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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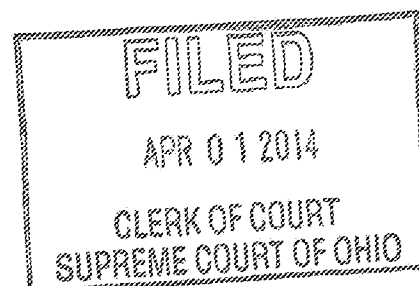

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ARGUMENT

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.

Consideration of this case requires review and analysis of R.C. 2907.05(C)(2)(a), which provides in pertinent part:

> (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.)

The few words in subsection (a) create issues that render the provision unenforceable and unconstitutional. The trial court believed that the phrase "evidence...admitted in the case..." raised an issue as to whether it applied to cases resolved through negotiated plea bargains. The court pointed out policy reasons why the provision should not apply in the plea context:

> ". . . 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)

Moreover, the statute is ambiguous. It 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), applies in the negotiated plea context.

As the trial court pointed out, the ambiguous language of the subsection creates constitutional issues. A law is void for vagueness in violation of Due Process where "persons of common intelligence must necessarily guess at meaning and differ as to application." *Smith v. Goguen*, 415 U.S. 566, 572 n. 8, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (citations omitted); *Coates v. Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), quoting *Connally v. Gen. Constr. Co.* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Due process requires that laws provide persons subject to regulation with a "reasonable opportunity to know what [conduct] is prohibited, so that [they] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Women's Medical Professional Corp.* v. *Voinovich*, 911 F.Supp. 1051, 1063 (S.D.Ohio 1995). Due process requires that a law must be sufficiently defined "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by

the statute." *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979); see also *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Where "a statute imposes criminal penalties, the standard of certainty [that due process requires] is higher." *Village of Hoffman Estates,* 455 U.S. at 489, 102 S.Ct. 1186; *see also Kolender,* 461 U.S. at 358 n. 8, 103 S.Ct. 1855. Where a statute imposes a criminal penalty, the court can invalidate it even when there is some valid application. *See Kolender,* 461 U.S. at 358 n. 8, 103 S.Ct. 1855.

In its merit brief, the State argues that this Court's opinion in *State v. Economo*, 76 Ohio St.3d 56, 666 N.E.2d 225 (1996) requires a determination that R.C. 2907.05(C)(2)(a) is constitutional and a valid exercise of legislative authority. But *Economo* involved another statute, R.C. § 2907.06(B), which provides that an individual could not be convicted of sexual imposition solely upon the victim's testimony unsupported by other evidence. But *Economo* addressed the amount or quantum of evidence required for conviction, rather than the quantity of evidence required to impose a particular sentence. It did not discuss the effect of R.C. 2901.04(A). Significantly, *Economo* predates the United States Supreme Court decisions discussed in the argument under the Second Proposition of Law. There is an issue whether *Economo* would survive analysis under these recent cases.

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.

The United States Supreme Court 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) hold that the guarantees of the Sixth Amendment require jury determination of any fact that increases the maximum punishment authorized for the offense. *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) extends the holdings of *Apprendi* and its progeny by holding that the Sixth Amendment requires jury determination of factors that increase minimum prison sentences.

In *Alleyne*, the Court held that the "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.

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.

Under *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 State argues in its merit brief that R.C. 2907.05(C)(2)(a) merely sets out a sentencing factor. But, under *Alleyne,* the determination whether "evidence other than the testimony of the victim was admitted in the case corroborating the violation", is an "element" requiring jury determination. 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. 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 the court 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. Rather, the court 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.

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, and for those set forth in his opening merit brief, Appellant respectfully urges this Court to reverse the judgment of the Franklin County Court of Appeals.

Respectfully submitted,

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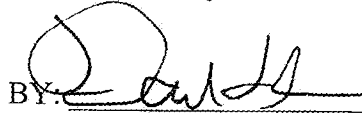

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CERTIFICATE OF SERVICE

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