

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

-vs-

KEVIN JOHNSON

Appellant.

CASE NO. 2006-2154

On Appeal from the  
Court of Appeals  
Twelfth Appellate District  
Butler County, Ohio

COURT OF APPEALS  
CASE NO.: CA 2005 10 0422

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APPELLANT'S MERIT BRIEF

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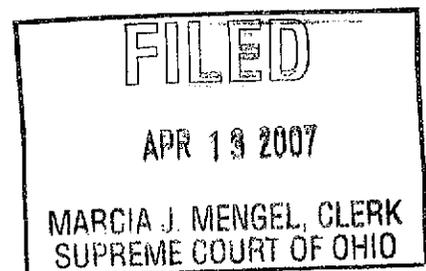
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## STATEMENT OF THE CASE AND FACTS

On August 5, 2004, Defendant-Appellant Kevin Johnson (“Appellant”) was indicted by a Butler County Grand Jury for four counts of rape in violation of R.C. 2907.02(A)(1)(b). On August 17, 2004, Appellant entered a plea of “not guilty” to the charges in the indictment. On November 15, 2004, Appellant filed a motion to suppress and on January 4, 2005, the trial court overruled Appellant’s motion. A jury trial was held on August 1 and 2, 2005, and on August 3, 2005, the jury returned “Guilty” verdicts on each of the four counts, as charged in the indictment. On September 30, 2005, the trial court designated Appellant a sexual predator and sentenced Appellant to serve a life sentence on each of the four rape counts. The trial court imposed each of these sentences consecutively. On October 10, 2005, Appellant filed his timely notice of appeal. On October 3, 2006, the Twelfth District Court of Appeals affirmed the decision of the trial court. *State v. Johnson*, 2006 Ohio 5195, 2006 Ohio App. LEXIS 5120. Appellant filed a motion for conflict certification on October 5, 2006, and the court of appeals sustained his motion on October 31, 2006. On January 24, 2007, this Court determined that a conflict exists between the Twelfth and Third District Courts of Appeals and granted jurisdiction. *State v. Johnson (2007)*, 112 Ohio St.3d 1439, 2007 Ohio 152, 860 N.E.2d 746. This appeal followed.

## ARGUMENT

### **Defendant-Appellant’s Sole Proposition of Law:**

**Whether the trial court has the option to impose concurrent or consecutive sentences when a defendant is convicted of multiple counts of an offense listed in R.C. 2929.13(F).**

**R.C. 2929.13(F) is clear and unambiguous.**

This Court has held that “ ‘if the meaning of a statute is clear on its face, then it must be applied as it is written.’ ” *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002 Ohio 2486, P 8, 768 N.E.2d 1170, quoting *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.* (1994), 69 Ohio St. 3d 521, 524, 1994 Ohio 330, 634 N.E.2d 611. “Thus, if the statute is unambiguous and definite, there is no need for further interpretation.” *Id.* “To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts.” *Lake Hosp. Sys. Inc.*, *supra*, quoting *Iddings v. Jefferson Cty. School Dist. Bd. of Edn.* (1951), 155 Ohio St. 287, 44 O.O. 294, 98 N.E.2d 827.

The trial court sentenced Appellant to consecutive prison terms by concluding that consecutive sentences were mandated by R.C. 2929.13(F)(2). The trial court stated at the sentencing hearing that it “does not have the discretion to run these sentences concurrent.” (Sentencing Tr. 9). In its sentencing entry, the court stated: “Since the conviction on each count requires a mandatory sentence, pursuant to R.C. 2929.13(F)(2), the Court is required by law to run each sentence consecutively. The Court specifically finds that none of the factors set forth in R.C. 2929.14(E)(4) would justify consecutive sentences in this case.” (Sept. 30, 2005, Sentencing Entry, 2). The trial court's interpretation of R.C. 2929.13(F)(2) was erroneous.

R.C. 2929.13(F) requires mandatory prison terms for fourteen offenses, one of which is “any rape.” Specifically, the statute states that the court “shall impose a prison term or terms” for the listed offenses. The court of appeals improperly reasoned that the imposition of multiple, mandatory prison terms under R.C. 2929.13(F) implicitly requires the imposition of consecutive prison terms.” However, the term “mandatory” makes no reference to consecutive sentences and can not be interpreted otherwise. R.C. 2929.01(Y). Furthermore, there is no

authority for the proposition that consecutive sentences are mandated by R.C. 2929.13(F). “The phrase ‘mandatory prison term’ is clear unambiguous and is defined as ‘the term in prison that must be imposed for the offenses set forth in divisions F(1) to F (8) of section 2929.13 of the Revised Code’.” *State v. Johnson*, 2006 Ohio 5195 at \*P92, Walsh, J., dissenting.

**Contrary to R.C. 2929.13(F), other statutes in the Revised Code mandate the imposition of consecutive sentences.**

The Ohio Revised Code explicitly provides for mandatory consecutive sentences in specific cases. For example, if a defendant is convicted of failure to comply with an order or signal of a police officer, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender. R.C. 2921.331. See, also, *State v. Smith*, Pickaway App. No. 05CA28, 2006 Ohio App. LEXIS 280, 2006 Ohio 316, (holding that trial court erred in sentencing defendant to concurrent terms of imprisonment upon convicting him of failure to comply with the order or signal of a police officer, and another offense, as 2921.331(D) required the imposition of consecutive sentences with another sentence to be served.) Additionally, a sentence for escape must be served consecutively to any other sentence. R.C. 2921.34; *State v. Sturgill*, Montgomery App. No. 19815, 2004 Ohio 672, 2004 Ohio App. LEXIS 639.

Moreover, a jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of pandering sexually oriented material involving a minor, (R.C.2907.322), escape (R.C. 2921.34), or possession of a deadly weapon while under disability (R.C.2923.131). Therefore, the absence of any such requirement in R.C. 2929.13(F)(2) is indicative of the

legislature's intent to leave the decision to impose consecutive prison terms to the discretion of the trial court when sentencing an offender to multiple, mandatory prison terms. See *State v. Franklin*, Greene App. No. 99-CA-117, 2000 Ohio App. LEXIS 6027 (where 'life imprisonment is the mandatory penalty \* \* \* the trial court had no choice of penalties to assign, other than making them consecutive or concurrent?'). *Johnson*, at \*P95, Walsh J., dissenting.

Additionally, Ohio's sentencing scheme generally requires that sentences of imprisonment be served concurrently. R.C. 2929.41(A). When the trial court imposes a sentence upon a defendant, the court must consider each offense individually and impose a separate sentence for each crime. After the imposition of each sentence, the judge may then consider whether the sentences imposed should be served consecutively or concurrently to each other. *State v. Saxon*, 109 Ohio St.3d 176, 2006 Ohio 1245 846 N.E.2d 824. The imposition of concurrent sentences in Ohio does not involve a "lump" sentence approach. Therefore, in this case, the court was required to sentence Appellant to serve four separate mandatory life sentences, however, the trial court had discretion to order each sentence to run concurrently.

**The Twelfth District Court of Appeals' Decision is in conflict with a previous decision issued by the Third District Court of Appeals.**

The Twelfth District Court of Appeals' decision to uphold the imposition of four consecutive life sentences is in conflict with a decision issued by the Third District Court of Appeals. The Third District Court of Appeals has reasoned that although R.C. 2929.13(F)(3) mandates that a defendant serve a prison term because the victim was under thirteen, the statute does not mandate the imposition of consecutive sentences. *State v. Sharp*, Allen App. No. 01-02-06, 2002 Ohio 2343; 2002 Ohio App. LEXIS 2343. In *Sharp*, which was decided prior to *State v. Foster* 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, the court upheld the

imposition of two consecutive five-year sentences for a defendant found guilty of two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). The court of appeals upheld the consecutive sentences despite the fact that the trial court incorrectly stated at the sentencing hearing that the imposition of consecutive sentences was mandatory. The court of appeals found that the defendant was not prejudiced by the trial court's misstatement of the law because the trial court gave its reasons for imposing consecutive sentences under R.C. 2929.19(B)(2)(c) on the record.

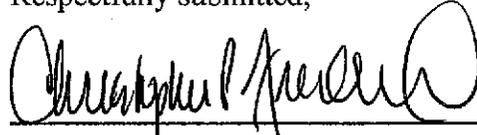
**State v. Foster 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, grants the discretion to impose consecutive or concurrent sentences solely to the trial court.**

In *Foster* supra, this Court held that R.C. 2929.14(E)(4), which governed the imposition of consecutive sentences, was unconstitutional inasmuch as it required judicial fact-finding before the imposition of consecutive prison sentences. *Id.* at paragraph four of the syllabus. This case does not involve any judicial findings under 2929.14(E)(4) or 2929.19(B)(2), the provisions found unconstitutional under *Foster*. Rather, here, the trial court imposed the mandatory life sentences consecutively, because the trial court mistakenly believed it had no other choice. However, post-*Foster*, the decision to impose consecutive rather than concurrent sentences is within the sound discretion of the trial court. Therefore, this Court must remand this case to the trial court so that it may exercise its discretion and impose concurrent sentences.

**CONCLUSION**

In view of the foregoing law and argument, it is respectfully requested that this Court reverse the decision of the Twelfth District Court of Appeals and remand this case to the trial court.

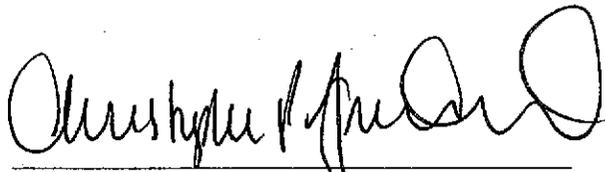
Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Appellant's Brief was sent by regular U.S. mail this 12<sup>th</sup> day of April 2007, to: Robin Piper, Prosecuting Attorney for Butler County, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011.



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## APPENDIX

§ 2907.02. Rape

(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender

under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to

section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section 2971.03 of the Revised Code applies, and the offender automatically is classified a sexual predator, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

§ 2929.13. Guidance by degree of felony; monitoring of sexual predators by global positioning device

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

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

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory

prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code. If the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of section 2929.15 of the Revised Code relative to the offender, including imposing a prison term on the offender pursuant to that division.

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Except as provided in division (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with

section 2929.12 of the Revised Code.

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

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

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

outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

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

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

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

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment

program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

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

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

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

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

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (G), or (L) 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), (G), or (L) 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) or (L) 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 or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161 [3719.16.1], 4729.37, or 4729.61, division (C) or (D) of section 3719.172 [3719.17.2], division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised

Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 [2941.14.10] of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense,

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

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of

section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1413 [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, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 [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.

## § 2929.01. Definitions

As used in this chapter:

(A) (1) "Alternative residential facility" means, subject to division (A)(2) of this section, any facility other than an offender's home or residence in which an offender is assigned to live and that satisfies all of the following criteria:

(a) It provides programs through which the offender may seek or maintain employment or may receive education, training, treatment, or habilitation.

(b) It has received the appropriate license or certificate for any specialized education, training, treatment, habilitation, or other service that it provides from the government agency that is responsible for licensing or certifying that type of education, training, treatment, habilitation, or service.

(2) "Alternative residential facility" does not include a community-based correctional facility, jail, halfway house, or prison.

(B) "Bad time" means the time by which the parole board administratively extends an offender's stated prison term or terms pursuant to section 2967.11 of the

Revised Code because the parole board finds by clear and convincing evidence that the offender, while serving the prison term or terms, committed an act that is a criminal offense under the law of this state or the United States, whether or not the offender is prosecuted for the commission of that act.

(C) "Basic probation supervision" means a requirement that the offender maintain contact with a person appointed to supervise the offender in accordance with sanctions imposed by the court or imposed by the parole board pursuant to section 2967.28 of the Revised Code. "Basic probation supervision" includes basic parole supervision and basic post-release control supervision.

(D) "Cocaine," "crack cocaine," "hashish," "L.S.D.," and "unit dose" have the same meanings as in section 2925.01 of the Revised Code.

(E) "Community-based correctional facility" means a community-based correctional facility and program or district community-based correctional facility and program developed pursuant to sections 2301.51 to 2301.58 of the Revised Code.

(F) "Community control sanction" means a sanction that is not a prison term and that is described in section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code or a sanction that is not a jail term and that is described in section 2929.26,

2929.27, or 2929.28 of the Revised Code. "Community control sanction" includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004.

(G) "Controlled substance," "marihuana," "schedule I," and "schedule II" have the same meanings as in section 3719.01 of the Revised Code.

(H) "Curfew" means a requirement that an offender during a specified period of time be at a designated place.

(I) "Day reporting" means a sanction pursuant to which an offender is required each day to report to and leave a center or other approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center.

(J) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(K) "Drug and alcohol use monitoring" means a program under which an offender agrees to submit to random chemical analysis of the offender's blood, breath, or urine to determine whether the offender has ingested any alcohol or other drugs.

(L) "Drug treatment program" means any program under which a person undergoes assessment and treatment designed to reduce or completely eliminate the person's physical or emotional reliance upon alcohol, another drug, or alcohol and another drug and under which the person may be required to receive assessment and treatment on an outpatient basis or may be required to reside at a facility other than the person's home or residence while undergoing assessment and treatment.

(M) "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(N) "Education or training" includes study at, or in conjunction with a program offered by, a university, college, or technical college or vocational study and also includes the completion of primary school, secondary school, and literacy curricula or their equivalent.

(O) "Firearm" has the same meaning as in section 2923.11 of the Revised Code.

(P) "Halfway house" means a facility licensed by the division of parole and community services of the department of rehabilitation and correction pursuant to section 2967.14 of the Revised Code as a suitable facility for the care and treatment of adult offenders.

(Q) "House arrest" means a period of confinement of an offender that is in the offender's home or in other premises specified by the sentencing court or by the parole board pursuant to section 2967.28 of the Revised Code and during which all of the following apply:

(1) The offender is required to remain in the offender's home or other specified premises for the specified period of confinement, except for periods of time during which the offender is at the offender's place of employment or at other premises as authorized by the sentencing court or by the parole board.

(2) The offender is required to report periodically to a person designated by the court or parole board.

(3) The offender is subject to any other restrictions and requirements that may be imposed by the sentencing court or by the parole board.

(R) "Intensive probation supervision" means a requirement that an offender

maintain frequent contact with a person appointed by the court, or by the parole board pursuant to section 2967.28 of the Revised Code, to supervise the offender while the offender is seeking or maintaining necessary employment and participating in training, education, and treatment programs as required in the court's or parole board's order. "Intensive probation supervision" includes intensive parole supervision and intensive post-release control supervision.

(S) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.

(T) "Jail term" means the term in a jail that a sentencing court imposes or is authorized to impose pursuant to section 2929.24 or 2929.25 of the Revised Code or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction.

(U) "Mandatory jail term" means the term in a jail that a sentencing court is required to impose pursuant to division (G) of section 1547.99 of the Revised Code, division (E) of section 2929.24 of the Revised Code, division (E) of section 2903.06 or division (D) of section 2903.08 of the Revised Code, division (B) of section 4510.14 of the Revised Code, or division (G) of section 4511.19 of the Revised Code or pursuant to any other provision of the Revised Code that requires a term in

a jail for a misdemeanor conviction.

(V) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.

(W) "License violation report" means a report that is made by a sentencing court, or by the parole board pursuant to section 2967.28 of the Revised Code, to the regulatory or licensing board or agency that issued an offender a professional license or a license or permit to do business in this state and that specifies that the offender has been convicted of or pleaded guilty to an offense that may violate the conditions under which the offender's professional license or license or permit to do business in this state was granted or an offense for which the offender's professional license or license or permit to do business in this state may be revoked or suspended.

(X) "Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains at least one thousand grams of hashish; at least one hundred grams of crack cocaine; at least one thousand grams of cocaine that is not crack cocaine; at least two thousand five hundred unit doses or two hundred fifty grams of heroin; at least five thousand unit doses of L.S.D. or five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate

form; or at least one hundred times the amount of any other schedule I or II controlled substance other than marihuana\* that is necessary to commit a felony of the third degree pursuant to section 2925.03, 2925.04, 2925.05, or 2925.11 of the Revised Code that is based on the possession of, sale of, or offer to sell the controlled substance.

(Y) "Mandatory prison term" means any of the following:

(1) Subject to division (Y)(2) of this section, the term in prison that must be imposed for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (14) of section 2929.13 and division (D) of section 2929.14 of the Revised Code. Except as provided in sections 2925.02, 2925.03, 2925.04, 2925.05, and 2925.11 of the Revised Code, unless the maximum or another specific term is required under section 2929.14 or 2929.142 [2929.14.2] of the Revised Code, a mandatory prison term described in this division may be any prison term authorized for the level of offense.

(2) The term of sixty or one hundred twenty days in prison that a sentencing court is required to impose for a third or fourth degree felony OVI offense pursuant to division (G)(2) of section 2929.13 and division (G)(1)(d) or (e) of section 4511.19 of the Revised Code or the term of one, two, three, four, or five years in prison that a sentencing court is required to impose pursuant to division (G)(2) of

section 2929.13 of the Revised Code.

(3) The term in prison imposed pursuant to division (A) of section 2971.03 of the Revised Code for the offenses and in the circumstances described in division (F)(11) of section 2929.13 of the Revised Code, pursuant to division (B)(1)(a), (b), or (c) of section 2971.03 of the Revised Code for the offense of rape committed on or after the effective date of this amendment in violation of division (A)(1)(b) of section 2907.02 of the Revised Code, pursuant to division (B)(2)(a) of section 2971.03 of the Revised Code for the offense of attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1418 [2941.14.18] of the Revised Code, pursuant to division (B)(2)(b) of section 2971.03 of the Revised Code for the offense of attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1419 [2941.14.19] of the Revised Code, or pursuant to division (B)(2)(c) of section 2971.03 of the Revised Code for the offense of attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1420 [2941.14.20] of the Revised Code and that term as modified or terminated pursuant to section 2971.05 of the Revised Code.

(Z) "Monitored time" means a period of time during which an offender continues

to be under the control of the sentencing court or parole board, subject to no conditions other than leading a law-abiding life.

§ 2921.331. Failure to comply with order or signal of police officer

(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C) (1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

(2) A violation of division (A) of this section is a misdemeanor of the first degree.

(3) Except as provided in divisions (C) (4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.

(4) Except as provided in division (C) (5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.

(5) (a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

(b) If a police officer pursues an offender who is violating division (B) of this section and division (C) (5) (a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of the Revised Code that are required to be considered, all of the following:

(i) The duration of the pursuit;

(ii) The distance of the pursuit;

(iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;

(iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;

(v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;

(vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;

(vii) Whether the offender committed a moving violation during the pursuit;

(viii) The number of moving violations the offender committed during the pursuit;

(ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

(D) If an offender is sentenced pursuant to division (C) (4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.

(E) In addition to any other sanction imposed for a violation of this section, the court shall impose a class two suspension from the range specified in division (A)(2) of section 4510.02 of the Revised Code. If the offender previously has been found guilty of an offense under this section, the court shall impose a class one suspension as described in division (A)(1) of that section. The court shall not grant limited driving privileges to the offender. No judge shall

suspend the first three years of suspension under a class two suspension of an offender's license, permit, or privilege required by this division on any portion of the suspension under a class one suspension of an offender's license, permit, or privilege required by this division.

(F) As used in this section:

(1) "Moving violation" has the same meaning as in section 2743.70 of the Revised Code.

(2) "Police officer" has the same meaning as in section 4511.01 of the Revised Code.

§ 2921.34. Escape

(A) (1) No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement.

(2) Division (A)(2) of this section applies to any person who is adjudicated a sexually violent predator and is sentenced to a prison term pursuant to division (A)(3) of section 2971.03 of the Revised Code for the sexually violent offense, to any person who is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment and is sentenced to a prison term pursuant to division (B)(1)(a), (b), or (c) of section 2971.03 of the Revised Code for the violation, and to any person who is convicted of or pleads guilty to attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code and is sentenced to a prison term pursuant to division (B)(2)(a), (b), or (c) of section 2971.03 of the Revised Code for the attempted rape. No person to whom this division applies, for whom the requirement that the entire prison term imposed upon the person pursuant to division (A)(3) or (B) of section 2971.03 of the Revised Code be served in a state correctional institution has been modified pursuant to section 2971.05 of the Revised Code, and who, pursuant to that modification, is restricted to a geographic area, knowing that the person is under a geographic restriction or being reckless in

that regard, shall purposely leave the geographic area to which the restriction applies or purposely fail to return to that geographic area following a temporary leave granted for a specific purpose or for a limited period of time.

(B) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a charge under this section if the detention is pursuant to judicial order or in a detention facility. In the case of any other detention, irregularity or lack of jurisdiction is an affirmative defense only if either of the following occurs:

(1) The escape involved no substantial risk of harm to the person or property of another.

(2) The detaining authority knew or should have known there was no legal basis or authority for the detention.

(C) Whoever violates this section is guilty of escape.

(1) If the offender, at the time of the commission of the offense, was under detention as an alleged or adjudicated delinquent child or unruly child and if the act for which the offender was under detention would not be a felony if committed by an adult, escape is a misdemeanor of the first degree.

(2) If the offender, at the time of the commission of the offense, was under detention in any other manner, the offender is a person who was adjudicated a sexually violent predator for whom the

requirement that the entire prison term imposed upon the person pursuant to division (A)(3) of section 2971.03 of the Revised Code be served in a state correctional institution has been modified pursuant to section 2971.05 of the Revised Code, the offender is a person who was convicted of or pleaded guilty to committing on or after the effective date of this amendment a violation of division (A)(1)(b) of section 2907.02 of the Revised Code for whom the requirement that the entire prison term imposed upon the person pursuant to division (B)(1)(a), (b), or (c) of section 2971.03 of the Revised Code be served in a state correctional institution has been modified pursuant to section 2971.05 of the Revised Code, or the offender is a person who was convicted of or pleaded guilty to committing on or after the effective date of this amendment attempted rape, who also was convicted of or pleaded guilty to a specification of the type described in section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code, who was sentenced pursuant to division (B)(2)(a), (b), or (c) of section 2971.03 of the Revised Code, and for whom the requirement that the entire prison term imposed pursuant to that division be served in a state correctional institution has been modified pursuant to section 2971.05 of the Revised Code, escape is one of the following:

(a) A felony of the second degree, when the most serious offense for which the person was under detention or for which the person had been sentenced to the prison term under division (A)(3), (B)(1)(a), (b), or (c), or (B)(2)(a), (b), or (c) of section 2971.03 of the Revised Code is aggravated murder, murder, or a felony of the first or second degree or, if the person was under detention as an alleged or adjudicated delinquent child, when the most serious act for which the person was under detention would be aggravated murder, murder, or a felony of the first or second degree if committed by an adult;

(b) A felony of the third degree, when the most serious offense for which the person was under detention or for which the person had been sentenced to the prison term under division (A)(3), (B)(1)(a), (b), or (c), or (B)(2)(a), (b), or (c) of section 2971.03 of the Revised Code is a felony of the third, fourth, or fifth degree or an unclassified felony or, if the person was under detention as an alleged or adjudicated delinquent child, when the most serious act for which the person was under detention would be a felony of the third, fourth, or fifth degree or an unclassified felony if committed by an adult;

(c) A felony of the fifth degree, when any of the following applies:

(i) The most serious offense for which the person was under detention is a misdemeanor.

(ii) The person was found not guilty by reason of insanity, and the person's detention consisted of hospitalization, institutionalization, or confinement in a facility under an order made pursuant to or under authority of section 2945.40, 2945.401 [2945.40.1], or 2945.402 [2945.40.2] of the Revised Code.

(d) A misdemeanor of the first degree, when the most serious offense for which the person was under detention is a misdemeanor and when the person fails to return to detention at a specified time following temporary leave granted for a specific purpose or limited period or at the time required when serving a sentence in intermittent confinement.

(D) As used in this section:

(1) "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.

(2) "Sexually violent offense" has the same meaning as in section 2971.01 of the Revised Code.

§ 2907.322. Pandering sexually oriented matter involving a minor

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, record, photograph, film, develop, reproduce, or publish any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(2) Advertise for sale or dissemination, sell, distribute, transport, disseminate, exhibit, or display any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(3) Create, direct, or produce a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(4) Advertise for presentation, present, or participate in presenting a performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;\*

(5) Knowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality;

(6) Bring or cause to be brought into this state any material that shows a minor participating or

engaging in sexual activity, masturbation, or bestiality, or bring, cause to be brought, or finance the bringing of any minor into or across this state with the intent that the minor engage in sexual activity, masturbation, or bestiality in a performance or for the purpose of producing material containing a visual representation depicting the minor engaged in sexual activity, masturbation, or bestiality.

(B) (1) This section does not apply to any material or performance that is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(2) Mistake of age is not a defense to a charge under this section.

(3) In a prosecution under this section, the trier of fact may infer that a person in the material or performance involved is a minor if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor.

(C) Whoever violates this section is guilty of pandering sexually oriented matter involving a minor. Violation of division (A)(1), (2), (3), (4), or (6) of this section is a felony of the second degree. Violation of division (A)(5) of this section is a felony of the fourth degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section or

section 2907.321 [2907.32.1] or 2907.323 [2907.32.3] of the Revised Code, pandering sexually oriented matter involving a minor in violation of division (A)(5) of this section is a felony of the third degree.

§ 2929.41. Multiple sentences

(A) Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of section 2971.03 of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B) (3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

(B) (1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code.

When consecutive sentences are imposed for misdemeanor under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months.

(2) If a court of this state imposes a prison term upon the offender for the commission of a felony and a court of another state or the United States also has imposed a prison term upon the offender for the commission of a felony, the court of this state may order that the offender serve the prison

term it imposes consecutively to any prison term imposed upon the offender by the court of another state or the United States.

(3) A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively.

When consecutive jail terms or sentences of imprisonment and prison terms are imposed for one or more misdemeanors and one or more felonies under this division, the term to be served is the aggregate of the consecutive terms imposed, and the offender shall serve all terms imposed for a felony before serving any term imposed for a misdemeanor.

§ 2907.05. Gross sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

§ 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, if the offender is being sentenced under section 2971.03 of the Revised Code for a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on

or after the effective date of this amendment, if the offender is sentenced to a term of life without parole under division (B) of section 2907.02 of the Revised Code, or if the offender is being sentenced for attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code. 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 or section 2929.142 [2929.14.2] of the Revised Code, its reasons for imposing the maximum prison term;

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

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

(a) Impose a stated prison term;

(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 July 11, 2006, the failure of a court to

notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of this section and failed to notify the offender pursuant to division (B)(3)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section

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

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

(4) 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, if the offender is being sentenced for an aggravated sexually oriented offense as defined in section 2950.01 of the Revised Code, if the offender is being sentenced under section 2971.03 of the Revised Code for a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment, if the offender is sentenced to a term of life without parole under division (B) of section 2907.02 of the Revised Code, or if the offender is being sentenced for attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code, 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.

STATE OF OHIO

CASE NO. CR04-07-1166

Plaintiff 2005 SEP 30 AM 11:21

STATE OF OHIO  
COUNTY OF BUTLER  
COURT OF COMMON PLEAS  
PRIORITY  
JUDGMENT OF CONVICTION ENTRY

vs.

KEVIN JOHNSON

Defendant

(This is a Final Appealable Order.)  
HONORABLE CREHAN

.....

On September 21, 2005, defendant's sentencing hearing was held and defense attorneys, David Brewer and the defendant were present and the charges, and verdict or findings being as set forth in the previous Entry of the court which are expressly included herein by reference. The defendant was afforded all rights pursuant to Crim. R. 32. The Court afforded counsel an opportunity to speak on behalf of the defendant, and the Court addressed the defendant personally and afforded the defendant an opportunity to speak on his own behalf. Defendant waived his right to speak both verbally and through his legal counsel. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as Ohio Revised Code Section 2929.02(B). Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction or fine. Defendant is found to be a **Sexual Predator**.

It is the ORDER of this Court that the said Defendant be sentenced as follows:

COUNT (1): Rape, pursuant to O.R.C. 2907.02(A)(1)(b), a felony of the first degree and whose punishment is subject to Section 2907.02(B) and 2929.13(F)(2) of the Ohio Revised Code: a mandatory term of Life Imprisonment in the Ohio Department of Rehabilitation and Correction.

COUNT (2): Rape, pursuant to O.R.C. 2907.02(A)(1)(b), a felony of the first degree and whose punishment is subject to Section 2907.02(B) and 2929.13(F)(2) of the Ohio Revised Code: a mandatory term of Life Imprisonment in the Ohio Department of Rehabilitation and Correction.

COUNT (3): Rape, pursuant to O.R.C. 2907.02(A)(1)(b), a felony of the first degree and whose punishment is subject to Section 2907.02(B) and 2929.13(F)(2) of the Ohio Revised Code: a mandatory term of Life Imprisonment in the Ohio Department of Rehabilitation and Correction.

PROSECUTING ATTORNEY, BUTLER COUNTY, OHIO  
P.O. BOX 515, HAMILTON, OH 45012-0515

**COUNT (4): Rape**, pursuant to O.R.C. 2907.02(A)(1)(b), a felony of the first degree and whose punishment is subject to Section 2907.02(B) and 2929.13(F)(2) of the Ohio Revised Code: a **mandatory term of Life Imprisonment** in the Ohio Department of Rehabilitation and Correction.

Since the conviction on each count requires a mandatory sentence, pursuant to ORC 2929.13(F)(2), the Court is required by law to run each sentence consecutively. The sentences shall run consecutive for each count. The Court specifically finds that none of the factors set forth in ORC 2929.14(E)(4) would justify consecutive sentences in this case.

The defendant is **ORDERED** to serve as part of this sentence any term of post release control or parole imposed by the Parol Board, all pursuant to Ohio Revised Code 2967.13, and any prison term for violation of that post release control or parole.

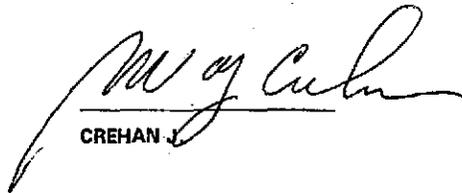
The defendant is therefore **ORDERED** conveyed to the custody of the Ohio Department of Rehabilitation and Correction. Credit for 451 days is granted as of this date along with future custody days while defendant awaits transportation to the appropriate state institution. The defendant is ordered to pay all costs of prosecution and any fees permitted pursuant to Revised Code Section 2929.18(A)(4).

The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his/her right to have notice of appeal filed on his behalf. Trial defense counsel informed the Court of their intent to file Notice of Appeal.

APPROVED AS TO FORM:

ENTER

ROBIN PIPER  
PROSECUTING ATTORNEY  
BUTLER COUNTY, OHIO



CREHAN J.

JMM/ljm  
September 22, 2005

PROSECUTING ATTORNEY, BUTLER COUNTY, OHIO  
P.O. BOX 515, HAMILTON, OH 45012-0515

IN THE COURT OF APPEALS **FILED**

TWELFTH APPELLATE DISTRICT OF OHIO: 04

BUTLER COUNTY HENRY CARPENTER  
COURT CLERK  
CLERK OF COURTS

STATE OF OHIO,

Plaintiff-Appellee,

CASE NO. CA2005-10-422

JUDGMENT ENTRY

- vs -

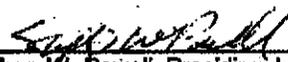
KEVIN JOHNSON,

Defendant-Appellant.

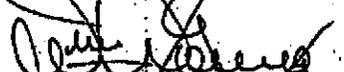
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

  
Stephen W. Powell, Presiding Judge

(Dissent)  
James E. Walsh, Judge

  
William W. Young, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

CASE NO. CA2005-10-422

- vs -

OPINION  
10/2/2006

KEVIN JOHNSON,

Defendant-Appellant.

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CR04-07-1166

Robin N. Piper, Butler County Prosecuting Attorney, Daniel G. Eichel, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Christopher P. Frederick, 304 North Second Street, Hamilton, Ohio 45011, for defendant-appellant

**POWELL, P.J.**

{¶1} Defendant-appellant, Kevin Johnson, appeals his convictions in the Butler County Court of Common Pleas on four counts of rape in violation of R.C. 2907.02(A)(1)(b).

We affirm the trial court's decision.

{¶2} Between April and June 2004, appellant, then 19 years old, intermittently lived with Tommy Brown and Ella Parker, and their family, including nine-year-old J.B. Appellant had been close to Parker for years, and she treated him "like one of her own" children. J.B.

shared a bedroom with an older sister, and appellant would sleep on the floor in the room with them. On four occasions during this period, appellant inserted his fingers into J.B.'s vagina, and on one of those four occasions, also inserted his penis inside of her vagina.

{13} On the evening of June 26, 2004, around 11:30 p.m., Parker went to check on the children who had gone to bed sometime earlier. She found that J.B. was not in her room. She looked around the house for her and found the bathroom door closed. She knocked on the door, and when appellant answered, she asked if he had seen J.B. He responded that he had not. Having a suspicion that something was wrong, Parker positioned herself outside the bathroom door, moments later she saw J.B. exit the bathroom, followed by appellant. Appearing stunned and scared, J.B. exclaimed to her mother, "[h]e wouldn't let me out." Appellant said nothing at that point and Parker left the house to find Brown. When she returned, Brown was already at the home with the police. Appellant had left.

{14} J.B. and her mother were interviewed at the Hamilton Police Department and then proceeded to Children's Hospital in Cincinnati, where J.B. was examined. After speaking with appellant's father, police found him at a friend's home. He agreed to accompany the police to the Hamilton Police Department. Appellant was taken to an interview room where Sgt. Wade McQueen advised appellant of his *Miranda* rights. Appellant executed a written waiver of those rights and agreed to speak with Sgt. McQueen. Although appellant initially denied having any sexual contact with J.B., he eventually told Sgt. McQueen that he had taken J.B. into the bathroom that evening and was "fingering her," i.e., putting his fingers inside of J.B.'s vagina. Sgt. McQueen then asked appellant if he had put his penis inside of the girl, and he replied "No, it wouldn't fit. It is too big."

{15} When asked how many times this "fingering" had happened, appellant said "several" times, eventually indicating he had digitally penetrated J.B. on four separate occasions, over a period of several weeks, with several days elapsing between each incident.

Appellant stated it would happen when he would see J.B. in bed, and he "got a sexual urge." He would start talking to her and "fingering" her; then he would lay back down on the floor and masturbate. Appellant signed a written statement relating these events. The statement reads in pertinent part as follows:

{16} "My name is Kevin Johnson. I'm at the Hamilton Police Department speaking with Detective McQueen in reference to the events that happened earlier tonight. I was at 25 Hurm Street, Number 4. I had been staying there for about two months. My two sisters lived there with their dad. About a month ago, I was lying on the floor of my sister [J.B.]'s room trying to sleep. I looked up and saw [J.B.] awake. She was lying on top of the covers. I don't know why, but I went up to her bed and started touching her legs. I then took her panties off and starting fingering her. When I say fingering her, I mean I am sticking my fingers in her vagina. I think I fingered her about two minutes or so. I don't remember saying anything to her or saying -- I'm sorry. I don't remember saying anything to her or her saying anything to me. She put her panties back on, and I laid back down to the floor and masturbated. \* \* \* A few nights later, I did the same thing again with pulling her panties off of her and fingering her. About two weeks ago, I think the same thing happened again with me fingering her. I had went and laid down in [J.B.]'s bedroom and got a sexual urge. I went in [J.B.]'s bed and pulled her panties down and started fingering her again. I then told her to go to the bathroom because I was afraid that my sister was going to wake up. She got up and walked into the bathroom, and I followed her. We got into the bathroom. And she had her pants and panties off, and I fingered her again. And her mom knocked on the bathroom door and asked if [J.B.] was in there. I told her no. I then told [J.B.] not to go out of the bathroom. We waited for a little while, and then I went out first and [J.B.] was behind me. [J.B.] went to the living room, and I went to the bedroom and grabbed my jacket. I knew that Tommy was going to kick me out. I then went into the living room and waited on Tommy. Tommy came in and talked to

[J.B.] and me and then told me to get out. I left and walked around for a while, and then I went to Tyrone Parker's house."

{¶7} Appellant was charged with four counts of rape, and the matter proceeded to a jury trial. The state presented the foregoing evidence. Appellant testified, denying that he had raped J.B., and denying that he had ever engaged in any sexual conduct with her. Appellant testified that on the night in question he was alone in the bathroom when Parker asked if J.B. was in there, and he replied, "no." He testified that Parker then ran out of the house, and he was subsequently falsely accused of rape. Appellant testified that he provided police with the confessions only because they called him a liar, and told him he could go home if he signed a written confession.

{¶8} The jury found appellant guilty of four counts of rape, with a finding that the victim was under ten years old. Appellant was sentenced, and now appeals raising ten assignments of error.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶11} In his first assignment of error, appellant contends that the trial court erred in overruling his motion to suppress his oral and written statements to police. Appellant contends that police coerced him into making the statements.

{¶12} When considering a motion to suppress evidence, the trial court serves as the trier of fact and is the primary judge of the weight of the evidence and the credibility of witnesses. See *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. When reviewing a trial court's decision on a motion to suppress, an appellate court relies upon the trial court's ability to assess the credibility of witnesses, and accepts the trial court's findings if they are supported by competent, credible evidence. See *State v.*

*McNamara* (1997), 124 Ohio App.3d 706, 710; *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. However, an appellate court reviews de novo whether the trial court's conclusions of law, based on its findings of fact, are correct. *Id.*

{¶13} A confession elicited by "coercive police activity" is involuntary and violates both the United States and Ohio Constitutions. *State v. Loza*, 71 Ohio St.3d 61, 66, 1994-Ohio-409, quoting *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515. In determining whether a confession was involuntarily induced, the court must consider the totality of the circumstances, including the age, mentality and prior criminal experience of the accused; the length, intensity and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. *Loza* at 66. Any statement given "freely and voluntarily without any compelling influences is, of course, admissible in evidence." *State v. Tucker*, 81 Ohio St.3d 431, 436, 1998-Ohio-438.

{¶14} Appellant contends that his confession was coerced because the detective repeatedly accused appellant of lying when he denied the allegations against him. Review of the record reveals that the interviewing detective did nothing more than urge appellant to tell the truth about the incidents. Such "[a]dmonitions to tell the truth are considered to be neither threats nor promises and are permissible" when interrogating a suspect. *Loza* at 66, citing *State v. Cooley* (1989), 46 Ohio St.3d 20, 28; *State v. Wiles* (1991), 59 Ohio St.3d 71, 81. Appellant further contends that his written confession is inadmissible because it was recorded by the detective, not by him. However, review of the record demonstrates that appellant acknowledged that the detective's written recitation of his confession was accurate, and the confession bears his signature attesting to its accuracy.

{¶15} We find appellant's contention that his confession was coerced to be without merit. Consequently, the trial court did not err in overruling his motion to suppress the statements. The assignment of error is overruled.

{¶16} Assignment of Error No. 2:

{¶17} "THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING J.B. COMPETENT AND PERMITTING HER TO TESTIFY."

{¶18} Appellant's second assignment of error asserts that the trial court erred when it determined that J.B., 11 years old at the time of trial, was competent to testify.

{¶19} The trial court is in the best position to determine the competency of witnesses and is afforded considerable discretion in such matters. *State v. Uhler* (1992), 80 Ohio App.3d 113, 118, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of the syllabus. See, also, *State v. Wilson* (1952), 156 Ohio St. 525. Absent an abuse of discretion, the competency determinations of the trial court will not be disturbed on appeal. *State v. Frazier* (1991), 61 Ohio St.3d 247, 251.

{¶20} Evid.R. 601(A) states in pertinent part that "[e]very person is competent to be a witness except \* \* \* children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." A child witness "who is ten years of age or older at the time of trial, but who was under the age of ten at the time an incident in question occurred, is presumed competent to testify about the event." *State v. Clark*, 71 Ohio St.3d 466, 1994-Ohio-43, paragraph one of the syllabus. See, also, *Uhler* at 118. In *Clark*, the court reasoned that Evid.R. 601(A) "favors competency," and as a result, "absent some articulable concern otherwise, an individual who is at least ten years of age is per se competent to testify." *Id.* at 469. See, also, *State v. Cooper* (2000), 139 Ohio App.3d 149, 164-165. Therefore, once a child attains the age of ten, the presumption of competency created by Evid.R. 601(A) applies to that child witness.

{¶21} In the present matter, the evidence established that J.B. was nine years old when the rapes occurred, and 11 years old at the time of trial. Because she was older than

ten at the time of trial, she was presumed to be a competent witness. See *Clark; Uhler*. Appellant has not articulated a particular concern regarding her competency, and review of the record reveals no abuse of discretion in permitting her testimony. Whether her testimony concerning events which occurred before she reached the age of ten is accurate is a credibility issue to be resolved by the trier of fact, not a question of competency. See *Uhler* at 118. The second assignment of error is overruled.

{¶22} Assignment of Error No. 3:

{¶23} "THE JURY VERDICT WAS AGAINST THE SUFFICIENCY AND THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶24} In his third assignment of error, appellant argues both that the state failed to present sufficient evidence to support the convictions, and that the convictions are against the manifest weight of the evidence presented at trial.

{¶25} Sufficiency of the evidence and weight of the evidence are legally distinct issues. See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In essence, "sufficiency is a test of adequacy." *Id.* Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.*, citing *State v. Robinson* (1955), 162 Ohio St. 486. Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." *Id.* at 387 (emphasis sic). We will address each issue in turn.

{¶26} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function is to examine the evidence admitted at trial to determine whether the evidence, viewed in a light most favorable to the prosecution, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶27} Appellant was charged with four counts of rape, in violation of R.C. 2907.02. This section provides, in pertinent part that, "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender" when "[t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person[.]"

{¶28} The term "sexual conduct" is defined in R.C. 2907.01(A), in part, as "vaginal intercourse between a male and female \* \* \* and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another."

{¶29} J.B. testified that appellant inserted his fingers into her vagina on at least four occasions, and on one occasion, also attempted to insert his penis inside of her vagina. In this case, the victim's testimony alone, if believed, was sufficient to prove each element of the offense of rape. Accord *State v. Roberts*, Hamilton App. No. C-040547, 2005-Ohio-6391, ¶64; *State v. Lewis* (1990), 70 Ohio App.3d 624, 638. We consequently find that the convictions are supported by sufficient evidence.

{¶30} We next turn to appellant's contention that the convictions are not supported by the manifest weight of the evidence. A court considering a manifest-weight claim "review[s] the entire record, weighs the evidence and all reasonable inferences, [and] considers the credibility of witnesses." *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The relevant inquiry is "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *Id.* The discretionary power to grant a new trial should be exercised "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin* at 175. An appellate court will not reverse a judgment as against the manifest weight of the evidence in a jury trial unless it unanimously disagrees with the jury's resolution of any conflicting testimony.

*Thompkins* at 389, citing Section 3(B) (3), Article IV of the Ohio Constitution.

{¶31} In addition to J.B.'s testimony, appellant's written confession was entered into evidence, and Detective McQueen testified that appellant admitted putting his fingers inside J.B.'s vagina on at least four occasions. J.B.'s mother testified about the evening that she discovered appellant in the bathroom with J.B. She testified that appellant lied to her about J.B.'s presence in the bathroom, and that when J.B. emerged from the bathroom she told her appellant "wouldn't let me out." To the contrary, appellant testified that the events never occurred, and that he admitted to police that he committed the offenses merely to end the interview.

{¶32} Appellant argues that the trier of fact lost its way in convicting him because his testimony was the more credible. However, an appellate court reviewing the evidence on a manifest weight claim must be mindful that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury in the present case chose to accept and allocate significant weight to the evidence supporting appellant's guilt. Considering the credibility and strength of the evidence in favor of appellant's convictions, this situation falls short of "the exceptional case in which the evidence weighs heavily against the conviction."

*Thompkins*, 78 Ohio St.3d at 387. A conviction is not against the manifest weight of the evidence merely because the trier of fact believes the state's evidence over the defendant's. See *State v. Guzzo* (Sept. 20, 2004), Butler App. No. CA2003-09-232, 2004-Ohio-4979, ¶13. Appellant's third assignment of error is overruled.

{¶33} Assignment of Error No. 4:

{¶34} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A MISTRIAL WHEN MEMBERS OF THE JURY SAW APPELLANT IN HANDCUFFS."

{¶35} In his fourth assignment of error, appellant argues that the trial court erred by

not granting a mistrial after two members of the jury saw appellant in handcuffs.

{¶36} The decision to grant a mistrial under Crim.R. 33 rests within the sound discretion of the trial court. *State v. Blankenship* (1995), 102 Ohio App.3d 534, 569, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182. An appellate court will not disturb this exercise of discretion "absent a showing that the accused has suffered material prejudice." *Id.* The granting of a mistrial is only necessary where a fair trial is no longer possible. *Id.*, citing *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. A mistrial should not be granted "merely because some minor error or irregularity has arisen." *Id.*, citing *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33.

{¶37} Review of the record reveals that, during a lunch recess, two jurors observed appellant in handcuffs and shackled. The incident occurred when appellant was being escorted between floors of the courthouse in an elevator also used by the public. The trial court conducted a voir dire of the jurors to determine what effect the incident might have on them. Both jurors indicated that seeing appellant in handcuffs would not prevent them from remaining fair and impartial, and the trial court denied appellant's request for a mistrial.

{¶38} Although a defendant should not be tried while shackled, absent unusual circumstances, a defendant's right to a fair trial "is not prejudiced by the use of handcuffs, or shackles where the jurors' view of the defendant in custody is brief, inadvertent, and outside of the courtroom." *Blankenship* at 553, citing *State v. Kidder* (1987), 32 Ohio St.3d 279, 285-286. "The ultimate question is the degree of prejudice, if any, which such brief exposure caused." *State v. Chitwood* (1992), 83 Ohio App.3d 443, 448. The danger of prejudice to a defendant is slight where a juror's view of the defendant in custody is brief, inadvertent and outside of the courtroom. *Kidder* at 285-286.

{¶39} In the present case, two members of the jury inadvertently saw appellant in restraints, outside of the courtroom. Upon inquiry, both jurors indicated that having seen

appellant in handcuffs would have no impact on their deliberations. There is no evidence that these circumstances unduly prejudiced appellant's right to a fair trial or in any way contributed to the guilty verdict in this case. As a result, we find that the trial court did not abuse its discretion when it overruled appellant's motion for a mistrial. Appellant's fourth assignment of error is overruled.

{¶40} Assignment of Error No. 5:

{¶41} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIM.R. 29."

{¶42} When reviewing the trial court's denial of a motion for acquittal under Crim.R. 29, an appellate court applies the same test as it would in reviewing a challenge based upon the sufficiency of the evidence. *Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶27; see, also, *State v. Jackson*, Butler App. Nos. CA2005-02-033 & CA2005-03-051, 2006-Ohio-1147, ¶21. Consequently, our analysis and rejection of appellant's third assignment of error challenging the sufficiency of the evidence to support the convictions is also dispositive of this assignment of error. Appellant's fifth assignment of error is overruled.

{¶43} Assignment of Error No. 6:

{¶44} "THE ADMISSION OF J.B.'S MEDICAL RECORDS VIOLATED THE CONFRONTATION CLAUSE AND/OR CONSTITUTED IMPERMISSIBLE HEARSAY."

{¶45} Appellant's sixth assignment of error asserts that the admission of medical records containing statements made by J.B. to medical examiners was error in light of the United States Supreme Court's decision in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354. Alternatively, appellant argues that the records themselves, not just J.B.'s statements contained therein, are inadmissible hearsay. We find that both assertions are without merit.

{¶46} In *Crawford*, the United States Supreme Court held that out-of-court statements

that are testimonial in nature are barred under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the trial court. *Id.* at 68. Therefore, the threshold issue we must determine is whether or not J.B.'s statements are testimonial. *State v. Crager*, Marion App. No. 9-04-54, 2005-Ohio-6868, at ¶28.

{¶47} While the Supreme Court in *Crawford* did not provide an exact definition of the term, it noted that at a minimum, "testimonial" statements include prior testimony at a preliminary hearing, before a grand jury or at a former trial, and statements made during police interrogations. *Crawford* at 68. It noted that the term would also encompass statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.*

{¶48} Following *Crawford*, the Supreme Court further explored the dichotomy between testimonial and nontestimonial statements in *Davis v. Washington* (2006), \_\_\_ U.S. \_\_\_, 126 S.Ct. 2266, 2273. In *Davis*, the Court held that statements to a 911 operator reporting an emergency were nontestimonial, but that a police interrogation, taking place in the home of the witness, was testimonial. As nontestimonial, the 911 call was properly admitted despite the witness not attending trial and the defendant not having an opportunity for cross-examination. *Id.* at 2277. The police interrogations were found to be improperly admitted at trial because testimonial evidence may only be admitted when the witness is unavailable for trial and the defendant had an opportunity for cross-examination. *Id.* at 2278. The Court applied the following test to reach its conclusion:

{¶49} "Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 2273-74. With this standard in mind, we turn to appellant's hearsay argument in the present case.

{¶50} In general, statements made by child abuse victims to medical providers are not testimonial in nature. See, e.g., *State v. Sheppard*, 164 Ohio App.3d 372, 2005-Ohio-6065, ¶30; *Edinger* at ¶82; *In re D.L.*, Cuyahoga App. No. 84643, 2005-Ohio-2320, ¶20. Applying the reasoning of *Crawford* and *Davis*, we reach the same conclusion in the present case. J.B. made the statements while seeking treatment at a hospital, not in the course of police questioning. The statements were provided so that the hospital's medical staff could treat her, not to investigate acts of alleged sexual abuse, nor to determine the identity of the perpetrator of the abuse. See *Crawford* at 68. Additionally, there is nothing in the record to indicate that J.B., at the time only nine years old, would have realized that her statements would be available for use at a later trial. See *Edinger* at ¶90 (finding it "highly doubtful" that a six-year-old had any idea that her statements would be preserved for use at a later trial).

{¶51} Because J.B.'s statements contained in the medical records were not testimonial, their introduction did not violate appellant's constitutional right to confront witnesses. Accord *Sheppard*; *Edinger*; *State v. Martin*, Franklin App. No. 05AP818, 2006-Ohio-2749, ¶22. Even assuming arguendo that her statements were testimonial, we note that J.B. was called to testify, providing appellant with the opportunity to cross-examine her regarding her statements which formed the basis for the medical records, thus comporting with the standards for admitting her hearsay statements set forth in both *Crawford* and *Davis*. See *Crawford* at 59; *Davis* at 2278; accord *Siler*; *State v. Jeffries*, Stark App. No. 2005-CA-0128, 2006-Ohio-828, ¶14-19. "When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements." *Crawford* at 59.

{¶52} Appellant also contends that the medical records are inadmissible hearsay. However, Evid.R. 803(4) excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶53} A trial court has broad discretion to determine whether a declaration should be admissible under a hearsay exception. *State v. Dever* (1992), 64 Ohio St.3d 401, 410. The records at issue contain statements made by J.B., a patient seeking diagnosis and treatment by medical professionals. We do not find that the trial court abused its discretion by admitting the evidence under this hearsay exception. See *Sheppard* at ¶29-30.

{¶54} Finally, we note that appellant stipulated generally to the admissibility of the medical records at trial, while making several hearsay objections to certain statements not made by J.B. The trial court redacted the portions to which appellant objected. Stipulations or agreements by a defendant in the course of a criminal trial are binding and enforceable. *State v. Brewer*, Clermont App. No. CA2002-03-025, 2003-Ohio-1064, ¶13, citing *State v. Folk* (1991), 74 Ohio App.3d 468, 471. Appellant is consequently bound by his stipulation as to the admissibility of the records. See *id.*

{¶55} Appellant's sixth assignment of error is overruled.

{¶56} Assignment of Error No. 7:

{¶57} "THE CUMULATIVE EFFECT OF ASSIGNMENTS OF ERRORS ONE THROUGH SIX DENIED APPELLANT A FAIR TRIAL."

{¶58} Appellant's seventh assignment of error contends that the cumulative effect of the errors argued in his first six assignments of error, considered together, merit reversal of his convictions.

{¶59} Although a particular error might not constitute prejudicial error in and of itself, a conviction may be reversed if the cumulative effect of the errors deprives a defendant of a fair trial, despite the fact that each error individually does not constitute cause for reversal. *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168; *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. However, the doctrine of cumulative error is not applicable where a defendant fails to establish multiple instances of harmless error during the course of the trial. *Garner* at 64.

{¶60} This court has found no instances of error as set forth in appellant's previous assignments of error; nor has appellant alleged or established any instances of harmless error. Consequently, the doctrine of cumulative error is not applicable in the present case. Appellant's seventh assignment of error is overruled.

{¶61} Assignment of Error No. 8:

{¶62} "THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO SERVE CONSECUTIVE PRISON TERMS."

{¶63} In his eighth assignment of error, appellant asserts that the trial court erred by imposing consecutive prison terms.

{¶64} Appellant first contends that his sentence was imposed in violation of the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the court held that R.C. 2929.14(E)(4), which governed the imposition of consecutive sentences, was unconstitutional inasmuch as it required judicial fact-finding before the imposition of consecutive prison sentences. *Id.* at paragraph four of the syllabus.

{¶65} Appellant is mistaken in asserting that the trial court relied on this unconstitutional section when sentencing him to consecutive prison terms. The trial court in fact specifically found that "none of the factors set forth in ORC 2929.14(E)(4) would justify consecutive sentences in this case." Appellant's contention that he was sentenced under an

unconstitutional statute is consequently without merit.

{¶66} Nevertheless, the trial court sentenced appellant to consecutive prison terms upon concluding that consecutive sentences were mandated by R.C. 2929.13(F)(2). The trial court stated at the sentencing hearing that it "does not have the discretion to run these sentences concurrent." In its sentencing entry, the court stated: "Since the conviction on each count requires a mandatory sentence, pursuant to ORC 2929.13(F)(2), the Court is required by law to run each sentence consecutively. The Court specifically finds that none of the factors set forth in ORC 2929.14(E)(4) would justify consecutive sentences in this case." Appellant maintains on appeal that the trial court's interpretation of R.C. 2929.13(F)(2) was erroneous.

{¶67} The paramount consideration in determining the meaning of a statute is legislative intent. *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, ¶34. In determining legislative intent, we review the statutory language, according the words used their usual, normal, or customary meaning. *State ex rel. Wolfe v. Delaware Cty. Bd. of Elections*, 88 Ohio St.3d 182, 184, 2000-Ohio-294. "With respect to legislative intent, '[i]f the statute's language reasonably permits an interpretation consistent with that intent, we should adopt it.'" *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶60, quoting *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* (2004), 542 U.S. 155, 174, 124 S.Ct. 2359.

{¶68} After reviewing R.C. 2929.13(F)(2) and considering the legislative intent evidenced in the statute's language, we disagree with appellant's argument that the trial court erred in interpreting the statute. R.C. 2929.13(F) requires mandatory prison terms for 14 serious offenses, one of which is "any rape." Specifically, the statute states that the court "shall impose a prison term or terms" for the listed offenses. We find that the imposition of multiple, mandatory prison terms under R.C. 2929.13(F) implicitly requires the imposition of consecutive prison terms. Anything less would diminish the intended effect of the mandatory

sentences, and would render such sentences not truly mandatory. We do not interpret the language of R.C. 2929.13(F) to allow for the possibility of a "volume discount," where a defendant essentially serves one term for the commission of multiple, serious crimes for which mandatory prison terms are required.

{¶69} In addition to the "shall impose a prison term or terms" language, R.C. 2929.13(F) states that, except as specifically provided in R.C. 2929.20 or R.C. 2967.191, or when parole is authorized under R.C. 2967.13, the court "shall not reduce" a defendant's prison terms pursuant to R.C. 2929.20, R.C. 2967.193, or any other provision of R.C. Chapter 2967 or Chapter 5120. We find this language to be a further indication of the legislature's intent to mandate consecutive sentences for multiple prison terms imposed under R.C. 2929.13(F). It is apparent that the statute does not favor reductions in mandatory sentences imposed, which is what an order of concurrent sentences essentially is.

{¶70} The Ohio Supreme Court has stated that sentencing courts have full discretion to impose a prison sentence within the statutory range and to impose multiple sentences either consecutively or concurrently. See *Foster*, 2006-Ohio-856, at ¶100; *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶9. However, the court was setting forth a general rule, and was not addressing cases in which a particular statute requires consecutive sentences, or cases in which multiple, mandatory sentences are imposed. A review of Ohio sentencing law reveals instances in which a sentencing court does not have discretion to impose consecutive or concurrent sentences. See, e.g., R.C. 2929.41(B) (sentences for certain misdemeanors, such as escape and pandering sexually oriented matter involving a minor, must be served consecutively); R.C. 2971.03 (sentences for certain violent sex offenses must be served consecutively). We find that the imposition of multiple, mandatory sentences under R.C. 2929.13(F) is another such instance.

{¶71} We are aware of the general rule set forth in R.C. 2929.41(A) that sentences of

imprisonment shall be served concurrently. See, also, *State v. Barnhouse*, 102 Ohio St.3d 221, 2004-Ohio-2492, ¶11. We are further aware that the listed exceptions to that rule do not include R.C. 2929.13(F). However, the general rule and the exceptions stated in R.C. 2929.41(A) do not specifically address cases in which the sentencing court orders multiple, mandatory sentences. R.C. 2929.13(F) is a more specific statute dealing with such cases, and therefore the legislative intent embodied in that statute controls. See R.C. 1.51; *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶54, citing *State ex rel. Belknap v. Lavelle* (1985), 18 Ohio St.3d 180, 182 ("It is a well-established rule of statutory construction that specific provisions prevail over general provisions.")

{¶72} We recognize that the courts of appeals in *State v. Franklin* (Dec. 22, 2000), Greene App. No. 99-CA-117, 2000 WL 1867524, \*4, and *State v. Sharp*, Allen App. No. 1-02-06, 2002-Ohio-2343, ¶26, have stated that a sentencing court has the option to impose concurrent or consecutive sentences when a defendant is convicted of multiple counts of an offense listed in R.C. 2929.13(F). However, we respectfully disagree with those courts' conclusions, by which this court is not bound. As stated above, it is our view that the imposition of multiple, mandatory prison terms under R.C. 2929.13(F) implicitly requires those terms to be served consecutively. Otherwise, the prison terms would not truly be mandatory. Accordingly, we overrule appellant's eighth assignment of error.

{¶73} Assignment of Error No. 9:

{¶74} "THE IMPOSITION OF FOUR CONSECUTIVE LIFE SENTENCES IS CRUEL AND UNUSUAL PUNISHMENT."

{¶75} In his ninth assignment of error, appellant asserts that the imposition of four, consecutive life sentences constitutes cruel and unusual punishment.

{¶76} Cases in which cruel and unusual punishments have been found "are limited to those involving sanctions which under the circumstances would be considered shocking to

any reasonable person." *State v. Weitbrecht*, 86 Ohio St.3d 368, 371, 1999-Ohio-113 quoting *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70. The rape of a child "is shocking outrageous, abominable, and it has enduring effects on the child;" consequently, a "penalty equivalent to its enormity" is required. *State v. Gregory* (1982), 8 Ohio App.3d 184, 185-186.

{¶77} We note that the constitutionality of the sentence mandated by R.C. 2907.02(B) "is a well-settled issue." *State v. Sholler* (Apr. 28, 1997), Clinton App. No. CA96-08-013. Ohio courts, including this court, have held that a sentence of life imprisonment under R.C. 2907.02(B) is constitutional and is not cruel and unusual punishment. See *Sholler*, *State v. Smelcer* (1993), 89 Ohio App.3d 115, 127; *State v. Gladding* (1990), 66 Ohio App.3d 502, 513; *State v. Fenton* (1990), 68 Ohio App.3d 412, 438-439; *Gregory*. Given the crimes committed by appellant in this case, we do not find that the consecutive life sentences ordered by the trial court constituted cruel and unusual punishment. See *State v. Johnson*, Cuyahoga App. No. 80436, 2002-Ohio-7057, ¶¶119-120; and *State v. Wolf* (Dec. 30, 1994), Lake App. No. 93-L-151, 1994 WL 738805, \*11 (finding consecutive life sentences for rape not cruel and unusual punishment). Accordingly, we overrule appellant's ninth assignment of error.

{¶78} Assignment of Error No. 10:

{¶79} "THE TRIAL COURT'S FINDING THAT APPELLANT IS A SEXUAL PREDATOR IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW, TO PROVE 'BY CLEAR AND CONVINCING EVIDENCE' THAT APPELLANT 'IS LIKELY TO ENGAGE IN THE FUTURE IN ONE OR MORE SEXUALLY ORIENTED OFFENSES."

{¶80} In his final assignment of error, appellant argues that the trial court's decision classifying him a sexual predator is against the manifest weight of the evidence.

{¶81} The Ohio Supreme Court has held that R.C. Chapter 2950 is remedial in nature and not punitive. *State v. Cook*, 83 Ohio St.3d 404, 413, 1998-Ohio-291. Accordingly, appellate review of a trial court's sexual predator determination is conducted applying the civil manifest weight standard. See *id.*; *State v. Bowman*, Butler App. Nos. CA2001-05-117 and CA2001-06-047, 2002-Ohio-4373, ¶6. This standard requires that the trial court's determination that an offender is a sexual predator be upheld if the court's judgment is supported by some competent, credible evidence going to all the essential elements of the case. *Id.*, citing *C.E. Morris Co. v. Foley Constr.* (1987), 54 Ohio St.2d 279, 280. An appellate court "will not disturb a trial court's determination upon a sexual predator hearing on appeal as being against the manifest weight of the evidence if reasonable minds could arrive at the conclusion reached by the trier of fact." *Id.* (citations omitted).

{¶82} A sexual predator is statutorily defined as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E). When making its determination, a trial court can classify an individual as a sexual predator only if it concludes that the state has established both prongs of the definition by clear and convincing evidence. R.C. 2950.09(B). R.C. 2950.09(B)(2) requires the trial court to consider "all relevant factors" in making this determination.<sup>1</sup> See, also, *State v. Lagow*, Butler App. No. CA2001-06-144, 2002-Ohio-557.

{¶83} There is no dispute that the offenses for which appellant was convicted

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1. These factors include, but are not limited to: the offender's age; the offender's past criminal conduct and if a criminal history, whether sentence served or treatment obtained; the age of the victim; whether multiple victims were involved; whether the offender used drugs or alcohol to impair the victim or to prevent the victim from resisting; mental illness or disability of offender; the nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse; whether offender displayed cruelty or made one or more threats of cruelty; and any additional behavioral characteristics that contribute to the offender's conduct.

constitute sexually-oriented offenses under the sexual predator statute. Consequently, a issue in the instant matter is whether the state presented clear and convincing evidence a trial that appellant is likely to engage in future sexually-oriented offenses. See *State v. Cook* 83 Ohio St.3d at 423-424, 1998-Ohio-291.

{¶84} Having reviewed the record, we conclude that the trial court's sexual predator determination is supported by competent, credible evidence. At the time of the offenses, the victim was nine years old while appellant was 19. Appellant was treated as a member of the victim's family, and used the trust gained by this status to commit the offenses. The abuse occurred on multiple occasions over a period of some months. The victim's age, the numerous incidents, and appellant's willingness to victimize a child regarded as a family member are "telltale signs" of his likelihood to reoffend. See *State v. McComas*, Franklin App. No. 05AP-134, 2006-Ohio-380. See, also, *State v. Jackson*, Franklin App. No. 05AP-101, 2005-Ohio-5094, ¶¶36-40 (age of minor victim and multiple incidents were indicators of accused's inability to refrain from criminal conduct); see, generally, *State v. Eppinger*, 91 Ohio St.3d 158, 2001-Ohio-380. Further, psychological testing of appellant revealed his risk of recidivism as "moderate to high." This evidence amply supports the trial court's determination that appellant is a sexual predator. Appellant's tenth assignment of error is overruled.

{¶85} The judgment of the trial court is affirmed.

YOUNG, J., concurs.

WALSH, J., concurs in part and dissents in part.

WALSH, J., concurring in part and dissenting in part.

WALSH, J., dissenting.

{¶86} Because I disagree with the majority's analysis and resolution of appellant's

eighth assignment of error, I respectfully dissent.

{¶87} R.C. 2929.13(F)(2) states that a court "shall impose a prison term or terms" for "any rape," in addition to fourteen other categories of offenses not at issue in the present matter. This section enumerates certain instances in which a prison term is mandatory, and removes the trial court's discretion to impose community control or other nonprison sanctions.

{¶88} The trial court construed this section as mandating not only the imposition of a prison term on each rape count, but also the imposition of consecutive prison terms on each count. As the majority notes, the trial court stated at the sentencing hearing that it "does not have the discretion to run these sentences concurrent." In its sentencing entry, the court reiterated its interpretation of the statute, stating: "Since the conviction on each count requires a mandatory sentence, pursuant to ORC 2929.13(F)(2), the Court is required by law to run each sentence consecutively. The Court specifically finds that none of the factors set forth in ORC 2929.14(E)(4) would justify consecutive sentences in this case."

{¶89} I agree with appellant's argument that the trial court erred by concluding that R.C. 2929.13(F)(2) requires the imposition of consecutive sentences.

{¶90} Although the majority begins its analysis with a correct statement of law regarding statutory construction, the majority fails to adhere to the rules it recites. I begin my analysis by reiterating that "[t]he primary goal of statutory construction is to give effect to the intent of the legislature." *State v. Wilson*, 77 Ohio St.3d 334, 336, 1997-Ohio-35; *Jackson* at ¶34. "In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished." *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 340, 1997-Ohio-278. See, also, *State v. Ventura*, Butler App. No. CA2005-03-079, 2005-Ohio-5048, ¶10. A well-established rule of statutory construction is that "in looking to the face of a statute or Act to determine legislative intent, significance and effect should be accorded to every word, phrase, sentence and part thereof, if possible." *KeyCorp*

v. Tracy, 87 Ohio St.3d 238, 241, 1999-Ohio-43, quoting *State v. Wilson*, 77 Ohio St.3d 334, 336-337, 1997-Ohio-35.

{¶91} This court, following a primary rule of statutory construction, must "apply a statute as it is written when its meaning is unambiguous and definite." *State v. Hughes*, 86 Ohio St.3d 424, 427, 1999-Ohio-118, citing *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 1996-Ohio-291. "An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words." *Portage City Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶52, citing *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 1997-Ohio-310.

{¶92} The majority concludes that consecutive sentences are "implied" by the statute's use of the term "mandatory." The phrase "mandatory prison term" is clear and unambiguous, and is defined as "the term in prison that must be imposed for the offenses set forth in divisions F(1) to F(8) [ ] of section 2929.13 [ ] of the Revised Code." R.C. 2929.01(Y). The phrase is defined by statute, makes no reference to consecutive sentences, and requires no further interpretation. This court is simply not permitted to insert words or requirements into this statute that is clear and unambiguous as written. See *id.* Notably, neither the state nor the majority can cite to any authority for the proposition that consecutive sentences are mandated by R.C. 2929.13(F). Although purporting to adhere to the legislative intent of the statute, the majority can cite no legislative history or committee comment in support of its result-oriented conclusion.

{¶93} The plain language of R.C. 2929.13(F)(2) requires that a trial court "impose a prison term" upon an offender convicted of rape and removes the trial court's discretion to impose a nonprison sanction. This section makes no mention of consecutive prison terms; rather, it simply requires that a prison term be imposed for the enumerated offenses.

Whether a prison term is ordered to run concurrent with, or consecutive to, another prison term has no bearing on whether an offender is in fact sentenced to a term of imprisonment for an offense. See, e.g., *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶9 ("[A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense. Only after the judge has imposed a separate prison term for each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively").

{¶94} Ohio's sentencing scheme generally requires that sentences of imprisonment be served concurrently. See R.C. 2929.41(A); *State v. Bamhouse*, 102 Ohio St.3d 221, 2004-Ohio-2492, ¶11. Specifically, R.C. 2929.41(A) states: "Except as provided in division (B) of this section [inter alia, misdemeanor vehicular assault; pandering sexually oriented material involving a minor; escape], division (E) of section 2929.14 [firearm specification], or division (D) or (E) of section 2971.03 [sexually violent offender specification] of the Revised Code, a prison term, jail term, or sentence of imprisonment *shall be served concurrently* with any other prison term." (Emphasis added.) Thus, except for certain enumerated statutes imposing nondiscretionary consecutive prison terms, none of which are applicable in the present case, Ohio's sentencing structure envisions concurrent prison terms. Post *Foster*, which excised R.C. 2929.14(E)(4) requiring the trial court to make factual findings before imposing consecutive sentences, the decision to impose consecutive rather than concurrent sentences is otherwise left to the discretion of the trial court. *Foster* at paragraph four of the syllabus.

{¶95} The majority rejects the revised code's general preference for concurrent prison sentences and instead reaches its conclusion based in part on the "more specific" R.C. 2929.13(F)(2). While this section does specifically address sentencing in rape cases, absent from the section is any reference to whether an offender convicted of multiple counts of rape must be sentenced to consecutive prison terms. The legislature has explicitly mandated in

other sections of Ohio's sentencing code that prison terms for certain offenses must be served consecutively. See 2929.14; 2971.03. Contrary to the majority's conclusion, the conspicuous absence of any such requirement in R.C. 2929.13(F)(2) is indicative of the legislature's intent to leave the decision to impose consecutive prison terms to the discretion of the trial court when sentencing an offender to multiple, mandatory prison terms. See *State v. Franklin*, Greene App. No. 99-CA-117 (where "life imprisonment is the mandatory penalty \* \* \* the trial court had no choice of penalties to assign, other than making them consecutive or concurrent").

{196} *Foster* in fact emphasized "that trial courts have full discretion to impose a prison sentence within the statutory range," including the imposition of consecutive sentences. *Foster* at ¶100. Only after the trial court sentences an offender for each offense may the trial court exercise its discretion and determine whether concurrent or consecutive sentences are appropriate. *Saxon* at ¶9, citing *Foster* at paragraph seven of the syllabus; R.C. 2929.12(A); and, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph three of the syllabus. Because R.C. 2929.13(F)(2) contains no language indicating that the legislature intended otherwise, this premise is equally applicable when a trial court sentences an offender under this section. See *Franklin*; accord *State v. Sharp*, Allen App. No. 1-02-06, 2002-Ohio-2343, ¶26 ("R.C. 2929.13[F][3] mandates that [the defendant] serve a prison term in this case because the victim was under the age of thirteen, it does not require the imposition of consecutive sentences"). Consequently, I conclude that R.C. 2929.13(F)(2) does not require the imposition of consecutive prison terms; rather, the trial court retains discretion to impose consecutive prison terms when sentencing under this section.

{197} While other appellate courts have reached the same conclusion that I reach in the present case, see *Franklin* and *Sharp*, the majority simply disagrees with those holdings. I agree that this court is not bound by the decisions of these courts, but I find the reasoning in

those cases persuasive when coupled with the plain language of the statute. I also find it persuasive that no other Ohio court has reached the conclusion reached by the majority today.

{¶98} Finally, while correctly citing R.C. 2929.13(F) for the proposition that a mandatory sentence imposed under that section may not be "reduced," the majority fails to cite any authority for its contention that ordering concurrent sentences is the legal equivalent of reducing a sentence under this section. R.C. 2929.13(F) prohibits reducing a sentence for rape "pursuant to section 2929.20 [Judicial release], section 2967.193 [Days of credit may be earned], or any other provision of Chapter 2967 [Pardon; parole; probation] or Chapter 5120 [Department of Rehabilitation and Correction]." The statute makes no reference to the imposition of consecutive sentences under R.C. 2929.41 as a prohibited "reduction" in sentence as argued by the majority. Following the majority's "volume discount" reasoning to its logical end, concurrent sentences would never be appropriate where an offender is convicted of multiple offenses, as it would inevitably permit the offender to "essentially" serve one sentence for the multiple offenses. Although the majority might find consecutive sentences preferable in such instances, the legislature simply has not crafted Ohio's sentencing scheme to operate in this manner.

{¶99} Whether sentences are ordered to be served consecutively or concurrently has no bearing on whether or not a sentence is in fact imposed. See *Saxon*. Each sentence stands independently and, unless otherwise proscribed by statute, the decision to run the sentences consecutively or concurrently rests with the discretion of the trial court. *Id.* While consecutive sentences may often be appropriate, Ohio's sentencing law, with few exceptions, leaves this determination to the discretion of the sentencing court. Because the trial court explicitly stated that it was not exercising its discretion when it imposed consecutive sentences in this matter, I would sustain appellant's eighth assignment of error and remand

this matter for resentencing. This resolution of appellant's eighth assignment of error would render appellant's ninth assignment of error moot. I otherwise concur with the majority's resolution of the remaining assignments of error.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

Frederick

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

STATE OF OHIO,

FILED BUTLER CO.  
COURT OF APPEALS

CASE NO. CA2005-10-422

Appellee,

OCT 31 2006

ENTRY GRANTING MOTION TO  
CERTIFY CONFLICT

vs.

CINDY CARPENTER  
CLERK OF COURTS

KEVIN JOHNSON,

Appellant.

The above cause is before the court pursuant to a motion to certify conflict to the Supreme Court of Ohio filed by counsel for appellant, Kevin Johnson, on October 5, 2006 and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on October 9, 2006.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinions of the two courts of appeal are inconsistent; the judgments of the two courts must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73.

Appellant was convicted of four counts of rape of a child under the age of 13 in violation of R.C. 2907.02(A)(1)(b). Pursuant to R.C. 2929.13(F)(2), the trial court was required to impose a prison term for each count. The trial court imposed a life sentence for each count as required by R.C. 2907.02(B) because the victim was under the age of

10. Indicating that it had no discretion in the matter pursuant to R.C. 2929.13(F), the trial court ordered appellant to serve the four life sentences consecutively.

On appeal, appellant argued in his eighth assignment of error that the trial court erred by imposing consecutive sentences. Appellant asserted that the trial court had the discretion to impose the life sentences either concurrently or consecutively. This court overruled appellant's eighth assignment of error, holding that R.C. 2929.13(F) required the imposition of consecutive prison terms. Appellant contends that this court's decision conflicts with cases decided by the Second and Third District Courts of Appeal: *State v. Franklin* (Dec. 22, 2000), Greene App. No. 99-CA-117, and *State v. Sharp*, Allen App. No. 1-02-06, 2002-Ohio-2342.

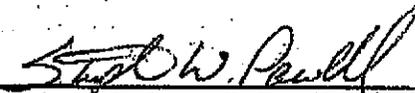
This court's holding is in conflict with the holding in *Sharp*. In both this case and *Sharp*, the appellant was convicted of multiple counts of one of the offenses listed in R.C. 2929.13(F). The trial court in both cases stated that consecutive sentences were required by law. The court in *Sharp*, in conflict with this court's holding, stated that consecutive sentences were not mandated by law, specifically referring to R.C. 2929.13(F)(3).

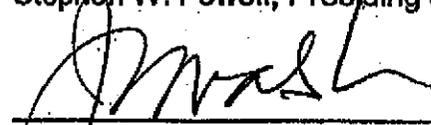
This court's holding is not in conflict with *Franklin* because the Second District's statement regarding whether the trial court had discretion to impose consecutive sentences was not part of the holding of the case. The trial court in *Franklin* imposed maximum sentences to be served concurrently. On appeal, the appellant contested the imposition of maximum sentences. The court of appeals rejected the appellant's argument, additionally noting, without mentioning R.C. 2929.13(F), that the trial court had the option of making the sentences concurrent or consecutive. The appellant had not raised the issue of whether the imposition of consecutive sentences was mandatory or

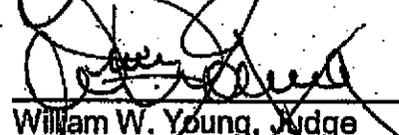
discretionary. Therefore, it does not appear that the court in *Franklin* pronounced a judgment upon the same question.

Accordingly, the motion to certify is GRANTED with respect to *Sharp*. The issue for certification is whether a trial court is required to impose consecutive sentences when a defendant is convicted of multiple counts of an offense listed in R.C. 2929.13(F).

IT IS SO ORDERED.

  
\_\_\_\_\_  
Stephen W. Powell, Presiding Judge

  
\_\_\_\_\_  
James E. Walsh, Judge

  
\_\_\_\_\_  
William W. Young, Judge

IN THE SUPREME COURT OF OHIO

06-2154

STATE OF OHIO

CASE NO.

Appellee,

On Appeal from the  
Court of Appeals  
Twelfth Appellate District  
Butler County, Ohio

-vs-

KEVIN JOHNSON

COURT OF APPEALS  
CASE NO.: CA 2005 10 0422

Appellant..

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NOTICE OF COURT OF APPEALS' DECISION TO SUSTAIN APPELLANT KEVIN  
JOHNSON'S MOTION TO CERTIFY A CONFLICT

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FILED

NOV 21 2006

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

**NOTICE**

Now comes Appellant, Kevin Johnson, through undersigned counsel, and hereby gives notice to this Court pursuant to S.Ct.Prac.R. IV, §4(B) that, on October 31, 2006, the Twelfth District Court of Appeals determined that a conflict exists between its decision in the instant case and *State v. Sharp*, Allen App. No. 1-02-06, 2002-Ohio-2343, and sustained Kevin Johnson's motion to certify a conflict.

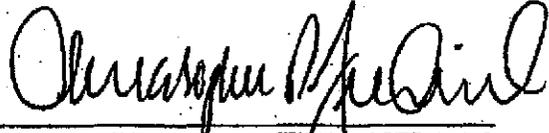
Respectfully submitted,



**CHRISTOPHER P. FREDERICK, ESQ.**  
**REG NO. 0076532**  
**COUNSEL FOR APPELLANT**  
**KEVIN JOHNSON**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Court of Appeals' Decision to Sustain Motion to Certify a Conflict was hand delivered to the Prosecuting Attorney for Butler County, Government Services Center, 315 High Street, 11<sup>th</sup> Floor, Hamilton, OH 45011 this 20 day of November, 2006.



**CHRISTOPHER P. FREDERICK, ESQ.**  
**REG NO. 0076532**  
**COUNSEL FOR APPELLANT**  
**KEVIN JOHNSON**

The Supreme Court of Ohio

FILED

JAN 24 2007

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

State of Ohio

Case No. 2006-2154

v.

ENTRY

Kevin Johnson

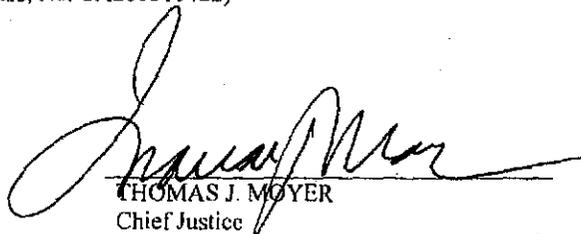
This cause is pending before the Court on the certification of a conflict by the Court of Appeals for Butler County. On review of the order certifying a conflict,

It is determined that a conflict exists and it is ordered by the Court that the parties are to brief the issue stated at page 3 of the court of appeals' entry file October 31, 2006, as follows:

"Whether a trial court is required to impose consecutive sentences when a defendant is convicted of multiple counts of an offense listed in R.C. 2929.13(F)."

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 Butler County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio

(Butler County Court of Appeals; No. CA200510422)

  
THOMAS J. MOYER  
Chief Justice