IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2019-1103
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Belmont County Court of Appeals
	:	Seventh Appellate District
DAVID C. KINNEY, JR.,	:	
	:	COA Case No. 18 BE 11
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT, DAVID C. KINNEY, JR.

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INTRODUCTION

Ohio is the only state in the country that categorically prohibits appellate review of aggravated murder sentences. That anomaly appears entirely unintentional. When the General Assembly implemented the appellate-review prohibition (hereinafter, simply "prohibition"), there was one sentence available for aggravated murder with no capital specifications[1]—life with parole eligibility after serving twenty years.[2] None of the words of that prohibition have changed since its inception. But the single available sentence for aggravated murder with no capital specifications subsequently evolved into a range of four choices for the trial court—life without the possibility of parole, life with parole eligibility after thirty years, life with parole eligibility after twenty-five years, and the original option, life with parole eligibility after twenty years. Thus, the continued existence of the prohibition may be most accurately understood as an ongoing legislative oversight.

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[1] Aggravated murder could and can be indicted with or without capital specifications. The distinction is monumental. With no capital specifications—either indicted or found by a jury or three-judge panel when a jury is waived—sentence is determined solely by the trial judge. But with specifications, sentence is determined by the trial jury with the trial judge or the three-judge panel if a jury is waived. Thus, the non-capital sentence determination when capital specifications are involved—although it included three possibilities before the prohibition and four possibilities now—is not determined by a single judge.

[2] Before the prohibition went into effect, the single sentence available for aggravated murder indicted without capital specifications, or without a jury finding of guilt on any specification, was life with parole eligibility after serving twenty years. *See* Former R.C. 2929.03(A)(1); Former R.C. 2929.03(C)(1)(a). Also before the prohibition went into effect, if capital specifications were indicted with the aggravated murder charge and one or more was found by the jury but death was not imposed, the sentences available were life imprisonment without parole, life imprisonment with parole eligibility after twenty-five full years, or life imprisonment with parole eligibility after serving thirty full years. *See* Former R.C. 2929.03(C)(2)(a)(i).

Even if the continuation is not an oversight, the prohibition no longer matches the logic of its original imposition; i.e., the prohibition was put in place because there was only one sentence available when a single judge determined the sentence. Judicial efficiency is well served in that scheme by allowing no appellate review because fundamentally no other sentence was permitted under the law, and, practically, no discretion was exercised by the sentencing judge. In other words, the prohibition now has consequences not contemplated when first passed by the General Assembly.

Irrespective of the legislative origins, the prohibition creates grave constitutional improprieties. So much so, in fact, that a Supreme Court of the United States Justice recently questioned the constitutionality of Ohio's prohibition through a separate statement. "Trial judges making the determination whether a defendant should be condemned to die in prison have a grave responsibility, and the fact that Ohio has set up a scheme under which those determinations 'cannot be reviewed' is deeply concerning." *Campbell v. Ohio*, 138 S.Ct. 1059, 200 L.Ed.2d 502 (2018) (Statement of Sotomayor, J.). As such, aggravated murder sentences that were "arbitrarily or irrationally imposed" should not be "shielded from appellate review." *Id*. at 1060.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is Ohio's agency designed to represent indigent criminal defendants, coordinate criminal defense efforts throughout Ohio, promote the proper administration of criminal justice, ensure equal treatment under the law, and protect the individual rights guaranteed by the state and federal constitutions. Accordingly, OPD has an interest in ensuring the constitutional, fair, just, and correct appellate review of criminal sentences.

STATEMENT OF INTEREST OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

STATEMENT OF CASE AND FACTS

OPD and NACDL adopt the Statement of Case and Facts as articulated in the brief of David Kinney.

ARGUMENT

Accepted Proposition of Law

R.C. 2953.08(D)(3) is unconstitutional both on its face, and as applied, as it violates the Ohio Constitution, Article I, Section 9 and the Eighth Amendment to the U.S. Constitution.

Ohio is alone in its prohibition—no other state has instituted such an approach.[3] As described below, Ohio's current position appears unintentional. Regardless, it is unconstitutional.

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[3] *See* Ala.R RCRP Rule 32 allowing appeals for sentences "not authorized by law"; Alaska Stat.Ann. 12.55.120 allowing appeals of sentences of imprisonment exceeding two years of unsuspended incarceration for a felony offense; Ariz.Rev.Stat.Ann. 13-4033 allowing appeals of a sentence on the grounds that the sentence is illegal or excessive; Ark. R.App.P. Crim. 1 allowing appeals for any persons convicted of a felony by virtue of a trial; Cal.Penal Code 1237 allowing appeals of criminal sentences; C.A.R. 4 allowing appeals for persons sentenced for conviction of a felony; Conn. R RAP 61-6 allowing appeals following the imposition of a sentence; Del. Code Ann., Title 22, 5301 allowing a right of appeal "from any order, rule, decision, judgment or sentence of the Court in a criminal action"; Fla.Stat. Ann. 924.06 allowing appeals as of right on the grounds that a sentence is illegal; Ga. Code Ann. 5-6-33 allowing a defendant in any criminal proceeding to appeal from "any sentence, judgment, decision, or decree of the court…"; Haw. R. Penal P. Rule 40 allowing an appeal when a sentence imposed is in violation of the constitution of the United States or of the State of Hawai'i; ID I.A.R. Rule 11 allowing an appeal as a matter of right from any judgment imposing a sentence after conviction; 730 Ill. Comp. Stat. Ann. 5/5-5-4.1 allowing a right of appeal "in all cases from sentences entered on conviction of first degree murder or any other Class of felony"; In. St. 35-38-4-1 allowing an appeal as a matter of right from any judgment in a criminal action; IA St 814.6 allowing a right to appeal from a final judgment of sentence except for simple misdemeanor convictions, an ordinance violation, or a conviction where the defendant has pled guilty; KS St 22-3602 allowing appeals as a matter of right from any judgment unless the defendant pleaded guilty or nolo contendere in which case another statute governs such an appeal; Ky.Rev.Stat. Ann. 22A.020 allowing an appeal as a matter of right from any conviction or final judgment; LA C.CR.P.Art. 912.1 allowing a right of appeal from a judgment in a criminal case triable by jury; ME ST, Title 15, 2111 allowing appeals in any criminal proceedings "except as otherwise specifically provided"; Md. Code Ann., Cts & Jud.Proc 12-301 and 12-302 allowing appeals from final judgment with a few specifically listed exceptions; Mass.Ann. Laws, Chapter 278, 28 allowing "a defendant aggrieved by a judgment of the district court or of the superior court in any criminal proceeding" to appeal therefrom; Mich.Comp. Laws Ann. 770.3 allowing right of appeal in felony cases unless the judgment was based on a guilty or nolo

I. Added sentencing options negated the original logic, purpose, intent, and context of the prohibition.

When the prohibition was first instituted, there was a single sentence possible for aggravated murder—life with parole eligibility after twenty years. The statutory language of the prohibition has remained unchanged since it originally took effect. The only difference surrounding the prohibition over time has been its shift to stand-alone status in

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contendere plea; Minn.R.Crim.P. 28.02 allowing an appeal as of right "from any sentence imposed or stayed in a felony case"; Miss.Code Ann. 99-35-1 allowing right to appeal for all cases of conviction; Mo. Sup. Ct. R. 30.01 allowing a right of appeal from a final judgment in a criminal case; Mont. Code Ann. 46-20-104 permitting an appeal "from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant"; Ne. Const. Art. I., 23 allowing aggrieved parties in a noncapital criminal case to take one appeal; Nev. Rev. Stat. Ann. 177.015 permitting appeals from final judgments or verdicts; N.H.R.S.Ct. Rule 7 permitting a discretionary appeal from "a final decision on the merits issued in an imposition of sentence proceeding"; 1A N.J. PRAC R 2:3-2 permitting appeals or the right to pursue leave to appeal for defendants aggrieved by the final judgment of conviction; NM ST 39-3-3 allowing appeals within thirty days from the entry of any final judgment; NY Crim Pr. 450.30 permitting appeals on the grounds that a sentence was harsh or excessive; NC ST 15A-1444 permitting appeals to determine whether a sentence was supported by evidence introduced at the trial and sentencing hearing; NDCC 29-28-03 permitting appeals from final judgment of convictions; Okl.St.Ann. 1051 permitting appeals as a matter of right "from any judgment"; ORS 138.020 allowing appeals as a matter of right from "a judgment in a criminal action; PA R.Crim P. 720 permitting post-sentence motions as a matter of right; RI St 12-22-1 allowing a right to appeal for "every person aggrieved by the sentence of the district court for any offense other than a violation…"; SC R A CT Rule 201 allowing appeals by a party aggrieved "by an order, judgment, sentence or decision may appeal"; SD ST 23A-32-2 granting a right of appeal from final judgments of conviction; TN ST 40-4-112 allowing "any person convicted of a criminal offense" to appeal as of right the sentence imposed; TX Crim. Pro. Art. 44.02 allowing a right of appeal for defendants in criminal actions except for those who enter a plea of guilty or nolo contendere; UT Code 77-18a-1 permitting an appeal as a matter of right from a final judgment of conviction; VT ST, Title 13, 7401 permitting appeals to the Supreme Court as of right for "all questions of law involved in any judgment of conviction"; VA ST 17.1-406 permitting appeals from any final conviction in a circuit court of a traffic infraction or a crime; WA ST 10.10.010 allowing appeals for "every person convicted before a district judge of any offense"; W. VA. Code 50-5-13 permitting appeals in criminal cases unless defendant pled guilty and was represented by counsel at the time the plea was entered; WI ST 974.02 allowing appeals by defendants in criminal cases from judgments of conviction; and Wy ST 7-12-101 permitting appeals of convictions "in any criminal case."

R.C. 2953.08(D)(3). None of this evolution indicates an informed legislative intent to prohibit review of sentences determined by a single judge under the current sentencing scheme for aggravated murder.

A. When the prohibition went into effect, there was only one available sentence for aggravated murder.

The prohibition, now and for its entire existence, reads: "A sentence imposed for aggravated murder * * * pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section."[4] *See* R.C. 2953.08(D)(3); Former R.C. 2953.08(D). It first became the law in Ohio on July 1, 1996. *See* Former R.C. 2953.08(D).

Aggravated murder sentences are governed by R.C. 2929.03. Until March 23, 2005, the only sentence available under the law was life with parole eligibility after serving twenty years in prison. *See* Former R.C. 2929.03. On and after March 23, 2005, there are four available sentences for aggravated murder—life without parole eligibility, life with parole eligibility after twenty years, life with parole eligibility after twenty-five years, and life with parole eligibility after thirty years. *See* R.C. 2929.03(A)(1)(a)-(d).

B. The words of the prohibition have never changed.

When the prohibition first became law, it was located in R.C. 2953.08(D) and was immediately preceded by an independent and unrelated prohibition not implicated in this case: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the

[4] The prohibition also applies to murder sentences, but because there is still only one available sentence for murder—an indefinite term of fifteen years to life—none of the issues discussed here apply to the prohibition against appellate review of sentences for murder.

prosecution in the case, and is imposed by a sentencing judge." *See* Former R.C. 2953.08(D).

As of August 3, 2006, R.C. 2953.08(D) contains three parts. The prohibition at issue here is contained in (D)(3) and continues to read: "A sentence imposed for aggravated murder * * * pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section." The jointly recommended prohibition not relevant here appears in (D)(1), and another prohibition not relevant to this case appears in (D)(2).

C. The stand-alone nature of the prohibition does not signify an informed endorsement of its application to the current landscape of four available sentences for aggravated murder.

On July 6, 2005, this Court decided *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690. In *Porterfield*, this Court analyzed former R.C. 2953.08(D) which contained both the jointly recommended prohibition and the prohibition at issue here. As described above, the first sentence read: "A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." *Porterfield* at ¶ 9. The second sentence read: "A sentence imposed for aggravated murder * * * pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section." *Id*.

This Court was asked to interpret that two-sentence provision. *Id*. at ¶ 3-7. First, this Court held that the term "section" means a decimal-numbered statute only and that appellate review of consecutive sentences for multiple counts of aggravated murder was not prohibited by former R.C. 2953.08(D). *Id*. at ¶ 13-16, 19. In deciding that issue, this

Court dealt with the lower court's characterization of R.C. 2953.08(D) as ambiguous. *Id*. at ¶ 10-17.

Second, this Court determined that the prohibition was unambiguous and "clearly means what it says: such a sentence cannot be reviewed." *Id*. at ¶ 17. Importantly, Mr. Porterfield was sentenced under the regime that permitted one single sentence for aggravated murder without death specifications—twenty-years-to-life. *See State v. Porterfield*, 11th Dist. Trumbull No. 2002-T-0045, 2004-Ohio-520, ¶ 2 (establishing that the crime for which Mr. Porterfield was sentenced was committed on June 23, 2000); 2004 Sub.H.B. 184 (the initial legislative creation of the four options for aggravated-murder-without-death-specifications sentences, which effectively became law on March 23, 2005). Thus, this Court's interpretation of the prohibition in *Porterfield* was supported by its original logic, purpose, intent, and context, i.e., the sound rationale to permit appellate review of a conviction but deny review for the sentence when a sentencing authority could *only* impose one mandatory sentence.

Thirteen months after this Court's decision in *Porterfield*, on August 3, 2006, the prohibition became a stand-alone provision in R.C. 2953.08(D)(3). In doing so, no change was made to the words of the prohibition. As such, all indications are that the shift to stand-alone status was to clarify the alleged ambiguity dealt with by this Court in *Porterfield*. *See Porterfield*, 2005-Ohio-3095, at ¶ 10-17. The modification in no way demonstrates an informed endorsement of applying the prohibition to the new four-option sentencing landscape. Indeed, as explained, this Court was not dealing with the prohibition in that context. *See Porterfield*, 2004-Ohio-520, ¶ 2 (establishing that the crime for which Mr. Porterfield was sentenced was committed on June 23, 2000); 2004 Sub.H.B. 184 (the

initial legislative creation of the four options for aggravated-murder-without-death-specifications sentences, which became law on March 23, 2005).

II. The prohibition in R.C. 2953.08(D)(3) is unconstitutional.

Irrespective of whether the continued existence of the prohibition is a legislative oversight, as is detailed in David Kinney's merit brief, R.C. 2953.08(D)(3) violates the federal and state constitutional protections against cruel and unusual punishment. It also violates the federal and state constitutional demands of equal protection.[5]

A. The gravity of life without parole.

One of the sentences available for aggravated murder is life without the possibility of parole. R.C. 2929.03(A)(1)(a). There is no greater non-capital penalty, and life-without-parole sentences share some characteristics with death sentences that are shared by no other sentences. The offender sentenced to life without parole is not executed, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. *Solem v. Helm*, 463 U.S. 277, 300-301, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

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[5] *Amici Curiae* recognize that it may be that no explicit equal protection challenge was presented to this Court, or to the lower court. Admittedly, there was no equal protection discussion to the lower court or this Court when discretionary review was sought. The appellate brief in the lower court did, however, cite the Fourteenth Amendment to the U.S. Constitution and Article I, Section 2 of the Ohio Constitution in the assignment of error challenging R.C. 2953.08(D)(3). If an equal protection challenge has been forfeited, despite this Court's general disinclination to address such forfeited constitutional challenges but for plain error, *Amici Curiae* urge this Court to exercise its discretion and review the equal protection challenge as presented here and referenced by incorporation in David Kinney's brief because "the rights and interests involved * * * warrant it." *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus; *see also State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15-16.

Sentencing a person to life without the possibility of parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham v. Florida*, 560 U.S. 48, 70, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Thus, it is only justified when it satisfies "the need for incapacitating the offender, deterring the offender and others from future crime, [and] rehabilitating the offender," provided that it is "commensurate with and not demeaning to the seriousness of the offender's conduct" and "consistent with sentences imposed for other similar crimes committed by similar offenders." R.C. 2929.11(B); *see also State v. Long,* 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 17 (holding that R.C. 2929.11 applies to aggravated-murder sentences).

B. Revised Code 2953.08(D)(3) violates Ohio and federal constitutional rights to equal protection.

If a State establishes the right to direct appeal, that right "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.'" *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S.Ct. 1818, 1819 L.Ed.2d 440 (1969). For example, in *State v. Noling*, 149 Ohio St.3d 327, 2016-Ohio-8252, this Court held that R.C. 2943.73—which granted appellate review of the denial of DNA applications—unconstitutionally distinguished between the appellate rights of capital and non-capital offenders. There was no rational basis to support the legislative determination that non-capital offenders were entitled to an appeal as of right while capital offenders were entitled only to discretionary review. *Id.* at ¶ 8. This type of "two-track appellate process" violates "both state and federal principles of equal protection." *Id.* at ¶ 31.

Like in *Noling*, there is no rational basis for a two-track process that grants appellate review to *all* felony sentences but for aggravated murder sentences. Currently, one sentenced to life without parole for rape may appeal the sentence. *See, e.g., State v. Koon*, 9th Dist. Lorain No. 16-CA-011050, 2018-Ohio-2090, ¶ 4. Someone convicted of fifth-degree theft could challenge the trial court's decision to impose a prison term rather than community control. R.C. 2929.13. If someone convicted of aggravated murder is sentenced to death, he or she is entitled to an *independent* review and balance of the aggravating and mitigating factors that led to the sentence. R.C. 2929.05. The legislative determination that review is appropriate for each of the above-mentioned scenarios, but not a non-capital sentence for aggravated murder lacks any rational basis. Accordingly, because R.C. 2953.08(D)(3) creates a two-track appellate process, it violates Ohio and federal rights to equal protection. *See Noling* at ¶ 31.

CONCLUSION

The prohibition in R.C. 2953.08(D)(3)—which is entirely unique to Ohio—is most accurately understood as a legislative oversight with severe unintended consequences. But even if not, it is unconstitutional on both cruel-and-unusual-punishment and equal-protection grounds. *Amici Curiae* urge this Court to provide meaningful appellate review of sentences for aggravated murder in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of this **Brief** was filed electronically and served via electronic mail on Kevin Flanagan, kevin.flanagan@co.belmont.oh.us; Diane Brey, diane.brey@ohioattorneygeneral.gov; and Chris Gagin, chris.gagin@gaginlegal.com, on this 18th day of February, 2020.

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