IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. _____**
Appellee,	:	**On Appeal from the Clermont County Court of Appeals, Twelfth Appellate District**
vs	:	
AUSTIN LOVELESS,	:	**Court of Appeals Case No. CA2022-10-064**
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT AUSTIN LOVELESS

W. Stephen Haynes (0023215)
Clermont County Public Defender
Robert F. Benintendi (0059525) (Counsel of Record)
Assistant Public Defender
302 East Main Street
Batavia, Ohio 45103
Phone: (513) 732-7240
Fax: (513) 732-5382
Email: rbenintendi@clermontcountyohio.gov

COUNSEL FOR APPELLANT AUSTIN LOVELESS

Mark L. Tekulve (0038545)
Clermont County Prosecutor
Nicholas Horton (0091191) (Counsel of Record)
Assistant Prosecutor
76 South Riverside Drive, 2nd Floor
Batavia, Ohio 45103
Phone: (513) 732-7313
Fax: (513) 732-7592
Email: nhorton@clermontcountyohio.gov

COUNSEL FOR APPELLEE STATE OF OHIO

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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST, OR WHY, BEING A FELONY, LEAVE SHOULD BE GRANTED

This case is one of statutory interpretation. It involves the service of prison terms imposed on multiple firearm specifications. Appellant has argued that such service is governed by R.C. 2929.14(C)(1)(a) which limits consecutive service to only those prison terms which are "mandatory prison terms." There is no statutory authorization, Appellant has argued, for consecutive service of "discretionary prison terms."

This case presents the identical issue currently pending before this Court in *State v. Beatty*, Case No. 2022-1290. In *State v. Beatty*, 12th Dist. Clermont No. CA2021-10-057, 2022-Ohio-3099, the Twelfth District Court of Appeals held that R.C. 2929.14(B)(1)(g) authorizes the consecutive service of all firearm specification prison terms. In so holding, the appellate court reaffirmed its 2012 decision in *State v. Isreal*, 12th Dist. Warren No. CA2011-11-115, 2012-Ohio-4876. In overruling Mr. Loveless's appeal, the Twelfth District Court of Appeals relied solely upon that court's decision in *State v. Beatty*.

Mr. Loveless, herein, as did Mr. Beatty before him, contends that R.C. 2929.14(B)(1)(g) does not govern the consecutive service of firearm specification prison terms, that distinction belongs to R.C. 2929.14(C)(1)(a). Further, Mr. Loveless argues that R.C. 2929.14(C)(1)(a) only authorizes the consecutive service of those firearm specification prison terms which qualify as "mandatory prison terms." Any firearm specification prison term imposed at the discretion of the court is, by definition, not a "mandatory prison term" and is therefore ineligible for consecutive service.

STATEMENT OF THE CASE AND FACTS

On July 6, 2021, the Clermont County Grand Jury returned an eight (8) count indictment against Austin Loveless, Appellant herein. Counts 1, 3 and 5 alleged that Austin had violated R.C. 2923.02(A) / 2903.02(A), Attempted Murder, felonies of the first degree; Counts 2, 4 and 6 claimed Austin had violated R.C. 2903.11(A)(2), Felonious Assault, felonies of the second degree; Count 7 alleged that Austin had violated R.C. 2923.161(A)(1), Improper Discharge Into Habitation, a felony of the second degree; and lastly, Count 8 claimed that Austin had violated R.C. 2919.22(A), Child Endangering, a misdemeanor of the first degree. A firearm specification was attached to Counts 1 through 6, pursuant to R.C. 2941.145.

Factually, the State alleged that Mr. Loveless used a handgun and fired a single shot at/toward TL within their home in Clermont County, Ohio. As Appellant went to reload, TL grabbed their child in common, ML, and fled the house running to a neighbor's home. The State further alleged that Appellant pursued TL and ML firing several shots at TL, ML and the neighbor VS. When the three went inside of VS's residence, Appellant, the State alleged, continued to fire rounds into the residence.

The case was scheduled for jury trial. However, on August 29, 2022, instead of a jury trial, a negotiated plea was entered. Mr. Loveless entered pleas of guilty to Counts 2, 4 and 6, Felonious Assault, and the accompanying firearm specifications. All remaining counts, Counts 1, 3, 5, 7 and 8, and accompanying firearm specifications, would be dismissed at sentencing. That same day a "Written Plea of Guilty" was filed.

On September 28, 2022, the court held the sentencing hearing. Pursuant to statute, the court first imposed a three year prison sentence for the firearm specifications attached to the two most serious charges. The court, in its discretion, imposed a third three-year prison sentence for the third

firearm specification. All firearm specification prison terms were ordered to be served consecutively for a total firearm specification prison term of nine (9) years.

On the three underlying felonious assault charges the court sentenced Appellant to an indefinite prison term of 4 to 6 years. These three prison terms were ordered to run consecutively for a total prison term for underlying felonious assaults of 12 to 14 years. Coupled with the firearm specification prison terms, Appellant's aggregate prison sentence (specifications + underlying) is 21 to 23 years in prison. The court credited Mr. Loveless with 391 days served in jail. A Judgment Entry Sentencing Defendant was filed the next day.

On October 26, 2022, Mr. Loveless filed his timely Notice of Appeal. On appeal Mr. Loveless argued that (1) R.C. 2929.14(C)(1)(a) governed the consecutive service of firearm specification prison terms – not R.C. 2929.14(B)(1)(g); and (2) R.C. 2929.14(C)(1)(a) does not authorize the consecutive service of firearm specification prison terms which are imposed at the discretion of the trial court.

On May 22, 2023, the Twelfth District Court of Appeals, after *sua sponte* assigning the case to the accelerated calendar, overruled Mr. Loveless's Assignment of Error based on the court's precedent in *State v. Beatty*, 12th Dist. Clermont No CA2021-10-057, 2022-Ohio-3099.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: R.C. 2929.14(C)(1)(a), not R.C. 2929.14(B)(1)(g), governs the consecutive service of multiple prison terms imposed on firearm specifications

The *Beatty/Isreal* decisions stand for the proposition that R.C. 2929.14(B)(1)(g) authorizes consecutive service of all firearm specification prison terms. However, even the most cursory examination of the statutory language of R.C. 2929.14(B)(1)(g) and 2929.14(C)(1)(a) makes clear

that R.C. 2929.14(C)(1)(a) governs consecutive service of firearm specification prison terms. Not only does that subsection deal with firearm specifications, it directly addresses the consecutive service of those specifications – the word 'consecutively' appearing three separate times. By contrast, the language of R.C. 2929.14(B)(1)(g) fails to address the consecutive service of firearm specifications and the words 'service' or 'consecutive,' or any derivations thereof, do not appear at all. Here are the two statutory provisions side-by-side:

R.C. 2929.14(B)(1)(g)	**R.C. 2929.14(C)(1)(a)**
If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and	[I]f a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, ***
if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies,	the offender ***shall serve*** any mandatory prison term imposed under [(B)(1)(a)] ***
the sentencing court ***shall impose*** on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and,	***consecutively*** to any other mandatory prison term imposed under [(B)(1)(a)],
in its discretion, also ***may impose*** on the offender the prison term specified under that division for any or all of the remaining specifications. (Emphasis added.)	***consecutively*** to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and
	consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender. (Emphasis added.)

It is clear from an examination of the words of R.C. 2929.14(B)(1)(g) that the General Assembly empowered trial courts to "impose" a separate prison term on multiple firearm specifications. The General Assembly created a bifurcated structure for the imposition of those prison terms – the imposition of some firearm specification prison terms (the two most serious)

would be mandatory, while any remaining would be discretionary. The language of R.C. 2929.14(B)(1)(g) is silent, however, as to how those once-imposed firearm specification prison terms, whether mandatory or discretionary, are to be served.

The language of R.C. 2929.14(C)(1)(a), on the other hand, deals directly with the service of firearm specification prison terms. That provision sets out: "the offender shall serve any mandatory [firearm specification] prison term *** consecutively to ***, consecutively to ***, and consecutively to ***." It is evident that this statutory provision concerns the consecutive service of firearm specification prison terms.

Therefore, when simply analyzing the language of the two statutes, it is facially apparent that R.C. 2929.14(B)(1)(g) empowers a trial court to "impose" firearm specification prison terms, and R.C. 2929.14(C)(1)(a) then empowers the court to run some of those imposed prison terms consecutively.

Furthermore, the two decisions upon which the Twelfth District Court of Appeals relied in overruling Mr. Loveless's assignment of error are wrongly decided and their underlying rationale is flawed. The flaws in the *Isreal* and *Beatty* decisions are two-fold: (1) the court added criteria to R.C. 2929.14(B)(1)(g) by conflating the authority to 'impose' multiple prison terms with the 'service' of those prison terms; and, (2) the court ignored R.C. 2929.14(C)(1)(a).

The first flaw in the *Isreal/Beatty* reasoning is that those decisions add criteria to R.C. 2929.14(B)(1)(g) which is not supported by the statutory text. "[T]he proper role of a court is to construe a statue as written without adding criteria not supported by the text." *State v. Taylor*, 163 Ohio St.3d 508, 2020-Ohio-6786, ¶ 27. "[A]ppellate review should resist the temptation to rewrite a statute to be more comprehensive or provide a more thorough meaning[.]" *Amba Invests. v. Clark*, 12th Dist. Butler No. CA2021-02-016, 2022-Ohio-43, ¶ 24, citing *State ex rel. Cable News Network,*

Inc. v. Bellbrook-Sugarcreek Local Schools, 163 Ohio St.3d 314, 2020-Ohio-5149, ¶ 11. The *Isreal*/*Beatty II* decisions violated these tenets of statutory interpretation.

In *Isreal*, the Twelfth District acknowledged that R.C. 2929.14(B)(1)(g) does not expressly address consecutive service. The court noted: "[T]he General Assembly did not include the word "consecutive" in R.C. 2929.14(B)(1)(g) ***." *Isreal*, at ¶ 73. Despite the admitted absence of the word "consecutive," the *Isreal* court concluded that pursuant to that subsection "sentences for multiple gun specifications should be run consecutive to each other." *Isreal*, at ¶ 72.

Perhaps more troubling is *Isreal* and *Beatty*'s complete disregard for R.C. 2929.14(C)(1)(a). R.C. 2929.14(C)(1)(a) contains the terms (1) "mandatory prison terms," (2) "(B)(1)(a)" – the firearm specification subsection, (3) the phrase "having a firearm on or about the offender's person or under the offender's control while committing a felony," (4) the words "shall serve," and (4) the word "consecutively," appears three times. How can that subsection be ignored? At the very least the court's decision in *Beatty* should have acknowledged the existence of that provision and explained why it did not apply. Instead, the court simply turned back to R.C. 2929.14(B)(1)(g), claiming that both the Supreme Court of Ohio and numerous appellate districts have ratified and adopted the *Isreal* holding. The fatal flaw in both the *Isreal* and *Beatty* decisions is that they are incomplete. No decision claiming to espouse settled law surrounding the consecutive service of firearm specification prison terms can be authoritative without considering the language of R.C. 2929.14(C)(1)(a).

Finally, as a general rule that sentences are to be served concurrently, subject only to clearly delineated exceptions. *State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655, ¶ 10, citing R.C. 2929.41(A). [C]oncurrent sentences are the default. *State v. Hitchcock*, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164, ¶ 21. R.C. 2929.41(A) states in pertinent part: "Except as provided in *** division (C) of section 2929.14, a prison term *** shall be served concurrently with any other

prison term *** imposed by a court of this state ***." In order to locate the exceptions to the general rule of concurrent sentences, R.C. 2929.41(A) directs the intrepid researcher to R.C. 2929.14(C), and what do we find there? We find paragraph after paragraph of instances when consecutive sentences are authorized. Most notably, R.C. 2929.14(C)(1)(a) is there. Interestingly, R.C. 2929.41(A) does not direct the legal scholar to R.C. 2929.14(B)(1)(g) for an exception to concurrent sentences.

The very structure of the Ohio Revised Code supports the conclusion the R.C. 2929.14(C)(1)(a) governs the consecutive service of firearm specification prison terms. The assembly of the ORC in this way makes plain that finding a justification for consecutive service of firearm specification prison terms in R.C. 2929.14(B)(1)(g) is, quite literally, misplaced.

Based on the foregoing, it is clear that R.C. 2929.14(C)(1)(a) governs the "service" of multiple firearm specification prison terms, while R.C. 2929.14(B)(1)(g) simply empowers a court to "impose" those prison terms.

> **Proposition of Law No. II**: R.C. 2929.14(C)(1)(a) authorizes the consecutive service of "mandatory prison terms" imposed on firearm specifications, there is no statutory authority for consecutive service of those firearm specification prison terms which were imposed at the discretion of the court

R.C. 2929.14(B)(1)(g) creates a bifurcated structure when it comes to the imposition of multiple firearm specification prison terms. For the two most serious specifications the trial court is instructed that it "shall impose" a prison term, but for any additional specifications the trial court is told it "may impose" a prison term but is not mandated to do so.

This bifurcated structure creates "mandatory firearm specification prison terms," and "discretionary firearm specification prison terms" and because R.C. 2929.14(C)(1)(a) speaks solely

in terms of "mandatory prison terms" it is only those prison terms that can be run consecutively. In other words, R.C. 2929.14(C)(1)(a) does not authorize the consecutive service of discretionary firearm specification prison terms. Because no statutory authorization exists, the default of concurrent sentences remains.

R.C. 2929.14(C)(1)(a) states in pertinent part:

> [I]f a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony *** the offender shall serve any mandatory prison term imposed under [(B)(1)(a)] *** consecutively to any other mandatory prison term imposed under [(B)(1)(a)] ***, consecutively to and prior to any prison term imposed for the underlying felony ***, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

From the statutory language above it is apparent that the General Assembly wished to limit the consecutive service of firearm specification prison terms to those prison terms which qualified as "mandatory prison terms." The use of the phrase "mandatory prison term" is limiting in nature. The statute only applies to a specific type of prison term, it does not apply to all prison terms. Had the General Assembly intended for all prison terms to run consecutively, it would have simply dropped the adjective "mandatory." Therefore, the scope of the authority granted to trial courts to run certain prison terms consecutively hinges on the definition of the phrase "mandatory prison term."

The phrase "mandatory prison term" is defined in the Ohio Revised Code. The definition is found in R.C. 2929.01(X). That subsection reads in pertinent part:

> (X) "Mandatory Prison Term" means any of the following:
>
> (1) Subject to division (X)(2) of this section, the term in prison ***that must be imposed*** for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (21) of section 2929.13 and division (B) of section 2929.14 of the Revised Code. (Emphasis added.)

R.C. 2929.01(X)(1) specifically references R.C. 2929.14(B). Therefore, a "mandatory prison

term" means the term in prison that must be imposed for the *** circumstances set forth in R.C. 2929.14(B). As set out above, R.C. 2929.14(B)(1)(g) contains the statutory authorization permitting a trial court to impose a mandatory prison term for the two most serious firearm specifications. A "mandatory prison term" is one that must be imposed in R.C. 2929.14(B).

The prison term for Mr. Loveless's third firearm specification was not one that "must be imposed." Because the trial court had discretion whether or not to impose a prison term on that specification, it is, by definition, not a "mandatory prison term." Not being a "mandatory prison term," R.C. 2929.14(C)(1)(a) provides no authority for their consecutive service.

CONCLUSION

Mr. Loveless's appeal is inexorably intertwined with Mr. Beatty's. In overruling Mr. Loveless's appeal, the Twelfth District relied solely upon its decision in *State v. Beatty*, 12th Dist. Clermont No. CA2021-10-057, 2022-Ohio-3099. The *Beatty* decision, and the issues presented therein, are currently pending before this Court in *State v. Beatty*, Case No. 2022-1290. Should this Court ultimately issue a decision favorable to Mr. Beatty, Mr. Loveless would not benefit from such decision unless his appeal is pending on the date that decision is announced.

> A new judicial ruling may be applied only to cases that are pending on the announcement date. *State v. Evans*, 32 Ohio St.2d 185, 186, 61 O.O.2d 422, 291 N.E.2d 466 (1972). The new judicial ruling may not be applied retroactively to a conviction that has become final, i.e., where the accused has exhausted all of his appellate remedies. *Id.*; *State v. Lynn*, 5 Ohio St.2d 106, 108, 34 O.O.2d 226, 214 N.E.2d 226 (1966); see, also, *State v. Gonzalez*, 138 Ohio App.3d 853, 859, 742 N.E.2d 710 (2000); cf. *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 323, 649 N.E.2d 1229 (1995), quoting *Doe v. Trumbull Cty. Children Serv. Bd.*, 28 Ohio St.3d 128, 28 OBR 225, 502 N.E.2d 605 (1986), paragraph one of the syllabus ("'A subsequent change in the controlling case law in an unrelated proceeding does not constitute grounds for obtaining relief from final judgment under Civ.R. 60[B]'").
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> *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, ¶ 6.

Consequently, Mr. Loveless presents this appeal and memorandum in support of jurisdiction, in order to preserve the pendency of his appeal with the hope that he might benefit from this Court's ultimate decision in *State v. Beatty*, Case No. 2022-1290. Therefore, Appellant urges this Court to accept jurisdiction of this case.

Respectfully submitted,
W. STEPHEN HAYNES
CLERMONT COUNTY PUBLIC DEFENDER

/s Robert F. Benintendi

Robert F. Benintendi (0059525) (Counsel of Record)
Assistant Clermont County Public Defender
302 East Main Street
Batavia, Ohio 45103
Phone: (513) 732-7223
Fax: (513) 732-5382
Email: rbenintendi@clermontcountyohio.gov

Counsel for Appellant Austin Loveless

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction was served by regular U.S. mail, postage prepaid, this 3rd day of July 2023, upon Nick Horton, Esq., Assistant Prosecuting Attorney, 76 South Riverside Drive, Second Floor, Batavia, Ohio 45103.

/s *Robert F. Benintendi*
Robert F. Benintendi (0059525)
Counsel for Appellant

APPENDIX

Judgment Entry (Accelerated Calendar), filed May 22, 2023