

In the  
**Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2015-1093
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Lake County
v.	:	Court of Appeals,
	:	Eleventh Appellate District
WILLIAM D. SERGENT,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 2013-L-125
	:	

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**BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL  
MICHAEL DEWINE IN SUPPORT OF APPELLANT STATE OF OHIO**

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## INTRODUCTION

This appeal arises out of William Sergent's attempt to challenge a sentence he himself agreed should be imposed. Sergent pleaded guilty to repeatedly raping his daughter during three distinct periods, each spanning a number of months. Subsequently, he and the prosecution jointly recommended that he receive three consecutive 8-year sentences for his crimes. The trial court agreed. Now, however, Sergent attacks this agreed sentence on the grounds that the trial court did not make the proper findings under R.C. 2929.14(C)(4), in violation of this Court's decision in *State v. Bonnell*, 140 Ohio St. 3d 209, 2014-Ohio-3177. He asks this Court to overlook the statutory bar to review of jointly recommended sentences, *Bonnell*'s inapplicability, the trial court's compliance with R.C. 2929.14(C)(4), and the absence of any prejudice to him.

R.C. 2953.08(D)(1) bars appellate review of a trial court's sentence that: (1) "is authorized by law," (2) "has been recommended jointly by the defendant and the prosecution in the case," and (3) "is imposed by a sentencing judge." Sergent does not dispute that his sentence was jointly recommended and imposed by a sentencing judge. Nor does his claim that the trial court's *sentencing procedures* were unauthorized by law show that his *sentence* was unauthorized by law. Indeed, this Court has already determined that the statute barred review of an identical claim. *See State v. Porterfield*, 106 Ohio St. 3d 5, 2005-Ohio-3095 ¶ 25-26.

*Bonnell* does not change this analysis, because it did not involve an agreed-upon sentence and did not disturb *Porterfield*'s analysis under R.C. 2953.08(D)(1). Additionally, *Porterfield* specifically held that the rule extended in *Bonnell* did not apply to jointly recommended sentences. Although the statutory landscape regarding consecutive sentences has changed over the years, *Porterfield* has been applied in all regimes. Moreover, the statutory landscapes in place when *Porterfield* and *Bonnell* were decided are identical in all relevant respects.

Even if this Court expands *Bonnell* by applying it to this case, it should still reverse because the trial court *did* make the necessary findings at the sentencing hearing. Specifically, it found that consecutive sentences: (1) were necessary to protect the public and punish Sergent; (2) were not disproportionate to the seriousness of Sergent’s conduct and the danger he posed to the public; (3) reflected the seriousness of Sergent’s conduct; and (4) were necessary to protect the public in light of Sergent’s history of criminal conduct. *See* R.C. 2929.14(C)(4). The fact that the court did not recite the exact statutory language when making those findings is irrelevant, because no “talismanic incantation” is required. *Bonnell*, 2014-Ohio-3177 ¶ 37.

Finally, even setting aside the statutory bar to review and indulging the notions that *Bonnell* should apply here and that the trial court failed to follow *Bonnell*’s command, Sergent still cannot prove prejudice. He jointly recommended the sentence that he received, and thus agreed that it was justified. As a result, there is no basis for concluding that he was prejudiced.

By rejecting these arguments, the Eleventh District’s decision became the predominant outlier among cases from this Court, at least half of the district courts, and many federal courts, all of which have held that courts need not make consecutive-sentence findings at sentencing before imposing jointly recommended sentences. This Court should endorse this consensus view and reaffirm its own precedent by reversing the Eleventh District.

#### **STATEMENT OF AMICUS INTEREST**

As Ohio’s chief law officer, the Attorney General has a keen interest in decisions that hinder prosecutors’ efforts to obtain consecutive sentences for serious crimes. *See* R.C. 109.02. A decision from this Court endorsing the Eleventh District’s opinion would limit the effectiveness of agreed-upon sentences by subjecting them to challenge on appeal when a trial court fails to make certain findings at the sentencing hearing. This would discourage their use

and reduce their effectiveness as bargaining tools for plea agreements, and would lengthen certain criminal proceedings as a result.

The Ohio Attorney General also has an interest in this case because protecting children is one of his core goals. For example, his Crimes Against Children Initiative seeks to provide assistance to local authorities investigating and prosecuting those who commit crimes against children, including sexual abuse. The ability to jointly recommend consecutive sentences is a tool that can be used, as it was in this case, to ensure that individuals who harm children receive proper punishment.

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

In November 2012, deputies from the Lake County Sheriff's Department were dispatched to the Freedom Assembly Church in response to a 14-year-old female's report that she had been sexually assaulted. *State v. Sergeant*, 2015-Ohio-2603 ¶ 3 (11th Dist.). Upon arrival, the deputies learned that the girl had recently told the church pastor's wife that she had been sexually abused by her father, 53-year-old William Sergeant. *Id.* The girl told the deputies that her mother left during June 2009. *Id.* She was 10 years old at the time. *Id.* Thereafter, Sergeant began pressuring her to have sex with him. *Id.* She initially refused, but Sergeant continued to pressure her and threatened to send her away until she submitted. *Id.* The girl stated that Sergeant had vaginal intercourse with her numerous times between June 1, 2009 and July 31, 2009; August 1, 2009 and September 30, 2009; and March 1, 2010 and August 31, 2010. *Id.* After listening to the girl's account, the deputies took her to a sexual assault nurse examiner for an examination, which revealed physical evidence of penetration. *Id.* ¶ 4.

Sergeant was arrested and charged with three counts of raping his biological daughter. *Id.* ¶ 2. In May 2013, Sergeant pleaded guilty. *Id.* Pursuant to the joint recommendation of

Sergent's counsel and the prosecution, the trial court sentenced Sergent to three consecutive 8-year terms in prison. *Id.* ¶ 6.

Five months after his conviction, Sergent sought leave to file a delayed appeal with the Eleventh District, which the court granted. *Id.* ¶ 7. Sergent's appellate counsel subsequently filed an *Anders* brief and motion to withdraw, stating that the trial court committed no prejudicial errors. *Id.* ¶ 8. The court granted Sergent leave to respond *pro se* and later granted his motion requesting an extension. *Id.* ¶ 9. Nevertheless, Sergent failed to file a brief. *Id.*

In November 2014, the court entered a judgment finding an arguable issue regarding the trial court's compliance with this Court's *Bonnell* decision. *Id.* ¶ 10. In that case, this Court held that a trial court must make the findings outlined in R.C. 2929.14(C)(4) at the sentencing hearing and include those findings in its sentencing entry when imposing consecutive sentences. *Id.* The trial court in this case did the latter but not the former. *Id.* As a result, the Eleventh District appointed new counsel to Sergent under *Anders* and ordered briefing on the *Bonnell* issue and "any additional arguable issues that may be found in the record." *Id.* ¶ 11.

Sergent's counsel advanced the *Bonnell* claim and also challenged the voluntariness of Sergent's guilty plea. *Id.* ¶¶ 12-13, 39-40. The court rejected the latter claim. *Id.* ¶ 54. Regarding the *Bonnell* claim, the court observed that it was bound by a prior Eleventh District decision holding that "an agreed sentence between the state and the defendant does not relieve the trial court of its obligation to make the statutorily required findings to impose consecutive sentences." *Id.* ¶ 22 (quoting *State v. Bell*, 2015-Ohio-218 ¶ 12 (11th Dist.)). Because of this precedent, the court vacated Sergent's sentence and remanded for resentencing. *Id.* ¶ 23.

The court noted that its holding conflicted with decisions from the Second and Fourth Districts. *Id.* ¶ 25. In those cases, the courts held that consecutive sentences issued pursuant to a

joint recommendation are unreviewable under R.C. 2953.08(D)(1) and that a court need not independently justify a sentence when the defendant stipulates that it is justified. *Id.* ¶¶ 26-28 (citing *State v. Pulliam*, 2015-Ohio-759 ¶ 7-8 (4th Dist.); *State v. Weese*, 2014-Ohio-3267 ¶ 5 (2d Dist.)). In light of this conflicting precedent, the Eleventh District *sua sponte* certified the following question to this Court: “In the context of a jointly-recommended sentence, is the trial court required to make consecutive-sentence findings under R.C. 2924.14(C) in order for its sentence to be authorized by law and thus not appealable?” *Id.* ¶¶ 35-36.

## ARGUMENT

### **Amicus Curiae’s Proposition of Law:**

*In the context of a jointly recommended sentence, a trial court is not required to make consecutive-sentence findings under R.C. 2929.14(C) for its sentence to be authorized by law and unappealable.*

William Sergent pleaded guilty to repeatedly raping his daughter during three discrete periods, each spanning many months. He agreed to and jointly recommended the imposition of consecutive sentences for his crimes, but now argues that those sentences should be vacated because the sentencing court did not make certain findings under R.C. 2929.14(C)(4). This claim should be rejected.

*First*, R.C. 2953.08(D)(1) bars review of agreed sentences that are “authorized by law.” Sergent’s argument that a procedural aspect of the sentencing hearing, rather than the sentence itself, was not authorized by law is insufficient to overcome this bar. Moreover, in *Porterfield* this Court applied R.C. 2953.08(D)(1) in a case identical to Sergent’s in all relevant respects. *Second*, this Court’s *Bonnell* decision does not change this conclusion, because it does not apply in the context of jointly recommended sentences. *Third*, even if *Bonnell* applies, the trial court’s findings here complied with R.C. 2929.14(C)(4). *Finally*, any error was harmless, because

Sergent cannot demonstrate that he was prejudiced by the imposition of a valid sentence that he jointly recommended.

**A. Sergent’s sentence is unreviewable under R.C. 2953.08(D)(1), which bars review of consecutive sentences issued pursuant to the joint recommendation of both parties.**

R.C. 2953.08(D)(1) bars review of a sentence that: (1) “is authorized by law,” (2) “has been recommended jointly by the defendant and the prosecution in the case,” and (3) “is imposed by a sentencing judge.” It is undisputed that Sergent’s sentence was jointly recommended and imposed by a sentencing judge. *See Sergent*, 2015-Ohio-2603 ¶¶ 6, 21. As the text of the statute, this Court’s precedents, and precedents from other courts demonstrate, Sergent’s sentence was also authorized by law. Indeed, adopting Sergent’s interpretation would require rewriting the statute.

**1. Sergent’s challenge to the sentencing procedure is not cognizable under a plain reading of R.C. 2953.08(D)(1).**

When interpreting statutes, courts must “first consider the statutory language, reading words and phrases in context and construing them in accordance with rules of grammar and common usage.” *Fraley v. Estate of Oeding*, 138 Ohio St. 3d 250, 2014-Ohio-452 ¶ 16 (citation and quotation marks omitted). In this case, the plain text of the statute indicates that review is permitted only when “the sentence” is not authorized by law, not when deficiencies occur in the *sentencing procedures*. Significantly, while the General Assembly specified that “the sentence” may include sentencing procedures in *other* parts of the statute, it chose *not* to alter the common meaning of the phrase in the provision governing agreed-upon sentences. Accordingly, the provision should be applied as written.

The statute states that a sentence “is not subject to review under this section if *the sentence* is authorized by law . . . .” R.C. 2953.08(D)(1) (emphasis added). The use of the term “the sentence” is significant. Ohio law defines a sentence as the “sanction . . . imposed by the

sentencing court,” R.C. 2929.01(E), indicating that the process of imposing the sentence is not itself part of the sentence. Courts routinely recognize this distinction when they employ the phrase “sentenced to a sentence.” See, e.g., *United States v. Pritchard*, 392 F. App’x 433, 436 (6th Cir. 2010); *State v. Leasure*, 2012-Ohio-318 ¶ 15 (5th Dist.); *State v. Boyd*, 2006-Ohio-6299 ¶ 27 (2d Dist.). Accordingly, R.C. 2953.08(D)(1)’s use of the term “the sentence” indicates that review is permitted when the *sentence* is not authorized by law, but not when the only deficiencies lie in the procedural aspects of the *sentencing process*.

Other courts have reached similar conclusions. For example, in *State v. Wilkins*, Maryland’s highest court addressed a defendant’s argument that his motion to correct an illegal sentence was wrongly denied because the trial judge failed to announce his authority to suspend any part of the defendant’s life sentence during sentencing. 900 A.2d 765, 767 (Md. 2006). The court affirmed, reasoning that the defendant’s argument related to the sentencing proceedings rather than the sentence itself. *Id.* at 774. It noted that “[a]n illegal sentence is a sentence not permitted by law” and that “a sentence, proper on its face, [does not] become[] an ‘illegal sentence’ because of some arguable procedural flaw in the sentencing procedure.” *Id.* at 767-68 (citation omitted). See also *State v. Baize*, 981 S.W.2d 204, 206 (Tex. Crim. App. 1998) (“[T]he State’s argument incorrectly substitutes ‘assessment of punishment’ for ‘sentence.’”); *Lindquist v. State*, 155 So.3d 1193, 1194 (Fla. Dist. Ct. App. 2014) (“Lindquist’s specific claim takes issue with the procedure employed during sentencing, as opposed to the actual sentence imposed, and is not cognizable in a [motion to correct an illegal sentence].”).

Moreover, when the General Assembly intended a reference to “the sentence” to include the sentencing procedures as well as the sentence itself, it specified as much. For example, R.C. 2953.08 uses the phrase “The sentence is contrary to law” to encompass sentencing errors.

Specifically, it states that a court hearing an appeal under the statute may modify or vacate a sentence when “the record does not support the sentencing court’s findings” or “the sentence is otherwise contrary to law.” R.C. 2953.08(G)(2). The use of the phrase “otherwise” indicates that the earlier phrase about unsupported findings constitutes an example of a sentence that is contrary to law. Thus, a sentence may be contrary to law even when the only error relates to the sentencing procedures. For this reason, courts routinely note that a sentence is contrary to law if a court “ignores an issue or factor which a statute requires a court to consider.” *State v. Gilbert*, 2015-Ohio-4509 ¶ 8 (2d Dist.) (citation and quotations omitted); *State v. Rossbach*, 2011-Ohio-281 ¶ 87 (6th Dist.); *State v. Terry*, 2007-Ohio-1306 ¶ 8 (8th Dist.); *see also State v. Estep*, 2012-Ohio-6296 ¶ 12 (4th Dist.) (“A sentence is contrary to law if a court fails to follow appropriate statutory guidelines.”); *State v. Miranda*, 2012-Ohio-3971 ¶ 4 (10th Dist.) (same). Furthermore, this usage comports with the traditionally expansive meaning of the term “contrary to law.” *See Callahan v. United States*, 285 U.S. 515, 517 (1932) (the “natural meaning” of contrary to law is “contrary to *any* law”) (emphasis added).

In contrast, the General Assembly chose *not* to utilize this broad term in the provision for agreed-upon sentences. More importantly, R.C. 2953.08(D)(1) makes no mention of the record or the trial court’s findings when employing the “authorized by law” language, nor does it offer any other indication that the General Assembly intended to alter the ordinary meaning of the phrase “the sentence.” This omission cannot be explained by concluding that “authorized by law” is merely the inverse of “contrary to law” because, as discussed in more detail below, this Court has already rejected that argument. *See State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1 ¶ 21. Thus, absent any suggestion from the General Assembly that the statutory

definition of “sentence” should be expanded to include “sentencing procedures”—a specification it knew how to make—this Court should apply the term’s plain meaning.

In this case, Sargent argues that the court committed a procedural error during the sentencing hearing by failing to make the statutory findings before imposing the sentence to which both parties agreed. He does *not* argue that the sentence itself was legally unauthorized. He does not claim, for example, that the sentence falls outside the statutory range for his offenses, lacks a mandatory period of post-release control, or contains sentences for unmerged allied offenses—deficiencies which, as this Court has concluded, render a sentence unauthorized by law. *See id.* ¶¶ 19-20, 26. Absent that type of deficiency, R.C. 2953.08(D)(1) bars review. This Court should therefore conclude that Sargent’s sentence is not subject to review.

**2. *Porterfield* is dispositive here because it applied R.C. 2953.08(D)(1) to bar the exact claim Sargent seeks to advance in this case.**

This Court has addressed the exact question presented here. In *State v. Porterfield*, a defendant charged with multiple offenses entered into a plea agreement and, along with the prosecution, jointly recommended consecutive sentences for his offenses. 106 Ohio St. 3d 5, 2005-Ohio-3095 ¶ 2. The trial court accepted this recommendation. *Id.* The appeals court reversed because the trial court failed to comply with this Court’s *Comer* decision holding that a trial judge must make the findings required by statute when imposing consecutive sentences. *Id.* ¶ 3 (citing *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio-4165).

Relying on R.C. 2953.08(D)(1), this Court reversed. *Id.* ¶ 26. The Court reasoned that “[the defendant]’s sentence was authorized by law, was recommended jointly by him and the prosecution, and was imposed by a sentencing judge. Pursuant to R.C. 2953.08(D), [the defendant]’s sentence is not subject to review. *Comer* cannot be applied here.” *Id.* ¶ 25. Looking to the statutory purpose, the Court added that “[t]he General Assembly intended a

jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence.” *Id.*

This case is indistinguishable from *Porterfield*. As in that case, the parties here jointly recommended consecutive sentences, and the trial court imposed consecutive sentences pursuant to that recommendation. *Sergent*, 2015-Ohio-2603 ¶¶ 6, 21. Furthermore, *Sergent*’s sentence resembles the sentence in *Porterfield* in all relevant respects. The Court in *Porterfield* concluded that the defendant’s consecutive sentences were authorized by law despite the fact that the trial court did not articulate the required statutory findings during sentencing. *See* 2005-Ohio-3095 ¶¶ 3, 25. The same result is appropriate here.

**3. *Underwood* and decisions from Ohio district courts and federal courts confirm that *Sergent*’s sentence was authorized by law.**

This Court’s later cases confirm the meaning of “authorized by law” in R.C. 2953(D)(1) and the result in *Porterfield*. In *Underwood*, this Court held that a sentence is authorized by law “if it comports with all mandatory sentencing provisions.” 2010-Ohio-1 ¶ 20; *see also id.* ¶ 21 (“[W]hen a sentence fails to include a mandatory provision, it may be appealed because such a sentence is . . . not ‘authorized by law.’”). Notably, the Court focused on the *sentence*, rather than the *sentencing procedures*, holding only that the sentence must comply with the mandatory sentencing provisions. The Court’s examples of unauthorized sentences illustrate this point. They include sentences that fall outside the statutory ranges for the offenses, do not include a mandatory period of post-release control, or contain sentences for unmerged allied offenses. *See id.* ¶¶ 19-20, 26. The sentence in *Underwood* fit that mold: The Court held that a sentence was not authorized by law because it did not comport with a statute that prohibits multiple convictions—and thus sentences for multiple convictions—for allied offenses. *Id.* ¶ 26.

*Underwood* also rejected the argument that “authorized by law” is the inverse of “contrary to law,” explaining that the first is narrower than the second. *Id.* ¶ 21. It noted that “[b]oth the state and the defendant have an appeal as of right if a sentence is ‘contrary to law.’ But a defendant has no right to appeal an agreed-upon sentence *unless* the sentence is not ‘authorized by law.’” *Id.* (emphasis added) (citations omitted). The court again used examples to make the point, noting decisions that would not render a sentence unauthorized by law but might render it contrary to law. *Compare id.* ¶ 22 (noting that R.C. 2953.08(D)(1) bars challenges to “whether the trial court complied with statutory provisions like R.C. 2929.11 . . . , 2929.12 . . . , and/or 2929.13(A) through (D) . . . or whether consecutive or maximum sentences were appropriate under certain circumstances.”), *with* Griffin & Katz, Ohio Felony Sentencing Law 779 (2002) (“Where a sentencing court fails to make findings required in R.C. [ ] 2929.13 or 2929.14, fails to engage in the seriousness and recidivism analysis required under R.C. [ ] 2929.12, or fails to set forth reasons when reasons are required in R.C. [ ] 2929.19, the sentence is contrary to law.”). *Underwood* squares with the statutory context in which the terms are used because it demonstrates that sentences that are contrary to law are a broader category than those that are not authorized by law.

In addition to supporting the plain text of R.C. 2953(D)(1), *Underwood* also supports the holding in *Porterfield*. *Underwood* quoted *Porterfield* for the proposition that “[t]he General Assembly intended a jointly agreed-upon sentence to be protected from review precisely because the parties agreed that the sentence is appropriate. Once a defendant stipulates that a particular sentence is justified, the sentencing judge no longer needs to independently justify the sentence.” *Underwood*, 2010-Ohio-1 ¶ 27 (quoting *Porterfield*, 2005-Ohio-3095 ¶ 25). The Court then distinguished *Porterfield* because it “did not involve a mandatory sentencing provision, but

merely the discretionary decision to impose consecutive sentences.” *Id.* Thus, the Court effectively reaffirmed its holding in *Porterfield* that consecutive sentences imposed pursuant to the joint recommendation of both parties are authorized by law even when the trial court does not make the statutory findings at the sentencing hearing.

To be sure, in rejecting the argument that “authorized by law” means only that a sentence falls within the statutory range for the offense, *Underwood* posited that “jointly recommended sentences imposed within the statutory range but missing mandatory provisions, such as . . . consecutive sentences (R.C. 2929.14(D) and (E)),” are reviewable. *Id.* ¶ 20. But that statement does not detract from the above analysis, for three reasons. First, the statement is *dicta*, as the case only addressed the trial court’s imposition of sentences for unmerged allied offenses, not its failure to make consecutive-sentence findings. Second, the statement refers to sentences *missing* consecutive sentences when those sentences are *mandatory*, not those *containing* consecutive sentences. Finally, the explicit affirmation of *Porterfield* elsewhere in the opinion indicates that the statement is not a repudiation of that precedent.

Beyond *Underwood*’s affirmation of *Porterfield*, at least half of the district courts have applied *Porterfield* in applicable cases. *See Pulliam*, 2015-Ohio-759 ¶ 8-10; *State v. Rue*, 2015-Ohio-4008 ¶ 6-7 (9th Dist.); *State v. Savage*, 2015-Ohio-574 ¶ 34 (12th Dist.); *State v. Miller*, 2014-Ohio-5685 ¶ 9 (8th Dist.); *Weese*, 2014-Ohio-3267 ¶ 5; *State v. Morris*, 2013-Ohio-1736 ¶ 11 (3d Dist.); *see also State v. Marcum*, 2015-Ohio-549 ¶ 7 (2d Dist.) (stating in *dicta* that *Porterfield* controlled in the context of jointly recommended consecutive sentences). All but the *Morris* decision post-date *Bonnell*, and the courts in those cases have consistently reasoned that “*Bonnell* only involved a negotiated plea agreement, not an agreed sentence. . . . Thus, *Bonnell* is factually distinguishable and does not control the outcome of the present case.” *Pulliam*,

2015-Ohio-759 ¶ 10. Moreover, federal courts have on numerous occasions applied *Porterfield* to similar cases arising through federal petitions for writs of *habeas corpus*. See *Butler v. Warden, Lebanon Corr. Inst.*, 483 F. App'x 102, 107 (6th Cir. 2012) (collecting cases).

Cases reaching the opposite conclusion are scarce. Two districts have issued potentially adverse but distinguishable decisions. The Sixth District declined to apply the bar against review when a defendant agreed to an aggregate sentence but the record did not show that he realized it included consecutive sentences. *State v. Deeb*, 2013-Ohio-5175 ¶ 10 (6th Dist.). That issue is absent here, because Sergeant's counsel specified that the agreed sentence included consecutive sentences. Sentencing Transcript, Doc. 40, at 4 ("Sen. Tr.") (Note: The plea-hearing transcript is also listed as Document 40 in the record.) The First District declined to apply the bar against review when the trial court made consecutive-sentence findings but did not include them in the sentencing entry. *State v. Davis*, 2015-Ohio-775 ¶ 8 (1st Dist.). Here, the reverse occurred. To the extent *Davis* is analogous, however, it is erroneous for the reasons articulated above.

Regarding the specific question at issue here, the Eleventh District is the sole outlier in an otherwise uniform trend of applying R.C. 2953.08(D)(1) and *Porterfield*. Even the Eleventh District expressed doubt about Sergeant's case. The court followed its *Bell* decision, which vacated jointly recommended consecutive sentences because the trial court failed to make the proper findings at sentencing. *Sergeant*, 2015-Ohio-2603 ¶ 22-23. But the court suggested that *Bell* misapplied *Underwood* by extending it to a case not involving unmerged allied offenses. *Id.* ¶ 24. That characterization is accurate. In *Bell*, the court simply quoted two paragraphs from *Underwood* and then, without any discussion of *Porterfield*, held that the trial court erred by accepting the agreed-upon sentence without making consecutive-sentence findings. 2015-Ohio-218 ¶¶ 13-16. Thus, it appears the only conflict in this case arises from one district's controlling

but admittedly mistaken precedent. This Court should accept the Eleventh District's implicit invitation to correct its wayward precedent by applying R.C. 2953.08(D)(1), *Porterfield*, and the rationale of numerous Ohio appellate courts and federal courts to Sergeant's case.

**B. *Bonnell* does not apply in the context of jointly recommended sentences.**

*Bonnell* does not detract from the plain meaning of R.C. 2953.08(D)(1) or *Porterfield*'s interpretation of that statute. Although judicial fact-finding has traveled a meandering path since *Porterfield*, “[t]his Court has now come full circle on the question of whether a trial court must engage in judicial fact-finding prior to imposing consecutive sentences on an offender.” *State v. Bonnell*, 140 Ohio St. 3d 209, 2014-Ohio-3177 ¶ 1. This Court recognized *Porterfield*'s continuing vitality throughout the transition years. See *Underwood*, 2010-Ohio-1 ¶ 27; *State v. Mathis*, 109 Ohio St. 3d 54, 2006-Ohio-855 ¶ 24 & n.6. Now, given that the statutory landscape when *Porterfield* was decided has been restored, its applicability is clearer than ever.

In *Porterfield*, this Court addressed a claim that a trial court failed to make the findings required by statute before imposing consecutive sentences. 2005-Ohio-3095 ¶ 3. The Court noted that it had interpreted this statute in its *Comer* decision and that “*Comer* requires the trial court to deliver these findings at the sentencing hearing.” *Id.* It nevertheless held that *Comer* did not apply to agreed-upon sentences. *Id.* ¶ 25-26.

Shortly after the decision in *Porterfield*, this Court, in *State v. Foster*, invalidated the fact-finding requirements, holding that judges need not make findings when imposing consecutive sentences. 109 Ohio St. 3d 1, 2006-Ohio-856 ¶¶ 97, 100. Three years later, the U.S. Supreme Court effectively overruled *Foster*, as this Court recognized in *State v. Hodge*. See 128 Ohio St.3d 1, 2010-Ohio-6320 ¶ 19-20 (discussing *Oregon v. Ice*, 555 U.S. 160, 168, 171-72 (2009)). The Court noted, however, that action from the General Assembly was required to revive the statutory provisions that *Foster* invalidated. *Id.* ¶ 35. In 2011, the General Assembly

“revived” the fact-finding requirements for consecutive sentences. *Bonnell*, 2014-Ohio-3177 ¶ 22. Subsequently, the Court in *Bonnell* held that a trial court must make consecutive-sentence findings at the sentencing hearing, effectively interpreting the language in the new statute the same way it interpreted the identical language in the old statute in *Comer*. *Compare id.* ¶ 29 (“When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing . . . .”), with *Comer*, 2003-Ohio-4165 ¶ 20 (“[P]ursuant to [the statute] . . . , when imposing consecutive sentences, a trial court is required to make the statutorily enumerated findings . . . at the sentencing hearing.”).

This brief history demonstrates that *Porterfield* applies in this case. For all relevant purposes, the pre-*Foster* statute is identical to the post-*Foster* statute and *Comer* is identical to *Bonnell*. *Porterfield* held that the old statute and *Comer* did not apply in the context of jointly recommended sentences. That holding applies equally to the new statute and *Bonnell*. Concluding otherwise would mean reading *Bonnell* as having altered the pre-*Foster* regime that it deemed revived. *See Bonnell*, 2014-Ohio-3177 ¶¶ 1, 22, 35. Specifically, it would mean that *Bonnell*, without mentioning the cases or statutes on jointly recommended sentences: (1) established a rule for jointly recommended sentences; (2) overruled *Porterfield* and rejected its interpretation of R.C. 2953.08(D)(1); and (3) rejected the discussion of *Porterfield* in *Underwood* and the application of *Porterfield* in scores of Ohio appellate cases and federal cases. *Bonnell* did not silently rework sentencing law in this manner.

**C. Even if this Court extends *Bonnell* to this case, it should hold that the trial court complied with R.C. 2929.14(C)(4).**

As this Court held in *Bonnell*, under R.C. 2929.14(C)(4), “a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to

support the findings, consecutive sentences should be upheld.” *Id.* ¶ 29; *see also id.* ¶ 37. Indeed, the trial court in *Bonnell* did not mention R.C. 2929.14(C)(4), and this Court nevertheless examined its findings at sentencing to determine whether they comported with the statute. *See id.* ¶ 33.

Applying the same analysis to this case, it is clear that the trial court made the requisite findings at sentencing. The sentencing statute states, in relevant part, that a court may impose consecutive sentences if it finds: (1) “that consecutive service is necessary to protect the public from future crime or to punish the offender,” (2) “that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public,” and (3) “any of the following:”

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender’s conduct.

(c) The offender’s history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

Regarding the first factor, the trial court stated that it had “calculated this sentence to achieve the two overriding purposes of felony sentencing,” which include the need “to protect the public from future crime by this offender and others similarly minded, and to punish this offender . . . .” Sen. Tr. at 10. Additionally, the court considered the need for incapacitation and deterrence and noted the impact of Sergeant’s crimes on society and the possibility of recidivism. Sen. Tr. at 10-11. In *Bonnell*, this Court concluded that the trial court’s statement that the defendant had “shown very little respect for society and the rules of society” constituted a finding that consecutive sentences were necessary to protect the public and punish the defendant.

2014-Ohio-3177 ¶ 33. This case is more straightforward. The trial court not only mentioned factors affecting public protection (societal impact, recidivism, deterrence) and punishment (incapacitation), it explicitly stated that it had calculated his sentence to protect the public from future crime and to punish Sergeant.

With respect to the second factor, the trial court stated that it “ha[d] reasonably calculated this sentence . . . to be commensurate with . . . the seriousness of this offender’s conduct and its impact not only on the victim, but on society . . . .” Sen. Tr. at 10-11. “Commensurate” and “proportionate” are synonyms. *See Webster’s II New Riverside University Dictionary* 286 (1994) (defining commensurate as “[c]orresponding in size, amount, or scale: PROPORTIONATE”). Thus, the court’s finding closely tracks the statutory language.

Other findings offer additional support for this conclusion. For example, the court stated its intent “to protect the public . . . and to punish this offender using the minimum sanctions that the Court determines accomplish the purposes . . . .” Sen. Tr. at 10. It also noted that it had considered the statements of both parties at the sentencing hearing, *id.*, which included the statement from Sergeant’s counsel that consecutive sentences “would not demean the seriousness of the offense, and it would adequately protect the public,” Sen. Tr. at 5. Moreover, the record supports these proportionality findings. Whereas the Court in *Bonnell* questioned an aggregate sentence of eight years and five months in prison for taking \$117 in change from vending machines, 2014-Ohio-3177 ¶ 33, there is little question that consecutive 8-year sentences are justified for the repeated rape of a minor child. The trial court’s statements demonstrate the proportionality of consecutive sentences for such a crime.

Finally, although it only needed to satisfy one of the final three provisions in the statute, the sentencing court in fact satisfied both the (b) and (c) provisions. Regarding (b), the

prosecution stated at sentencing that Sergent's three counts of first-degree rape were "continuing courses of criminal conduct" and recounted each of the three months-long periods of abuse. Sen. Tr. at 7-9. It noted the "seriousness" of Sergent's "abuse of power"; the "physical evidence, physical harm, psychological harm"; and Sergent's attitude of "minimization, denial, and blame." Sen. Tr. at 8-9. It concluded: "So based on the victim's age, fiscal, psychological harm," and "the fact that this is a parent . . . with his daughter who lives in the home with him, we did join in a joint recommendation of 24 years." Sen. Tr. at 9. The trial court considered these statements and noted that "certainly the prosecutor hit the most meaningful points. The Court adopts those statements. The Court adopts the joint recommendation for prison." Sen. Tr. at 11. These statements indicate the court's agreement with the parties' conclusion that three consecutive 8-year sentences were necessary in light of the severe and unique harm caused by the three discrete periods in which Sergent repeatedly raped his daughter. Accordingly, the court's imposition of consecutive sentences comported with the statutory factors.

The court also satisfied provision (c) of the statute by noting that it had calculated the sentence to protect the public from future crimes by Sergent after considering the parties' statements regarding his history of criminal conduct. Sen. Tr. at 10-11. That conduct includes the offenses at issue here, as well as a misdemeanor conviction from 1995 and other dismissed charges. Sen. Tr. at 4. Although this history was not extensive prior to the conduct underlying this case, the statutory language encompasses that conduct all the same. Under a plain reading, Sergent's conduct toward his daughter qualifies as part of his "history of criminal conduct" because it is criminal conduct that occurred in the past. Moreover, the statute directs courts to consider whether a defendant's history of criminal conduct "demonstrates that consecutive sentences are necessary *to protect the public from future crime by the offender.*" R.C.

2929.14(C)(4)(c) (emphasis added). This directive would be meaningless if it excluded the conduct at issue, because it would render any public-protection analysis incomplete. Here, it would mean omitting the three months-long periods, spanning multiple years, during which Sergeant repeatedly raped his minor daughter, despite the fact that those actions are the most relevant factor bearing on the need for public protection.

This conclusion is supported by the numerous cases that have read “history of criminal conduct” broadly. The First District, for example, has noted that, if “the General Assembly had intended to limit a sentencing court’s review of prior actions to criminal *convictions*, it could have done so.” *State v. Bromagen*, 2012-Ohio-5757 ¶ 8 (1st Dist.). Indeed, the General Assembly has used such restrictive language elsewhere. *See, e.g.*, R.C. 2929.04(B). Recognizing this distinction, this Court has held that, although juvenile matters are civil rather than criminal, they constitute “criminal conduct” due to their “inherently criminal aspects.” *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919 ¶ 76 (collecting cases); *see also State v. Green*, 2015-Ohio-4078 ¶ 26 (8th Dist.) (S. Gallagher, J., dissenting) (“History of criminal conduct includes all criminal conduct and has no limitation.”). Thus, considering Sergeant’s abuse of his daughter comports with the broad language of the statute and the tenor of the case law. When considered, that conduct and the trial court’s statements about it show that the court imposed consecutive sentences to protect the public in light of Sergeant’s history of criminal conduct.

**D. Any error committed by the trial court was harmless because Sergeant cannot demonstrate prejudice.**

Even if this Court concludes that Sergeant’s sentence is reviewable, that *Bonnell* should be extended to this case, and that the trial court failed to comply with *Bonnell*, the Court should still affirm because no harm resulted. “Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Crim. R. 52(A). To satisfy this standard, “the

error must have been *prejudicial*: It must have affected the outcome of the [trial] court proceedings.” *State v. Fisher*, 99 Ohio St. 3d 127, 2003-Ohio-2761 ¶ 7 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). Sergeant cannot satisfy this standard. He agreed to the sentence, as did the prosecution, and the trial court imposed it according to the parties’ wishes. There are simply no grounds upon which he can show that he was prejudiced by the proceedings.

This case is unlike *Underwood*, in which this Court vacated jointly recommended consecutive sentences when the trial court failed to merge allied offenses because “nothing in the record . . . demonstrate[d] that [the defendant] was informed that he was agreeing to be convicted of allied offenses” and “a defendant is prejudiced by having more convictions than are authorized by law.” 2010-Ohio-1 ¶¶ 31, 32. No such deficiency exists here.

The sort of prejudice in *Bonnell* is also absent. In *Bonnell*, the Court noted that the statutory findings “afford[] notice to the offender and to defense counsel” and “give the offender an opportunity to object . . . .” 2014-Ohio-3177 ¶¶ 13, 29. The defendant in *Bonnell* was deprived of this opportunity because, “[a]t the sentencing hearing, the trial court heard arguments from the parties, but no one addressed whether the sentences should be served concurrently or consecutively . . . .” *Id.* ¶ 9. That is not the case here; both parties stipulated that consecutive sentences were justified prior to sentencing and the trial court announced its acceptance of their joint recommendation at the sentencing hearing. It would be strange indeed to hold that a defendant was prejudiced by the imposition of a valid sentence that he recommended.

**CONCLUSION**

This Court should reverse the Eleventh District's judgment and reinstate the sentence.

Respectfully submitted,

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