutional limits on the enactment of laws that undercut or subvert the role of the jury. “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (Stevens, J., concurring)). The historical foundation for these principles “extends down centuries into the common law.” *Apprendi*, 530 U.S. at 477.

The Fifth and Sixth Amendments express these principles and their protections: the rights of an accused to notice, to indictment by a grand jury, to trial by a petit jury, and to be found guilty only upon proof beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 476-77; *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 188, 144 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). These rights place constitutional

limits on the discretion of a legislature to define criminal offenses. A legislature may not define an offense to relieve the government of its Fifth Amendment burden of proving an element beyond a reasonable doubt. See *Mullaney*, 421 U.S. at 698. Nor may a legislature remove from the jury's consideration facts that set or increase the range of punishment to which a defendant is exposed. See *Apprendi*, 530 U.S. at 476-85; *Jones*, 526 U.S. at 243-48. A legislature may not avoid these limits by labeling components of an offense as “sentencing factors.” The relevant inquiry is not one of form, but of effect. See *Apprendi*, 530 U.S. at 484-85, 494; *Ring v. Arizona*, 536 U.S. at 604-05. When a statute “annexes a higher degree of punishment” based on a specified fact, that fact must be charged in the indictment and proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 480 (internal citation and punctuation omitted). The statute in question improperly and unconstitutionally divests the jury with the authority to determine this element.

### CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to reverse the judgment of the Franklin County Court of Appeals.

Respectfully submitted,

Yeura R. Venters 0014879  
Franklin County Public Defender

BY: 

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing Brief of Appellant Damon Bevely was served upon the following counsel by hand delivery, this

21<sup>st</sup> day of January 2014:

Steven L. Taylor  
Assistant Franklin County Prosecuting Attorney  
373 South High Street, 14<sup>th</sup> Floor  
Columbus, Ohio 43215

*Attorney for Appellee*



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**DAVID L. STRAIT 0024103**

*Attorney for Appellant*

**APPENDIX**

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 12AP-471
	:	(C.R.C. No. 11CR-08-4152)
Damon L. Bevly,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 28, 2013, appellant's assignment of error is sustained. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded to the trial court for further proceedings consistent with this decision. Costs shall be assessed against appellee.

McCORMAC, BRYANT & DORRIAN, JJ.

*John W. McCormac*

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 12AP-471
	:	(C.P.C. No. 11CR-08-4152)
Damon L. Bevly,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

DECISION

Rendered on March 28, 2013

*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

*Yeura R. Venters*, Public Defender, and *David L. Strait*, for appellee.

APPEAL from the Franklin County Court of Common Pleas  
McCORMAC, J.

{¶ 1} Defendant-appellee, Damon L. Bevly, was charged with four counts of gross sexual imposition in the Franklin County Court of Common Pleas. The charges were third degree felonies because they alleged violations of R.C. 2907.05(A)(4) which applies when the victim is less than 13 years old. The indictment alleged that the victim was aged 10-11 at the time of the offenses.

{¶ 2} The crime of gross sexual imposition under 13 generally carries a presumption of prison. R.C. 2907.05(C)(2). However, when "evidence other than the testimony of the victim was admitted in the case corroborating the violation" the general assembly has provided that a court "shall impose" on such offender "a mandatory prison term equal to one of the prison terms described in section 2929.14 of the Revised Code for a felony of the third degree." R.C. 2907.05(C)(2)(a).

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{¶ 3} Defendant pleaded guilty to Counts 1 and 2 of the indictment as charged, both third degree felonies. He understood that the state was taking the position that mandatory sentencing was required. At the plea hearing, the state introduced the testimony of Detective Brian Sheline, who testified that defendant confessed to the offenses by admitting that he had fondled the girl's vaginal area and then touched his penis to her vaginal area on at least two occasions as well. In addition to Sheline's testimony regarding defendant's confession, the state introduced as exhibit A the compact disc recording of the confession.

{¶ 4} In the interim between the plea and sentencing hearings, defendant filed a sentencing memorandum raising two constitutional challenges to the mandatory sentencing requirement. The state filed a memorandum opposing the constitutional issues. Those lines of argument will be discussed later in this decision.

{¶ 5} The trial court issued a decision rejecting the application of the mandatory sentencing provision:

First, there is a question as to whether this is evidence "admitted" in a case as anticipated by the statute. Defense counsel did not even cross-examine the witness. Admittedly, he was given the opportunity to do so but did not. It is reasonable to assume that he saw no need as his client was going to enter a plea of guilty. Clearly, this would not have happened at a trial. Second, a serious question can be raised as to whether the testimony of Det. Sheline is evidence as anticipated in R.C. 2907.05(C)(2)(a). Rule 101(C)(3) of the Rules of Evidence specifically provides that the Rules of Evidence do not apply to miscellaneous criminal proceedings, including sentencing. This is a plausible conclusion when read in conjunction with Evid.R. 102, which provides that the purpose of the rules is to provide procedures for the "adjudication of causes."

Construing R.C. 2907.05(C)(2)(a) strictly against the State, and liberally in favor of the accused, as required by R.C. 2901.04(A), it is the opinion of this Court that the mandatory sentencing provision at issue does not apply. This makes good policy as it recognizes the importance of a defendant accepting responsibility for his actions and not putting the system and the victims through an expensive and emotional trial. To read the statute differently, the defendant ends up being more severely punished because of his cooperation.

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In addition to the Court's statutory interpretation of the relevant section of the Revised Code, the Court finds the same to be unconstitutional for two reasons. First, the Court does 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. Second, the Court finds that the distinction violates the Defendant's right to have the fact decided by a jury as guaranteed by the Sixth Amendment.

April 26, 2012 decision finding that the prison term is not mandatory.

{¶ 6} At the subsequent sentencing hearing, the trial court noted that there was an issue at sentencing as to whether or not the prison term in this case is mandatory. The court noted that, while the statute as represented by the state is mandatory, the court found the mandatory provision to be unconstitutional. The court imposed concurrent three-year prison sentences and specifically stated that the sentences were not mandatory.

{¶ 7} The state filed a timely appeal of right asserting the following assignment of error:

THE COMMON PLEAS COURT ERRED WHEN IT FAILED TO IMPOSE THE PRISON SENTENCES AS MANDATORY SENTENCES FOR GROSS SEXUAL IMPOSITION AGAINST A CHILD UNDER 13 WHEN THERE WAS CORROBORATING EVIDENCE OF THE VIOLATIONS.

{¶ 8} The first issue is whether the common pleas court erred when it failed to impose those sentences for gross sexual imposition against a child under 13 as mandatory sentences. Both parties agree that R.C. 2907.05(C)(2)(a) requires a mandatory sentence if the provisions of the statute are followed. Before proceeding to other aspects of this issue, we must first determine whether the general assembly may constitutionally order mandatory sentencing for the same crime, in this case, gross sexual imposition, when certain defined evidence strengthens the proof by enhancing the likelihood that the testimony of the victim is true.

{¶ 9} The Supreme Court of Ohio stated in *State v. Thompkins*, 75 Ohio St.3d 558, 560 (1996): "Pursuant to its police powers, the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment." In *State v. Morris*, 55 Ohio St.2d 101, 112 (1978), the court stated that "at all times it is within the

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power of the General Assembly to establish crimes and penalties" which power rests with the General Assembly alone. Some statutes require corroboration in order to convict a defendant on the testimony of an accomplice alone. See *State v. Pearson*, 62 Ohio St.2d 291, 295 (1980). More applicable to the crime of gross sexual imposition, the General Assembly has required corroborating evidence beyond just the victim's testimony. *State v. Economo*, 76 Ohio St.3d 56 (1996). The foregoing provisions are corroborating enhancement that increases the burden of the prosecution generally in regard to crimes where there is a close personal relationship. However, in our opinion, enhancement by corroborating evidence may also apply to a defendant as long as the evidence is introduced in a way that is constitutional. It seems obvious that the General Assembly felt that it was better to start out with a sentence that was not required to be mandatory and to make the sentence mandatory only if there is corroborative proof beyond the alleged victim's testimony that the crime was actually committed.

{¶ 10} Appellee argues that this case is moot because even though the court held that the prison term was not mandatory, it sentenced appellee to prison. Thus, appellee argues that the state's appeal raises only an academic issue which will have no bearing whatsoever on appellee's prison sentence.

{¶ 11} The distinguishing character of a moot issue is that it involves no actual genuine live controversy, the decision of which can definitely affect existing legal relationships. See *Culver v. City of Warren*, 84 Ohio App. 373, 393 (7th Dist.1948). Based on the assertion that the judgment rendered herein will have no effect on defendant's incarceration in any way whatsoever, appellee argues that the judgment of the common pleas court should be left intact. Appellee further asserts that it is too late to change the non-mandatory statutory determination that the trial judge adopted as the sentence ordered by the trial court was mandatory in character.

{¶ 12} We disagree. If the determination was held to be mandatory per se, there would be a substantial difference in the way it would affect defendant. If the mandatory provision had been held valid by the trial court, appellee no longer could be released early. The fact that the sentence was imposed in a mandatory fashion but without a mandatory determination allows the trial court's sentence to be changed in important ways potentially favorable to defendant. The case is not moot for that reason.

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{¶ 13} The state's other argument against declaring the case moot is that the trial court's judgment would be held against the state in later cases and "will bind the State in future sentencing matters, such as precluding the State from arguing that judicial release or transitional control is barred because the sentences are mandatory."

{¶ 14} The state's principle argument is that R.C. 2907.05(C)(2)(a), which provides a mandatory prison term if evidence corroborates the violation poses a sentencing factor rather than an element of the crime, and that therefore the trial judge is the one that determines its applicability in a sentencing hearing rather than the issue being submitted to a jury even if a jury had not been waived. The determination of this issue is based upon the rationale of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. In *Apprendi*, New Jersey had enacted a hate crime statute which increased the maximum penalty that otherwise would apply for that type of crime. The New Jersey Supreme Court had affirmed, holding that it was a sentencing matter to be decided by the trial court judge. The United States Supreme Court reversed, holding that other than the fact of a prior conviction, any fact that increases the penalty for crime beyond prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. A failure to do so violated the due process clause and the hate crime statute New Jersey had enacted specifically calling the determination a sentencing factor which was abruptly dismissed as simply disagreeing with the constitutional mandate set forth in *Apprendi*. Ohio's General Assembly did not label the provision as either an element of the crime or a sentencing factor. It does refer to a term equal to one of the prison terms described in R.C. 2929.14 for a felony of the third degree. Thus, the term to which appellee was sentenced could not exceed a maximum term possible under the third degree felony provisions even without a finding of corroboration.

{¶ 15} As we pointed out before, finding that a prison term is mandatory eliminates some possible benefits that may otherwise apply during the prison term imposed including early release, something that is otherwise possible as no one in prison has a guarantee that they are going to be released early and those provisions may be changed by entities other than courts or juries. It is another form of sentencing prerogatives and it is also not unusual that those sentencing prerogatives and release prerogatives are not court determined. Consequently, we find that the statutory provision

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does not increase the maximum prison sentence that could have been applied without the corroboration provision and it is therefore a sentencing factor.

{¶ 16} The trial court erred in holding that the issue of whether the victim's testimony had been corroborated was one that must be presented to a jury if the jury provision had not been waived. The trial court was required to make this determination. While it is true that the determination was presented to the court after a guilty plea but prior to the actual sentencing hearing, it should have been considered in the sentencing phase.

{¶ 17} In the case of *Southern Union Co. v. United States*, 132 S.Ct. 2344 (2012), the court noted that legislatures can enact statutes that constrain judges' discretion in sentencing. Of course that prerogative must be in accordance with valid constitutional principles, but as explained before, it was in this case. R.C. 2907.05(C)(2)(a) does constrain the judges' discretion in regard to imposing the mandatory provision. Issues may arise as to the standard of proof. Some sentencing provisions specify the standard of proof. Other provisions require the trial court to weigh numerous applicable provisions and to exercise discretion as to which ones outweigh adverse ones.

{¶ 18} The trial court also held that the evidence was not admissible because it was not admitted in the case and that it was not evidence as anticipated in R.C. 2907.05(C)(2)(a). The trial court erred in both of these holdings. The case includes all parts thereof, one of which is sentencing. Rules of evidence are not applicable to miscellaneous criminal proceedings including sentencing. However, the sentence procedure is part of the case despite the fact that defendant had pled guilty to two charges. There is no conflict with Evid.R. 102, which provides that the purpose of the rules is to provide procedures for the "adjudication of causes." Criminal cases are not fully adjudicated without a sentence having been ordered. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The disputed testimony meets that standard. It is evidence that is of great value in determining the crucial issue of whether the court "shall impose" a mandatory prison sentence. The fact that the rules of evidence do not apply in some situations in a trial such

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as in sentencing does not affect the character of the evidence but only the procedure for introducing it.

{¶ 19} Appellant's assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is reversed and the case is remanded to the trial court for further proceedings consistent with this decision.

*Judgment reversed and remanded  
for further proceedings.*

BRYANT and DORRIAN, JJ., concur.

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McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).

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### **Fifth Amendment, United States Constitution**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Sixth Amendment, United States Constitution**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### **Fourteenth Amendment, United States Constitution**

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a

member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability,

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

#### **Section 16, Article I, Ohio Constitution**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

#### **2901.04 Rules of construction for statutes and rules of procedure.**

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004

#### **2907.05 Gross sexual imposition.**

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(C) Whoever violates this section is guilty of gross sexual imposition.

(1) Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in section 3719.41 of the Revised Code to the person surreptitiously or by force, threat of force, or deception, gross sexual imposition committed in violation of division (A)(2) of this section is a felony of the third degree.

(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(D) A victim need not prove physical resistance to the offender in prosecutions under this section.

(E) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(F) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(G) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

Effective Date: 03-10-1998; 08-03-2006; 2007 SB10 01-01-2008

### **2907.06 Sexual imposition.**

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

(2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's or touching person's conduct is substantially impaired.

(3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

(5) The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or patient that the sexual contact is necessary for mental health treatment purposes.

(B) No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence.

(C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree. If the offender previously has been convicted of a violation of this section or of section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.12 of the Revised Code, a violation of this section is a misdemeanor of the first degree.

Effective Date: 05-14-2002

## **2923.01 Conspiracy.**

\* \* \*

(H)

(1) No person shall be convicted of conspiracy upon the testimony of a person with whom the defendant conspired, unsupported by other evidence.

(2) If a person with whom the defendant allegedly has conspired testifies against the defendant in a case in which the defendant is charged with conspiracy and if the testimony is supported by other evidence, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice that is supported by other evidence does not become inadmissible because of the accomplice's complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect the witness' credibility and make the witness' testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

(3) "Conspiracy," as used in division (H)(1) of this section, does not include any conspiracy that results in an attempt to commit an offense or in the commission of an offense.

## **2929.12 Seriousness of crime and recidivism factors.**

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

(F) The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.

Amended by 129th General Assembly File No. 176, HB 197, §1, eff. 3/22/2013.

Effective Date: 07-08-2002

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

DAMON L. BEVLY,

Appellant

Case No.: **13-0821**

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

Court of Appeals  
Case No. 12AP-471

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NOTICE OF APPEAL OF APPELLANT  
DAMON L. BEVLY

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Franklin County Prosecuting Attorney

-and-

-and-

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**FILED**  
MAY 23 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

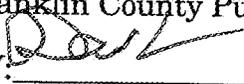
**NOTICE OF APPEAL OF APPELLANT DAMON L. BEVLY**

Appellant Damon L. Bevly gives notice of appeal to the Supreme Court of Ohio from judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No 12AP-471 on April 11, 2013.

This case raises a substantial constitutional question and matters of public or great general interest.

Respectfully submitted,

Yeura R. Venters 0014879  
Franklin County Public Defender

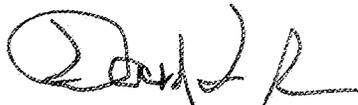
BY: 

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing Notice of Appeal was served upon Steven L. Taylor, Assistant Franklin County Prosecuting Attorney, 373 South High Street, 13<sup>th</sup> Floor, Columbus, OH 43215, by hand delivery this 23<sup>rd</sup> day of May 2013.



\_\_\_\_\_  
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*Attorney for Appellant*