**[Cite as *State v. Orms*, 2015-Ohio-2870.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellant, | : | |
| | | No. 14AP-750 |
| v. | : | (C.P.C. No. 11CR-2191) |
| Nathan S. Orms, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on July 16, 2015

*Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

*Todd W. Barstow*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

**{¶ 1}** Plaintiff-appellant, State of Ohio, appeals a decision of the Franklin County Court of Common Pleas that granted judicial release to defendant-appellee, Nathan S. Orms. We overrule three of the state's assignments of error, render one assignment of error moot, and affirm the decision of the trial court granting Orms judicial release.

## I. FACTS AND PROCEDURAL HISTORY

**{¶ 2}** On April 27, 2011, a Franklin County Grand Jury indicted Orms and others for engaging in a pattern of corrupt activity and numerous other counts of theft, money laundering, receiving stolen property, and forgery in connection with a mortgage lending scheme. The indictment alleged that the overall pattern of corrupt activity, as set forth in 84 counts, resulted in the theft of millions of dollars. Not every count related to Orms. Orms eventually pled guilty on February 3, 2012, to 1 count of engaging a pattern of corrupt activity, a second-degree felony, and 9 counts of money laundering, each felonies of the third degree.

**{¶ 3}** On May 18, 2012, the trial court held a hearing and sentenced Orms. The sentencing entry was filed May 21, 2012. The trial court sentenced Orms to a total prison term of four and one-half years for his convictions. Specifically, the trial court imposed four years on the second-degree felony, pattern of corrupt activity count, two years on one of the nine money laundering counts, and two and one-half years (30 months) on each of the other eight money laundering counts. To reach the total four and one-half years sentence, the trial court ordered Orms to serve two of the money laundering counts consecutively with one another for a total of four and one-half years, and it sentenced all other counts concurrently with one another and with the two consecutive money laundering counts.

**{¶ 4}** On November 20, 2012, after serving six months, Orms moved for judicial release. The state opposed Orms' release by written memorandum filed December 17, 2012. The trial court held a hearing on Orms' motion on May 31, 2013, and it granted judicial release, filing it in the record on July 17, 2013. The state appealed the July 17, 2013 entry. *See State v. Orms*, 10th Dist. No. 13AP-698, 2014-Ohio-2732, ¶ 5. We reversed and remanded, instructing the trial court to make the necessary findings under R.C. 2929.20(J) and 2929.12 prior to granting judicial release. *Id*.

**{¶ 5}** On remand, the trial court held a hearing on judicial release on July 31, 2014, and again granted Orms judicial release, filing its entry September 2, 2014. By memorandum decision issued on December 9, 2014, we granted the state leave to file an appeal of the trial court's decision granting Orms judicial release as to all counts.

## II. ASSIGNMENTS OF ERROR

**{¶ 6}** The state advances four assignments of error for our review:

> [I.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN CONCLUDING THAT THE PROSECUTION'S FAILURE TO SEEK RESTITUTION BARRED ITS ARGUMENTS THAT THERE WAS SERIOUS ECONOMIC HARM.
>
> [II.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN REACHING THE UNSUPPORTED CONCLUSION THAT THERE WAS NO ECONOMIC HARM.
>
> [III.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN REACHING THE UNSUPPORTED CONCLUSION THAT THERE WAS NO ORGANIZED CRIMINAL ACTIVITY.

> [IV.] THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING JUDICIAL RELEASE FOR NINE THIRD-DEGREE MONEY LAUNDERING FELONIES BY CONCLUDING THAT THERE WAS NO ECONOMIC HARM AND NO ORGANIZED CRIMINAL ACTIVITY WHEN THERE WAS NO RECORD SUPPORT FOR SUCH CONCLUSIONS.

## III. DISCUSSION

**{¶ 7}** In granting judicial release before the completion of a criminal defendant's prison term, the trial court that previously imposed the prison term must make certain factual findings, first determining whether the inmate is an "eligible offender" and then making specific findings as required by law and relevant to the level of the felony conviction for which the offender was previously sentenced. Orms was sentenced to prison for committing one second-degree felony and nine third-degree felonies.

> (J)(1) A court shall not grant a judicial release under this section to an eligible offender who is imprisoned for a felony of the first or second degree * * * unless the court, with reference to factors under section 2929.12 of the Revised Code, finds both of the following:
>
> (a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;
>
> (b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

R.C. 2929.20(J)(1)(a) and (b). We defer to the trial court's findings on these factors, unless we find that the record clearly and convincingly does not support the trial court's findings made pursuant to R.C. 2929.20(J)[1] or that the trial court's decision is otherwise

[1] As of the time of this writing, R.C. 2953.08(G)(1), in an apparent clerical mistake, refers to "findings required by * * * division (I) of section 2929.20 of the Revised Code" rather than division (J). R.C. 2929.20(I) does not discuss required findings. R.C. 2929.20(J) does.

contrary to law. *State v. Walker*, 10th Dist. No. 14AP-181, 2014-Ohio-4586, ¶ 6, citing R.C. 2953.08(G)(2); *State v. Williams*, 10th Dist. No. 10AP-55, 2010-Ohio-4519, ¶ 9. The state does not argue in this appeal any trial court error concerning Orms' risk of recidivism and, thus, we consider that R.C. 2929.20(J)(1)(a) has been satisfied. We focus on R.C. 2929.20(J)(1)(b) concerning the seriousness of the offenses, and weigh related factors regarding their seriousness in reviewing the state's appeal.

**{¶ 8}** Under division (J)(1)(b) of R.C. 2929.20, the factors that support the view that the offender's conduct was less serious (that must be weighed against factors that would support the view that the offender's conduct was more serious) are whether:

> (1) The victim induced or facilitated the offense.
>
> (2) In committing the offense, the offender acted under strong provocation.
>
> (3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.
>
> (4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

R.C. 2929.12(C)(1) through (4). The factors that support the view that the offender's conduct was more serious (than that typically constituting the offense) are whether:

> (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.
>
> (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.
>
> (3) The offender held a public office or position of trust in the community, and the offense related to that office or position.
>
> (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.
>
> (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

> (6) The offender's relationship with the victim facilitated the offense.
>
> (7) The offender committed the offense for hire or as a part of an organized criminal activity.
>
> (8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.
>
> (9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

R.C. 2929.12(B)(1) through (9).

### A. First and Second Assignments of Error – Whether the Trial Court's Findings on Economic Harm were in Error

**{¶ 9}** The trial court discussed R.C. 2929.20(J)(1)(b) and the nine factors set forth in R.C. 2929.12(B)(1) through (9). It found none of them satisfied. The majority of the nine, indisputably, have no bearing on this case. However, the state argues that the trial court erred in failing to find, under R.C. 2929.12(B)(2), that "[t]he victim of the offense suffered serious * * * economic harm as a result of the offense."

**{¶ 10}** The trial court not only found that the victim(s) of the offense did not suffer serious economic harm, it further found that there was "no economic harm to the victims," based on the state failing to ask for restitution at sentencing or resentencing upon judicial release. (July 31, 2014 Tr. 13.) The trial court reasoned as follows:

> Subsection (2) [of R.C. 2929.12(B)]: "The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense." The victims in this case, I assume the banks, there is certainly no physical, no psychological harm. The prosecutor would argue economic harm, and I think that has been the big difficulty in this case throughout and the great disagreement, if you will. And with regard to economic harm, I say we have none, specifically because I asked the prosecutor on two occasions at the plea on the record which is

> before the Court of Appeals if there was restitution in this case, and the answer was no.
>
> What disturbs me somewhat is that in the face of that no, there is no restitution, the prosecutor continues to talk about multiple numbers. And a moment ago I referred to the probation report or the pre-sentence investigation in this case, and the pre-sentence investigation indicates that the probation officer thought $2.59 million. Okay, that is fine.
>
> In the prosecutor's memorandum opposing the motion to terminate community control, page 6, starting with the first full paragraph, the prosecutor talks about serious economic harm. He talks about defendant caused millions of dollars in harm. Well, after that on that same page, page 6 of the prosecutor's memorandum in opposition, he talks about $12 million. He talks about $2.5 million, talks about $14 million, he talks about $3.4 million. He talks about a lot of numbers. He talks to the probation department about $2.5 million.
>
> Well, you come into court and it says, "no restitution," and then you go make up numbers. So what is it? I don't think we know what it is. I have no restitution. So I specifically find that based on the record before us and the plea and the presentation by the prosecutor, that there is no restitution, that we have no economic harm to the victims. He had his opportunity to present that and he did not.

(July 31, 2014 Tr. 12-13.) We note that Orms pled guilty to engaging in a pattern of corrupt activity, a second-degree felony. We also note that the defense expressly stipulated that the guilty plea had evidentiary support and that a guilty plea "is a complete admission of the defendant's guilt" that "embrace[s] not only the discrete acts alleged, but the totality of the substantive conduct involved in committing the crime." Crim.R. 11(B)(1); *State v. Ninness*, 6th Dist. No. OT-11-024, 2013-Ohio-974, ¶ 15; *State v. Brimacombe*, 195 Ohio App.3d 524, 2011-Ohio-5032, ¶ 16 (6th Dist.). We further note that Orms admitted in his sentencing memorandum that "[t]he financial injury suffered by the victims in the case was significant." (Apr. 27, 2012 Sentencing Memorandum, 9.) Under these circumstances, it would be difficult to find that "no economic harm" occurred.

**{¶ 11}** The state argues that the trial court found the failure to supply an exact figure for or to request restitution amounted to "no economic harm" and was tantamount

to waiver of any claim that Orms had caused serious economic harm to one or more victims. We disagree. The trial court record indicates that the trial court was dissatisfied with the fact that the state presented little to nothing in the way of evidence relating to "serious economic harm." The state did not offer *evidence* (or even consistent in-court statements which were not evidence) of what amounts were actually misappropriated by this particular offender and what harm came to which victims as a result.[2] *See, e.g., Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, ¶ 32 ("Statements made by counsel are not evidence."). Based on the lack of evidence before the trial court, we find no clear or convincing evidence in the record to reject the trial court's finding that there was no evidence that victims had suffered harm. We further find that the state's failure to seek restitution was not treated by the trial court as a waiver, but, rather, as a fact to be considered when determining whether economic harm had been demonstrated under R.C. 2929.20(J)(1)(b). *Walker* at ¶ 6.

**{¶ 12}** That the trial court concluded that there was "no economic harm" does not require us to disturb its judgment in granting release, because the relevant inquiry is whether the "victim of the offense suffered serious * * * economic harm as a result of the offense." R.C. 2929.12(B)(2). Though Orms generally admitted harm in his sentencing memorandum, he did not admit that the harm was "serious" and was careful to explain that "[t]he victims [sic] loss was not due, solely, because of Mr. Orms' conduct." (Apr. 27, 2012 Sentencing Memorandum, 9.) We find clearly and convincingly that the record shows economic harm did occur, but in applying R.C. 2929.12(B)(2) to the evidence before it, the trial court still correctly concluded that this factor went unsatisfied, because no evidence or testimony was presented to show that any particular "victim of the offense suffered serious * * * economic harm as a result of the offense." R.C. 2929.12(B)(2). Upon Orms' hearing for judicial release, where there was *no* agreement between the parties (unlike at the plea hearing), it was incumbent on the state to provide the court with more than simply statements or allegations. Failing to find that the record clearly and convincingly does not support the trial court's findings made pursuant to R.C.

[2] We are aware that there was a presentence investigation report ordered by the trial court in this case. We note that the statements of the PSI writer concerning the nature of the offense, including the amounts misappropriated by the defendant, are taken solely from "reports received from the Franklin County Prosecutor's Office." (PSI, 4.)

2929.20(J) or that the trial court's decision is otherwise contrary to law, we are bound under *Walker* to defer to the trial court's findings.

**{¶ 13}** While Orms' plea sufficiently admits that fraudulent loans were obtained from banks, the state failed to present exactly how much was taken from each bank, whether the amounts taken had an effect on the banks, or whether the banks were eventually made whole. The state did not offer testimony, evidence, or even an assertion by a purported victim to attempt to establish that any particular "victim of the offense suffered serious * * * economic harm as a result of the offense." R.C. 2929.12(B)(2).

**{¶ 14}** We take judicial notice that, during the past two decades it has become a common practice of the mortgage lending and banking industries to resell mortgage loan packages, whether or not obtained under false pretenses, to assign to service companies other than the original mortgagees the collection of mortgage payments and even the bringing of foreclosure actions, and to bundle repurchased mortgage packages into derivatives for purchase by other investors. There is insufficient, rather, a dearth of evidence, let alone clear and convincing evidence, that any bank suffered any loss as a result of Orms' crimes. When the trial court found a lack of evidence of serious economic loss under R.C. 2929.12(B)(2) to make such a finding, we cannot find evidence in the record that clearly and convincingly would cause us to vacate such a determination.

**{¶ 15}** Even from the standpoint of attempting to determine one or more "victims" who would be entitled to restitution, we cannot find such evidence. The state presented letters from various straw purchasers and persons whose identities were used in transactions alleging that their credit and reputations had been harmed by the scheme in which Orms participated, but it did not present specific amounts of loss alleged to be suffered by these discrete persons. The Ohio Revised Code contains a number of different definitions for "victim" at various junctures in the Code, but at no point is there promulgated a generally applicable definition that applies to the entire Revised Code or even to the state's criminal code, found in Title 29. *See, e.g.*, R.C. 2305.111 (defining "victim").

**{¶ 16}** In the criminal law context, some courts have noted that "R.C. 2930.01(H)(1) is useful in understanding the legislature's intent, although it is not explicitly controlling for matters other than those in Chapter 2930." *State v. Christian*, 2d Dist. No. 25256, 2014-Ohio-2672, ¶ 107, citing *State v. Ritchie*, 174 Ohio App.3d 582,

2007-Ohio-6577, ¶ 23 (5th Dist.); *see also Arnold v. Ohio Adult Parole Auth.*, 10th Dist. No. 11AP-120, 2011-Ohio-4928, ¶ 13 (using R.C. 2930.01(H)(1) to define "victim" outside the context of R.C. Chapter 2930). R.C. 2930.01(H)(1) defines "victim" in relevant part as:

> A person who is identified as the victim of a crime * * * in a police report or in a complaint, indictment, or information that charges the commission of a crime and that provides the basis for the criminal prosecution * * *.

In this case, none of the persons who submitted letters were identified as victims in the indictment.

**{¶ 17}** *Black's Law Dictionary* defines "victim" much more broadly as, "[a] person harmed by a crime, tort, or other wrong." *Black's Law Dictionary* (10th Ed.2014). Straw purchasers may, to the extent they were harmed, fall within *Black's* broad definition of victim. But the record also suggests that these persons may be taken to have been involved in the crimes as unindicted co-conspirators. (*See, e.g.*, indictment alleges two of the letter-writers were participants in the pattern of corrupt activity.) Given that fact, we cannot say that the trial court's refusal to find "serious" economic harm to these purported "victims" was "clearly and convincingly" unsupported by the record.

**{¶ 18}** The state argues that Orms' guilty plea to engaging in a pattern of corrupt activity automatically means he is guilty of having caused millions of dollars in harm. The state further argues that this shows that the finding of no "serious" economic harm was "clearly and convincingly" unsupported by the record.

**{¶ 19}** Orms' guilty plea was not to the pattern of corrupt activity as indicted. *Compare* guilty of a second-degree felony *with* indicted as a first-degree felony. Orms pled to a second-degree felony version of the offense. A first-degree felony offense of engaging in a pattern of corrupt activity can be found when any of the individual or constituent corrupt acts constituting a pattern of corrupt activity are first, second, or third-degree felonies. R.C. 2923.32(B)(1). While Orms' plea and accompanying stipulation are sufficient within the confines of this criminal case to attribute to him a binding admission of the constituent acts, without further evidence, they do not by virtue of a plea mean that Orms admitted to having inflicted harm measured in millions of

dollars.[3] Constituent acts constituting a second-degree felony pattern of corrupt activity include theft, forgery, and receiving stolen property as third-degree felonies under typical circumstances when the amount at issue in the crime exceeds $150,000. R.C. 2913.02(B)(2); 2913.31(C)(1)(b)(i) and (ii); 2913.51(C). By statute, Orms' plea, at most, can be construed as having admitted to constituent acts involving amounts less than $150,000. While we note that Orms also pled guilty to nine counts of money laundering, money laundering typically involves transfers of money in order to aid a criminal in remaining undetected, not an offense that generally has a readily discernable victim or discrete loss amount. R.C. 1315.55. In short, Orms' guilty plea does not compel the finding that millions of dollars in harm occurred or, for that matter, that such harm was "serious" as to any particular victim.

**{¶ 20}** The state's first assignment of error is overruled. We do not find that the trial court treated the state's failure to seek restitution as a waiver. Rather, the trial court used the failure to seek restitution as one factual circumstance, among the other factual circumstances in the record, to find a paucity of evidence on the question of serious economic harm. The record does not clearly and convincingly show otherwise. The state's second assignment of error is, thus, also overruled. The trial court overstated the matter when it said that "no" economic harm had occurred, but the evidence in the record more supports the trial court's ultimate conclusion that the harm factor in R.C. 2929.12(B)(2) went unsatisfied, because the record was weak on the question of whether any particular victim "suffered serious * * * economic harm as a result of the offense." R.C. 2929.12(B)(2). There is no clear and convincing evidence to find otherwise.

### B. Third Assignment of Error – Whether the Trial Court's Findings Regarding the Presence of Organized Criminal Activity were in Error

**{¶ 21}** In addition to arguing that the trial court should have found serious economic harm to one or more victims, the state argues that the trial court erred in failing to find, under R.C. 2929.12(B)(7), that "[t]he offender committed the offense for hire or as a part of an organized criminal activity."

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[3] Appellate counsel for Orms appears to take it as admitted that Orms is responsible for at least $12,000,000 in thefts. ("The record is clear that Appellee admitted to a series of thefts aggregating $12,000,000." (Appellee's Brief, 8.)) However, the record is not, in fact, clear on this point and the trial court did not have the benefit of Orms' appellate counsel's concession at the time it considered judicial release. Hence, it cannot have been error for the trial court not to have considered it.

**{¶ 22}** The term "organized criminal activity" is defined for use in R.C. 177.01 through 177.03, in relevant part, as follows:

> "Organized criminal activity" means any combination or conspiracy to engage in activity that constitutes "engaging in a pattern of corrupt activity;" * * *.

R.C. 177.01(E)(1). While Orms pled guilty to a second-degree felony for engaging in a pattern of corrupt activity, it was not pursuant to R.C. 177.01 through 177.03, and "the term 'organized criminal activity' is not defined in R.C. Chapter 2929." *State v. Fimognari*, 6th Dist. No. WD-04-095, 2005-Ohio-5880, ¶ 34, citing *State v. Martinez*, 6th Dist. No. WD-01-027, 2002-Ohio-735 (6th Dist.). "As such, courts must determine on a case-by-case basis whether an offense is part of an organized criminal activity." *Id.* at ¶ 34, citing *State v. Obregon*, 6th Dist. No. S-99-042, (Aug. 25, 2000). "Commentators have defined 'organized criminal activity' as 'criminal activity which because of the number of participants and planned utilization of those participants poses more of a risk to the public order than an activity carried out by a single individual acting in isolation from other offenders or than multiple individuals acting together spontaneously or impulsively.' " *Id.* at ¶ 34, quoting Griffin and Katz, *Ohio Felony Sentencing Law*, Section T. 4.14.3, 368-69 (1999).

**{¶ 23}** This court has affirmed the use of the term "organized criminal activity" in a variety of cases. *State v. Morgan*, 10th Dist. No. 13AP-620, 2014-Ohio-5661, ¶ 38 ("a defendant's participation in an aggravated robbery along with one or more co-defendants is sufficient to find the incident occurred as part of organized criminal activity"); *State v. Akanny*, 10th Dist. No. 01AP-1415, 2002-Ohio-4776, ¶ 20-22 (affirming application of the descriptor "organized criminal activity" to a case involving a "large scale, multi-state operation using false names, false identities"); *State v. Beauford*, 10th Dist. No. 01AP-1166, 2002-Ohio-2016 (affirming a sentence where a trial court found that a drive-by shooting involving two perpetrators, a gunner and a driver, constituted "organized criminal activity").

**{¶ 24}** We have also found the term was incorrectly applied in some circumstances. *State v. Biggs*, 10th Dist. No. 01AP-1185, 2002-Ohio-4999, ¶ 30-32 (finding error in the application of the term to a person who purchased crack cocaine, paid some of the crack to the person who set up the deal, and kept the rest for herself); *State v. Radcliff*, 10th

Dist. No. 97APA08-1054 (Mar. 17, 1998) (finding it was incorrectly applied to a theft scheme involving merely the defendant and one other accomplice). In short, there is not a bright line test for "organized criminal activity," nor does it have a singular application. Consistent with our role as an appellate court rather than as a sentencing court, we shall not reverse a trial court's decision to apply or not apply the term to an act or series of acts unless the record "clearly and convincingly" does not support the trial court's findings. *Walker* at ¶ 6.

**{¶ 25}** With respect to whether the offense in this case was organized or for hire, the trial court briefly stated its reasoning and conclusion as follows:

> There were others who participated with him, but it certainly was not an organized criminal activity, not for hire, not at all in accordance with that section.

(July 31, 2014 Tr. 14.) The record in this case shows that a number of persons were involved in this scheme and that it was more complex than the thefts we addressed in *Radcliff* and *Morgan*. For instance, Orms stated in his sentencing memorandum:

> The argument could be made that the activities of all of the Co-Defendants was a loosely organized group. This was not an organization that had a hierarchy. This was a group of people driven by greed to maximize their returns from the real estate industry.

(Apr. 27, 2012 Sentencing Memorandum, 10.) Orms also elaborated in another place in the memorandum:

> The loss was generated by the accumulation of all the Co-Defendants involvement in the case. They included loan officers, appraisers, the real estate agents and others. There was no significant leader.

(Apr. 27, 2012 Sentencing Memorandum, 9.)

**{¶ 26}** At best, Orms was a "bottom feeder" in what some non-fiction authors post-September 2008 have described as "organized crime" in trying to make sense of the financial practices that evolved after Congress' 1999 repeal of the Glass-Steagall Act (U.S. Banking Act of 1933). Orms does admit to being part of a group of greedy people who acted together in semi-spontaneous, short-term-profit-driven ways who were largely encouraged to do so by recently adopted federal policies. Orms does admit to being a

player in a scheme that permitted banking and rating institutions to establish various types of financially-based transactions that made it possible for people from top-to-bottom of the system and with dishonest intentions such as Orms to carry out their own schemes for self-enrichment at the expense of nameless millions of other Americans in myriad and still emerging ways. It is clear from the record that all parties involved recognize that the toll of this collective conduct, including Orms' crimes, has been severe. But, we can no more identify with necessary specificity the others involved in the overall activity in which Orms participated than we can identify with necessary specificity its victims. How much "organized criminal activity" is attributable to Orms, or how organized was Orms' stated conspiracy, were questions that went largely unaddressed at both the plea and judicial release hearing. To deny Orms judicial release on the tenuous terms suggested by the state does not comport with the law. We find no clear and convincing evidence in the record to sustain the error the state assigns to the trial court's decision to grant Orms judicial release upon the trial court's refusal to find an organized criminal activity.

**{¶ 27}** We also note that the trial court's finding as to R.C. 2929.12(B)(7) as to organized criminal activity is but a single factor tending toward a finding that Orms' crime was "more serious" than the typical crime in this class under R.C. 2929.12(B). Moreover, the factors in R.C. 2929.12(B) must be balanced against factors in R.C. 2929.12(A) that would make it less serious than the typical crime in this class. Finding no clear and convincing evidence to move us otherwise, we follow *Walker* and defer to the trial court's findings. The state's third assignment of error is overruled.

### C. Fourth Assignment of Error – Whether Error in Findings Under R.C. 2929.20(J) Affects Judicial Release with Respect to Counts for Which Such Findings are not Required

**{¶ 28}** Section 2929.20(J) findings only apply to cases where an "eligible offender * * * is imprisoned for a felony of the first or second degree." R.C. 2929.20(J)(1). Orms was sentenced to imprisonment on both a second-degree felony (pattern of corrupt activities) and nine third-degree felonies (money laundering). The state argues that, if we reverse the trial court's decision on the basis of R.C. 2929.20(J), we must also reverse the finding of judicial release as to the third-degree felonies even though facially, R.C. 2929.20(J) only speaks to first and second-degree felonies. Orms argues that this

constitutes a de facto adoption of the sentencing package doctrine; a doctrine that has been rejected by the Supreme Court.

**{¶ 29}** Because we have not found error in the trial court's R.C. 2929.20(J) findings and have not reversed, we need not address whether reversal of other counts that form part of the same "stated prison term" would also be warranted. *See* R.C. 2929.01(FF). The state's fourth assignment of error is moot.

## IV. CONCLUSION

**{¶ 30}** We overrule the state's first three assignments of error and, as a result, render its fourth assignments of error moot. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

HORTON, J., concurs.
DORRIAN, J., dissents.

DORRIAN, J., dissenting.

**{¶ 31}** I respectfully dissent. I would find that the trial court erred in finding that there was "no economic harm to the victims." I do not believe the record clearly and convincingly supports this finding. I also respectfully dissent from the taking of judicial notice at ¶ 14 of the majority decision. Finally, I would find that the trial court erred in finding that appellant did not participate in organized criminal activity. I do not believe the record clearly and convincingly supports that finding.

**{¶ 32}** I would sustain appellant's assignment of error and reverse the judgment of the trial court.

_____