[Cite as *State v. Atkins-Boozer*, 2005-Ohio-2666.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84151

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
NICOLA ATKINS-BOOZER	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION:	May 31, 2005
CHARACTER OF PROCEEDING:	Criminal appeal from Court of Common Plea Case No. CR-440033
JUDGMENT:	AFFIRMED
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor PATRICK LEARY, Assistant 1200 Ontario Street Cleveland, Ohio 44113
For Defendant-Appellant:	ROBERT L. TOBIK Cuyahoga County Public Defender JOHN T. MARTIN, Assistant 1200 West Third Street Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Nicola Atkins-Boozer ("Atkins-Boozer"), appeals her conviction and sentence for aggravated vehicular homicide, child endangerment, and failure to stop after a motor vehicle accident. Finding no merit to the appeal, we affirm.

{¶ 2} The events giving rise to the charges occurred on July 6, 2003, when Atkins-Boozer drove to the Eddy Road area of Cleveland, to obtain drugs while her five-year-old son was in the back seat. The evidence at her jury trial revealed that Atkins-Boozer made two attempts to "con" a drug dealer by speeding away without paying for the drugs. On her second attempt, Atkins-Boozer encountered the victim, who hung onto her vehicle as she sped off. After being dragged by the vehicle, the victim died.

{¶ 3} The jury found Atkins-Boozer guilty of the three charges and the trial court sentenced her to three years in prison for aggravated vehicular homicide and six months in jail on the remaining charges, with all terms to run concurrently.

{¶ 4} Atkins-Boozer appeals, raising three assignments of error.

Other Acts Evidence

{¶ 5} In her first assignment of error, Atkins-Boozer claims that the trial court erred by admitting "other acts" testimony. She argues the trial court erred by allowing testimony about her numerous encounters with the Painesville police, including those relating to "drug activity." She further claims that the trial

court improperly allowed testimony concerning her history of buying drugs, failing to care for her child, and prostituting herself for drugs. Evid.R. 404(B) provides:

> **"Other crimes, wrongs or acts. Evidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."**

{¶ 6} Similarly, R.C. 2945.59 provides that evidence of other crimes may be admissible to show "motive or intent, the absence of mistake or accident on [defendant's] part, or the defendant's scheme, plan, or system in doing the act in question."

{¶ 7} Evid.R. 404(B) and R.C. 2945.59 are exceptions to the general rule which excludes evidence of previous or subsequent criminal acts by the accused which are wholly independent of the charges for which the accused is on trial. *State v. Hector* (1969), 19 Ohio St.2d 167. Because they are exceptions, Evid.R. 404(B) and R.C. 2945.59 are strictly construed against admissibility. "Other acts" evidence may be admitted only if the other act tends to show by substantial proof any of those elements enumerated in R.C. 2945.59 and Evid.R. 404(B). *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. The acts may or may not be similar to the crime at issue. Id.

{¶ 8} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must

determine whether the trial court's decision to admit or exclude the evidence was arbitrary, unreasonable, or unconscionable and not merely an error of judgment. *State v. Xie* (1992), 62 Ohio St.3d 521.

{¶ 9} With regard to Atkins-Boozer's claim involving the testimony of a drug dealer, Fredrick Brown testified concerning Atkins-Boozer's drug activities and prostitution and her behavior toward her child. We initially note that defense counsel never objected to this testimony. Atkins-Boozer has therefore waived all but plain error. However, even if defense counsel had objected to the testimony, we find that the trial court properly admitted the evidence.

{¶ 10} This evidence was offered in the instant case to demonstrate intent, motive, or plan. Atkins-Boozer's theory at trial was that she was the victim of a carjacking. She claimed that she drove to the Eddy Road area in Cleveland to visit a friend. In contrast, the State's theory was that the offenses arose out of Atkins-Boozer's attempt to "scam" the victim out of drugs. Brown's testimony demonstrated that Atkins-Boozer routinely drove to the area to buy drugs and that she "knew the system" of purchasing drugs on the street – a quick exchange with the dealer while the buyer remained in the car with the engine running. He further stated that she would prostitute herself for drugs in her child's presence. Thus, the testimony showed that Atkins-Boozer came to the area to buy drugs and not to visit a friend. Further,

the evidence was indicative of her system of buying drugs in the area with her son in the back seat.

{¶ 11} Atkins-Boozer further claims that the trial court improperly allowed the admission of evidence that suggested that she had at least 12 previous encounters with the Painesville police, some involving drug activity. Painesville police officer Abraham Alamo ("Alamo") testified that he responded to a Cleveland police request to impound a vehicle registered to Atkins-Boozer, a Painesville resident. Officer Alamo located the vehicle and told Atkins-Boozer to contact the Cleveland police. At trial, he confirmed that the vehicle was parked behind Atkins-Boozer's residence and that the vehicle had been damaged. He also testified about Atkins-Boozer's nervous demeanor when he confronted her. He stated that her initial response upon seeing him was to ask whether she was going to be arrested. She next claimed that she had been the victim of a carjacking, although she acknowledged that she had not reported the incident to the police.

{¶ 12} The State further questioned Officer Alamo regarding his familiarity with Atkins-Boozer. He was asked how often he had been in her "presence" prior to that evening, and he replied, "12, 15 times." Admittedly, the admission of this testimony was irrelevant and prejudicial to Atkins-Boozer's case and violated Evid.R. 404(B). It served no purpose but to imply that she had a number of "encounters" with the police and, therefore, she had a "bad

character." However, despite the statement's improper admission, we find it to be harmless error.[1]

{¶ 13} Pursuant to Crim.R. 52(A), "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." In order to find an error harmless, a reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State v. Lytle* (1976), 48 Ohio St.2d 391, 403. A reviewing court may overlook an error where the admissible evidence comprises "overwhelming" proof of a defendant's guilt. *State v. Williams* (1983), 6 Ohio St.3d 281, 290. "Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal." *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-61.

{¶ 14} In the instant case, there was overwhelming proof of Atkins-Boozer's guilt, notwithstanding the inadmissible testimony. It was undisputed that Atkins-Boozer dragged the victim while he was hanging from her car. There was testimony that she attempted to remove him from the car by weaving back and forth, but, when those efforts failed, she "sideswiped" a parked car. Although Atkins-Boozer claimed that she was the victim of a carjacking, she never reported the incident. Further, her response to the

[1]To the extent that Atkins-Boozer claims that Officer Alamo implied that she was involved in drug activity, we disagree. Officer Alamo testified that he had no firsthand knowledge of any drug activity involving Atkins-Boozer.

situation was not consistent with a victim's normal response. She never called the police nor asked for help from any of the people gathered near the incident. When Officer Alamo came to her residence, her first concern was whether she was going to be arrested. This evidence overwhelmingly demonstrated Atkins-Boozer's guilt on aggravated vehicular homicide and failing to stop after a motor vehicle accident. As for the child endangerment charge, it was undisputed that her child was in the back seat of the car throughout the incident.

{¶ 15} Accordingly, the first assignment of error is overruled.

Sufficiency of the Evidence

{¶ 16} In her second assignment of error, Atkins-Boozer claims that the trial court erred in denying her motion for acquittal on child endangerment. She argues that the State was prohibited from charging her under the general provision of the child endangerment statute because her conduct fell within R.C. 2919.22(C), a more specific provision. Because the State failed to prosecute her under this provision, she claims that her conviction under the more general provision, R.C. 2919.22(A), cannot stand. This argument lacks merit.

{¶ 17} First, the Ohio Supreme Court held in *State v. Volpe* (1988), 38 Ohio St.3d 191, paragraph one of the syllabus, that "[w]here there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence." However, a special provision

prevails only after it is determined that the conflict between it and the general provision is irreconcilable. The instant case does not involve conflicting general and special provisions. Rather, Atkins-Boozer refers to two different subsections in the same statute which contain the same penalty. Her suggestion that the State must indict her under one subsection over the other is completely erroneous. The State has discretion to decide which charges to bring against a defendant.

{¶ 18} Second, the State never argued that the child endangerment count stemmed from the fact that Atkins-Boozer was intoxicated or "high" while operating her vehicle. See R.C. 2919.22(C)(operating a motor vehicle while under the influence of alcohol or drugs with a minor child in the vehicle constitutes child endangerment). Rather, the State argued that Atkins-Boozer's actions fell under R.C. 2919.22(A), which provides in pertinent part:

> "**(A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.**"

{¶ 19} A motion for acquittal may be granted only where the evidence is insufficient to sustain a conviction. Crim.R. 29(A); *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23. "In essence, sufficiency is a test of adequacy." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. Whether the evidence is legally

sufficient to sustain a verdict is a question of law. Id., citing *State v. Robinson* (1955), 162 Ohio St. 486.

{¶ 20} In reviewing the sufficiency of the evidence in a criminal case, an appellate court will not reverse a conviction where there is substantial evidence, viewed in a light most favorable to the prosecution, which would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263.

{¶ 21} The evidence offered by the State revealed that Atkins-Boozer attempted to purchase drugs from the victim, dragged him with her car, rammed him against a parked car, and fled the scene, all with her child in the back seat. These actions clearly created a "substantial risk to the safety" of her child. Accordingly, this court cannot say that the trial court erred in denying her motion for acquittal.

{¶ 22} The second assignment of error is overruled.

Sentencing - EN BANC

{¶ 23} In her final assignment of error, Atkins-Boozer claims that her sentence must be vacated because the trial court imposed more than the minimum sentence. She argues that, in light of the United States Supreme Court's recent decision in *Blakely v. Washington* (2004), ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403, the trial court was prohibited from imposing more than the minimum

term without the jury deciding the factual question of whether the minimum term would "demean the seriousness of the offense." We disagree.

{¶ 24} R.C. 2929.14(B)(2) provides that the trial court must impose the minimum sentence on an offender who has not previously served a prison term, unless the court finds one of the following on the record: (1) "that the shortest prison term will demean the seriousness of the offender's conduct" or (2) "will not adequately protect the public from future crime by the offender or others." R.C. 2929.14(B)(2).

{¶ 25} The Ohio Supreme Court has held that, "pursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is required to make its statutorily sanctioned findings on the record at the sentencing hearing." *State v. Comer*, 99 Ohio St.3d 463, 469, 2003-Ohio-4165. However, the trial court is not required to give specific reasons for its finding pursuant to R.C. 2929.14(B)(2). Id., citing *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110.

{¶ 26} The specific question before this court en banc is whether the findings set forth in R.C. 2929.14(B), required for the imposition of more than the minimum sentence on a "first offender," implicate the Sixth Amendment as construed by the United States

Supreme Court in *Blakely* and *U.S. v. Booker* (2005), ___ U.S. ___, 125 S.Ct. 738, 160 L.Ed.2d 621.[2]

{¶ 27} We find this court's analysis in *Lett*, addressing the imposition of maximum and consecutive sentences, to be equally applicable and pertinent to the instant case. In *Lett*, we held that the findings required under R.C. 2929.14(C) and (E) for the imposition of maximum and consecutive sentences do not implicate the Sixth Amendment as construed in *Blakely* and *Booker*. In reaching this conclusion, we recognized that Ohio's hybrid sentencing scheme "stands in stark contrast" to the grid sentencing schemes invalidated in *Blakely* and *Booker*.

{¶ 28} Because Ohio has a hybrid sentencing scheme that imposes determinate sentences from an indeterminate range of possible terms, a defendant knows from the point of indictment what the possible maximum term of incarceration will be for a particular offense. For example, in the instant case, Atkins-Boozer was found guilty of aggravated vehicular homicide, a third degree felony, which carries a prison term of one, two, three, four, or five years. See R.C. 2929.14(A). Thus, the maximum sentence that she could receive for her conviction of a third degree felony is five years. The findings required under R.C. 2929.14(B) do nothing to change the maximum sentence that could be imposed, i.e., Atkins-

[2]In conjunction with the release of this opinion, we also release *State v. Lett*, Cuyahoga App. Nos. 84707 and 84729, in which we address issues relating to the imposition of maximum and consecutive sentences.

Boozer could never be sentenced to more than five years for the offense. In contrast, the grid sentencing schemes in *Blakely* and *Booker* failed to ensure that the maximum sentence an offender could receive was derived from the jury verdict or guilty plea, and allowed a harsher sentence based on additional fact-finding by the sentencing court. See *State v. Combs*, Butler App. No. CA2000-03-047, 2005-Ohio-1923, ¶59.

{¶ 29} Indeed, in *Lett*, this court determined that the findings required under Senate Bill 2 do not constitute "additional" facts which implicate *Blakely*. Rather, the findings required under Senate Bill 2 for determining the appropriate sentence (within the range set in R.C. 2929.14(A)) are distinctively different than the factual determinations at issue in *Blakely* and *Booker*. In *Booker*, the defendant pled guilty to possessing 50 grams of crack cocaine, but the sentencing judge found that Booker actually possessed 92.5 grams and sentenced him on that basis. Likewise, in *Blakely*, the sentencing judge went beyond the facts determined by the jury and found that *Blakely* committed his offense with "deliberate cruelty," thereby imposing a harsher sentence. As recognized in *Lett*, these facts could easily have been charged as elements of the offense because they were objective findings and thus readily amenable to disposition at trial. Conversely, the statutory findings required under Senate Bill 2 for imposing a maximum sentence or a nonminimum sentence on a first offender are purely subjective in nature and

not amenable to disposition based solely on facts found by the trier of fact or admitted in a plea.

{¶ 30} Applying the same reasoning to the instant case, we hold that R.C. 2929.14(B) is constitutional and does not implicate the Sixth Amendment as construed in *Blakely* and *Booker*. Although the factors enumerated in R.C. 2929.14(B) guide a trial court in determining the appropriate sentence based on the defendant's conduct, they do not permit a trial court to impose any sentence beyond the prescribed statutory range, as contained in R.C. 2929.14(A).

{¶ 31} Further, the subjective determination of whether a minimum sentence would demean the seriousness of the offense is not a matter to be determined by a jury. Rather, the finding is a matter reserved for the sound discretion of the trial court and necessary for its determination of the appropriate sentence within the statutory range. See, *Combs*, supra, ¶58; *State v. Allen*, Lake App. No. 2004-L-038, 2005-Ohio-1415, ¶32, citing *State v. Murphy*, 11th Dist. No. 2003-L-049, 2005-Ohio-412, at ¶¶56-60; *State v. Sieng*, Franklin App. No. 04AP-556, 2005-Ohio-1003, ¶40. As stated by Justice Stevens in *Booker*, "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the

facts that the judge deems relevant." (Citations omitted.) *Booker*, 125 S.Ct. at 750.

{¶ 32} Finally, we note that our resolution of this issue is consistent with the majority of Ohio appellate courts. Ten of the 12 Ohio appellate districts have held that Ohio's sentencing scheme does not violate the Sixth Amendment as construed in *Blakely*. See, *State v. Collier*, 2d Dist. No. CA2003-11-282, 2005-Ohio-944, ¶41; *State v. Scarberry*, 3d Dist. No. 8-04-32, 2005-Ohio-1425, ¶10, citing *State v. Trubee*, 3d Dist. No. 9-03-65, 2005-Ohio-552, ¶23; *State v. Ward*, 4th Dist. No. 04CA25, 2005-Ohio-1580, ¶14; *State v. Rorie*, 5th Dist. No. 2002CA00187, 2005-Ohio-1726, ¶69, quoting *State v. Iddings*, 5th Dist. No. 2004CAA06043, 2004-Ohio-7312, ¶12; *State v. Adams*, 6th Dist. No. S-04-17, 2005-Ohio-1548, ¶6, quoting *State v. Curlis*, 6th Dist. No. WD-04-032, 2005-Ohio-1217, ¶18; *State v. Goins*, 7th Dist. No. 02 CA 68, 2005-Ohio-1439, ¶111; *State v. Burns*, 9th Dist. No. 22198, 2005-Ohio-1459, ¶¶4-5; *State v. Sieng*, 10th Dist. No. 04AP-556, 2005-Ohio-1003, ¶37; *State v. Rubert*, 11th Dist. No. 2003-L-54, 2005-Ohio-1098, ¶48; *State v. Gann*, 12th Dist. No. CA2004-01-028, 2005-Ohio-678, ¶16.

{¶ 33} Applying R.C. 2929.14(B) to the instant case, we find clear and convincing evidence supporting the trial court's determination that a nonminimum sentence would demean the seriousness of the offense. The record reveals that the offenses were part of a continuing course of conduct in which Atkins-Boozer attempted to steal drugs on more than one occasion, with the final

attempt resulting in the victim's death. In sentencing Atkins-Boozer, the trial court stated:

> **"When the Court considers the minimum sentence in this case, the Court feels that the minimum sentence would demean the seriousness of the offense, and in light of the fact that this was a continuing situation, that Miss Boozer, who is a very smart individual, could have foreseen occurring – and the Court says that because she continuously left Painesville to come into the City of Cleveland to purchase drugs, and as she would continuously involve her son, and bring her son down, exposing him to the dangers of purchasing drugs on the street, and after the testimony, during the trial, was that she had attempted to do one of these * * * [p]ull-offs when she was down here this time, but apparently this was not far from the location where this incident occurred, that she attempted it on one occasion, it was unsuccessful, so she went around the corner and engaged in the conduct again, whereupon she encountered Mr. McBee, and this tragedy took place."**

{¶ 34} Accordingly, in light of Atkins-Boozer's conduct in the instant case, we cannot say that a nonminimum sentence is contrary to law.

{¶ 35} The final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JUDGE
COLLEEN CONWAY COONEY

PATRICIA ANN BLACKMON, A.J. and JAMES J. SWEENEY, J. concur on the first two assignments of error.

COLLEEN CONWAY COONEY, writing for the majority on the constitutionality of nonminimum sentences. PATRICIA ANN BLACKMON, FRANK D. CELEBREZZE, JR., ANTHONY O. CALABRESE, JR., MARY EILEEN KILBANE, CHRISTINE T. McMONAGLE, and MICHAEL J. CORRIGAN concur.

JAMES J. SWEENEY, dissenting on the constitutionality of nonminimum sentences. ANN DYKE, DIANE KARPINSKI, KENNETH A. ROCCO, AND SEAN C. GALLAGHER concur.

DIANE KARPINSKI, dissenting on the constitutionality of the en banc procedure. CHRISTINE T. McMONAGLE concurs only as to Part I of JUDGE KARPINSKI's dissenting opinion.

SEAN C. GALLAGHER, concurring in part as to the constitutionality of the court's en banc procedure. PATRICIA ANN BLACKMON, FRANK D. CELEBREZZE, JR., JAMES J. SWEENEY, COLLEEN CONWAY COONEY, ANTHONY O. CALABRESE, JR., MARY EILEEN KILBANE, KENNETH A ROCCO, AND MICHAEL J. CORRIGAN concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COUNTY OF CUYAHOGA

NO. 84151

STATE OF OHIO	:	
	:	C O N C U R R I N G
Plaintiff-Appellee	:	
	:	A N D
-vs-	:	
	:	D I S S E N T I N G
NICOLA ATKINS-BOOZER	:	
	:	O P I N I O N
Defendant-Appellant	:	

DATE: May 31, 2005

JAMES J. SWEENEY, J., CONCURRING AND DISSENTING:

{¶ 36} I concur with the majority decision to affirm Atkins-Boozer's sentence, but respectfully dissent from the analysis that certain provisions of Senate Bill 2 are unaffected by the United States Supreme Court's decisions in *Blakely* and *Booker*. This Court is simultaneously releasing *State v. Lett*, Cuyahoga App. Nos. 84707 and 84729, in which I dissented on similar grounds that I incorporate here.

{¶ 37} The majority defines the "statutory maximum" solely with reference to the basic prison sentences set forth in 2929.14(A). The majority reasons that offenders are aware of the basic ranges ("from the point of indictment") and, therefore, no Sixth Amendment rights are implicated when the statutory scheme prevents a trial judge from enhancing a sentence within those ranges without first making specific findings. Yet, in *Blakely,* the offender also knew

from the "point of indictment" that his offense, a Class B felony, was punishable by a maximum term of 10 years. The United States Supreme Court rejected the notion that Blakely's sentence comported with the Sixth Amendment because it fell within the general range (10 years) allowed by the State law.[3]

{¶ 38} Again, in *United States v. Booker* (2005), 543 U.S. ____, 125 S.Ct. 738, the Court reiterated its rejection of "the State's argument that the jury verdict was sufficient to authorize a sentence within the general 10-year sentence for [Blakely's offense], noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence." (Emphasis in the original). There is no substantive distinction (for Sixth Amendment purposes) between the judicial fact-finding of Washington State law necessary to enhance a sentence beyond the "recommended range" and the judicial fact-finding of R.C. 2929.14(B) necessary to enhance an offender's sentence beyond the minimum prison term under Ohio law.

---

[3]Blakely pled guilty to second-degree kidnapping. "Washington's Sentencing Reform Act specifies, for [Blakely's] offense of second-degree kidnapping with a firearm a 'standard range' of 49-53 months. [citations omitted]." *Blakely* supra. "In Washington, second-degree kidnapping is a class B felony. [] State law provides that '[n]o person convicted of a [Class B] felony shall be punished by confinement *** exceeding *** a term of ten years.'" Id. "A judge may impose a sentence above the standard range if he finds 'substantial and compelling reasons justifying an exceptional sentence ***.' The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive ***. When a judge imposes an exceptional sentence he must set forth findings of fact and conclusions of law supporting it ***. A reviewing court will reverse the sentence if it finds that 'under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.'" Id.

{¶ 39} The gist of the Sixth Amendment concern is a defendant's right to have all facts affecting sentencing proven and determined by a jury. The greatest prison term Atkins-Boozer could have possibly received as a result of the facts determined by the jury was one year. In other words, the statutory findings of R.C. 2929.14(B) are a prerequisite to imposition of any sentence greater than one year; if the trial court had imposed a longer sentence ***without making any additional findings,*** we would be compelled to reverse. R.C. 2953.08(G).

{¶ 40} Because R.C. 2929.14(B) *required* the judge to find additional facts in order to impose more than a one-year prison term on Atkins-Boozer, the rationale of *Blakely* applies and the defendant's Sixth Amendment rights are implicated by those sentence-enhancing findings. "Pursuant to R.C. 2929.14(B), when imposing a nonminimum sentence on a first offender, a trial court is *required* to make its statutorily sanctioned findings at the sentencing hearing." *Comer*, 99 Ohio St.3d 463, paragraph 2 of the syllabus (emphasis added). The "statutory maximum," as defined by *Blakely*, must be ascertained with reference to Senate Bill 2 as a whole and not one isolated provision of it. *State v. Comer*, 99 Ohio St.3d 463, 476, 2003-Ohio-4165 ("the individual provisions of the sentencing scheme may not be read alone.")

{¶ 41} The majority also maintains that *Blakely* and *Booker* should be distinguished from Ohio law on the theory that the judicial fact-findings of those cases were more capable of

indictment than the statutory findings required under Senate Bill 2. The Sixth Amendment violation is not the result of the nature of the findings (i.e., "subjective" or "objective") nor the ability to charge them in an indictment. The Sixth Amendment violation arises from the statutory prohibition to increase a sentence *without making the additional findings*. Whether something is capable of indictment or too vague for jury determination may very well raise other constitutional concerns. This, however, does not alleviate a Sixth Amendment violation that arises from the denial of an offender's right to have sentence-enhancing facts determined by a jury.

{¶ 42} For these reasons and those set forth in my opinion in *Lett*, I would declare the judicial findings of R.C. 2929.14(B), that are required as a prerequisite to enhance an offender's sentence beyond a minimum prison term, unconstitutional under the authority of *Blakely* and *Booker*. Being in the minority of this Court, it is unnecessary to elaborate on what the ramifications would be had these provisions been deemed unconstitutional.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84151

STATE OF OHIO :
:
:
Plaintiff-appellee :

	:	DISSENTING
v.	:	
	:	OPINION
NICOLA ATKINS-BOOZER	:	
	:	
	:	
Defendant-appellant	:	

DATE: May 31, 2005

KARPINSKI, J., DISSENTING:

I

{¶ 43} First, I respectfully dissent because I find unconstitutional the en banc process this court used to arrive at a decision in this case. I further dissent because I find the application of *Blakely* and *Booker*, ante, renders unconstitutional the process, mandated by Ohio statute, that requires a judge to make certain findings in order to impose more than the minimum on offenders who have never been incarcerated. Because I dissented on the same grounds in *State v. Lett*, Cuyahoga App. Nos. 84707 and 84729, which is being issued simultaneously with the opinion in the case at bar, I incorporate that dissent here.

II

{¶ 44} In *Smylie v. Indiana* (2005), 823 N.E.2d 679, the Indiana Supreme Court found a sentencing statute unconstitutional under *Blakely* and *Booker*, and ordered the case remanded to the lower court to allow the State to elect between proving to a jury adequate aggravating circumstances or to accept the statutory fixed

term. Id. at 691. The Ohio Supreme Court has already denied the first option that the Indiana Court provided: sending the sentence part of the case back to a jury. *Mason v. Griffin* (2004) 104 Ohio St.3d 279. The second alternative was a sentence based on the "fixed term," that is, the presumptive sentence. I would follow the remedy adopted by the Indiana Supreme Court in its second alternative, a remedy also adopted by the First Appellate District in Ohio. *State v. Bruce*, Hamilton App. No. C-040421, 2005-Ohio-373, at ¶1.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84151

STATE OF OHIO	:	
	:	CONCURRING AND
Plaintiff-Appellee	:	
	:	DISSENTING
vs.	:	
	:	OPINION
NICOLA ATKINS-BOOZER	:	
	:	
	:	
Defendant-Appellant	:	
	:	

DATE: May 31, 2005

SEAN C. GALLAGHER, J., CONCURRING AND DISSENTING:

{¶ 45} I concur with the majority position with respect to en banc, as stated in my separate concurring and dissenting opinion in *State v. Lett*, Cuyahoga App. Nos. 84707 and 84729.

{¶ 46} I concur with the majority decision to affirm Atkins-Boozer's sentence, but respectfully dissent from the analysis. Instead, I concur with the analysis of Judge James J. Sweeney with regard to the application of *Apprendi*, *Blakely* and *Booker* to the Ohio sentencing format.