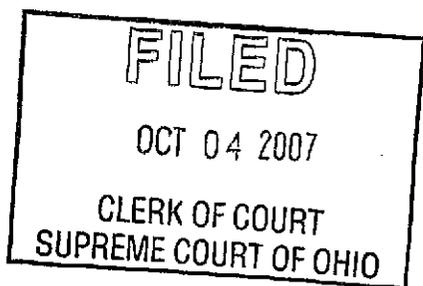


IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, :
-vs- : Case No. 07-0475
PHILLIP E. ELMORE, :
Appellant. :

MERIT BRIEF OF APPELLANT PHILLIP E. ELMORE



KEITH A. YEAZEL
(Counsel of Record)
Supreme Court No. 0041274
5354 North High Street
Columbus, Ohio 43214
Telephone: (614) 885-2900
Facsimile: (614) 885-1900

KENNETH W. OSWALT
Licking County Prosecutor
Supreme Court No. 0037208
20 South Second Street, Suite 201
Newark, Ohio 43055
Telephone: (740) 349-6195

COUNSEL FOR APPELLEE

W. JOSEPH EDWARDS
Supreme Court No. 0030048
523 South Third Street
Columbus, Ohio 43215
Telephone: (614) 228-0523
Facsimile: (614) 228-0520

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

A Licking County Grand Jury returned a six count indictment against Appellant charging him with aggravated murder, murder, kidnapping, aggravated robbery, aggravated burglary and grand theft.

The aggravated murder count in the indictment contained four separate death penalty specifications enumerated in R.C. §§2929.04(A)(3) and 2929.04(A)(7).

Generally, the State alleged that the aggravated murders were committed during the commission of the offenses of kidnapping, aggravated burglary and aggravated robbery and for the purpose of escaping detention, apprehension, trial or punishment for another offense that he committed.

Prior to trial, the trial court conducted a hearing on Appellant's motion to suppress statements. (Transcripts titled: Oral Hearing on Motion to Suppress, dated December 20, 2002.) Appellant alleged that he was arrested without probable cause and that his statements were made in violation of the Fifth and Sixth Amendments to the United States Constitution.

The trial court denied Appellant's motion to suppress statements.

A jury trial was held in which the State introduced substantial evidence against Appellant including several statements made to law enforcement officials which implicated himself in Pamela Annarino's death.

After the State rested (Tr. Vol. VI, p. 986), the defense likewise rested without calling any witnesses.

The defense moved for a judgment of acquittal under Rule 29 of the Ohio Rules of Criminal Procedure. (Tr. Vol. VI, p. 1002).

The trial court denied Appellant's motion. (Tr. Vol. VII, p. 1026).

Closing arguments were held and the case was submitted to the jury.

The jury returned verdicts of guilty as to all counts as well as all four capital specifications. (Tr. Vol. VII, p. 1121).

The case proceeded to the penalty phase. (Tr. Vol. VIII).

Appellant made an unsworn statement (Tr. Vol. VIII, p. 1216). Thereafter, the defense called its one and only witness, Dr. Jeffrey Smalldon, a clinical psychologist. (Tr. Vol. VIII, p. 1218).

The defense then rested. (Id. 1333-34).

The State presented no rebuttal evidence.

The jury returned a verdict recommending that Appellant be sentenced to death. (Tr. Vol. IX, pp. 1399-1402).

The trial court accepted the jury's recommendation and sentenced Appellant to death. (Transcript titled: Sentencing Hearing, dated November 19, 2003). As to the non-capital offenses the trial court: merged Count 2, Murder, with Count 1, Aggravated Murder; imposed 10-year terms of imprisonment on Counts 3, 4, 5, and on Count 6 an 18-month term of imprisonment. Count 3 was ordered to run concurrently with all other counts. Counts 4, 5, and 6 were ordered to run consecutively to one another and consecutive to the death sentence imposed for Count 1.

Appellant appealed his convictions and sentences to the Ohio Supreme Court in Case No. 04-041. On December 13, 2006, the Court affirmed Appellant's convictions and death sentence. State v. Elmore, 111 Ohio St.3d 515, 2006-Ohio-6207. The Court also remanded this case to the trial court for resentencing on the noncapital offenses in

accordance with State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856. Elmore, 109 Ohio St.3d at 540, 2006-Ohio-856 at ¶ 169.

On remand, the trial court resentenced Appellant on the non-capital counts as follows:

Count 2, Murder merged with Count 1, Aggravated Murder;

Count 3, Kidnapping, 10 years imprisonment;

Count 4, Aggravated Robbery, 10 years imprisonment;

Count 5, Aggravated Burglary, 10 years imprisonment; and

Count 6, Grand Theft, 18 months imprisonment.

Count 3 was ordered to run concurrently with all other counts. Counts 4, 5, and 6 were ordered to run consecutively to one another and consecutive to the death sentence imposed for Count 1. (Transcript titled: Resentencing Hearing, dated February 8, 2007, p. 10).

Appellant filed a timely notice of appeal. The record was filed on May 11, 2007.

In accordance with SCt. R. XIX § 5(A), this is Appellant's merit brief.

STATEMENT OF THE FACTS

Appellant was born into a family of ten siblings where he was the second youngest. (Id. at 1245). His mother died in 1975 when Appellant was about eleven years of age and his father re-married a woman named Florence.

Appellant's home life was dysfunctional at best and abusive, in terms of physical and sexual, at worst. Appellant's father beat him and his brothers, as well as his mother, on a routine basis, particularly when he drank, which unfortunately, was often because of his alcoholism. (Tr. Vol. VIII, pp. 1249-51). Appellant told the defense psychologist, Dr. Jeffrey Smalldon, that he loved his father but also wanted him dead because "I watched him beat my mother." (Id. at 1251).

Far worse than the beatings, Appellant often witnessed his father sexually assaulting his older sister Nikki and his younger sister Sonya. (Id. at 1251). Appellant was very close to his younger sister Sonya and would do his best to protect her, especially from their alcoholic and abusive father. On one occasion, when he was twelve, Appellant's father ordered him out of the house, and upon returning, Sonya, who was a year younger, told him that their father "had been having sexual intercourse with her, and, in fact, had been doing so for years before that." (Id. at 1253).

Neuropsychological testing revealed that Appellant has a mild brain impairment which can result in impulse control problems, emotional over-reactivity, deficits in judgment and problem solving. (Id. at 1267-68). Consistent with this finding, further testing revealed that Appellant's I.Q. was somewhere in the high 70's or low 80's, which, as Dr. Smalldon noted, "[t]hat's close to the bottom threshold that's usually talked in the low 70's, which is really low...I mean, that's close to the bottom threshold that's usually

used to mark off mild mental retardation.” (Id. at 1269).

Shortly before trial, Dr. Smalldon examined the Licking County Justice Center’s jail records which indicated that Appellant had no visits from family members during his year in jail. (Id. at 1237). Clearly, Appellant’s family was not close and as the trial started, Appellant had no support from his family.

The trial of this case arose from the tragic death of Pamela S. Annarino, whose body was found on June 4, 2002, in the upstairs bathroom of her home located at 32 West Postal Avenue, Newark, Ohio. The body was found by two men, Clifton Rodeniser, the victim’s brother-in-law, and close friend Timothy Grooms. (Tr. Vol. V, pp. 674 and 687). According to the Coroner, the victim died of “multiple blunt force injuries to the head with incomplete ligature strangulation.” (Tr. Vol. V, pp. 845-47).

The investigation focused almost immediately upon Appellant. Gloria Cooperider, Annarino’s neighbor, saw Appellant leave the victim’s home during the late afternoon of June 1, 2002, get into the victim’s vehicle, and drive from the area. (Tr. Vol. VI, pp. 883-90). Cooperider’s boyfriend, John Williams, was driving to her residence at about the same time when he saw Appellant driving the victim’s vehicle. (Id. at 894). Appellant’s behavior was not unusual at the outset because he had befriended and dated Annarino and was known by both Cooperider and Williams. However, after June 1, 2002, Annarino was not seen again, and after the body was found, law enforcement realized that Appellant was near the residence close to the time of the homicide, making him a suspect.

Licking County law enforcement officials put out an all-points bulletin for the victim’s 1998 gold Toyota Camry which Appellant was last seen driving away from her

residence. (Tr. Vol. VI, pp. 923-25).

Appellant was arrested early in the morning on June 5, 2002, in Columbus, Ohio. (Id. at 928-32). Detectives Vanoy and Baum of the Newark Police Department, who were working the homicide, went to Columbus to conduct an interview of Appellant and transport him back to Licking County. (Tr. Vol. VI, pp. 929-35). During an initial unrecorded interview, Appellant told detectives, "I did it. I'm guilty. That's it." (Id. at 934).

After being transported back to Licking County, Appellant, on June 5, 2002, gave a second recorded interview to detectives. (Id.) The tape of this interview was played to the jury during the trial. (Tr. Vol, VI, p. 941). The taped interview again, but in more detail, reflects Appellant's admission as to his involvement in the homicide, including the use of a lead pipe during the incident. (Id. at 944-46).

A second tape recorded statement was obtained from Appellant after he called Detective Baum while in the Licking County Jail. (Tr. Vol. VI, pp. 963-66). The second tape recorded interview was also played to the jury. (Tr. Vol. VI, p. 966). During this interview, Appellant told detectives that Annarino "flared off" at him, in part leading up to the incident. (Id. at 967). In addition to Appellant's statement, the State introduced two important pieces of physical evidence linking him to the crime scene. Margaret Saupe, a criminalist with B.C.I., testified that a blood stain found on Appellant's shorts that he was wearing when arrested "was consistent with the D.N.A. profile of Pam Annarino." (Tr. Vol. VI, pp. 971, 983). The State also introduced Exhibit 14, a latent lift taken from the side door of the residence at 32 West Postal Avenue. (Tr. Vol. V, p. 724). This latent fingerprint was compared to the known prints of Appellant. (Id. at 765). The

comparison revealed that the latent lift was that “of the left ring finger, the left middle finger and the left index finger of Mr. Elmore.” (Id. at 765).

Thereafter, the State rested its case. (Tr. Vol. VI, p. 986).

The defense moved for a dismissal under Rule 29, which the Trial Court denied.

The defense then rested its case without calling any witnesses. (Id. at 986).

As stated above, Appellant was convicted on all counts and the case proceeded to mitigation.

Besides Dr. Smalldon’s testimony, Appellant gave an unsworn statement during the defense’s mitigation phase presentation. (Tr. Vol. VIII, p. 1216-17). The unsworn statement was short and concise, consisting of approximately one transcript page.

Appellant apologized to “Pamela’s family...for what I’ve done.” (Id. at 1216). Appellant told the jury that “Why it happened, I just - - I don’t know. I really don’t know.” (Id.).

Appellant accepted complete responsibility for his actions and also commented that, “I feel that I deserve the worst punishment that there is. That’s one thing I agree with the Prosecutor.” (Id.).

Concluding his statement, Appellant, showing remorse for his actions, told the jury:

If I could bring her back, I would bring her back. I really would. I don’t understand why I did it. I ask myself that every day, each and every day. The nightmares, it’s just too much. If I could give my life for her right now, I would with no hesitation, none. And I’m sorry, I’m truly sorry.

(Tr. Vol. VIII, p. 1217).

After the defense rested and instructions were given, the jury returned a verdict

recommending a sentence of death. (Tr. Vol. IX, p. 1399-1401).

PROPOSITION OF LAW ONE

APPLICATION OF THE FOSTER REMEDIES TO A DEFENDANT WHO COMMITTED HIS OFFENSE(S) PRIOR TO THE ANNOUNCEMENT OF FOSTER VIOLATES A DEFENDANT'S RIGHT TO TRIAL BY JURY.

The offenses in this case occurred in June 2002. At that time, Ohio's sentencing scheme provided, absent judicial fact-finding, that persons convicted of felonies would receive presumptive sentences of minimum and concurrent terms of imprisonment. On February 27, 2006, the Court issued its ruling in State v. Foster (2006), 109 Ohio St.3d 1, 2006-Ohio-856 finding that portions of Ohio's sentencing statutes were unconstitutional under Blakely v. Washington (2004), 542 U.S. 296. Appellant submits that retroactive application of Foster is incompatible with the controlling precedent of the United States Supreme Court. The decision of the Court of Common Pleas must be reversed, and this case must be remanded with instructions to enter minimum and concurrent terms of incarceration.

At resentencing, Appellant objected to the retroactive application of the remedies outlined in Foster. (Resentencing Hearing Tr. p. 4). Nonetheless, the trial court imposed maximum and consecutive sentences on the aggravated robbery, aggravated burglary and grand theft convictions. Application of the Foster remedy in this case deprived Appellant of the constitutional statutory presumptions which were in effect at the time of the commission of the offenses at bar.

The jury trial guarantee of the Sixth Amendment is made applicable to the States

by the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana (1968), 391 U.S. 45. Once a legislature, state or federal, has predicated the availability of a criminal penalty upon proof of a particular fact, the penalty may not be imposed unless the fact has been admitted by the defendant or found by a jury to have been proven beyond a reasonable doubt. United States v Booker (2005), 543 U.S. 220; Blakely v. Washington (2004), 542 U.S. 296; Apprendi v. New Jersey (2000), 530 U.S. 466; accord Jones v. United States (1999), 526 U.S. 227. See also, State v. Foster, 2006-Ohio-856, ¶2-12. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring v. Arizona (2002), 536 U.S. 584, 602.

As explained in Blakely, if a legislature has enacted a mandatory determinate criminal sentencing system, the Sixth Amendment forbids a court from imposing any penalty in excess of the statutory maximum unless the required factual findings have been made in accordance with the right to trial by jury. Blakely, 542 U.S. at 303. The "statutory maximum" is

the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant...[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

Id. (emphasis in original).

As a result, prior to the decision of the Ohio Supreme Court in Foster, the Sixth and Fourteenth Amendments prohibited the imposition of non-minimum sentences in Defendant Elmore's case. Id. Here, Appellant Elmore was convicted of 3 first-degree felony counts carrying minimum sentences of three years and 1 fourth-degree felony

carrying a minimum sentence of six months. Because the Federal Constitution required the imposition of minimum sentences and forbade the imposition of consecutive sentences, the only lawful sentence which could have been rendered against Appellant Elmore prior to Foster was a term of three years. Foster, 2006-Ohio-856 at ¶¶156-67; In re Criminal Sentencing, 2006-Ohio-2109 at ¶221; State ex rel Mason v. Griffin (2004), 104 Ohio St.3d 279, 282.

Foster held, however, that the Sixth Amendment would not require the imposition of minimum and non-consecutive sentences on remand. Foster, 2006-Ohio-856 at ¶¶ 93-102. Instead that the statutory presumptions which require judicial fact-finding to depart from minimum, non-maximum and concurrent sentences were found unconstitutional. Id. Rather than simply hold the requirement of judicial fact-finding unconstitutional, the Court went further and severed all the statutory presumptions, (including those that did not involve unconstitutional judicial fact-finding) from the statute. The Court held that on remand, judges would be free to impose any sentence, regardless of whether or not the penalty imposed at resentencing exceeded that which would have been permissible under Blakely. Id. For the reasons which follow, the decision of the Ohio Supreme Court in Foster is incompatible with the controlling precedent of the United States Supreme Court as it relates to unconstitutional criminal sentences which had already been rendered and challenged on Sixth Amendment grounds at the time Foster was decided; as a result, post-Foster sentencing as applied to Appellant Elmore's case violates the Federal Constitution.

The holding of Apprendi and the subsequent decisions enforcing its requirements result from the constitutionally-mandated balance of power between the legislature, judge

and jury. As recognized in Apprendi, the Sixth Amendment not only prohibits the legislature from removing predicate factual findings from the jury, but also forbids the judiciary from circumventing the limitations which the legislature has placed on the availability of criminal punishments which correspond to varying degrees of criminal culpability. Apprendi, 530 U.S. at 483-85, citing Mullaney v. Wilbur (1975), 421 U.S.

684. As subsequently explained in Blakely:

Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary... Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely, 542 U.S at 305-06 (citations omitted).

With these considerations in mind, it is evident that the decision of the Ohio Supreme Court in Foster cannot stand against the controlling authority of the United States Supreme Court. It is beyond dispute that when a sentencing scheme incorporates a statutory maximum prohibiting the imposition of specified punishments except upon proof of certain facts, the facts which must be demonstrated in order to exceed the statutory maximum are to be treated as elements of a criminal offense. Washington v. Recuenco (2006), 126 S.Ct. 2546, 2552. Under Apprendi, "elements and sentencing enhancements must be treated the same for Sixth Amendment purposes." Recuenco, 126 S.Ct. at 2552. Any other rule would permit the States to "manipulate their way out of

Winship¹ merely by claiming that a criminal offense is actually nothing more than a sentencing enhancement attached to a less-serious conviction. Jones, 526 U.S. at 243.

The Supreme Court of Ohio may not cure an unconstitutional sentence by simply eliminating the Sixth Amendment statutory maximum. If a defendant is convicted of violating a statute that is subsequently held to be unconstitutional, a court cannot salvage the conviction by severing the unconstitutional element; doing so would violate the Federal Constitution by retroactively criminalizing a broader range of conduct than that which the statute had originally prohibited. Long v. State (Tex. Crim. App. 1996), 931 S.W.2d 285, 295. Because elements and sentencing enhancements are indistinguishable for Sixth Amendment purposes, it necessarily follows that severing an unconstitutional sentencing enhancement is also impermissible because it retroactively extends the range of criminal conduct to which a criminal penalty can attach.

The Ohio Supreme Court cannot retroactively eliminate the statutory maximum for a criminal sentence any more than it can retroactively eliminate an element of the offense of conviction. Compare Recuenco, Apprendi, Blakely, Booker, Jones, with Long; cf. Fiore v. White (2001), 531 U.S. 225. Permitting a defendant to be resentenced under a scheme with an increased statutory maximum is no different than salvaging an unconstitutional conviction by severing an unlawful element. C.f. Long, supra. Because the Federal Constitution "gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged," Booker, 543 U.S. at 230, (quoting United States v. Gaudin (1995), 515 U.S. 506), the unilateral elimination of

¹ In re Winship (1970), 397 U.S. 398

the controlling statutory maximum by the Ohio Supreme Court in Foster cannot be reconciled with the jury trial guarantee of the Sixth and Fourteenth Amendments.

Foster suggests that the severance remedy adopted by the United States Supreme Court in United States v. Booker (2005), 543 U.S. 220, served as the blueprint for the remedy ultimately adopted by the Court. Foster at ¶90. While the Booker majority did sever a portion of the sentencing statute, the severance was limited and maintained the significant parts of the statute designed to effect Congressional intent. As Foster notes, the United States Supreme Court severed the subsection that required a trial court to impose a sentence within the applicable guidelines and the subsection setting forth the standards of review on appeal. Id., n. 97. What is noticeably absent from the Foster opinion, however, is what remains in the federal sentencing statutes to insure that the intent of the statute was preserved.

Booker still demands that a trial court consider the guideline ranges established for a particular offense category as applied to a particular category of defendant to accomplish the congressional goal of uniformity. 543 U.S. at 259-60. Significantly, the United States Supreme Court did not sever 18 U.S.C. §3553(c)(2), which mandates that a trial court state its reasons for departing from the guidelines. Booker continued to permit defendants to challenge the reasonableness of their sentence on appeal. 543 U.S. at 260-61.

In contrast, the severance employed in Foster cuts a wide swath through the sentencing statutes, eliminating presumptions, save those favoring incarceration, eliminating a trial court's duty to explain reasons for departing from the guidelines, thus effectively eliminating the ability of an appellate court to effectively review a sentence,

and essentially eliminating any real chance of accomplishing the General Assembly's goal of establishing uniformity and proportionality in Ohio's criminal sentencing. Had the United States Supreme Court done in Booker what the Court did in Foster, there would be no federal sentencing guidelines because the presumptive terms under the guidelines would "have no meaning now that judicial findings are unconstitutional." See Foster, at ¶ 97. This is why the Foster remedy unlike the Booker remedy cannot be applied retroactively.

This principle is evident from the decisions of the United States Supreme Court which precipitated the Foster decision. When the United States Supreme Court reversed the sentence which had been rendered in Blakely, it did not leave the Washington state judiciary with discretion to remedy the error by simply rewriting its sentencing statutes through judicial severance; on the contrary, the United States Supreme Court left absolutely no question that any sentence above the statutory maximum at the time the offense was committed would violate the right to trial by jury:

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

Blakely, 542 U.S. at 313-14 (emphasis added).

If the State of Washington could have avoided the "modest inconvenience of submitting its accusation" to a jury on remand simply by retroactively eliminating the Sixth Amendment statutory maximum, the jury trial guarantee would be absolutely meaningless. The point of Apprendi is to ensure that all factual findings upon which an

otherwise-unavailable punishment is based must be submitted to a jury. See, e.g., Ring, 536 U.S. at 602. With these considerations in mind, it is clear that the judiciary cannot circumvent the requirements of the Sixth Amendment by retroactively altering the factual prerequisites which the General Assembly has deemed necessary to the imposition of a particular penalty. As a result, the sentencing framework established in Foster violates the Federal Constitution, and Appellant Elmore can be sentenced to no more than the statutory maximum of three years.

PROPOSITION OF LAW NO. 2

THE FOSTER REMEDIES CONSTITUTE JUDICIAL LEGISLATION AND APPLICATION OF THE FOSTER REMEDIES TO A DEFENDANT WHO COMMITTED HIS OFFENSE(S) PRIOR TO THE ANNOUNCEMENT OF FOSTER IS VIOLATIVE OF THE EX POST FACTO CLAUSE OF THE FEDERAL CONSTITUTION.

Both the Ohio and federal Ex Post Facto Clauses prohibit the Ohio General Assembly from retroactively increasing the penalty for a crime which has already been committed. Stogner v. California (2003), 539 U.S. 607, 612, quoting Calder v. Bull (1798), 3 U.S. 386, 391. If the Ohio General Assembly had passed a law repealing the statutory maximums which were held unconstitutional and severed in Foster, the Ex Post Facto Clause would have prohibited the application of any increased penalty upon Appellant Elmore. Id.

By way of illustration, in Miller v. Florida (1987), 482 U.S. 423, revisions to Florida's state sentencing guidelines after the defendant's offense increased the "presumptive" sentence that the defendant could receive when he was finally sentenced. Id. at 424. Florida's revision of its sentencing guidelines fell within the ex post facto

prohibition because it met two critical elements: the law was retrospective – applying to events occurring before its enactment; and it disadvantaged the offender affected by it. Id. at 430. The Court first held that a law is retrospective if it "changes the legal consequences of acts completed before its effective date." Id. at 430, citing Weaver v. Graham (1981), 450 U.S. 24, 31. The Court then observed that it is "axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Id. at 431 (internal citation omitted). The Miller court found that eliminating appellate review "substantially disadvantaged" the defendant. Id., at 433.

The Ex Post Facto Clause clearly does not permit a patently unlawful penalty to be imposed merely because the increased statutory maximum resulted from judicial severance instead of legislative action. In Rogers v. Tennessee, (2001) 532 U.S. 451, the Supreme Court was careful to note that retroactive application of pure common law principles was sometimes permissible because:

Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of ex post facto principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of ex post facto principles. It was on account of concerns such as these that Bouie restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."

Rogers, 532 U.S. at 460-61.

In contrast, the unilateral judicial severance of a statute has nothing to do with "the incremental and reasoned development of precedent that is the foundation of the common law system." Retroactive judicial severance of a statute places the accused in

exactly the same circumstances he would be in if the legislature enacted an unlawful ex post facto law. The mere fact that the statute is changed by judicial decree rather than legislative act is irrelevant: the statute itself is what has been changed, not merely the prevailing judicial interpretation of the meaning of the statute. See State v. Waddell (N.C. 1973), 194 S.E. 2d 19, 29-30, (abrogated on other grounds), Woodson v. North Carolina (1976), 428 U.S. 280; see also State v. Watkins (N.C. 1973), 196 S.E.2d 750, 755.

Because judicial severance changes the actual terms of the statute, it must be viewed as, in effect, an implied legislative change. Foster ruled that the severance remedy, including severance of those provisions that did not violate the Sixth Amendment (for example, presumptive minimum sentences), was the remedy the General Assembly would have intended. Foster, ¶¶ 90-92. Viewed as a legislative change, the Ex Post Facto Clause applies directly, and it bars any retroactive application of the Foster remedy to the detriment of Appellant. See, Miller, 482 U.S. at 431. Stated differently, legislative actions the Ohio Supreme Court rules the General Assembly would have intended must be subject to the same Ex Post Facto limitations as legislation that the General Assembly actually passes. Since the Ex Post Facto Clause prohibits the State of Ohio from retroactively increasing a criminal penalty and the Foster remedy can be viewed as an implied legislative change, Appellant Elmore may be sentenced to no more than three years.

PROPOSITION OF LAW NO. 3

APPLICATION OF THE FOSTER REMEDIES TO A DEFENDANT WHO COMMITTED HIS OFFENSE(S) PRIOR TO THE ANNOUNCEMENT OF FOSTER IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION UNDER ROGERS V. TENNESSEE (2001), 532 U.S. 451.

Even if an act of judicial severance which expands the available range of punishment falls outside the proscriptions of the Ex Post Facto clause, it can still exceed the limits on retroactive judicial decisions. Rogers expressly noted that its holding was based at least in part on the fact that the retroactive decision at issue involved "...not the interpretation of a statute but an act of common law judging." Rogers, 532 U.S. at 460-61. Thus, the absence of a statute was a primary factor which distinguished Rogers from the earlier decision in Bouie v. City of Columbia (1964), 378 U. S. 347.

As recognized in Bouie, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, 10, of the Constitution forbids." 378 U.S. at 353; see also Douglas v. Buder (1973), 412 U.S. 430. As stated previously in Proposition of Law 2, the decision of the Ohio Supreme Court in Foster did not merely constitute judicial interpretation of the meaning of a statute; the sentencing statutes themselves were altered and enlarged through judicial severance. Nevertheless, even assuming that the Ex Post Facto Clause does not reach acts of judicial severance, the decision in Foster still violates the Fourteenth Amendment because "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie, 378 U.S. at 353-54.

If the General Assembly had repealed the statutory maximums which were in place prior to the decision in Foster, the Ex Post Facto Clause would have prohibited the State of Ohio from imposing the increased penalties on Appellant Elmore. Stogner, Calder, supra. The Fourteenth Amendment accordingly prohibits the Supreme Court of

Ohio from achieving the exact same result through an act of judicial severance. Bouie, 378 U.S. at 353-45; accord Rogers, 532 U.S. at 460-61. Consequently, the holding of Rogers prohibits the State of Ohio from imposing any term of incarceration exceeding three years upon Appellant Elmore. The decision of the Court of Common Pleas must therefore be reversed.

Proposition of Law No. 4

A COMMON PLEAS COURT LACKS JURISDICTION TO IMPOSE CONSECUTIVE SENTENCES FOR THE COMMISSION OF MULTIPLE FELONIES.

Prior to Foster, Ohio required that sentences of imprisonment be served concurrently. R.C. § 2929.41(A). The Court severed this statute in Foster. 2006–Ohio–856, ¶ 97. The Court also severed the statute, R.C. § 2929.14(E)(4), that provided the exception to the rule that sentences be served concurrently. Id. The question to be answered is “What is the source of a common pleas court’s authority to impose consecutive sentences?”

The Ohio Constitution does not confer any power on a common pleas court to impose consecutive sentences. Under § 4(B), Art.IV of the Ohio Constitution, “[t]he courts of common pleas and divisions thereof shall have original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law. (Underlining added). The Ohio Constitution makes no specific mention of the power to impose consecutive sentences. Thus, the Ohio Constitution itself does not authorize the imposition of consecutive sentences. No statute authorizes a common pleas to impose a consecutive sentence.

As previously noted in the first paragraph of this Proposition of Law, the sentencing statutes authorizing consecutive sentences have been severed. The answer to the question “What is the source of a court’s authority to impose consecutive sentences?” is “Neither the Ohio Constitution or any statute authorizes a common pleas judge to impose consecutive sentences for multiple felonies.” Since there is no constitutional or statutory grant of jurisdiction to courts of common pleas to impose consecutive sentences, the imposition of consecutive sentences in this case was ultra vires. The Court is respectfully requested to reverse and remand this action to re-sentence Appellant to concurrent sentences on his felony convictions.

Proposition of Law No. 5

THE RULE OF LENITY CODIFIED IN R.C. § 2901.04(A) REQUIRES THE IMPOSITION OF MINIMUM AND CONCURRENT SENTENCES FOR THOSE PERSONS WHO COMMITTED THEIR OFFENSES PRIOR TO THE ANNOUNCEMENT OF THE OPINION IN STATE V. FOSTER (2006), 109 OHIO ST.3D 1, 2006-OHIO-856.

Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not the courts should define criminal activity, United States v. Bass (1971), 404 U.S. 336, and set the punishments therefor. See, Bifulco v. United States (1980), 447 U.S. 381. The rule of lenity cautions against increasing the penalty imposed upon a particular offender where the increase is based on nothing more than a guess as to what criminal sanction the legislature intended. Ladner v. United States (1958), 358 U.S. 169, 178. The General Assembly has expressly incorporated the rule of lenity into the statutory framework of Ohio's criminal justice system. State v. Quisenberry (1994), 69 Ohio St.3d

556, 557.

The enactment of the statutory provisions struck down in the Ohio sentencing cases demonstrates that the General Assembly did not intend for judges to impose consecutive, maximum and/or non-minimum sentences in all cases. It may be fairly said to be a presupposition of our law to resolve doubts in enforcement of a penal code against the imposition of harsher punishment. Bell v. United States (1955), 349 U.S. 81.

The attempt to constitutionalize Ohio's sentencing statutes by excising all clauses that restrict the trial court's discretion to impose higher sentences does not pass the test of lenity in interpretation. The enabling statute, R.C. 181.24, clearly intended for the statutes enacted to provide uniformity and proportionality, "with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender," with judicial discretion to be limited by those goals. R.C. 181.24(B)(1) (3). Those goals were embodied in the statutes ultimately enacted and subsequently reviewed by the Ohio Supreme Court in Foster. The Supreme Court expressly stated that the purposes and intent of Senate Bill 2 was to reserve consecutive sentences for the worst offenses and offenders. State v. Comer, 99 Ohio St. 3d 463, 2003-Ohio-4165, at ¶21 (citation omitted). "Consistency and proportionality are hallmarks of the new sentencing law." Id. (citation omitted). And while consecutive sentences were permitted, imposition of consecutive sentences required that "findings and reasons must be articulated by the trial court so an appellate court can conduct a meaningful review of the sentencing decision." Comer, 2003-Ohio-4165 at ¶21.

The General Assembly's articulated goals are now relegated to historical and statutory notes, replaced by a judicially enacted scheme that requires findings only when

a trial court seeks to give a "downward departure" pursuant to R.C. 2929.20(H). State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, syllabus, para. 1. Given the Court's prior pronouncements on the laudable goals inherent in Senate Bill 2, this construction violates R.C. 2901.04(A) by imposing the least lenient construction of the statute on a defendant being resentenced.

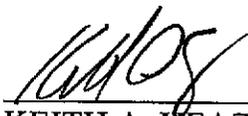
In Foster, despite the fact that they did not violate the Constitution, the Court severed the statutory presumptions for minimum and concurrent sentences. The Court reasoned that since judicial fact-finding was unconstitutional R.C. 2929.14(C) and R.C. 2929.14(E)(4) had "no meaning." Id., at ¶ 97. In fact, those provisions had meaning independent of the unconstitutional judicial fact-finding provisions. Appellant submits that proper application of the Geiger v. Geiger (1927), 117 Ohio St. 451, severance test would have resulted in the retention of those statutory presumptions. Specifically, the statutory presumptions were capable of separation from the unconstitutional judicial fact-finding provisions. The Foster court knew that they were capable of separation. Id. at ¶ 88, n.95. Second, in enacting the presumptions, the General Assembly expressed its intent to limit judicial sentencing discretion by reserving more than minimum and consecutive sentences for the worst offenses and offenders. See, R.C. 181.24(B)(1). Under Foster, there are no such restraints on judicial discretion. By severing the presumptions it is impossible to give effect to the General Assembly's intention that judicial sentencing discretion be so limited. Third, no insertion of words or terms would be necessary to separate the statutory presumptions from the judicial fact-finding provisions and give effect only to the statutory presumptions. At best, the elimination of judicial fact-finding made the statutory presumptions ambiguous—not unconstitutional.

The rule of lenity applies when there is an ambiguity in a criminal statute. State v. Arnold (1991), 61 Ohio St.3d 175. With such an ambiguity, the severance remedy should have been strictly construed against the state and liberally construed in favor of the person to be sentenced. This would result in the imposition of minimum, concurrent sentences for Appellant.

CONCLUSION

Foster makes more onerous the punishment for crimes committed before its announcement. The Court should hold that the Foster remedy can not be applied retroactively to those persons who committed their offenses prior to the effective date of Foster. The Court should reverse the non-minimum, maximum, and consecutive sentences imposed in the case and order that the trial court impose minimum, concurrent sentences on remand.

Respectfully submitted,



KEITH A. YEAZEL (0041274)
COUNSEL OF RECORD
5354 NORTH HIGH STREET
COLUMBUS, OHIO 43214
(614) 885-2900

W. Joseph Edwards by Keith A. Yeazel per authority granted 10-2-07
W. JOSEPH EDWARDS (0030048)
523 SOUTH THIRD STREET
COLUMBUS, OHIO 43215
(614) 228-0523

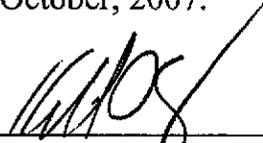
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

A copy of Appellant's Brief was served upon:

Kenneth W. Oswalt
Licking County Prosecutor
Suite 201
20 South Second Street
Newark, Ohio 43055

by United States Mail, Postage Prepaid, this ____ day of October, 2007.



Keith A. Yeazel

APPENDIX

IN THE SUPREME COURT OF OHIO

07-0475

STATE OF OHIO,

Plaintiff--Appellee,

-v-

PHILLIP L. ELMORE,

Defendant--Appellant

On Appeal from the
Licking County Court
of Common Pleas

DEATH PENALTY
Resentenced
February 8, 2007

Common Pleas Court
Case No. 02 CR 275

NOTICE OF APPEAL OF APPELLANT PHILLIP L. ELMORE

W. JOSEPH EDWARDS (0030048)(Counsel of Record)
523 SOUTH THIRD STREET
COLUMBUS, OHIO 43215
(614) 228-0523

KEITH A. YEAZEL (0041274)
5354 NORTH HIGH STREET
COLUMBUS, OHIO 43214
(614) 885-2900

COUNSEL FOR APPELLANT, PHILLIP L. ELMORE

ROBERT L. BECKER (0010188)
LICKING COUNTY PROSECUTING ATTORNEY
20 SOUTH SECOND STREET- SUITE 201
NEWARK, OHIO 43055
(740) 349-6195

COUNSEL FOR APPELLEE, STATE OF OHIO
Elmore Appendix Page 1

FILED
MAR 16 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

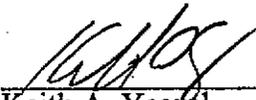
NOTICE OF APPEAL OF APPELLANT PHILLIP L. ELMORE

Appellant Phillip L. Elmore hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Licking County Court of Common Pleas, entered in Case No. 02 CR 275 on February 8, 2007.

This is an appeal of right involving a case in which the death penalty has been imposed for an offense committed on or after January 1, 1995.

Respectfully submitted,


W. Joseph Edwards (0030048) *per authority* 3-16-07
(Counsel of Record)
523 South Third Street
Columbus, Ohio 43215
(614) 228-0523


Keith A. Yeazel (0041274)
65 South Fifth Street
Columbus, Ohio 43215
(614) 228-7005

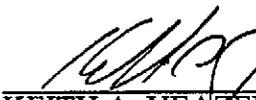
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon:

Robert L. Becker
Licking County Prosecuting Attorney
20 South Second Street- Suite 201
Newark, Ohio 43055

by United States Mail, Postage Prepaid, this 16th day of March, 2007.


KEITH A. YEAZEL

In the Court of Common Pleas, Licking County, Ohio

LICKING COUNTY
COMMON PLEAS COURT

State of Ohio,

2007 FEB -8 A 10:55

Plaintiff,

vs.

Case No. 02 CR 275

FILED
GARY R. WALTERS
CLERK

Phillip L. Elmore,

Defendant.

JUDGMENT ENTRY

On the 8th day of February, 2007, came the State of Ohio through Assistant Prosecutor Kenneth Oswalt, and also came the defendant, personally, and with legal counsel, W. Joseph Edwards and Keith Yeazel, and this cause came on for resentencing on the noncapital convictions pursuant to a remand from the Ohio Supreme Court, the defendant having been found guilty by a jury and convicted of the following:

Count 2, Murder, in violation of O.R.C. Section 2903.02(B);

Count 3, Kidnapping, in violation of O.R.C. Section 2905.01(B)(1) and/or (B)(2);

Count 4, Aggravated Robbery, in violation of O.R.C. Section 2911.01(A)(1);

Count 5, Aggravated Burglary, in violation of O.R.C. Section 2911.11(A)(1) and/or (A)(2).

Count 6, Grand Theft (Motor Vehicle), in violation of O.R.C. Section 2913.02(A)(1).

The Court further finds that the defendant having elected previously not to request the preparation of a presentence investigation report, no such report has been prepared and, therefore, no presentence investigation report has been considered by this Court.

The Court then afforded counsel an opportunity to speak on behalf of the defendant and addressed the defendant personally, affording the defendant an opportunity to make a statement in the form of mitigation and to present information regarding the existence or nonexistence of the factors the Court has considered and weighed.

The Court has considered the record, oral statements, and the Presentence Investigation prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12.

Judge
Ron R. Spahr
40-670-5770

Judge
Ms. Marcelain
40-670-5777

Courthouse
Columbus, OH 43055

IT IS ORDERED that the defendant be sentenced as follows:

Count 2, Murder, the Court merges this count with the Count 1, the aggravated murder and no sentence is imposed;

Count 3, Kidnapping, ten (10) years confinement;

Count 4, Aggravated Robbery, ten (10) years confinement;

Count 5, Aggravated Burglary, ten (10) years confinement;

Count 6, Grand Theft, eighteen (18) months confinement;

Count 3 shall run concurrently with all other counts;

Counts 4, 5, and 6, shall all run consecutively to one another and consecutive to Count 1.

The Court finds that the minimum sentence in this case would not adequately punish the defendant nor would it address the seriousness of the offense committed and would demean the seriousness of the offenses.

The Court further orders that the defendant shall pay the costs of prosecution herein.

The Court finds that the defendant has been incarcerated continuously from June 5, 2002, until this date, to wit: February 8, 2007, for a total period of 1,708 days, and grants the defendant jail credit in Count 4 only.

The Court then, pursuant to Criminal Rule 32, advises the defendant that he has a right to appeal; that if he is unable to pay the cost of appeal, he has the right to an appeal without payment of costs; that if he is unable to obtain counsel for an appeal, counsel will be appointed by the Court without cost to him; that if he is unable to pay the costs of documents necessary for an appeal, such documents will be provided to him without cost; and that he has the right to have a notice of appeal timely filed in his behalf.

The Court further notifies the defendant that post release control is mandatory in this case for a period of five years. Pursuant to Revised Code 2967.28, the Adult Parole Authority will supervise the defendant. The Adult Parole Authority can return the defendant to prison for misconduct under post release control, and if the defendant commits a felony while under post release control, the court in that new felony case can return the defendant to prison in this case in addition to the new felony. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the parole board, and any prison term for violation of that post release control.

At the request of the defendant, the Court appoints W. Joseph Edwards and Keith Yeazel as appellate counsel in this case.

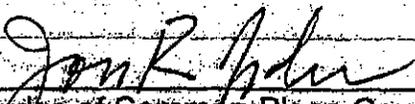
The Court is not imposing a fine in this case finding that the defendant is indigent and unable to pay a fine.

The Court orders that all appeal costs, including the costs of documents necessary to prosecute the appeal be provided to the defendant without cost and at State's expense.

The Court further orders that the defendant be remanded to the custody of the Licking County Sheriff's Department for transportation forthwith to the Ohio Department of Corrections.

This being a capital case, the defendant has no right to an appellate bond and none is set in this action.

The Clerk of this Court is directed to serve notice of this judgment and its date of entry upon the journal upon the following: Robert Becker, Prosecuting Attorney; W. Joseph Edwards and Keith Yeazel, counsel for the defendant; and the Licking County Sheriff's Department.



Judge of Common Pleas Court
Jen R. Spahr

cc: Licking County Prosecutor
Adult Court Services Department
W. Joseph Edwards, Esq.
Keith Yeazel, Esq.

United States Constitution, Article I, Section. 10:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

United States Constitution, Sixth Amendment:

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

United States Constitution, Fourteenth Amendment, Sec. 1:

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

Ohio Constitution, Article I, Sec. 16:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Constitution, Article II, Sec. 28:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Ohio Constitution, Article IV, Sec. 4(B):

The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and

agencies as may be provided by law.

R.C. § 181.24

(A) No later than July 1, 1993, the state criminal sentencing commission shall recommend to the general assembly a comprehensive criminal sentencing structure for the state that is consistent with the sentencing policy developed pursuant to division (B) of section 181.23 of the Revised Code and the conclusions of the study conducted pursuant to division (A) of that section. The sentencing structure shall be designed to enhance public safety, to assist in the management of prison overcrowding and correctional resources, to simplify the sentencing structure of the state that is in existence on August 22, 1990, and to result in a new sentencing structure that is readily understandable by the citizens of the state, to simplify the criminal code of the state, to assure proportionality, uniformity, and other fairness in criminal sentencing, and to provide increased certainty in criminal sentencing.

(B) The comprehensive criminal sentencing structure recommended by the commission shall provide for all of the following:

(1) Proportionate sentences, with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender;

(2) Procedures for ensuring that the penalty imposed for a criminal offense upon similar offenders is uniform in all jurisdictions in the state;

(3) Retention of reasonable judicial discretion within established limits that are consistent with the goals of the overall criminal sentencing structure;

(4) Procedures for matching criminal penalties with the available correctional facilities, programs, and services;

(5) A structure and procedures that control the use and duration of a full range of sentencing options that is consistent with public safety, including, but not limited to, long terms of imprisonment, probation, fines, and other sanctions that do not involve incarceration;

(6) Appropriate reasons for judicial discretion in departing from the general sentencing structure.

(C) The commission shall project the impact of all aspects of the comprehensive criminal sentencing structure upon the capacities of existing correctional facilities. It also shall project the effect of parole release patterns and patterns of release from regional and local jails, workhouses, and other correctional facilities upon the sentencing structure. Additionally, the commission shall determine whether any additional correctional facilities are necessary to implement the sentencing structure.

(D) The commission shall determine whether any special appellate procedures are necessary for reviewing departures from, or the misapplication of, the general sentencing structure recommended pursuant to this section.

(E) The commission shall submit a draft version of the comprehensive criminal sentencing

structure to selected judges, prosecuting attorneys, defense attorneys, law enforcement officials, correctional officials, bar associations, and other persons with experience or expertise in criminal sentencing and solicit their comments on the draft.

R.C. § 2901.04

(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.

R.C. § 2929.14

(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, 2941.144, or 2941.145 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 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 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 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, 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 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 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 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, 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 2941.141 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, 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 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 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 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, 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 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 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, 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, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, 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 of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

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

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

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local

incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 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, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 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, 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 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 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

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

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

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

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of

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

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

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

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) If a person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender is adjudicated a sexually violent predator, if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender

pursuant to section 2971.03 of the Revised Code, or if a person 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, 2941.1419, or 2941.1420 of the Revised Code, the court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

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

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

(J) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

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

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

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

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

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

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

R.C. § 2929.20

(A) As used in this section, ““eligible offender”” means any person serving a stated prison term of ten years or less when either of the following applies:

- (1) The stated prison term does not include a mandatory prison term.
- (2) The stated prison term includes a mandatory prison term, and the person has served the mandatory prison term.

(B) Upon the filing of a motion by the eligible offender or upon its own motion, a sentencing court may reduce the offender’s stated prison term through a judicial release in accordance with this section. The court shall not reduce the stated prison term of an offender who is not an eligible offender. An eligible offender may file a motion for judicial release with the sentencing court within the following applicable period of time:

(1)(a) Except as otherwise provided in division (B)(1)(b) or (c) of this section, if the stated prison term was imposed for a felony of the fourth or fifth degree, the eligible offender may file the motion not earlier than thirty days or later than ninety days after the offender is delivered to a state correctional institution.

(b) If the stated prison term is five years and is an aggregate of stated prison terms that are being served consecutively and that were imposed for any combination of felonies of the fourth degree

and felonies of the fifth degree, the eligible offender may file the motion after the eligible offender has served four years of the stated prison term.

(c) If the stated prison term is more than five years and not more than ten years and is an aggregate of stated prison terms that are being served consecutively and that were imposed for any combination of felonies of the fourth degree and felonies of the fifth degree, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term.

(2) Except as otherwise provided in division (B)(3) or (4) of this section, if the stated prison term was imposed for a felony of the first, second, or third degree, the eligible offender may file the motion not earlier than one hundred eighty days after the offender is delivered to a state correctional institution.

(3) If the stated prison term is five years, the eligible offender may file the motion after the eligible offender has served four years of the stated prison term.

(4) If the stated prison term is more than five years and not more than ten years, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term.

(5) If the offender's stated prison term includes a mandatory prison term, the offender shall file the motion within the time authorized under division (B)(1), (2), (3), or (4) of this section for the nonmandatory portion of the prison term, but the time for filing the motion does not begin to run until after the expiration of the mandatory portion of the prison term.

(C) Upon receipt of a timely motion for judicial release filed by an eligible offender under division (B) of this section or upon the sentencing court's own motion made within the appropriate time period specified in that division, the court may schedule a hearing on the motion. The court may deny the motion without a hearing but shall not grant the motion without a hearing. If a court denies a motion without a hearing, the court may consider a subsequent judicial release for that eligible offender on its own motion or a subsequent motion filed by that eligible offender. If a court denies a motion after a hearing, the court shall not consider a subsequent motion for that eligible offender. The court shall hold only one hearing for any eligible offender.

A hearing under this section shall be conducted in open court within sixty days after the date on which the motion is filed, provided that the court may delay the hearing for a period not to exceed one hundred eighty additional days. If the court holds a hearing on the motion, the court shall enter a ruling on the motion within ten days after the hearing. If the court denies the motion without a hearing, the court shall enter its ruling on the motion within sixty days after the motion is filed.

(D) If a court schedules a hearing under division (C) of this section, the court shall notify the eligible offender of the hearing and shall notify the head of the state correctional institution in which the eligible offender is confined of the hearing prior to the hearing. The head of the state

correctional institution immediately shall notify the appropriate person at the department of rehabilitation and correction of the hearing, and the department within twenty-four hours after receipt of the notice, shall post on the database it maintains pursuant to section 5120.66 of the Revised Code the offender's name and all of the information specified in division (A)(1)(c)(i) of that section. If the court schedules a hearing for judicial release, the court promptly shall give notice of the hearing to the prosecuting attorney of the county in which the eligible offender was indicted. Upon receipt of the notice from the court, the prosecuting attorney shall notify the victim of the offense for which the stated prison term was imposed or the victim's representative, pursuant to section 2930.16 of the Revised Code, of the hearing.

(E) Prior to the date of the hearing on a motion for judicial release under this section, the head of the state correctional institution in which the eligible offender in question is confined shall send to the court a report on the eligible offender's conduct in the institution and in any institution from which the eligible offender may have been transferred. The report shall cover the eligible offender's participation in school, vocational training, work, treatment, and other rehabilitative activities and any disciplinary action taken against the eligible offender. The report shall be made part of the record of the hearing.

(F) If the court grants a hearing on a motion for judicial release under this section, the eligible offender shall attend the hearing if ordered to do so by the court. Upon receipt of a copy of the journal entry containing the order, the head of the state correctional institution in which the eligible offender is incarcerated shall deliver the eligible offender to the sheriff of the county in which the hearing is to be held. The sheriff shall convey the eligible offender to the hearing and return the offender to the institution after the hearing.

(G) At the hearing on a motion for judicial release under this section, the court shall afford the eligible offender and the eligible offender's attorney an opportunity to present written information relevant to the motion and shall afford the eligible offender, if present, and the eligible offender's attorney an opportunity to present oral information relevant to the motion. The court shall afford a similar opportunity to the prosecuting attorney, the victim or the victim's representative, as defined in section 2930.01 of the Revised Code, and any other person the court determines is likely to present additional relevant information. The court shall consider any statement of a victim made pursuant to section 2930.14 or 2930.17 of the Revised Code, any victim impact statement prepared pursuant to section 2947.051 of the Revised Code, and any report made under division (E) of this section. The court may consider any written statement of any person submitted to the court pursuant to division (J) of this section. After ruling on the motion, the court shall notify the victim of the ruling in accordance with sections 2930.03 and 2930.16 of the Revised Code.

(H)(1) A court shall not grant a judicial release under this section to an eligible offender who is imprisoned for a felony of the first or second degree, or to an eligible offender who committed an offense contained in Chapter 2925. or 3719. of the Revised Code and for whom there was a presumption under section 2929.13 of the Revised Code in favor of a prison term, unless the court, with reference to factors under section 2929.12 of the Revised Code, finds both of the following:

(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

(2) A court that grants a judicial release to an eligible offender under division (H)(1) of this section shall specify on the record both findings required in that division and also shall list all the factors described in that division that were presented at the hearing.

(I) If the court grants a motion for judicial release under this section, the court shall order the release of the eligible offender, shall place the eligible offender under an appropriate community control sanction, under appropriate community control conditions, and under the supervision of the department of probation serving the court, and shall reserve the right to reimpose the sentence that it reduced pursuant to the judicial release if the offender violates the sanction. If the court reimposes the reduced sentence pursuant to this reserved right, it may do so either concurrently with, or consecutive to, any new sentence imposed upon the eligible offender as a result of the violation that is a new offense. The period of the community control sanction shall be no longer than five years. The court, in its discretion, may reduce the period of the community control sanction by the amount of time the eligible offender spent in jail for the offense and in prison. If the court made any findings pursuant to division (H)(1) of this section, the court shall serve a copy of the findings upon counsel for the parties within fifteen days after the date on which the court grants the motion for judicial release.

Prior to being released pursuant to a judicial release granted under this section, the eligible offender shall serve any extension of sentence that was imposed under section 2967.11 of the Revised Code.

If the court grants a motion for judicial release, the court shall notify the appropriate person at the department of rehabilitation and correction of the judicial release, and the department shall post notice of the release on the database it maintains pursuant to section 5120.66 of the Revised Code.

(J) In addition to and independent of the right of a victim to make a statement pursuant to section 2930.14, 2930.17, or 2946.051 of the Revised Code and any right of a person to present written information or make a statement pursuant to division (G) of this section, any person may submit to the court, at any time prior to the hearing on the offender's motion for judicial release, a written statement concerning the effects of the offender's crime or crimes, the circumstances surrounding the crime or crimes, the manner in which the crime or crimes were perpetrated, and the person's opinion as to whether the offender should be released.

R.C. § 2929.41

(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.