IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	**Case No. 2021 - 1033**
Plaintiff-Appellee;	:	
	:	**On Appeal from the Delaware**
v.	:	**County Court of Appeals**
	:	**Fifth District**
SUSAN GWYNNE,	:	
	:	**Court of Appeals Case No.**
Defendant-Appellant.	:	**16 CAA 12 0056**
	:	
	:	

APPELLEE'S MOTION FOR RECONSIDERATION

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PLAINTIFF-APPELLEE STATE OF OHIO'S MOTION FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. 18.02, and for the reasons stated in the following memorandum in support, plaintiff-appellee State of Ohio respectfully requests that this Court reconsider the decision issued on December 23, 2022. Upon such reconsideration, Appellee further requests this Court order supplemental briefing and order an additional oral argument.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Appellee State of Ohio respectfully moves that this Court reconsider its decision in *State v. Gwynne*, Slip Opinion 2022-Ohio-4607, reversing and remanding the case to the Fifth District Court of Appeals. This Court instructed the appellate court to "consider whether the record in this case clearly an convincingly does not support the consecutive-sentencing findings under R.C. 2929.14(C)(4)." Id. at ¶31.

The majority opinion presents three separate, distinct flaws: 1) it was decided on an issue that was not raised or briefed by the parties, 2) it applied an improper and internally inconsistent standard of review, and 3) it provided an improper remedy. The cumulative effect of these flaws merits reconsideration.

A. The Court decided this case on an issue neither raised nor briefed by the parties

This Court has long held "appellate courts should not decide cases on the basis of a new, unbriefed issue without 'giv[ing] the parties notice of its intention and an opportunity to brief the issue.'" *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, ¶ 21, quoting *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170 (1988). Yet that is exactly what occurred in this case.

This case was accepted on two propositions of law: 1) "A trial court errs when it sentences a defendant to consecutive terms of imprisonment, when such a sentence is clearly and convincingly not supported by the record" and 2) "A sentence that shocks the conscience violates the Eighth Amendment's prohibition against cruel and unusual punishment, and is thus contrary to law." *Gwynne*, ¶ 9. This case was ultimately decided on the first proposition of law, with the second proposition of law being dismissed as having been improvidently accepted. Id. at ¶ 31.

Gwynne's first proposition of law was narrowly tailored, focused solely on whether any consecutive sentences were clearly and convincingly not supported by the record. Gwynne never

argued that the appellate court had the authority to reverse some but not all of her consecutive sentences. As such, the State had no reason to brief this issue. Likewise, Gwynne never argued that the Fifth District applied the wrong, deferential standard of review. Accordingly, the State had no reason to brief this issue either.

The concept of a trial court making repeated consecutive-sentence findings for each count was never raised or briefed by either party. The notion was merely addressed in passing at oral argument, when Judge Trapp asked a handful of questions on the topic. During that time undersigned counsel pointed out the apparent lack of any case law in support of that reading of the statute. That was the entire extent of the parties getting to address this issue.

Interestingly, other litigants before this Court also believed this issue was not being addressed in this case. Appellant Anthony J. Polizzi, Jr.'s Motion for Reconsideration in Case No. 2022-0164 highlighted the differences between the argument he was making and the one advanced by Gwynne. "[Gwynne] only calls on this Court to decide whether the record in that case supports imposing consecutive sentences. It does not ask this Court to decide whether a court of appeals has authority to vacate some but not all consecutive sentences as is raised in this appeal. Thus, this Court will likely not address that issue as it is not properly before it." Appellant Anthony J. Polizzi Jr.'s 5/23/22 Motion for Reconsideration at 4 (emphasis in original).

"In fairness to the parties, a Court of Appeals which contemplates a decision upon an issue not briefed should…give the parties notice of its intention and an opportunity to brief the issue." *C. Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 n.3, 313 N.E.2d 400 (1974). This Court's decision is fundamentally unfair to the parties and amici. Deciding the case on an issue not raised or briefed by the parties also created errors in the judgment. In

addition to the issues raised in Sections C, D, and E of this memorandum, this Court also appears to have not fully considered the text of the statute or the ridiculous consequences its decision could have.

Had the parties been provided an opportunity to brief this issue, Appellee could have addressed the text of the statute, which is clear and unambiguous. If the trial court makes the findings under R.C. 2929.14(C)(4) it then has the authority to run consecutively any or all of the sentences being imposed for separate crimes committed by a defendant. To read otherwise requires the addition of words not included in the statute. See *Gwynne*, ¶ 68 (Kennedy, J. dissenting).

This Court's decision will also lead to absurd results. Although this Court dismissed the constitutional issue as being improvidently accepted, the case law on cruel and unusual punishments ought to be considered here. In 2008 this Court heard a case dealing with an aggregate 134-year sentence that was imposed on a defendant for a series of home burglaries. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073. Hairston argued that his sentence was grossly disproportionate to the aggregate nature of his crimes and that it was shocking to a reasonable person and to the community's sense of justice. Id. at ¶ 11.

In *Hairston*, this Court first noted that "[a] sentence is the sanction or combination of sanctions imposed for each separate, individual offense." Id. at ¶ 16 quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824. "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time," and "[o]nly after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively." Id. quoting *Saxon* at ¶ 8-9. Because Hairston pleaded guilty to 14 separate felonies the "cumulative length of his

sentence [was] therefore attributable to the number of offenses he committed." Id. (emphasis in original).

The *Hairston* decision went on to examine numerous federal courts of appeals cases as well as other state supreme court cases regarding whether a cumulative prison term imposed for multiple offenses can constitute cruel and unusual punishment. Id. at ¶ 17-19. This Court quoted with approval a number of decisions that all held that the Eighth Amendment proportionality review does not apply to cumulative sentences. Id.

"If a proportionality review were to consider the cumulative effect of all the sentences imposed, the result would be the possibility that a defendant could generate an Eighth Amendment disproportionality claim simply because that defendant had engaged in repeated criminal activity." Id. at ¶ 19, quoting *Close v. People* (Colo.2002), 48 P.3d 528, 540. "[I]t is wrong to treat stacked sanctions as a single sanction [because] [t]o do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." Id. at ¶ 17 quoting *Pearson v. Ramos* (C.A.7, 2001), 237 F.3d 881, 886.

This Court has explicitly told lower courts not to consider the aggregate sentence when considering whether a punishment is disproportionate for purposes of the Eighth Amendment. It now reversed course and instructs lower courts the do the exact opposite with regard to the statutory findings – courts must consider whether the consecutive sentences are disproportionate in light of the aggregate sentence. This leads to the same "ridiculous consequences" that it would in an Eighth Amendment analysis. A defendant, simply by committing too many crimes, can end up with an aggregate sentence that an appellate court reverses as being disproportionate to his or her conduct.

The decision also fails to treat victims with fairness and respect. A defendant who burglarizes a victim's home may not be able to receive an additional penalty for that crime if they had already burglarized too many other homes. What victim gets told they do not matter simply because the aggregate sentence is already too long?

These issues and more deserve to be fully examined through briefing and argument of the parties. This case stands as a clear representation of the dangers inherent in an appellate court deciding a case on an issue that was not raised or briefed by the parties. Consequently, this Court should grant the motion for reconsideration and order further briefing and oral argument.

B. The evidentiary standard provided for trial courts is internally inconsistent and misstates the law

This Court should also reconsider its decision with regard to the evidentiary standard to be applied by the trial court in making consecutive-sentence findings. This Court initially stated "[a] trial court makes its consecutive-sentencing findings using a preponderance-of-the-evidence standard – i.e., a more-likely-than-not standard. But pursuant to R.C. 2953.08(G)(2), the appellate court can reverse or modify the trial court's order of consecutive sentences if it clearly and convincingly finds that the record does not support the findings." *State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, ¶ 23.

This Court then goes on to say "[i]f the appellate court determines that the R.C. 2929.14(C)(4) consecutive-sentence findings have been made, the appellate court may then determine whether the record clearly and convincingly supports those findings." *Id.* at ¶ 26. These two paragraphs of the majority opinion are internally-inconsistent and the second one is a misstatement of the law. Reconsideration should be granted to address this error.

C. The standard of review provided for appellate courts misstates the law

This Court should also reconsider its decision with regard to the standard of review to be applied by an appellate court reviewing the trial court's consecutive-sentence findings and the aggregate sentence imposed. The majority opinion held "[a]n appellate court's review of the record and findings is de novo with the ultimate inquiry being whether it clearly and convincingly finds—in other words, has a firm conviction or belief—that the evidence in the record does not support the consecutive-sentencing findings that the trial court made." *Id.* at ¶ 27. The majority also held "[u]nder this standard, the appellate court is, in fact, authorized to substitute its judgment for the trial court's judgment if the appellate court has a firm conviction or belief, after reviewing the entire record, that the evidence does not support the specific findings made by the trial court to impose consecutive sentences, which includes the number of consecutive terms and the aggregate sentence that results." *Id.* at ¶ 29. That standard of review is not supported by the text of R.C. 2953.08(G)(2) nor is it supported by the case law.

R.C. 2953.08(G)(2) permits an appellate court to increase, reduce, or otherwise modify consecutive sentences if the record clearly and convincingly does not support the trial court's consecutive-sentence findings. This clear-and-convincing standard of review is written in the negative. It is not a requirement that the trial court's findings be supported by clear and convincing evidence. Rather, an appellate court may only take action if the findings are clearly and convincingly not supported by the record.

Despite this plain language, the majority opinion held that R.C. 2953.08(G)(2) requires the appellate court to review the record de novo, or without any deference to the trial court's findings. As pointed out by the dissent, the legislature knows how to express when a court should conduct a de novo review and it did not do so in this statute. *Gwynne*, Slip Opinion No.

2022-4607, ¶ 57 (Kennedy, J. dissenting). A review of appellate cases in Ohio supports this reading of the statute.

Appellate courts often cite review of consecutive sentences as being deferential and one that prohibits appellate courts from substituting their judgment for that of the trial court. *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 19-21 (8th Dist.). It has also been described that consecutive sentence review is "not an invitation to determine or criticize how well the record supports the findings." *State v. Jones,* 8th Dist. Cuyahoga No. 104152, 2016-Ohio-8145. Other appellate districts have referred to the standard of review of consecutive sentences as being deferential. See *State v. Rodeffer,* 2d Dist. Montgomery Nos. 25574, 25575, 25576, 2013-Ohio-5759, *State v. Losey,* 4th Dist. Washington No. 14CA11, 2015-Ohio-285, *State v. Gooding,* 5th Dist. Holmes No. 13CA006, 2013-Ohio-5148, *State v. Thompson*, 9th Dist. Wayne No. 15AP0016, 2016-Ohio-4689, *State v. Hargrove*, 10th Dist. Franklin No. 15AP-102, 2015-Ohio-3125, *State v. Lane,* 11th Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, and *State v. Lee,* 12th Dist. Butler No. 2012-09-182, 2013-Ohio-3404. As the Tenth District recently reiterated:

> In an appeal of a judgment imposing consecutive sentences, we are required to review the record, including the underlying findings given by the sentencing court, and may "increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing" if we clearly and convincingly find the record does not support the sentencing court's findings under R.C. 2929.14(C)(4) or the sentence is otherwise contrary to law. R.C. 2953.08(G)(2). The "clearly and convincingly" standard under R.C. 2953.08(G)(2) is an extremely deferential standard of review. *State v. Higginbotham*, 10th Dist. No. 17AP-147, 2017-Ohio-7618, ¶ 11.
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> "[I]n determining compliance with R.C. 2929.14(C)(4), we examine whether: (1) the trial court engaged in the correct analysis, and (2) the record contains evidence to support the findings of the trial court." *State v. Knowles*, 10th Dist. No. 16AP-345, 2016-Ohio-8540, ¶ 41. "[T]he record must contain a basis upon which a reviewing court can determine that the trial court made the findings required by R.C. 2929.14(C)(4) before it imposed consecutive sentences." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, ¶ 28, 16 N.E.3d 659. The trial court must state the required findings as part of the sentencing hearing and incorporate those

> findings into the sentencing entry. *Id.* at ¶ 29. However, a trial court "has no obligation to state reasons to support its findings. Nor is it required to give a talismanic incantation of the words of the statute, provided that the necessary findings can be found in the record and are incorporated into the sentencing entry." *Id.* at ¶ 37.

State v. Bland, 10th Dist. Franklin Nos. 19AP-826, 19AP-827, 2020-Ohio-4662, ¶ 16-17

A deferential standard of review is proper due to the self-evident proposition that a trial court is in the best position to make fact-intensive sentencing findings. *State v. Benvenuto*, 3d Dist. Allen No. 1-17-39, 2018-Ohio-2242, ¶51 citing *State v. McLemore,* 136 Ohio App. 3d 550, 554, 2000-Ohio-1619, 737 N.E.2d 125 (3rd Dist.) and *State v. Martin,* 136 Ohio App. 3d. 355, 361, 1999-Ohio-814, 736 N.E.2d 907 (3rd Dist.). See also *State v. Morris,* 73 N.E.3d 1010, 2016-Ohio-7614, ¶33 (8th Dist.) citing *State v. Elmore,* 7th Dist. Jefferson No. 14 JE 0021, 201-Ohio-890, 60 N.E.3d 794.

Even if this Court were to reaffirm its holding requiring trial courts to consider the aggregate sentence when making necessity and proportionality findings for consecutive sentences, reconsideration should be granted to correct the standard of review an appellate court must apply.

D. The Court's remedy is improper in context of its decision

Finally, this Court should also reconsider its decision with regard to the remedy. As it stands, this Court has remanded the case to the Fifth District Court of Appeals to examine the trial court record to see if it supports findings *that did not exist until the opinion was issued.* As far as undersigned counsel is aware, no court in Ohio has ever held that R.C. 2929.14(C)(4) requires the trial court to consider the aggregate sentence when making the necessity and proportionality findings.

If that interpretation of R.C. 2929.14(C)(4) stands, the trial court ought to be given the first opportunity to make those findings. A trial court, faced with an appellate court that may conduct a de novo review of its consecutive-sentence findings, may choose to place additional details into the record to support its conclusions. As usual, the trial court is in the best position to weigh evidence in the record and make these findings. It should be given the first opportunity to review the sentence in light of this Court's decision.

CONCLUSION

The majority opinion decided this case on an issue that was never raised by the parties in any court during any of the years of litigation regarding Gwynne's sentence. Doing so has led to a fundamentally unfair end to these proceedings and it resulted in this Court issuing a decision that did not fully consider the issues.

This Court has provided guidance regarding its reconsideration authority. First, reconsideration is not an opportunity reargue the case at hand. *State ex rel. Huebner v. W. Jefferson Village Council* 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). Second, the Court can use its reconsideration authority to "correct decisions which upon reflection, are deemed to have been made in error." *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9. Finally, reconsideration is appropriate where it raises a material issue that was not fully considered when it should have been. *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883.

Here, Appellee's motion for reconsideration meets all these criteria. First, Appellee is not seeking to reargue the case at hand. Instead, this motion for reconsideration argues an issue that it did not have the opportunity to weigh in on during the original appeal. Second, with the benefit of the argument of the parties, this Court can further reflect upon the arguments and

reverse the portions of the opinion in error. Finally, by addressing the unbriefed issues, the motion for reconsideration meets the criteria of raising material issues that were not fully considered when they should have been.

Based on all the foregoing, Appellee respectfully requests this Court grant its motion for reconsideration and order further briefing and argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Attorney hereby certifies that a true and accurate copy of the foregoing document was served upon Craig Jaquith, Attorney for Appellant, via email to craig.jaquith@opd.ohio.gov on this 3rd day of January, 2023.

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