IN THE SUPREME COURT OF OHIO

STATE OF OHIO, **CASE NO. 2006-2154**

Appellant,

vs.

KEVIN JOHNSON,

Appellee.

On Appeal from the Court of Appeals of Butler County, Case No. CA2005-10-0422, 2006-Ohio-5195

MERIT BRIEF OF APPELLEE, STATE OF OHIO

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND FACTS 1

ARGUMENT

- **Proposition of Law No. 1:**

  A Trial Court must sentence a defendant convicted of multiple counts of rape to consecutive sentences pursuant to the unambiguously mandatory directive of R.C. 2929.13(F). 1- 11

CONCLUSION 12

CERTIFICATE OF SERVICE 12

APPENDIX: *Appx. Page*

R.C. 1.42 ..... A 1
R.C. 2901.04 ..... A 2
2000 Senate Bill 222, Final Bill Analysis ..... A 3-14

TABLE OF AUTHORITIES

Page

CASES:

Brennaman v. R.M.I. Co. (1994) 70 Ohio St.3d 460, 639 N.E.2d 425. 1
Dorrian v. Scioto Conservancy Dist. (1971) 27 Ohio St.2d 102, 271 N.E.2d 834. 6
Holloway v. U.S. (1999), 526 U.S. 1, 119 S.Ct. 966. 10
Key Services Corp. v. Zaino, Tax Commr. (2002), 95 Ohio St.3d 11, 2002-Ohio-1488, 764 N.E.2d 1015. 2
Roxane Laboratories, Inc. v. Tracy (1996), 75 Ohio St.3d 125, 661 N.E.2d 1011. ... 1
State v. Arnold (1991), 61 Ohio St.3d 175, 573 N.E.2d 1079. 10
State v. Buehler (2007), 113 Ohio St.3d 114, 2007-Ohio-1246. ..... 1, 2
State v. Cress (2006), 112 Ohio St.3d 72, 2006-Ohio-6501. 2
State v. Foster (2006), 109 Ohio St.3d 1, 2006-Ohio-856. ..... 9, 10
State v. Franklin, Greene App. No. 99-CA-117, 2000 WL 1867524. ..... 3, 4
State v. Johnson, Butler App. No. CA2005-10-422, 2006-Ohio-5195..... 3, 4, 5
State v. Patterson (1998), 81 Ohio St.3d 524, 1998-Ohio-611, 692 N.E.2d 593. 3
State v. Pelfrey (2007), 112 Ohio St.3d 422, 2007-Ohio-256. ..... 2, 3
State v. Saxon (2006), 109 Ohio St.3d 176, 2006-Ohio-1245. 9
State v. Sharp, Allen App. No. 1-02-06, 2002-Ohio-2343, 2002 WL 1001035. ..... 3, 4
Wachendorf v. Shaver (1948), 149 Ohio St. 231, 78 N.E.2d 370, 36 O.O. 554. ..... 6, 11

STATUTES:

Chapter 2967..... Passim
Chapter 5120 ..... Passim
R.C. 1.42 2
R.C. 2901.04(A) 10
R.C. 2929.11 7
R.C. 2929.13(F) 1, 3, 4, 5, 6, 7, 8, 9, 10, 11
R.C. 2929.14(A) ..... Passim
R.C. 2929.193 ..... Passim
R.C. 2929.20 ..... Passim
R.C. 2929.41 .....5, 10, 11

MISCELLANEOUS:

2000 Senate Bill 222, Final Bill Analysis..... 8, 9

STATEMENT OF THE CASE

Pursuant to Rule VI, Section 3(A), of the Rules of Practice of the Supreme Court of Ohio, the Appellee, the State of Ohio, will agree with the statement of facts presented by the Appellant.

ARGUMENT

Proposition of Law No. 1:

A trial court must sentence a defendant convicted of multiple counts of rape to consecutive sentences pursuant to the unambiguously mandatory directive of R.C. 2929.13(F).

The issue before this Honorable Court is the statutory interpretation of R.C. §2929.13(F), and whether the statute mandates consecutive sentences. The State believes that a plain reading of R.C. §2929.13(F) dictates that trial courts must sentence a defendant convicted of multiple offenses pursuant to R.C. §2929.13(F)(1)-(14) to consecutive prison terms. This belief is based on the Ohio General Assembly's decision to use unambiguous mandatory language in R.C. §2929.13(F), commanding trial courts to impose consecutive sentences for multiple convictions.

The construction of a statute is a question of law. *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 639 N.E.2d 425. The principles of statutory construction require courts to first look at the specific language contained in the statute, then if the language is ambiguous to apply the clear meaning of the words used. *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 661 N.E.2d 1011.

In addition to looking at the specific statutory language, courts must also consider the legislative intent in enacting the statute. As this Honorable Court has recently stated "[i]n cases of statutory construction, 'our paramount concern is the legislative intent in

enacting the statute.'" *State v. Buehler* (2007), 113 Ohio St.3d 114, 2007-Ohio-1246, at ¶ 29, quoting *State ex rel. Steele v. Morrissey* (2004), 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶21. To determine legislative intent, a court should "review the statutory language, reading words and phrases in context and construing them according to the rules of grammar and common usage." *Id.* "[I]t is the duty of the court to give effect to the words used in a statute, not to insert words not used." *State v. Cress* (2006), 112 Ohio St.3d 72, 2006-Ohio-6501, at ¶38, quoting *State v. S.R.* (1992), 63 Ohio St.3d 590, 595, 589 N.E.2d 1319. Further, R.C. §1.42 directs: "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

Synthesizing the aforementioned rules together, this Court has determined that "[i]f we are able to glean the meaning of the statute from the language used, and the words are free from ambiguity and doubt, then we have no need to resort to interpretation." *Key Services Corp. V. Zaino, Tax Commr.* (2002), 95 Ohio St.3d 11, 14, 2002-Ohio-1488, 764 N.E.2d 1015, citing *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, paragraph two of the syllabus. "[T]he province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used." *Id.*

Furthermore, as stated more recently by this Court, "[w]hen the General Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning." *State v. Pelfrey* (2007), 112 Ohio St.3d 422, 2007-Ohio-256, at ¶ 12. "Thus, if the statute is unambiguous and definite, there is no need for further

interpretation. To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts." *Id.*, at ¶ 11, (internal citation omitted). In attempting not to legislate, courts should also be mindful that all statutes that relate to the same general subject matter must be read in pari materia – that is, all aspects of a statutory scheme must be interpreted harmoniously and given complete application. *State v. Patterson* (1998), 81 Ohio St.3d 524, 525, 1998-Ohio-611, 692 N.E.2d 593.

Pursuant to the aforementioned, in interpreting a statute, courts must look at the specific language of the statute, apply the clear meaning of the words used, consider the legislative intent in enacting the statute, and construe words and phrases in context and accord them the rules of grammar and common usage. Finally, courts should also be mindful of all statutes that relate to the same general subject and read them in pari materia.

In the case at bar, the Twelfth District properly addressed and applied the well established canons of statutory construction when it held that R.C. §2929.13(F)(2) mandates consecutive prison terms for multiple rape convictions. *State v. Johnson*, Butler App. No. CA2005-10-422, 2006-Ohio-5195. However, the cases cited by Appellant were not only decided after this Honorable Court's decision in *Foster*, but they also did not apply any of the statutory interpretation rules as promulgated by this Court. See, *State v. Franklin*, Greene App. No. 99-CA-117, 2000 WL 1867524, and *State v. Sharp*, Allen App. No. 1-02-06, 2002-Ohio-2343, 2002 WL 1001035. As such, this Court should affirm the Twelfth District's holding.

In *Franklin*, the appellant was sentenced on May 12, 1999, and the issue before the court of appeals was whether the trial court erred in ordering that he serve a maximum

sentence. *Franklin*, 2000 WL 1867524 * 1 & 4. The Second District Court of Appeals did not mention R.C. §2929.13(F) anywhere in its opinion, and it did not address any issues relating to consecutive sentences.

Similarly, in *Sharp*, the Third District Court of Appeals considered R.C. §2929.13(F), but only in a superficial way. *Sharp*, 2002 WL 1001035, at * 3. Specifically, the court stated: "[t]he appellant complains that the trial court erroneously stated during the sentencing hearing: '[b]ut first of all consecutive terms are mandated and specified by law. They're separate offenses.' The appellant correctly points out that, while R.C. 2929.13(F)(3) mandates that he 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." *Id.* The Third District failed to indicate what statutory language it considered before it held that consecutive sentences are not mandated, nor did it consider the legislative intent or the purposes of sentencing.

In a stark contrast, the Twelfth District Court of Appeals extensively analyzed the statutory language of R.C. §2929.13(F), the well established statutory construction laws, and the legislative intent. The Twelfth District stated: "[t]he paramount consideration in determining the meaning of a statute is legislative intent. In determining legislative intent, we review the statutory language, according the words used their usual, normal, or customary meaning. With respect to legislative intent, '[i]f the statutes language reasonable permits an interpretation consistent with that intent, we should adopt it.'" *Johnson*, 2006-Ohio-5195, at ¶ 67 (internal citation omitted).

Thereafter, the Twelfth District held: "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. *** It is apparent that the statute does not favor reductions in mandatory sentences imposed, which is what an order of concurrent sentences essentially is." *Id.*, at ¶¶ 68-69.

The Twelfth District also considered the other sections in the sentencing statutes and read them in pari materia with R.C. §2929.13(F). *Id.*, at ¶ 71. Furthermore, the Twelfth District applied this Court's previous holding that specific provisions prevail over general provisions before it concluded: "[w]e are aware of the general rule set forth in R.C. 2929.41(A) that sentences of imprisonment shall be served concurrently. 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." *Id.* (Internal citation omitted).

Therefore, the Twelfth District's decision, in which all statutory construction principles were addressed and applied, was proper and should be affirmed by this Court. The holding that R.C. §2929.13(F) mandates consecutive sentences for multiple

convictions is supported by the unambiguously mandatory directive language of R.C. §2929.13(F).

Specifically, R.C. §2929.13(F) states in pertinent part: "[n]otwhithstanding divisions (A) to (E), the court shall impose a prison term or terms *** for any of the following offenses: *** (2) [a]ny rape, regardless of whether force was involved and regardless of the age of the victim." R.C. §2929.13(F)(2) (Emphasis added). The word "shall" is a mandatory one. See, *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834. It has consistently been interpreted that the word "shall" makes "the provision in which it is contained mandatory unless there is clear and unequivocal intent that it receive a construction other than its ordinary meaning." *Id.*, paragraph one of the syllabus.

The phrase "[t]he court shall impose a prison term or terms" is clear and plain in that it mandates a trial court to impose a prison term upon a defendant convicted of any of the offenses listed in R.C. §2929.13(F)(1)-(14). Contrary to Appellant's disregard for this Court's directive that "[s]ignificance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act," *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 78 N.E.2d 370, 36 O.O. 554, paragraph 5 of the syllabus (Emphasis added), the words "prison term or terms," are a clear directive from the Ohio General Assembly that multiple convictions mandate multiple consecutive prison terms. It is exactly this point that negates the Appellant's argument. For under the Appellant's theory of how to read R.C. §2929.13(F) there is no meaning given to the words "or terms." This is a clear violation of the canons of statutory construction. Therefore, in order to comply with the legislative intent, which is clearly and plainly determined from the words of the statute, the only conclusion is that consecutive sentences are mandated for multiple convictions. As such, a

trial court must impose consecutive prison terms for a defendant with multiple convictions under R.C. §2929.13(F).

The conclusion that mandatory consecutive sentences are required for multiple convictions pursuant to R.C. §2929.13(F)(1)-(14) is also illustrated by the overarching purposes of sentencing. "[T]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender." R.C. §2929.11(A). The Ohio General Assembly has determined that the best way to protect the public and punish the offender is to mandate that certain offenses receive a mandatory prison term and that the sentences received cannot be reduced. R.C. §2929.13(F)(1)-(14).

The Ohio General Assembly's clear directive that a defendant convicted of any of the offenses in R.C. §2929.13(F)(1)-(14) shall not receive a reduced sentence is clearly stated in the statute, which provides: "[N]otwithstanding 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, or section 2971.03 of the Revised Code and except as specifically provided in section 2929.20 or 2967.191 of the Revised Code or when parole is authorized for the offense under section 2967.13 of the Revised Code <u>shall not reduce the terms</u> pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for any of the following offenses: ***." R.C. 2929.13(F) (Emphasis added). Therefore, the Ohio General Assembly mandated that the sentences for these dangerous offenders to be served consecutively, and that none of these offenders be eligible for a reduction pursuant to R.C. §§2929.20, 2929.193, and any provisions in chapter 2967. or chapter 5120.

The Ohio General Assembly's intent to sentence any offenders of R.C. §2929.13(F) to consecutive mandatory prison terms is also illustrated by the enactment in 2000, of the body armor offense. See, R.C.§2929.13(F)(9). R.C. §2929.13(F)(9) mandates a prison term for "[a]ny offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (D)(1)(d) of section 2929.14 of the Revised Code for wearing or carrying the body armor."

There is no question that the Ohio General Assembly's intent was to require trial courts to impose mandatory sentences for multiple convictions under R.C. §2929.13(F)(1) to (14), especially when looking at the final bill analysis of the body armor offense written by the Ohio Legislative Service Commission. See, 2000 Senate Bill 222. The Ohio Legislative Service Commission in their final bill analysis wrote: "[i]f a court imposes a mandatory armor specification prison term under this section provision of the act, <u>the offender must serve the mandatory prison term so imposed **consecutively** to any other body armor specification prison term</u> or any firearms specification mandatory prison term imposed under continuing law, **consecutively** to and prior to any prison term imposed for the underlying felony, and **consecutively** to any other prison term or mandatory prison term previously, <u>simultaneously</u>, or subsequently imposed upon the offender." 2000 Senate Bill 222, final bill analysis, operation of the act (Emphasis added).

As such, the final bill analysis specifically states that the mandatory prison term for a conviction of a felony violence offense with body armor must be served consecutive to any other body armor specification, and additionally, to any simultaneous offenses. (Id.) Therefore, if a defendant is convicted with multiple felony offenses of violence with the use

of body armor, the mandatory prison terms for the multiple convictions must be served consecutively. As such, what is clear from the enactment of the body armor provision and the final bill analysis by the Ohio Legislative Service Commission, which emphasized the word consecutive, is that consecutive sentences are mandatory for multiple offenses under R.C. §2929.13(F). Similarly then, any mandatory prison terms for multiple convictions of rape must also be served consecutively to each other. R.C. §2929.13(F)(2).

Moreover, the Ohio General Assembly's intent to mandate consecutive prison terms for multiple convictions pursuant to R.C. §2929.13(F) is attested to by this Court's decision in *State v. Saxon*, where this Court stated: "[t]here is no doubt that the legislature did not intend to punish a defendant guilty of multiple number of crimes in the same manner as one who committed only one." *Saxon* (2006), 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶ 29. Additionally, this Court in *State v. Foster*, stated: "[e]xcept for certain enumerated statutes imposing nondiscretionary consecutive terms," the judicial fact finding before imposing consecutive sentences pursuant to R.C. §2929.14(E) "[v]iolates principles announced in *Blakely*." *Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, at ¶¶ 66-67 (Emphasis added).

Therefore, this Court's decision in *Foster* supports the conclusion that R.C. §2929.13(F) is nondiscretionary, thus, it requires mandatory consecutive prison terms for multiple convictions without any additional judicial fact findings. This Court's decision in *Foster* held that nondiscretionary consecutive terms, where no additional judicial fact findings are required, do not violate the principles in *Blakely*. *Id.* Thus, when this Court looked at R.C. §2929.13, and did not conclude that R.C. §2929.13(F) required judicial fact finding, then it is clear that this Court believed R.C. §2929.13(F) required

nondiscretionary mandatory consecutive prison terms for a defendant convicted of multiple offenses.

Furthermore, contrary to Appellant's assertion, the rule of lenity does not apply in this case since R.C. §2929.13(F) is not ambiguous, and is not in conflict with any other statutory provisions. R.C. §2901.04(A) states in pertinent part: "[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." However, as the United States Supreme Court stated: "[w]e have repeatedly stated that the rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Holloway v. U.S.* (1999), 526 U.S. 1, 12, 119 S.Ct. 966. Moreover, this Court has held: "[w]hile we are required to strictly construe statutes defining criminal penalties against the state, this 'rule of lenity' applies only where there is ambiguity in or conflict between the statutes." *State v. Arnold* (1991), 61 Ohio St.3d 175, 178, 573 N.E.2d 1079, internal citation omitted.

Appellant, without merit, argues that the rule of lenity should apply since R.C. §2929.13(F) is in conflict with R.C. §2929.41. (Amicus Brief, pages 1-2) This Honorable Court has recently severed the presumption of concurrent sentences in R.C. §2929.41(A) since it violated the United States Supreme Court's decisions in *Apprendi v. New* Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, Washington *v. Blakely* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, and *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621. *Foster*, 2006-Ohio-856, at ¶¶ 66, 99, paragraph three of the syllabus. Therefore, since this Court has severed R.C. §2929.41(A), that provision is void, and thus, cannot be in conflict with R.C. §2929.13(F).

Additionally, R.C. §2929.41(B) is also not in conflict with R.C. §2929.13(F). R.C. §2929.41(B)(1)-(3) gives the trial court discretion to impose consecutive prison sentences when a defendant is convicted of specific misdemeanor offenses along with other offenses, and a consecutive sentence when the defendant has other convictions in any other State. R.C. §2929.41(B) does not address any of the offenses mentioned in R.C. §2929.13(F). Therefore, there cannot be a conflict when each statute addresses different offenses.

This Honorable Court should affirm the Twelfth District Court of Appeal's holding that R.C. §2929.13(F)(2) mandates consecutive prison terms for multiple rape convictions. The language stated in R.C. §2929.13(F)(2) that "a court shall impose a prison term or terms" is plain and clear directing trial courts to impose mandatory prison terms for multiple convictions of "any rape." Such a conclusion is consistent with the requirement to give significance to every word in an act. See, *Shaver*, 149 Ohio St.3d 231. The words "or terms" are not only a clear directive from the Ohio General Assembly that multiple convictions mandate multiple prison terms, it is also exactly this point that negates the Appellant's argument, and supports the Twelfth District's holding. As such, this Court should affirm, and hold that R.C. §2929.13(F) mandates consecutive prison terms for multiple convictions pursuant to R.C. §2929.13(F)(1)-(14).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Twelfth District Court of Appeals.

Respectfully submitted,

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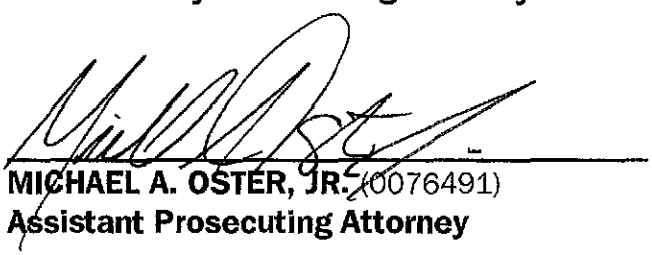

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This is to certify that a copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent to:

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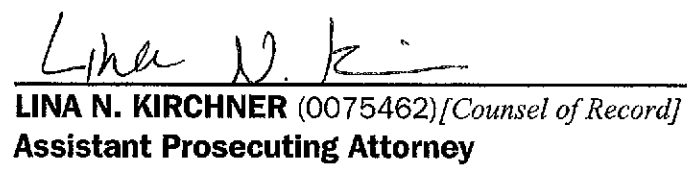

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§ 1.42

Statutes & Session Law

GENERAL PROVISIONS

CHAPTER 1: DEFINITIONS; RULES OF CONSTRUCTION

1.42 Common, technical or particular terms.

1.42 Common, technical or particular terms.

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

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APPENDIX
PAGE 1

§ 2901.04

Statutes & Session Law

TITLE [29] XXIX CRIMES -- PROCEDURE

CHAPTER 2901: GENERAL PROVISIONS

2901.04 Rules of construction for statutes and rules of procedure.

2901.04 Rules of construction for statutes and rules of procedure.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004

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APPENDIX
PAGE 2

Lisa Sandberg *Legislative Service Commission*

Am. Sub. S.B. 222

123rd General Assembly
(As Passed by the General Assembly)

Sens. **Watts, Johnson, Drake, Herington**

Reps. **Goodman, Taylor, Hughes, Willamowski, Womer Benjamin, Kilbane, Sulzer, Olman, Corbin, Roman, Flannery, Salerno, Grendell, Ogg, Amstutz, Krupinski, O'Brien, Austria, Metzger, Collier, Damschroder, Widener, Young, Mottley, Britton, Barrett**

Effective date: *

ACT SUMMARY

- Requires a court to impose a mandatory prison term of two years upon a person convicted of any felony offense of violence when the offender also is convicted of a body armor specification that charges the offender with wearing or carrying body armor while committing the felony offense of violence.

- Provides that a juvenile court may commit a child to the Department of Youth Services for an additional two-year period of commitment, if the child is adjudicated a delinquent child for committing an act that would be a felony offense of violence if committed by an adult, the court commits the child to Department's custody, and the court also determines that the child, if the child was an adult, would be guilty of a body armor specification.

- Expands the application of existing provisions related to providing background information about certain delinquent children when the delinquent children are placed in foster care so that they also apply to any delinquent child whose delinquent act would be a felony offense of violence if committed by an adult and whom the court determines is guilty of a body armor specification.

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* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.*

- Defines "body armor," for use throughout its provisions, as any vest, helmet, shield, or similar item that is designed or specifically carried to diminish the impact of a bullet or projectile upon the offender's body.

TABLE OF CONTENTS

Introduction 2
Body armor specification 2
Definition of body armor 3
Mandatory prison term for convicted felons 3
  Continuing law 3
  Operation of the act 4
Department of Youth Services institutionalization for delinquent children 4
  Existing law 4
  Operation of the act 6
Restrictions on foster home placement of certain delinquent children 7
  Continuing law 7
  Operation of the act 9

CONTENT AND OPERATION

Introduction

The act extends specified provisions of existing law that pertain to the treatment of criminal offenders or delinquent children so that they also apply to an offender or delinquent child who, while wearing or carrying "body armor" (see "***Definition of body armor***," below) commits a felony or an act that would be a felony if committed by an adult.

Body armor specification

The act enacts a new "specification" that relates to an offender's wearing or carrying of *body armor* (see "***Definition of body armor***," below) while committing an "offense of violence" (see **COMMENT** 1) that is a felony. The act provides that imposition of a two-year mandatory prison term under the act as described below in "***Mandatory prison term for convicted felons***" is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender wore or carried body armor while committing the offense and that the offense is an offense of violence that is a felony. The specification must be stated at the end of the body of the indictment, count, or information and must be stated in a specified form indicated in the act. (R.C. 2941.1411.)

Definition of body armor

The act defines "body armor," for use throughout its provisions, as any vest, helmet, shield, or similar item that is designed or specifically carried to diminish the impact of a bullet or projectile upon the offender's body (R.C. 2151.62(I), 2929.01(RR), and 2941.1411(B)).

Mandatory prison term for convicted felons

Continuing law

Under the continuing Felony Sentencing Law, a court that is sentencing a person convicted of a criminal offense that is a felony, other than one for which a term of life imprisonment is required, generally has the discretion to impose upon the offender a prison term or one or more community control sanctions, consisting of community residential sanctions, nonresidential sanctions, and financial sanctions. The discretion is "guided" by specified principles and purposes of sentencing with which the court must comply, specified factors that the court must consider, and specified procedures and presumptions with which the court must comply. (R.C. 2919.11 to 2919.19.)

For certain offenses, though, a court sentencing a person convicted of a felony must impose a prison term on the offender and cannot reduce the term pursuant to a judicial release, earned credits, or any other provision of R.C. Chapter 2967. or 5120. This prison term is referred to as a "mandatory prison term." Generally, a mandatory prison term is imposed from the range of terms authorized for the particular degree of offense under R.C. 2929.14 and in accordance with criteria set forth in that section. (R.C. 2929.13(F) and 2929.14.) The offenses for which a mandatory prison term is required under existing law are identified in **COMMENT** 2.

Continuing law permits a court that sentenced a convicted felon to a prison term to reduce the prison term, upon the motion of the offender and if the offender is an "eligible offender," through a *judicial release*. A convicted felon sentenced to a mandatory prison term is an "eligible offender" if the felon's stated prison term that includes the mandatory prison term does not exceed ten years and if the felon has served the mandatory prison term. An eligible offender may file a motion for judicial release within a specified period of time, after the offender has served a specified portion of the sentence imposed. Continuing law sets forth procedures that govern the granting of judicial releases and imposes restrictions on the judicial release of an eligible offender who is imprisoned for a felony of the first or second degree, or who committed an offense contained in the Drug Offenses Laws or the Controlled Substances Laws and for whom there was a

presumption under R.C. 2929.13 in favor of a prison term. (R.C. 2929.20--not in the act.)

Operation of the act

The act requires a court to impose a mandatory prison term of two years on a person convicted of any "offense of violence" (see **COMMENT** 1) that is a felony when the offender wore or carried *body armor* while committing the felony offense of violence. If a court imposes a mandatory body armor specification prison term under this provision of the act, the mandatory term cannot be reduced by judicial release, earned credits, or any other provision of R.C. Chapter 2967. or 5120. A court may not impose more than one body armor specification prison term under this provision of the act for felonies committed as part of the same act or transaction. If a court imposes a mandatory firearms specification prison term under continuing law (see **COMMENT** 3 for a discussion of the law governing firearms specification mandatory prison terms), the court is not precluded from imposing a body armor specification prison term under this provision of the act.

If a court imposes a mandatory body armor specification prison term under this provision of the act, the offender must serve the mandatory prison term so imposed consecutively to any other body armor specification prison term or any firearms specification mandatory prison term imposed under continuing law, consecutively to and prior to any prison term imposed for the underlying felony, and consecutively to any other prison term or mandatory prison term previously, simultaneously, or subsequently imposed upon the offender. Regarding the consecutive terms, the term to be served is the aggregate of all the terms imposed consecutively. (R.C. 2929.13(F)(9) and 2929.14(D)(1)(d), (E)(1)(b) and (E)(5).)

The continuing provisions governing judicial releases, described above in "***Continuing law***" and unchanged by the act, apply regarding an offender sentenced to a body armor specification prison term imposed under this provision of the act (R.C. 2929.20--not in the act).

Department of Youth Services institutionalization for delinquent children

Continuing law

Under the continuing Juvenile Code, if a child is adjudicated a delinquent child, the juvenile court may make any of a list of authorized orders of disposition. Some of the authorized orders of disposition permit the court to commit the delinquent child to the Department of Youth Services (DYS) for a specified period of time, depending upon the circumstances present--these DYS orders are described below. The rest of the authorized orders permit the court to impose

other sanctions that do not involve a commitment to DYS. The authorized orders of commitment to DYS provide as follows (R.C. 2151.355(A)(4) to (7)):

(1) If the child's delinquent act would be a felony of the third, fourth, or fifth degree if committed by an adult or if it is underage purchase of a firearm, the court may commit the child to DYS's legal custody for institutionalization for an indefinite term consisting of a minimum period of six months and a maximum period not to exceed the child's attainment of 21.

(2) If the child's delinquent act if committed by an adult would be voluntary manslaughter, kidnapping, aggravated arson, aggravated robbery, involuntary manslaughter based on the commission of a felony, or rape other than when the sexual conduct or insertion involved was consensual and when the victim of the violation was older than, the same age as, or less than three years younger than the delinquent child, the court may commit the child to DYS's legal custody for institutionalization in a secure facility for an indefinite term consisting of a minimum period of one to three years, as prescribed by the court, and a maximum period not to exceed the child's attainment of 21.

(3) If the child's delinquent act is an attempt to commit an act that if committed by an adult would be aggravated murder or murder, the court may commit the child to DYS's legal custody for institutionalization in a secure facility for an indefinite term consisting of a minimum period of six to seven years, as prescribed by the court, and a maximum period not to exceed the child's attainment of 21.

(4) If the child's delinquent act is not described in paragraph (2) or (3), above, and would be a felony of the first or second degree if committed by an adult, the court may commit the child to DYS's legal custody for institutionalization in a secure facility for an indefinite term consisting of a minimum period of one year and a maximum period not to exceed the child's attainment of 21.

(5) If the child's delinquent act if committed by an adult would be aggravated murder or murder, the court may commit the child to DYS's legal custody for institutionalization in a secure facility until the child's attainment of 21.

(6) If the child's delinquent act would be a felony if committed by an adult, other than carrying a concealed weapon, if the child is committed to DYS's legal custody as described above in paragraphs (1) to (5), and if the juvenile court determines that the child, if the child was an adult, would be guilty of a firearms mandatory prison term specification (see **COMMENT** 3) in relation to the act for which the child was adjudicated a delinquent child, the court may commit the

child to DYS's legal custody for institutionalization in a secure facility for the following period of time: (a) if the child would be guilty of a firearms specification of the type set forth in R.C. 2941.141, a period of one year, or (b) if the child would be guilty of a firearms specification of the type set forth in R.C. 2941.144, 2941.145, or 2941.146, a period of three years. The court cannot commit a child to DYS's legal custody under this provision for a period of time that exceeds three years; the period of commitment imposed under this provision is in addition to, and must be served consecutively with and prior to, a period of commitment ordered pursuant to the provisions described above in (1) to (5), provided that the total of all the periods of commitment cannot exceed the child's attainment of 21.

(7) If the child's delinquent act is a category one offense or a category two offense, if the child is committed to DYS's legal custody pursuant to the provisions described above in (2) to (5), and if the court determines that the child, if the child was an adult, would be guilty of a gang-related offense specification in relation to the act for which the child was adjudicated a delinquent child, the court must commit the child to DYS's legal custody for institutionalization in a secure facility for a period of not less than one year or more than three years, subject to certain limitations. The court cannot commit a child to DYS's legal custody under this provision for a period of time that exceeds three years; the period of commitment imposed under this provision is in addition to, and must be served consecutively with and prior to, a period of commitment ordered pursuant to the provisions described above in (2) to (5), provided that the total of all the periods of commitment cannot exceed the child's attainment of 21.

If, pursuant to the above-described provisions, the court orders the commitment of a child for two or more delinquent acts to DYS's custody, the court may order that all of the periods of commitment imposed under those provisions for those acts be served consecutively in DYS's legal custody and, if applicable, be in addition to and commence immediately following the expiration of a period of commitment that the court imposes under the provision described above in (6) or (7). A court cannot commit a child to DYS's custody under this provision for a period that exceeds the child's attainment of 21 years of age. (R.C. 2151.355(B)(2).)

Operation of the act

The act expands the continuing provisions that authorize a juvenile court to impose additional "firearm" orders of disposition to DYS on a delinquent child that it has committed to DYS's custody so that the provisions also permit the court to impose an additional order of disposition to DYS regarding a delinquent child whose delinquent act would be an offense of violence that is a felony if committed by an adult and who wore or carried *body armor* while committing the act. Under

the act, if a child who is adjudicated a delinquent child for committing an act that would be an offense of violence that is a felony if committed by an adult, if the court commits the child to DYS's custody, and if the court also determines that the child, if the child was an adult, would be guilty of the *body armor specification* enacted in the act, the court may commit the child to DYS's legal custody for institutionalization in a secure facility for a period of two years.

The court cannot commit a child to DYS's legal custody under the act's body armor specification disposition provisions described above for a period of time that exceeds three years. The period of commitment imposed is in addition to, and must be served consecutively with and prior to, a period of commitment ordered pursuant to the provisions described above in (1) to (5) of "***Continuing law***," provided that the total of all the periods of commitment cannot exceed the child's attainment of 21 years of age. (R.C. 2151.355(A)(7)(c) and (d).)

The act specifies that a court that commits a delinquent child to DYS under a firearms specification disposition is not precluded from committing the child to DYS under a different type of firearms specification disposition or under a body armor specification disposition enacted in the act, and that a court that commits a child to DYS under a body armor specification disposition enacted in the act is not precluded from committing the child to DYS under a firearms specification disposition (R.C. 2151.355(A)(7)(d)).

As under continuing law, if, pursuant to the above-described provisions of the act and the provisions of continuing law, the court orders the commitment of a child for two or more delinquent acts to DYS's custody, the court may order that all of the periods of commitment imposed under those provisions for those acts be served consecutively in DYS's legal custody and, if applicable, be in addition to and commence immediately following the expiration of a period of commitment that the court imposes under the provision described above in (6) or (7) of "***Continuing law***" or under the act's provisions described above. A court cannot commit a child to DYS's custody under this provision for a period that exceeds the child's attainment of 21 years of age. (R.C. 2151.355(B)(2).)

Restrictions on foster home placement of certain delinquent children

Continuing law

Under continuing law, a public children services agency, private child placing agency, private noncustodial agency, or court, DYS, or another private or government entity cannot place a child who is or previously has been adjudicated a delinquent child for certain specified acts (see below) in a certified foster home until it provides the foster caregivers with all of the following: (1) a written report describing the child's social history, (2) a written report describing all the acts

committed by the child the entity knows of that resulted in the child being adjudicated a delinquent child and the disposition made by the court, unless the records pertaining to the acts have been sealed pursuant to law, (3) a written report describing any other violent act committed by the child of which the entity is aware, (4) the substantial and material conclusions and recommendations of any psychiatric or psychological examination conducted on the child or, if no such examination of the child is available, the substantial and material conclusions and recommendations of an examination to detect mental and emotional disorders conducted in compliance with the requirements of R.C. Chapter 4757. by an independent social worker, social worker, professional clinical counselor, or professional counselor licensed under that chapter.

Notwithstanding the continuing record sealing law, if records of an adjudication that a child is a delinquent child have been sealed pursuant to that law and an entity knows the records have been sealed, the entity must provide the foster caregivers a written statement that the records of a prior adjudication have been sealed. Continuing law also imposes requirements relative to the conduct of psychological examinations of a child placed in a certified foster home, reports of the examinations, and the cost of the examinations and reports.

Continuing law also provides that, when a juvenile court grants temporary or permanent custody of a child who is or previously has been adjudicated a delinquent child for certain specified acts (see below), to a public children services agency or private child placing agency, the court must provide the agency the information described in the second preceding paragraph and pay the expenses of preparing that information and of conducting any necessary examination. Further, if DYS, a juvenile court with temporary or permanent custody of the child, or a public children services agency or private child placing agency with temporary or permanent custody of the child is placing such a child in a certified foster home with the assistance of or by contracting with a public children services agency, private child placing agency, or a private noncustodial agency, the entity must provide the agency with that information and pay the expenses of preparing that information and of conducting any necessary examination. Finally, if such a child is placed in a certified foster home as a result of an emergency removal of the child from home pursuant to R.C. 2151.31(D), an emergency change in the child's case plan pursuant to R.C. 2151.412(E)(3), or an emergency placement by DYS, the entity that places the child in the certified foster home must provide that information no later than 96 hours after the child is placed in the certified foster home.

Continuing law prohibits a person employed by an entity subject to the above-described provisions and made responsible by that entity for the child's placement in a certified foster home from failing to provide the foster caregivers

with the specified information. A violation of this prohibition is a minor misdemeanor.

The provisions described above apply only to a child who is or previously has been adjudicated a delinquent child for an act to which any of the following applies: (1) it would be aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, felonious assault, aggravated assault, assault, rape, sexual battery, or gross sexual imposition if committed by an adult, (2) it is a violation of R.C. 2923.01 and involved an attempt to commit aggravated murder or murder, or (3) it would be a felony if committed by an adult, and the court determined that the child, if an adult, would be guilty of a firearms mandatory prison term specification that relates to the possession or use of a firearm during the commission of the act for which the child was adjudicated a delinquent child. (R.C. 2161.62 and 2151.99(C).)

Operation of the act

The act expands the application of the foster care-related provisions described in "***Continuing law***" so that they also will apply in relation to any child who is or previously has been adjudicated a delinquent child for an act that would be an offense of violence that would be a felony if committed by an adult and the court determined that the child, if an adult, would be guilty of the *body armor specification* enacted in the act or a specification under another Revised Code provision that related to the wearing or carrying of *body armor* during the commission of the delinquent act (R.C. 2151.62(A)(4)).

COMMENT

1. As used in the Revised Code, "offense of violence" means any of the following (R.C. 2901.01):

(a) The offense of aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, felonious assault, aggravated assault, assault, permitting child abuse, aggravated menacing, menacing by stalking, menacing, kidnapping, abduction, extortion, rape, sexual battery, gross sexual imposition, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, inciting to violence, aggravated riot, riot, inducing panic, domestic violence, intimidation, intimidation of an attorney, victim, or witness in a criminal case, escape, or improperly discharging a firearm at or into a habitation of school safety zone; the offense of burglary when it involves an occupied structure; the offense of endangering children when it involves abuse, torture, cruel abuse, excessive corporal punishment, physical disciplinary measures, or physical restraint that creates a substantial risk of serious physical harm to the victim, or the repeated

administration of unwarranted disciplinary measures to the victim that involves a substantial risk of serious impairment or retardation of the victim's mental health or development; or the former offense of felonious sexual penetration as it existed prior to September 3, 1996;

(b) A violation of an existing or former municipal ordinance or law of Ohio or any other state or the United States, substantially equivalent to any offense identified in **COMMENT** 1(a), above;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of Ohio or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense identified in **COMMENT** 1(a), (b), or (c), above.

All of the offenses that are within the portion of the definition set forth in **COMMENT** 1(a), above, are felonies, except that aggravated menacing, menacing, and riot always are misdemeanors, and except that assault, menacing by stalking, arson, inciting to violence, inducing panic, domestic violence, intimidation of an attorney, victim, or witness in a criminal case, escape, and endangering children are misdemeanors in certain specified circumstances and are felonies in other specified circumstances. It is not possible to determine whether the offenses that are within the portion of the definition set forth in **COMMENT** 1(b), (c), or (d), above, are felonies or misdemeanors.

2. The specific felony offenses for which continuing law requires a sentencing court to impose a mandatory prison term are (R.C. 2929.13(F)): (a) aggravated murder when death is not imposed or murder, (b) any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape by force when the victim is under 13, (c) gross sexual imposition or sexual battery, if the victim is under 13, if the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and if the victim of the previous offense was under 13, (d) involuntary manslaughter, aggravated vehicular homicide, vehicular homicide, aggravated vehicular assault, vehicular assault, felonious assault aggravated assault, or assault, when the offense is a felony and the section containing it requires the imposition of a prison term, (e) a first, second, or third degree felony drug offense, for which the applicable Revised Code section requires the imposition of a mandatory prison term, (f) any first or second degree felony that is not described above in clause (a) to (d), if the offender previously was convicted of aggravated murder, murder, any first or second degree felony, or any offense under an existing or former law of Ohio, another

state, or the United States that is or was substantially equivalent to one of those offenses, (g) any third degree felony identified in the definition of "repeat violent offender" if the offender previously was convicted of or pleaded guilty to specified offenses, (h) any offense, other than carrying a concealed weapon, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to a firearms specification for having the firearm (the required term is either one, three, five, or six years, depending upon the circumstances present; see **COMMENT** 3), (i) corrupt activity when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree, (j) any sexually violent offense for which the offender also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging the sexually violent offense, and (k) the offense of illegal conveyance of weapons onto the grounds of a detention facility or a mental health or mental retardation and developmental disabilities facility or of illegal conveyance of drugs of abuse onto the grounds of a detention facility or a mental health or mental retardation and developmental disabilities facility, if the offender is a Department of Rehabilitation and Correction officer or employee.

Continuing law also requires a court sentencing a person for the offense of state OMVI when it is a felony to impose on the offender, depending upon the circumstances present, either a mandatory prison term or a mandatory term of local incarceration (R.C. 2929.13(G), 2929.14(D)(4), and 4511.99(A)(4) and (8)). Also, continuing law requires a sentencing court to impose a mandatory prison term on certain repeat violent offenders (R.C. 2929.14(D)(2)), on felons convicted of a criminal gang specification (R.C. 2929.14(I)), on certain felons convicted of a school safety zone specification (R.C. 2929.14(J)), on felons who are major drug offenders, committed corrupt activity in certain circumstances, or committed attempted rape in certain circumstances not described above (R.C. 2929.14(D)(3)), and for felons who are subject to the Sexually Violent Predator Sentencing Law (R.C. 2929.14(G)).

3. Continuing R.C. 2929.14(D) generally requires the imposition of a mandatory prison term, of a specified length that varies depending upon the circumstances present, on an offender convicted of a felony who also is convicted of a firearms specification that charges the offender with possessing, using, brandishing, etc., a firearm during the commission of the felony. The requirement does not apply if the felony offense is carrying concealed weapons, illegal conveyance of a deadly weapon or dangerous ordnance into a courthouse, illegal possession or control of a deadly weapon or dangerous ordnance in a courthouse, or, in certain circumstances, having weapons while under a disability. Under the provision, if an offender who is convicted of a felony also is convicted of certain

types of firearms specifications, the court must impose on the offender one of the following mandatory prison terms: (a) a prison term of six years, if the specification 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, (b) a prison term of three years, if the specification 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, (c) a prison term of one year, if the specification charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony, or (d) a prison term of five years, if the felony is a violation of R.C. 2923.161 or a similar type of felony offense and if the specification charges the offender with committing the offense by discharging a firearm from a motor vehicle, other than a manufactured home.

HISTORY

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