

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Plaintiff-Appellee, : Case No.
vs. : On Appeal from the Champaign
JOHN NELSON, : County Court of Appeals
Defendant-Appellant. : Second Appellate District
: C.A. Case No. 2018-CA-5

**APPELLANT JOHN NELSON'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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The caps on community-control-violation prison sentences for underlying, qualified fourth- and fifth- degree felonies apply to all community-control violations that are based upon conduct that does not constitute a felony-level crime. R.C. 2929.15(B)(1)(c)(i) and (ii).	4
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INTRODUCTION

This Court’s guidance is needed to determine how the Ohio Legislature’s caps on community-control-violation prison sentences for—non-violent and non-sex-offense—fourth- and fifth-degree felonies operate. Ohio’s Legislature appeared to cap all prison sentences for community-control violations not based upon felony-level criminal conduct to ninety days for underlying, qualified fifth-degree felonies, and one-hundred eighty days for underlying, qualified fourth-degree felonies. *See R.C. 2929.15(B)(1)(c)(i) and (ii).*

The plain language of the statute constructs a binary scheme for the above-referenced caps. All prison sentences for violations based upon conduct that is not a felony-level crime are subject to the caps, but all prison sentences for violations based upon conduct that is a felony-level crime are not. Some Ohio appellate courts have so held. *See State v. Abner*, 4th Dist. Adams Nos. 18-CA-1061 and 18-CA-1062, 2018-Ohio-4506, ¶ 2, 12-13; *State v. Cozzzone*, 11th Dist. Geauga No. 2017-G-0141, 2018-Ohio-2249, ¶ 38; *State v. Pino*, 11th Dist. Lake No. 2017-L-171, 2018-Ohio-2825, ¶ 6. Nonetheless, other courts—like the one below—have created a third category that is also not subject to the caps. *See State v. Nelson*, 2d Dist. Champaign No. 2018-CA-5, 2018-Ohio-4763, ¶ 32, citing *State v. Davis*, 12th Dist. Warren No. CA2017-11-156, 2018-Ohio-2672, ¶ 16-18; *see also State v. Mannah*, 5th Dist. Fairfield No. 17-CA-54, 2018-Ohio-4219, ¶ 14-15.

That third category—consisting of what those courts call non-technical violations—exists because of the statute’s term technical violation, which is not

defined in Ohio's Revised Code. Consequently, and unsurprisingly, for courts that recognize such a third category, conduct within it is difficult to define and identify. The existence of the third category also creates discrepancies throughout Ohio regarding community-control-violation prison sentences for underlying, qualified fifth- and fourth-degree-felony offenses.

These problems are avoided, however, when lower courts—like those referenced above—follow this Court's precedent in the parole context, which has long defined the term technical violation to mean non-criminal conduct. *See State ex rel. Taylor v. Ohio Adult Parole Auth.*, 66 Ohio St.3d 121, 124, 609 N.E.2d 546 (1993) (relying on *Inmates Councilmatic Voice v. Rogers*, 541 F.2d 633 (6th Cir.1976)); *see also Abner*, 2018-Ohio-4506, ¶ 2, 12-13; *Cozzone*, 2018-Ohio-2249, ¶ 38; *Pino*, 2018-Ohio-2825, ¶ 6.

**EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case warrants review because courts, lawyers, and citizens need to know how the Ohio Legislature's caps operate. The legitimacy and transparency of Ohio's criminal-justice system in this area is dependent upon such clarity. Because it does not now exist, this case is a prime opportunity for this Court to establish exactly how the relevant caps operate by defining technical violation here as it has in the parole context.

STATEMENT OF THE CASE AND FACTS

John Nelson was on community control for four fourth-degree felonies: trafficking in cocaine, attempted aggravated trafficking in drugs, and two counts of corrupting another with drugs. *State v. Nelson*, 2018-Ohio-4763, ¶ 2-4. He violated that community control in three ways: misdemeanor criminal damaging, misdemeanor disorderly conduct, and contact with a prohibited person. *Id.* at ¶ 6. He was sentenced to thirty-four months in prison for his violation grounded in his contact with a prohibited person. *Id.* at ¶ 1, 32. On appeal, Mr. Nelson challenged the prison sentence as violative of the legislative cap in R.C. 2929.15(B)(1)(C)(ii). *Id.* at ¶ 16-17. The court of appeals upheld the aggregate prison sentence based on the following rationale:

We disagree with Nelson's assertion that all of his community control violations are "either technical violations *** or a misdemeanor," such that R.C. 2929.15(B)(1)(c)(ii) applies to limit his sentence. We find the distinction in [*State v. Davis*], 12th Dist. Warren No. CA2017-11-156, 2018-Ohio-2672] to be instructive between "an administrative requirement facilitating community control supervision," as in [*State v. Cearfoss*], 5th Dist. Stark No. 2004CA00085, 2004-Ohio-7310] and [*State v. Jenkins*], 2d Dist. Champaign No. 2005-CA-22, 2006-Ohio-2639], and "a substantive rehabilitative requirement which *addressed a significant factor contributing to appellant's criminal conduct.*" (Emphasis added.) Nelson was ordered to have no contact with Elliott in order to address an issue that significantly contributed to his criminal conduct, namely consuming alcohol. The no-contact sanction was specifically tailored to Nelson. He acknowledged that drinking alcohol was his "main problem," and that Elliott's use of alcohol around him contributed to his drinking and his violations of community control. The prosecutor identified with particularity Nelson's contact with Elliott as the basis for

his failure to succeed on community control, and the trial court similarly concluded that Nelson's contact with Elliott "resulted in commission of misdemeanor acts of property destruction and reckless behavior." For the foregoing reasons, we conclude that Nelson's contact with Elliott, although non-criminal in nature, was not a technical violation, and that R.C. 2929.15(B)(1)(c)(ii) did not apply to limit Nelson's sentence. In other words, Nelson's sentence does not violate R.C. 2929.15(B)(1)(c)(ii) and is not contrary to law. Nelson's sole assigned error is overruled, and the judgment of the trial court is affirmed.

Nelson, 2018-Ohio-4763, at ¶ 32.

This timely discretionary-review request follows.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

The caps on community-control-violation prison sentences for underlying, qualified fourth- and fifth-degree felonies apply to all community-control violations that are based upon conduct that does not constitute a felony-level crime. R.C. 2929.15(B)(1)(c)(i) and (ii).

The relevant statute, which became the effective law in Ohio on September 29, 2017, reads in pertinent part:

(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: * * *

(c) A prison term on the offender pursuant to section 2929.14 of the Revised Code and division (B)(3) of this section, provided that a prison term imposed under this division is subject to the following limitations, as applicable:

(i) If the prison term is imposed for any technical violation of the conditions of a community control sanction imposed for a felony of the fifth degree or for any violation of law committed while under a community control sanction imposed for such a felony that consists of a new criminal offense and that is not a felony, the prison term shall not exceed ninety days.

(ii) If the prison term is imposed for any technical violation of the conditions of a community control sanction imposed for a felony of the fourth degree that is not an offense of violence and is not a sexually oriented offense or for any violation of law committed while under a community control sanction imposed for such a felony that consists of a new criminal offense and that is not a felony, the prison term shall not exceed one hundred eighty days.

R.C. 2929.15(B)(1)(c)(i) and (ii).

The previous version of the statute did not differentiate between violation types at all and did not contain any caps for prison sentences based upon violations. *See Former R.C. 2929.15(B)(1)(c)* (which simply provided that a trial court could, for any type of violation in any case, impose “[a] prison term on the offender pursuant to section 2929.14 of the Revised Code”). And, in parole cases, this Court and federal courts—prior to the enactment of the current version of R.C. 2929.15(B)(1)(c)(i) and (ii) in June 2017—had long defined the term technical violation to mean non-criminal conduct. *See State ex rel. Taylor*, 66 Ohio St.3d at 124; *Inmates Councilmatic Voice*, 541 F.2d 633.

Thus, the context of R.C. 2929.15(B)(1)(c)(i) and (ii) establishes that a technical violation means any non-criminal violation, as at least two Ohio appellate courts have held. *See Abner*, 2018-Ohio-4506, ¶ 2, 12-13; *Cozzone*, 2018-Ohio-2249,

¶ 38; *Pino*, 2018-Ohio-2825, ¶ 6. This clean, either/or approach is consistent with the legislative goal of shifting community-control-violation incarcerations for non-felony criminal conduct to jails rather than Ohio prisons, which is inherent in the plain language of the statute.

By carving out a third category for supposed non-technical violations, the decision below and those it followed have transformed a predictable, binary scheme into a malleable and variable warren. *See Nelson*, 2018-Ohio-4763, ¶ 32, citing *State v. Davis*, 12th Dist. Warren No. CA2017-11-156, 2018-Ohio-2672, ¶ 16-18; *see also State v. Mannah*, 5th Dist. Fairfield No. 17-CA-54, 2018-Ohio-4219, ¶ 14-15. In doing so, those decisions did not even reference this Court’s decision in *State ex rel. Taylor*. Accordingly, this Court’s guidance is greatly needed.

CONCLUSION

Because the current landscape in Ohio is unpredictable and lacks uniformity in this area, this Court should accept jurisdiction to interpret R.C. 2929.15(B)(1)(c)(i) and (ii) to operate as an either/or scheme, consistent with the parole-violation context, in which prison sentences for all violations not based upon felony-level criminal conduct are subject to the statute’s caps.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this **Memorandum** was sent regular U.S. mail to Jane Napier, Assistant Champaign County Prosecutor, 200 North Main Street, Urbana, Ohio 43078, this 14th day of January, 2019.

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APPENDIX TO
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