ORIGINAL

IN THE SUPREME COURT OF OHIO
2014

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DAMON L. BEVLY,

Defendant-Appellant

Case No. 13-821

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

Court of Appeals Case No. 12AP-471

MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO

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STATEMENT OF FACTS

Defendant Bevly was charged with four counts of gross sexual imposition. (Trial Rec. 1) 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 age 10-11 at the time of the offenses. (Id.)

The crime of GSI under 13 generally carries a presumption of prison. R.C. 2907.05(C)(2). However, when "[e]vidence 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 an offender "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 * * *." R.C. 2907.05(C)(2)(a).

Defendant pleaded guilty to Counts One and Two as charged, both third-degree felonies. (Trial Rec. 73-74) He understood that the State was taking the position that mandatory sentencing was required. (Id.) 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 had touched his penis to her vaginal area on at least two occasions as well. (3-8-12 Tr. 10-13) In addition to Sheline's testimony regarding defendant's confession, the State introduced as State's Ex. A the compact disc recording of defendant's confession. (Id. 17)

In the interim between the plea and sentencing hearings, defendant filed a sentencing memorandum raising two constitutional challenges to the mandatory-sentencing requirement. (Trial Rec. 79) The defense contended that the mandatory-

sentence provision violated his right to jury trial under the *Apprendi-Blakely* line of cases. (Id.) He also contended that the corroborating-evidence criterion was an impermissible sentencing factor because it is not dependent on some aggravating factor involved in the commission of the offense, but, rather, based on the strength of the evidence. (Id.)

The State filed a memorandum opposing the constitutional contentions. (Trial Rec. 80) The State noted that the *Apprendi-Blakely* line of cases did not bar the mandatory sentence because it was merely a mandatory-minimum sentence that did not increase the maximum penalty for the offense. (Id.) The State also contended that the corroborating-evidence feature easily passed rational-basis constitutional review. (Id.)

The court issued a decision rejecting the application of the mandatory-sentencing provision. (Trial Rec. 84) First, as a statutory matter, the court questioned whether the detective's testimony and CD of the confession constituted "evidence" because the Evidence Rules do not apply to miscellaneous criminal proceedings like sentencing. (Id.) The court also found constitutional problems with the mandatory-sentencing provision, contending that there was an *Apprendi-Blakely* problem and that the corroborating-evidence provision lacked a rational basis. (Id.)

At the subsequent sentencing hearing, the court noted that "there was an issue at sentencing as to whether or not the prison term in this case is mandatory * * *." (5-9-12 Tr. 2) The court stated that, "while the statute, indeed as represented by the state, is mandatory, the court published a decision finding that same to be unconstitutional." (Id. 2) The court nevertheless followed the presumption of prison and imposed concurrent three-year prison sentences. (Id. 11-12) The court's judgment specified that the

sentences were "not mandatory." (Trial Rec. 89-93)

The State timely appealed, and the Tenth District sustained the assignment of error and reversed the non-mandatory part of the sentence.

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). But the common pleas court refused to follow this mandatory provision. The court questioned whether the corroborating-evidence provision applied to a plea-based conviction and found the provision unconstitutional as violating defendant's right to a jury trial and as lacking rationality.

The Tenth District correctly reversed. The statutory provision readily applies to plea-based convictions when the prosecution introduces evidence "in the case" corroborating the violation. It also passes rational-basis review. The provision likewise does not violate the right to jury trial, an issue addressed under the second proposition of law.

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); see, also, *State v. Taylor*, ___ Ohio St.3d ___, 2014-Ohio-460, ¶ 12. "[A]t all times it is the power of the General Assembly to establish crimes and penalties." *Morris*, 55 Ohio St.2d at 112-13. "[T]he power to define crimes and establish penalties rests with the General Assembly alone." Id. at 113.

This legislative prerogative includes "the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). "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 rationally 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. *State v. Pearson*, 62 Ohio St.2d 291, 295, 405 N.E.2d 296 (1980) (discussing former R.C. 2923.03(D)). Even today, a defendant charged with conspiracy cannot be convicted based on the testimony of a co-conspirator alone. R.C. 2923.01(H)(1). Proof of the crime of sexual imposition also requires additional

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)).

Such requirements are not demanding or exacting. In relation to the crime of sexual imposition, this Court has 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 R.C. 2907.05(C)(2)(a) is clear. 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 is "corroborating" of the violations, and it is from a source "other than the testimony of the victim." By all indications, this corroborating-evidence provision applied. The common pleas 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 common pleas court contended "there is a question" whether the provision applied. Several problems attended the court's written analysis.

1.

The court initially pointed to the fact that the defense did not cross-examine the detective. But, as the court recognized, the defense had been given the opportunity to cross-examine, and it had declined. (3-8-12 Tr. 14)

There is no "actual cross-examination" requirement in the statutory language. The statutory language only requires corroborating evidence, not evidence that the defense has chosen to cross-examine. The court's observation about the lack of cross-examination bespeaks an act of judicial legislation, attempting to insert a cross-examination requirement into the statute when the General Assembly imposed no such requirement. "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. The defense here had no reason to cross-examine because it was not disputing the existence of the confession and was not disputing defendant's guilt. 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. There *was* corroborating evidence here.

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 would place the operation of this sentencing provision solely in the strategic control of the defense, thereby allowing the defendant to avoid the mandatory sentence

through the mere expedient of declining cross-examination. Nothing in the statutory language purports to give the defendant this kind of veto over the mandatory sentence.

2.

The common pleas 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, again, the court's logic was upside-down.

While the statutory language requires the "evidence" be "admitted in the case," the inapplicability of the Evidence Rules to sentencing proceedings is not a reason to avoid applying the provision. 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. The language "admitted in the case" readily applies to evidence admitted in any type of hearing in the case, whether it be a trial, a plea hearing, or a sentencing hearing. The court's analysis amounted to judicial legislation by adding an "in the trial" requirement.

In addition, the nature or quality of an item as "evidence" does not turn on the question of whether the Evidence Rules control. Whether admitted at a trial or at a plea or sentencing proceeding, defendant's confession still partakes of being "evidence." See

State v. Dixon, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042 ¶ 58 ("the strong evidence of guilt, including his confession"). 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 common pleas 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 "recognizes the importance of a defendant accepting responsibility for his actions and not putting the system and victims through an expensive and emotional trial." According to the court, if the statute applies here, "the defendant ends up being more severely punished because of his cooperation."

The court's analysis amounted to thinly-veiled policy-making that is 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 corroborating evidence of guilt. The statutory language makes no distinction between the various sources of corroborating evidence, but the common pleas court wrongly is seeking to impose a distinction dependent on whether the corroborating evidence is a result of the defendant's "cooperation." There is simply no "cooperation" exception to this provision.

The statutory policy of mandatory punishment based on corroboration would

especially apply to confessions. 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 can often provide the most damning evidence of guilt. In adopting this corroborating-evidence provision, the General Assembly gave no indication that it was exempting this entire class of evidence from the reach of the corroboration requirement. Nor did the General Assembly give any indication that it was excluding the most-damning evidence of guilt from the corroboration requirement. Corroboration and punishment were the legislative goal, not an exemption for offenders who are most clearly guilty because they confessed.

The common pleas court's policy-making analysis went even further astray 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. In requiring corroborating evidence before mandating prison, the General Assembly was not purporting to exempt plea-based convictions. Nothing in the statutory language would exempt plea-based convictions. Nor does it make any distinction between the various methods by which guilt is established. It merely requires the admission of corroborating evidence "in the case," not the admission of evidence "at the trial."

The statutory language is fairly clear and should be applied. "It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative

intent." *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). "[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 cannot graft limitations or qualifications onto statutory language. "The court must first look to the plain language of the statute itself to determine the legislative intent. We apply a statute as it is written when its meaning is unambiguous and definite. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9 (citations omitted). "We have held that a court may not add words to an unambiguous statute, but must apply the statute as written." Id. at ¶ 15. If "[t]he statute does not limit its reach," then courts should not do so. Id. at ¶¶ 10, 15 ("The statute does not limit its reach to children, as Lowe argues."; "[T]he plain language of [the statute] * * * makes no exception for consent of the stepchild or the stepchild's age.").

"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). Criminal statutes must be "read as broadly as they are written." Id. at 406-407. A court cannot "restrict the unqualified language of a statute to the particular evil that [the legislature] was trying to remedy – even assuming that it is possible to identify that evil from something other than the text of the statute itself." Id. at 403. "We have long recognized that neither administrative agencies nor

this court 'may legislate to add a requirement to a statute enacted by the General Assembly.'" *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, ¶ 15. "This court should not graft * * * requirements to [the statute], because the statute has no text imposing them." Id. at ¶ 19. "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

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, otherwise 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. at 463 (internal quotation marks and brackets omitted); *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 40 (same).

"The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied

if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly." *State v. Sway*, 15 Ohio St.3d 112, 116, 472 N.E.2d 1065 (1984). "[A]lthough criminal statutes are strictly construed against the state, they should not be given an artificially narrow interpretation that would defeat the apparent legislative intent." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 20 (citation omitted). "[C]ourts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 626 N.E.2d 939, (1994).

The legislative intent here was to require prison when there is corroborating evidence, and the statutory language 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. The language "admitted *in the case*" shows that no such distinctions were intended.

4.

In another case, the defendant has contended that the provision applies only when the victim has actually testified in the case. But this argument is not supported by the statutory language. The statute requires that "[e]vidence other than the testimony of the victim was admitted in the case * * *." The testimony of the victim is mentioned only to say that such testimony is *not* enough to trigger the mandatory sentence. The mandatory sentence comes into play when evidence "other than" testimony of the victim is admitted.

The focus is on the other evidence, not on the victim's testimony.

In addition, the statutory language focuses on evidence "corroborating the violation." It does not require evidence "corroborating the victim's testimony." A violation can be established without the victim's testimony, including by guilty plea as occurred in the present case. The prosecution obtained the admission of the other evidence that corroborated the violation. It was unnecessary under the statute to introduce the victim's testimony too.

Again, the rule of strict construction would not aid defendant here. No construction is needed, since it is plain that the other evidence need only corroborate the "violation." The phrase "admitted in the case" demonstrates even more that the mandatory-sentence provision applies to plea-based convictions and therefore would not require the victim's testimony in such instances. There is no indication in the statutory text that the General Assembly was requiring that the victim testify to support the mandatory sentence even when the defendant has pleaded guilty.

The Tenth District correctly rejected this "victim must testify" argument in *State v. North*, 10th Dist. No. 13AP-110, 2013-Ohio-4607:

> {¶ 14} The relevant statutory clause states that the trial court shall impose a mandatory prison term for an offender convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4) or (B) when "[e]vidence other than the testimony of the victim was admitted in the case corroborating the violation." R.C. 2907.05(C)(2)(a). In our view, this provision is straightforward and unambiguous. The statute mandates that a prison sentence must be imposed when there is some evidence, other than the victim's testimony, introduced in the case to corroborate the violation. Thus, it appears that the General Assembly intended to require trial courts to impose a mandatory

> prison sentence where a conviction for gross sexual imposition against a victim less than 13 years old was based on more than a single piece of evidence.
>
> {¶ 15} Appellee's interpretation of R.C. 2907.05(C)(2)(a), that the introduction of the victim's testimony is required as a predicate to the imposition of a mandatory prison sentence, requires adding words to the statute. Appellee's argument would be persuasive if the statutory provision began with the clause "if the victim's testimony was introduced" – i.e., a mandatory prison sentence must be imposed when, "if the victim's testimony was introduced, evidence other than the testimony of the victim was admitted in the case corroborating the violation." Alternatively, introduction of the victim's testimony would be a predicate event if the statute required corroboration of the victim's testimony, rather than of the violation – i.e., if the statute provided for a mandatory prison sentence when "evidence other than the testimony of the victim was admitted in the case corroborating the victim's testimony." In construing a statute, however, we may not add words not used by the General Assembly. Therefore, we reject appellee's construction of R.C. 2907.05(C)(2)(a) and hold that introduction of the victim's testimony in a case is not required to trigger a mandatory prison sentence under that statutory provision.

(Citation omitted).

C.

Defendant also faces a high burden of proof in challenging the constitutionality of this mandatory-sentencing provision.

> [A]ll enactments enjoy a strong presumption of constitutionality, and before a court may declare the statute unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting. *State ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Further, doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute. *State, ex rel. Swetland, v.*

> *Kinney* (1982), 69 Ohio St.2d 567, 23 O.O.3d 479, 433 N.E.2d 217.

State v. Gill, 63 Ohio St.3d 53, 55, 584 N.E.2d 1200 (1992).

D.

Defendant relies heavily on the common pleas court's conclusion that the corroborating-evidence provision is irrational under substantive-due-process review. But the common pleas court committed several errors in reaching that conclusion.

1.

As the Tenth District has recognized, it is rational for the General Assembly to impose a corroboration requirement in relation to a "sexual contact" crime. The General Assembly could view such crimes as less serious than "sexual conduct" crimes. The General Assembly also 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 other evidence before it would mandate a prison sentence. It is rational to impose a corroborating-evidence requirement.

2.

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. The Court stated, as follows:

> Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. * * * But a person who has been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, * * * and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause * * *.

Chapman, 500 U.S. at 465 (citations omitted). In accordance with *Chapman*, the mere fact that a statute imposes imprisonment will not justify strict judicial scrutiny. See *Glucksberg*, supra (no strict scrutiny for criminal statute banning assisted suicide). 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, 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), paragraph five of the syllabus. "[T]he Ohio Constitution's guarantees of due process are substantially equivalent to those of the United States Constitution's." *State v. Benson*, 81 Ohio App.3d 697, 700 n. 2, 612 N.E.2d 337 (4th Dist. 1992); *Thompkins*, 75 Ohio St.3d at 560 ("similar").

The "rational basis" standard of review is the paradigm of judicial restraint. See *FCC v. Beach Communications*, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

> Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

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," nor does it "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 Communications*, 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. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Univ. Professors*, 87 Ohio St.3d at 58, quoting *Heller*, 509 U.S. at 321.

A legislature is allowed to focus on what it perceives to be the greatest danger. *Beach Communications*, 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. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). A law is not unconstitutional because it makes rough accommodations in light of practical considerations. Id.

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). "[C]riminal process [will be found] lacking only where it offends some principle of justice so rooted

in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins*, 506 U.S. 390, 407-408, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (internal quotation marks and citations omitted). Courts "have defined the category of infractions that violate 'fundamental fairness' very narrowly." *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

3.

Under these standards, the General Assembly could conclude that the relative strength of the prosecution's case should be considered before imposing a mandatory sentence. For purposes of punishment, it is rational to distinguish between cases not having corroborating evidence and cases having such evidence. Just as the prosecutor could consider the strength of the case 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 (and resulting prison resources and costs) 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* defendants.

4.

The common pleas 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 common pleas court was aware of the General Assembly's rational basis, i.e., the desire to have corroborating evidence of guilt before mandating prison. The common pleas 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 policy choice is not a basis for courts to find that policy unconstitutional. The General Assembly decides sentencing policy, not the courts.

The common pleas court also 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 amount 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 common pleas court categorically refused to entertain the idea of requiring corroboration in any way.

The court next contended that "the court is unaware of any other criminal offense where the penalty is enhanced based on the amount of evidence." The court added that nothing in the sentencing statutes (R.C. 2929.11 to 2929.14) instructs the court to consider the amount of evidence supporting conviction in sentencing the offender.

One wonders what difference these observations could make. The failure of other sentencing provisions to expressly mention a corroborating-evidence criterion is no reason to find the present statute unconstitutional. What matters is what the present statute does. There was no requirement that the General Assembly adopt corroborating-evidence requirements in pairs or triplets, and the rationality of a corroborating-evidence requirement does not depend in any way on the legislature adopting the same provision as to other crimes. In any event, the sentencing statutes allow a court to consider *any* relevant factor, see R.C. 2929.12(A) – (E), which is broad enough to allow a court to consider the existence or absence of corroborating evidence as a sentencing factor.

As stated earlier, a corroborating-evidence requirement is not new to Ohio criminal law. To be sure, the aforementioned Ohio examples are applicable to the guilt phase, rather than the sentencing phase. But the novel or rare nature of a provision does not make it unconstitutional. See *Martin v. Ohio*, 480 U.S. 228, 236, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987).

The rationality of a corroborating-evidence requirement does not vary from the guilt phase to the penalty phase. In both phases, such a requirement satisfies the General Assembly's goal of requiring some minimal additional evidence before convicting or, as here, before imposing a mandatory sentence.

The common pleas 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; a mandatory sentence is a bitter pill to swallow. 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 to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Heller*, 509 U.S. at 319.

The court noted that it "could find no rationale for this new sentencing requirement" in Am.Sub.H.B. 95, which adopted the corroborating-evidence provision. But 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. Whether or not the General Assembly stated its "rationale," defendant fell far short of negating every conceivable rational basis for this statute.

5.

Ironically, it was the common pleas court's analysis that was counterproductive. Many defendants would *welcome* the corroborating-evidence requirement, as it creates a hurdle that must be crossed in order to impose the mandatory sentence. If the common pleas court were correct, however, the General Assembly is constitutionally barred from

imposing such a requirement. In the next round of legislation, the General Assembly could simply mandate prison without corroborating evidence. The common pleas court's ruling does no favor to this group of offenders and affirmatively bars this kind of pro-defendant corroboration requirement.

6.

Some have contended that the provision is "vague" because it does not specify how the judge is to decide the corroboration issue and what standard of proof applies. But, as stated earlier, the standard of "corroborating evidence" is hardly new or unique in Ohio law. Drawing on earlier Ohio Supreme Court cases and other decisions, the binding syllabus in *Economo* indicated that "corroborating evidence" is evidence that "need not be independently sufficient to convict the accused, and it need not go to every essential element of the crime charged." The *Economo* syllabus stated that "corroborating evidence" could be "[s]light circumstances or evidence" that merely "tends" to support the case.

If judges are looking for the standard governing corroboration, they do not need to look any further than the *Economo* syllabus. The General Assembly did not need to set forth a detailed standard in the statute itself because it was already aware of the *Economo* analysis.

As for the burden of persuasion at sentencing, it is well settled that a preponderance standard applies at sentencing. *State v. Casalicchio*, 58 Ohio St.3d 178, 181, 569 N.E.2d 916 (1991); *State v. Daniel*, 10th Dist. No. 05AP-564, 2005-Ohio-4627, ¶ 29; *State v. Burge*, 82 Ohio App.3d 244, 253, 611 N.E.2d 866 (10th Dist. 1992).

Even if there were doubts about proper procedure, they would have provided no basis to find the statute unconstituional as to this defendant. No such doubts arose in defendant's case, as defendant's confession was clearly corroborating and the admissibility of the confession was not disputed, especially given that the defense waived cross-examination. As applied to defendant, there were no procedural doubts, and the statute cannot be found facially unconstitutional merely because such doubts might be encountered in some other cases. "In order for a statute to be facially unconstitutional, it must be unconstitutional in all applications." *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, ¶ 13.

Defendant's first proposition of law does not warrant relief.

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.

Even if one accepts the premise that the right to jury trial could be implicated when only a mandatory-minimum sentence is at issue, defendant's jury-trial claim still fails, as no "fact" is decided in a court's determination of whether corroborating evidence was admitted in the case.

A.

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 increases 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 v. United States*, 536 U.S. 545, 568, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002); *Apprendi*, 530 U.S. at 487; *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

But in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Court has now overruled this line of cases upholding mandatory-minimum sentencing. 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*, 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*.

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 federal right to a jury trial.

For purposes of the Ohio Constitution, this Court should follow *Harris*, not *Alleyne*. *Alleyne* is only binding under the federal constitution, not under the state constitution. If this Court adhered to *Harris* for purposes of the Ohio Constitution, the United States Supreme Court could do nothing to overturn a state supreme court's ruling on a matter of state law. *Wainwright v. Goode*, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 488, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Howard v. Kentucky*, 200 U.S. 164, 173, 26 S.Ct. 189, 50 L.Ed. 421 (1906).

There is no requirement that a state have a state-law jury-trial right that equals or exceeds the federal right. Federalism "does not necessarily mean that state constitutional guarantees always are more stringent than decisions of the Supreme Court under their federal counterparts. A state's view of its own guarantee may indeed be less stringent, in which case the state remains bound to whatever is the contemporary federal rule." *State v. Kennedy*, 295 Ore. 260, 270-71, 666 P.2d 1316, 1323 (1983).

For example, in *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Court recognized that the States may eliminate the exclusionary rule for a violation of state law even though federal law provided an exclusionary rule for federal search-and-seizure constitutional violations.

B.

Even under *Alleyne*, defendant's jury-trial-right claim *still* fails because no "fact"

is determined 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*, 719 F.3d 511, 532 (6th Cir. 2013) (en banc). The *Alleyne* majority reiterated, over and over again, that the jury-trial right is implicated when a "fact" is used to increase the penalty floor or penalty ceiling. Defendant's quotations from *Alleyne* merely reinforce this point, as the quotations *seven times* refer to the jury-trial right pertaining to "facts" that increase the statutory minimum or maximum. Defendant's Brief, at pp. 11-12.

A corroborating-evidence requirement does not present an issue of "fact." As stated by the syllabus of *Economo*, "[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." As *Economo* emphasized, "a corroboration requirement does not mandate proof of the facts which are the very substance of the crime charged" and that such a requirement is merely "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 59-60. 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.

Defendant has previously contended that the corroboration requirement "requires

a weighing of evidence that is inherently factual." But defendant did not address *Economo* and its contention that corroboration is only an inquiry into legal sufficiency. It is well settled that questions of sufficiency do not involve any weighing of evidence but only a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

In *State v. North*, supra, the Tenth District correctly concluded that the corroborating-evidence provision did not present an issue of "fact," but, rather, only presented an issue of the volume of evidence in a given case.

> {¶ 10} We conclude that the determination called for under R.C. 2907.05(C)(2)(a) does not involve the same type of "fact" that must be determined by the jury under *Apprendi* and *Alleyne*. As noted above, the key fact in *Alleyne* was whether the defendant brandished a firearm while committing his crime. Similarly, in *Apprendi*, the relevant fact was whether the defendant committed his crime with the purpose of intimidating an individual or group because of race, color, gender, handicap, religion, sexual orientation or ethnicity. *Apprendi* at 468-69. By contrast, in this case, the "fact" to be determined is whether corroborating evidence was introduced in the case. The volume of evidence introduced in a case is not the type of "fact" that, when combined with the "core crime" of gross sexual imposition against a victim less than 13 years old, constitutes "a new, aggravated crime." *Alleyne* at 2161. The elements of the crime of gross sexual imposition remain constant, irrespective of whether corroborating evidence was introduced. To the extent that the quantity of evidence presented in a case can be characterized as a "fact," we hold that that it constitutes a fact influencing judicial discretion that may be determined by a judge and need not be submitted to the jury. See *Alleyne* at 2163 ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.").

In other words, the corroborating-evidence provision does not change the "facts" or "elements" needed to prove the GSI offense. Rather, it merely assesses the volume of evidence tending to prove those "facts" or "elements." "Corroboration is not an element of the offense, but is merely an ancillary evidentiary requirement." *State v. Curtis*, 12th Dist. No. CA2008-01-008, 2009-Ohio-192, ¶ 93; *Akron v. Myers*, 9th Dist. No. 20743, 2002-Ohio-1112. "[S]tate laws requiring corroboration do not implicate constitutional concerns" and, importantly, do not become part of the federal due-process sufficiency-of-evidence analysis of the elements, as there is no federal constitutional requirement of corroboration in sufficiency review. *Harrington v. Nix*, 983 F.2d 872, 874 (8th Cir. 1993).

C.

The common pleas 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 evidence corroborating the violation was admitted in the case.

Again, as stated in *Economo*, "[t]he 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 sufficient to corroborate, the evidence satisfies the corroboration requirement regardless of what weight the jury as factfinder would actually give such evidence. Thus, the corroborating-evidence requirement does not call for a second-guessing of the jury's fact-finding, but, rather, only for an assessment of whether additional corroborating evidence was admitted.

Likewise, the constitutionality of this provision is not dependent on the court's conjured-up worst-case scenario. Even if the provision were unconstitutional in such a worst-case scenario, the provision would still be constitutional as applied in the present case of a defendant who confessed and pleaded guilty. Supposed doubts about the constitutionality of the provision in outlier scenarios is not a basis to invalidate it on its face or as applied in this case. A challenger cannot succeed merely because he posits some worst-case scenario under which the law's constitutionality might be doubtful. *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990).

D.

The common pleas 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. 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) (discussing long history of upholding

general verdicts). General verdicts are acceptable even when multiple theories of guilt were submitted to the jury under a single count and the general verdict does not specify which of the theories the jury relied upon. Id. at 49-51; *Schad v. Arizona*, 501 U.S. 624, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality – Constitution does not command greater verdict specificity); Id. at 650-51 (Scalia, J., concurring – constitutional "norm" to submit charge of murder to jury under multiple theories); *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995.

Apprendi and *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. Nothing in *Apprendi* or *Blakely* requires a special verdict form.

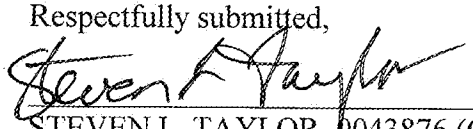
In addition, once the jury finds the defendant guilty of the elements of the offense beyond a reasonable doubt, the sentencer is not controlled by the particulars of the jury deliberations. *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997). Since the existence of corroborating evidence is a question of sufficiency, the existence of corroboration becomes a legal matter and does not depend on the particulars of the jury deliberations. The fact that the jury might have discounted or disregarded the corroborating evidence does not prevent a court from concluding that, as a matter of law, evidence of a corroborating nature was admitted.

Defendant's second proposition of law does not warrant relief.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the Tenth District's judgment and remand the case to the common pleas court for resentencing to apply the mandatory-sentencing provision.[1]

Respectfully submitted,



STEVEN L. TAYLOR 0043876 (Counsel of Record)
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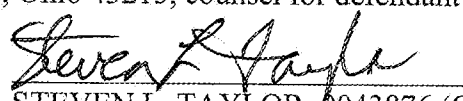
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on March 12, 2014, to the office of David L. Strait, dlstrait@franklincountyohio.gov, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant appellant.



STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

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[1] If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).