ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 11-0202
Plaintiff-Appellee,	:	
		On Appeal from the Meigs
v.	:	County Court of Appeals
		Fourth Appellate District
ERIC A. QUALLS,	:	
		Court of Appeals
Defendant-Appellant.	:	Case No. 10CA8

MERIT BRIEF OF APPELLANT ERIC A. QUALLS

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STATEMENT OF THE CASE AND FACTS

On March 14, 2002, a Meigs County, Ohio, Grand Jury indicted Eric Qualls for the following offenses:

Count	Revised Code Section	Death-Penalty Specification	Firearm Specification
One	R.C. 2903.01(A): Aggravated Murder	R.C. 2929.04(A)(7)	R.C. 2941.145
Two	R.C. 2903.01(B): Aggravated Murder	R.C. 2929.04(A)(7)	R.C. 2941.145
Three	R.C. 2905.01(A)(3): Kidnapping	N/A	R.C. 2941.145

(Mar. 14, 2002 Indictment).

In 2002, Mr. Qualls pleaded guilty to Counts One and Three. (Aug. 15, 2002 Petition to Enter a Plea of Guilty). In exchange for pleading guilty, the State dismissed Count Two, along with the firearm specification that was attached to the kidnapping charge. Id. Additionally, the State dismissed the death-penalty specification that was attached to Count One. Id. The trial court sentenced Mr. Qualls to a prison term of life with parole eligibility after 20 years for the aggravated-murder charge. The trial court also imposed a three-year prison term for the firearm specification that was attached to the aggravated-murder charge, and a ten-year prison term for the kidnapping charge. (Aug. 15, 2002 Sentencing Entry). The trial court ordered each prison term to be served consecutively, making Mr. Qualls's aggregate prison term 33-years-to-life. Id.

Although Mr. Qualls did not appeal, he filed various pro se motions requesting sentence reductions and permission to withdraw his guilty plea. (Qualls's Mar. 25, 2003 Mot. to Reduce His Sentence; Qualls's Sept. 30, 2003 Mot. to Withdraw His Guilty Plea; Qualls's Oct. 22, 2003 Mot. to Withdraw His Guilty Plea; Qualls's July 27, 2004 Mot. to Withdraw His Guilty Plea;

Qualls's Dec. 21, 2004 Mot. to Vacate and Set Aside Judgment of Conviction and Sentence for Lack of Jurisdiction; Qualls's May 5, 2005 Mot. to Modify Sentence). The trial court denied Mr. Qualls's requests. (Apr. 25, 2003 Judgment Entry; Oct. 7, 2003 Judgment Entry; Nov. 5, 2003 Judgment Entry; Aug. 12, 2003 Judgment Entry; Dec. 7, 2004 Judgment Entry; May 17, 2005 Judgment Entry, respectively).

In 2006, Mr. Qualls filed a petition for postconviction relief and asked to be resentenced. (Qualls's June 26, 2006 Petition for Postconviction Relief). The trial court denied the request (July 12, 2006 Entry), and the Fourth District Court of Appeals affirmed that decision. *State v. Qualls*, 4th Dist. No. 06CA7, 2007-Ohio-3938. Mr. Qualls appealed, but this Court declined jurisdiction. *State v. Qualls*, 115 Ohio St.3d 1444, 2007-Ohio-5567, 875 N.E.2d 104.

In 2008, Mr. Qualls once again requested that he be permitted to withdraw his guilty plea. (Qualls's Feb. 22, 2008 Mot. to Withdraw Plea of Guilty). The trial court denied the motion, stating that the request had already been made on September 30, 2003 and October 22, 2003. (Feb. 22, 2008 Journal Entry). The trial court further found that the September and October motions had been denied, (Oct. 7, 2003 Journal Entry; Nov. 5, 2003 Entry, respectively), and that the February 22, 2008 motion contained the same arguments that the former two motions alleged. (Feb. 22, 2008 Journal Entry). The trial court also stated that Mr. Qualls would be sanctioned if he filed further motions that repeated any legal arguments that had already been denied. Id.

On January 15, 2010, Mr. Qualls filed a motion for a de novo resentencing hearing. (Qualls's Jan. 15, 2010 Mot. for De Novo Resentencing Hearing). Mr. Qualls argued that although the trial court informed him of postrelease control at his sentencing hearing, because he was convicted of a "special felony," he was not subject to postrelease control under R.C.

2967.28. (Id. at p. 2). The State responded, explaining that postrelease control was not imposed on the aggravated-murder charge, but rather on the kidnapping charge. (State's Feb. 8, 2010 Response to Defendant's Mot. for a De Novo Resentencing Hearing, pp. 1-2). Noting a discrepancy in Mr. Qualls's August 15, 2002 Sentencing Entry, the State pointed out that although Mr. Qualls was informed of postrelease control at his sentencing hearing, any language regarding his postrelease-control obligations was omitted from his sentencing entry. (Id. at pp. 2-3. See, also, Aug. 15, 2002 Sentencing Entry). Rather than request that Mr. Qualls be brought back for a de novo resentencing hearing in order to correct his void sentence, the State requested that the trial court issue a nunc pro tunc entry. (State's Feb. 8, 2010 Response to Defendant's Mot. for a De Novo Resentencing Hearing, p. 3). Subsequently, Mr. Qualls filed a motion to dismiss the charges against him reasoning that his original sentence was invalid, and thus void. (Qualls's Mar. 10, 2010 Mot. to Dismiss Charges Due to an Unreasonable Delay in Sentencing).

On March 29, 2010, the trial court denied Mr. Qualls's motion for a de novo hearing and issued a nunc pro tunc sentencing entry, which included language imposing Mr. Qualls's postrelease-control obligations. (Mar. 29, 2010 Entry to Defendant's Mot. for a De Novo Sentencing Hearing; Mar. 29, 2010 Nunc Pro Tunc Entry, respectively). Mr. Qualls appealed. (Qualls's Apr. 26, 2010 Notice of Appeal). Among other assignments of error, Mr. Qualls argued that the trial court erred when it overruled his motion for a de novo resentencing hearing and issued a nunc pro tunc entry. (Qualls's May 5, 2010 Merit Brief). The court of appeals affirmed the trial court's decision, explaining:

> In his motion for de novo hearing, appellant admitted that he "was also *informed* that he would be subject to 5 years of Post Release Control upon his release." (Emphasis added.) The appellee also cites a portion of the hearing transcript in which the court not only

> informed appellant of the control, but also directed defense counsel to make sure that he understood what it meant. After appellant and counsel discussed the matter, the court asked appellant directly if he "understood post-release control" and appellant responded "Yes, sir."
>
> Under circumstances virtually identical to those present here, our First District colleagues held:
>
> > "The original sentencing court, during sentencing, informed [defendant] that he would 'be placed on post-release control for a period of five years,' but that notification was not reflected in the sentencing entry. The court below attempted to remedy the omission by resentencing [defendant]... The trial court had no authority to resentence [him]. The proper remedy was to add the omitted postrelease-control language in a nunc pro tunc entry after a hearing."
>
> *State v. Gause*, 182 Ohio App.3d 143, 2009-Ohio-2140, at ¶2. We agree that this is the proper remedy to employ under these circumstances and find no error on the trial court's part.

State v. Qualls, 4th Dist. No. 10CA8, 2010-Ohio-5316, ¶12-13.

On November 3, 2010, Mr. Qualls filed a motion in accordance with App.R. 25 and asked the court of appeals to certify his case to this Court for review. (Qualls's Nov. 3, 2010 Mot. to Certificate [sic] a Conflict). Mr. Qualls claimed that the court of appeals' decision in his case conflicted with this Court's decision in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, and the Sixth District Court of Appeals' decision in *State v. Lee*, 6th Dist. No. L-09-1279, 2010-Ohio-1704. Id. The court of appeals certified the following question: If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, can that omission be corrected with a nunc pro tunc entry? (Jan. 13, 2011 Entry on Mot. to Certify Record to the Supreme

Court). This Court determined that a conflict existed and ordered briefing as to the issue that had been stated by the court of appeals. (Mar. 16, 2011 Entry).

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, such omission may not be corrected by the mere issuance of a nunc pro tunc entry.

I. Summary of Argument.

Before December 23, 2010, this Court's decision in *State v. Singleton*, 2009-Ohio-6434 clarified how Ohio's courts should remedy errors involving the deficient imposition of postrelease control. (See Argument II, pp. 6-13, infra). Any defendant who had been sentenced prior to July 11, 2006, and who did not receive proper notification of his or her postrelease-control obligations, were entitled to a de novo resentencing hearing. (See Argument II, pp. 6-13, infra). And any defendant who had been sentenced after July 11, 2006, and who did not receive proper notification of his or her postrelease-control obligations, were governed by R.C. 2929.191. Id.

However, on December 23, 2010, this Court abrogated a defendant's right to a resentencing hearing, both de novo and partial, in situations in which the trial court failed to properly follow the sentencing mandates for postrelease control. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332. (See Argument III, pp. 13-15, infra). Although *Fischer* settled how courts of appeals should prospectively deal with postrelease-control issues, the Ohio and United States Constitutions forbid courts from applying the decision retroactively. (See Argument V, pp. 18-20, infra). Moreover, even after this Court's decision in *Fischer*, a

sentencing entry that improperly imposes postrelease control may not be fixed without a hearing. See R.C. 2929.191(C). (See, also, Argument IV, pp. 15-18, infra).

II. The law relating to postrelease control before December 23, 2010.

This Court has repeatedly addressed the consequences of a trial court's failure to adhere to the mandatory requirements of the postrelease-control sentencing statutes. In *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774, this Court considered whether the trial court's failure to impose a mandatory sentence, and its subsequent correction of that sentence, violated the defendant's constitutional guarantee against double jeopardy. Id. at 75. This Court recognized that "[a]ny attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." Id. This Court further explained that because jeopardy does not attach to a void sentence, a court's subsequent correction of the void sentence did not violate the principles of double jeopardy. Id.

In *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171, 733 N.E.2d 1103, this Court addressed the constitutional significance of a trial court's inclusion of postrelease control into a defendant's sentence, and stated that because the separation-of-powers doctrine precluded the executive branch of government from impeding the judiciary's imposition of a sentence, the Adult Parole Authority could impose postrelease-control sanctions only if a trial court incorporated postrelease control into the defendant's original sentence. Id. at 512-513. Moreover, this Court explained that postrelease control was a part of a defendant's judicially imposed sentence. Id. at 512. Indeed, "postrelease-control sanctions are sanctions aimed at behavior modification in the attempt to reintegrate the offender safely into the community." Id.

Next, in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, this Court considered the consequences of a trial court's failure to advise an offender about

postrelease control at his or her sentencing hearing. Id. at ¶1. Applying *Beasley*, this Court held that "[b]ecause a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law" and void, and the cause must be remanded for resentencing. Id. at ¶23, 27. Furthermore, this Court explained that "in order to properly impose [a] sentence in a felony case, a trial court must consider and analyze numerous sections of the Revised Code to determine applicability *and must provide notice to offenders at the sentencing hearing and incorporate that notice into its journal entry.* See, e.g., R.C. 2925.02, 2929.11, 2929.12, 2929.13, 2929.14, 2929.15, and 2929.18. Nonetheless, in every sentencing, courts must follow the dictates of the General Assembly." (Emphasis added.) Id. at ¶9.

This Court again confronted a sentencing court's failure to notify or incorporate postrelease control into a defendant's sentencing entry in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301. In *Hernandez*, the defendant was tried and convicted for possessing cocaine in an amount exceeding 1,000 grams, and for conspiracy to possess cocaine. Id. at ¶2. During the sentencing hearing, the trial court imposed a 19-year prison term, and advised Mr. Hernandez that he was "being sent to prison and placed on postrelease control by the Parole Board for a period of up to five years." Id.

On appeal, Mr. Hernandez's convictions were reversed and remanded. Id. at ¶3. On remand, Mr. Hernandez pleaded guilty to possession of cocaine. Id. at ¶4. The trial court sentenced Mr. Hernandez to a seven-year prison term. Id. But the trial court did not notify Mr. Hernandez that he would be subject to postrelease control. Id. Nor did it incorporate postrelease control into its journal entry. Id.

Mr. Hernandez completed his seven-year sentence and was released from prison. Id. at ¶5. Upon his release, the Adult Parole Authority (APA) placed Mr. Hernandez on postrelease control for five years. Id. A few months later, Mr. Hernandez was charged with violating the conditions of postrelease control. Id. at ¶6. The APA conducted a hearing and determined that Mr. Hernandez had violated several conditions of his postrelease control. Id. As a sanction, he was sentenced to an additional 160 days of incarceration, with continued supervision upon his release. Id. Shortly thereafter, Mr. Hernandez filed a writ of habeas corpus challenging the APA's decision to place him on postrelease control and its subsequent decision to sanction him for violating the terms of that control. Id. at ¶7-12.

In granting Mr. Hernandez's petition, this Court reasoned that "an after-the-fact notification [to Mr.] Hernandez, who has served a seven-year sentence, would circumvent the objective behind R.C. 2929.14(F) and R.C. 2967.28 to notify defendants of the imposition of postrelease control at the time of their sentencing." Id. at ¶28. Moreover, this Court emphasized the importance of placing a defendant's notice of postrelease-control in the sentencing entry:

> It is axiomatic that "[a] court of record speaks only through its journal entries." *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan,* 100 Ohio St.3d 366, 2003-Ohio-6608, at ¶20; *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 2000-Ohio-381, (noting this axiom in a habeas corpus case). Here, the trial court's sentencing entry specified only Hernandez's seven-year sentence, which he completed in February 2005. Because his only journalized sentence has now expired, habeas corpus is an appropriate remedy. See *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 346, 1994-Ohio-380 ("habeas corpus is available where an individual's maximum sentence has expired and he is being held unlawfully"); *Heddleston v. Mack* (1998), 84 Ohio St.3d 213, 214, 1998-Ohio-320, 702 N.E.2d 1198.

Hernandez at ¶30.

After *Hernandez*, this Court denied a petition seeking a writ of prohibition to vacate a resentencing entry imposing a mandatory period of postrelease control. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶1. Unlike *Hernandez*, in *Cruzado*, the trial court discovered the sentencing error before the inmate had completed serving his sentence, and the court conducted a resentencing hearing and properly imposed a mandatory three-year period of postrelease control. Id. at ¶9-11. Citing to *Beasley* and *Jordan*, supra, and distinguishing *Hernandez* on the basis that Mr. Cruzado had not yet completed his sentence, this Court held that the trial court did not patently and unambiguously lack jurisdiction to correct the sentence. *Cruzado* at ¶19-28, 32.

In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, this Court concluded that when a trial court failed to properly notify a defendant of his or her postrelease-control obligations, that defendant was entitled to a de novo resentencing hearing. And a little over one year later, in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, this Court stated: "[I]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." Id. at ¶6. Furthermore, this Court recognized that conducting a new sentencing hearing would not offend double jeopardy or due process, because an offender could not have a legitimate expectation of finality in a void sentence. Id. at ¶36-37.

Subsequent postrelease-control litigation involved Substitute House Bill Number 137 ("H.B. 137"), which was passed with a July 11, 2006 effective date, and amended R.C. 2967.28, 2929.14, and 2929.19, and enacted R.C. 2929.191, to provide a mechanism for correcting

sentences in which the trial court failed either to notify the offender of postrelease control or to incorporate it into the sentencing entry. As amended, R.C. 2967.28(B) provides:

> Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code a statement regarding post-release control.

Likewise, R.C. 2929.14(F)(1) and R.C. 2929.19(B)(3)(c) and (e), as amended by H.B. 137, provides that if a court imposed a sentence before July 11, 2006, and failed to either notify the offender of postrelease control or to include postrelease control in the judgment entry, then R.C. 2929.191 applied. Revised Code Section 2929.191 provides:

> (A)(1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.
>
> * * *
>
> (2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the

> offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code....
>
> * * *
>
> (C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

In *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, this Court addressed various constitutional challenges to R.C. 2929.191 raised by three separate offenders in separate cases. This Court made three important rulings: (1) offenders who were sentenced and received de novo resentencing hearings before July 11, 2006 lacked standing to challenge the constitutionality of the statute, ¶31; (2) the enactment of R.C. 2929.191 did not violate separation-of-powers doctrine nor the one-subject-rule, ¶45 and ¶56; and (3) when a court improperly imposes postrelease control, and that offender has completed his or her stated term

of imprisonment, the APA has no authority to supervise the offender on postrelease control, ¶69-71.

Next, in *State v. Singleton*, 2009-Ohio-6434, this Court addressed how courts should be applying R.C. 2929.191. This Court noted that prior to the enactment of R.C. 2929.191, the State did not have a statutory remedy for sentences that lacked the proper imposition of postrelease control. Id. at ¶25. Consequently, for those sentences that were imposed prior to July 11, 2006, the de novo resentencing procedure should be followed. Id. at ¶26. Specifically, this Court explained:

> R.C. 2929.191 purports to authorize application of the remedial procedure set forth therein to add postrelease control to sentences imposed before its effective date. We recognize the General Assembly's authority to alter our caselaw's characterization of a sentence lacking postrelease control as a nullity and to provide a mechanism to correct the procedural defect by adding postrelease control at any time before the defendant is released from prison. However, for sentences imposed prior to the effective date of the statute, there is no existing judgment for a sentencing court to correct. *H.B. 137 cannot retrospectively alter the character of sentencing entries issued prior to its effective date that were nullities at their inception, in order to render them valid judgments subject to correction.* Therefore, for criminal sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, the de novo sentencing procedure detailed in decisions of the Supreme Court of Ohio should be followed to properly sentence an offender.

(Emphasis added.) Id.

Thus, up until December 23, 2010—when this Court issued its decision in *State v. Fischer*, 2010-Ohio-6238 (see Argument III, infra)—in order to properly impose postrelease control, and comply with due process, a trial court must (1) give the defendant legally sufficient notice at the sentencing hearing that his or her sentence includes postrelease control, and (2) precisely set forth the term of the defendant's postrelease control in the judgment entry. *State v.*

Simpkins, 2008-Ohio-1197; *State v. Jordan*, 2004-Ohio-6085, at ¶7, 22. The court must state whether the term is mandatory. *State v. Bloomer*, 2009-Ohio-2462, at ¶69; *State ex rel. Cruzado v. Zaleski*, 2006-Ohio-5795. The trial court must also advise the defendant that a violation of postrelease control may result in an additional term of imprisonment of up to fifty percent of the original sentence. *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224, ¶22. The court must also incorporate that notice into its sentencing entry. *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶80; *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, ¶17.

Mr. Qualls was sentenced in 2002, before R.C. 2929.191's effective date. And in his original sentencing entry, the trial court failed to inform Mr. Qualls as to his postrelease-control obligations. (Aug. 15, 2002 Sentencing Entry; Feb. 8, 2010 Response to Defendant's Mot. for a De Novo Resentencing Hearing, pp. 2-3). This Court declined to apply R.C. 2929.191 retroactively. And according to the caselaw that controlled the erroneous imposition of postrelease control in Mr. Qualls's case, Mr. Qualls's sentence was void. As explained by the history of this Court's caselaw, the proper remedy to correct a void sentence that was imposed before July 11, 2006 is a de novo resentencing hearing—not the issuance of a nunc pro tunc entry.

III. The law relating to postrelease control after December 23, 2010.

On December 23, 2010, this Court issued its opinion in *State v. Fischer*, 2010-Ohio-6238. The relevant background in the *Fischer* case is as follows:

> In 2002, a judge sentenced appellant, Londen K. Fischer, to an aggregate term of 14 years' imprisonment for aggravated robbery, felonious assault, having a weapon while under disability, and two counts of aggravated burglary, all with firearms specifications. A timely direct appeal followed, and his convictions were affirmed by the court of appeals. *State v. Fischer,* Summit App. No. 20988,

> 2003-Ohio-95 (rejecting sufficiency-of-the-evidence claims and *Batson* challenges).
>
> Several years later, Fischer successfully moved pro se for resentencing after this court issued its decision in *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250 (holding that a sentence that omits a statutorily mandated postrelease term is void) because he had not been properly advised of his postrelease-control obligations. Thereafter, the trial court properly notified Fischer of those obligations and reimposed the remainder of the sentence. Fischer appealed.
>
> On appeal, he asserted that because his original sentence was void, his first direct appeal was "not valid" and that this appeal is in fact "his first direct appeal" in which he may raise any and all issues relating to his conviction. *State v. Fischer,* 181 Ohio App.3d 758, 2009-Ohio-1491, at ¶4 and 5. The court of appeals rejected his claim, holding that the appeal was precluded by the law-of-the-case doctrine. Id. at ¶7-8.
>
> We granted discretionary review of a single proposition arising from the appeal: whether a direct appeal from a resentencing ordered pursuant to *State v. Bezak* is a first appeal as of right. *State v. Fischer,* 123 Ohio St. 3d 1410, 2009-Ohio-1491. We hold that it is not.

State v. Fischer, 2010-Ohio-6238, at ¶2-5.

This Court's analysis began with the history of the postrelease-control cases. Id. at ¶10-18. This Court then held that "when a judge fails to impose statutorily mandated postrelease control as part of a defendant's sentence, that *part* of the sentence is void and must be set aside." (Emphasis sic.) Id. at ¶26. This Court further held that "the new sentencing hearing to which an offender is entitled under *Bezak* is limited to proper imposition of postrelease control." Id. at ¶29. Those holdings departed drastically from this Court's longstanding principle that prior to the enactment of R.C. 2929.191, a trial court's failure to impose postrelease control either at a defendant's sentencing hearing or in his or her journal entry rendered the sentence void and entitled the defendant to a de novo resentencing hearing.

This Court also noted that "remand is just one arrow in the quiver. R.C. 2953.08(G)(2) also provides that an appellate court may 'increase, reduce or otherwise modify a sentence...*or* may vacate the sentence and remand the matter to the resentencing court for resentencing.'" (Emphasis sic.) Id. at ¶29. Accordingly, in abrogating a defendant's right to receive a de novo resentencing hearing to correct his or her void sentence, and in some instances to a resentencing hearing to correct a sentence that is contrary to law, this Court concluded that "[c]orrecting the defect without remanding for resentencing can provide an equitable, economical, and efficient remedy for a void sentence." Id. at ¶30.

IV. *Fischer* does not alter a defendant's right to receive a hearing in compliance with R.C. 2929.191 when a trial court fails to properly impose postrelease control.

A. Revised Code Section 2929.191 unambiguously states that in order to fix a trial court's deficient imposition of postrelease control, a defendant must receive a hearing before a trial court may issue a nunc pro tunc entry.

The Meigs County Court of Common Pleas attempted to remedy Mr. Qualls's deficient sentence by issuing a nunc pro tunc entry. (Mar. 29, 2010 Entry to Defendant's Mot. for a De Novo Sentencing Hearing; Mar. 29, 2010 Nunc Pro Tunc Entry). A hearing was not held before the nunc pro tunc entry was journalized. Id. The Fourth District Court of Appeals approved that remedy. *State v. Qualls*, 2010-Ohio-5316, at ¶12-13. But R.C. 2929.191 does not permit a court to issue a nunc pro tunc entry without first conducting a hearing. Revised Code Section 2929.191(C) specifically states that "a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division." Revised Code 2929.191(C) explains the type of hearing that must occur:

> Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the

> hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

Although this Court noted that R.C. 2953.08(G)(2) allows appellate courts to "increase, reduce or otherwise modify a sentence," *Fischer* at ¶29, such options are impermissible when another statute explains that, among those choices, the only remedy that may be ordered in a specific situation is "remanding the matter to the sentencing court for a resentencing." R.C. 2953.08(G)(2), R.C. 2929.191(C). See, also, *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶32 ("Applying the rules of statutory construction set forth in R.C. 1.51 and 1.52, we note that a specific statute will prevail unless the general statute can be shown to be the later adoption of the two and the manifest intent of the General Assembly was to have the general provision control."); *State ex rel. Choices for South-Western City Schools v. Anthony,* 108 Ohio St.3d 1, 2005-Ohio-5362, 840 N.E.2d 582, ¶46 (statutes that relate to the same subject matter must be construed in pari materia and harmonized so as to give full effect to the statutes); *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, 875 N.E.2d 46, ¶24 (same). Indeed, when R.C. 2953.08(G) is read in pari materia with R.C. 2929.191(C), the more specific statute—R.C. 2929.191(C)—prevails over the more general statute—R.C. 2953.08(G). Accordingly, no court may issue a nunc pro tunc entry in order to correct a trial court's failure to include postrelease control in a defendant's sentence without conducting a hearing.

B. Revised Code Section 2929.191's requirement that a defendant receive a hearing before postrelease control is added to his or her sentence is consistent with the Ohio and United States Constitutions, and Crim.R. 43(A).

On August 15, 2002, the Meigs County Court of Common Pleas sentenced Mr. Qualls to an aggregate prison term of 33-years-to-life. (Aug. 15, 2002 Sentencing Entry). That sentence did not include a mandatory period of postrelease control. Id. More than eight years later, the trial court issued a nunc pro tunc entry that altered Mr. Qualls's sentence by imposing the mandatory period of postrelease control. (Mar. 29, 2010 Entry to Defendant's Mot. for a De Novo Sentencing Hearing; Mar. 29, 2010 Nunc Pro Tunc Entry). The trial court did not conduct either a de novo resentencing hearing (see Argument V, infra), or a hearing as mandated by R.C. 2929.191. By altering Mr. Qualls's sentence without requiring his presence, the trial court violated R.C. 2929.191(C), Criminal Rule 43(A)(1), and Mr. Qualls's rights to due process and appointed counsel. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution.

Postrelease control is a part of a defendant's sentence. See *Woods v. Telb*, 89 Ohio St.3d at 512 ("postrelease control is part of the original judicially imposed sentence"). And as mandated by the Due Process and Right to Counsel Clauses of the Ohio and United States Constitutions, a defendant must be present during the imposition of any portion of his or her criminal sentence. Both the Ohio Constitution and the United States Constitution guarantee a criminal defendant the right to be physically present at every critical stage in a criminal proceeding. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution; Crim.R. 43(A) ("The defendant shall be present at...the imposition of sentence"); *United States v. Wade* (1967), 388 U.S. 218, 227-228, 97 S. Ct. 1926 (right of presence through counsel at critical stages); *Mempa v. Rhay* (1967), 389

U.S. 128, 134, 88 S. Ct. 254 (sentencing is a critical stage of the proceedings); *State v. Brooks*, 2004-Ohio-4746, at paragraph one of the syllabus (when sentencing a defendant to a community-control sanction, the trial court is required to deliver the required notifications in open court); *State v. Jordan*, 2004-Ohio-6085, at paragraph one of the syllabus (a trial court is required to notify a defendant as to his or her postrelease-control obligations in open court). Indeed, a court may not "correct" a prior sentence by issuing a corrected judgment entry unless and until the court holds a resentencing hearing and brings the defendant before the court. See *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶13 (recognizing that a defendant must be given the opportunity to challenge a sentence that may be imposed).

In the case sub judice, the trial court made a substantive change to Mr. Qualls's sentence in his absence, and outside the presence of counsel. A trial court may not make a substantive change in a defendant's criminal sentence with a nunc pro tunc entry. As indicated by the Ohio and United States Constitutions, any substantive changes must be made during a hearing in which both the defendant and his or her attorney are present. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution; Crim.R. 43(A). Moreover, based upon Ohio and United States Supreme Court precedent, Mr. Qualls had a right to more than just the hearing as guaranteed by R.C. 2929.191. Mr. Qualls had a right to a de novo resentencing hearing. (See Argument V, infra).

V. *Fischer* may not be applied to any defendant who, at the time of the decision, had the right to a de novo resentencing hearing.

This Court has already determined that R.C. 2929.191 may not apply retroactively. *State v. Singleton*, 2009-Ohio-6434, at ¶26. And prior to December 23, 2010, Mr. Qualls had a right to a de novo resentencing hearing. This Court's decision in *State v. Fischer*, 2010-Ohio-6238 may not abolish that right.

The United States Supreme Court stated that "[t]he Ex Post Facto Clause, by its own terms, does not apply to the courts." *Rogers v. Tennessee* (2001), 532 U.S. 451, 460, 121 S. Ct. 1693. However, retroactive judicial decision-making is limited by the due process concept of fair warning, not by the ex post facto clause. *State v. Garner* (1995), 74 Ohio St.3d 49, 57-58, 1995-Ohio-168, 656 N.E.2d 623 (No change of law by judicial construction occurred because there was no judicial precedent prior to defendant's sentencing recognizing a right to an instruction on mercy or residual doubt.), quoting *Bouie v. Columbia* (1964), 378 U.S. 347, 353, 84 S. Ct. 1697. See, also, *State v. Bruce*, 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44. "With respect to judicial decisions, fair warning is violated when the judicial interpretation is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *State v. Bruce*, 2007-Ohio-175, at ¶8. See, also, *Rogers v. Tennessee*, 532 U.S. at 461, 462; *Bouie v. Columbia*, 378 U.S. at 353-354 (due process places constraints on a court's power to apply precedent to cases arising before the precedent was announced); *Teague v. Lane* (1989), 489 U.S. 288, 301, 109 S. Ct. 1060 ("a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). (Emphasis sic).

In 2009, this Court explained that R.C. 2929.191 may not be applied retroactively. *State v. Singleton*, 2009-Ohio-6434, at ¶26. And prior to *State v. Fischer*, this Court steadfastly maintained that any defendant who failed to receive proper notice of his or her postrelease-control obligations, and who was sentenced prior to July 11, 2006, received a de novo resentencing hearing. (See Argument II, supra). For the past twenty years, this Court has continuously held that a trial court's failure to include postrelease control as part of a defendant's sentence in accordance with the Ohio Revised Code rendered a defendant's

sentence void. Id. And until the *Fischer* decision, "void" meant that "'the judgment is a mere nullity and the parties are [placed back] in the same position as if there had been no judgment.'" *State v. Bezak*, 2007-Ohio-3250, at ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223. When "a sentence is void because it does not contain a statutorily mandated term, the proper remedy is...to resentence the defendant." *State v. Jordan*, 2004-Ohio-6085, at ¶23. Accordingly, *Fischer's* change in the law relating to postrelease control was unforeseeable and resulted in the deprivation of a state-created liberty interest, in violation of the United States' and Ohio's Due Process Clauses. Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution, respectively. As such, because Mr. Qualls had the right to a de novo resentencing hearing at the time that his conviction became final, the mandates of this Court's decision in *Fischer* do not apply to him.

CONCLUSION

Neither R.C. 2929.191 nor *State v. Fischer*, 2010-Ohio-6238 may be applied to a defendant who was sentenced before July 11, 2006. And no matter when a defendant received his or her sentence, a trial court may not correct the deficient imposition of postrelease control by issuing a nunc pro tunc entry without a hearing. Accordingly, this Court should adopt the proposition of law put forth by Mr. Qualls, and should reverse the judgment of the Fourth District Court of Appeals.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

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COUNSEL FOR ERIC A. QUALLS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant Eric A. Qualls** has been sent by regular U.S. mail, postage prepaid, to Colleen S. Williams, Meigs County Prosecutor, Meigs County Prosecutor's Office, 100 W. 2nd Street, P.O. Box 151, Pomeroy, Ohio 45769 , on this 5th day of May, 2011.

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Assistant State Public Defender
(COUNSEL OF RECORD)

COUNSEL FOR ERIC A. QUALLS

#339587

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 11-0202
Plaintiff-Appellee,	:	
		On Appeal from the Meigs
v.	:	County Court of Appeals
		Fourth Appellate District
ERIC A. QUALLS,	:	
		Court of Appeals
Defendant-Appellant.	:	Case No. 10CA8

APPENDIX TO MERIT BRIEF OF APPELLANT ERIC A. QUALLS

ORIGINAL

IN THE SUPREME COURT OF OHIO

ERIC QUALLS

APPELLANT, : S.Ct. NO. 11-0202

VS : APA NO. 10 CA 8

STATE OF OHIO : TIAL Ct NO. 02-CR-020

APPELLEE. :

NOTICE OF CERTIFICATION OF CONFLICT

(PURSUANT TO S. Ct. Prac. R. 4.1)

Comes now the Appellant, Mr. Eric Qualls who while acting in Pro Se, do hereby give Notice of his intention to file for the Certification Of Conflict in the above captioned case.

The Appellant asserts that this case did not originate in the Court of Appeals and does involve a substantial Constitutional question.

RESPECTFULLY SUBMITTED

Eric A. Qualls
429625 J-Dorm
ROSS CORRECTIONAL INST.
P.O. BOX 7010
CHILLICOTHE, OHIO 45601

CERTIFICATE OF SERVICE

I, Eric Qualls, do hereby certify that a true and correct copy of the foregoing "NOTICE OF CERTIFICATION OF CONFLICT" was delivered to the R.C.I. Mailroom, addressed to the Prosecutor for Meigs County, Ohio on this the 27th day of JAN. 2011.

Eric A. Qualls

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. 10CA8

vs. :

ERIC QUALLS, : ENTRY ON MOTION TO CERTIFY RECORD TO THE SUPREME COURT

Defendant-Appellant. :

This matter comes on for consideration of the motion filed by Eric Qualls, defendant below and appellant herein, to certify our decision to the Ohio Supreme Court for review and final determination. On October 28, 2010, we affirmed the trial court's judgment that overruled appellant's motion for "De Novo Sentencing Hearing." See State v. Qualls, Meigs App. No. 10CA8, 2010-Ohio-5316.

On November 3, 2010, appellant filed a motion pursuant to App.R. 25 and asked us to certify this case to Ohio Supreme Court for review and final determination. Appellant argues that our judgment conflicts with the Ohio Supreme Court in State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, and the Sixth District in State v. Lee, Lucas App. No. L-09-1279, 2010-Ohio- 1704.

Section 3(B)(4), Article IV, Ohio Constitution states that "[w]henever the judges of a court of appeals find that a judgment

upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." (Emphasis added.) As the appellee correctly points out in its memorandum contra, appellate courts do not certify alleged conflicts between its decisions and decisions of the Ohio Supreme Court. If a litigant believes an appellate court's ruling conflicts with a pronouncement of the Ohio Supreme Court, the proper remedy is to appeal that judgment to the Ohio Supreme Court.

In view of our ultimate disposition of the motion to certify, however, we believe it beneficial to explain why we find no conflict between our decision and either Singleton, supra, or its progenitor, State v. Jordan, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085. Singleton and Jordan both involved situations in which the sentencing court failed to alert a defendant at a sentencing hearing to either (1)the imposition of post-release control, or (2) the ramifications of breaking post-release control. See respectively, 2004-Ohio-6985, at ¶¶2-3: 2009-Ohio-6434, at ¶4. The trial court in Jordan tried to correct those omissions in its sentencing entry, 2004-Ohio-6985, at ¶4, and the trial court in Singleton set out an erroneous notification in its sentencing entry. 2009-Ohio-6434, at ¶4.

The facts in this case, however, are almost the polar opposite. There is no question that appellant was notified of post-release control at his sentencing hearing. Indeed, he freely admitted as much. That notification was simply omitted from the sentencing entry. Does this make a difference? We believe that it does.

It is well-settled that trial courts possess the inherent authority to issue nunc pro tunc judgments to modify judgments to correctly reflect events in the record. See State v. Leone, Cuyahoga App. No. 94275, 2010-Ohio-5358, at ¶5; State v. Johnson, Scioto App. Nos. 07CA3135 & 07CA3136, 2009-Ohio-7173, at ¶11; State v. Dugan (May 28, 1998), Scioto App. No. 97CA2534. In light of appellant's admission that he was informed of post-release control at sentencing, a nunc pro tunc judgment would be an appropriate method to correct a sentencing entry to reflect that fact.

By contrast, a nunc pro tunc judgment entry would not have been appropriate in either Jordan or Singleton in which notification was absent altogether or there was a mis-notification. Nunc pro tunc judgments cannot be used to correct a mistake or to add something that was never done in the first place. See generally Johnson, supra at ¶11; State v. Jama,

Franklin App. Nos. 09AP-872 & 09AP-878, 2010-Ohio-4739, at ¶16.[1] There is no doubt that this intermediate appellate Court is bound by Ohio Supreme Court decisions, but we are reluctant to extend Jordan or Singleton beyond their specific facts to impose additional burdens on trial courts within this district.[2]

That said, we must agree with appellant that our decision conflicts with the Lucas County Court of Appeals in Lee. The operative facts in Lee are virtually identical to those in the case sub judice, specifically that the appellant was notified of

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[1] We also note that our ruling appears to be buttressed by the Ohio Supreme's Court recent ruling in State ex rel. Carnail v. McCormick, 126 Ohio St.3d 124, 931 N.E.2d 110, 2010-Ohio-2671. Although the facts in that case are unclear as to whether the petitioner was informed of postrelease control at his sentencing hearing, notice of that control was omitted from his sentencing entry. Id. at ¶2. The Ohio Supreme Court ruled that the appellant was entitled to a writ of mandamus to compel the trial court judge to issue a new (presumably, a nunc pro tunc) sentencing entry. Id. at ¶37.

[2] Our First District Colleagues apparently came to the same conclusion, at least insofar as Jordan was concerned, in their affirmance of a nunc pro tunc entry to correct a sentencing judgment that failed to include the same notification of post release control that was given at sentencing. State v. Gause, 182 Ohio App.3d 143, 911 N.E.2d 977, 2009-Ohio- 2140, at ¶2. Gause, admittedly, was decided almost two months before Singleton, but it came five years after Jordan. That a nunc pro tunc judgment could be used to correct a sentencing entry, after notification of postrelease control have been given at the sentencing hearing, was so obvious to the Hamilton County Court of Appeals that they quickly disposed of the issue without a Jordan analysis.

Our conclusion is further buttressed by a Twelfth District Court of Appeals decision in State v. Harrison, Butler App. Nos. Nos. CA2009-10-272, CA2010-01-019, 2010-Ohio-2709, at ¶¶16-25, which held that a nunc pro tunc entry can be used to correct a judgment that set out erroneous information about postrelease control so that it reflects correct information given at the sentencing hearing.

post release control at the sentencing hearing, that notification was not carried over to the sentencing entry and the trial court attempted to correct that omission with a nunc pro tunc entry. 2010-Ohio-1704, at ¶¶2-3. Our colleagues in the Sixth District held that a nunc pro tunc entry is insufficient to comply with Singleton. 2010-Ohio-1704, at ¶11.

The appellee counters that no conflict exists between this case and Lee because Lee involved arguments advanced pursuant to R.C. 2828.191, whereas the trial court here did not cite that statute. We, however, believe that this is a distinction without substance. Both the appellant in Lee and appellant in this case were sentenced well before the operative date of that statute and, thus, regardless of what was specifically argued, they are in the same position. Both were warned about postrelease control at sentencing, but neither had those warnings carried over into the sentencing entry. We find that a nunc pro tunc entry is sufficient to correct the error, but the Lee court disagreed.

In order for us to certify a conflict to the Ohio Supreme Court, an actual conflict must exist on a rule of law and not just on the facts. See Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596, 613 N.E.2d 1032, 1034; also see State v. Lewis (Jun. 24, 1998), Lawrence 97CA51. After our review of Lee, supra, we believe that our decision conflicts with the legal principle from that case.

We therefore certify to the Ohio Supreme Court the following question: If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, can that omission be corrected with a nunc pro tunc entry?

Harsha, P.J. & McFarland, J.: Concur

IT IS SO ORDERED.

Peter B. Abele, Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 10CA8
vs.	:	
ERIC QUALLS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Eric Qualls, #429-625, Ross Correctional Inst., P.O. Box 7010, Chillicothe, Ohio 45601

COUNSEL FOR APPELLEE: Colleen S. Williams, Meigs County Prosecuting Attorney, and Matthew J. Donahue, Meigs County Assistant Prosecuting Attorney, 117 West Second Street, Pomeroy, Ohio 45769

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Meigs County Common Pleas Court judgment that denied a motion for "De Novo Sentencing Hearing" filed by Eric Qualls, defendant below and appellant herein.

Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"WHEN A SENTENCE IS VOID AS A MATTER OF LAW BECAUSE IT DOES NOT CONTAIN A STATUTORILY MANDATED TERM OF 'PROPERLY IMPOSED' POST RELEASE CONTROL, A TRIAL COURT ABUSES ITS DISCRETION WHEN DENYING A MOTION FOR DE NOV

SENTENCING HEARING."

SECOND ASSIGNMENT OF ERROR:

"THE APPROXIMATELY EIGHT YEAR DELAY FROM THE FINDING [OF] GUILT UNTIL THE COURT IMPOSED SENTENCE CONSTITUTED AN UNNECESSARY, UNJUSTIFIED AND UNREASONABLE DELAY IN SENTENCING AND THEREFORE DIVEST[ED] THE COURT OF ITS JURISDICTION TO IMPOSE SENTENCE IN THIS CASE."

In 2002, appellant pled guilty to kidnapping and aggravated murder with a firearm specification and the trial court sentenced appellant to serve an aggregate prison term of thirty-three years to life. Appellant did not appeal his conviction.

In 2004, appellant filed an action in this Court and sought a writ of mandamus to compel the Meigs County Prosecutor to turn over certain records. We sua sponte dismissed his petition and the Ohio Supreme Court affirmed. See State ex rel. Qualls v. Story, 104 Ohio St.3d 343, 819 N.E.2d 701, 2004- Ohio-6565.

In 2006, appellant filed a petition for postconviction relief and asked to be re-sentenced. Summary judgment was entered against him and we affirmed. See State v. Qualls, Meigs App. No. 06CA7, 2007-Ohio-3938. The Ohio Supreme Court declined to hear any further appeal on appellant's petition. See State v. Qualls, 115 Ohio St.3d 1444, 875 N.E.2d 104, 2007-Ohio-5567.

This latest round of litigation began on January 25, 2010, when appellant filed a motion for a "de novo sentencing hearing." The gist of the motion is that the trial court informed

appellant at sentencing that he is subject to five years of post-release control after he is released from prison. Appellant argued, however, that he was convicted of a "special felony," and, thus, not subject to post-release control under R.C. 2967.28.

Appellee's memorandum contra responded that post-release control was not imposed on the aggravated murder charge but, rather, on the kidnapping charge. Appellee conceded, however, that an error occurred in the sentencing entry that appellant had not raised in his motion. Although appellant was informed of post-release control at the hearing, a provision to indicate that fact was inadvertently omitted from the sentencing entry. The State requested the court issue a nunc pro tunc judgment to correct the entry and to make it conform with the actual events that transpired at the hearing.

Appellant, in turn, promptly filed a motion to dismiss the charges against him reasoning that his original sentence is invalid, and thus void, and should be held for naught. We note that more than eight years elapsed between appellant's original conviction and the new de novo hearing to which he claimed himself entitled and such delay, he asserts, is "unreasonable."

On March 29, 2010, the trial court (1) denied appellant's motion for a de novo hearing, and (2) issued a nunc pro tunc sentencing entry that included language regarding appellant's

post-release control. The court did not expressly rule upon appellant's motion for dismissal of the charges against him, but we will treat it as having been impliedly overruled.[1] This appeal followed.

I

In his first assignment of error, appellant asserts that the trial court erred by overruling his motion for a de novo hearing. Appellant's motion is based on an argument that post-release control was improperly imposed upon his conviction for aggravated murder. However, post-release control was imposed on the kidnapping count, not the aggravated murder count. Thus, the trial court correctly overruled the motion.[2]

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[1] Takacs v. Baldwin (1995), 106 Ohio App.3d 196, 209, 665 N.E.2d 736; In re Sites, Lawrence App. No. 05CA39, 2006-Ohio-3787, at ¶18, fn. 6; Kline v. Morgan (Jan. 3, 2001), Scioto App. Nos. 00CA2702 & 00CA2712.

[2] We note appellant should have been barred from raising this issue based on grounds of res judicata. An alleged failure to comply with Ohio's complex felony sentencing statutes could have been, and should have been, raised on appeal. Appellant, however, did not file an appeal and should be barred from raising the issue at this date. However, in State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, a majority of the Ohio Supreme Court held that a failure to impose post-release control renders a judgment void, rather than voidable, and res judicata does not apply. Id. at ¶¶21-22 & 30. Consequently, this Court and the trial court are bound by the majority opinion in Simpkins (rather than Justice Lanzinger's dissenting view). Id. at ¶¶39-52. Furthermore, a separate procedure must now be employed for sentences imposed after 2006. See State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, and R.C. 2929,191.

Appellant also claims that the trial court failed to provide him with other statutory information at the sentencing hearing. However, this issue was not raised in his motion for a de novo hearing and, thus, the appellee has not had the chance to respond to that allegation. We will not consider such claims raised for the first time on appeal. State v. Musser, Ross App. No. 08CA3077, 2009-Ohio-4979, at ¶6; State v. Stephens, Pike App. No. 08CA776, 2009-Ohio-750, at ¶7.

Appellant also asserts that the trial court erred by issuing the nunc pro tunc entry. At the outset, we note that this argument is not set forth as an assignment of error. See App.R. 12(A)(1)(b). Nevertheless, in view of our policy to afford leniency to pro se litigants, see e.g. Akbar-El v. Muhammed (1995), 105 Ohio App.3d 81, 85, 663 N.E.2d 703; Besser v. Griffey (1993), 88 Ohio App.3d 379, 382, 623 N.E.2d 1326, we will consider the issue.

In his motion for de novo hearing, appellant admitted that he "was also informed that he would be subject to 5 years of Post Release Control upon his release." (Emphasis added.) The appellee also cites a portion of the hearing transcript in which the court not only informed appellant of the control, but also directed defense counsel to make sure that he understood what it meant. After appellant and counsel discussed the matter, the court asked appellant directly if he understood post-release

control" and appellant responded "Yes, sir."

Under circumstances virtually identical to those present here, our First District colleagues held:

> "The original sentencing court, during sentencing, informed [defendant] that he would 'be placed on post-release control for a period of five years,' but that notification was not reflected in the sentencing entry. The court below attempted to remedy the omission by resentencing [defendant] . . . The trial court had no authority to resentence [him]. The proper remedy was to add the omitted postrelease-control language in a nunc pro tunc entry after a hearing."

State v. Gause, 182 Ohio App.3d 143, 911 N.E.2d 977, 2009-Ohio-2140, at ¶2. We agree that this is the proper remedy to employ under these circumstances and find no error on the trial court's part.

Thus, for these reasons, we hereby overrule appellant's first assignment of error.

II

In his second assignment of error, appellant asserts that the trial court erred by overruling his motion to dismiss all charges due to the "delay" in sentencing him. Again, we disagree.

In the case sub judice, there was no "delay" in sentencing. The trial court sentenced appellant in 2002. While some errors may have occurred in the sentencing entry, which apparently rendered that sentence "void," the fact remains that sentencing did in fact occur. We also note that although res judicata may

not bar appellant from raising statutory mistakes in sentencing eight years after the fact, it does bar him from challenging his conviction - a conviction entered after his guilty plea to the offenses, thereby completely admitting guilt. See Crim.R. 11(B)(1). Thus, the second assignment of error is without merit and is hereby overruled.

Having reviewed all errors assigned and argued by appellant in his brief, and having found merit in none of them, the trial court's judgment is hereby affirmed.

JUDGMENT AFFIRMED.

MEIGS, 10CA8

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and 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 Meigs County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Court of Appeals of Ohio,
Sixth District, Lucas County.

STATE of Ohio, Appellee
v.
Johnny LEE, Jr., Appellant.

ORIGINAL

No. L-09-1279.
Decided April 16, 2010.

West KeySummary

110 Criminal Law
110XXIII Judgment
110k996 Amendment or Correction
110k996(1) k. In General.

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(G) Hearing
350Hk350 Advice and Warnings
350Hk354 k. Other Particular Issues.

Court's attempt to remedy its failure to include the mandatory postrelease control language in the defendant's sentence, via a nunc pro tunc entry, was improper. The defendant argued that he was entitled to resentencing because the trial court had failed to comply with the statutory sentencing requirement, that his sentence include postrelease control, when it failed to included post release sentencing in his sentencing order. While the defendant had been informed of his postrelease sentence during sentencing, the courts failure to include postrelease terms in his sentencing order could not be remedied by a later nunc pro tunc entry. The defendant was entitled to resentencing. R.C. § 2929.191.

Julia R. Bates, Lucas County Prosecuting Attorney, and Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Johnny Lee, Jr., pro se.

COSME, J.

*1 {¶ 1} This appeal arises from the filing by the Lucas County Court of Common Pleas of a nunc pro tunc entry attempting to correct its omission of the mandatory term of postrelease control in appellant's sentencing order. Because appellant was sentenced before the effective date of R.C. 2929.191, any defects in the mandatory notification of postrelease control require a de novo sentencing hearing consistent with the decisions of the Supreme Court of Ohio. For the reasons that follow, this matter is remanded to the trial court for a new sentencing hearing.

I. BACKGROUND

{¶ 2} Appellant pled guilty to one count of felonious assault, a second degree felony, and was sentenced to seven years of incarceration on September 17, 2003. Appellant was informed of the postrelease control during sentencing pursuant to R.C. 2929.19(B)(3), but the trial court failed to incorporate this notice into the sentencing order filed September 18, 2003.

{¶ 3} On August 12, 2009, appellant moved for resentencing arguing that the trial court had failed to comply with the statutory sentencing requirements. Without hearing, the trial court filed a nunc pro tunc entry on September 22, 2009, which states only: "Entry should reflect: Post Release Control Notice under R.C. 2929.19(B)(3) and R.C. 2967.28 was given at time

of sentencing." FN1 This appeal followed.

FN1. Our holding in this case should not be construed as questioning the sufficiency of the notice in the nunc pro tunc entry. In *State v. Milazo*, 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 24, 27, citing *State v. Blackwell*, 6th Dist. No. L-06-1296, 2008-Ohio-3268, ¶ 15, this court held that an identically worded original entry of sentencing was satisfactory. Here, no notice was given in the original sentencing entry.

II. PRE-JULY 11, 2006 SENTENCES

{¶ 4} Appellant's first assignment of error asks:

{¶ 5} "Whether a nunc pro tunc order can be used to supply the omitted action of 'mandatory' postrelease control, Norris v. Schotten, 146 F.3d 314, at: 333-336 (6th Cir.1998), quoting *State v. Gruelich*, --- N.E.2d ---- (citation omitted). *see also:* State v. Boswell, 121 Ohio St.3d 575, 906 N.E.2d 422."

{¶ 6} At the outset, the trial court is required to order postrelease control as part of the sentence for all offenders convicted of first and second-degree felonies, or violent third-degree felonies. R.C. 2929.19(B)(3). It is undisputed that the trial court notified appellant at his sentencing hearing that he would be subject to mandatory postrelease control. The trial court did not, however, include this notice in the sentencing entry.

{¶ 7} The state asserts that the nunc pro tunc entry was proper because R.C. 2929.191 provides a mechanism for a trial court to correct its own judgment entry. We disagree.

{¶ 8} In State v. Jordan, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085, paragraph two of the syllabus, superseded by statute, State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio held that the notice of the postrelease control requirement at sentencing is mandatory, and the trial court must also include that notice in its journal entry imposing sentence. The failure to notify a defendant about post-release control requires reversal of the sentence and a remand for resentencing.

{¶ 9} In State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, ¶ 6, certiorari denied (2008), --- U.S. ---, 129 S.Ct. 463, 172 L.Ed.2d 332, superseded by statute on other grounds as stated in State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio stated: "[I]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence."

*2 {¶ 10} Most recently, in State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio addressed the statutory remedy to correct a failure to properly impose postrelease control. Am.Sub.H.B. No. 137, effective July 11, 2006, amended R.C. 2929.14, 2929.19, and 2967.28 and enacted R.C. 2929.191. R.C. 2929.191 established a procedure to remedy such a sentence. The court in *Singleton* noted that prior to the enactment of R.C. 2929.191, the state did not have a statutory remedy for sentences that lacked proper postrelease control. Id. at ¶ 25, 920 N.E.2d 958. Therefore, for those sentences that were imposed prior to the effective date of R.C. 2929.191, the de novo sentencing procedure set forth in *Singleton* should be followed. Id. at ¶ 26, 920 N.E.2d 958.

{¶ 11} Consistent with *Singleton*, we find that the trial court's nunc pro tunc entry was not adequate to remedy its failure to include the mandatory postrelease control language in the original sentencing order. Accordingly, appellant's first assignment of error is well-taken.

III. SENTENCING TRANSCRIPT

{¶ 12} Appellant's second assignment of error sets forth the following question:

{¶ 13} "Where the transcript of the proceedings (plea and sentencing) has been destroyed, may a reviewing court accept a belated nunc pro tunc entry which insufficiently seeks to impose a term of * [sic] undefined postrelease control as controlling as to law and fact, see: State v. Hofman, 2004 WL 2848938 (Ohio App. 6 Dist.), 2004-Ohio ----."

{¶ 14} In his second assignment of error, appellant implies that the sentencing transcript has been destroyed, and the unavailability of the transcript would bar the imposition of postrelease control. The record reflects, however, that a transcript of the sentencing proceedings on September 17, 2003, is part of the record through appellant's own "Motion for 'Sentencing" filed with the common pleas court on August 12, 2009. As such, we need not reach the question of whether the unavailability of a transcript would bar the imposition of postrelease control. Appellant's second assignment of error is moot.

IV. CONCLUSION

{¶ 15} We hold that for sentences imposed prior to the effective date of R.C. 2929.191, a defect in the postrelease control notification renders the sentence void and such actions are subject to de novo sentencing hearings.

{¶ 16} Here, the trial court failed to notify appellant-in the sentencing entry-of mandatory postrelease control. The nunc pro tunc entry is insufficient to cure the defect in notice. Because appellant was not advised of his mandatory postrelease control in the sentencing entry, the de novo sentencing procedure detailed in the decisions of the Supreme Court of Ohio is the appropriate method to correct appellant's criminal sentence which was imposed in 2003.

{¶ 17} Wherefore, based upon the foregoing, the judgment of the Lucas County Court of Common Pleas is reversed and remanded for resentencing in accordance with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

*3 JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

ARLENE SINGER, J., THOMAS J. OSOWIK, P.J., and KEILA D. COSME, J., concur.

Ohio App. 6 Dist.,2010.
State v. Lee
Slip Copy, 2010 WL 1511708 (Ohio App. 6 Dist.), 2010 -Ohio- 1704

END OF DOCUMENT

IN THE COURT OF COMMON PLEAS, MEIGS COUNTY, OHIO

STATE OF OHIO v ERIC A. QUALLS Case No. **02-CR-020**

PETITION TO ENTER A PLEA OF GUILTY

THE DEFENDANT represents to the Court:

(1) My full name is ERIC A. QUALLS, and I request that all proceedings against me be had in that name; and I am mentally competent to make this Petition. I understand should the pleas of guilty herein tendered not be accepted and a trial follows, that admissions made herein would not be admissible against me at said trial. I AM A CITIZEN OF THE UNITED STATES.

(2) I am represented by Counsel, William N. Eachus of the Gallia County Bar and K. Robert Toy of the Athens County Bar.

(3) I enter a plea of guilty to the following offenses: being Count One of the Indictment as hereinafter amended and Count Three of the Indictment as hereinafter amended, to-wit:

Count or Specification	*Offense/Specification*	*ORC Section*	*Level*
One	**AGGRAVATED MURDER** ***w/Firearms Spec.***	2903.01	Special Category Felony
Three	**KIDNAPPING**	2905.01	Felony of the First Degree

(4) I have consulted with my legal Counsel and I understand the nature of the charge against me and my rights under the Constitution of the United States and the State of Ohio; I understand the possible consequences of a plea of guilty; I understand all possible defenses that I might have in this case.

(5) I understand that I may plead 'Not Guilty" to any offense charged against me. If I choose to plead "Not Guilty" the Constitution guarantees me (a) the right to speedy and public trial by jury, (b) the right to see and hear all witnesses called to testily against me, (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor, and (d) the right to have the assistance of a lawyer at all stages of the proceedings, (e) I also understand that if I plead "Guilty" to the charges against me, the Court may impose the same

punishment as if I had plead "Not Guilty", stood trial and had been convicted by a jury.

(7) MAXIMUM PENALTY. I understand that the maximum penalty as to each count or specification is as follows:

Offense/ Specification	Maximum Stated Prison Term (Yrs./Mos.)	Maximum Fine	Mandatory Fine	License Suspension	Prison Term is Mandatory/ Consecutive	Prison Term is Presumed Necessary
AGG. MURDER	**LIFE Parole Eligible After 20 Full Yrs.**	$25,000	N.A.	N.A.	Mandatory	Yes
Firearms Specification	**Three years**	—	—	—	Mandatory Consecutive	Yes
KIDNAP	**10 YEARS**	$20,000	N.A.	N.A.	Mandatory	Yes

I understand that the offense to which I enter the pleas of guilty do not permit community control, as provided in Revised Code Section 2929.14 et seq and that a sentence of imprisonment up to the maximum is mandatory.

Prison terms for multiple charges, even if consecutive sentences are not mandatory, may be imposed consecutively by the Court. The MAXIMUM aggregate sentence as to Aggravated Murder with a Firearms Specification and Kidnapping is life in prison with no parole eligibility for a period of THIRTY-THREE full years and the maximum aggregate fine could be forty-five thousand dollars ($45,000.00). Court costs, restitution and other financial sanctions including fines, day fines, and reimbursement for the cost of any sanctions may also be imposed.

I understand that if I am now on felony probation, parole, under a community control sanction, or under post release control from prison, this plea may result in revocation proceedings and any new sentence could he imposed consecutively. I know any prison term stated will be served without good time credit.

(8) I understand the nature of these charges and the possible defenses I might have. I am not under the influence of drugs or alcohol. No threats have been made to me. No promises have been made except as part of this plea agreement stated entirely as follows:

a.) Defendant to plead guilty to Counts One and Three, as amended, of the Indictment. The Defendant stipulates and agrees that there is a factual basis for the Court to find that the maximum, consecutive sentences are required, and specifically, the Defendant stipulates and agrees that the victim suffered serious physical harm, and specifically death, that the offense was more serious as provided in Revised Code Section 2929.12 (B); that the Defendant has a history of prior misdemeanor criminal convictions,

indicating that recidivism is likely, as provided in Revised Code Section 2929.12 (C); that the offender committed the worst form of the offense, as provided in Revised Code Section 2929.14 (C); that to impose less than the longest term would demean the seriousness of the offense and not adequately protect the public, as provided in Revised Code Section 2929.14 (A). The Defendant further stipulates and agrees that consecutive sentences are necessary to protect the public and punish the offender, are not disproportionate to the conduct and to the danger the offender poses and the harm was so great or unusual that a single term does not adequately reflect the seriousness of the conduct and the Defendant's criminal history shows that consecutive terms are needed to protect the public.

b.) As to sentencing, the State will recommend as follows:

As to Count One, charging the offense of Aggravated Murder with a Firearms Specification, that the Defendant be Ordered to serve a sentence of Life with parole eligibility after twenty (20) full years and as to the firearms specification, that the Defendant be Ordered to serve a sentence of three (3) years, which sentence is mandatory and must be served consecutive to the sentence of Life with parole eligibility after twenty (20) full years. As to Count Three, charging the offense of Kidnapping, a felony of the first degree, that the Defendant be Ordered to serve a sentence of ten (10) years, which sentence is mandatory, the Offense being a felony offense of violence as defined in Revised Code Section 2901.01, and the Defendant having a firearm on or about his person or under his control during the commission of the offense. The State of Ohio will further recommend that all sentences be Ordered to be served consecutively, or one after the other, for an aggregate sentence of imprisonment for life with parole eligibility after the Defendant has served thirty-three (33) full years.

In consideration of pleas of guilty to Counts One and Three, the State of Ohio will move the Court to dismiss Count Two of the Indictment herein.

c .) As to restitution, none is requested. No fine, as the Defendant is indigent.

(9) By pleading guilty I admit committing the offenses and will tell the Court the facts and circumstances of my guilt. I know the offenses to which I am pleading guilty do not permit community control and are mandatory sentences of imprisonment. I specifically waive any right I may have to a pre-sentence investigation and request that the Court proceed immediately with judgment and sentence with full understanding that I will be Ordered to serve a sentence of imprisonment up to the maximum permitted by law for each count and that any sentences could be Ordered to be served consecutively or one after the other. I understand my right to timely appeal a maximum sentence, my other limited appellate rights and that any appeal must be filed within 30 days of my sentence. I understand that I have the right to Counsel to assist in any appeal, and the right to have Counsel appointed upon a finding of indigency. I understand the consequences of a conviction upon me if I am not a U.S. citizen.

(10) I plead "Guilty" and respectfully request the Court to accept my plea of "Guilty" and to have the Clerk enter my plea of "Guilty" and hereby stiplate that there is a factual basis for Court to find me guilty.

(11) I offer my plea of "Guilty" freely and voluntarily and of my own accord and with full understanding of all the matters set forth in the Indictment and in this Petition. I admit my guilt to the offenses charged and specifically that

*I, **ERIC A. QUALLS (DOB 09-17-75 SSN 276-72-9203)** did:*

Count One: on or about March 7, 2002, in the Village of Middleport, Meigs County, Ohio, did purposely, and with prior calculation and design, cause the death of another, to-wit: Rebecca Ackerman and

I further admit to the Specification to Count One that I, Eric A. Qualls, had a firearm on or about my person or under my control while committing the offense and displayed the firearm, brandished the firearm, indicated the offender had a firearm or used a firearm to facilitate the offense,

said offense being commonly known as AGGRAVATED MURDER with a Firearms Specification, a Special Category Felony, in violation of Ohio Revised Code Section 2903.01 (A);

Count Three: on or about March 7, 2002, in the Village of Middleport, Meigs County, Ohio, did, by force, threat or deception, remove another, to-wit: Rebecca Ackerman, from the place where she was found or restrain the liberty of the said Rebecca Ackerman, to terrorize or to inflict serious physical harm on the victim, and further specifically that I, Eric A. Qualls, did not release the victim in a safe place unharmed, said offense being commonly known as KIDNAPPING, a felony of the first degree, in violation of Ohio Revised Code Section 2905.01 (A)(3).

(12) I further understand that the recommendation of the Prosecuting Attorney is only a recommendation and that the Court and the Court alone determines the appropriate sentence. I understand that the Court can proceed today and Order me to serve the maximum sentence for each count and specification and that any or all sentences could be Ordered to be served consecutively or one after the other.

(13) I further state that I wish to waive the 24 hour service of the amended Indictment, and I request the Court to enter my plea of "Guilty" as set forth in paragraph ten (10) of this Petition.

(14) I have the right to appeal this conviction by filing Notice of Appeal within 30 days of the date of sentencing. If without sufficient funds, I have the right to a transcript and lawyer without cost to me.

Signed by me in open Court this 15th day of August 2002.

Eric A. Qualls, Defendant

William N. Eachus, Counsel for Defendant

K. Robert Toy, Counsel for Defendant

PAT STORY 0055732
Prosecuting Attorney

CHRISTOPHER E. TENOGLIA 0055290
Assistant Prosecuting Attorney

WAIVER OF JURY TRIAL AND ACKNOWLEDGEMENT OF RIGHTS

I, the defendant in the above case, being now in open court, hereby voluntarily waive and relinquish my right to trial by jury. Further, I acknowledge that all explanations required by Ohio Rules of Criminal Procedure 11(c) have been explained to me and I fully understand that a plea of guilty gives up those rights.

Eric A. Qualls, Defendant

William N. Eachus, Counsel for Defendant

K. Robert Toy, Counsel for Defendant

PAT STORY 0055732
Prosecuting Attorney

CHRISTOPHER E. TENOGLIA 0055290
Assistant Prosecuting Attorney

FINDING OF GUILTY PLEA

The Court hereby determines that the Defendant understands all of his rights specified in Rule 11(e), Rules of Criminal Procedure and that he has been advised of his constitutional rights and that he stated in open Court that he understood and waived all these rights before entering his plea of guilty to the crime with which he stands charged. The above plea of "Guilty" is accepted and ordered filed, and the Court hereby finds the Defendant guilty.

JUDGE FRED W. CROW III
Presiding Judge

JUDGE RICHARD WALTON
By Assignment of the Ohio Supreme Court

JUDGE DAN W. FAVREAU
By Assignment of the Ohio Supreme Court

COMMON PLEAS COURT

2002 AUG 15 AM 11:18

CLERK OF COURTS

IN THE COMMON PLEAS COURT OF MEIGS COUNTY, OHIO

V. 142 P. 375

STATE OF OHIO,	:	
Plaintiff,	:	Case No. **02-CR-020**
vs.	:	**JUDGE FRED W. CROW III** **JUDGE RICHARD WALTON**
	:	**JUDGE DAN W. FAVREAU**
ERIC A. QUALLS,	:	**SENTENCING ENTRY** **AGGRAVATED MURDER with**
	:	***Firearms Specification*** **2903.01 (A) Special Category Felony**
Defendant.	:	**KIDNAPPING** **2905.01 Felony of the 1st Degree**

On the 15th day of August, 2002, appeared Prosecuting Attorney Pat Story and Assistant Prosecuting Attorney Christopher E. Tenoglia, on behalf of the State of Ohio, and the Defendant, **ERIC A. QUALLS**, with his Counsel, William N. Eachus and K. Robert Toy.

Whereupon the Prosecuting Attorney informed the Court that the State had entered into discussions with the Defendant and his Counsel and, that in accordance with provisions of Rule 11(F) of the Ohio Rules of Criminal Procedure, the Defendant indicated that it was his desire to enter voluntary pleas of **GUILTY** to **Count One** of the Indictment, as amended, **charging the offense of AGGRAVATED MURDER** with a Firearms Specification but with no aggravating circumstances, **a Special Category Felony,** in violation of Ohio Revised Code Section 2903.01 (A) and **Count Three** of the Indictment, as amended, **charging the offense of KIDNAPPING, a Felony of the First Degree,** in violation of Ohio Revised Code Section 2905.01 (A)(3).

The Defendant advised the Court that his understanding of what had taken place conformed with what the Prosecutor had said. Thereupon, the Defendant informed the Court that it was his desire to enter pleas of of **GUILTY** to **Count One** of the Indictment, as amended, **charging the offense of AGGRAVATED MURDER** with a Firearms Specification but with no aggravating circumstances, **a Special Category Felony,** in violation of Ohio Revised Code Section 2903.01 (A) and **Count Three** of the Indictment, as amended, **charging the offense of KIDNAPPING, a Felony of the First Degree,** in

violation of Ohio Revised Code Section 2905.01 (A)(3).

Whereupon, the Court inquired if the family of the victim had been advised of the proposed pleas and of their rights as victims of crime, to which inquiry the Prosecuting Attorney did respond in the affirmative and did further indicate the members of the victim's family were present and desired to address the Court regarding the victimization at the appropriate time.

A representative of the victim's family did thereupon advise the Court that what the Prosecutor has stated was correct and that the family agreed with the proposed pleas of guilty.

It is **ORDERED** that the Court Reporter cause to be transcribed the statements by members of the victims family and thereafter to forward a copy of the same to the Adult Parole Authority Victim Notification Office.

Whereupon, the Court advised the Defendant that **AGGRAVATED MURDER,** as charged in Count One of the Indictment as amended, is a Special Category Felony, carrying a maximum possible penalty of Life imprisonment with parole eligibility after twenty (20) full years and a fine of up to $25,000.00; additionally, Count One contains a **Firearms Specification,** which carries a mandatory consecutive sentence of three (3) years; **KIDNAPPING**, as charged in Count Three of the Indictment, as amended, is a felony of the first degree, carrying a maximum possible penalty of ten (10) years in a state penal institution and a fine of up to twenty thousand dollars ($20,000.00). In addition, any sentence imposed herein could be Ordered to be served consecutive to any other sentence of imprisonment, and that as a result, the maximum possible penalty could be an aggregate sentence of life in prison with parole eligibility after thirty-three (33) full years in a state penal institution and a maximum aggregate fine of forty-five thousand dollars ($45,000.00).

Upon inquiry of the Defendant, the Court finds that the Defendant has voluntarily entered pleas of **GUILTY** to Count One, as amended, charging the offense of **AGGRAVATED MURDER,** with a Firearms Specification, a Special Category Felony, in violation of Ohio Revised Code Section 2903.01 (A) and **GUILTY** to Count Three, as amended, charging the offense of **KIDNAPPING,** a felony of the first degree, in violation of Ohio Revised Code Section 2905.01 (A)(3), with full understanding of the nature of the charges and the possible penalties involved. The Court further inquired of the Defendant whether he fully understood the effect of the pleas of **GUILTY** and that the Court, upon acceptance of the pleas might proceed immediately with judgment and sentence; and whether the Defendant understood that by entering the pleas of **GUILTY,** he would be waiving his right to a trial by jury or to the Court; to confront witnesses against him; to have compulsory process for obtaining witnesses in his own behalf; and the right to have the

State prove guilt beyond a reasonable doubt, at a trial, to a jury or to the Court each and every element of the offenses and specification, where the Defendant could not be compelled to testify against himself. The Court further inquired of the Defendant if he understood that any recommendation of the Prosecuting Attorney as to sentencing is only a recommendation and not binding upon the Court; that the Court and the Court alone determines the appropriate sentence. The Defendant replied in the affirmative to all of the above inquiries.

The Defendant was further advised by the Court that any sentence imposed would served without any "good time" credit. The Defendant was further advised that the offenses to which the pleas of guilty are offered, being felony offenses of violence as defined in Revised Code Section 2901.01, and being committed while the Defendant had a firearm on or about his person or under his control, do not permit community control and carry mandatory sentences of imprisonment.

Thereupon, the Defendant executed a Written Waiver of Indictment, a Written Waiver of Trial by Jury or to the Court and a Written Plea of Guilty. The Court finds that all said Waivers are made voluntarily, knowingly and intelligently. The same are each and all accepted by the Court and Ordered to be made a part of the record of the proceedings herein.

The Court, being fully satisfied that the Plea is made knowingly, voluntarily and intelligently, and being fully satisfied that the Defendant did commit the elements in the offense as charged, and being convinced that the Defendant fully understands his plea of **GUILTY,** hereby finds the Defendant, **ERIC A. QUALLS**, **GUILTY** of **AGGRAVATED MURDER**, a Special Category Felony, in violation of Ohio Revised Code Section 2903.01 (A); and **GUILTY** of the **Firearms Specification** therein contained, and **GUILTY** of **KIDNAPPING**, a felony of the first degree, in violation of Revised Code Section 2905.01 (A)(3).

The Court finds that the Defendant has stipulated and the Court finds that there is a factual basis, and it does so find the maximum, consecutive sentences should be imposed. Specifically, the Defendant stipulates and agrees that the offense was more serious; that the Defendant has a history of prior misdemeanor criminal conduct, and that recidivism is more likely; and that the shortest term would demean the seriousness of the offenses and not adequately protect the public and the Defendant committed the worst form of the offense and the Defendant poses the greatest likelihood of committing future crimes. The Court further finds that consecutive sentences are necessary to protect the public, to punish the offender and consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public.

The Court further finds that the Defendant is not amenable to available community control sanctions.

Further, the Defendant did waive any right to a pre-sentence investigation and request that the Court immediately proceed with sentencing.

Whereupon, the Court inquired of the Defendant and his Counsel if either had anything further to say why sentence should not be pronounced or in mitigation thereof, and no good and sufficient reason to the contrary being given or appearing or appearing to the Court, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the said **ERIC A. QUALLS as to the Firearms Specification to Count One,** that the Defendant be imprisoned and confined at the appropriate state penal institution for a **term of term of three years, which sentence is a mandatory sentence; as to** Count Three of the Indictment, as amended, charging the offense of **KIDNAPPING,** a Felony of the First Degree, in violation of Ohio Revised Code Section 2905.01 (A)(3), that the Defendant be imprisoned and confined at the appropriate state penal institution for a **term of ten (10) years: and as to** Count One of the Indictment, as amended, charging the offense of **AGGRAVATED MURDER**, be imprisoned and confined at the appropriate state penal institution, for a **term of Life with parole eligibility after twenty (20) full years. It is further ORDERED that said sentences be served consecutively for an aggregate sentence of life in prison with no eligibility for parole for a period of thirty-three (33) full years in a state penal institution.** It is further **ORDERED** that the Defendant be given jail time credit for one hundred seventy-one (171) days, as of August 15, 2002, for local confinement during the pendency of this matter, as well as any additional days thereafter until he shall be delivered into the care and custody of the state penal institution.

Upon application of the Prosecuting Attorney, as provided in the Plea Petition and upon the pleas of guilty to Count One, with the firearms specification and Count Three of the Indictment, as amended, to enter a Nolle Prosequi as to Count Two, the Court finds said Motion is well-taken and the same should be and hereby is granted. It is therefore **ORDERED** that Count Two of the Indictment is dismissed.

No fine is Ordered, the Defendant being indigent.

It is further **ORDERED** that the Defendant is remanded to the custody of the Sheriff of Meigs County who shall forthwith and according to law transport and convey the said ERIC A. QUALLS to the Orient Correctional Reception Center to commence the sentence of imprisonment as Ordered herein. It is further **ORDERED** that a copy of this Entry shall serve as an Order of Commitment thereon.

It is further **ORDERED** that the Defendant shall pay the costs of this matter as determined by the Clerk of Courts for which judgment is rendered and execution may issue.

The Court did advise the Defendant of his right to timely file an appeal from the judgment and sentence herein for the imposition of the maximum sentence, and did further advise the Defendant of his right to Counsel to assist in any appeal, his right to have such Counsel appointed upon a finding of indigency, his right to have a transcript of the proceedings and copies of any and all pleadings herein.

THIS IS A FINAL APPEALABLE ORDER. THE CLERK, PURSUANT TO CIVIL RULE 58 (B), SHALL SERVE NOTICE OF SAME ON ALL PARTIES WHO ARE NOT IN DEFAULT OF ENTRY OF APPEARANCE. WITHIN THREE (3) DAYS AFTER JOURNALIZATION OF THIS ENTRY, THE CLERK IS REQUIRED TO SERVE NOTICE OF THE JUDGMENT PURSUANT TO CIVIL RULE 5 (B).

SO ORDERED.

JUDGE FRED W. CROW III
Presiding Judge

JUDGE RICHARD WALTON
By Assignment of the Ohio Supreme Court

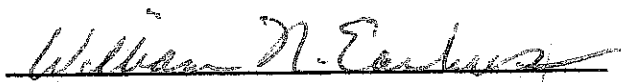
JUDGE DAN W. FAVREAU
By Assignment of the Ohio Supreme Court

SUBMITTED:

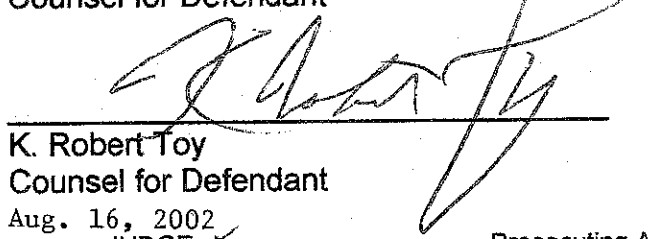
PAT STORY 0055290
Prosecuting Attorney

CHRISTOPHER E. TENOGLIA 0055290
Assistant Prosecuting Attorney

APPROVED:



William N. Eachus
Counsel for Defendant



K. Robert Toy
Counsel for Defendant

Aug. 16, 2002
cc: JUDGE
William N. Eachus, Attorney
Sheriff
Clerk of Courts
Defendant
Prosecuting Attorney
K. Robert Toy, Attorney
~~SEPTA~~
Board of Elections
Victim

DL

ERIC QUALLS AGG MURDER KIDNAPPING SE.wpd:pg

IN THE COURT OF COMMON PLEAS
MEIGS COUNTY, OHIO

2010 MAR 29 PM 1:20

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 02-CR-020
-vs.-	:	**JUDGE FRED W. CROW III** **JUDGE DAN W. FAVREAU** **JUDGE RICHARD WALTON**
ERIC QUALLS,	:	
Defendant.	:	

V 188 P791

CLERK OF COURTS

Entry to Defendant's Motion for a *De Novo* Sentencing Hearing

The admitted and convicted, murder and kidnapper, defendant Eric Qualls, hereafter Qualls, has filed his latest post-conviction motion[1]. Qualls asserts in his newest motion that he should have a *de novo* sentencing hearing[2]. Boiled down to its point Qualls argument is that because one of his convictions, aggravated murder is an unclassified felony, then he cannot be placed upon post-release control for any reason, and thus he should be resentenced, omitting post-release control from his sentence. Qualls is flat wrong and fails, again.

In Ohio if a defendant, sentenced prior to July 11, 2006, was not advised of post-release control the defendant should be brought back for a *de novo* sentencing hearing in accordance with the case law and procedures outlined by the Ohio Supreme Court.[3] It is true post-release control does not apply to an indefinite sentence such as aggravated murder, but post-release control does apply to definite sentences such as kidnapping, and does apply to the definite

[1] This includes, but is not limited to, several motions to withdraw his pleas of guilty, attempted delayed appeals, improper public records actions, and an attempted writ of mandamus against the former elected-prosecutor who convicted him.
[2] Def. Mot. at page 2
[3] State v. Singleton, Slip Op. 2009 Ohio 6434, Par. one of the syllabus

3/2

convictions in situations where indefinite and definite convictions are both present in the same sentence. [4]

Qualls admits that he was informed that he would be subject to 5 years of post-release control at his sentencing.[5] Qualls was not only informed of the post-release control but Judge Crow, whom was the presiding judge clarified that post-release control applied to the kidnapping charge only, in the following exchange:

> **Judge Crow**: (after explaining post-release control) That would be appropriate advice as to the Kidnapping charge, would it not, counsel?
> **(Defense)Attorney Eachus**: It would, Your Honor.
> **Judge Crow**: Go over that with your client and make sure he understands that, and have him acknowledge that he does understand it.
> **Defendant confers with counsel.**
> **Attorney Eachus**: Your Honor, we have reviewed that with our client.
> **Judge Crow**: Do you understand what I said and what your counsel has told you about post-release control?
> **Defendant:** Yes, sir.[6]

In this particular case, it is clear that the post-release control advisement was for the kidnapping charge only, and not for the aggravated murder charge. On the aggravated murder charge Qualls is subject to decisions of the parole board, whom may or may not grant parole.[7] Thus Qualls motion is denied on its grounds.

Qualls motion has however caused the State to notice, and bring to the Court's attention, an additional issue regarding Qualls original sentencing entry. Qualls, original sentencing entry does not contain post-release control language, although Qualls as outlined above was advised and admits he was advised of post-release control. Without this language the parole board would be unable to

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[4] State v. Clark, (2008) 119 Ohio St.3d 239 at 246.
[5] Def. Mot. at page 2.
[6] Tran. of Sent. Hearing of Aug 15, 2002. Pg 9, lines 17-25, pg 10, lines 1-3
[7] State v. Clark, 119 Ohio St.3d 246

supervise Qualls, under the post-release control provision, if he ever was released. This is not the first time in Ohio this has occurred, and in situations, such as exist here, where the defendant was orally informed of post-release control but the post-release control language was omitted from the entry, the sentencing court should not resentence the defendant, under the applicable case law or statue. Rather the sentencing court should issue a corrective entry *nunc pro tunc*.[8] A *nunc pro tunc* is appropriate in this case because this Court, by a clerical entry, merely omitted from the journal entry what it did in fact do at the sentencing hearing.[9]

By Qualls own admission, and from a review of the transcript, this is not a situation where Qualls, was not advised of the post-release control, but one in which the entry neglects to included what even Qualls admits, was actually done. The Court issues a corrective *nunc pro tunc* entry and denies Qualls motion.

IT IS SO ORDERED

JUDGE FRED W. CROW III
Presiding Judge

JUDGE RICHARD WALTON
By Assignment of the Ohio Supreme Court

JUDGE DAN W. FAVREAU
By Assignment of the Ohio Supreme Court

[8] see State v. Gause, (2009) 182 Ohio App.3d 143, 1st Dist.
[9] see McKay v. McKay (1985), 24 Ohio App.3d 74. Jacks v. Adamson (1897), 56 Ohio St. 397, Webb v. Western Reserve Bond & Share Co. (1926), 115 Ohio St. 247, Brown v. Brown (Ohio App. 4 Dist.), 2003-Ohio-304.

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IT IS SO ORDERED

JUDGE FRED W. CROW III
Presiding Judge

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By Assignment of the Ohio Supreme Court

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By Assignment of the Ohio Supreme Court

[8] see State v. Gause, (2009) 182 Ohio App.3d 143, 1st Dist.
[9] see McKay v. McKay (1985), 24 Ohio App.3d 74. Jacks v. Adamson (1897), 56 Ohio St. 397, Webb v. Western Reserve Bond & Share Co. (1926), 115 Ohio St. 247, Brown v. Brown (Ohio App. 4 Dist.), 2003-Ohio-304.

IN THE COMMON PLEAS COURT OF MEIGS COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

ERIC A. QUALLS,

Defendant.

Case No. **02-CR-020**

JUDGE FRED W. CROW III
JUDGE RICHARD WALTON
JUDGE DAN W. FAVREAU

SENTENCING ENTRY
Nunc Pro Tunc
AGGRAVATED MURDER with *Firearms Specification*
2903.01 (A) Special Category Felony
KIDNAPPING
2905.01 Felony of the 1st Degree

On the 15th day of August, 2002, appeared Prosecuting Attorney Pat Story and Assistant Prosecuting Attorney Christopher E. Tenoglia, on behalf of the State of Ohio, and the Defendant, **ERIC A. QUALLS**, with his Counsel, William N. Eachus and K. Robert Toy.

Whereupon the Prosecuting Attorney informed the Court that the State had entered into discussions with the Defendant and his Counsel and, that in accordance with provisions of Rule 11(F) of the Ohio Rules of Criminal Procedure, the Defendant indicated that it was his desire to enter voluntary pleas of **GUILTY** to **Count One** of the Indictment, as amended, **charging the offense of AGGRAVATED MURDER** with a Firearms Specification but with no aggravating circumstances, **a Special Category Felony,** in violation of Ohio Revised Code Section 2903.01 (A) and **Count Three** of the Indictment, as amended, **charging the offense of KIDNAPPING, a Felony of the First Degree,** in violation of Ohio Revised Code Section 2905.01 (A)(3).

The Defendant advised the Court that his understanding of what had taken place conformed with what the Prosecutor had said. Thereupon, the Defendant informed the Court that it was his desire to enter pleas of of **GUILTY** to **Count One** of the Indictment, as amended, **charging the offense of AGGRAVATED MURDER** with a Firearms Specification but with no aggravating circumstances, **a Special Category Felony,** in violation of Ohio Revised Code Section 2903.01 (A) and **Count Three** of the Indictment, as amended, **charging the offense of KIDNAPPING, a Felony of the First Degree,** in violation of Ohio Revised Code Section 2905.01 (A)(3).

Whereupon, the Court inquired if the family of the victim had been advised of the proposed pleas and of their rights as victims of crime, to which inquiry the Prosecuting

Attorney did respond in the affirmative and did further indicate the members of the victim's family were present and desired to address the Court regarding the victimization at the appropriate time.

A representative of the victim's family did thereupon advise the Court that what the Prosecutor has stated was correct and that the family agreed with the proposed pleas of guilty.

It is **ORDERED** that the Court Reporter cause to be transcribed the statements by members of the victims family and thereafter to forward a copy of the same to the Adult Parole Authority Victim Notification Office.

Whereupon, the Court advised the Defendant that **AGGRAVATED MURDER,** as charged in Count One of the Indictment as amended, is a Special Category Felony, carrying a maximum possible penalty of Life imprisonment with parole eligibility after twenty (20) full years and a fine of up to $25,000.00; additionally, Count One contains a **Firearms Specification,** which carries a mandatory consecutive sentence of three (3) years; **KIDNAPPING**, as charged in Count Three of the Indictment, as amended, is a felony of the first degree, carrying a maximum possible penalty of ten (10) years in a state penal institution and a fine of up to twenty thousand dollars ($20,000.00). In addition, any sentence imposed herein could be Ordered to be served consecutive to any other sentence of imprisonment, and that as a result, the maximum possible penalty could be an aggregate sentence of life in prison with parole eligibility after thirty-three (33) full years in a state penal institution and a maximum aggregate fine of forty-five thousand dollars ($45,000.00).

Upon inquiry of the Defendant, the Court finds that the Defendant has voluntarily entered pleas of **GUILTY** to Count One, as amended, charging the offense of **AGGRAVATED MURDER,** with a Firearms Specification, a Special Category Felony, in violation of Ohio Revised Code Section 2903.01 (A) and **GUILTY** to Count Three, as amended, charging the offense of **KIDNAPPING,** a felony of the first degree, in violation of Ohio Revised Code Section 2905.01 (A)(3), with full understanding of the nature of the charges and the possible penalties involved. The Court further inquired of the Defendant whether he fully understood the effect of the pleas of **GUILTY** and that the Court, upon acceptance of the pleas might proceed immediately with judgment and sentence; and whether the Defendant understood that by entering the pleas of **GUILTY,** he would be waiving his right to a trial by jury or to the Court; to confront witnesses against him; to have compulsory process for obtaining witnesses in his own behalf; and the right to have the State prove guilt beyond a reasonable doubt, at a trial, to a jury or to the Court each and every element of the offenses and specification, where the Defendant could not be compelled to testify against himself. The Court further inquired of the Defendant if he understood that any recommendation of the Prosecuting Attorney as to sentencing is only a recommendation and not binding upon the Court; that the Court and the Court alone determines the appropriate sentence. The Defendant

replied in the affirmative to all of the above inquiries.

The Defendant was further advised by the Court that any sentence imposed would served without any "good time" credit. The Defendant was further advised that the offenses to which the pleas of guilty are offered, being felony offenses of violence as defined in Revised Code Section 2901.01, and being committed while the Defendant had a firearm on or about his person or under his control, do not permit community control and carry mandatory sentences of imprisonment.

Thereupon, the Defendant executed a Written Waiver of Indictment, a Written Waiver of Trial by Jury or to the Court and a Written Plea of Guilty. The Court finds that all said Waivers are made voluntarily, knowingly and intelligently. The same are each and all accepted by the Court and Ordered to be made a part of the record of the proceedings herein.

The Court, being fully satisfied that the Plea is made knowingly, voluntarily and intelligently, and being fully satisfied that the Defendant did commit the elements in the offense as charged, and being convinced that the Defendant fully understands his plea of **GUILTY,** hereby finds the Defendant, **ERIC A. QUALLS**, **GUILTY** of **AGGRAVATED MURDER**, a Special Category Felony, in violation of Ohio Revised Code Section 2903.01 (A); and **GUILTY** of the **Firearms Specification** therein contained, and **GUILTY** of **KIDNAPPING**, a felony of the first degree, in violation of Revised Code Section 2905.01 (A)(3).

The Court finds that the Defendant has stipulated and the Court finds that there is a factual basis, and it does so find the maximum, consecutive sentences should be imposed. Specifically, the Defendant stipulates and agrees that the offense was more serious; that the Defendant has a history of prior misdemeanor criminal conduct, and that recidivism is more likely; and that the shortest term would demean the seriousness of the offenses and not adequately protect the public and the Defendant committed the worst form of the offense and the Defendant poses the greatest likelihood of committing future crimes. The Court further finds that consecutive sentences are necessary to protect the public, to punish the offender and consecutive sentences are not disproportionate to the seriousness of the offender's conduct and the danger the offender poses to the public.

The Court further finds that the Defendant is not amenable to available community control sanctions.

Further, the Defendant did waive any right to a pre-sentence investigation and request that the Court immediately proceed with sentencing.

Whereupon, the Court inquired of the Defendant and his Counsel if either had anything further to say why sentence should not be pronounced or in mitigation thereof,

and no good and sufficient reason to the contrary being given or appearing or appearing to the Court, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the said **ERIC A. QUALLS as to the Firearms Specification to Count One,** that the Defendant be imprisoned and confined at the appropriate state penal institution for a **term of term of three years, which sentence is a mandatory sentence; as to** Count Three of the Indictment, as amended, charging the offense of **KIDNAPPING,** a Felony of the First Degree, in violation of Ohio Revised Code Section 2905.01 (A)(3), that the Defendant be imprisoned and confined at the appropriate state penal institution for a **term of ten (10) years: and as to** Count One of the Indictment, as amended, charging the offense of **AGGRAVATED MURDER**, be imprisoned and confined at the appropriate state penal institution, for a **term of Life with parole eligibility after twenty (20) full years. It is further ORDERED that said sentences be served consecutively for an aggregate sentence of life in prison with no eligibility for parole for a period of thirty-three (33) full years in a state penal institution.** It is further **ORDERED** that the Defendant be given jail time credit for one hundred seventy-one (171) days, as of August 15, 2002, for local confinement during the pendency of this matter, as well as any additional days thereafter until he shall be delivered into the care and custody of the state penal institution.

Upon application of the Prosecuting Attorney, as provided in the Plea Petition and upon the pleas of guilty to Count One, with the firearms specification and Count Three of the Indictment, as amended, to enter a Nolle Prosequi as to Count Two, the Court finds said Motion is well-taken and the same should be and hereby is granted. It is therefore **ORDERED** that Count Two of the Indictment is dismissed.

No fine is Ordered, the Defendant being indigent.

For the Kidnapping offense only, the Court notified the Defendant that upon his release from prison, if such event should ever happen, the Defendant shall be subject to a five year mandatory period of post-release control, by the Parole Board. The Court further advised the Defendant that if he violates any condition of any post-release control sanctions by committing a new felony, the sentencing Court for that felony may terminate the period of post-release control and impose a prison term for that violation, the maximum of which shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the Defendant has spent under post-release control for the earlier felony.

The Defendant was further advised that if he should be released from prison and after his release he should violate the terms and conditions of Post Release Control, the Adult Parole Authority could send him back to prison for up to nine (9) months, and for repeated violations for a term not to exceed 50% of the original term as Ordered by this Court. He was further advised that if the violation is a new felony, he could not only be sent to prison for the new felony, but that the sentencing Court could add to that

sentence the greater of one year or the balance of the time remaining on Post Release Control.

It is further **ORDERED** that the Defendant is remanded to the custody of the Sheriff of Meigs County who shall forthwith and according to law transport and convey the said ERIC A. QUALLS to the Orient Correctional Reception Center to commence the sentence of imprisonment as Ordered herein. It is further **ORDERED** that a copy of this Entry shall serve as an Order of Commitment thereon.

It is further **ORDERED** that the Defendant shall pay the costs of this matter as determined by the Clerk of Courts for which judgment is rendered and execution may issue.

The Court did advise the Defendant of his right to timely file an appeal from the judgment and sentence herein for the imposition of the maximum sentence, and did further advise the Defendant of his right to Counsel to assist in any appeal, his right to have such Counsel appointed upon a finding of indigency, his right to have a transcript of the proceedings and copies of any and all pleadings herein.

THIS IS A FINAL APPEALABLE ORDER. THE CLERK, PURSUANT TO CIVIL RULE 58 (B), SHALL SERVE NOTICE OF SAME ON ALL PARTIES WHO ARE NOT IN DEFAULT OF ENTRY OF APPEARANCE. WITHIN THREE (3) DAYS AFTER JOURNALIZATION OF THIS ENTRY, THE CLERK IS REQUIRED TO SERVE NOTICE OF THE JUDGMENT PURSUANT TO CIVIL RULE 5 (B).

SO ORDERED.

JUDGE FRED W. CROW III
Presiding Judge

JUDGE RICHARD WALTON
By Assignment of the Ohio Supreme Court

JUDGE DAN W. FAVREAU
By Assignment of the Ohio Supreme Court

April 1, 2010

cc: JUDGE
William N. Eachus, Attorney
Sheriff
Clerk of Courts
Defendant
Prosecuting Attorney
K. Robert Toy, Attorney
~~SEPTA~~
~~Board of Elections~~
~~Victim~~

ERIC QUALLS AGG MURDER KIDNAPPING Nunc Pro Tunc SE.
DL

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 10CA8
vs.	:	
ERIC QUALLS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Eric Qualls, #429-625, Ross Correctional Inst., P.O. Box 7010, Chillicothe, Ohio 45601

COUNSEL FOR APPELLEE: Colleen S. Williams, Meigs County Prosecuting Attorney, and Matthew J. Donahue, Meigs County Assistant Prosecuting Attorney, 117 West Second Street, Pomeroy, Ohio 45769

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Meigs County Common Pleas Court judgment that denied a motion for "De Novo Sentencing Hearing" filed by Eric Qualls, defendant below and appellant herein.

Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"WHEN A SENTENCE IS VOID AS A MATTER OF LAW BECAUSE IT DOES NOT CONTAIN A STATUTORILY MANDATED TERM OF 'PROPERLY IMPOSED' POST RELEASE CONTROL, A TRIAL COURT ABUSES ITS DISCRETION WHEN DENYING A MOTION FOR DE NOV

SENTENCING HEARING."

SECOND ASSIGNMENT OF ERROR:

"THE APPROXIMATELY EIGHT YEAR DELAY FROM THE FINDING [OF] GUILT UNTIL THE COURT IMPOSED SENTENCE CONSTITUTED AN UNNECESSARY, UNJUSTIFIED AND UNREASONABLE DELAY IN SENTENCING AND THEREFORE DIVEST[ED] THE COURT OF ITS JURISDICTION TO IMPOSE SENTENCE IN THIS CASE."

In 2002, appellant pled guilty to kidnapping and aggravated murder with a firearm specification and the trial court sentenced appellant to serve an aggregate prison term of thirty-three years to life. Appellant did not appeal his conviction.

In 2004, appellant filed an action in this Court and sought a writ of mandamus to compel the Meigs County Prosecutor to turn over certain records. We sua sponte dismissed his petition and the Ohio Supreme Court affirmed. See State ex rel. Qualls v. Story, 104 Ohio St.3d 343, 819 N.E.2d 701, 2004- Ohio-6565.

In 2006, appellant filed a petition for postconviction relief and asked to be re-sentenced. Summary judgment was entered against him and we affirmed. See State v. Qualls, Meigs App. No. 06CA7, 2007-Ohio-3938. The Ohio Supreme Court declined to hear any further appeal on appellant's petition. See State v. Qualls, 115 Ohio St.3d 1444, 875 N.E.2d 104, 2007-Ohio-5567.

This latest round of litigation began on January 25, 2010, when appellant filed a motion for a "de novo sentencing hearing." The gist of the motion is that the trial court informed

appellant at sentencing that he is subject to five years of post-release control after he is released from prison. Appellant argued, however, that he was convicted of a "special felony," and, thus, not subject to post-release control under R.C. 2967.28.

Appellee's memorandum contra responded that post-release control was not imposed on the aggravated murder charge but, rather, on the kidnapping charge. Appellee conceded, however, that an error occurred in the sentencing entry that appellant had not raised in his motion. Although appellant was informed of post-release control at the hearing, a provision to indicate that fact was inadvertently omitted from the sentencing entry. The State requested the court issue a nunc pro tunc judgment to correct the entry and to make it conform with the actual events that transpired at the hearing.

Appellant, in turn, promptly filed a motion to dismiss the charges against him reasoning that his original sentence is invalid, and thus void, and should be held for naught. We note that more than eight years elapsed between appellant's original conviction and the new de novo hearing to which he claimed himself entitled and such delay, he asserts, is "unreasonable."

On March 29, 2010, the trial court (1) denied appellant's motion for a de novo hearing, and (2) issued a nunc pro tunc sentencing entry that included language regarding appellant's

post-release control. The court did not expressly rule upon appellant's motion for dismissal of the charges against him, but we will treat it as having been impliedly overruled.[1] This appeal followed.

I

In his first assignment of error, appellant asserts that the trial court erred by overruling his motion for a de novo hearing. Appellant's motion is based on an argument that post-release control was improperly imposed upon his conviction for aggravated murder. However, post-release control was imposed on the kidnapping count, not the aggravated murder count. Thus, the trial court correctly overruled the motion.[2]

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[1] Takacs v. Baldwin (1995), 106 Ohio App.3d 196, 209, 665 N.E.2d 736; In re Sites, Lawrence App. No. 05CA39, 2006-Ohio-3787, at ¶18, fn. 6; Kline v. Morgan (Jan. 3, 2001), Scioto App. Nos. 00CA2702 & 00CA2712.

[2] We note appellant should have been barred from raising this issue based on grounds of res judicata. An alleged failure to comply with Ohio's complex felony sentencing statutes could have been, and should have been, raised on appeal. Appellant, however, did not file an appeal and should be barred from raising the issue at this date. However, in State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, a majority of the Ohio Supreme Court held that a failure to impose post-release control renders a judgment void, rather than voidable, and res judicata does not apply. Id. at ¶¶21-22 & 30. Consequently, this Court and the trial court are bound by the majority opinion in Simpkins (rather than Justice Lanzinger's dissenting view). Id. at ¶¶39-52. Furthermore, a separate procedure must now be employed for sentences imposed after 2006. See State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, and R.C. 2929,191.

Appellant also claims that the trial court failed to provide him with other statutory information at the sentencing hearing. However, this issue was not raised in his motion for a de novo hearing and, thus, the appellee has not had the chance to respond to that allegation. We will not consider such claims raised for the first time on appeal. State v. Musser, Ross App. No. 08CA3077, 2009-Ohio-4979, at ¶6; State v. Stephens, Pike App. No. 08CA776, 2009-Ohio-750, at ¶7.

Appellant also asserts that the trial court erred by issuing the nunc pro tunc entry. At the outset, we note that this argument is not set forth as an assignment of error. See App.R. 12(A)(1)(b). Nevertheless, in view of our policy to afford leniency to pro se litigants, see e.g. Akbar-El v. Muhammed (1995), 105 Ohio App.3d 81, 85, 663 N.E.2d 703; Besser v. Griffey (1993), 88 Ohio App.3d 379, 382, 623 N.E.2d 1326, we will consider the issue.

In his motion for de novo hearing, appellant admitted that he "was also informed that he would be subject to 5 years of Post Release Control upon his release." (Emphasis added.) The appellee also cites a portion of the hearing transcript in which the court not only informed appellant of the control, but also directed defense counsel to make sure that he understood what it meant. After appellant and counsel discussed the matter, the court asked appellant directly if he understood post-release

control" and appellant responded "Yes, sir."

Under circumstances virtually identical to those present here, our First District colleagues held:

> "The original sentencing court, during sentencing, informed [defendant] that he would 'be placed on post-release control for a period of five years,' but that notification was not reflected in the sentencing entry. The court below attempted to remedy the omission by resentencing [defendant] . . . The trial court had no authority to resentence [him]. The proper remedy was to add the omitted postrelease-control language in a nunc pro tunc entry after a hearing."

State v. Gause, 182 Ohio App.3d 143, 911 N.E.2d 977, 2009-Ohio-2140, at ¶2. We agree that this is the proper remedy to employ under these circumstances and find no error on the trial court's part.

Thus, for these reasons, we hereby overrule appellant's first assignment of error.

II

In his second assignment of error, appellant asserts that the trial court erred by overruling his motion to dismiss all charges due to the "delay" in sentencing him. Again, we disagree.

In the case sub judice, there was no "delay" in sentencing. The trial court sentenced appellant in 2002. While some errors may have occurred in the sentencing entry, which apparently rendered that sentence "void," the fact remains that sentencing did in fact occur. We also note that although res judicata may

not bar appellant from raising statutory mistakes in sentencing eight years after the fact, it does bar him from challenging his conviction - a conviction entered after his guilty plea to the offenses, thereby completely admitting guilt. See Crim.R. 11(B)(1). Thus, the second assignment of error is without merit and is hereby overruled.

Having reviewed all errors assigned and argued by appellant in his brief, and having found merit in none of them, the trial court's judgment is hereby affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and 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 Meigs County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: Peter B. Abele, Judge

Judge Crow
Judge Harsha (1st pg of decision)
Colleen Williams
Matthew Donahue
Eric Duell
10-28-10 R4

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

ORIGINAL

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
MEIGS COUNTY, OHIO

STATE OF OHIO	:	
PLAINTIFF-APPELLEE,	:	
VS		CASE NO. 10CA8
ERIC QUALLS	:	
DEFENDANT-APPELLANT.	:	

MOTIN TO CERTIFICATE A CONFLICT

Comes now the defendant-appellant, Mr. Eric Qualls, who while acting in Pro Se, do hereby respectfully [Move] this honorable Court to recognize and certify this case as a "Conflict" with STATE V SINGLETON, 920 N.E. 2d at 958 and STATE V LEE 2010 WL 1511708,2010-ohio-1704.

The defendant-appellant asserts that this action is being taken pursuant to Appellate Rule 25, Article IV, section 3(B)(4) of the Ohio Constitution as well as Article 1,section 10 and 16.

The defendant-appellant asserts that the reasons for this Motion are more fully stated in the Memorandum In Support which is attached hereto.

RESPECTFULLY SUBMITTED

Eric A. Qualls
429-625

ROSS CORRECTIONAL INST.
P.O. BOX 7010
CHILLICOTHE, OHIO 45601

MEMORANDUM IN SUPPORT

Comes now the defendant-appellant, Mr. Eric Qualls, who while acting in Pro Se, do hereby respectfully request that this Court "Certifies" this case as a "Conflict". The defendant-appellant asserts that he filed a Motion For De Novo Sentencing Hearing in the Trial Court. In it's response, the State agreed that it failed to put the post release control notification into it's Entry. Since a Court of Record speaks only through it's Entry; the error by the Trial Court rendered the attempted sentence void ab initio and a nullity. However, instead of ordering a De Novo Hearing, the Trial Court issued a Nunc Pro Tunc Order to "Correct" the Error. This behavior by the Trial Court and the affirmation by the Court of appeals is in direct conflict with the Ohio Supreme Court's ruling in STATE V SINGLETON 920 N.E. 2d 958 and the Sixth District's Court of Appeals in STATE V LEE 2010 WL 1511708, 2010-ohio-1704.

In STATE V SINGLETON, 920 N.E. 2d 958 at ¶ 22 it asserts that the General Assembly imposed a duty on Trial Courts to notify an offender at the Sentencing Hearing of the imposition of post release control and of the authority of the Parole Board to impose a prison term for a violation; the General Assembly also required that a Court include any post release control sanctions in its sentencing Entry. However,prior to the enactment of R.C. 2929.191 in July 2006, no statutory mechanism existed to correct a sentence that failed to comport with these statutory requirements. The Ohio Supreme Court determined such sentencing Judgments to be contrary to law, thereby rendering them subject to De Novo Sentencing. see BEZAK 868 N.E. 2d 961.

As asserted by the Ohio Supreme Court in Bezak, "[w]hen post release control is not properly included in a sentence for a particular offense, the sentence for that offense is void." The offender is entitled to a new sentencing hearing for that particular offense. id at 4.

Because Bezak clarifies that a void sentence is "as if there had been no original sentence," the defendant-appellant has difficulty understanding how the State's interpretation of "correct" can apply after Bezak. While only aspect of the original sentence may have been improper, the remedy under Bezak to "correct" the

void sentence requires the Trial Court to resentence De Novo. Indeed, by the State issuing the Nunc Pro Tunc Order, the State's interpretation of "correct" to mean the Trial Court on resentencing has the authority only to tinker with that aspect of the sentence considered defective not only contravenes Bezak, but ascribes an unduly limited meaning to "correct". In a De Novo Sentencing, "correct" means any defect rendering the original sentence void. see STATE V LATHAN, 2007-ohio-5595.

The Sixth Circuit reasoned that void ment, "an instrument or transaction [that] is nugatory and ineffectual so that nothing can cure it." Void also means, "of no legal force or effect and so incapable of confirmation or ratification." citing Blacks Law Dictionary (6Ed. 1990) 1573; Webster's Third International Dictionary (1971) 2562. Therefore,it is the mind-set of the defendant-appellant that the error in this case could not be "fixed" or corrected. The remedy, as in STATE V OWENS 910 N.E. 2d 1059 at ¶ 33. see also UNITED STATES V FLEISH 227 F Supp 967(the proper remedy in such a case is to vacate the sentence and release the defendant from custody). However, at the very least, a De Novo Sentencing Hearing should be Ordered!

Wherefore, the defendant-appellant prays that this Honorable Court will find this Motion Well Taken and grant same.

RESPECTFULLY SUBMITTED

Eric A. Qualls

CERTIFICATE OF SERVICE

I, Eric Qualls, do hereby certify that a copy of the foregoing Motion To Certify A Conflict was mailed by regular U.S. Mail to the office of COLLEEN S. WILLIAMS, Meigs County Prosecuting Attorney at 117 West Second Street Pomeroy, Ohio on this the 31st day of Oct 2010.

Eric A. Qualls

IN THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT
MEIGS COUNTY, OHIO

STATE OF OHIO	:	
PLAINTIFF-APPELLEE,	:	
VS	:	CASE NO. 10CA8
ERIC QUALLS	:	
DEFENDANT-APPELLANT.	:	

AFFIDAVIT OF INDIGENCY

I, Eric Qualls, do hereby solemnly swear that I have presently this 31st day of Oct no means of financial support and no assets of any value and therefore cannot afford to pay for any fee's cost or legal services on my behalf. I further assert that I receive $18.00 per Month State Pay which is to be used to buy personal hygiene items, writing material and for the cost od having access to the Courts such as legal copies and postage.

RESPECTFULLY SUBMITTED
Eric A. Qualls
429-625
ROSS CORRECTIONAL INST.
P.O. BOX 7010
CHILLICOTHE, OHIO 45601

SWORN TO AND SUBSCRIBED TO IN MY PRESENCE ON THIS THE 31 DAY OF October 2010.

Janet E. Spearry
Notary Public - Ohio
My Commission Expires 8-25-2013

STATE OF OHIO NOTARIAL SEAL

Janet E Spearry
NOTARY PUBLIC

Court of Appeals of Ohio,
Sixth District, Lucas County.

STATE of Ohio, Appellee
v.
Johnny LEE, Jr., Appellant.

No. L-09-1279.
Decided April 16, 2010.

West KeySummary

110 Criminal Law
110XXIII Judgment
110k996 Amendment or Correction
110k996(1) k. In General.

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(G) Hearing
350Hk350 Advice and Warnings
350Hk354 k. Other Particular Issues.

Court's attempt to remedy its failure to include the mandatory postrelease control language in the defendant's sentence, via a nunc pro tunc entry, was improper. The defendant argued that he was entitled to resentencing because the trial court had failed to comply with the statutory sentencing requirement, that his sentence include postrelease control, when it failed to included post release sentencing in his sentencing order. While the defendant had been informed of his postrelease sentence during sentencing, the courts failure to include postrelease terms in his sentencing order could not be remedied by a later nunc pro tunc entry. The defendant was entitled to resentencing. R.C. § 2929.191.

Julia R. Bates, Lucas County Prosecuting Attorney, and Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Johnny Lee, Jr., pro se.

COSME, J.

*1 {¶ 1} This appeal arises from the filing by the Lucas County Court of Common Pleas of a nunc pro tunc entry attempting to correct its omission of the mandatory term of postrelease control in appellant's sentencing order. Because appellant was sentenced before the effective date of R.C. 2929.191, any defects in the mandatory notification of postrelease control require a de novo sentencing hearing consistent with the decisions of the Supreme Court of Ohio. For the reasons that follow, this matter is remanded to the trial court for a new sentencing hearing.

I. BACKGROUND

{¶ 2} Appellant pled guilty to one count of felonious assault, a second degree felony, and was sentenced to seven years of incarceration on September 17, 2003. Appellant was informed of the postrelease control during sentencing pursuant to R.C. 2929.19(B)(3), but the trial court failed to incorporate this notice into the sentencing order filed September 18, 2003.

{¶ 3} On August 12, 2009, appellant moved for resentencing arguing that the trial court had failed to comply with the statutory sentencing requirements. Without hearing, the trial court filed a nunc pro tunc entry on September 22, 2009, which states only: "Entry should reflect: Post Release Control Notice under R.C. 2929.19(B)(3) and R.C. 2967.28 was given at time

of sentencing." FN1 This appeal follows.

FN1. Our holding in this case should not be construed as questioning the sufficiency of the notice in the nunc pro tunc entry. In *State v. Milazo,* 6th Dist. No. L-07-1264, 2008-Ohio-5137, ¶ 24, 27, citing *State v. Blackwell,* 6th Dist. No. L-06-1296, 2008-Ohio-3268, ¶ 15, this court held that an identically worded original entry of sentencing was satisfactory. Here, no notice was given in the original sentencing entry.

II. PRE-JULY 11, 2006 SENTENCES

{¶ 4} Appellant's first assignment of error asks:

{¶ 5} "Whether a nunc pro tunc order can be used to supply the omitted action of 'mandatory' postrelease control, Norris v. Schotten, 146 F.3d 314, at: 333-336 (6th Cir.1998), quoting *State v. Gruelich,* --- N.E.2d ---- (citation omitted). *see also:* State v. Boswell, 121 Ohio St.3d 575, 906 N.E.2d 422."

{¶ 6} At the outset, the trial court is required to order postrelease control as part of the sentence for all offenders convicted of first and second-degree felonies, or violent third-degree felonies. R.C. 2929.19(B)(3). It is undisputed that the trial court notified appellant at his sentencing hearing that he would be subject to mandatory postrelease control. The trial court did not, however, include this notice in the sentencing entry.

{¶ 7} The state asserts that the nunc pro tunc entry was proper because R.C. 2929.191 provides a mechanism for a trial court to correct its own judgment entry. We disagree.

{¶ 8} In State v. Jordan, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085, paragraph two of the syllabus, superseded by statute, State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio held that the notice of the postrelease control requirement at sentencing is mandatory, and the trial court must also include that notice in its journal entry imposing sentence. The failure to notify a defendant about post-release control requires reversal of the sentence and a remand for resentencing.

{¶ 9} In State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, ¶ 6, certiorari denied (2008), --- U.S. ---, 129 S.Ct. 463, 172 L.Ed.2d 332, superseded by statute on other grounds as stated in State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio stated: "[I]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence."

*2 {¶ 10} Most recently, in State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the Supreme Court of Ohio addressed the statutory remedy to correct a failure to properly impose postrelease control. Am.Sub.H.B. No. 137, effective July 11, 2006, amended R.C. 2929.14, 2929.19, and 2967.28 and enacted R.C. 2929.191. R.C. 2929.191 established a procedure to remedy such a sentence. The court in *Singleton* noted that prior to the enactment of R.C. 2929.191, the state did not have a statutory remedy for sentences that lacked proper postrelease control. Id. at ¶ 25, 920 N.E.2d 958. Therefore, for those sentences that were imposed prior to the effective date of R.C. 2929.191, the de novo sentencing procedure set forth in *Singleton* should be followed. Id. at ¶ 26, 920 N.E.2d 958.

{¶ 11} Consistent with *Singleton,* we find that the trial court's nunc pro tunc entry was not adequate to remedy its failure to include the mandatory postrelease control language in the original sentencing order. Accordingly, appellant's first assignment of error is well-taken.

III. SENTENCING TRANSCRIPT

{¶ 12} Appellant's second assignment of error sets forth the following question:

{¶ 13} "Where the transcript of the proceedings (plea and sentencing) has been destroyed, may a reviewing court accept a belated nunc pro tunc entry which insufficiently seeks to impose a term of * [sic] undefined postrelease control as controlling as to law and fact, see: State v. Hofman, 2004 WL 2848938 (Ohio App. 6 Dist.), 2004-Ohio ----."

{¶ 14} In his second assignment of error, appellant implies that the sentencing transcript has been destroyed, and the unavailability of the transcript would bar the imposition of postrelease control. The record reflects, however, that a transcript of the sentencing proceedings on September 17, 2003, is part of the record through appellant's own "Motion for 'Sentencing" filed with the common pleas court on August 12, 2009. As such, we need not reach the question of whether the unavailability of a transcript would bar the imposition of postrelease control. Appellant's second assignment of error is moot.

IV. CONCLUSION

{¶ 15} We hold that for sentences imposed prior to the effective date of R.C. 2929.191, a defect in the postrelease control notification renders the sentence void and such actions are subject to de novo sentencing hearings.

{¶ 16} Here, the trial court failed to notify appellant-in the sentencing entry-of mandatory postrelease control. The nunc pro tunc entry is insufficient to cure the defect in notice. Because appellant was not advised of his mandatory postrelease control in the sentencing entry, the de novo sentencing procedure detailed in the decisions of the Supreme Court of Ohio is the appropriate method to correct appellant's criminal sentence which was imposed in 2003.

{¶ 17} Wherefore, based upon the foregoing, the judgment of the Lucas County Court of Common Pleas is reversed and remanded for resentencing in accordance with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

*3 JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

ARLENE SINGER, J., THOMAS J. OSOWIK, P.J., and KEILA D. COSME, J., concur.

Ohio App. 6 Dist.,2010.
State v. Lee
Slip Copy, 2010 WL 1511708 (Ohio App. 6 Dist.), 2010 -Ohio- 1704

END OF DOCUMENT

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

CA 8
P 149

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 10CA8
vs.	:	
ERIC QUALLS,	:	ENTRY ON MOTION TO CERTIFY RECORD TO THE SUPREME COURT
Defendant-Appellant.	:	

This matter comes on for consideration of the motion filed by Eric Qualls, defendant below and appellant herein, to certify our decision to the Ohio Supreme Court for review and final determination. On October 28, 2010, we affirmed the trial court's judgment that overruled appellant's motion for "De Novo Sentencing Hearing." See State v. Qualls, Meigs App. No. 10CA8, 2010-Ohio-5316.

On November 3, 2010, appellant filed a motion pursuant to App.R. 25 and asked us to certify this case to Ohio Supreme Court for review and final determination. Appellant argues that our judgment conflicts with the Ohio Supreme Court in State v. Singleton, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, and the Sixth District in State v. Lee, Lucas App. No. L-09-1279, 2010-Ohio- 1704.

Section 3(B)(4), Article IV, Ohio Constitution states that "[w]henever the judges of a court of appeals find that a judgment

upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." (Emphasis added.) As the appellee correctly points out in its memorandum contra, appellate courts do not certify alleged conflicts between its decisions and decisions of the Ohio Supreme Court. If a litigant believes an appellate court's ruling conflicts with a pronouncement of the Ohio Supreme Court, the proper remedy is to appeal that judgment to the Ohio Supreme Court.

In view of our ultimate disposition of the motion to certify, however, we believe it beneficial to explain why we find no conflict between our decision and either Singleton, supra, or its progenitor, State v. Jordan, 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085. Singleton and Jordan both involved situations in which the sentencing court failed to alert a defendant at a sentencing hearing to either (1)the imposition of post-release control, or (2) the ramifications of breaking post-release control. See respectively, 2004-Ohio-6985, at ¶¶2-3: 2009-Ohio-6434, at ¶4. The trial court in Jordan tried to correct those omissions in its sentencing entry, 2004-Ohio-6985, at ¶4, and the trial court in Singleton set out an erroneous notification in its sentencing entry. 2009-Ohio-6434, at ¶4.

The facts in this case, however, are almost the polar opposite. There is no question that appellant was notified of post-release control at his sentencing hearing. Indeed, he freely admitted as much. That notification was simply omitted from the sentencing entry. Does this make a difference? We believe that it does.

It is well-settled that trial courts possess the inherent authority to issue nunc pro tunc judgments to modify judgments to correctly reflect events in the record. See State v. Leone, Cuyahoga App. No. 94275, 2010-Ohio-5358, at ¶5; State v. Johnson, Scioto App. Nos. 07CA3135 & 07CA3136, 2009-Ohio-7173, at ¶11; State v. Dugan (May 28, 1998), Scioto App. No. 97CA2534. In light of appellant's admission that he was informed of post-release control at sentencing, a nunc pro tunc judgment would be an appropriate method to correct a sentencing entry to reflect that fact.

By contrast, a nunc pro tunc judgment entry would not have been appropriate in either Jordan or Singleton in which notification was absent altogether or there was a mis-notification. Nunc pro tunc judgments cannot be used to correct a mistake or to add something that was never done in the first place. See generally Johnson, supra at ¶11; State v. Jama,

Franklin App. Nos. 09AP-872 & 09AP-878, 2010-Ohio-4739, at ¶16.[1] There is no doubt that this intermediate appellate Court is bound by Ohio Supreme Court decisions, but we are reluctant to extend Jordan or Singleton beyond their specific facts to impose additional burdens on trial courts within this district.[2]

That said, we must agree with appellant that our decision conflicts with the Lucas County Court of Appeals in Lee. The operative facts in Lee are virtually identical to those in the case sub judice, specifically that the appellant was notified of

---

[1] We also note that our ruling appears to be buttressed by the Ohio Supreme's Court recent ruling in State ex rel. Carnail v. McCormick, 126 Ohio St.3d 124, 931 N.E.2d 110, 2010-Ohio-2671. Although the facts in that case are unclear as to whether the petitioner was informed of postrelease control at his sentencing hearing, notice of that control was omitted from his sentencing entry. Id. at ¶2. The Ohio Supreme Court ruled that the appellant was entitled to a writ of mandamus to compel the trial court judge to issue a new (presumably, a nunc pro tunc) sentencing entry. Id. at ¶37.

[2] Our First District Colleagues apparently came to the same conclusion, at least insofar as Jordan was concerned, in their affirmance of a nunc pro tunc entry to correct a sentencing judgment that failed to include the same notification of post release control that was given at sentencing. State v. Gause, 182 Ohio App.3d 143, 911 N.E.2d 977, 2009-Ohio- 2140, at ¶2. Gause, admittedly, was decided almost two months before Singleton, but it came five years after Jordan. That a nunc pro tunc judgment could be used to correct a sentencing entry, after notification of postrelease control have been given at the sentencing hearing, was so obvious to the Hamilton County Court of Appeals that they quickly disposed of the issue without a Jordan analysis.

Our conclusion is further buttressed by a Twelfth District Court of Appeals decision in State v. Harrison, Butler App. Nos. Nos. CA2009-10-272, CA2010-01-019, 2010-Ohio-2709, at ¶¶16-25, which held that a nunc pro tunc entry can be used to correct a judgment that set out erroneous information about postrelease control so that it reflects correct information given at the sentencing hearing.

post release control at the sentencing hearing, that notification was not carried over to the sentencing entry and the trial court attempted to correct that omission with a nunc pro tunc entry. 2010-Ohio-1704, at ¶¶2-3. Our colleagues in the Sixth District held that a nunc pro tunc entry is insufficient to comply with Singleton. 2010-Ohio-1704, at ¶11.

The appellee counters that no conflict exists between this case and Lee because Lee involved arguments advanced pursuant to R.C. 2828.191, whereas the trial court here did not cite that statute. We, however, believe that this is a distinction without substance. Both the appellant in Lee and appellant in this case were sentenced well before the operative date of that statute and, thus, regardless of what was specifically argued, they are in the same position. Both were warned about postrelease control at sentencing, but neither had those warnings carried over into the sentencing entry. We find that a nunc pro tunc entry is sufficient to correct the error, but the Lee court disagreed.

In order for us to certify a conflict to the Ohio Supreme Court, an actual conflict must exist on a rule of law and not just on the facts. See Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596, 613 N.E.2d 1032, 1034; also see State v. Lewis (Jun. 24, 1998), Lawrence 97CA51. After our review of Lee, supra, we believe that our decision conflicts with the legal principle from that case.

We therefore certify to the Ohio Supreme Court the following question: If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, can that omission be corrected with a nunc pro tunc entry?

Harsha, P.J. & McFarland, J.: Concur

IT IS SO ORDERED.

Peter B. Abele, Judge

cc: Judge Harsha - 4 copies
Supreme Court of OH. - 2 certified copies by certified mail.
Colleen Williams - Prosecuting
Eric Quallen.

1-13-11
BAE

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member

of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court

and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

LEXSTAT ORC 1.51

PAGE'S OHIO REVISED CODE ANNOTATED

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 8 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

OHIO REVISED CODE GENERAL PROVISIONS

CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION

CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.51 (2011)

§ 1.51. Special or local provision prevails over general; exception

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

HISTORY:

134 v H 607. Eff 1-3-72.

LEXSTAT ORC 1.52

PAGE'S OHIO REVISED CODE ANNOTATED

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 8 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

OHIO REVISED CODE GENERAL PROVISIONS

CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION

CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.52 (2011)

§ 1.52. Irreconcilable statutes or amendments

(A) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

(B) If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are substantively irreconcilable, the latest in date of enactment prevails. The fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation.

HISTORY:

134 v H 607. Eff 1-3-72.

LEXSTAT ORC 2903.01

PAGE'S OHIO REVISED CODE ANNOTATED

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2903. HOMICIDE AND ASSAULT

HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.01 (2011)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in *section 2929.02 of the Revised Code.*

(G) As used in this section:

(1) "Detention" has the same meaning as in *section 2921.01 of the Revised Code.*

(2) "Law enforcement officer" has the same meaning as in *section 2911.01 of the Revised Code.*

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 239 (Eff 9-6-96); 147 v S 32 (Eff 8-6-97); 147 v H 5 (Eff 6-30-98); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002.

LEXSTAT ORC 2905.01

PAGE'S OHIO REVISED CODE ANNOTATED

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 8 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2905. KIDNAPPING AND EXTORTION

KIDNAPPING AND RELATED OFFENSES

Go to the Ohio Code Archive Directory

ORC Ann. 2905.01 (2011)

§ 2905.01. Kidnapping

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in *section 2907.01 of the Revised Code*, with the victim against the victim's will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority;

(6) To hold in a condition of involuntary servitude.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty.

(C) (1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in this division or division (C)(2) or (3) of this section, if an offender who violates division (A)(1) to (5), (B)(1), or (B)(2) of this section releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

(2) If the offender in any case also is convicted of or pleads guilty to a specification as described in *section 2941.1422 [2941.14.22] of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, the court shall order the offender to make restitution as provided in division (B)(8) of *section 2929.18 of the Revised Code* and, except as otherwise provided in division (C)(3) of this section, shall sentence the offender to a mandatory prison term as provided in division (D)(7) of *section 2929.14 of the Revised Code.*

(3) If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in *section 2929.14 of the Revised Code*, the offender shall be sentenced pursuant to *section 2971.03 of the Revised Code* as follows:

(a) Except as otherwise provided in division (C)(3)(b) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(b) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section:

(1) "Involuntary servitude" has the same meaning as in *section 2905.31 of the Revised Code.*

(2) "Sexual motivation specification" has the same meaning as in *section 2971.01 of the Revised Code.*

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 146 v S 2. Eff 7-1-96; 152 v S 10, § 1, eff. 1-1-08; 152 v H 280, § 1, eff. 4-7-09; 153 v S 235, § 1, eff. 3-24-11.

LEXSTAT ORC 2925.02

PAGE'S OHIO REVISED CODE ANNOTATED

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2925. DRUG OFFENSES

CORRUPTING; TRAFFICKING

Go to the Ohio Code Archive Directory

ORC Ann. 2925.02 (2011)

§ 2925.02. Corrupting another with drugs

(A) No person shall knowingly do any of the following:

(1) By force, threat, or deception, administer to another or induce or cause another to use a controlled substance;

(2) By any means, administer or furnish to another or induce or cause another to use a controlled substance with purpose to cause serious physical harm to the other person, or with purpose to cause the other person to become drug dependent;

(3) By any means, administer or furnish to another or induce or cause another to use a controlled substance, and thereby cause serious physical harm to the other person, or cause the other person to become drug dependent;

(4) By any means, do any of the following:

(a) Furnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard;

(b) Induce or cause a juvenile who is at least two years the offender's junior to use a controlled substance, when the offender knows the age of the juvenile or is reckless in that regard;

(c) Induce or cause a juvenile who is at least two years the offender's junior to commit a felony drug abuse offense, when the offender knows the age of the juvenile or is reckless in that regard;

(d) Use a juvenile, whether or not the offender knows the age of the juvenile, to perform any surveillance activity that is intended to prevent the detection of the offender or any other person in the commission of a felony drug abuse offense or to prevent the arrest of the offender or any other person for the commission of a felony drug abuse offense.

(B) Division (A)(1), (3), or (4) of this section does not apply to manufacturers, wholesalers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and

other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code.

(C) Whoever violates this section is guilty of corrupting another with drugs. The penalty for the offense shall be determined as follows:

(1) Except as otherwise provided in this division, if the drug involved is any compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, corrupting another with drugs is a felony of the second degree, and, subject to division (E) of this section, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the drug involved is any compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, and if the offense was committed in the vicinity of a school, corrupting another with drugs is a felony of the first degree, and, subject to division (E) of this section, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) Except as otherwise provided in this division, if the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, corrupting another with drugs is a felony of the second degree, and there is a presumption for a prison term for the offense. If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V and if the offense was committed in the vicinity of a school, corrupting another with drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) Except as otherwise provided in this division, if the drug involved is marihuana, corrupting another with drugs is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender. If the drug

involved is marihuana and if the offense was committed in the vicinity of a school, corrupting another with drugs is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(D) In addition to any prison term authorized or required by division (C) or (E) of this section and *sections 2929.13* and *2929.14 of the Revised Code* and in addition to any other sanction imposed for the offense under this section or *sections 2929.11* to *2929.18 of the Revised Code*, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section or the clerk of that court shall do all of the following that are applicable regarding the offender:

(1) (a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of *section 2929.18 of the Revised Code* unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of *section 3719.21 of the Revised Code*, any mandatory fine imposed pursuant to division (D)(1)(a) of this section and any fine imposed for a violation of this section pursuant to division (A) of *section 2929.18 of the Revised Code* shall be paid by the clerk of the court in accordance with and subject to the requirements of, and shall be used as specified in, division (F) of *section 2925.03 of the Revised Code*.

(c) If a person is charged with any violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the forfeited bail shall be paid by the clerk of the court pursuant to division (D)(1)(b) of this section as if it were a fine imposed for a violation of this section.

(2) The court shall suspend for not less than six months nor more than five years the offender's driver's or commercial driver's license or permit. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension. Upon the filing of the motion and the court's finding of good cause for the termination, the court may terminate the suspension.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with *section 2925.38 of the Revised Code*.

(E) Notwithstanding the prison term otherwise authorized or required for the offense under division (C) of this section and *sections 2929.13* and *2929.14 of the Revised Code*, if the violation of division (A) of this section involves the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and if the court imposing sentence upon the offender finds that the offender as a result of the violation is a major drug offender and is guilty of a specification of the type described in *section 2941.1410 [2941.14.10] of the Revised Code*, the court, in lieu of the prison term that otherwise is authorized or required, shall impose upon the offender the mandatory prison term specified in division (D)(3)(a) of *section 2929.14 of the Revised Code* and may impose an additional prison term under division (D)(3)(b) of that section.

HISTORY:

136 v H 300 (Eff 7-1-76); 143 v H 215 (Eff 4-11-90); 143 v S 258 (Eff 11-20-90); 144 v H 591 (Eff 11-2-92); 145 v H 377 (Eff 9-30-93); 145 v H 391 (Eff 7-21-94); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 66 (Eff 7-22-98); 148 v S 107 (Eff 3-23-2000); 148 v H 241. Eff 5-17-2000; 149 v S 123, § 1, eff. 1-1-04; 151 v S 154, § 1, eff. 5-17-06.

LEXSTAT ORC 2929.04

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR MURDER

Go to the Ohio Code Archive Directory

ORC Ann. 2929.04 (2011)

§ 2929.04. Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to *section 2941.14 of the Revised Code* and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in *section 2921.01 of the Revised Code*, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in *section 2911.01 of the Revised Code*, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of *section 2929.03 of the Revised Code* by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 147 v S 32 (Eff 8-6-97); 147 v H 151 (Eff 9-16-97); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002.

LEXSTAT ORC 2929.11

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR FELONY

Go to the Ohio Code Archive Directory

ORC Ann. 2929.11 (2011)

§ 2929.11. Purposes of felony sentencing; discrimination prohibited

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

HISTORY:

146 v S 2. Eff 7-1-96.

LEXSTAT ORC 2929.12

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR FELONY

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ORC Ann. 2929.12 (2011)

§ 2929.12. Seriousness and recidivism factors

(A) Unless otherwise required by *section 2929.13* or *2929.14 of the Revised Code*, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(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.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(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.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to *section 2929.16, 2929.17,* or *2929.18 of the Revised Code,* or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from

post-release control for a prior offense pursuant to division (B) of *section 2967.16* or *section 2929.141 [2929.14.1] of the Revised Code.*

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.

LEXSTAT ORC 2929.13

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR FELONY

Go to the Ohio Code Archive Directory

ORC Ann. 2929.13 (2011)

§ 2929.13. Guidance by degree of felony; monitoring of sexually oriented offenders by global positioning device

(A) Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in *sections 2929.14* to *2929.18 of the Revised Code*. The sentence shall not impose an unnecessary burden on state or local government resources.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to *section 2929.18 of the Revised Code* or a sanction of community service pursuant to *section 2929.17 of the Revised Code* as the sole sanction for the offense. Except as otherwise provided in this division, if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court also shall impose any financial sanction pursuant to *section 2929.18 of the Revised Code* that is required for the offense and may impose any other financial sanction pursuant to that section but may not impose any additional sanction or combination of sanctions under *section 2929.16* or *2929.17 of the Revised Code*.

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code* and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under *section 2929.16* or *2929.17 of the Revised Code*. If the court imposes upon the

offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of *section 2929.15 of the Revised Code* relative to the offender, including imposing a prison term on the offender pursuant to that division.

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (D)(4) of *section 2929.14 of the Revised Code* or a community control sanction as described in division (G)(2) of this section.

(B) (1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a sex offense that is a fourth or fifth degree felony violation of *section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3]*, or *2907.34 of the Revised Code.*

(g) The offender at the time of the offense was serving, or the offender previously had served, a prison term.

(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(i) The offender committed the offense while in possession of a firearm.

(2) (a) If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in *section 2929.12 of the Revised Code*, finds that a prison term is consistent with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code* and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in *section 2929.12 of the Revised Code*, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*, the court shall impose a community control sanction or combination of community control sanctions upon the offender.

(C) Except as provided in division (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject

to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under *section 2929.11 of the Revised Code* and with *section 2929.12 of the Revised Code.*

(D) (1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of *section 2907.05 of the Revised Code* for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under *section 2929.11 of the Revised Code.* Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of *section 2907.05 of the Revised Code.*

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of *section 2907.05 of the Revised Code*, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under *section 2929.12 of the Revised Code* that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(E) (1) Except as provided in division (F) of this section, for any drug offense that is a violation of any provision of Chapter 2925. of the Revised Code and that is a felony of the third, fourth, or fifth degree, the applicability of a presumption under division (D) of this section in favor of a prison term or of division (B) or (C) of this section in determining whether to impose a prison term for the offense shall be determined as specified in *section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36,* or *2925.37 of the Revised Code*, whichever is applicable regarding the violation.

(2) If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code.*

(3) A court that sentences an offender for a drug abuse offense that is a felony of the third, fourth, or fifth degree may require that the offender be assessed by a properly credentialed professional within a specified period of time. The court shall require the professional to file a written assessment of the offender with the court. If the offender is eligible for a community control sanction and after considering the written assessment, the court may impose a community control sanction that includes treatment and recovery support services authorized by *section 3793.02 of the Revised Code*. If the court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after considering the assessment and recommendation of treatment and recovery support services providers.

(F) Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under *sections 2929.02* to *2929.06*, *section 2929.14*, *section 2929.142 [2929.14.2]*, or *section 2971.03 of the Revised Code* and except as specifically provided in *section 2929.20* or *2967.191 [2967.19.1] of the Revised Code* or when parole is authorized for the offense under *section 2967.13 of the Revised Code* shall not reduce the term or terms pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for any of the following offenses:

(1) Aggravated murder when death is not imposed or murder;

(2) Any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape if, had the offender completed the rape that was attempted, the offender would have been guilty of a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* and would be sentenced under *section 2971.03 of the Revised Code*;

(3) Gross sexual imposition or sexual battery, if the victim is less than thirteen years of age and if any of the following applies:

(a) Regarding gross sexual imposition, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and the victim of the previous offense was less than thirteen years of age;

(b) Regarding gross sexual imposition, the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation.

(c) Regarding sexual battery, either of the following applies:

(i) The offense was committed prior to August 3, 2006, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(ii) The offense was committed on or after August 3, 2006.

(4) A felony violation of *section 2903.04, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13,* or *2907.07 of the Revised Code* if the section requires the imposition of a prison term;

(5) A first, second, or third degree felony drug offense for which *section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99,* or *4729.99 of the Revised Code,* whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses;

(7) Any offense that is a third degree felony and either is a violation of *section 2903.04 of the Revised Code* or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

(a) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under *section 2907.12 of the Revised Code* prior to September 3, 1996, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed in division (F)(7)(a) of this section that resulted in the death of a person or in physical harm to a person.

(8) Any offense, other than a violation of *section 2923.12 of the Revised Code*, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (D)(1)(a) of *section 2929.14 of the Revised Code* for having the firearm;

(9) Any offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (D)(1)(d) of *section 2929.14 of the Revised Code* for wearing or carrying the body armor;

(10) Corrupt activity in violation of *section 2923.32 of the Revised Code* when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree;

(11) Any violent sex offense or designated homicide, assault, or kidnapping offense if, in relation to that offense, the offender is adjudicated a sexually violent predator;

(12) A violation of division (A)(1) or (2) of *section 2921.36 of the Revised Code*, or a violation of division (C) of that section involving an item listed in division (A)(1) or (2) of that section, if the offender is an officer or employee of the department of rehabilitation and correction.

(13) A violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* if the victim of the offense is a peace officer, as defined in *section 2935.01 of the Revised Code*, or an investigator of the bureau of criminal identification and investigation, as defined in *section 2903.11 of the Revised Code*, with respect to the portion of the sentence imposed pursuant to division (D)(5) of *section 2929.14 of the Revised Code*;

(14) A violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* if the offender has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 [2941.14.15] of the Revised Code*, or three or more violations of any combination of those divisions and offenses, with respect to the portion of the sentence imposed pursuant to division (D)(6) of *section 2929.14 of the Revised Code*;

(15) Kidnapping, in the circumstances specified in *section 2971.03 of the Revised Code* and when no other provision of division (F) of this section applies;

(16) Kidnapping, abduction, compelling prostitution, promoting prostitution, engaging in a pattern of corrupt activity, illegal use of a minor in a nudity-oriented material or performance in violation of division (A)(1) or (2) of *section 2907.323 [2907.32.3] of the Revised Code*, or endangering children in violation of division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code*, if the offender is convicted of or pleads guilty to a specification as described in *section*

2941.1422 [2941.14.22] of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense;

(17) A felony violation of division (A) or (B) of *section 2919.25 of the Revised Code* if division (D)(3), (4), or (5) of that section, and division (D)(6) of that section, require the imposition of a prison term;

(18) A felony violation of *section 2903.11*, *2903.12*, or *2903.13 of the Revised Code*, if the victim of the offense was a woman that the offender knew was pregnant at the time of the violation, with respect to a portion of the sentence imposed pursuant to division (D)(8) of *section 2929.14 of the Revised Code*.

(G) Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

(1) If the offender is being sentenced for a fourth degree felony OVI offense and if the offender has not been convicted of and has not pleaded guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code*, the court may impose upon the offender a mandatory term of local incarceration of sixty days or one hundred twenty days as specified in division (G)(1)(d) of *section 4511.19 of the Revised Code*. The court shall not reduce the term pursuant to section 2929.20, 2967.193 [2967.19.3], or any other provision of the Revised Code. The court that imposes a mandatory term of local incarceration under this division shall specify whether the term is to be served in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility, and the offender shall serve the term in the type of facility specified by the court. A mandatory term of local incarceration imposed under division (G)(1) of this section is

not subject to any other Revised Code provision that pertains to a prison term except as provided in division (A)(1) of this section.

(2) If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code* or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code* if the offender has not been convicted of and has not pleaded guilty to a specification of that type. The court shall not reduce the term pursuant to section 2929.20, 2967.193 [2967.19.3], or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory term of local incarceration pursuant to division (G)(1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of *section 4511.19 of the Revised Code.* In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under *section 2929.16* or *2929.17 of the Revised Code*, but the offender shall serve the prison term prior to serving the community control sanction. The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to *section 5120.033 [5120.03.3] of the*

Revised Code if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement. Upon the establishment of the initial intensive program prison pursuant to *section 5120.033 [5120.03.3] of the Revised Code* that is privately operated and managed by a contractor pursuant to a contract entered into under *section 9.06 of the Revised Code*, both of the following apply:

(a) The department of rehabilitation and correction shall make a reasonable effort to ensure that a sufficient number of offenders sentenced to a mandatory prison term under this division are placed in the privately operated and managed prison so that the privately operated and managed prison has full occupancy.

(b) Unless the privately operated and managed prison has full occupancy, the department of rehabilitation and correction shall not place any offender sentenced to a mandatory prison term under this division in any intensive program prison established pursuant to *section 5120.033 [5120.03.3] of the Revised Code* other than the privately operated and managed prison.

(H) If an offender is being sentenced for a sexually oriented offense or child-victim oriented offense that is a felony committed on or after January 1, 1997, the judge shall require the offender to submit to a DNA specimen collection procedure pursuant to *section 2901.07 of the Revised Code.*

(I) If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under *sections 2950.04, 2950.041 [2950.04.1], 2950.05*, and *2950.06 of the Revised Code*, and the duration of the duties. The judge shall inform the offender, at the time of sentencing, of those duties and of their duration. If required under division (A)(2) of *section 2950.03 of the Revised Code*, the judge shall perform the duties specified in that section, or, if re-

quired under division (A)(6) of *section 2950.03 of the Revised Code*, the judge shall perform the duties specified in that division.

(J) (1) Except as provided in division (J)(2) of this section, when considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit an offense in violation of *section 2923.02 of the Revised Code*, the sentencing court shall consider the factors applicable to the felony category of the violation of *section 2923.02 of the Revised Code* instead of the factors applicable to the felony category of the offense attempted.

(2) When considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense, the sentencing court shall consider the factors applicable to the felony category that the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

(K) As used in this section, "drug abuse offense" has the same meaning as in *section 2925.01 of the Revised Code*.

(L) At the time of sentencing an offender for any sexually oriented offense, if the offender is a tier III sex offender/child-victim offender relative to that offense and the offender does not serve a prison term or jail term, the court may require that the offender be monitored by means of a global positioning device. If the court requires such monitoring, the cost of monitoring shall be borne by the offender. If the offender is indigent, the cost of compliance shall be paid by the crime victims reparations fund.

HISTORY:

146 v S2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 293 (Eff 3-17-98); 147 v H 122 (Eff 7-29-98); 148 v S 142 (Eff 2-3-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327. Eff 7-8-2002; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 183, § 1, eff. 9-11-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09; 153 v S 58, § 1, eff. 9-17-10.

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PAGE'S OHIO REVISED CODE ANNOTATED

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 8 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR FELONY

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ORC Ann. 2929.14 (2011)

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section or in division (D)(6) of *section 2919.25 of the Revised Code* and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section, in *section 2907.02*, *2907.05*, or *2919.25 of the Revised Code*, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in *section 2919.25 of the Revised Code*, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D) (1) (a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141 [2941.14.1]*, *2941.144 [2941.14.4]*, or *2941.145 [2941.14.5] of the Revised Code*, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 [2941.14.4] of the Revised Code* that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 [2941.14.5] of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and dis-

playing the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 [2941.14.1] of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (D)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 [2923.16.1] of the Revised Code* or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 [2941.14.6] of the Revised Code* that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 [2923.16.1] of the Revised Code* or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under

division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 [2941.14.11] of the Revised Code* that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.12* or *2923.123 [2923.12.3] of the Revised Code*. The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 [2923.12.2] that involves a deadly weapon that is a firearm other than a dangerous ordnance, *section 2923.16*, or *section 2923.121 [2923.12.1] of the Revised Code*. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section

upon an offender for a violation of *section 2923.13 of the Revised Code* unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 [2941.14.12] of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer as defined in *section 2941.1412 [2941.14.12] of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (D)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or

all of the remaining specifications. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(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, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2) (a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second

degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of *section 2929.01 of the Revised*

Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) (a) Except when an offender commits a violation of *section 2903.01* or *2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03* or *2925.11 of the Revised Code* and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161 [3719.16.1], 4729.37, or 4729.61, division (C) or (D) of section 3719.172 [3719.17.2], division (C) of section 4729.51, or division (J) of *section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 [2941.14.10] of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and,

if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under *section 2929.16* or *2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code* and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 [2941.14.14] of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section 2935.01 of the Revised Code*, or an investigator of the bureau of criminal identification and investigation, as defined in *section 2903.11 of the Revised Code*, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1415 [2941.14.15] of the Revised Code* that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 [2941.14.15] of the Revised Code*, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than

one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(7) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323 [2907.32.3], or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 [2941.14.22] of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised.

(b) The prison term imposed under division (D)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of *section 2903.11, 2903.12*, or *2903.13 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1423 [2941.14.23] of the Revised Code* that charges that the

victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the same degree as the violation.

(E) (1) (a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(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 a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(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.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(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.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(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.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (D)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates *section 2917.02, 2917.03, 2921.34*, or *2921.35 of the Revised Code*, if an offender who is under detention at a detention facility commits a felony violation of *section 2923.131 [2923.13.1] of the Revised Code*, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of *section 2921.34 of the Revised Code*, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of *section 2911.01 of the Revised Code*, a violation of division (A) of *section 2913.02 of the Revised Code* in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of *section 2921.331 [2921.33.1] of the Revised Code*, the offender shall serve that prison term consecutively

to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to *section 2929.16, 2929.17*, or *2929.18 of the Revised Code*, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code*. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison

term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code.*

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) or division (J)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of *section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment,

in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) The court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section 2907.02 of the Revised Code*, or division (B) of *section 2907.02 of the Revised Code* provides that the court shall not sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418 [2941.14.18]*, *2941.1419 [2941.14.19]*, or *2941.1420 [2941.14.20] of the Revised Code*.

(4) A person is convicted of or pleads guilty to a violation of *section 2905.01 of the Revised Code* committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022 [2929.02.2], division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of *section 2929.06 of the Revised Code* requires the court to sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code.*

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of *section 2929.02 of the Revised Code* requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code.*

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the *Revised Code, section 2929.142 [2929.14.2] of the Revised Code*, or *section 2971.03 of the Revised Code*, or any other provision of law, *section 5120.163 [5120.16.3] of the Revised Code* applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.142 [2941.14.2] of the Revised Code* that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) (1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.143 [2941.14.3] of the Revised Code* that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional pris-

on term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2) (a) If an offender is convicted of or pleads guilty to a felony violation of *section 2907.22, 2907.24, 2907.241 [2907.24.1]*, or *2907.25 of the Revised Code* and to a specification of the type described in *section 2941.1421 [2941.14.21] of the Revised Code* and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (J)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of *section 2907.22, 2907.23, 2907.24, 2907.241 [2907.24.1]*, or *2907.25 of the Revised Code* and also was convicted of or pleaded guilty to a specification of the type described in *section 2941.1421 [2941.14.21] of the Revised Code* regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (J)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (J)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of *section 2907.22, 2907.24, 2907.241 [2907.24.1]*, or *2907.25 of*

the Revised Code and any residential sanction imposed for the violation under *section 2929.16 of the Revised Code*. A sanction imposed under this division shall be considered to be a community control sanction for purposes of *section 2929.15 of the Revised Code*, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under *section 5120.031 [5120.03.1] of the Revised Code* or for placement in an intensive program prison under *section 5120.032 [5120.03.2] of the Revised Code*, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2] of the Revised Code*, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2] of the Revised Code*, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in *section 5120.031 [5120.03.1]* or *5120.032 [5120.03.2] of the Revised Code* and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A) (1) of *section 2903.06 of the Revised Code* and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to *section 2929.142 [2929.14.2] of the Revised Code.*

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 88 (Eff 9-3-96); 146 v H 445 (Eff 9-3-96); 146 v H 154 (Eff 10-4-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 2 (Eff 1-1-99); 148 v S 1 (Eff 8-6-99); 148 v H 29 (Eff 10-29-99); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff

5-17-2000); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 130. Eff 4-7-2003; 149 v S 123, § 1, eff. 1-1-04; 150 v H 12, §§ 1, 3, eff. 4-8-04*; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 137, § 1, eff. 7-11-06; 151 v H 137, § 3, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 184, § 1, eff. 9-9-08; 152 v S 220, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09.

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PAGE'S OHIO REVISED CODE ANNOTATED

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 8 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR FELONY

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ORC Ann. 2929.15 (2011)

§ 2929.15. Community control sanctions

(A) (1) If in sentencing an offender for a felony the court is not required to impose a prison term, a mandatory prison term, or a term of life imprisonment upon the offender, the court may directly impose a sentence that consists of one or more community control sanctions authorized pursuant to *section 2929.16*, *2929.17*, or *2929.18 of the Revised Code*. If the court is sentencing an offender for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code*, in addition to the mandatory term of local incarceration imposed under that division and the mandatory fine required by division (B)(3) of *section 2929.18 of the Revised Code*, the court may impose upon the offender a community control sanction or combination of community control sanctions in accordance with *sections 2929.16* and *2929.17 of the Revised Code*. If the court is sentencing an offender for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, in addition to the mandatory prison term or mandatory prison term and additional prison term imposed under that division, the court also may impose upon the offender a community control sanction or combination of community control sanctions under *section 2929.16* or *2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

The duration of all community control sanctions imposed upon an offender under this division shall not exceed five years. If the offender absconds or otherwise leaves the jurisdiction of the court in which the offender resides without obtaining permission from the court or the offender's probation officer to leave the jurisdiction of the court, or if the offender is confined in any institution for the commission of any offense while under a community control sanction, the period of the community control sanction ceases to run until the offender is brought before the court for its further action. If the court sentences the offender to one or more nonresidential sanctions under *section 2929.17 of the Revised Code*, the court shall impose as a condition of the nonresidential sanctions

that, during the period of the sanctions, the offender must abide by the law and must not leave the state without the permission of the court or the offender's probation officer. The court may impose any other conditions of release under a community control sanction that the court considers appropriate, including, but not limited to, requiring that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in division (D) of this section to determine whether the offender ingested or was injected with a drug of abuse and requiring that the results of the drug test indicate that the offender did not ingest or was not injected with a drug of abuse.

(2) (a) If a court sentences an offender to any community control sanction or combination of community control sanctions authorized pursuant to *section 2929.16, 2929.17,* or *2929.18 of the Revised Code*, the court shall place the offender under the general control and supervision of a department of probation in the county that serves the court for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer. Alternatively, if the offender resides in another county and a county department of probation has been established in that county or that county is served by a multicounty probation department established under *section 2301.27 of the Revised Code*, the court may request the court of common pleas of that county to receive the offender into the general control and supervision of that county or multicounty department of probation for purposes of reporting to the court a violation of any condition of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer, subject to the jurisdiction of the trial judge over and with respect to the person of the offender, and to the rules governing that department of probation.

If there is no department of probation in the county that serves the court, the court shall place the offender, regardless of the offender's county of residence, under the general control and supervision of the adult parole authority for purposes of reporting to the court a violation of any of the sanctions, any condition of release under a community control sanction imposed by the court, a violation of law, or the departure of the offender from this state without the permission of the court or the offender's probation officer.

(b) If the court imposing sentence upon an offender sentences the offender to any community control sanction or combination of community control sanctions authorized pursuant to *section 2929.16, 2929.17,* or *2929.18 of the Revised Code,* and if the offender violates any condition of the sanctions, any condition of release under a community control sanction imposed by the court, violates any law, or departs the state without the permission of the court or the offender's probation officer, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation or departure directly to the sentencing court, or shall report the violation or departure to the county or multicounty department of probation with general control and supervision over the offender under division (A)(2)(a) of this section or the officer of that department who supervises the offender, or, if there is no such department with general control and supervision over the offender under that division, to the adult parole authority. If the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction reports the violation or departure to the county or multicounty department of probation or the adult parole authority, the department's or authority's officers may treat the offender as if the offender were on probation and in violation of the probation, and shall report the violation of the condition of the sanction, any condition of release under a

community control sanction imposed by the court, the violation of law, or the departure from the state without the required permission to the sentencing court.

(3) If an offender who is eligible for community control sanctions under this section admits to being drug addicted or the court has reason to believe that the offender is drug addicted, and if the offense for which the offender is being sentenced was related to the addiction, the court may require that the offender be assessed by a properly credentialed professional within a specified period of time and shall require the professional to file a written assessment of the offender with the court. If a court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after consideration of the written assessment, if available at the time of sentencing, and recommendations of the professional and other treatment and recovery support services providers.

(4) If an assessment completed pursuant to division (A)(3) of this section indicates that the offender is addicted to drugs or alcohol, the court may include in any community control sanction imposed for a violation of *section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36,* or *2925.37 of the Revised Code* a requirement that the offender participate in a treatment and recovery support services program certified under *section 3793.06 of the Revised Code* or offered by another properly credentialed program provider.

(B) (1) If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing court may impose upon the violator one or more of the following penalties:

(a) A longer time under the same sanction if the total time under the sanctions does not exceed the five-year limit specified in division (A) of this section;

(b) A more restrictive sanction under *section 2929.16, 2929.17,* or *2929.18 of the Revised Code*;

(c) A prison term on the offender pursuant to *section 2929.14 of the Revised Code.*

(2) The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(3) of *section 2929.19 of the Revised Code.* The court may reduce the longer period of time that the offender is required to spend under the longer sanction, the more restrictive sanction, or a prison term imposed pursuant to this division by the time the offender successfully spent under the sanction that was initially imposed.

(C) If an offender, for a significant period of time, fulfills the conditions of a sanction imposed pursuant to *section 2929.16, 2929.17,* or *2929.18 of the Revised Code* in an exemplary manner, the court may reduce the period of time under the sanction or impose a less restrictive sanction, but the court shall not permit the offender to violate any law or permit the offender to leave the state without the permission of the court or the offender's probation officer.

(D) (1) If a court under division (A)(1) of this section imposes a condition of release under a community control sanction that requires the offender to submit to random drug testing, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section may cause the offender to submit to random drug testing performed by a laboratory or entity that has entered into a contract with any of the governmental entities or officers authorized to enter into a contract with that laboratory or entity under *section 341.26, 753.33,* or *5120.63 of the Revised Code.*

(2) If no laboratory or entity described in division (D)(1) of this section has entered into a contract as specified in that division, the department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section shall cause the offender to submit to random drug testing performed by a reputable public laboratory to determine whether the individual who is the subject of the drug test ingested or was injected with a drug of abuse.

(3) A laboratory or entity that has entered into a contract pursuant to *section 341.26, 753.33,* or *5120.63 of the Revised Code* shall perform the random drug tests under division (D)(1) of this section in accordance with the applicable standards that are included in the terms of that contract. A public laboratory shall perform the random drug tests under division (D)(2) of this section in accordance with the standards set forth in the policies and procedures established by the department of rehabilitation and correction pursuant to *section 5120.63 of the Revised Code.* An offender who is required under division (A)(1) of this section to submit to random drug testing as a condition of release under a community control sanction and whose test results indicate that the offender ingested or was injected with a drug of abuse shall pay the fee for the drug test if the department of probation or the adult parole authority that has general control and supervision of the offender requires payment of a fee. A laboratory or entity that performs the random drug testing on an offender under division (D)(1) or (2) of this section shall transmit the results of the drug test to the appropriate department of probation or the adult parole authority that has general control and supervision of the offender under division (A)(2)(a) of this section.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349. Eff 9-22-2000; 149 v S 123, § 1, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 152 v H 130, § 1, eff. 4-7-09; 153 v H 338, § 1, eff. 9-17-10.

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR FELONY

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§ 2929.18. Financial sanctions; restitution; reimbursements

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to *section 2947.23 of the Revised Code*, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in *section 2929.32 of the Revised Code*, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments.

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(2) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision, or as described in division (B)(2) of this section to one or more law enforcement agencies, with the amount of the fine based on a standard percentage of the offender's daily income over a period of time determined by the court and based upon the seriousness of the offense. A fine ordered under this division shall not exceed the maximum conventional fine amount authorized for the level of the offense under division (A)(3) of this section.

(3) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

(a) For a felony of the first degree, not more than twenty thousand dollars;

(b) For a felony of the second degree, not more than fifteen thousand dollars;

(c) For a felony of the third degree, not more than ten thousand dollars;

(d) For a felony of the fourth degree, not more than five thousand dollars;

(e) For a felony of the fifth degree, not more than two thousand five hundred dollars.

(4) A state fine or costs as defined in *section 2949.111 of the Revised Code.*

(5) (a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including the following:

(i) All or part of the costs of implementing any community control sanction, including a supervision fee under *section 2951.021 of the Revised Code*;

(ii) All or part of the costs of confinement under a sanction imposed pursuant to *section 2929.14, 2929.142 [2929.14.2]*, or *2929.16 of the Revised Code*, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement;

(iii) All or part of the cost of purchasing and using an immobilizing or disabling device, including a certified ignition interlock device, or a remote alcohol monitoring device that a court orders an offender to use under *section 4510.13 of the Revised Code*.

(b) If the offender is sentenced to a sanction of confinement pursuant to *section 2929.14* or *2929.16 of the Revised Code* that is to be served in a facility operated by a board of county commissioners, a legislative authority of a municipal corporation, or another local governmental entity, if, pursuant to *section 307.93, 341.14, 341.19, 341.23, 753.02, 753.04, 753.16, 2301.56*, or *2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, the board, legislative authority, or other local governmental entity requires prisoners to reimburse the county, municipal corporation, or other entity for its expenses incurred by reason of the prisoner's confinement, and if the court does not impose a financial sanction under division (A)(5)(a)(ii) of this section, confinement costs may be assessed pursuant to *section 2929.37 of the Revised Code*. In addition, the offender may be required to pay the fees specified in *section 2929.38 of the Revised Code* in accordance with that section.

(c) Reimbursement by the offender for costs pursuant to *section 2929.71 of the Revised Code*.

(B) (1) For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a manda-

tory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

(2) Any mandatory fine imposed upon an offender under division (B)(1) of this section and any fine imposed upon an offender under division (A)(2) or (3) of this section for any fourth or fifth degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code shall be paid to law enforcement agencies pursuant to division (F) of *section 2925.03 of the Revised Code.*

(3) For a fourth degree felony OVI offense and for a third degree felony OVI offense, the sentencing court shall impose upon the offender a mandatory fine in the amount specified in division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code*, whichever is applicable. The mandatory fine so imposed shall be disbursed as provided in the division pursuant to which it is imposed.

(4) Notwithstanding any fine otherwise authorized or required to be imposed under division (A)(2) or (3) or (B)(1) of this section or *section 2929.31 of the Revised Code* for a violation of *section 2925.03 of the Revised Code*, in addition to any penalty or sanction imposed for that offense under *section 2925.03* or *sections 2929.11* to *2929.18 of the Revised Code* and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender for a violation of *section 2925.03 of the Revised Code* may impose upon the offender a fine in addition to any fine imposed under division (A)(2) or (3) of this section and in addition to any mandatory fine imposed under division (B)(1) of this section. The

fine imposed under division (B)(4) of this section shall be used as provided in division (H) of *section 2925.03 of the Revised Code*. A fine imposed under division (B)(4) of this section shall not exceed whichever of the following is applicable:

(a) The total value of any personal or real property in which the offender has an interest and that was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of *section 2925.03 of the Revised Code*, including any property that constitutes proceeds derived from that offense;

(b) If the offender has no interest in any property of the type described in division (B)(4)(a) of this section or if it is not possible to ascertain whether the offender has an interest in any property of that type in which the offender may have an interest, the amount of the mandatory fine for the offense imposed under division (B)(1) of this section or, if no mandatory fine is imposed under division (B)(1) of this section, the amount of the fine authorized for the level of the offense imposed under division (A)(3) of this section.

(5) Prior to imposing a fine under division (B)(4) of this section, the court shall determine whether the offender has an interest in any property of the type described in division (B)(4)(a) of this section. Except as provided in division (B)(6) or (7) of this section, a fine that is authorized and imposed under division (B)(4) of this section does not limit or affect the imposition of the penalties and sanctions for a violation of *section 2925.03 of the Revised Code* prescribed under those sections or *sections 2929.11* to *2929.18 of the Revised Code* and does not limit or affect a forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code.

(6) If the sum total of a mandatory fine amount imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* under division (B)(1) of this section plus the amount of any fine imposed under division (B)(4) of this section does not exceed the maximum

statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court may impose a fine for the offense in addition to the mandatory fine and the fine imposed under division (B)(4) of this section. The sum total of the amounts of the mandatory fine, the fine imposed under division (B)(4) of this section, and the additional fine imposed under division (B)(6) of this section shall not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*. The clerk of the court shall pay any fine that is imposed under division (B)(6) of this section to the county, township, municipal corporation, park district as created pursuant to *section 511.18* or *1545.04 of the Revised Code*, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender pursuant to division (F) of *section 2925.03 of the Revised Code*.

(7) If the sum total of the amount of a mandatory fine imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* plus the amount of any fine imposed under division (B)(4) of this section exceeds the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court shall not impose a fine under division (B)(6) of this section.

(8) (a) If an offender who is convicted of or pleads guilty to a violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 [2941.14.22] of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the sentencing court shall sentence the offender to a financial sanction of restitution by the offender to the victim or any survivor of the victim, with the restitution including the costs of hous-

ing, counseling, and medical and legal assistance incurred by the victim as a direct result of the offense and the greater of the following:

(i) The gross income or value to the offender of the victim's labor or services;

(ii) The value of the victim's labor as guaranteed under the minimum wage and overtime provisions of the "Federal Fair Labor Standards Act of 1938," *52 Stat. 1060, 20 U.S.C. 207,* and state labor laws.

(b) If a court imposing sentence upon an offender for a felony is required to impose upon the offender a financial sanction of restitution under division (B)(8)(a) of this section, in addition to that financial sanction of restitution, the court may sentence the offender to any other financial sanction or combination of financial sanctions authorized under this section, including a restitution sanction under division (A)(1) of this section.

(C) (1) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by the department of rehabilitation and correction in operating a prison or other facility used to confine offenders pursuant to sanctions imposed under *section 2929.14, 2929.142 [2929.14.2]*, or *2929.16 of the Revised Code* to the treasurer of state. The treasurer of state shall deposit the reimbursements in the confinement cost reimbursement fund that is hereby created in the state treasury. The department of rehabilitation and correction shall use the amounts deposited in the fund to fund the operation of facilities used to confine offenders pursuant to *sections 2929.14, 2929.142 [2929.14.2]*, and *2929.16 of the Revised Code.*

(2) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a county pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant

to a sanction imposed under *section 2929.16 of the Revised Code* to the county treasurer. The county treasurer shall deposit the reimbursements in the sanction cost reimbursement fund that each board of county commissioners shall create in its county treasury. The county shall use the amounts deposited in the fund to pay the costs incurred by the county pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code.*

(3) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a municipal corporation pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code* to the treasurer of the municipal corporation. The treasurer shall deposit the reimbursements in a special fund that shall be established in the treasury of each municipal corporation. The municipal corporation shall use the amounts deposited in the fund to pay the costs incurred by the municipal corporation pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code.*

(4) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed pursuant to division (A)(5)(a) of this section for the costs incurred by a private provider pursuant to a sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* to the provider.

(D) Except as otherwise provided in this division, a financial sanction imposed pursuant to division (A) or (B) of this section is a judgment in favor of the state or a political subdivision in which

the court that imposed the financial sanction is located, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(5)(a)(ii) of this section upon an offender who is incarcerated in a state facility or a municipal jail is a judgment in favor of the state or the municipal corporation, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed upon an offender pursuant to this section for costs incurred by a private provider of sanctions is a judgment in favor of the private provider, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of restitution imposed pursuant to division (A)(1) or (B)(8) of this section is an order in favor of the victim of the offender's criminal act that can be collected through execution as described in division (D)(1) of this section or through an order as described in division (D)(2) of this section, and the offender shall be considered for purposes of the collection as the judgment debtor. Imposition of a financial sanction and execution on the judgment does not preclude any other power of the court to impose or enforce sanctions on the offender. Once the financial sanction is imposed as a judgment or order under this division, the victim, private provider, state, or political subdivision may bring an action to do any of the following:

(1) Obtain execution of the judgment or order through any available procedure, including:

(a) An execution against the property of the judgment debtor under Chapter 2329. of the Revised Code;

(b) An execution against the person of the judgment debtor under Chapter 2331. of the Revised Code;

(c) A proceeding in aid of execution under Chapter 2333. of the Revised Code, including:

(i) A proceeding for the examination of the judgment debtor under *sections 2333.09* to *2333.12* and *sections 2333.15* to *2333.27 of the Revised Code*;

(ii) A proceeding for attachment of the person of the judgment debtor under *section 2333.28 of the Revised Code*;

(iii) A creditor's suit under *section 2333.01 of the Revised Code.*

(d) The attachment of the property of the judgment debtor under Chapter 2715. of the Revised Code;

(e) The garnishment of the property of the judgment debtor under Chapter 2716. of the Revised Code.

(2) Obtain an order for the assignment of wages of the judgment debtor under *section 1321.33 of the Revised Code.*

(E) A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.

(F) Each court imposing a financial sanction upon an offender under this section or under *section 2929.32 of the Revised Code* may designate the clerk of the court or another person to collect the financial sanction. The clerk or other person authorized by law or the court to collect the financial sanction may enter into contracts with one or more public agencies or private vendors for the collection of, amounts due under the financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*. Before entering into a contract for the collection of amounts due from an offender pursuant to any financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*, a court shall comply with *sections 307.86* to *307.92 of the Revised Code.*

(G) If a court that imposes a financial sanction under division (A) or (B) of this section finds that an offender satisfactorily has completed all other sanctions imposed upon the offender and that all restitution that has been ordered has been paid as ordered, the court may suspend any financial

sanctions imposed pursuant to this section or *section 2929.32 of the Revised Code* that have not been paid.

(H) No financial sanction imposed under this section or *section 2929.32 of the Revised Code* shall preclude a victim from bringing a civil action against the offender.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 147 v H 122 (Eff 7-29-98); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v H 461, § 1, eff. 4-4-07; 151 v H 241, § 1, eff. 7-1-07; 152 v S 17, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09.

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§ 2929.19. Sentencing hearing

(A) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to *section 2953.07* or *2953.08 of the Revised Code*. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with *section 2930.14 of the Revised Code*, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

(B) (1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to *section 2951.03 of the Revised Code* or *Criminal Rule 32.2*, and any victim impact statement made pursuant to *section 2947.051 [2947.05.1] of the Revised Code*.

(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

(a) Unless the offense is a violent sex offense or designated homicide, assault, or kidnapping offense for which the court is required to impose sentence pursuant to division (G) of *section 2929.14 of the Revised Code*, if it imposes a prison term for a felony of the fourth or fifth degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of *section 2929.13 of the Revised Code* for purposes of sentencing, its reasons for imposing the prison term, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and any factors

listed in divisions (B)(1)(a) to (i) of *section 2929.13 of the Revised Code* that it found to apply relative to the offender.

(b) If it does not impose a prison term for a felony of the first or second degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and for which a presumption in favor of a prison term is specified as being applicable, its reasons for not imposing the prison term and for overriding the presumption, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and the basis of the findings it made under divisions (D)(1) and (2) of *section 2929.13 of the Revised Code.*

(c) If it imposes consecutive sentences under *section 2929.14 of the Revised Code*, its reasons for imposing the consecutive sentences;

(d) If the sentence is for one offense and it imposes a prison term for the offense that is the maximum prison term allowed for that offense by division (A) of *section 2929.14 of the Revised Code* or *section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term;

(e) If the sentence is for two or more offenses arising out of a single incident and it imposes a prison term for those offenses that is the maximum prison term allowed for the offense of the highest degree by division (A) of *section 2929.14 of the Revised Code* or *section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term.

(3) Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

(b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) Notify the offender that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. If a court imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of *section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the

third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of this section and failed to notify the offender pursuant to division (B)(3)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code*, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(e) of this section that the parole board may impose a prison term as described in division (B)(3)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code* or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of *section 2967.28 of the Revised Code*, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(f) Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in *section 341.26, 753.33,* or *5120.63 of the Revised Code,* whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

(4) (a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of *section 2950.03 of the Revised Code* if any of the following apply:

(i) The offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) The offender is being sentenced under *section 2971.03 of the Revised Code* for a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of *section 2907.02 of the Revised Code.*

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418 [2941.14.18]*, *2941.1419 [2941.14.19]*, or *2941.1420 [2941.14.20] of the Revised Code.*

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* for an offense described in those divisions committed on or after January 1, 2008.

(b) Additionally, if any criterion set forth in divisions (B)(4)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (G) of *section 2929.14 of the Revised Code*, the court shall impose sentence on the offender as described in that division.

(5) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to *section 2929.14 of the Revised Code.*

(6) Before imposing a financial sanction under *section 2929.18 of the Revised Code* or a fine under *section 2929.32 of the Revised Code*, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(7) If the sentencing court sentences the offender to a sanction of confinement pursuant to *section 2929.14* or *2929.16 of the Revised Code* that is to be served in a local detention facility, as

defined in *section 2929.36 of the Revised Code*, and if the local detention facility is covered by a policy adopted pursuant to *section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56*, or *2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to *section 2929.37 of the Revised Code* for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(7)(a)(i) of this section and does not pay the bill by the times specified in *section 2929.37 of the Revised Code*, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(7)(a)(ii) of this section.

(8) The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(3)(a) of this section or to include in the sentencing entry any information required by division (B)(3)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

(C) (1) If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose additional sanctions as specified in *sections 2929.15*, *2929.16*, *2929.17*, and *2929.18 of the Revised Code*. The court shall not impose a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of *section 2929.13 of the Revised Code*.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose an additional prison term as specified in *section 2929.14 of the Revised Code*. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (K) of *section 2929.14 of the Revised Code*, may recommend placement of the offender in a program of shock incarceration under *section 5120.031 [5120.03.1] of the Revised Code* or an intensive program prison under *section 5120.032 [5120.03.2] of the Revised Code*, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 137, § 1, eff. 7-11-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT ORC 2929.191

PAGE'S OHIO REVISED CODE ANNOTATED

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 8 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR FELONY

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ORC Ann. 2929.191 (2011)

§ 2929.191. Correction to judgment of conviction concerning post-release control

(A) (1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of *section 2929.14 of the Revised Code*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of *section 2929.14 of the Revised Code*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the

journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(c) of *section 2929.19 of the Revised Code* or that the offender may be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(d) of that section.

(B) (1) If, prior to the effective date of this section, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of *section 2929.19 of the Revised Code*, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code* the parole board may impose as

part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

(2) If the court prepares and issues a correction to a judgment of conviction as described in division (B)(1) of this section before the offender is released from imprisonment under the term, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(3)(e) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to ap-

pear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

HISTORY:

151 v H 137, § 1, eff. 7-11-06.

LEXSTAT ORC 2941.145

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2941. INDICTMENT

FORM AND SUFFICIENCY

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ORC Ann. 2941.145 (2011)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of *section 2929.14 of the Revised Code* is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of *section 2929.14 of the Revised Code* is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in *section 2152.17 of the Revised Code.*

(D) As used in this section, "firearm" has the same meaning as in *section 2923.11 of the Revised Code.*

HISTORY:

146 v S 2 (Eff 7-1-96); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3. Eff 1-1-2002.

LEXSTAT ORC 2953.08

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES

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ORC Ann. 2953.08 (2011)

§ 2953.08. Grounds for appeal by defendant or prosecutor of sentence for felony; appeal cost oversight committee

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of *section 2929.14* or *section 2929.142 [2929.14.2] of the Revised Code*, the sentence was not imposed pursuant to division (D)(3)(b) of *section 2929.14 of the Revised Code*, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of *section 2929.13 of the Revised Code* for purposes of sentencing, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of *section 2929.13 of the Revised Code* to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of *section 2971.03 of the Revised Code*,

if the minimum term of the indefinite term imposed pursuant to division (A)(3) of *section 2971.03 of the Revised Code* is the longest term available for the offense from among the range of terms listed in *section 2929.14 of the Revised Code*. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in *section 2971.01 of the Revised Code*. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in *section 2929.01 of the Revised Code*, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(2)(a) of *section 2929.14 of the Revised Code*.

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(3)(b) of *section 2929.14 of the Revised Code*.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under *section 2929.20 of the Revised Code* of a sentence that was imposed for a felony of the first or second degree.

(C) (1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of *section 2929.14 of the Revised Code* and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (D)(2)(a) or (b) of *section 2929.14 of the Revised Code* if the additional sentence is for a definite prison term that is longer than five years.

(D) (1) 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.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (D)(2)(b) of *section 2929.14 of the Revised Code*. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (D)(2)(c) of *section 2929.14 of the Revised Code*.

(3) A sentence imposed for aggravated murder or murder pursuant to *sections 2929.02* to *2929.06 of the Revised Code* is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in *Rule 4(B) of the Rules of Appellate Procedure*, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to *section 2947.06* or *2951.03 of the Revised Code* or *Criminal Rule 32.2* in connection with the appeal of a sentence under this section shall comply with division (D)(3) of *section 2951.03 of the Revised Code* when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of *section 2951.03 of the Revised Code* and does not cause that report to become a public record, as defined in *section 149.43 of the Revised Code*, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of *section 2929.20 of the Revised Code.*

(G) (1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of *section 2929.20 of the Revised Code* relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of *section 2929.20 of the Revised Code*, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

(I) (1) There is hereby established the felony sentence appeal cost oversight committee, consisting of eight members. One member shall be the chief justice of the supreme court or a representative of the court designated by the chief justice, one member shall be a member of the senate appointed by the president of the senate, one member shall be a member of the house of representatives appointed by the speaker of the house of representatives, one member shall be the director of budget and management or a representative of the office of budget and management designated by the director, one member shall be a judge of a court of appeals, court of common pleas, municipal court, or county court appointed by the chief justice of the supreme court, one member shall be the state public defender or a representative of the office of the state public defender designated by the state public defender, one member shall be a prosecuting attorney appointed by the Ohio prosecuting attorneys association, and one member shall be a county commissioner appointed by the county commissioners association of Ohio. No more than three of the appointed members of the committee may be members of the same political party.

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the member appointed by the chief justice of the supreme court shall serve a term ending three years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of

Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty days has elapsed, whichever occurs first.

If the chief justice of the supreme court, the director of the office of budget and management, or the state public defender serves as a member of the committee, that person's term of office as a member shall continue for as long as that person holds office as chief justice, director of the office of budget and management, or state public defender. If the chief justice of the supreme court designates a representative of the court to serve as a member, the director of budget and management designates a representative of the office of budget and management to serve as a member, or the state public defender designates a representative of the office of the state public defender to serve as a member, the person so designated shall serve as a member of the commission for as long as the official who made the designation holds office as chief justice, director of the office of budget and management, or state public defender or until that official revokes the designation.

The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the committee shall meet at least once every six months or more often upon the call of the chairperson or the written request of three or more members, provided that the committee shall

not meet unless moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section and the moneys so appropriated then are available for that purpose.

The members of the committee shall serve without compensation, but, if moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section, each member shall be reimbursed out of the moneys so appropriated that then are available for actual and necessary expenses incurred in the performance of official duties as a committee member.

(2) The state criminal sentencing commission periodically shall provide to the felony sentence appeal cost oversight committee all data the commission collects pursuant to division (A)(5) of *section 181.25 of the Revised Code*. Upon receipt of the data from the state criminal sentencing commission, the felony sentence appeal cost oversight committee periodically shall review the data; determine whether any money has been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing state financial assistance to counties in accordance with this division for the increase in expenses the counties experience as a result of the felony sentence appeal provisions set forth in this section or as a result of a postconviction relief proceeding brought under division (A)(2) of *section 2953.21 of the Revised Code* or an appeal of a judgment in that proceeding; if it determines that any money has been so appropriated, determine the total amount of moneys that have been so appropriated specifically for that purpose and that then are available for that purpose; and develop a recommended method of distributing those moneys to the counties. The committee shall send a copy of its recommendation to the supreme court. Upon receipt of the committee's recommendation, the supreme court shall distribute to the counties, based upon that recommendation, the moneys that have been so appropriated specifically for the

purpose of providing state financial assistance to counties under this division and that then are available for that purpose.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 148 v S 107 (Eff 3-23-2000); 148 v H 331. Eff 10-10-2000; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 461, § 1, eff. 4-4-07; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT ORC 2967.28

PAGE'S OHIO REVISED CODE ANNOTATED

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 8 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2967. PARDON; PAROLE; PROBATION

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ORC Ann. 2967.28 (2011)

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

(1) "Monitored time" means the monitored time sanction specified in *section 2929.17 of the Revised Code.*

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code.*

(3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of *section 2929.19 of the Revised Code* of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under

that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Pursuant to an agreement entered into under *section 2967.29 of the Revised Code*, a court of common pleas or parole board may impose sanctions or conditions on an offender who is placed on post-release control under this division.

(D) (1) Before the prisoner is released from imprisonment, the parole board or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court shall impose upon a prisoner described in division (B) of this section, may impose upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 [5120.03.1] or in division (B)(1) of *section 5120.032 [5120.03.2] of the Revised Code*, one or more

post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board or court imposes one or more post-release control sanctions upon a prisoner, the board or court, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the offender not leave the state without permission of the court or the offender's parole or probation officer and that the offender abide by the law. The board or court may impose any other conditions of release under a post-release control sanction that the board or court considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17*, and *2929.18 of the Revised Code*. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board or court shall review the prisoner's criminal history, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board or court shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board or court shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031 [5120.03.1], or division (B)(1) of *section 5120.032 [5120.03.2] of the Revised Code*, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board or court shall presume that monitored time is the appropriate post-release control sanction unless the board or court determines that a more restrictive sanction is

warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after July 11, 2006, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of *section 2967.131 [2967.13.1] of the Revised Code* that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority or court may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. The authority also may recommend that the parole board or court increase or reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board or court increase the duration of post-release control, the board or court shall review the releasee's behavior and may increase the duration of the period of post-release control imposed by the court up to eight years. If the authority recommends that the board or court reduce the duration of control for an offense described in division (B) or (C) of this section, the board or court shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board or court reduce the duration of the

period of control imposed for an offense described in division (B)(1) of this section to a period less than the length of the stated prison term originally imposed, and in no case shall the board or court permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

(E) The department of rehabilitation and correction, in accordance with Chapter 119. of the Revised Code, shall adopt rules that do all of the following:

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in *section 2929.11 of the Revised Code* and that are appropriate to the needs of releasees;

(2) Establish standards by which the parole board can determine which prisoners described in division (C) of this section should be placed under a period of post-release control;

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the releasee's activities including, but not limited to, remaining free from criminal activity and from the abuse of alcohol or other drugs, successfully participating in approved rehabilitation programs, maintaining employment, and paying restitution to the victim or meeting the terms of other financial sanctions;

(4) Establish standards to be used by the adult parole authority in modifying a releasee's post-release control sanctions pursuant to division (D)(2) of this section;

(5) Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

(a) Classify violations according to the degree of seriousness;

(b) Define the circumstances under which formal action by the parole board is warranted;

(c) Govern the use of evidence at violation hearings;

(d) Ensure procedural due process to an alleged violator;

(e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;

(f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

(F) (1) Whenever the parole board imposes one or more post-release control sanctions upon an offender under this section, the offender upon release from imprisonment shall be under the general jurisdiction of the adult parole authority and generally shall be supervised by the field services section through its staff of parole and field officers as described in *section 5149.04 of the Revised Code*, as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* that are imposed on the offender, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation directly to the adult parole authority or to the officer of the authority who supervises the offender. The authority's officers may treat the offender as if the offender were on parole and in violation of the parole, and otherwise shall comply with this section.

(2) If the adult parole authority or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court determines that a releasee has violated a post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* imposed upon the releasee and that a more restrictive sanction is appropriate, the authority or court may impose a more restrictive sanction upon the releasee, in accordance with the standards established under division (E) of this section or in accordance with the agreement made under *section 2967.29 of the Revised Code*, or may report the violation to the parole board for a hearing pursuant to division (F)(3) of this section. The authority or court may not, pursuant to this division, increase the duration of the releasee's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the authority or court may impose on the releasee any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16*, *2929.17*, and *2929.18 of the Revised Code*.

(3) The parole board or, pursuant to an agreement under *section 2967.29 of the Revised Code*, the court may hold a hearing on any alleged violation by a releasee of a post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* that are imposed upon the releasee. If after the hearing the board or court finds that the releasee violated the sanction or condition, the board or court may increase the duration of the releasee's post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release control sanction. When appropriate, the board or court may impose as a post-release control sanction a residential sanction that includes a prison term. The board or court shall consider a prison term as a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when

the releasee committed repeated violations of post-release control sanctions. Unless a releasee's stated prison term was reduced pursuant to *section 5120.032 [5120.03.2] of the Revised Code*, the period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. If a releasee's stated prison term was reduced pursuant to *section 5120.032 [5120.03.2] of the Revised Code*, the period of a prison term that is imposed as a post-release control sanction under this division and the maximum cumulative prison term for all violations under this division shall not exceed the period of time not served in prison under the sentence imposed by the court. The period of a prison term that is imposed as a post-release control sanction under this division shall not count as, or be credited toward, the remaining period of post-release control.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control for a period of time determined by division (F)(4)(d) of this section, the maximum cumulative prison term for all violations under this division shall not exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the parole board or court, plus one-half of the total stated prison term of the new felony.

(4) Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole.

The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under *section 2967.16 of the Revised Code* until the post-release control period otherwise would have ended.

(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

(c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board or court. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

(d) The period of post-release control for a releasee who commits a felony while under post-release control for an earlier felony shall be the longer of the period of post-release control specified for the new felony under division (B) or (C) of this section or the time remaining under the period of post-release control imposed for the earlier felony as determined by the parole board or court.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 111 (Eff 3-17-98); 148 v S 107 (Eff 3-23-2000); 149 v H 327 (Eff 7-8-2002); 149 v H 510; Eff 3-31-2003; 151 v H 137, § 1, eff. 7-11-06; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT OHIO APP.R. 25

OHIO RULES OF COURT SERVICE

*** RULES CURRENT THROUGH APRIL 1, 2011 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Appellate Procedure

Title III General Provisions

Ohio App. Rule 25 (2011)

Review Court Orders which may amend this Rule.

Rule 25. Motion to certify a conflict

(A) A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing no later than ten days after the judgment or order of the court that creates a conflict with a judgment or order of another court of appeals has been approved by the court and filed

by the court with the clerk for journalization. The filing of a motion to certify a conflict does not extend the time for filing a notice of appeal in the supreme court. A motion under this rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

(B) Parties opposing the motion shall answer in writing within ten days of service of the motion. The moving party may file a reply brief within seven days after service of the answer brief in opposition. Copies of the motion, answer brief in opposition, and reply brief shall be served as prescribed for the service and filing of briefs in the initial action. Oral argument of a motion to certify a conflict shall not be permitted except at the request of the court.

(C) The court of appeals shall rule upon a motion to certify within sixty days of its filing.

HISTORY: Effective 7-1-94; 7-1-10.

LEXSTAT OHIO CRIM.R. 43

OHIO RULES OF COURT SERVICE

*** RULES CURRENT THROUGH APRIL 1, 2011 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 43 (2011)

Review Court Orders which may amend this Rule.

Rule 43. Presence of the Defendant

(A) Defendant's presence.

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise pro-

vided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(2) Notwithstanding the provisions of division (A)(1) of this rule, in misdemeanor cases or in felony cases where a waiver has been obtained in accordance with division (A)(3) of this rule, the court may permit the presence and participation of a defendant by remote contemporaneous video for any proceeding if all of the following apply:

(a) The court gives appropriate notice to all the parties;

(b) The video arrangements allow the defendant to hear and see the proceeding;

(c) The video arrangements allow the defendant to speak, and to be seen and heard by the court and all parties;

(d) The court makes provision to allow for private communication between the defendant and counsel. The court shall inform the defendant on the record how to, at any time, communicate privately with counsel. Counsel shall be afforded the opportunity to speak to defendant privately and in person. Counsel shall be permitted to appear with defendant at the remote location if requested.

(e) The proceeding may involve sworn testimony that is subject to cross examination, if counsel is present, participates and consents.

(3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.

(B) Defendant excluded because of disruptive conduct.

Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may

proceed in the defendant's absence or by remote contemporaneous video, and judgment and sentence may be pronounced as if the defendant were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

HISTORY: Amended, eff. 07/01/08.