

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Supreme Court Nos. 06-1245
	:	06-1383
Plaintiff-Appellee,	:	
	:	
vs.	:	On Appeal from the
	:	Franklin County Court
	:	Tenth Appellate District
Ronald D. Payne,	:	Court of Appeals
	:	Case No. 05AP-517
Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT RONALD D. PAYNE

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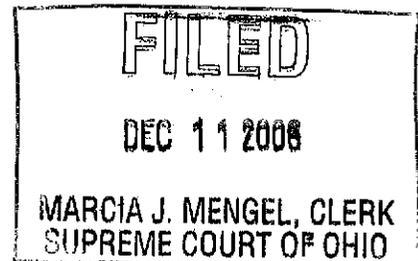


TABLE OF CONTENTS

PAGE NO.

I. STATEMENT OF THE CASE 1

II. STATEMENT OF THE FACTS 3

III. ARGUMENT

PROPOSITION OF LAW

Sentences imposed under statutes held to be unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and which were pending on direct review at the time that Foster was released, are void. The cases are not subject to waiver analysis and must be remanded for re-sentencing..... 6

A. Background

State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856Passim

Blakely v. Washington (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403Passim

B. The Ohio Supreme Court created an exception to the waiver doctrine in *State v. Foster*..... 7

1. The waiver doctrine is discretionary. 7

Washington v. Recuenco (2006), 548 U.S. _____, 126 S.Ct. 2546..... 7

Hill v. Urbana (1997), 79 Ohio St.3d 130..... 7

State v. Awan (1986), 22 Ohio St.3d 120 8

In re M.D. (1988), 38 Ohio St.3d 149, 527 N.E.2d 286..... 8

Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 121 8

2. The holding in *Foster* created a specific, limited exception to the waiver doctrine that required re-sentencing in all *Blakely* appeals pending at the time of its decision..... 8

TABLE OF CONTENTS

	PAGE NO.	
<i>In re Ohio Criminal Sentencing Statutes Cases, 109 Ohio St.3d 313, 2006-Ohio-2109</i>	9	
<i>State v. Miller, 2006-Ohio-1138</i>	10, 11	
<i>State v. Mitchell, 2006-Ohio-1259</i>	10, 11	
<i>State v. Brinkman, Wood App. No. WD-05-058, 2006-Ohio-3868</i>	11	
<i>State v. Buchanan, Mahoning App. No. 05MA-60, 2006-Ohio-5653</i>	11	
<i>State v. Featherkile (Jun. 14, 2006), Hamilton App. No. C-050827</i>	13	
<i>State v. Mason, 2006-Ohio-1998</i>	13	
<i>State v. Boyce, 2006-Ohio-2048</i>	13	
<i>State v. Cole, 2006-Ohio-1981</i>	13	
<i>State v. Congress, 2006-Ohio-2081</i>	14	
<i>State v. Barnard, 2006-Ohio-2012</i>	14	
<i>State v. Buske, 2006 Ohio 2054</i>	14	
<i>State v. Gulley, 2006 Ohio 2023</i>	14	
3. Sentences rendered unlawful by <i>Foster</i> are invalid and must be remanded for re-sentencing.		14
<i>State v. Peeks, Franklin App. No. 05AP-1370, 2006-Ohio-6256</i>	14, 15	
<i>State v. Draughon, Franklin App. No. 05AP-860, 2006-Ohio-2445</i>	15	
<i>State v. Parker, 95 Ohio St.3d 524, 2002-Ohio-2833</i>	16	
<i>Kelley v. Wilson, 103 Ohio St.3d 201, 2004-Ohio-4883</i>	16	
<i>United States v. Booker (2005), 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621</i>	7, 16, 17	

TABLE OF CONTENTS

	PAGE NO.
<i>State v. Gray</i> , Belmont App. No. 02 BA 26, 2003 Ohio 805	17
<i>State v. Walker</i> (Dec. 6, 2001), Cuyahoga App. No. 79630	17
<i>Colegrove v. Burns</i> (1964), 175 Ohio St. 437, 438.....	17
<i>State v. Beasley</i> (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d	17
<i>State ex rel. Cruzado v. Zaleski</i> , 111 Ohio St.3d 353, 2006-Ohio-5795	17
<i>State v. Jordan</i> , 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.....	17, 18
4. Alternative remedies.	18
<i>State v. Long</i> (1978), 53 Ohio St. 2d 91.	19
<i>State v. Wolery</i> (1976), 46 Ohio St. 2d 316.....	19
<i>State v. Payne</i> , 2006-Ohio-2552	19, 21
<i>State v. Clayton</i> (1980), 62 Ohio St. 2d 45, 47	19
<i>State v. Adams</i> (1980), 62 Ohio St. 2d 151, 154.....	19
<i>Powell v. Alabama</i> (1932), 287 U.S. 45.....	20
<i>Johnson v. Zerbst</i> (1938), 304 U.S. 458.....	20
<i>Gideon v. Wainwright</i> (1963), 372 U.S. 335.....	20
<i>McMann v. Richardson</i> (1970), 397 U.S. 759	20
<i>Strickland v. Washington</i> (1984), 466 U.S. 688.....	20
<i>State v. Hester</i> (1976), 45 Ohio St. 2d 71, 341 N.E.2d 304	20
<i>State v. Lytle</i> (1976), 48 Ohio St. 2d 391, 358 N.E. 2d 623	20
<i>State v. Murnahan</i> (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204	21

TABLE OF CONTENTS

	PAGE NO.
CONCLUSION	23
CERTIFICATE OF SERVICE	23
APPENDIX	24
Notice of Appeal, Supreme Court of Ohio, June 28, 2006.....	A-1
Acceptance of Certified Conflict, Supreme Court No. 06-1383 October 4, 2006.....	A-3
Acceptance of Jurisdiction, Supreme Court No. 06-1245 October 4, 2006.....	A-4
Decision, Court of Appeals Tenth Appellate District, May 23, 2006.....	A-5
Journal Entry, Court of Appeals Tenth Appellate District, May 23, 2006.....	A-8
R.C. 2929.14	A-9
R. C. 2929.19	A-19
R.C. 2945.06	A-24
R.C. 2953.08	A-25

TABLE OF AUTHORITIES

PAGE NO.

CASES

<i>Blakely v. Washington</i> (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403Passim	
<i>Colegrove v. Burns</i> (1964), 175 Ohio St. 437, 438.....	17
<i>Gideon v. Wainwright</i> (1963), 372 U.S. 335.....	20
<i>Goldfuss v. Davidson</i> (1997), 79 Ohio St.3d 116, 121	8
<i>Hill v. Urbana</i> (1997), 79 Ohio St.3d 130.....	7
<i>In re Ohio Criminal Sentencing Statutes Cases</i> , 109 Ohio St.3d 313, 2006-Ohio-2109	9
<i>In re M.D.</i> (1988), 38 Ohio St.3d 149, 527 N.E.2d 286.....	8
<i>Johnson v. Zerbst</i> (1938), 304 U.S. 458.....	20
<i>Kelley v. Wilson</i> , 103 Ohio St.3d 201, 2004-Ohio-4883	16
<i>McMann v. Richardson</i> (1970), 397 U.S. 759	20
<i>Powell v. Alabama</i> (1932), 287 U.S. 45.....	20
<i>State ex rel. Cruzado v. Zaleski</i> , 111 Ohio St.3d 353, 2006-Ohio-5795.....	17
<i>State v. Adams</i> (1980), 62 Ohio St. 2d 151, 154.....	19
<i>State v. Awan</i> (1986), 22 Ohio St.3d 120	8
<i>State v. Beasley</i> (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d	17
<i>State v. Barnard</i> , 2006-Ohio-2012.....	14
<i>State v. Boyce</i> , 2006-Ohio-2048	13
<i>State v. Brinkman</i> , Wood App. No. WD-05-058, 2006-Ohio-3868.....	11
<i>State v. Buchanan</i> , Mahoning App. No. 05MA-60, 2006-Ohio-5653	11
<i>State v. Buske</i> , 2006 Ohio 2054.....	14

TABLE OF AUTHORITIES

	PAGE NO.
CASES	
<i>State v. Clayton</i> (1980), 62 Ohio St. 2d 45.....	19
<i>State v. Cole</i> , 2006-Ohio-1981.....	13
<i>State v. Congress</i> , 2006-Ohio-2081.....	14
<i>State v. Draughon</i> , Franklin App. No. 05AP-860, 2006-Ohio-2445.....	15
<i>State v. Featherkile</i> (Jun. 14, 2006), Hamilton App. No. C-050827.....	13
<i>State v. Foster</i> , 109 Ohio St.3d 1, 2006-Ohio-856.....	Passim
<i>State v. Gray</i> , Belmont App. No. 02 BA 26, 2003 Ohio 805.....	17
<i>State v. Gulley</i> , 2006 Ohio 2023.....	14
<i>State v. Hester</i> (1976), 45 Ohio St. 2d 71, 341 N.E.2d 304.....	20
<i>State v. Jordan</i> , 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.....	17, 18
<i>State v. Lytle</i> (1976), 48 Ohio St. 2d 391, 358 N.E. 2d 623.....	20
<i>State v. Long</i> (1978), 53 Ohio St. 2d 91.	19
<i>State v. Mason</i> , 2006-Ohio-1998.....	13
<i>State v. Miller</i> , 2006-Ohio-1138.....	10, 11
<i>State v. Mitchell</i> , 2006-Ohio-1259.....	10, 11
<i>State v. Murnahan</i> (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204.....	21
<i>State v. Parker</i> , 95 Ohio St.3d 524, 2002-Ohio-2833.....	16
<i>State v. Payne</i> , 2006-Ohio-2552.....	19, 21
<i>State v. Peeks</i> , Franklin App. No. 05AP-1370, 2006-Ohio-6256.....	14, 15
<i>Strickland v. Washington</i> (1984), 466 U.S. 688.....	20

TABLE OF AUTHORITIES

PAGE NO.

CASES

United States v. Booker (2005), 543 U.S. 220, 125 S. Ct. 738,
160 L. Ed. 2d 6217, 16, 17

State v. Walker (Dec. 6, 2001), Cuyahoga App. No. 79630 17

Washington v. Recuenco (2006), 548 U.S. _____, 126 S.Ct. 2546..... 7

State v. Wolery (1976), 46 Ohio St. 2d 316..... 19

OHIO REVISED CODE

R.C. 2929.14 6

R.C. 2929.14(C) 13

R.C. 2929.19(B)(3)(c)..... 17

R.C. 2929.19(B)(3)(d)..... 17

R.C. 2945.06 16

R.C. 2953.08(D) 17

RULES

Crim.R. 11(C)(3)..... 16

Crim.R. 52(B) 18

UNITED STATES CONSTITUTION

Sixth Amendment20

I. STATEMENT OF THE CASE

On August 11, 2003, the Franklin County Grand Jury indicted Ronald Dovon Payne, defendant-appellant (hereinafter, Appellant), on one count of aggravated burglary, a violation of R.C. 2911.11, on one count of kidnapping, a violation of R.C. 2905.01, on four counts of rape, violations of R.C. 2907.02, and one count of felonious assault, a violation of R.C. 2903.11. The counts of aggravated burglary and kidnapping contained specifications alleging that Appellant used a firearm during the commission of the offenses.

On April 25, 2005, a jury trial commenced before Judge Alan Travis of the Franklin County Common Pleas Court. On April 27, during the course of the trial, Appellant indicated to the court that he wished to withdraw his previously entered not guilty plea and enter a guilty plea, pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162. Appellant subsequently entered guilty pleas to aggravated burglary (as a felony of the first degree), four counts of rape (as felonies of the first degree), and felonious assault (as a felony of the second degree). The prosecutor dismissed the two firearm specifications in exchange for the plea.

The trial court conducted a sexual predator hearing, based primarily upon the testimony introduced to the court and additional details given by the prosecutor. The court found that there was insufficient evidence to believe that Appellant, who was forty-four years of age, would pose a risk of committing further offenses at the time of his release.

The court proceeded to sentence Appellant to Five (5) years for the offense of aggravated burglary, Eight (8) years for kidnapping, Five (5) years for each of four

offenses of rape, and Two (2) years for the offense of felonious assault. The court ordered that the terms be served consecutively, for a total of Thirty-Five (35) years. The court recognized 635 days of jail credit.

On March 31, 2006, the Franklin County Court of Appeals reversed the judgment of the trial court and ordered a new sentencing hearing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. On May 23, 2006, the Court of Appeals granted the state's application for reconsideration and reversed its March 31, 2006 remand order. The appellate court held that Appellant had waived all sentencing issues since he did not specifically object at the initial sentencing hearing that the sentence imposed by the court was contrary to the holding of the United States Supreme Court in *Blakely v. Washington* (2004), 124 S.Ct. 2531, even though the Tenth District had repeatedly rejected *Blakely* challenges as being wholly inapplicable to Ohio's sentencing statutes.

On June 2, 2006, Appellant filed an Application to Reconsider and a Motion to Certify because of conflict between appellate districts. The state joined in Appellant's request that the matter be certified to the Supreme Court because of conflict. While the motions were pending, Appellant sought leave to appeal in this Court.

On May 23, 2006, the Court of Appeals granted the motion to certify. On October 4, 2006, this Court accepted certification on the conflict and jurisdiction on Appellant's appeal.

II. STATEMENT OF FACTS

Alonzetta Clark testified that she first met Appellant in 1987. They lived together from 1992 through 1995. Their child, Dominique Payne, was fifteen at the time of trial. Ms. Clark indicated that she had had only incidental contact with Appellant since 1996.

On July 29, 2003, Ms. Clark was working as a manager for a Certified Oil station. She returned home about 11:30 that evening to a residence that she shared with her son Dominique, her cousin Latasha, Latasha's boyfriend David, and Latasha's son Eddie. Latasha and David, who worked the third shift, left shortly after Ms. Clark returned home. Dominique asked his mother about going to a friend's home. She was too tired to drive him, so Dominique called his father (Appellant) for a ride.

Ms. Clark did not see Appellant pick up her son. She took a bath and went to bed. Around 3:20 a.m., she was awakened by a person wearing a mask, standing in her room. (Tr. 44) She reached for the telephone. The man pushed her down on the bed and said that if she screamed, he would kill Eddie. The man held a small, black gun and a stun gun. (Tr. 45) The intruder put handcuffs on Ms. Clark and tape on her mouth and over her eyes. He walked her down the stairs and a hill, and had her remain on the ground as he brought a car to her. Ms. Clark described the vehicle as large and having a new car smell. (Tr. 47)

The intruder drove Ms. Clark for about twenty minutes. He carried her over his shoulder up some stairs and through a smaller door, where he dropped her on the floor and onto a small mattress. The man cut off her t-shirt and raped her vaginally. (Tr. 48) When he was finished, the man stunned her with his stun gun and left the room. (Tr. 50)

The man returned about fifteen minutes later. He cut a hold in the tape on her mouth and tried to force her to have oral sex. (Tr. 51-52) The man departed and returned about forty-five minutes later and raped her anally. (Tr. 53) He then left her for a period of several hours.

Ms. Clark, still handcuffed and bound with tape over her mouth, legs, and eyes, scooted around the room. With her feet, she was able to feel shoes, weights, a fan, and some clothing on the floor. (Tr. 54) Based upon the odor of the man and noises that he made during sex, she came to believe that Appellant was her assailant. (Tr. 55) When the man returned, he placed a plastic cover on the mattress and raped her vaginally. (Tr. 56) He then washed her with something that smelled like raspberries and sprayed her with vinegar and water before raping her vaginally again. (Tr. 56)

Eventually the man taped a blanket around her body and put her in the trunk of another car. They drove for about twenty minutes before the man stopped the car and left her on the ground. (Tr. 60-61)

Ms. Clark struggled to get free and call for help. Some persons responded and called 9-1-1. (Tr. 61) Paramedics transported her to Grant Hospital.

According to Ms. Clark, she took three months to heal. She went to a chiropractor because she lost some feeling in her arms from being handcuffed. (Tr. 85) At the time of trial, she still carried some light scars on her wrists. (Tr. 86)

On the next day of trial, Appellant stated to the court that he wished to enter a plea to reduced charges. (Tr. 140) During the plea hearing, the prosecutor indicated that additional witnesses would have testified that Ms. Clark's bedspread, purse, and assorted personal belongings were recovered from Appellant's car. (Tr. 161) The attic

floor of Appellant's home contained weights, shoes and stereo equipment, as described by Ms. Clark. Various used condoms discovered in Appellant's trash can yielded sperm cells that matched Appellant's DNA and skin cells that matched Ms. Clark's DNA. (Tr. 163) In addition, a black ski mask recovered from Ms. Clark's bedroom contained skin cells that matched Appellant's DNA.

III. ARGUMENT

PROPOSITION OF LAW

Sentences imposed under statutes held to be unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and which were pending on direct review at the time that *Foster* was released, are void. The cases are not subject to waiver analysis and must be remanded for re-sentencing.

A. Background

The present case involves a clear conflict between five appellate districts on a matter of public and great general interest. The Ninth and Tenth Appellate Districts have held that challenges to sentences under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 are waived if the defendants failed to object at the time of sentencing on the specific ground that that the sentencing process violated *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. This holding is the minority position in Ohio, is inconsistent with this Court's unequivocal language in *Foster*, and is otherwise contrary to law.

In *Foster*, the Supreme Court determined that Ohio's sentencing structure, as set forth in R.C. 2929.14, was unconstitutional. As a result, *sentences* imposed under the stricken provisions were void and must be vacated, and the cases must be remanded for re-sentencing. The Second, Sixth, and Seventh Appellate Districts have specifically rejected the waiver theory. In addition, the Third, Fourth, Sixth, Eighth, and Eleventh Districts have declared *void* the *sentences* imposed under the statutes held by *Foster* to be unconstitutional. The remaining appellate districts have held that remand for re-sentencing is required by *Foster*. Since the release of the decision in *Foster*, this Court has routinely ordered that cases pending on appeal at the time of its holding be

remanded for re-sentencing, without considering whether the constitutional challenge had been preserved in the trial court.

The state has generally argued in its appeals that the United States Supreme Court has left open the option for courts to reject *Blakely* re-sentencing requests if the challenges were not properly preserved in the trial court. In *United States v. Booker* (2005), the Supreme Court ruled that federal sentencing guidelines were unconstitutional but held that they could still be advisory in any case in which the Constitution would prohibit judicial factfinding. In *Washington v. Recuenco* (2006), 548 U.S. ____, 126 S.Ct. 2546, the United States Supreme Court held that *Blakely/Booker* errors are not structural and can be held to be harmless. In *Foster*, however, the Ohio Supreme Court struck Ohio's sentencing factors and gave trial courts absolute discretion in imposing new sentences.

With the exception of the Ninth and Tenth Districts, Ohio courts have declined to consider waiver in addressing the requests for relief. This is especially the case in light of language of *Foster*, which invalidated as being unconstitutional, the sentencing provisions upon which felony sentences had been imposed.

B. The Ohio Supreme Court created an exception to the waiver doctrine in *State v. Foster*.

The Ohio Supreme Court has implicitly rejected waiver and plain error review in *Blakely/Foster* sentencing appeals. In doing so, this Court has recognized an exception to the doctrine of waiver that applies to *Blakely/Foster* sentencing appeals.

1. The waiver doctrine is discretionary.

Ohio courts have never adopted an absolute waiver rule. In *Hill v. Urbana* (1997), 79 Ohio St.3d 130, this Court noted that,

This Court has held on numerous occasions that the waiver doctrine is discretionary. See, e.g., *In re M.D.* (1988), 38 Ohio St.3d 149, 527 N.E.2d 286, syllabus. In fact, we specifically held that “[e]ven where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it.” (Emphasis added.) *Id.*”

In *In re M.D.*, the Supreme Court held in syllabus that, “[t]he waiver doctrine in *State v. Awan* (1986), 22 Ohio St.3d 120, is discretionary. Even when waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests may warrant it.” As an example of this principle, the Supreme Court recognized a plain error exception to the waiver doctrine in civil cases, even though there was no plain error exception under the then existing Ohio Rules of Civil Procedure.¹ *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121.

Ohio courts have never viewed the waiver doctrine as being absolute and have created exceptions in instances of plain error or where the rights and interests of the parties may warrant it.

2. The holding in *Foster* created a specific, limited exception to the waiver doctrine that required re-sentencing in all *Blakely/Foster* appeals pending at the time of its decision.

The Supreme Court held in *Foster* that all cases that were pending on direct review at the time of its release must be remanded for re-sentencing. The Court did not limit this holding based on the release date of *Blakely v. Washington* (2004), 124 S.Ct.

¹ In July 2000, Civ.R. 56 was amended to reflect legislative adoption of plain error exception to the waiver rule. Newly enacted Civ.R. 56(D)(3)(b)(iv) expressly provides that “[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).”

2531, by suggesting that challenges could be waived where defense counsel did not specifically argue that there was a violation under *Blakely*. Moreover, the Supreme Court did not direct lower courts to conduct a plain error review of each case because of the absence of a *Blakely* objection. The Supreme Court in *Foster* made it clear that sentences imposed under the statutes stricken as being unconstitutional were void. This rendered the earlier judgments invalid and required the cases to be remanded for new sentencing hearings. According to *Foster*, at ¶103-104:

{¶ 103} The sentences of *Foster*, *Quinones*, and *Adams* were based on unconstitutional statutes. *When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing.* See, e.g., *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23 (where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the offender). In fact, in the case of *Quinones*, the court of appeals, whose judgment we today affirm, vacated the sentence and remanded to the trial court for resentencing.

{¶ 104} *These cases and those pending on direct review must be remanded to trial courts for new sentencing hearings not inconsistent with this opinion.* We do not order resentencing lightly. Although new sentencing hearings will impose significant time and resource demands on the trial courts within the counties, causing disruption while cases are pending on appeal, must follow the dictates of the United States Supreme Court. Ohio's felony sentencing code must protect Sixth Amendment principles as they have been articulated. [Emphasis added].

On May 3, 2006, in *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, the Supreme Court remanded a large number of cases that had been accepted for review and consolidated with *Foster*. The Court had stayed briefing in the cases pending decision in *Foster*. The Supreme Court ordered the causes to be remanded for re-sentencing without applying the waiver doctrine. In several of these

cases, the Court ordered new sentencing hearings even though the original sentences had been imposed after the release of *Blakely v. Washington*. The Supreme Court did not conduct a waiver analysis on any of the cases, remand the cases to a lower court for a preliminary review of waiver, or suggest that a waiver analysis would be appropriate.

In addition, the holdings of the Second, Sixth, and Seventh Districts in rejecting waiver of *Foster* claims under appeal are more persuasive. In *State v. Miller*, 2006-Ohio-1138. In *Miller*, the dissent noted that the defendant in the case was sentenced after *Blakely*, and thus, the defendant “should have been required to raise his constitutional claim that he had a right to have a jury impose the sentence” (¶7). The majority rejected this position and ordered a new sentencing hearing. According to the concurring opinion in *Miller*, at ¶6,

“In view of the breadth of the language of *State v. Foster*, *supra*, in which the subject of remedy on direct appeal is addressed, I conclude that the proper course is to reverse any sentence imposed pursuant to the procedure set forth in the statutory provision that has been held to be unconstitutional, where the sentence is within the scope of the appeal, and unless the sentencing issue is rendered moot as a result of other aspects of disposition on appeal, to remand the cause for re-sentencing in accordance with *State v. Foster*.”

In *State v. Mitchell*, 2006-Ohio-1259, released a week later, the Second District expressly addressed the waiver issue raised in the dissenting opinion in *Miller*. According to the Second District in *Mitchell*, at ¶¶3-4,

[¶3] At no point on appeal does Mitchell explicitly assert that the trial court violated *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, when it sentenced her to the maximum term for her offense, nor did she raise the

issue during the sentencing phase of her trial. We previously have recognized that a defendant waives a *Blakely* issue by failing to raise it in the trial court. [Citations omitted] We also have declined to find plain error. *Id.*

¶4] However, the Ohio Supreme Court recently decided *State v. Foster* (2006), ___ Ohio St.3d ___ 2006-Ohio-856, declaring R.C. 2929.14(C) governing imposition of the maximum sentence for an offense unconstitutional. Thus, consistent with *Foster's* mandate, we reverse the sentence that was imposed and remand this case for a new sentencing hearing.

The appellate panels in *Miller* and *Mitchell* relied on the language of *Foster* in expressly rejecting the waiver analysis that the Ninth and Tenth Districts have adopted.

In *State v. Brinkman*, Wood App. No. WD-05-058, 2006-Ohio-3868, the Sixth District similarly rejected the state's waiver theory, citing to two separate grounds. First, the Court held that at the time the defendant had been sentenced, there was a substantial body of case law in Ohio that rejected the argument that *Blakely* applied to state sentencing statutes. The Court of Appeals noted that "[w]hen Appellant was sentenced, this court and many others had held that *Blakely* was inapplicable to Ohio's sentencing statutes." *Brinkman*, at ¶28. As a result, the Court of Appeals believed that *Blakely* challenges had been discredited and viewed them as meritless at best and frivolous at worst. Second, and more important, the Sixth District held that waiver was "inconsistent with *Foster*, which clearly directs that "those [cases] pending on direct review must be remanded to trial courts for new sentencing hearings." ¶31

In *State v. Buchanan*, Mahoning App. No. 05MA-60, 2006-Ohio-5653, the Seventh District noted that in *Foster* the Ohio Supreme Court created a new exception to the doctrine of waiver, making it inapplicable to *Foster* issues.

{¶43} However, we must take this opportunity to explain why we hold as such. First, we note that the general rule is that challenges to constitutional issues must first be raised to the trial court or they are deemed waived for appellate review. The doctrine of waiver is fundamental and well established. That said, *Foster* and its progeny created an exception to the doctrine of waiver. Many of the cases the Ohio Supreme Court has remanded pursuant to *Foster* involved post-*Blakely* sentencing dates. Yet, the Ohio Supreme Court gave no indication whether *Blakely* issues were raised to the trial court. Instead, it has unlimitedly remanded the cases. See *State v. Moser*, 5th Dist. No. 05CA39, 2006-Ohio-165 (sentencing took place on April 20, 2005); *State v. Bryant*, 9th Dist. No. 22723, 2006-Ohio-517 (sentencing took place on May 9, 2005), *State v. Kendrick*, 2d Dist No. 20965, 2006-Ohio-311 (sentencing took place on March 9, 2005), *State v. Phipps*, 8th Dist. No. 86133, 2006-Ohio-99 (sentencing took place on March 3, 2005); *State v. Hampton*, 10th Dist. No. 04AP-806, 2005-Ohio-7063 (sentencing took place on July 12, 2004), *State v. Herbert*, 3d Dist No. 16-5-08, 2005-Ohio-6869 (sentencing took place on May 24, 2005); *State v. Wassil*, 11th Dist. No. 2004-P-0102, 2005-Ohio-7053 (sentencing took place on October 18, 2004); *State v. Cottrell*, 7th Dist. No. 04CO53, 2005-Ohio-6923 (sentencing took place on September 3, 2004). This is just a small representative sample of cases from eight different appellate courts which affirmed sentences in which the defendant was sentenced post-*Blakely*, and in which the Ohio Supreme Court later reversed the sentences and remanded for resentencing under *Foster*.

{¶44} The above cited cases contain no clear indication that *Blakely* issues were preserved for review. Yet, a review of the cases seems to indicate that they were not. In both the *Phipps* (Eighth Appellate District) and *Kendrick* (Second Appellate District) cases, it does not appear that *Blakely* issues were raised to the appellate courts. In neither of those decisions is *Blakely* even mentioned. Thus, it appears as if *Blakely* was raised for the first time to the Ohio Supreme Court and yet the Court still reversed and remanded that case for resentencing pursuant to *Foster*.²

² In *State v. Hampton*, 10th Dist. No. 04AP-806, 2005-Ohio-7063, a case in which Appellant's counsel handled the appeal, trial counsel failed to raise an objection to the sentence based on *Blakely* grounds.

{¶45} If that were not enough for this court to conclude that the doctrine of waiver is inapplicable to *Foster* issues, in *Cottrell*, *Blakely* issues were not raised to the trial court. Yet, the Ohio Supreme Court still reversed and remanded the case for resentencing pursuant to *Foster*. Thus, the Supreme Court's reversal and remanding of *Cottrell* for resentencing based on *Foster* is a clear indication that *Foster* is a special case in which the doctrine of waiver is inapplicable.

{¶46} Accordingly, considering all the above, we agree with the Sixth Appellate District and hold that the doctrine of waiver is inapplicable to *Foster* issues. Thus, even though Buchanan was sentenced post-*Blakely* and did not raise issues related to *Foster* and *Blakely* to the sentencing court, those issues are not deemed waived. Therefore, in accordance with *Foster*, we find that this case must be reversed.

In its review of cases remanded by this Court in the wake of the *Foster* decision, it is apparent that many of the sentences had been imposed after *Blakely* and many of those defendants had failed to raise a *Blakely* challenge. This history is consistent with interpreting *Foster* as requiring new sentencing hearings without regard to the waiver doctrine. There could be no reasonable justification for handling the appeals pending in the Ninth and Tenth Districts differently from the appeals pending before this Court.

In addition, the First, Third, Fourth, Sixth, Eighth, and Eleventh Districts have all declared *void* the *sentences* imposed pursuant to the sentencing statutes held by *Foster* to be unconstitutional. See, *State v. Featherkile* (Jun. 14, 2006), Hamilton App. No. C-050827 ("Because the trial court sentenced Featherkile under an unconstitutional statute, we sustain the first and second assignments of error"); *State v. Mason*, 2006-Ohio-1998 ("In *Foster*, the Supreme Court of Ohio held that portions of Ohio's felony sentencing framework are unconstitutional and *void*. Pursuant to the ruling in *Foster*, Mason's second and fourth assignments of error are sustained." Third District, at ¶9);

State v. Boyce, 2006-Ohio-2048 (“Because Appellant was sentenced under R.C. 2929.14(C), the ruling in *Foster* applies to the case sub judice; therefore, as R.C. 2929.14(C) was deemed unconstitutional, the *sentence* is rendered *void*.” Fourth District, at ¶4); *State v. Cole*, 2006-Ohio-1981 (“[W]e find that the trial court referenced statutes deemed *void* by *Foster*. . . . Accordingly, this case must be remanded so that appellant can be resentenced by the trial court on the basis of the non-severed sentencing statutes.” Sixth District, at ¶4); *State v. Congress*, 2006-Ohio-2081 (“[D]efendants that were sentenced under unconstitutional and now *void* statutory provisions must be re-sentenced.” Eighth District, at ¶44); and *State v. Barnard*, 2006-Ohio-2012 (“Since *Foster* was released while this case was pending on direct review, appellant’s *sentence* is *void*, must be vacated, and remanded for resentencing.” Eleventh District, at ¶9). These districts conclude that *Foster* requires that the cases involving *Blakely/Foster* sentencing errors be remanded for re-sentencing.

The remaining districts — the Fifth and Twelfth — have held that *Foster* requires remand for re-sentencing. See, *State v. Buske*, 2006 Ohio 2054 (Fifth District); *State v. Gulley*, 2006 Ohio 2023 (Twelfth District). Simply put, two districts apply waiver analysis, and ten districts do not.

3. Sentences rendered unlawful by *Foster* are invalid and must be remanded for re-sentencing.

In spite of the clear language of *Foster*, at ¶¶103-104, numerous reversals from this Court, and the holdings of First, Third, Fourth, Sixth, Eighth, and Eleventh Districts that *sentences* pending appeal prior to the release of *Foster* were void and/or invalid, the Tenth District has recently held that *Foster* was wrongfully decided and that the *Blakely/Foster* sentences are only *voidable*. As a result, the Tenth District argues, the

waiver doctrine governs *Foster* appeals. See, *State v. Peeks*, Franklin App. No. 05AP-1370, 2006-Ohio-6256.

The reasoning of the Tenth District in *Peeks* is suspect. According to the Court of Appeals, “[n]otwithstanding the language in *Foster* that declared sentences imposed pursuant to an unconstitutional statute void, the assumption underlying our decision in *Draughon* was that a *Blakely-Foster* error rendered his sentence voidable – not void.” *Peeks*, at ¶9. In other words, this Court’s holding in *Foster* was in conflict with the holding of the Tenth District in *State v. Draughon*, Franklin App. No. 05AP-860, 2006-Ohio-2445, at ¶7. The Tenth District apparently chose to remain consistent with *Draughon* rather than adopting the clear language of *Foster*, which pre-dated *Draughon*. The Tenth District explained its position by stating that “[w]e again note that the void-voidable distinction was not addressed in *Foster*. Given the absence of any analysis of this important distinction, we conclude that appellant’s reliance on the *Foster* court’s use of the word “void” is misplaced.” *Peeks*, at ¶12.

The suggestion that this Court did not consider the import of its holding that *Blakely-Foster* sentencing errors were void is simply not correct. As argued earlier, this Court in *Foster* expressed its concerns about the potential impact of ordering new sentencing hearings for all cases pending appeal but held that reversal was mandated because of the nature of the errors.

We do not order resentencing lightly. Although new sentencing hearings will impose significant time and resource demands on the trial courts within the counties, causing disruption while cases are pending on appeal, we must follow the dictates of the United States Supreme Court. Ohio’s felony sentencing code must protect Sixth Amendment principles as they have been articulated.

Foster, at ¶103.

The attempt of the Tenth District to classify these errors as mere “sentencing errors” is also incorrect. This Court vacated the sentence imposed in *Foster* because it derived from statutes struck as unconstitutional. Accordingly, the trial courts lacked the authority to impose an enhanced sentence as there had been no jury determination as to the statutory sentencing factors that would allow the court to depart from the presumptive maximum terms set by statute.

The Tenth District also argues that the Supreme Court erred in finding that the *Blakely-Foster* sentences were void based on the dissent in *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833. In *Parker*, this Court held that a defendant charged with a crime punishable by death who has waived his right to trial by jury must, pursuant to R.C. 2945.06 and Crim.R. 11(C)(3), have his case heard and decided by a three-judge panel, and that the failure to provide a three-judge panel is a jurisdictional error that cannot be waived. *Parker*, at 12. Justice Cook dissented, arguing that the error was avoidable – a position implicitly rejected by the majority. *Parker*, at ¶20.

The holding in *Foster* was not that trial courts lacked subject matter jurisdiction to conduct new sentencing hearings (see, *Kelley v. Wilson*, 103 Ohio St.3d 201, 2004-Ohio-4883), but rather that sentences that exceeded the statutory maximum terms in violation of *Blakely* and *Foster* were invalid and had to be vacated. In this sense, the holding of *Foster* was correct. The trial court did not lose jurisdiction over the case, as it had jurisdiction over the person and the subject matter. A new sentencing hearing, however, was mandated as the prior sentence was unlawful. This principle is also

consistent with a great body of Ohio law that **sentences** that fall outside the statutory limits are invalid and are required to be corrected.

According to the United States Supreme Court, "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker* (2005), 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621. "Authorized by law" under R.C. 2953.08(D) means that the sentence falls within the statutorily set range of available sentences. *State v. Gray*, Belmont App. No. 02 BA 26, 2003 Ohio 805. A sentence is authorized by law as long as the prison term imposed does not exceed the maximum term prescribed by the statute for the offense. *State v. Walker* (Dec. 6, 2001), Cuyahoga App. No. 79630. The penalty imposed in the present case – consecutive terms amounting to 35 years – was permissible only if the jury made certain statutory findings. In the absence of those findings, the trial judge lacked the authority to impose a sentence greater than concurrent terms.

Ohio courts have consistently held that "[c]rimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute. A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law." *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. Moreover, "any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void." *State v. Beasley* (1984), 14 Ohio St.3d 74, 75, 471 N.E.2d 774. This Court recently applied this principle in *State ex rel. Cruzado v. Zaleski*, 111

Ohio St.3d 353, 2006-Ohio-5795, where it held that, “[W]here a sentence is void because it does not contain a statutorily mandated term, the proper remedy is ... to resentence the defendant.” *Cruzado*, at ¶20; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23. In *Jordan*, the Supreme Court held that the failure of a trial court to notify an offender about post release control at the sentencing hearing violates the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d). This sentencing failure **requires** that the *sentence* be vacated and the matter remanded to the trial court for re-sentencing.

In *Foster*, this Court determined that *Blakely* sentencing errors were comparable to the failure of trial courts to impose statutorily mandated periods of post release control. Both sentences were invalid. Accordingly, this Court held in *Foster*, at ¶103: “When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing. See, e.g., *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 23 (where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is to resentence the offender).”

It is also problematic that even though the state did not timely appeal the failure of numerous trial courts to include mandated periods of post release control, the waiver doctrine did not prevent the state from seeking delayed relief. It is inconsistent for the state to now argue that a *Blakely/Foster* sentence that falls outside the range permitted by statutes in existence at the time of sentencing be subject to waiver while a sentence that failed to impose a statutorily mandated period of post release control is void.

4. Alternative remedies.

Finally, if this Court were to back away from its holding in *Foster*, it would still be appropriate to remand all *Foster* appeals for re-sentencing. First, a remedy of a new sentencing hearing satisfies the plain error standard set forth in Crim.R. 52(B). The failure of trial counsel to assert a *Blakely* sentencing error would have deprived the defendant of a new sentencing hearing, at which time he could present additional favorable details or demonstrate that he had benefited from the punishment he had already suffered. But for the error, Appellant would unquestionably have been entitled to a new sentencing hearing at which he was eligible to receive a reduced term of incarceration. See, *State v. Long* (1978), 53 Ohio St. 2d 91.

In discussing the basis for the plain error rule, the Ohio Supreme court in *State v. Wolery* (1976), 46 Ohio St. 2d 316, indicated that the rule's purpose is to safeguard the right of a defendant to a fair hearing, notwithstanding his failure to object in timely fashion to error. Pursuant to *Foster*, Appellant was unlawfully sentenced to a term that was unavailable at the time of his sentencing hearing. Plain error would, under the circumstances, be present.

Second, the Tenth District in *State v. Payne*, 2006-Ohio-2552 did not conduct a plain error analysis as required by law. It simply held that the *Blakely/Foster* sentencing issue was waived, without considering whether a new sentencing hearing would likely lead to a different result. In essence, the Court held that the error was harmless beyond a reasonable doubt without weighing the sentencing factors or considering matters that were before the trial court or had occurred since sentencing.

Because plain error is not easily or readily definable, each case must be considered on its own facts. *State v. Clayton* (1980), 62 Ohio St. 2d 45, 47. Ohio law

requires that appellate courts carefully and thoroughly examine the record to determine "the probable impact of [the error and] whether substantial prejudice may have been visited on the defendant, thereby resulting in a manifest miscarriage of justice." *State v. Adams* (1980), 62 Ohio St. 2d 151, 154. The Tenth District failed to conduct a plain error analysis prior to rejecting Appellant's sentencing challenge; it simply rejected the error as being waived.

Third, the failure of trial counsel to have raised an objection under *Blakely v. Washington*, would constitute ineffective assistance of counsel, as counsel's failure to preserve a legal issue would have deprived the client the opportunity to obtain a new sentencing hearing. In a long line of cases that include *Powell v. Alabama* (1932), 287 U.S. 45, *Johnson v. Zerbst* (1938), 304 U.S. 458, and *Gideon v. Wainwright* (1963), 372 U.S. 335, the United States Supreme Court has recognized that the Sixth Amendment right to counsel exists and is needed, in order to protect the fundamental right to a fair trial. Although the Constitution guarantees a fair trial through the Due Process Clauses, it defines the basic elements of a fair trial largely through the provisions of the Sixth Amendment:

"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 (sic)."

As the presence of counsel is critical to ensure a fundamental level of fairness, courts have recognized that "the right to counsel is the right to the effective assistance of

counsel". *McMann v. Richardson* (1970), 397 U.S. 759, *Strickland v. Washington* (1984), 466 U.S. 688.

In *State v. Hester* (1976), 45 Ohio St. 2d 71, 341 N.E.2d 304 the Ohio Supreme Court set forth the standard to be used to determine whether the defendant has been denied his right to the effective assistance of counsel. The Court held that the test is whether the accused, under all the circumstances, had a fair trial and substantial justice was done. The Court further developed its standard in *State v. Lytle* (1976), 48 Ohio St. 2d 391, 358 N.E. 2d 623 where it stated:

When considering an allegation of ineffective assistance of counsel, a two step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated; there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness. At 48 Ohio St. 2d 396, 397. Also see: *State v. Clayton* (1980), 62 Ohio St. 2d 45; 402 N.E. 2d 1189; *State v. Wilkins* (1980), 64 Ohio St. 2d 308, 415 N.E. 2d.

Trial counsel's failure to enter a timely objection, if determined to be critical to receiving a new sentencing hearing, would constitute a violation of counsel's essential duties to his client. Moreover, defendants would be prejudiced by being denied new sentencing hearings that would give them the opportunity to argue that lengthy terms of incarceration were excessive in light of the absence of aggravating factors and in consideration of conduct since sentencing. Application of the waiver doctrine to *Blakely/Foster* sentencing issues would open the door to ineffectiveness challenges under *Strickland* and *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, which provides criminal defendants the right to file successive applications for

reopening. The review required by appellate courts under this approach would be far more burdensome than ordering re-sentencing hearings in the trial courts.

The alternative remedies to remanding *Blakely/Foster* sentencing issues for new hearings are even more cumbersome and time-consuming. This Court was correct when it held in *Foster* that sentences that were unlawfully imposed should be remanded for re-sentencing. Ten of the twelve appellate districts relied on that language in ordering new sentencing hearings for all defendants with pending *Blakely* claims, regardless of whether those claims had been asserted in the trial courts. Hundreds, if not thousands, of re-sentencings have already occurred. *Foster* was properly decided and properly interpreted by ten of the appellate districts. The analysis of *Payne* should be rejected.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Tenth Appellate District and remand the case to the trial court for a new sentencing hearing.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo was hand delivered to the office of Steven L. Taylor, Assistant Prosecuting Attorney, 373 South High St., 13th Floor, Columbus, Ohio 43215 on this the 11th day of December, 2006.



Paul Skendelas (0014896)
Counsel for Defendant-Appellant
Ronald D. Payne

8649J17

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth Appellate
District.

vs.

RONALD D. PAYNE,
Defendant-Appellant.

Case No. 05AP-517

06-1245

NOTICE OF APPEAL OF DEFENDANT-APPELLANT RONALD D. PAYNE

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And

PAUL SKENDELAS 0012896
Assistant Public Defender
(Counsel of Record)
614 / 719-8867
Counsel for Defendant-Appellant
And

RONALD J. O'BRIEN 0017245
Prosecuting Attorney
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And

STEVEN L. TAYLOR 0043876
Assistant Prosecuting Attorney
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CLERK OF COURT

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JUN 28 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF DEFENDANT-APPELLANT RONALD D. PAYNE

Defendant-Appellant Ronald D. Payne, gives notice of appeal to the Supreme Court of Ohio from judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case Nos. 05AP-517 on May 23, 2006.

This case raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,



Paul Skendelas 0014896
Counsel of Record
Counsel for Defendant/Appellant
Ronald D. Payne

CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal was had-delivered to the Office of the Steven L. Taylor, Assistant Prosecuting Attorney, 373 South High St., 13th Floor, Columbus, Ohio 43215 on this the 26th day of June, 2006.



Paul Skendelas 0014896
Counsel of Record
Counsel for Defendant/Appellant
Ronald D. Payne

The Supreme Court of Ohio

FILED

OCT 04 2006

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio

v.

Ronald D. Payne

Case No. 06-1383

ENTRY

This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Franklin County. On review of the order certifying a conflict,

It is determined that a conflict exists. The parties are to brief the issue stated at page 3 of the court of appeals' memorandum decision filed July 13, 2006, as follows:

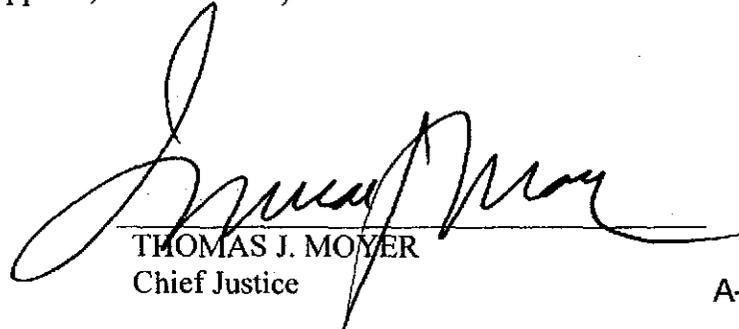
"Whether the lack of objection in the trial court waives or forfeits the *Blakely* issue for purposes of appeal when the sentencing occurred after the *Blakely* decision was announced."

It is ordered by the Court, sua sponte, that this cause is consolidated with Supreme Court Case No. 06-1245, *State v. Payne*.

It is further ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Franklin County.

It is further ordered that the parties shall combine the briefing of Case Nos. 06-1245 and 06-1383 and file one brief for each permitted under S.Ct.Prac.R. VI; the parties shall file an original of the brief in each case and 18 copies of the brief; and the parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

(Franklin County Court of Appeals; No. 05AP517)



THOMAS J. MOYER
Chief Justice

A-3

The Supreme Court of Ohio

FILED

OCT 04 2006

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio

v.

Ronald D. Payne

Case No. 06-1245

ENTRY

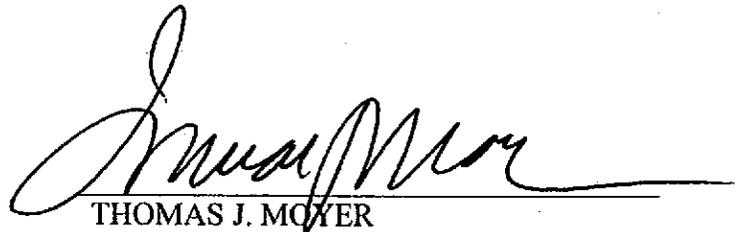
Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal.

It is ordered by the Court, sua sponte, that this cause is consolidated with Supreme Court Case No. 06-1383, *State v. Payne*.

The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Franklin County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

It is further ordered that the parties shall combine the briefing of Case Nos. 06-1383 and 06-1245 and file one brief for each permitted under S.Ct.Prac.R. VI; the parties shall file an original of the brief in each case and 18 copies of the brief; and the parties shall otherwise comply with the requirements of S.Ct.Prac.R. VI.

(Franklin County Court of Appeals; No. 05AP517)



THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO
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CLERK OF COURTS

State of Ohio, :
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 Plaintiff-Appellee, :
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 v. : No. 05AP-517
 : (C.P.C. No. 03CR-08-5424)
 Ronald D. Payne, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on May 23, 2006

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

Yeura Venters, Public Defender, and *Paul Skendelas*, for
appellant.

ON APPLICATION FOR RECONSIDERATION
AND MOTION TO CERTIFY

McGRATH, J.

{¶1} On April 5, 2006, plaintiff-appellee, the State of Ohio ("the State"), filed an application for reconsideration, pursuant to App.R. 26(A), requesting this court to reconsider its judgment entry filed March 31, 2006. Alternatively, the State also filed a motion to certify a conflict pursuant to App.R. 25(A) and Section 3(B)(4) of the Ohio Constitution. For the following reasons, we grant the State's application for reconsideration, and deny the State's motion to certify.

{¶2} The test generally applied in reviewing a motion for reconsideration is whether the motion "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by the court when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, para. 2 of the syllabus; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 69. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, dismissed, appeal not allowed, 77 Ohio St.3d 1487.

{¶3} In our March 31, 2006 judgment entry we sustained defendant-appellant Ronald D. Payne's ("appellant") single assignment of error asserting that the sentence imposed upon him by the trial court constituted a violation of jury principles afforded by the Sixth Amendment to the United State Constitution and in contravention of *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348. The State argued that *Blakely* was not applicable to Ohio's sentencing statutes, and that even if it was, appellant waived his *Blakely* challenge by failing to raise it in the trial court. In our March 31, 2006 judgment entry, we summarily sustained appellant's single assignment of error and remanded the matter to the trial court for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶4} In its application for reconsideration, the State contends that we failed to consider its waiver and plain error arguments in this case. We agree, as we did in *State v. Draughon*, Franklin App. No. 05AP-860, 2006-Ohio-____, and grant the State's application to consider these arguments.

{¶5} This precise issue was raised in *Draughon*, and in that case this court stated "in accordance with the well-settled doctrine of waiver of constitutional challenges, and the language in *Booker*, we hold that a *Blakely* challenge is waived by a defendant sentenced after *Blakely* if it was not raised in the trial court." *Id.* at ¶8. Therefore, a defendant who did not assert a *Blakely* challenge in the trial court, and thereby waived such challenge is not entitled to a resentencing hearing based on *Foster*.

{¶6} As in *Draughon*, appellant was sentenced after the Supreme Court's decision in *Blakely*, and thus, he could have objected to his sentencing based on *Blakely* and the constitutionality of Ohio's sentencing scheme. Appellant, however, did not raise such a constitutional challenge to Ohio's sentencing statutes in the trial court, and therefore appellant waived his *Blakely* argument on appeal.

{¶7} Pursuant to *Foster* and this court's reasoning in *Draughon*, appellee's motion for reconsideration is well-taken and granted. After review, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed. Given our reconsideration of our March 31, 2006 judgment entry, appellee's motion to certify is rendered moot.

*Application for reconsideration granted;
motion to certify moot.*

KLATT, P.J., and PETREE, J., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN CO. OHIO

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State of Ohio, :
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 Plaintiff-Appellee, :
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 v. :
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 Ronald D. Payne, :
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 Defendant-Appellant. :

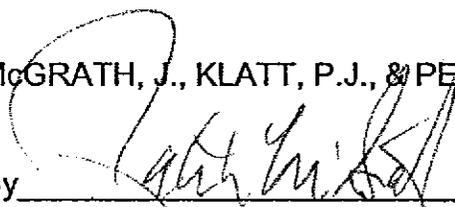
No. 05AP-517
(C.P.C. No. 03CR-08-5424)

(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the opinion of this court rendered herein on May 23, 2006, it is the order of this court that appellee's motion for reconsideration is well-taken and granted, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed. Further, given our reconsideration of our March 31, 2006 judgment entry, appellee's motion to certify is rendered moot.

McGRATH, J., KLATT, P.J., & PETREE, J.

By  _____
Judge Patrick M. McGrath

PAUL SKENDELAS
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§ 2929.14. Basic prison terms.

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), or (G) of this section 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), or (G) of this section, in section 2907.02 or 2907.05 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 (G) of this section 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 displaying 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. 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) 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. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) 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)(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.

(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 (DD)(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, a

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 2941.1413 [2941.14.13] 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, 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 2941.1414 [2941.14.14] 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 2941.1414 [2941.14.14] 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.

(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.

(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. ~~At 15~~

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.

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) 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 the effective date of this amendment, 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 the effective date of this amendment, 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 the effective date of this amendment, 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) If 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, 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.

(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 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) 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 prison 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.

(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.

History

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/D; 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.

§ 2929.19. Sentencing hearing.

(A) (1) 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.

(2) Except as otherwise provided in this division, before imposing sentence on an offender who is being sentenced on or after January 1, 1997, for a sexually oriented offense that is not a registration-exempt sexually oriented offense and who is in any category of offender described in division (B)(1)(a)(i), (ii), or (iii) of section 2950.09 of the Revised Code, the court shall conduct a hearing in accordance with division (B) of section 2950.09 of the Revised Code to determine whether the offender is a sexual predator. The court shall not conduct a hearing under that division if the offender is being sentenced for a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender was adjudicated a sexually violent predator. Before imposing sentence on an offender who is being sentenced for a sexually oriented offense that is not a registration-exempt sexually oriented offense, the court also shall comply with division (E) of section 2950.09 of the Revised Code.

Before imposing sentence on or after July 31, 2003, on an offender who is being sentenced for a child-victim oriented offense, regardless of when the offense was committed, the court shall conduct a hearing in accordance with division (B) of section 2950.091 [2950.09.1] of the Revised Code to determine whether the offender is a child-victim predator. Before imposing sentence on an offender who is being sentenced for a child-victim oriented offense, the court also shall comply with division (E) of section 2950.091 [2950.09.1] of the Revised Code.

(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, 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, 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;

(b) Notify the offender that, as part of the sentence, the parole board may extend the stated prison term for certain violations of prison rules for up to one-half of the stated prison term;

(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 the effective date of this amendment, 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 the effective date of this amendment, 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 the effective date of this amendment, 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 the effective date of this amendment, 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 the effective date of this amendment, 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) If 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, if the offender is being sentenced for a sexually oriented offense that is not a registration-exempt sexually oriented offense and that the offender committed on or after January 1, 1997, and the court imposing the sentence has determined pursuant to division (B) of section 2950.09 of the Revised Code that the offender is a sexual predator, if the offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense and the court imposing the sentence has determined pursuant to division (B) of section 2950.091 [2950.09.1] of the Revised Code that the offender is a child-victim predator, or if the offender is being sentenced for an aggravated sexually oriented offense as defined in section 2950.01 of the Revised Code, the court shall include in the offender's sentence a statement that the offender has been adjudicated a sexual predator, has been adjudicated a child victim predator, or has been convicted of or pleaded guilty to

an aggravated sexually oriented offense, whichever is applicable, and shall comply with the requirements of section 2950.03 of the Revised Code. Additionally, 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.

(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.

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

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.

§ 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court.

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

History

HISTORY: GC § 13442-5; 113 v 123(179), ch 21, § 5; 115 v 531; Bureau of Code Revision, 10-1-53; 139 v S 1. Eff 10-19-81.

§ 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 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-25~~

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 (H) 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 (H) 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 (H) 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, ~~and~~

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 (1)(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 (1)(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

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.