

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No. 2007-1261
-vs- : Appeal taken from Butler County
DONALD J. KETTERER, : Court of Common Pleas
: Case No. CR 2003-03-0309
Appellant. : This is a death penalty case.

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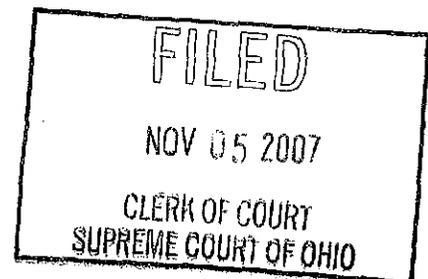


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STATEMENT OF THE CASE AND FACTS

Procedural Posture

TRIAL LEVEL PROCEEDINGS

On March 4, 2003, the Butler County Grand Jury returned a five-count indictment charging Appellant with the aggravated murder, aggravated robbery of Lawrence Sanders on February 24, 2003, the theft of Sanders' motor vehicle and the burglary and aggravated burglary of his residence. The aggravated murder count contained three capital specifications.

On January 27, 2004, on advice of defense counsel Detective Ketterer waived his right to a jury trial and pled guilty to the entire indictment. On January 28, and 29, 2004 the three judge panel entertained evidence and argument as to the sufficiency of the evidence to convict Appellant. At close of the hearing the panel found Appellant guilty of all counts and specifications. [1/29/04 Transcript, p. 222].

On February 2-4, 2004, the panel conducted the sentencing hearing. At the conclusion of that hearing the panel found that the aggravating circumstances outweighed the mitigating factors by proof beyond a reasonable doubt. [2/04/07 Transcript p. 301]. The panel immediately sentenced Appellant to death on count one. [*Id.*] The panel imposed the following sentences as to the other charges: Count Two, a sentence of nine years and a \$2,000 fine; Count Three, a consecutive sentence of nine years and a \$2,000 fine; Count Four, a sentence of seventeen months to be served concurrent to the terms of imprisonment in Counts two and Three; and Count Five, a consecutive sentence of four years and a \$1,000 fine. [*Id.* at pp. 303-305, 2/05/04 Transcript p. 4].

DIRECT APPEAL PROCEEDINGS

On March 19, 2004, Appellant filed his Notice of Appeal with this Court. On October 29, 2004, he filed his Merit Brief with this Court. On February 16, 2005, the state filed its merit brief. On October 25, 2006, this Court affirmed Appellant's convictions and sentences. *State v. Ketterer*, 111 Ohio St. 3d 70, 2006-Ohio-5283.

On January 23, 2007, Appellant filed his Application for Reopening. On February 8, 2007, this state filed its memorandum opposing the application. On April 18, 2007, this Court vacated the non-capital sentences and remanded the matter for re-sentencing. *State v. Ketterer*, 113 Ohio St. 3d 1463, 2007-Ohio-1722.

POST-CONVICTION PROCEEDINGS

On December 28, 2002, Appellant filed his initial post-conviction petition which challenged his conviction for capital murder and death sentence. *State v. Ketterer*, Butler C.P. No. CR2003-03-0309. On January 7, 2003, the prosecution filed its answer to the petition.

On April 27, 2003, Appellant filed a Motion to Reconvene the panel that sentenced him to death, for purposes of ruling on the post-conviction and related motion. On April 24, 2006, after the panel conducted a status conference and the parties submitted additional briefing, the presiding judge Patricia S. Oney overruled Appellant's Motion to Reconvene the Panel.

The post-conviction proceedings have since been held in abeyance while the parties litigated the original action and the remand proceedings from this Court. In addition, the parties have litigated whether the resentencing of Appellant has necessitated the filing of a new post-conviction petition. *See State v. Roberts* (Trumbull App. Oct. 19, 2007), 2007-Ohio-5616, Ohio App LEXIS 4956, ¶¶ 5-9.

MANDAMUS PROCEEDINGS

On July 19, 2006, Appellant instituted a mandamus action against the presiding judge in the Butler County Court of Appeals. He challenged the jurisdiction of the judge to hear the post-conviction proceedings without the other two judges, who comprised the three judge panel which sentenced him to death.

On July 26, 2006, Appellee filed a motion to dismiss pursuant to Civ. R. 12(b)(6). On October 3, 2006, the Butler County Court of Appeals granted Appellee's Motion to Dismiss. *State, ex rel Ketterer v. Oney, Judge*, Butler App. No. CA2006-07-0171. That court did not reach the merits, but instead held that Appellant had an adequate remedy at law. *Id.*

On November 17, 2006, Appellant timely filed his Notice of Appeal to this Court from the entry dismissing his original action. On January 16, 2007, Appellant filed his Merit Brief. On February 8, 2007, the Respondent filed her Merit Brief. On May 9, 2007, this Court affirmed the decision of the trial court holding that Appellant had an adequate remedy at law. *State, ex rel. Ketterer v. Oney, Judge*, 113 Ohio St. 3d 306, 2007-Ohio-1954, ¶6.

REMAND PROCEEDINGS

After this Court ordered the remand proceedings, Appellant filed motions 1) to reconvene the panel for purposes of resentencing, 2) for disclosure of exculpatory evidence and 3) to withdraw his guilty pleas. The court granted the motion to reconvene.

On May 24, 2007, the panel reconvened for purposes of resentencing. It heard argument and denied the motion for disclosure of exculpatory information. [5/24/07 Transcript pp. 5-13, A-12]. It then imposed the same sentences that it had at the time of retrial: Count Two, a sentence of nine years and a \$2,000 fine; Count Three, a consecutive sentence of nine years and a \$2,000 fine; Count Four, a sentence of seventeen months to be served

concurrent to the terms of imprisonment in Counts two and Three; and Count Five, a consecutive sentence of four years and a \$1,000 fine. [*Id.* at pp. 23-24, A-9-10]. The presiding judge, after the other two judges had adjourned, then denied Appellant's Motion to withdraw his guilty pleas. [*Id.* at pp. 24-29, A-11].

CURRENT PROCEEDINGS IN THIS COURT

On July 18, 2007, Appellant timely appealed to this Court. [A-1-7]. On September 5, 2007, the Clerk submitted the record from the court below. On October 25, 2007, Appellant filed a motion to supplement the record with the transcript of the May 24, 2007 remand hearing. That motion is still pending.

On July 23, 2007, the state filed a motion to dismiss claiming that the Butler County Court of Appeals had exclusive jurisdiction to hear this appeal. On August 29, 2007, this Court denied the motion.

On October 24, 2007, Appellant filed a stipulation extending the time for him to file his merit brief until November 4, 2007.

Factual Posture

Appellant has very limited intelligence. On the WAIS-III he received a Verbal IQ score of 76, a Performance IQ score of 73, and a Full Scale IQ score of 72. [Motion to Withdraw Guilty Exhibit 5, ¶ 17]. All of his scores were in the lower range of the Borderline Intellectual Functioning classification on the Wide Range Achievement Test-3 [*Id.* at ¶ 18]. He obtained a reading score of 64 (better than only about 1% of others his age) and a Spelling Score of 57 (better than less than 1% of the individuals his age) [*Id.*]. Appellant also suffers from a serious mental illness, *i.e.*, bipolar disorder.

On February 25, 2003 at 7:30 p.m. the investigating officer arrested Appellant [4.03.03 Transcript, pp. 93-94]. He had been drinking at a bar from at least 4:00 p.m. until 7:00 p.m. [1.28.04 Transcript, pp. 29-30]. The bartender stopped serving him and a cab was called to transport him from the bar. [*Id.* at pp. 40, 65]. Officer Cifuentes testified that he thought Appellant was intoxicated at the time of his arrest [*Id.* at 359-61]. At the time of his arrest, Appellant was in the midst of a crack-cocaine binge. Detective Collins testified that Appellant would associate with crack addict Mary Gabbard at 706 East Avenue, where the two of them would drink and smoke crack-cocaine. [4.04.03 Transcript, p. 61]. Detective Rogers testified that when he arrested Appellant at the back door of 706 East Avenue, he was talking about crack-cocaine. [*Id.* at 134].

After the officers arrested Appellant they took him to a local police station, where because of his condition, he fell asleep or passed out. [*Id.* at p. 47]. Prior to passing out, he executed separate consent forms for the search of his coat, bag and his residence. The form had a reading twelfth grade level, which was approximately eight grades above Appellant's reading level. [Motion to Withdraw Guilty Plea, Exhibit 5, ¶ 29]. Appellant also executed a Miranda waiver prior to making two inculpatory statements to the arresting officers. The document the police utilized to have Appellant waive his rights had a Flesch-Kincaid Grade Level of 9.9--six full grade levels above Mr. Ketterer's reading and writing abilities. [*Id.* at Exhibit 5, ¶ 21]. In the second written statement that Appellant signed, the following statement is attributed to him "I was in Vietnam. I can tell you that when I was in combat that I probably did kill several Vietnamese in battle. And from that time until I killed Larry I have never killed anyone else." Appellant never served in combat in Vietnam. The reading level of both of the written statements signed by him had a Flesch-Kincaid grade Level of 6.6 and 6.3 respectively – almost three

grades above Mr. Ketterer's reading and writing abilities. [Motion to Withdraw Guilty Plea Exhibit 5. ¶¶ 25-26]. Both of the documents contained language that is beyond Appellant's linguistic ability. [*Id.*].

Prior to trial, the Coroner, when he conducted the autopsy, found hairs on both of the victim's hands. On February 4, 2004, after the Panel found Petitioner Ketterer guilty, Cellmark issued its report finding that the hair recovered by the Coroner in the victim's hands did not belong to Appellant. [*Id.* at Exhibit 25].

Defense counsel met with Appellant the night prior to the start of his jury trial. They told him that if he waived his right to a jury trial he would not receive the death penalty. [*Id.* at Exhibit 1] For this reason alone he waived his right to a jury. [*Id.*] Appellant advised two fellow inmates that he was going to waive his right to a jury trial because his attorneys told him that he would not receive the death penalty, if entered such a waiver. [*Id.* at Exhibits 2 and 3].

Appellant, in open court, executed a written waiver, which had a grade level of a twelfth grader, eight full grades beyond his comprehension. [*Id.* at Exhibit 5, at ¶32] Appellant entered two written guilty pleas; one for the Count of Aggravated Murder and the other written waiver for the non-capital counts. The guilty plea forms were beyond Appellant's level of reading comprehension. The guilty plea forms required a reading level of a 10.9 grade, nearly seven grade years beyond Petitioner Ketterer's ability. [*Id.* at ¶ 31].

Prior to trial, the presiding judge had authorized funding for mitigation specialist James Crates to conduct the sentencing investigation. Crates did not meet with Appellant. [Motion to Withdraw Guilty Plea, Exhibit 25, ¶3]. Crates conducted little or no investigation. [*Id.*]. As a result, defense counsel failed to present significant, available mitigating evidence, including: a) Appellant's father had a bad temper; b) Appellant was severely physically,

verbally, and emotionally abused by his father; c) Appellant was further physically abused by at least one of his brothers; d) Appellant's father was an alcoholic; e) Appellant was exposed to alcohol as a child and first drank alcohol at the age of 9 or 10; f) Appellant's mother reportedly abused tranquilizers and then began abusing alcohol after Appellant's father died; g) Appellant was born with a heart murmur and he also had rheumatic fever as a child, resulting in frequent absences from school and missing socialization opportunities; h) Appellant's father frequently complained about expensive medical bills that were incurred due to Appellant's medical conditions; i) Appellant struggled to accept his brother's homosexuality; j) Appellant's family has a history of psychiatric illness, including one brother who is under the care of a psychiatrist for a chronic mental illness, another brother who was previously psychiatrically hospitalized and one of Appellant's paternal uncles committed suicide; k) Appellant's father died when Appellant was 13 or 14 years old, and this caused emotional conflict for Appellant because he was happy that the abuse he was suffered stopped, but he also experienced guilt over having secretly wished his father would die and l) when his father died, Appellant's mother was ineffective at imposing structure and unable to place limits on the children. [*Id.* at Exhibit 5, ¶ 37].

PROPOSITION OF LAW NO. I

A DEFENDANT'S SENTENCE IS VOID WHEN THE TRIAL COURT FAILS TO PROPERLY ADVISE HIM CONCERNING POST RELEASE CONTROL ON ALL COUNTS.

The panel re-sentenced Appellant on the offenses of aggravated robbery (Count Two), aggravated burglary (Count Three), grand theft (Count Four), and burglary (Count Five5). The trial court orally imposed post release control "in regards to Count Two and Five, if you are released after serving that sentence, the Ohio Department of Rehabilitation and Control will put you on post-release control, mandatory for a period of five years." [5/24/07 Transcript, p. 24].

The panel erred when it failed to impose post release control as to Count Two, the offense of aggravated burglary.

A trial court is obligated to impose post-release control with respect to each first and second degree felony it sentences a defendant. R.C. 2967.28(B)(1). *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, ¶ 21 (“The plain language of R.C. 2929.14(F) and 2967.28 evinces the intent of the General Assembly not only to make all incarcerated felons subject to mandatory or discretionary post-release control, but also to require all sentencing trial courts in this state to include postrelease control as part of the sentence for every incarcerated offender.”) The third count of the indictment, aggravated burglary was an offense of the first degree. R.C. 2911.11(B). Thus, the panel erred when it failed to impose post-release control as to Count Two. R.C. 2967.28(B)(1).

A trial court’s failure to include a provision as to post-release control renders the sentence void. *State v. Jordan*, 2004-Ohio-6085, at ¶23. The proper remedy for such an error is to remand the case for purposes of re-sentencing. *Id.* See *State v. Beasley* (1984), 14 Ohio St. 3d 74, 75, 471 N.E.2d 774.

The panel compounded this error when it placed its sentencing entry of record. The panel provided therein “As to Count(s) Two, Three, Four and Five: The Court [sic] has notified the defendant that post release is in this case up to a maximum of [sic] years, as well as the consequences for violating the conditions of post release control imposed by the Parole Board under Ohio Revised Code Section 2967.28” [A-9]. The panel’s entry was incorrect because 1) Appellant did not receive post release control as to Count Four, because that was a felony of the fourth degree, and 2) the panel did not advise Appellant as to post-release control as

to Count Three. More importantly, the panel, in its sentencing entry, did not identify the number of years that Appellant would be subject to post release control. [A-9].

A trial court, when it imposes a sentence of post-release control is not only required to orally notify the defendant of the provision, but to place it in its sentencing entry. *State v. Jordan*, 2004-Ohio-6085, at Syllabus 1 (“When sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and *is further required to incorporate that notice into its journal entry imposing sentence.*”) (emphasis added). See *State v. Phillips*, Logan App. No. 8-06-14, 2007-Ohio-686, 2007 Ohio App. LEXIS 611, 2007 Ohio App. LEXIS 611 ¶ 26 (While the trial court informed the defendant orally concerning post-release control at sentencing, it “failed to incorporate the notice about post-release control in its sentencing entry. Consequently, Phillips’ sentence was rendered void.”); *State v. Balderson*, Stark App. No. 2006-Ohio-2463, 2007 Ohio App. LEXIS 2288, ¶ 27 (Because the trial court orally advised defendant of post release control, but did not include it in its sentencing entry, “the Court’s September 24, 1998 Judge Entry was, therefore void.”). Thus the panel’s sentencing entry in the present case is void as to the Counts Two, Three and Five.

This Court should sustain Proposition of Law No. I and remand this matter to the trial court for re-sentencing.

PROPOSITION OF LAW NO. II

A TRIAL COURT’S SENTENCING MUST BE VACATED IF IT DOES NOT CONTAIN THE INFORMATION MANDATED BY CRIM. R. 32(B).

A sentencing entry shall set forth the “the plea, the verdict or findings, and the sentence.” Crim. R. 32(C). An entry which does not contain all of this information does not constitute a final appealable order. *State v. Miller*, Medina App. No. 06CA0056-M, 2007-Ohio-

1353, 2007 Ohio App. LEXIS 1258 at ¶ 10; *State v. Combs*, Lorain App. No. 06CA008942, 2007-Ohio-2155, 2007 Ohio App. LEXIS 2032 at ¶¶ 5-10.¹

The panel's sentencing entry in the present case does contain Appellant's plea [A-]. Therefore the panel's re-sentencing judgment of conviction entry does not meet the requirements of Crim. R. 32(C).

This Court should sustain Proposition of Law No. II and remand this case for purposes of the panel entering a proper judgment entry.

PROPOSITION OF LAW NO. III

A DEFENDANT MAY NOT BE RESENTENCED PURSUANT TO A STATUTORY SCHEME IN WHICH THE REQUIREMENT FOR ADDITIONAL FACT FINDING TO IMPOSE GREATER THAN THE MINIMUM AND CONSECUTIVE SENTENCES WAS ELIMINATED SUBSEQUENT TO HIS GUILTY PLEAS.

This Court remanded Appellant's case for resentencing because the panel's imposition of sentences with respect to the non-capital counts violated Mr. Ketterer's right to a jury trial. *State v. Ketterer*, 113 Ohio St. 3d 1463, 2007-Ohio-1722. At his resentencing Mr. Ketterer argued that the imposition of sentences that exceeded the statutory minimum and were to be served consecutively violated his constitutional rights because the provisions lacked the fact finding requirements which were in place at the time of his guilty pleas. [5/24/07, pp. 14-19]. The trial court rejected the argument and imposed sentences which exceeded the statutory minimum and which were to be served consecutively. [*Id.* at pp. 23-23, A-9-10]. The trial court erred when it imposed non-minimum and consecutive sentences.

¹ This Court has accepted for review the issue concerning the effect of a trial court's failure to enter a judgment entry which complies with Crim. R. 32(C). *State v. Baker*, 114 Ohio St. 3d 1505, 2007-Ohio-4285.

On February 27, 2006, this Court found portions of R.C. 2929.14, 2929.19 and 2929.41 to be unconstitutional. *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, paragraphs one, three and five of the syllabus. To remedy the constitutional violations, this Court severed those portions of the statutes declared to be unconstitutional. *Id.*, at paragraphs two, four, and six of the syllabus. This Court, in *Foster*, declared that any case in which the trial courts imposed non-minimum and/or consecutive sentences premised on the factors contained in R.C. 2929.14, must be reversed and remanded to the trial court for resentencing. The *Foster* remedy violates the Ex Post Facto and Due Process Clauses because it effectively changes the presumptive sentence to the detriment of the defendant. *Miller v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446.

In *Foster*, this Court suggested that it relied on *United States v. Booker* (2005), 543 U.S. 220, 125 S. Ct. 738, as the blueprint for the remedy, which it adopted. *Foster* at ¶90. Although the United States Supreme Court in *Booker* did sever a portion of the sentencing statute, the severance was limited, and the Court did uphold significant portions of the statute. The United States Supreme Court in *Booker* 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. The United States Supreme Court, however, left in tact the statutory provisions which require a trial court to consider the guideline ranges established for a particular offense category. *United States v. Booker*, 543 U.S. at 259-260. In addition, 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. Consequently, although the Supreme Court in *Booker* severed four separate standards of appellate review, the remaining portions of

the statute permitted either party to seek appellate review to determine the reasonableness of the trial court's sentence. *United States v. Booker*, 543 U.S. at 260, 261.

By contrast, the severance which this Court imposed 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 legislature's goal of establishing uniformity and proportionality in Ohio's criminal sentencing. Recently, the United States Supreme Court held that a state court cannot apply the *Booker* severance to state sentencing statutes in the manner that this Court applied in *Foster*. *Cunningham v. California* (2007), ___ U.S. ___, 127 S. Ct. 856. In that case the Supreme Court found that California's sentencing scheme, "does not resemble the advisory system the *Booker* Court had in view. * * * Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." *Id.* at 870. Ohio's statutory sentencing scheme after the *Foster* severance suffers from the same deficiency. In Ohio, facts a judge found are used to elevate statutorily mandated minimum, concurrent sentences, to a higher sentence within the range, or to consecutive sentences. Those facts must be found by a jury or admitted by the defendant.

A. THIS COURT, CONSISTENT WITH DUE PROCESS AND JURY TRIAL CLAUSES OF THE FEDERAL AND THE OHIO CONSTITUTIONS, CANNOT RETROACTIVELY ELIMINATE STATUTORILY REQUIRED FINDINGS TO EVISCERATE A DEFENDANT'S RIGHT TO A JURY TRIAL.

The right to a jury trial, which is encompassed in 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. 145, 88 S. Ct. 1444. 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, 230-31, 125 S. Ct. 738; *Blakely v. Washington* (2004), 542 U.S. 296, 313, 124 S. Ct. 2531; *Apprendi v. New Jersey* (2000), 530 U.S. 466, 476, 120 S. Ct. 2348. accord *Jones v. United States* (1999), 526 U.S. 227, 251-52, 119 S. Ct. 1215. See also, *State v. Foster*, 2006-Ohio-856, ¶¶ 2-12.

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. 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.” *Blakely*, 542 U.S. at 303 (emphasis in original).

When the United States Supreme Court struck down *Blakely*’s enhanced sentence because it was based on unconstitutional fact-finding, the State of Washington was not free to just eliminate its system of guidelines and retroactively apply a new discretionary scheme in order to re-sentence *Blakely* to his original illegal term of imprisonment. The trial court could only impose on remand a sentence that could be imposed at the time of the offense that did not require unconstitutional judicial fact-finding:

[*Blakely*] 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 neighbors.”

Blakely, 542 U.S. at 313.²

Similarly when this Court found that trial courts had engaged in infirm fact-finding, it was not free to cure the fact finding by striking down the guidelines. This Court in *Foster* should have fashioned a remedy that would have permitted fact finding in the sentencing process by specifying that a jury rather than a judge determine sentencing factors. *See, e.g., State v. Smylie* (Ind. Sup. Ct. 2005), 823 N.E. 2d 679, 685 (“We thus hold that the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana’s existing sentencing laws.”). However, this Court declined to do so.

Prior to the decision in *Foster*, the Sixth and Fourteenth Amendments prohibited trial courts from imposing any sentence other than the statutory minimum and concurrent sentences upon criminal defendants. Any other sentence would require additional factual findings which were neither admitted by Appellant nor found by a jury. *Foster*, 2006-Ohio-856 at ¶¶56-67. Because the Sixth Amendment constitutionally required the imposition of minimum and concurrent sentences pursuant to the law as it existed at the time of the instant offenses, the only lawful sentences which the trial court could have imposed on remand were the statutory minimums. *State v. Foster*, 2006-Ohio-856 at ¶¶56-67.

This Court held, however, that the Sixth Amendment would not require the imposition of minimum, concurrent sentences on remand. *Foster*, 2006-Ohio-856 at ¶¶93-102. This Court held instead that the statutory presumptions which require judicial fact-finding to

² See also, *Blakely*, *supra*, at 309: “In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a found by a jury. *Id.* (emphasis in original).”

depart from minimum, non-maximum and non-consecutive sentences were unconstitutional. *Id.* Rather than hold the requirement of judicial fact-finding unconstitutional, the Court severed the statutory presumptions from the remainder of the statutes. It concluded that on remand, judges would be free to impose *any* sentence, regardless of whether or not the penalty imposed at re-sentencing exceeded that which would have been compelled by *Blakely*. *Id.*

This Court's decision in *Foster* is incompatible with the controlling precedent of the United States Supreme Court. 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.

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. *Apprendi, Blakely, Booker, supra.* Any other rule would permit the States to "manipulate their way out of *Winship*" 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.

This Court cannot retroactively eliminate the statutory directives which limited the maximum for a criminal sentence any more than it can retroactively eliminate an element of the offense of charged in the indictment. *Compare Apprendi, Blakely, Booker, Jones, supra, cf. Fiore v. White* (2001), 531 U.S. 225, 228-29; 121 S. Ct. 712. As a result, the sentencing

framework that this Court created in *Foster*, violates the Federal Constitution, and Appellant must be resentenced to the statutory minimum sentences to be served concurrently.

B. APPELLANT’S NONCAPITAL SENTENCES VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

I. Severance operates as an ex post facto law.

It is well-established that due process prohibits retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which was expressed before the conduct in issue. *Bouie v. Columbia* (1964), 378 U.S. 347, 354, 84 S. Ct. 1697. As this Court has recognized, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law. . . ,” and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Garner* (1995), 74 Ohio St. 3d 49, 57, 656 N.E.2d 623, quoting *Bouie v. Columbia*, 378 U.S. at 353 (internal citations omitted). The scope of the Ex Post Facto Clause’s protection includes “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull* (1798), 3 U.S. 386, 3 Dallas 386 (seriatim opinion of Chase, J.). Although the constitutional prohibition against ex post facto laws is applicable only to legislative enactments, judicial enlargement of a statute implicates the same concerns expressed by the Ex Post Facto Clause. *State v. Garner*, 74 Ohio St. 3d at 57.

The application of a state’s revised sentencing guidelines to a defendant whose crimes occurred before the revisions took effect, violates the Ex Post Facto Clause and the prisoner’s right to due process. *Miller v. Florida* (1987), 482 U.S. 423, 432, 107 S. Ct. 2446. In that case, Florida revised its sentencing guidelines, after the defendant’s offense transpired, by raising the “presumptive” sentence that the defendant could receive when he was sentenced. The Supreme Court found that Florida’s revision of its sentencing guidelines fell within the ex post

facto prohibition because 1) it was retrospective, the guidelines were applied to events occurring before its enactment; and 2), it disadvantaged the offender affected by it. *Id.* at 430. A law is retrospective if it “changes the legal consequences of acts completed before its effective date.” *Id.* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31, 101 S. Ct. 960. As to the second element, the Court observed that it is “axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.” *Id.* (internal citation omitted).

On remand in Appellant’s case, the panel’s application of the severance remedy operated retrospectively and disadvantaged Appellant. Under the sentencing statutes in effect at the time of the murder of Mr. Sanders, there was a presumption that he would be sentenced to a minimum, concurrent sentence. The application of the severed statute eliminated the presumption in favor of minimum, concurrent sentences. In addition, by eliminating the presumptive sentencing levels contained within the severed statutes and the judicial fact-finding that attended sentences exceeding the presumptive range, this Court effectively foreclosed appellate review. In *Miller*, the U.S. Supreme Court found that eliminating appellate review was a second reason to find that the defendant had been “substantially disadvantaged” by the retrospective application of the revised guidelines to his crime. *Miller v. Florida* 482 U.S. at 433.

The retroactive application of sentencing statutes, as amended by this Court, changes the punishment that Appellant will suffer and compromises his ability to appeal his sentence. Accordingly, the *Foster* remedy as applied to Appellant violates the Ex Post Facto Clause and thereby deny him due process.

2. *This Court’s remedy was unforeseeable and cannot be defended in light of the law in existent prior to Foster.*

Due process demands that a defendant have fair warning of what constitutes a crime. *Bouie v. Columbia*, 378 U.S. at 350. A defendant is denied fair warning, when there is an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Id.* at 352. Consequently, if a judicial construction of a criminal statute is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,” [the construction] must not be given retroactive effect.” *Id.* at 354 (citation omitted).

When the alleged crimes occurred, Appellant could not have foreseen that this Court would replace those portions of Senate Bill 2 that gave a trial court “guided discretion” with unfettered, unreviewable discretion. *State v. Foster* at ¶89. Even after *Blakely*, defendants could not have foreseen severance, given this Court’s decision in *State ex rel. Mason v. Griffin*, 104 Ohio St. 3d 279, 2004-Ohio-6384 at ¶17, that if the statutes were found to be unconstitutional (after *Blakely*), a trial court “should apply the pertinent sentencing statutes without any enhancement provisions found to be unconstitutional...”

The severance remedy was also unforeseeable by reference to the relevant statute and caselaw. The enabling statute required that the statutes provide uniformity and proportionality “with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender,” and with judicial discretion to be limited by those goals. R.C. 181.24(B)(1)-(3). This Court expressly held that the intent of Senate Bill 2 was to reserve non-minimum sentences for the worst offenses and offenders. *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio-4165, at ¶21, citing *State v. Boland*, 147 Ohio App. 3d 151, 162, 2002-Ohio-1163. “Consistency and proportionality are hallmarks of the new sentencing law.” *Id.*, citing *Griffin & Katz*, “Sentencing Consistency: Basic Principles Instead of Numerical Grids;

The Ohio Plan (2002),” 53 Case W.Res.L.Rev. 1, 12. And while non-minimum sentences were permitted, imposition 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* at ¶21, internal citations omitted.

C. APPELLANT’S NONCAPITAL SENTENCES VIOLATE THE RULE OF LENITY.

Because of the seriousness of criminal penalties and that 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, 339, 92 S. Ct. 515 and set the punishments. See *Bifulco v. United States* (1980), 447 U.S. 381, 401, 100 S. Ct. 2247. The policy of lenity requires that a court not interpret a criminal statute so as to increase the penalty, when such an interpretation can be based on no more than speculation as to what the legislature intended. *Albernaz v. United States* (1981), 450 U.S. 333, 101 S. Ct. 1137, 342.

The statutory provisions struck down in *Foster* documented that the Ohio General Assembly did not intend for judges to impose consecutive or maximum sentences in all cases. All doubts in enforcement of a penal code should be resolved against the imposition of harsher punishment. *Bell v. United States*, 349 U.S. 81, 83, 27 S. Ct. 620 (1955). "Sections of the Revised Code defining . . . penalties shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04(A)

This Court’s decision in *Foster* which excised all of the statutory provisions that restricted a trial court's discretion to impose higher sentences, violates the test of lenity. The Ohio Legislature enacted the sentencing statutes to provide uniformity, proportionality, “with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender.” R.C. 181.24(B)(1)-(3). These laudable goals are now history, 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. This construction violates R.C. 2901.04(A) by imposing the least lenient construction of the statute on Appellant, when a more lenient version of the statute was in effect at the time of the offense.

This Court should sustain Proposition of Law No. III and enter minimum, current sentences.

PROPOSITION OF LAW NO. IV

THE PROSECUTION IS REQUIRED TO PROVIDE THE DEFENDANT WITH EXCULPATORY EVIDENCE WHICH IS MATERIAL TO SENTENCING.

Prior to the re-sentencing hearing, Appellant moved the three judge panel to order the prosecution to provide him with all exculpatory evidence. The motion specifically requested the three judge panel to order that the prosecution provide information concerning the involvement of other individuals in the offense (including Donald Williams and Mary Gabbard) and Donald’s Ketterer’s state of mind at the time of the offenses. The panel heard argument on the motion at the conclusion of which it denied the motion. [5/24/07 Transcript pp. 5-13].

The prosecution has a constitutional obligation to disclose evidence favorable to the accused. *State v. Brown*, 115 Ohio St. 3d 55, 2007-Ohio-4837, ¶ 39, *Brady v. Maryland* (1963), 373 U.S. 83, 86, 83 S. Ct. 1194. The suppression by the prosecution of favorable evidence results in constitutional error “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* (quoting *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S. Ct. 3375). The United States Supreme Court emphasized that:

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’

Kyles v. Whitley (1995), 514 U.S. 419, 434, 115 S. Ct. 1555; *see also Strickler v. Greene* (1999), 527 U.S. 263, 264, 119 S. Ct. 1936 .

The prosecution’s suppression of favorable evidence violates due process where the evidence is material to either guilt or *punishment*. *Brady*, 373 U.S. at 87. In *Brady*, the defendant had been sentenced to death. The prosecutor suppressed the statement of a co-defendant in which he admitted to committing the killing. *Id.* at 84. *Brady*, in the trial phase, admitted to participating in the murder, but claimed that the co-defendant committed the actual killing. *Id.* The Supreme Court remanded the case for retrial solely on the issue of punishment as a result of the prosecution’s suppression of the co-defendant’s statement. *Id.* at p. 90.

The United States Supreme Court has revisited the issue of disclosure of exculpatory evidence with respect to sentencing. *Banks v. Dretke* (2004), 540 U.S. 668, 701-703, 124 S. Ct. 1256. The prosecutor therein suppressed evidence that one of its penalty phase witnesses had misrepresented his dealings with the police including: 1) the receipt of consideration, 2) conversations that he had with the investigating officers, and 3) the content of those conversations. *Id.* at 694. The Court granted penalty phase relief as a result of the prosecution’s suppression of favorable evidence. *Id.* at 702-703.

The prosecutor’s duty of disclosure with respect to sentencing is not limited to capital cases. The criminal rules specifically provide that the prosecutor shall provide to defense counsel evidence “favorable to the defendant and material either to guilt or *punishment*.” Crim.

R. 16(B)(1)(f) (emphasis added). The rule contains no limitation with respect to non capital cases.

A. THE THREE JUDGE PANEL ERRED WHEN IT REFUSED TO ORDER THAT THE PROSECUTION PROVIDE ALL INFORMATION IN ITS ACTUAL OR CONSTRUCTIVE POSSESSION CONCERNING OTHER INDIVIDUALS WHO WERE POSSIBLY INVOLVED IN THE HOMICIDE OF LAWRENCE SANDERS.

The prosecutor has a duty to provide defense counsel with information concerning other suspects in a case. *State v. Brown*, 2007-Ohio-4837 at ¶¶ 45-50; *Jamison v. Collins* (6th Cir. 2002), 291 F.3d 380, 390; *Castleberry v. Brigano* (6th Cir. 2003), 349 F.3d 286, 293. This duty extends to information concerning co-defendants who committed the offense in conjunction with the defendant. *Brady v. Maryland*, 373 U.S. at 86. This Court has recognized that the participation of other individuals in the commission of a homicide is a mitigating or exculpatory factor with respect to sentencing. *State v. Issa* (2001), 93 Ohio St. 3d 49, 752 N.E.2d 904, 71, 752 N.E.2d 904; *State v. Cunningham*, 105 Ohio St. 3d 197, 2004-Ohio-707, at ¶133. The United States Supreme Court invalidated the State of Ohio's previous death penalty because the relevant statute did not permit the sentencer to afford any weight to mitigating factors including the involvement of other individuals. *Lockett v. Ohio* (1978), 438 U.S. 586, 608, 98 S. Ct. 2954.

In the present case Appellant told the investigating officers that Donald Williams and Mary Gabbard were involved in this instant offense. [Appellant's Motion for the Disclosure of Favorable Evidence for Purposes of Resentencing, Exhibit 1]. Appellant is of low intelligence, with an IQ of 70-72 [*Id.* at Exhibit 2, ¶¶ 18-21]. His low level of intelligence was exacerbated by consumption of crack cocaine. [*Id.* at ¶22]. When he ingests crack cocaine, he becomes easily manipulated and prone to suggestion.

During the course of the investigation, the officers found hair in both hands of the decedent. [*Id.* at Exhibit 3]. The presiding judge had granted defense counsel funding to conduct DNA testing on the hair. Cellmark Laboratories determined that the hair found on both of the victim's hands did not belong to Appellant. [*Id.* at Exhibit 4].

Donald Williams operated an ongoing criminal enterprise at 706 East Avenue, Hamilton, Ohio [1.28.04 Transcript, p. 53]. Appellant frequented that address to exchange property or money for cocaine [6.07.02 Transcript, p. 53-55]. On February 7, 2003, the police had raided that location [*Id.* at pp. 56-60]. The police may have had fifteen drug cases that could have been filed against Williams as a result of the raid. [Appellant's Motion for the Disclosure of Favorable Evidence for Purposes of Resentencing, Exhibit 5]. At the time of Appellant's arrest, Donald Williams was in possession of the personal property of the decedent. [4.03.03 Transcript, p. 90]. Williams provided the police with the initial information that Sanders had been killed. [*Id.* At Tr. 88].³

Mary Gabbard sold drugs for Donald Williams [Appellant's Motion for the Disclosure of Favorable Evidence for Purposes of Resentencing, Exhibit 5, ¶4]. She also was a prostitute and bought and sold stolen property [01.28.04 Transcript, p. 53]. Williams was her pimp and supplier of drugs [Appellant's Motion for the Disclosure of Favorable Evidence for Purposes of Resentencing, Exhibit 5, ¶4]. As a result of the raid on Williams' place of business, the police charged her with a felony [*Id.*]. Gabbard testified that she was with Appellant immediately after the homicide. [04.03.03 Transcript, pp. 258-273]. She told another individual that she sold crack to Appellant prior to and after the homicide. [Appellant's Motion for the

³ While the Aggravated Murder charges were pending against Donald Ketterer, the Hamilton Police Department instituted yet other unrelated felony charges against Williams [1.20.04, Transcript, pp. 67-68]. Those charges were reduced. [*Id.*].

Disclosure of Favorable Evidence for Purposes of Resentencing, Exhibit 5, ¶4]. However, she refused to state whether she was with Appellant at the time of the homicide. [*Id.*].⁴

These facts establish that Williams and Gabbard had personal knowledge of the circumstances surrounding the murder of Lawrence Sanders. They were clearly persons of interest during the course of the investigation. However, the extent that the investigating officer's were able to document the involvement of Williams and Gabbard has never been revealed to Appellant. He is entitled to full disclosure of this information. This Court has recognized that the involvement of other individuals can be a mitigating fact with respect to sentence. *State v. Lawson*, 64 Ohio St. 3d 336, 352, 595 N.E.2d 902; *State v. Herring* (2002), 94 Ohio St. 3d 246, 267, 762 N.E.2d 940.

The panel should have ordered that the prosecution to provide all information concerning other individuals who were involved in the offenses for which it is it about to re-sentence Appellant. The Court should have specifically ordered, with regard to Gabbard and Williams, that the prosecution provide the following: 1) all information relating to the commission of illegal activities at 706 East Avenue (the business of Williams and the residence of Gabbard); 2) all documents relating to the prior illegal activities of Mary Gabbard and Donald Williams, including but not limited to prostitution, receiving stolen property and the sale or consumption of illegal drugs; and 3) all documents relating to the crimes for which Appellant was charged in which Donald Williams or Mary Gabbard are referenced.

⁴ The prosecution never charged her with selling crack to Donald Ketterer on the day of the homicide, even though she under oath admitted to that offense. [1.28.04 Transcript, p. 45].

B. THE PANEL ERRED WHEN IT DENIED APPELLANT'S MOTION TO ORDER THE PROSECUTION TO PROVIDE ALL INFORMATION IN ITS ACTUAL OR CONSTRUCTIVE POSSESSION CONCERNING APPELLANT'S EMOTIONAL, MENTAL AND PHYSICAL CONDITION AT THE TIME THE OFFENSES.

A defendant's mental and physical state are relevant to the issues surrounding sentencing. *Brown v. Crosby* (S.D. Fla. 2003), 249 F. Supp 2d 285, 1314; *United States v. Brown* (D. Oregon 2004), 347 F. Supp. 2d 920, 923-4; *People v. Breggs* (Ill. 2004), 209 N.E.2d 472, 486-489; *Commonwealth v. Hilton* (Mass. 2005), 823 N.E.2d 383, 393. The prosecution's duty of disclosure extends to relevant psychological information. *East v. Johnson* (5th Cir. 1997), 123 F.3d 235, 238-239; *Bailey v. Rae* (9th Cir. 2003), 339 F.3d 1107, 1114.

On February 25, 2003, at 7:30 p.m. the investigating police officers arrested Appellant [4.03.03 Transcript, pp. 93-94]. Appellant had been drinking at a bar on February 25, 2003 from at least 4:00 p.m. until 7:00 p.m. [1.28.04 Transcript, pp. 29-30]. The bartender refused to serve him any more alcohol, and called a cab for Appellant. [*Id.* Tr. 40, 65]. Donald Williams reported that Appellant "had been drinking a lot." [*Id.* at 293-296]. When the arresting officers first approached Appellant, they detected alcohol on his breath. [4.04.03 Transcript, p. 359]. Officer Cifuentes believed that Appellant was intoxicated [*Id.* at 359-61]. The officer that interrogated him also acknowledged that he could smell alcohol on Appellant's breath, and that he seemed slow, slurred his words, and had severe cotton mouth [4.03.02 Transcript, p. 41].

Appellant suffers from a serious mental illness, *i.e.*, bipolar disorder. [*Id.* at p. 165; State's Hearing Exhibit 7]. He has very limited intelligence. On the WAIS-III he received a Verbal IQ standard score of 76, a Performance IQ standard score of 73, and a Full Scale IQ standard score of 72. [Appellant's Motion for the Disclosure of Favorable Evidence for Purposes of Resentencing, Exhibit 2, ¶17]. All of his scores on the Wide Range Achievement Test-3 were in the lower range of the Borderline Intellectual Functioning classification [*Id.* at

¶18]. He obtained a reading standard score of 64 (better than only about 1% of others his age) and a Spelling Standard Score of 57, (better than less than 1% of the individuals his age) [*Id.*].

When this Court initially reviewed Appellant's case, it recognized that he suffers from significant mental illnesses including chronic alcoholism, drug abuse, bipolar disorder, a personality disorder with borderline and anti-social features and a limited IQ. *State v. Ketterer*, 111 Ohio St. 3d 70, 2006-Ohio-5283, ¶¶ 200-202.

The panel below should have ordered the prosecution to disclose all information in its possession concerning any impairment, no matter how slight, that Appellant suffered from at the time of his arrest and the immediate twenty-four hour period thereafter. This Court has determined that a defendant's intoxication at the time of the commission of the offense is a mitigating factor. *State v. LaMar*, 93 Ohio St. 3d 181, 2002-Ohio-2128, at ¶195; *State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059, at ¶59; *State v. Scott*, 101 Ohio St. 3d 31, 2004-Ohio-10 at ¶106.

C. THE PANEL ERRED WHEN IT REFUSED TO ORDER THE PROSECUTION TO PROVIDE ALL INFORMATION IN ITS ACTUAL OR CONSTRUCTIVE POSSESSION CONCERNING FAVORABLE TREATMENT OFFERED SCOTT HESTER AND TYRONE JASPER

1. The prosecutor suppressed exculpatory evidence concerning Scott Hester.

On May 19, 2003, Mr. Kristenoff, an investigator appointed by the court to assist defense counsel, interviewed inmate Scott Hester in the Butler County Jail. Hester told the investigator, in a recorded statement, that he had witnessed Appellant's arrest and contrary to the arresting officers' testimony, they had placed Appellant in handcuffs and under arrest, when they removed him from the premises at 706 East Street for purposes of interrogation concerning the murder. [Motion to Withdraw Guilty Pleas Exhibit 31]. On May 22, 2002, trial counsel for Mr.

Ketterer moved the Court to re-open the Motion to suppress to present the testimony of Scott Hester. [*Id.* at Exhibit 9].

On May 14, 2003, just five days earlier, the Butler County Grand Jury had indicted Hester for the offense of Escape [*Id.* at Exhibit 10]. On May 21, 2003, the Butler County Grand Jury had indicted Hester for the Offenses of Having a Weapon Under a Disability, Carrying a Loaded Concealed Weapon (9 mm handgun) and a Concealed Weapon (knife) 2003 CR, 040703. [*Id.* at Exhibit 11]. In addition Hester faced yet other felony charges. On May 13, 2003 the Municipal Court bound Hester over on the offense of Criminal Damaging 03CRB02088. [*Id.* at Exhibit 12]. On the same date, that court bound Hester over on the offenses discharging a firearm within the city limits and Having Weapon Under a Disability, 02CRB02088. [*Id.* at Exhibit 13].

Once the prosecution became aware of Hester's status as a potential defense witness, the wheels of justice began to move in his favor. On June 3, 2003, the Butler County Grand Jury refused to indict Hester as to the offenses of Criminally Damaging and Discharging a Firearm within the City Limits. [*Id.* at Exhibit 12]. On June 25, 2003, Scott Hester pled guilty to Escape [*Id.* at Exhibit 14]. On the same date he pled guilty to the reduced charge of Attempted Carrying a Weapon Under a Disability and Carrying a Concealed Weapon. The trial court, at the prosecutor's behest dismissed the other Concealed Weapon Charges. [*Id.* at Exhibit 15]. On July 29, 2004, the trial court sentenced Scott Hester to one year on the Escape [*Id.* at Exhibit 16]. The trial court also sentenced Hester to six months for the offense of Having a Weapon under a Disability and one year on the Concealed Weapon with the two sentences to be served concurrently. [*Id.* at Exhibit 17].

Scott Hester did ultimately appear for the defense after the trial court ordered that the motion to suppress be reopened. Hester refused to testify, despite having given a tape recorded statement concerning the facts surrounding the arrest. [06.02.03 Transcript, pp. 6-8].

The prosecutors never provided trial counsel with information concerning all the pending charges against Hester and the manner in which most of them were dismissed or reduced.

2. *The prosecution suppressed exculpatory evidence concerning Tyrone Jasper.*

On December 17, 2003, the Butler County Grand Jury had indicted Tyrone Jasper for two counts of Burglary [Motion to Withdraw Guilty Plea, Exhibit 18]. The two counts involved separate residences on separate dates. [*Id.*].

On January 6, 2004, the prosecutor provided trial counsel with supplemental discovery listing Tyrone Jasper as a potential witness. [Motion to Withdraw Guilty Plea, Exhibit 19]. On January 16, 2004, the prosecutor provided trial counsel with the discovery as to Jasper's prior criminal record. [Motion to Withdraw Guilty Plea, Exhibit 20]. The prosecutor, however, did not provide any discovery as to the pending charges against Jasper. [*Id.*].

On February 4, 2004 Cellmark Laboratory determined that the hairs found in both of the victim's hands did not belong to the victim or Appellant [Motion to Withdraw Guilty Plea, Exhibit 21]. At the sentencing hearing trial counsel decided not to place into evidence the exculpatory DNA results because the prosecutor threatened to call inmates Tyrone Jasper and Tim Engel, would have testified that Appellant told them that he was the only person involved in the murder. [04.04.04 Transcript, p. 230].

On March 23, 2004, the prosecutor reduced the charges against Tryone Jasper from two counts of burglary (second degree felonies) to two counts of Attempted Breaking and Entering (first degree misdemeanors) [Motion to Withdraw Guilty Plea, Exhibit 22]. On May

14, 2004 the trial court sentenced Jasper to consecutive sentences totaling nine months with credit for the 177 days he had already served. [Motion to Withdraw Guilty Plea, Exhibit 23].

D. THE PANEL ERRED WHEN IT REFUSED TO ORDER THE PROSECUTION TO PROVIDE ALL EXCULPATORY INFORMATION IN ITS ACTUAL OR CONSTRUCTIVE POSSESSION.

The *Brady* materiality standard is not a stringent one. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the Government’s evidentiary suppression “undermines confidence in the outcome of the trial”. *Kyles v. Whitley*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. at 678); *Strickler v. Greene*, 527 U.S. at 281-82 (1999) (reaffirming the “material” evidence standard).

Materiality is to be analyzed “in terms of suppressed evidence considered collectively, not item by item”. *Kyles v. Whitley*, 514 U.S. at 436; *Smith v. Secretary of N.M. Dept. of Corrs.* (10th Cir. 1995), 50 F.3d 801, 834 (“While some of this evidence, standing alone, may seem somewhat trivial, in the context of the entire record in this case, we believe that the disclosure of all of this evidence might have led to a different result”.); *Schledwitz v. United States* (6th Cir., 1999), 169 F.3d 1003, 1013; *Jamison v. Collins* (S.D. Ohio, 2000), 100 F.Supp.2d 647, 695 (“[T]he collective effect of the suppressed evidence in this case undermines our confidence in Petitioner’s conviction and sentence”).

In addition, *Brady* requires consideration of the manner in which the prosecution’s suppression limited trial counsel’s ability to investigate other exculpatory evidence. *Kyles v. Whitley*, 514 U.S. at 445 (“[the undisclosed] statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the

circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well.”); *United States v. Bagley*, 473 U.S. at 683 (noting the relevance of “any adverse effect” that the failure to produce *Brady* materials “might have had on the preparation or presentation of the defendant’s case”).

The prosecution’s case would look much different if the prosecution had disclosed all of the evidence. Appellant is an individual of limited intellectual ability whose life at times was driven by the need to feed his drug habit. Two individuals who were out on bond awaiting trial and who may be serving as government informants, took advantage of him by inducing him to commit an aggravated burglary to pay for the drugs they had to sell him. Those individuals gave him drugs prior to the commission of the aggravated burglary. The aggravated burglary went and awry and a death resulted. Regardless, both informants still took their cut and in fact returned to the residence the following day.

This Court should sustain Proposition of Law No. IV and remand this matter with instructions that the panel grant Appellant’s motion to disclose exculpatory evidence.

PROPOSITION OF LAW NO. V

WHEN A DEFENDANT IN A CAPITAL CASE WAIVES HIS RIGHT TO A JURY AND A THREE JUDGE PANEL ACCEPTS HIS GUILTY PLEAS AS TO BOTH THE CAPITAL AND NON CAPITAL CHARGES CONTAINED IN THE INDICTMENT, THE PANEL AND NOT THE PRESIDING JUDGE SHOULD DECIDE THE DEFENDANT’S SUBSEQUENT MOTION TO WITHDRAW HIS GUILTY PLEAS.

A panel of judges of the Butler County Common Pleas Court accepted Appellant’s guilty pleas as to both the capital and non capital charges contained in his indictment. [1/29/04 Transcript, p. 222]. The same panel sentenced Appellant on both the capital and non capital charges. [2/02/04 Transcript, pp. 301-305, 307; 2/02/04 Transcript, pp. 3-4]. On

April 18, 2007, this Court vacated the non-capital sentences and remanded the matter for re-sentencing. *State v. Ketterer*, 113 Ohio St. 3d 1463, 2007-Ohio-1722.

Prior to the resentencing, Appellant filed a motion to withdraw his guilty pleas as to the non-capital sentences. On May 24, 2007, the panel conducted the re-sentencing hearing. After the panel resentenced Appellant, the panel adjourned. [5/24/07 Transcript p. 24]. The presiding judge, without the other two members of the panel and over objection, conducted the hearing on Appellant's motion to withdraw his guilty pleas. [*Id.*] At the conclusion of argument concerning the pleading, the presiding judge denied the motion. [*Id.* at p. 29].

A. THIS COURT HAS HELD THAT A THREE JUDGE PANEL MUST RECONVENE FOR PURPOSES OF DECIDING POST SENTENCING MOTIONS.

This Court initially had this issue before it in *State v. Johnston* (1988), 39 Ohio St. 3d 48, 49, 529 N.E.2d 898. In that case the three judge panel sentenced the defendant to death. The defendant subsequently filed a motion for a new trial, which the three judge panel denied. The court of appeals reversed the panel's denial of the new trial motion. This Court affirmed the judgment of the appellate court concerning the new trial motion. *Id.* at 60-62. The Court did not address the procedural issue of the three judge panel hearing and deciding the new trial motion.

This Court subsequently addressed the procedural issue. *State v. Stumpf* (1987), 32 Ohio St. 3d 95, 512 N.E.2d 598.⁵ Stumpf pled guilty and the three judge panel sentenced him to death. *Id.* at 97. He subsequently filed a motion to withdraw his guilty plea, or in the alternative, to grant him a new sentencing hearing. *Id.* at 98. [A-53-54]. On October 1, 1985 two members of the panel entertained oral argument on the Motion. [A-55-82]. Judge Raymond

⁵ The United States Supreme Court, in Stumpf's case, addressed the merits of the guilty plea issue. *Bradshaw v. Stumpf* (2005), 545 U.S. 175. Because the procedural issue that is now before this Court involves only state law, that Court did not address this issue.

C. Rice, who was a member of the original panel, died after the panel imposed Stumpf's death sentence, but before it ruled on his post-judgment motion. [A-57]. The remaining members sought guidance from this Court on the manner in which they should decide the post-judgment motion. Louis Domiani, the then Director of this Court, responded to the Panel's inquiries, "It would appear that you and Judge Bettis, a majority of the panel originally assigned in this case, may rule on this motion. In the event that you conclude that you cannot reach a unanimous decision on this motion, a third judge will be appointed to replace Judge Raymond C. Rice, deceased. This situation appears to be governed by Crim. R. 25." [*Id.*]. The two remaining members denied Stumpf's post-judgment motion.

Stumpf appealed that denial to the Fifth District Court of Appeals. *State v. Stumpf* (Guernsey Ct. App. May 22, 1986), Case Nos. CA-760, CA-763, 1986 Ohio LEXIS 7003. The Court of Appeals affirmed the panel's decision denying the post-trial motion. *Id.* at *32. Stumpf appealed that decision to this Court. He raised therein two distinct issues concerning the post-trial motion, including a challenge to the fact that all three judges did not decide the motion:

PROPOSITION OF LAW NUMBER 12

Ohio Revised Code Section 2945.06 requires that the trial of a capital case, without a jury, be conducted by a three-judge panel, and consideration of post-sentence proceedings by less than the entire panel is not authorized and violates the Defendant's right to due process in equal protection of the law.

[A-88]

The prosecution responded to Stumpf's Proposition of Law by arguing that "once the fact finding or jury function of that panel is complete and the sentence imposed, further duties devolve upon the original presiding judge to whom the case was first assigned. While appellant had the benefit of having two of the members of the panel rule on his post-trial, post-

sentence motions, he was entitled only to have the original presiding trial judge rule on his post-trial motions. He was not entitled to more.” [A-97]. The prosecution’s wording of its Proposition of Law could not have been any clearer:

PROPOSITION OF LAW TWELVE

FOLLOWING THE VERDICT AND SENTENCE IN A CAPITAL CASE HEARD BY A THREE-JUDGE PANEL PURSUANT TO REVISED CODE SECTION 2945.06, POST-SENTENCE MOTIONS ARE HEARD AND DECIDED BY THE TRIAL JUDGE.

[A-96].

This Court, when it affirmed the trial court’s denial of the new trial motion, implicitly, if not explicitly, rejected the argument that post-sentence motions are to be heard and decided solely by the presiding judge. This Court concluded, “We therefore find that the *panel* did not abuse its discretion in denying appellant’s motion.” *State v. Stumpf*, 32 Ohio St. 3d at 105. (emphasis added) This Court would not have affirmed the decision of the panel, if the panel lacked jurisdiction.⁶

In addition, this Court has held that a three-judge panel should reconvene for purposes of re-weighing the evidence when it has committed an error in its sentencing opinion. *State v. Davis* (1988), 38 Ohio St. 3d 361, 373). In *Davis*, the panel initially incorrectly considered the facts of the case as an aggravating circumstance. *Id.* at 372. This Court remanded the case for the proper reweighing by the entire panel. *Id.* at 373. Subsequently a panel of judges from the Butler County Common Pleas Court did reconvene for re-sentencing. *State v. Davis* (1992), 63 Ohio St. 3d 44 .

⁶ A three-judge panel recently reconvened to hear the post-conviction proceedings in a Green County capital case. *State v. Bays* (Greene Ct. App. Jan. 30, 1998), No. 96 CA 118, 1998 Ohio App. LEXIS 226. It appears that neither party contested the reconvening of the panel.

B. THIS COURT HAS HELD THAT R.C. 2945.06 CONFERS JURISDICTION ON THE THREE JUDGE PANELS FOR PURPOSES OF DECIDING POST JUDGMENT MOTIONS.

Crim. R. 11(C)(3) provides the basis for the convening of a three judge panel in a capital case, “If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall” The Rule is silent as to whether the panel or the presiding judge rules on post judgment motions.

This Court’s decision in *Stumpf*, in which it interpreted R.C. 2945.06, answered that question. The prosecution in *Stumpf* argued “It is readily apparent from the plain wording of the statute [2945.06] that the composition of the three judge trial court is for the *trial* of the case, the ascertaining of facts, equivalent to the function of a jury where a jury is not waived. . . . In the case of trial before a three judge panel called pursuant to Revised Code Section 2945.06, once the fact finding or jury function of that panel is complete and the sentence imposed, further duties devolve upon the original presiding judge” [A-97]. (Emphasis in original). This Court rejected the prosecution’s interpretation of R.C. 2945.06, It cited to the fact that “*R.C. 2945.06* expressly provides that “[t]he judges *or a majority of them* may decide all questions of fact and law arising upon the trial” *Id.* (Emphasis in original) *State v. Stumpf*, 32 Ohio St. 3d at 105. This Court therein concluded that the panel acted appropriately when it denied the post-judgment motion. *Id.* Therefore the three judge panel’s jurisdiction does not somehow terminate once it imposes sentence. It continues to exist to dispose of all post-judgment motions.

C. THE FACT THAT APPELLANT’S MOTION CHALLENGED HIS GUILTY PLEAS AS TO THE NON-CAPITAL CHARGES IS NOT RELEVANT.

On November 8, 1994, the Ohio voters approved a constitutional amendment which provided that in those cases in which the death penalty was imposed, the direct appeal

should proceed directly to this Court. The Ohio General Assembly amended R.C. 2953.02 to reflect the constitutional amendment.

This Court subsequently found those amendments to be constitutional. *State v. Smith* (1997), 80 Ohio St. 3d 89, 94-104, 684 N.E.2d 668. This Court therein specifically held “[t]he courts of appeals shall not accept jurisdiction of *any case* in which the sentence of death has been imposed for an offense committed on or after January 1, 1995. Appeals in such cases shall be made directly from the trial court to the Supreme Court.” *Id.* at Syllabus 2. (emphasis added). This Court, consistently throughout its opinion in *Smith*, held that a death sentenced individual is entitled to have this Court on direct appeal review *all* of his issues. This Court concluded that “under the amendments, a capital defendant also has one right to appeal *all* issues, but *all* of the capital defendant’s non-capital convictions are still reviewed by the Supreme Court of Ohio, along with his or her capital convictions...” *Id.* at 101 (emphasis in original). This Court later reiterated the same conclusion, “[a]s stated, all of a defendant’s issues, both noncapital and capital, constitutional or statutory are reviewed by the Supreme Court.” *Id.* at 102. Finally this Court concluded “Thus the Supreme Court has jurisdiction over the whole case, instead of counts, charges, or sentences.” *Id.* at 104.

Similarly this Court has held that a three-judge panel should re-convene when it fails to consider the non capital charges contained in the indictment. *State v. Filiaggi* (1999), 86 Ohio St. 3d 230, 240, 714 N.E. 2d 867 In that case the presiding judge was the only member of the panel to consider the non-capital charges. This Court remanded the case with the instructions that “the trial panel is to proceed from the point at which error occurred.” *Id.* The Court further held that “the three-judge panel, should reconstitute itself and deliberate anew...” *Id.*

This Court should apply the same analysis with respect to the remand proceedings in this case. The capital and non-capital charges were contained in the same indictment. The panel accepted Mr. Ketterer's guilty pleas as to both the capital and non-capital charges. The panel sentenced Mr. Ketterer on both the capital and non-capital charges. For the sake of consistency, it should be the panel that hears all post trial motions, regardless of which counts the motion relate.

This Court should vacate the decision of the presiding judge as to Appellant's motion to withdraw his guilty pleas. It should remand this matter to permit the entire panel to hear his motion.

This Court should sustain Proposition of Law Error No. V.

PROPOSITION OF LAW NO. VI

A DEFENDANT'S GUILTY PLEA, TO BE KNOWING AND INTELLIGENTLY ENTERED, MUST BE BASED UPON AN ACCURATE UNDERSTANDING OF THE FACTS AND APPLICABLE LAW.

On May 21, 2007, Appellant filed a motion to withdraw his guilty pleas. He premised his motion on the fact that: 1) he misunderstood the effect of his guilty pleas; 2) he misunderstood the law which was applicable to the length of sentence that would be imposed; 3) the prosecutor suppressed exculpatory evidence; and 4) he received the ineffective assistance of counsel in entering the pleas. On May 22, 2007, the prosecution filed a memorandum opposing the motion, The presiding judge entertained argument on the motion, at the conclusion of which she denied the motion. [5/24/07 Transcript pp. 24-29]. The presiding judge's ruling violated Appellant's rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments.⁷

⁷ In Proposition of Law No. V, Donald Ketterer challenged the jurisdiction of the presiding judge to consider the motion without the other two members of the panel.

A. A DEFENDANT'S GUILTY PLEA MUST BE PREMISED UPON AN ACCURATE UNDERSTANDING OF THE FACTS AND LAW.

A plea of guilty or no contest differs in purpose and effect from a mere admission of an extra judicial confession, in that the plea is itself a conviction. A guilty plea must represent a voluntary and intelligent choice among the alternative courses open to the accused. *Boykin v. Alabama* (1969), 395 U.S. 238, 242, 89 S. Ct. 1709; *Machibroda v. United States* (1962), 368 U.S. 487, 493, 82 S. Ct. 510.

Therefore a guilty plea is only proper if it is entered voluntarily after proper advice and with full understanding of the consequences. *Machibroda v. United States*, 368 U.S. at 493; *Kercheval v. United States* (1927), 274 U.S. 220, 223, 47 S. Ct. 582. The standard to be applied in assessing a guilty plea is whether “under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.” *State v. Stewart* (1977), 51 Ohio St. 2d 86, 93, 364 N.E.2d 1163; *State v. Carter* (1979), 60 Ohio St. 2d 34, 38, 396 N.E.2d 757.

B. APPELLANT'S PLEAS ARE INFIRM BECAUSE THEY WERE PREMISED UPON A FACTUAL MISUNDERSTANDING.

Defense counsel advised Appellant that if he entered a guilty plea to a three judge panel, his life would be spared. [Motion to Withdraw Guilty Pleas, Exhibit 1]. Appellant told Nolan Smiley, who was incarcerated with him, that “his attorneys told him that if he plead guilty, he would not get the death penalty. This is the reason that he did not go to the jury.” [*Id.* at Exhibit 2]. Appellant made a similar statement to fellow inmate Oran Brumely. [*Id.* at Exhibit 3].

The presiding judge and the three judge panel conducted separate hearings as to the jury waiver and guilty pleas. The presiding judge accepted the jury waiver on the morning of

January 27, 2004. The panel conducted the hearing on the entry of the guilty pleas the same afternoon.

When the presiding judge accepted his jury waiver, Appellant executed a written waiver which provided as follows:

I, Donald Ketterer, the above-named defendant in the above-captioned cause, appeared in open court on the 27th day of January, 2004 and was advised that I am entitled under the Constitution and Laws of the State of Ohio to a trial by jury. Having been so advised and having satisfied this Court that I understand that I have such right, I do hereby knowingly, intelligently, and voluntarily waive my right to trial by jury.

Appellant is illiterate. [Exhibit 5, ¶¶ 17-20]. He has a full scale IQ of 72, which is in the borderline range of intellectual functioning. [*Id.* at ¶ 17] He reads and spells at a level that is in the lowest one percent of the population of his age group, at the level of a second and third grader. [*Id.* at ¶¶ 18-19]. The jury waiver that Appellant signed has a grade level of a twelfth grader, eight full grades beyond Petitioner Ketterer's comprehension. [*Id.* at ¶32] Even if he could have understood the document, it provided him with no information that a three judge panel could still impose the death penalty.

Defense counsel placed on the record the matter upon which they advised Mr. Ketterer concerning his guilty pleas. [01.27.04 Morning Session, Transcript, pp. 15-16]. Defense counsel did not affirmatively state that they advised Petitioner that he could still receive the death penalty if he waived his right to a jury trial.

The presiding judge conducted two colloquies with Appellant concerning his jury waiver. In its first colloquy the presiding judge focused on the range of sentences the jury could impose. [*Id.* at pp. 16-18]. This was irrelevant because the real issue was the range of sentences that the panel could impose. The trial court conducted a second colloquy with Appellant. [*Id.* at pp. 20-22]. This colloquy focused on the jury waiver that Appellant had previously executed.

The written waiver, which was beyond Appellant's comprehension, did not address the range of penalties that the panel could impose. Appellant, because he wanted the presiding judge to accept the waiver, told her that he could read and write, was not having any "problems with the English language," understood the plea waiver "perfectly", that he had no mental health problems, and he experienced no difficulty understanding what he was reading when he takes that medication [01.27.04, Morning session, pp. 21-22]. Appellant has always had mental health problems [Motion to Withdraw Guilty Pleas Exhibit 5, ¶ 37]. He is also illiterate, which is a condition that does not change over time. [*Id.* at 17-20]

The panel began the plea hearing by instructing Appellant that "And then you understood that *there was* a possibility of four possible sentences that they could come back [sic]" [01.27.04 Transcript, Afternoon Session, p. 4]. (emphasis added). But again, as in the morning session, the panel was referring to the four possible sentences that a jury could return. The panel's use of the past tense, "was" would have reinforced that the death penalty was no longer an option. When the panel, for the first time, stated that a three judge panel could also impose one of four sentences [*Id.* p. 7], Appellant simply replied "Yes ma'am" [*Id.* at p. 12]. His response was premised on the fact that appointed counsel had previously informed him that the Panel would not impose a death sentence. [Motion to Withdraw, Exhibit 1, ¶ 3].

Appellant executed two written guilty pleas; one for the Count of Aggravated Murder [*Id.* at Exhibit 4] and the other for the non-capital counts [*Id.* at Exhibit 6]. The guilty plea forms were beyond Appellant's level of comprehension. He has a full scale IQ of seventy-two [*Id.* at Exhibit 5, ¶ 17]. He reads at the level of a fourth grader. [*Id.* at 18] The guilty plea forms had a reading level of a 10.9 grade, nearly seven grade years beyond Appellant's level. [*Id.* at ¶31].

Even if Appellant had been able to read the forms, it would not have increased his understanding of the plea process. The forms were captioned "Plea of Guilty and Jury Waiver." He had already waived his right to a jury trial during the morning hearing. The forms did list the maximum penalty, "I understood that the maximum penalty as to each count is as follows..." [*Id.* at Exhibits 4 and 6]. Appellant's claim does not involve the assertion that he was not informed of the maximum penalties. Rather his claim is premised on the fact that he was led to believe that he would not receive the maximum sentence if he waived his right to a jury trial and entered guilty pleas.

An accused's guilty plea is not knowingly and intelligently entered when it is based upon the misinformation as to the sentence that he would receive. *Kercheval v. United States*, 274 U.S. at 49. This includes erroneous advice that is supplied by trial counsel. *State v. Longo* (1982), 4 Ohio App. 3d 136, 140, 446 N.E.2d 1145; *State v. Hyatt* (1996), 116 Ohio App. 3d 418, 122, 688 N.E.2d 531. That is what occurred in the present case.

C. APPELLANT'S PLEAS ARE INFIRM BECAUSE THEY WERE PREMISED UPON STATUTES THAT HAVE NOW DETERMINED TO BE CONSTITUTIONALLY INFIRM.

The statutory guidelines that were in effect at the time that Appellant plead guilty have since been determined to be unconstitutional. *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856. This change in the law renders his guilty plea constitutionally infirm. His plea was premised upon the law then in effect. See Proposition of Law No. III.

D. APPELLANT'S PLEAS ARE INFIRM BECAUSE THE PROSECUTORS SUPPRESSED EXCULPATORY EVIDENCE.

Mr. Ketterer did not have an adequate understanding of the facts of his case when he entered his guilty plea. The prosecutor had suppressed exculpatory information. See Proposition of Law No. IV.

E. APPELLANT'S PLEAS ARE INFIRM BECAUSE THE COURT APPOINTED ATTORNEYS FAILED TO HIS PROVIDE HIM WITH REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant was entitled to the effective assistance of counsel with respect to his no contest pleas. *McMann v. Richardson* (1970), 397 U.S. 759, 770, 90 S. Ct. 1441; *Tollet v. Henderson* (1973), 411 U.S. 258, 266, 93 S. Ct. 1602. A court when resolving an ineffective assistance of counsel claim involving a guilty plea applies the two part test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S. Ct. 2052. A court assesses whether counsel's performance was deficient and whether there was a reasonable probability that but for counsel's error, the defendant would have stood on his not guilty plea and gone to trial. *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59, 106 S. Ct. 366. *State v. Xie* (1992), 62 Ohio St. 3d 521, 524, 584 N.E.2d 715.

The advice that appointed counsel provided Appellant concerning the entrance of his guilty pleas was not proceeded by a reasonable investigation. Any information or advice that appointed counsel provides a defendant and which is not preceded by a reasonable investigation does not constitute a "strategic decision." *Strickland v. Washington*, 466 U.S. at 689, 691.

Appointed counsel did not possess all of the relevant facts concerning the involvement of Mary Gabbard and Donald Williams in the homicide. Some of counsels' lack of knowledge was attributable to the prosecutor for not providing the discovery of all exculpatory evidence. See Proposition of Law No. I, *supra*. Trial counsel's own negligence was the cause of some of their ignorance of the facts. Trial counsel's delay in submitting the hair found in the victim's hands for testing was critical. As a result, trial counsel did not receive the DNA results until after Appellant entered his guilty pleas. [Motion to Withdraw Guilty Plea Exhibit 21].

More importantly, appointed counsel did not notify Appellant of the DNA results until after he entered his plea. [*Id.* at Exhibit 1, ¶4].

Similarly, appointed counsel did not possess all of the relevant facts concerning sentencing when advising Appellant to plead guilty. On March 18, 2003 the trial court appropriated funding for trial counsel to retain two investigators one of whom was mitigation specialist Jim Crates who was to conduct the sentencing investigation [*Id.* at Exhibit 24]. Crates, what little work he did complete, was not conducted until later in the case. [*Id.* at Exhibit 25]. He never met with Appellant. [*Id.* at Exhibits 25 ¶3; 32 ¶25].

Appointed counsel failed to meaningfully communicate with Appellant. Counsel must not only insure that the information provided the client is correct, but that the information is communicated in such a manner that the client fully comprehends the information. Defense counsel, when they represent an uneducated individual who is not sophisticated in legal terminology, have a duty to explain in very simple terms, using language with which the client is familiar, exactly what the options are and how they will affect him. Appellant has a full scale IQ of 72 and functions on the level of a third or fourth grader. [*Id.* at Exhibit 5, ¶20]. Thus defense counsel had a duty to explain to Appellant the guilty pleas and jury waiver procedures in such a manner that a third or fourth grader would understand. There is no evidence that trial counsel met this requirement. Appointed counsel had a very tense and negative relationship with Appellant. [12.09.03, Transcript pp. 6, 7, Motion to Withdraw Guilty Plea Exhibits 27, 28, pp. 11-12; Exhibit 29]. They waited until the night prior to the commencement of trial to approach Appellant concerning the entrance of guilty pleas. [01.27.04 Morning Session Transcript, p. 15]. This last minute approach did not afford Appellant sufficient time weigh his options, given his

significant mental health and intelligence limitations, as determined to exist by this Court. *State v. Ketterer*, 111 Ohio St. 3d 70, 2006-Ohio-5283, ¶¶ 200-202

Defense counsel, when communicating with a client, must provide the client with the downside of any course of action. 2003 ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases, Guidelines 10.9.1 D and 10.9.2 B. Appellant should have been made to understand that even if he waived his right to a jury, the death penalty was still legally available. He obviously did not understand that he could still receive the death penalty as evidenced in the conversations that he had with fellow inmates. [Motion to Withdraw Guilty Plea Exhibits, 2, 3]. After the panel sentenced him to death, he felt betrayed because he believed that his counsel had promised him that if he waived his right to a jury trial and entered guilty pleas, his life would be spared. [*Id.* at Exhibits 1, 2, 3,].

Appellant was prejudiced by counsel's deficient performance. There is a reasonable probability that he would have proceeded with a jury if he had been properly advised by trial counsel.

F. CONCLUSION: THE PRESIDING JUDGE ERRED WHEN SHE DENIED THE MOTION TO WITHDRAW THE PLEAS, OR IN THE ALTERNATIVE, DID NOT CONDUCT AN EVIDENTIARY HEARING.

"[A] presentence motion to withdraw a guilty plea should be freely and liberally granted [when] . . . there is a reasonable and legitimate basis for the withdrawal of the plea." *State v. Xie*, 62 Ohio St. 3d at 527. Because this Court had vacated his sentences, Appellant's motion to withdraw his guilty pleas constituted a "presentence motion to withdraw a guilty plea." The presiding judge erred when she did not grant the motion.

In the alternative, the presiding judge should have conducted an evidentiary hearing concerning the motion to withdraw the plea. The allegations contained therein were

sufficiently plausible and find sufficient support in the record. *State v. Kidd*, 168 Ohio App. 3d 382, 2006 Ohio 4008, ¶ 14,

This Court should sustain Proposition of Law No. VI.

CONCLUSION

For the reasons identified herein, this Court should 1) vacate Appellant's sentences, 2) the decisions of the panel and trial denying his motions for court disclosure of exculpatory evidence and to withdraw his guilty pleas and 3) remand this matter to the trial court. This Court should order that on remand the panel grant the exculpatory evidence motion and either grant the motion to withdraw the guilty pleas or hold an evidentiary hearing on the motion. This Court should further instruct the panel court that any sentences it does impose should not exceed the statutory minimum and should be served concurrently.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender

Randall L. Porter by authorization,
Randall L. Porter (0005835)
Assistant State Public Defender
Counsel of Record

Richard J. Vick
Richard J. Vick
0032997

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Randall.Porter@OPD.Ohio.gov

COUNSEL FOR DONALD KETTERER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of Appellant Donald J. Ketterer was forwarded by first-class U.S. Mail, postage prepaid to Daniel G. Eichel, First Assistant Butler County Prosecuting Attorney, and Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorney at the Government Services Center, 315 High Street, Hamilton, Ohio 45011 on this 5th day of November, 2007.

Randall L. Porter

RANDALL L. PORTER #0005835
Assistant State Public Defender

COUNSEL FOR DONALD KETTERER

by
authorization
RJ Vick
Richard J. Vick
0032997

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No. 2007-1261
-vs- : Appeal taken from Butler County
DONALD J. KETTERER, : Court of Common Pleas
: Case No. CR 2003-03-0309
Appellant. : This is a death penalty case.

APPENDIX TO MERIT BRIEF OF APPELLANT DONALD J. KETTERER

ROBIN PIPER
Prosecuting Attorney

Daniel Eichel (0008259)
First Assistant Prosecuting Attorney

Michael A. Oster (0076491)
Assistant Prosecuting Attorney

Butler County Prosecutor's Office
Government Services Center
315 High Street, 11th Floor
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COUNSEL FOR APPELLANT

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

DONALD J. KETTERER,

Appellant.

:

: Case No.

07-1261

: Appeal taken from Butler County
Court of Common Pleas

: Case No. CR 2003-03-0309

: This is a death penalty case.

NOTICE OF APPEAL OF APPELLANT DONALD J. KETTERER

ROBIN PIPER
Prosecuting Attorney

Daniel Eichel (0008259)
First Assistant Prosecuting Attorney

Michael A. Oster (0076491)
Assistant Prosecuting Attorney
Prosecuting Attorney

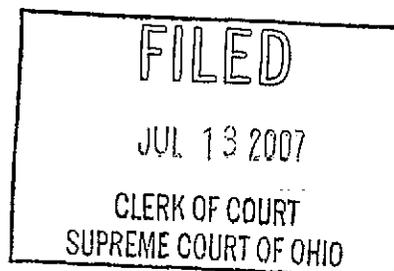
Butler County Prosecutor's Office
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315 High Street, 11th Floor
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COUNSEL FOR APPELLEE

DAVID H. BODIKER
Ohio Public Defender

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COUNSEL FOR APPELLANT



IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. _____
Appellee, :
-vs- : Appeal taken from Butler County
DONALD J. KETTERER, : Court of Common Pleas
: Case No. CR 2003-03-0309
Appellant. : This is a death penalty case.

DONALD KETTERER'S NOTICE OF APPEAL

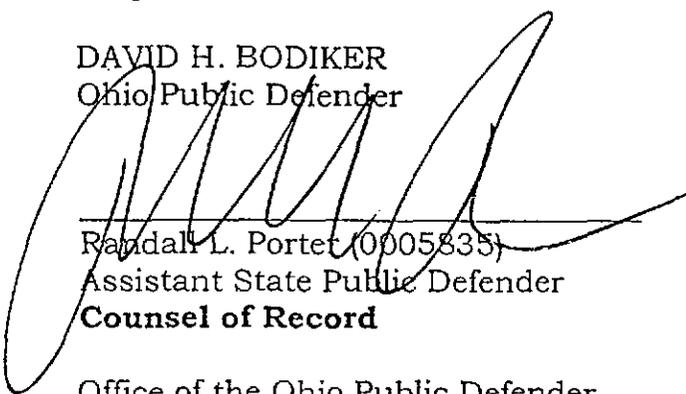
Appellant Donald J. Ketterer hereby gives notice of appeal to the Supreme Court of Ohio from the orders and judgment entry of the Butler County Court of Common Pleas entered in Case No. CR 2003-03-0309 on the following dates: May, 29, 2007 (Re-sentencing Judgment Entry of Conviction, Exhibit A); June 21, 2007 (Order Denying Defendant's Motion for The Disclosure of Favorable Evidence for Purposes of Re-Sentencing, Exhibit B) and June 21, 2007 (Order Denying Appellant's Motion to Withdraw Guilty Pleas, Exhibit C).

This is a capital case and the date of the offense is February 24, 2003. See Supreme Court Rule of Practice XIX, § 1(A). This Court has affirmed Donald Ketterer's convictions and death sentence. *State v. Ketterer* 111 Ohio St. 3d 70, 2006-Ohio-5283. On April 18, 2007, this Court vacated the non-capital offenses and remanded the matter for re-sentencing. *State v. Ketterer*

113 Ohio St. 3d 1463, 2007-Ohio-1722. The instant appeal is from the remand proceedings in the trial court.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender



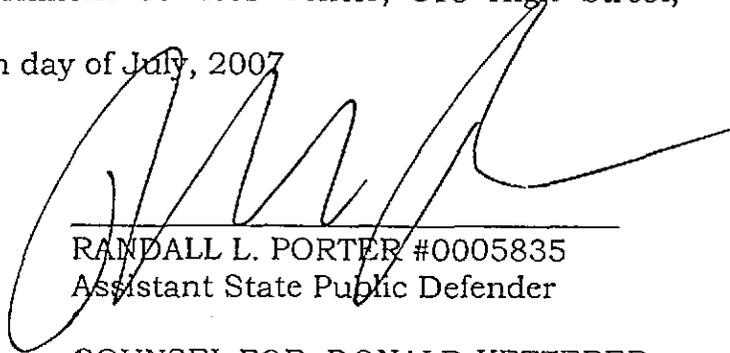
Randall L. Porter (0005835)
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Counsel of Record

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Columbus, Ohio 43215
(614) 466-5394
(614) 644-0703 (Fax)
Randall.Porter@OPD.Ohio.gov

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify a copy of the foregoing NOTICE OF APPEAL has been sent by regular U.S. mail to Daniel G. Eichel, First Assistant Butler County Prosecuting Attorney, and Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorney at the Government Services Center, 315 High Street, Hamilton, Ohio 45011 on this 13th day of July, 2007



RANDALL L. PORTER #0005835
Assistant State Public Defender

COUNSEL FOR DONALD KETTERER

R. Porter

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED in Common Pleas Court
BUTLER COUNTY, OHIO
MAY 29 2007
CINDY CARPENTER
CLERK OF COURTS

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

CASE NO. CR2003-03-0309

ONEY, J., SAGE, J. and CREHAN, J.

RE-SENTENCING
JUDGMENT OF CONVICTION ENTRY

On May 24, 2007 defendant's re-sentencing hearing was held on the noncapital offenses, Counts Two, Three, Four and Five, pursuant to Ohio Revised Code Section 2929.19 and the decision in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722, the previous judgment of conviction and sentence as to Count One having been affirmed in State vs. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, certiorari denied (May 14, 2007), _____ U.S. _____, 2007 WL812004. Defense attorney Randall Porter, and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's Guilty Finding by Judges, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees.

The Court finds that the defendant has been found guilty of:

AGGRAVATED ROBBERY as to Count Two, a violation of Revised Code Section 2911.01(A)(3) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count One.
Fine in the amount of \$2,000

AGGRAVATED BURGLARY as to Count Three, a violation of Revised Code Section 2911.11(A)(1) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count Two.
Fine in the amount of \$2,000

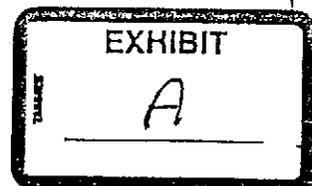
GRAND THEFT as to Count Four, a violation of Revised Code Section 2913.02(A)(1) a fourth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 17 months.
This sentence will be served **concurrent** with Count(s) Two and Three.

BURGLARY as to Count Five, a violation of Revised Code Section 2911.12(A)(3) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.

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



This sentence will be served consecutive to Count(s) Two and Three.
Fine in the amount of \$1,000

Credit for 1556 served is granted as of this date.

As to Count(s) Two, Three, Four and Five:

The Court has notified the defendant that post release control is in this case up to a maximum of years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. 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. The defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

Defendant is ORDERED to pay:

Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4).

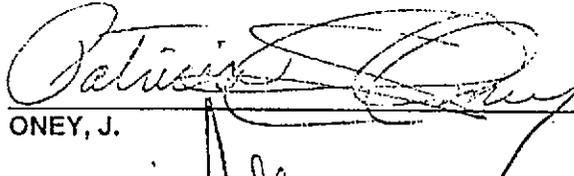
The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his / her right to have notice of appeal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

Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

APPROVED AS TO FORM:

ENTER

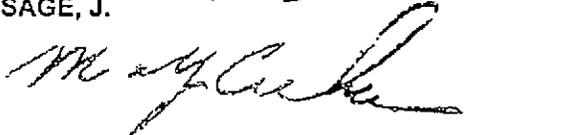
ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO



ONEY, J.



SAGE, J.



CREHAN, J.

MAO/beg
May 25, 2007

h. letter

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JUN 21 2007

CLERK OF COURTS

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

CASE NO. CR2003-03-0309

ONEY, J.

ORDER DENYING DEFENDANT'S MOTION
FOR THE DISCLOSURE OF FAVORABLE
EVIDENCE FOR PURPOSES OF RE-
SENTENCING

This matter came before the Court, on May 24, 2007, upon Defendant's Motion for the disclosure of favorable evidence for purposes of re-sentencing. After due consideration of the Motion, Legal Memorandum and Oral Argument from both parties on said Motion, the Court finds that said motion is not well taken.

It is, THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendant's Motion for the disclosure of favorable evidence for purposes of re-sentencing is hereby denied.

[Handwritten Signature]
Oney, J.

APPROVED AS TO FORM:

ROBIN PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

MAO/beg
June 19, 2007

EXHIBIT
B

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JUN 27 2007
CLERK OF COURTS
BUTLER COUNTY, OHIO

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

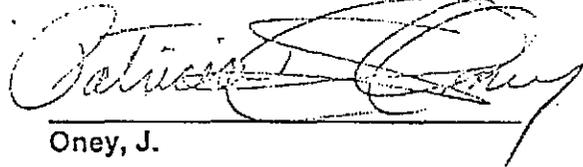
CASE NO. CR2003-03-0309

ONEY, J.

ORDER DENYING DEFENDANT'S MOTION
TO WITHDRAW GUILTY PLEAS

This matter came before the Court, on May 24, 2007, upon Defendant's Motion to withdraw guilty pleas. After due consideration of the Motion, Legal Memorandum and the Oral Argument from both parties, the Court finds that the motion is not well taken.

It is, **THEREFORE, ORDERED, ADJUDGED AND DECREED** that Defendant's Motion to withdraw his guilty pleas is hereby denied.



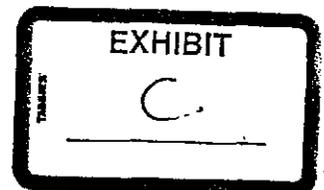
Oney, J.

APPROVED AS TO FORM:

ROBIN PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

MAO/beg
June 19, 2007

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



h. Pollock

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED in Common Pleas Court
BUTLER COUNTY, OHIO

MAY 29 2007
CINDY CARPENTER
CLERK OF COURTS

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

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The Court finds that the defendant has been found guilty of:

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PROSECUTING ATTORNEY, BUTLER COUNTY, OHIO
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Defendant is ORDERED to pay:

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Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

APPROVED AS TO FORM:

ENTER

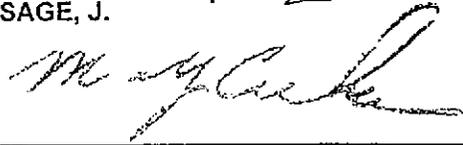
ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO



ONEY, J.



SAGE, J.



CREHAN, J.

MAO/beg
May 25, 2007

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JUN 27 2007

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

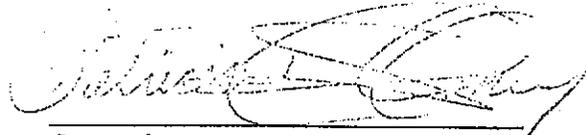
CASE NO. CR2003-03-0309

ONEY, J.

ORDER DENYING DEFENDANT'S MOTION
TO WITHDRAW GUILTY PLEAS

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It is, **THEREFORE, ORDERED, ADJUDGED AND DECREED** that Defendant's Motion to withdraw his guilty pleas is hereby denied.



Oney, J.

APPROVED AS TO FORM:

ROBIN PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

MAO/beg
June 19, 2007

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

H. Polter

2007

STATE OF OHIO

CASE NO. CR2003-03-0309

Plaintiff

ONEY, J.

vs.

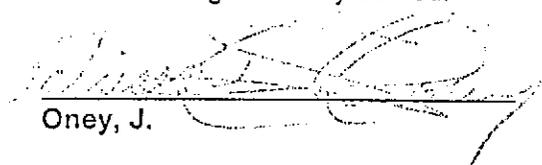
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FOR THE DISCLOSURE OF FAVORABLE
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SENTENCING

DONALD JOSEPH KETTERER

Defendant

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Oney, J.

APPROVED AS TO FORM:

ROBIN PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

MAO/beg
June 19, 2007

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT VI

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.

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT XIV

Section 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.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

LEXSTAT 18 USC 3553

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH P.L. 110-106, APPROVED 10/25/2007 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
 PART II. CRIMINAL PROCEDURE
 CHAPTER 227. SENTENCES
 SUBCHAPTER A. GENERAL PROVISIONS

Go to the United States Code Service Archive Directory

18 USCS § 3553

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
 THIS IS PART 1.
 USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to *section 994(a)(1) of title 28, United States Code*, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [*18 USCS § 3742(g)*], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to *section 994(a)(3) of title 28, United States Code*, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to *section 994(a)(2) of title 28, United States Code*, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.

(1) In general [Caution: In *United States v. Booker* (2005) 543 US 220, 160 L Ed 2d 621, 125 S Ct 738, the Supreme Court held that 18 USCS § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the requirements of the Sixth Amendment and therefore must be severed and excised from the Sentencing Reform Act of 1984.]. Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 [18 USCS § 1201] involving a minor victim, an offense under section 1591 [18 USCS § 1591], or an offense under chapter 71, 109A, 110, or 117 [18 USCS §§ 1460 et seq., 2241 et seq., 2251 et seq., or 2421 et seq.], the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with *Federal Rule of Criminal Procedure* 32. In the event that the court relies upon statements received in camera in accor-

dance with *Federal Rule of Criminal Procedure 32* the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555 [18 USCS § 3555], the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to *section 994 of title 28, United States Code*.

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 USCS § 848]; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

LEXSTAT ORC 181.24

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH OCTOBER 24, 2007 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2007 ***

TITLE 1. STATE GOVERNMENT
CHAPTER 181. CRIMINAL SENTENCING COMMISSION; CRIMINAL JUSTICE SERVICES
CRIMINAL SENTENCING

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ORC Ann. 181.24 (2007)

§ 181.24. Recommendation of comprehensive criminal sentencing structure; projections; draft version

(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.

LEXSTAT ORC 2901.04

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

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ORC Ann. 2901.04 (2007)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(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.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
BURGLARY

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ORC Ann. 2911.11 (2007)

§ 2911.11. Aggravated burglary

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in *section 2909.01 of the Revised Code*.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2929. PENALTIES AND SENTENCING
 PENALTIES FOR FELONY

Go to the Ohio Code Archive Directory

ORC Ann. 2929.14 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (G), or (L) of this section and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

- (1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.
- (2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.
- (3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.
- (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.
- (5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in *section 2907.02 or 2907.05 of the Revised Code*, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

- (1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.
- (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D) (1) (a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141 [2941.14.1]*, *2941.144 [2941.14.4]*, or *2941.145 [2941.14.5]* of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 [2941.14.4]* of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 [2941.14.5]* of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 [2941.14.1]* of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 [2923.16.1]* of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 [2941.14.6]* of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 [2923.16.1]* of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 [2941.14.11]* of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.12 or 2923.123 [2923.12.3]* of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.13 of the Revised Code* unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 [2941.14.12] of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer as defined in *section 2941.1412 [2941.14.12] of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to *section 2929.20, section 2967.193 [2967.19.3]*, or any other provision of Chapter 2967, or Chapter 5120, of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(2) (a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (DD)(1) of *section 2929.01 of the Revised Code*, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) (a) Except when an offender commits a violation of *section 2903.01 or 2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03 or 2925.11 of the Revised Code* and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161 [3719.16.1], 4729.37, or 4729.61, division (C) or (D) of section 3719.172 [3719.17.2], division (C) of section 4729.51, or division (J) of *section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 [2941.14.10] of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

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

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

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 [2941.14.14] of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section*

2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 [2941.14.15] 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 [2941.14.15] of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(E) (1) (a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 [2923.13.1] of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 [2921.33.1] of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

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

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

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

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] 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 [2929.14.2] 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 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to 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 [2941.14.18]*, *2941.1419 [2941.14.19]*, or *2941.1420 [2941.14.20] 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 [2929.14.2] of the *Revised Code*, or section 2971.03 of the *Revised Code*, or any other provision of law, section 5120.163 [5120.16.3] of the *Revised Code* applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 [2941.14.2] of the *Revised Code* that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 [2941.14.3] of the *Revised Code* that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 [5120.03.1] of the *Revised Code* or for placement in an intensive program prison under section 5120.032 [5120.03.2] of the *Revised Code*, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the *Revised Code*, whichever is applicable, that the offender is eligible for the placement.

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

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

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

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the *Revised Code*, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the *Revised Code* and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(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 [2929.14.2] of the *Revised Code*.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH OCTOBER 24, 2007 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.19 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 2929.19. Sentencing hearing

(A) (1) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to *section 2953.07 or 2953.08 of the Revised Code*. At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with *section 2930.14 of the Revised Code*, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

(2) Except as otherwise provided in this division, before imposing sentence on an offender who is being sentenced on or after January 1, 1997, for a sexually oriented offense that is not a registration-exempt sexually oriented offense and who is in any category of offender described in division (B)(1)(a)(i), (ii), or (iii) of *section 2950.09 of the Revised Code*, the court shall conduct a hearing in accordance with division (B) of *section 2950.09 of the Revised Code* to determine whether the offender is a sexual predator. The court shall not conduct a hearing under that division if the offender is being sentenced for a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender was adjudicated a sexually violent predator, if the offender is being sentenced under *section 2971.03 of the Revised Code* for a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after the effective date of this amendment, if the offender is sentenced to a term of life without parole under division (B) of *section 2907.02 of the Revised Code*, or if the offender is being sentenced for attempted rape committed on or after the effective date of this amendment and a specification of the type described in *section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code*. Before imposing sentence on an offender who is being sentenced for a sexually oriented offense that is not a registration-exempt sexually oriented offense, the court also shall comply with division (E) of *section 2950.09 of the Revised Code*.

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

(B) (1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to *section 2951.03 of the Revised Code* or *Criminal Rule 32.2*, and any victim impact statement made pursuant to *section 2947.051 [2947.05.1] of the Revised Code*.

(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

(a) Unless the offense is a violent sex offense or designated homicide, assault, or kidnapping offense for which the court is required to impose sentence pursuant to division (G) of *section 2929.14 of the Revised Code*, if it imposes a prison term for a felony of the fourth or fifth degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of *section 2929.13 of the Revised Code* for purposes of sentencing, its reasons for imposing the prison term, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and any factors listed in divisions (B)(1)(a) to (i) of *section 2929.13 of the Revised Code* that it found to apply relative to the offender.

(b) If it does not impose a prison term for a felony of the first or second degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and for which a presumption in favor of a prison term is specified as being applicable, its reasons for not imposing the prison term and for overriding the presumption, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and the basis of the findings it made under divisions (D)(1) and (2) of *section 2929.13 of the Revised Code*.

(c) If it imposes consecutive sentences under *section 2929.14 of the Revised Code*, its reasons for imposing the consecutive sentences;

(d) If the sentence is for one offense and it imposes a prison term for the offense that is the maximum prison term allowed for that offense by division (A) of *section 2929.14 of the Revised Code* or *section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term;

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

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

(a) Impose a stated prison term;

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

(c) Notify the offender that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. If a court imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of *section 2967.28 of the Revised Code*. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of this section and

failed to notify the offender pursuant to division (B)(3)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

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

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

(4) If the offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense, if the offender is being sentenced for a sexually oriented offense that is not a registration-exempt sexually oriented offense and that the offender committed on or after January 1, 1997, and the court imposing the sentence has determined pursuant to division (B) of *section 2950.09 of the Revised Code* that the offender is a sexual predator, if the offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense and the court imposing the sentence has determined pursuant to division (B) of *section 2950.091 [2950.09.1] of the Revised Code* that the offender is a child-victim predator, if the offender is being sentenced for an aggravated sexually oriented offense as defined in *section 2950.01 of the Revised Code*, if the offender is being sentenced under *section 2971.03 of the Revised Code* for a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after the effective date of this amendment, if the offender is sentenced to a term of life without parole under division (B) of *section 2907.02 of the Revised Code*, or if the offender is being sentenced for attempted rape committed on or after the effective date of this amendment and a specification of the type described in *section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code*, the court shall include in the offender's sentence a statement that the offender has been adjudicated a sexual predator, has been adjudicated a child victim predator, or has been convicted of or pleaded guilty to an aggravated sexually oriented offense, whichever is applicable, and shall comply with the requirements of *section 2950.03 of the Revised Code*. Additionally, in the circumstances described in division (G) of *section 2929.14 of the Revised Code*, the court shall impose sentence on the offender as described in that division.

(5) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to *section 2929.14 of the Revised Code*.

(6) Before imposing a financial sanction under *section 2929.18 of the Revised Code* or a fine under *section 2929.32 of the Revised Code*, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(7) If the sentencing court sentences the offender to a sanction of confinement pursuant to *section 2929.14* or *2929.16 of the Revised Code* that is to be served in a local detention facility, as defined in *section 2929.36 of the Revised Code*, and if the local detention facility is covered by a policy adopted pursuant to *section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to *section 2929.37 of the Revised Code* for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(7)(a)(i) of this section and does not pay the bill by the times specified in *section 2929.37 of the Revised Code*, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(7)(a)(ii) of this section.

(C) (1) If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose additional sanctions as specified in *sections 2929.15, 2929.16, 2929.17, and 2929.18 of the Revised Code*. The court shall not impose a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of *section 2929.13 of the Revised Code*.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose an additional prison term as specified in *section 2929.14 of the Revised Code*. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (K) of *section 2929.14 of the Revised Code*, may recommend placement of the offender in a program of shock incarceration under *section 5120.031 [5120.03.1] of the Revised Code* or an intensive program prison under *section 5120.032 [5120.03.2] of the Revised Code*, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

LEXSTAT ORC ANN. 2929.20

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
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*** ANNOTATIONS CURRENT THROUGH JULY 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

Go to the Ohio Code Archive Directory

ORC Ann. 2929.20 (2007)

§ 2929.20. Judicial release

(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 [2947.05.1] 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 [2946.05.1]* 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.

LEXSTAT ORC ANN. 2929.41

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
MULTIPLE SENTENCES

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ORC Ann. 2929.41 (2007)

§ 2929.41. Multiple sentences

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

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

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

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

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

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
TRIAL BY COURT

ORC Ann. 2945.06 (2007)

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

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES

ORC Ann. 2953.02 (2007)

§ 2953.02. Review of judgments

In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which a sentence of death is imposed for an offense committed before January 1, 1995, and in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right. The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except that, in cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, and in which the question of the weight of the evidence to support the judgment has been raised on appeal, the supreme court shall determine as to the weight of the evidence to support the judgment and shall determine as to the weight of the evidence to support the sentence of death as provided in section 2929.05 of the Revised Code.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2967. PARDON; PAROLE; PROBATION

ORC Ann. 2967.28 (2007)

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

(1) "Monitored time" means the monitored time sanction specified in section 2929.17 of the Revised Code.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to 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 shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after the effective date of this amendment, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section

2929.14 of the Revised Code a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) 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 physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code a statement regarding post-release control.

(D) (1) Before the prisoner is released from imprisonment, the parole board shall impose upon a prisoner described in division (B) of this section, may impose upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 [5120.03.1] or in division (B)(1) of section 5120.032 [5120.03.2] of the Revised Code, one or more post-

release control sanctions to apply during the prisoner's period of post-release control. Whenever the board imposes one or more post-release control sanctions upon a prisoner, the board, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the individual or felon not leave the state without permission of the court or the individual's or felon's parole or probation officer and that the individual or felon abide by the law. The board may impose any other conditions of release under a post-release control sanction that the board considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to sections 2929.16, 2929.17, and 2929.18 of the Revised Code. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall review the prisoner's criminal history, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031 [5120.03.1], or division (B)(1) of section 5120.032 [5120.03.2] of the Revised Code, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board shall presume that monitored time is the appropriate post-release control sanction unless the board determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after the effective date of this amendment, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division

(B) of section 2967.131 [2967.13.1] of the Revised Code that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. Unless the period of post-release control was imposed for an offense described in division (B)(1) of this section, the authority also may recommend that the parole board reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board reduce the duration of control for an offense described in division (B)(2), (B)(3), or (C) of this section, the board shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board reduce the duration of the period of control imposed by the court for an offense described in division (B)(1) of this section, and in no case shall the board permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

(E) The department of rehabilitation and correction, in accordance with Chapter 119. of the Revised Code, shall adopt rules that do all of the following:

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in section 2929.11 of the Revised Code and that are appropriate to the needs of releasees;

(2) Establish standards by which the parole board can determine which prisoners described in division (C) of this section should be placed under a period of post-release control;

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony

of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the releasee's activities including, but not limited to, remaining free from criminal activity and from the abuse of alcohol or other drugs, successfully participating in approved rehabilitation programs, maintaining employment, and paying restitution to the victim or meeting the terms of other financial sanctions;

(4) Establish standards to be used by the adult parole authority in modifying a releasee's post-release control sanctions pursuant to division (D)(2) of this section;

(5) Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

(a) Classify violations according to the degree of seriousness;

(b) Define the circumstances under which formal action by the parole board is warranted;

(c) Govern the use of evidence at violation hearings;

(d) Ensure procedural due process to an alleged violator;

(e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;

(f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

(F) (1) Whenever the parole board imposes one or more post-release control sanctions upon an offender under this section, the offender upon release from imprisonment shall be under the general jurisdiction of the adult parole authority and generally shall be supervised by the field services section through its staff of parole and field officers as described in section 5149.04 of the Revised Code, as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions described in division (A) of section 2967.131 [2967.13.1] of the Revised Code that are imposed on the offender, the public or private person or entity that operates or administers the sanction or the program or activity

that comprises the sanction shall report the violation directly to the adult parole authority or to the officer of the authority who supervises the offender. The authority's officers may treat the offender as if the offender were on parole and in violation of the parole, and otherwise shall comply with this section.

(2) If the adult parole authority determines that a releasee has violated a post-release control sanction or any conditions described in division (A) of section 2967.131 [2967.13.1] of the Revised Code imposed upon the releasee and that a more restrictive sanction is appropriate, the authority may impose a more restrictive sanction upon the releasee, in accordance with the standards established under division (E) of this section, or may report the violation to the parole board for a hearing pursuant to division (F)(3) of this section. The authority may not, pursuant to this division, increase the duration of the releasee's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the authority may impose on the releasee any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to sections 2929.16, 2929.17, and 2929.18 of the Revised Code.

(3) The parole board may hold a hearing on any alleged violation by a releasee of a post-release control sanction or any conditions described in division (A) of section 2967.131 [2967.13.1] of the Revised Code that are imposed upon the releasee. If after the hearing the board finds that the releasee violated the sanction or condition, the board may increase the duration of the releasee's post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release control sanction. When appropriate, the board may impose as a post-release control sanction a residential sanction that includes a prison term. The board shall consider a prison term as a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when the releasee committed repeated violations of post-release control sanctions. The period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. The period of a prison term that is imposed as a post-release control sanction under this division shall not count as, or be credited toward, the

remaining period of post-release control.

post-release control imposed for the earlier felony as determined by the parole board.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control for a period of time determined by division (F)(4)(d) of this section, the maximum cumulative prison term for all violations under this division shall not exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the parole board, plus one-half of the total stated prison term of the new felony.

(4) Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under section 2967.16 of the Revised Code until the post-release control period otherwise would have ended.

(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

(c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

(d) The period of post-release control for a releasee who commits a felony while under post-release control for an earlier felony shall be the longer of the period of post-release control specified for the new felony under division (B) or (C) of this section or the time remaining under the period of

OHIO RULES OF COURT SERVICE

Ohio Rules Of Civil Procedure Title III Pleadings And Motions

Ohio Civ. R. 12 (2007)

Rule 12. Defenses and objections - when and how presented - by pleading or motion - motion for judgment on the pleadings

(A) When answer presented.

(1) Generally.

The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

(2) Other responses and motions.

A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

(B) How presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6)

failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(C) Motion for judgment on the pleadings.

After the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings.

(D) Preliminary hearings.

The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

(E) Motion for definite statement.

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days

after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(F) Motion to strike.

Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

(G) Consolidation of defenses and objections.

A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except

as provided in subdivision (H) of this rule.

(H) Waiver of defenses and objections.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2007)

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a

lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 16 (2007)

Rule 16. Discovery and Inspection

(A) Demand for discovery.

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney.

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant.

Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record.

Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects.

Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the

state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests.

Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record.

Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant.

Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e)

apply to this subsection.

(g) In camera inspection of witness' statement.

Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure.

Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

(3) Grand jury transcripts.

The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment.

The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(a) Documents and tangible objects.

If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests.

If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses.

If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement.

Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to

determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure.

Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment.

The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose.

If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery.

(1) Protective orders.

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied,

restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Time, place and manner of discovery and inspection.

An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) Failure to comply.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions.

A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 25 (2007)

Rule 25. Disability of a Judge

(A) During trial.

If for any reason the judge before whom a jury trial has commenced is unable to proceed with the trial, another judge designated by the administrative judge, or, in the case of a single-judge division, by the Chief Justice of the Supreme Court of Ohio, may proceed with and finish the trial, upon certifying in the record that he has familiarized himself with the record of the trial. If such other judge is satisfied that he cannot adequately familiarize himself with the record, he may in his discretion grant a new trial.

(B) After verdict or finding of guilt.

If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by the administrative judge, or, in the case of a single-judge division, by the Chief Justice of the Supreme Court of Ohio, may perform those duties. If such other judge is satisfied that he cannot perform those duties because he did not preside at the trial, he may in his discretion grant a new trial.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32 (2007)

Rule 32. Sentence

(A) Imposition of sentence.

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

- (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.
- (2) Afford the prosecuting attorney an opportunity to speak;
- (3) Afford the victim the rights provided by law;
- (4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

STATE OF OHIO

Plaintiff

CASE NO. 9684

VS

JOHN DAVID STUMPF

MOTION

Defendant

Now comes the Defendant by his Attorneys Lewis N. Tingle and Craig Stephens and moves the Court for leave to withdraw his former plea of Guilty entered in the above case and setting this case for trial. In the alternative, the Defendant requests the Court to set aside the sentence imposed in this case and to order that a new sentencing (mitigation) proceeding be conducted.

/s/LEWIS M. TINGLE
Attorney for Defendant
138 North Seventh Street
Cambridge, OH 43725
(614) 439-7745

MEMORANDUM

This Court previously accepted a plea of Guilty from the Defendant and, following a hearing, imposed the Death Penalty upon the Defendant. At that time, a Co-Defendant was in custody in the State of Texas awaiting extradition to Ohio. This Co-Defendant, Clyde Daniel Wesley, was not

available to the Court or to the Defendant for testimony at that time. In fact, that Co-Defendant had made no statement to any law enforcement officer concerning the crimes for which the Defendant was charged and convicted.

Subsequent to this Defendant's sentencing, Clyde Daniel Wesley was returned to the State of Ohio and stood trial upon identical charges to that of the Defendant. Following that trial, Clyde Daniel Wesley was found Guilty of Aggravated Murder but received a sentence of life in prison with parole eligibility after twenty (20) years. During the course of that trial, the State produced a witness who testified as to conversations with Clyde Daniel Wesley while both were incarcerated in the Guernsey County Jail. This witness, James Eastman, testified that Clyde Daniel Wesley told him that he was the one who actually shot Mary Jane Stout. A copy the transcript of that testimony is attached hereto.

At the time of sentencing, this Court issued its separate Findings and specifically found that John David Stumpf was the principal offender in the shooting and killing of Mary Jane Stout. This testimony of James Eastman, which was not available to this Defendant at the time of sentencing, directly contradicts this finding of the Court. It is evidence which the Court should have available to it in determining the appropriate sentence to be imposed against John David Stumpf. It is of such a nature and importance that it warrants the withdrawal of the Guilty plea previously entered by this Defendant. At the very least, it is evidence which must be considered by the Court in determining the appropriate sentence to be imposed upon John David Stumpf. It is evidence which is material to the conduct of John David Stumpf and supports the evidence offered at the sentencing hearing that this Defendant was not the principal offender in

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the crime charged. A review of that evidence indicates it has a high degree of credibility when analyzed with the other evidence available.

Respectfully submitted,

/s/LEWIS M. TINGLE

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Motion was served upon C. Keith Plummer, Prosecuting Attorney, 139 Courthouse Square, Cambridge, Ohio 43725, by placing the same in the United States Mail addressed to him this 7th day of June, 1985.

/s/LEWIS M. TINGLE

IN THE COURT OF COMMON PLEAS,
FIFTH DISTRICT COURT OF APPEAL
IN AND FOR GUERNSEY COUNTY,
OHIO.

CASE NO. 9684

STATE OF OHIO,

Appellee,

v.

JOHN DAVID STUMPF,

Appellant.

1985 DEC 30 11 30 AM

Transcript of Trial Proceedings held on Tuesday,
October 1, 1985, before the Honorable John E. Henderson,
Judge and the Honorable J. Warren Settis.

APPEARANCES:

JAMES R. SCOTT
C. KEITH PLUMMER
Attorneys at Law
139 W. 8th Street
Cambridge, Ohio

For the Appellee,

CRAIG STEPHENS
LEWIS M. TINGLE
Attorney at Law
122 E. 8th Street
Cambridge, Ohio

For the Appellant.

P R O C E E D I N G S

(Whereupon, at 2:37 o'clock p.m.
Tuesday, October 1, 1985, the
following proceedings were had
before the Court.)

JUDGE HENDERSON: This is Case #9684. State of Ohio versus John David Stumpf, and it comes on to be heard upon a motion that had been filed on the 30th. There was a prior motion filed on the 7th day of June, 1985, in this case. Mr. Tingle had filed it on behalf of the defendant. Mr. Tingle and Mr. Stevens, for leave to withdraw former plea of "guilty" entered in the above case, set the case for trial in the alternative to set aside the sentence imposed in this case to order that a new sentencing proceeding be conducted to which the State of Ohio responded on the 15 of July. And then the matter was delayed in being set for hearing upon some indecision as to whether or not there was a Court in being which could hear this matter.

I think it should be stated that this was a four---or a three judge Court that has formerly heard the matter. Judge Bettis,

Judge Rice, and myself, and that at the time that the motion was filed by Mr. Tingle, the Court inquired of Judge Bettis and Judge Rice and learned that Judge Rice not only was ill, but was in extremely precarious condition and he died some weeks later. Then, the question arose as to whether or not this Court, the sitting Judge of the Common Pleas Court of Guernsey County, had any jurisdiction to hear any part of this and the question whether or not there was still a three judge Court of which two judges remain. And so this case has been set, the motion has been set for hearing at this time upon advice received by letter of September 11 from Louis Damiani, who is the Director of the Supreme Court in which the letter writer suggests "It would appear that you and Judge Bettis, a majority of the panel originally assigned in this case, may rule on this motion. In the event that you conclude that you cannot reach a unanimous decision on this motion, a third judge will be appointed to replace Judge Raymond C. Rice, deceased. This situation appears to be governed by Criminal Rule 25."

We also have received from the---let me say first that this entire case had been appealed and

was before the Court of Appeals of the Fifth Appellate District; and we received a judgment entry from the Court of Appeals which reads, "In the opinion of this court, the trial court has continuing jurisdiction to determine the motions now pending before it, but to accomodate the views of those who might consider it to be necessary, it is ORDERED, ADJUDGED AND DECREED that this cause is remanded to the trial court for the purpose of the determination of any and all motions now pending before it.

Following that determination, such supplemental assignments of error and briefs as counsel shall desire may be filed in accordance with the appellate rules. No new notice of appeal shall be necessary to preserve the continuing jurisdiction of this Court of Appeals over the direct appeal from the death sentence, and the question of whether any new notice or notices of appeal need be filed will depend, of course, upon the nature of the judgment of trial court upon the pending motions." Signed by three judges: Putman, Milligan, and Wise.

Then on yesterday there was filed in this Court a motion at 3:06 in the afternoon moving

the Court for a continuance of the hearing set for October 1 on his motion for withdrawal of the plea of "guilty" or in the alternative for new sentencing hearing, and Mr. Tingle is here to provide other statements. But he states in his motion that Clyde Daniel Wesley has advised him; that is, I suppose, Mr. Tingle, that he is willing to testify to the truth, that he did fire the gun which resulted in the death of Mary Jane Stout. States that insufficient time is available to obtain the presence of Clyde Daniel Wesley prior to the hearing scheduled for October 1, and that this is evidence which was not available at the time of the trial.

The Court has determined that there will be some type of a hearing today. Counsel is present both for the State and for the Defendant. And I think in fairness to Mr. Tingle and his colleague, Mr. Stevens, that the motion for continuance would bear some hearing at this time if you desire to present anything in support of that motion for continuance. I'm going to make a statement, however, at this time that this motion has been filed for a long time, and counsel was advised of the hearing of this date, and it seems to me that it's

very inappropriate that at 3:00 o'clock and six minutes yesterday afternoon that we would receive a motion for a continuance which Judge Bettis had carved out of his busy schedule and which this Judge has also found time for hearing. And it was set down with the full knowledge of the attorneys for the defendant and for the prosecution.

Before we go any further, I'm going to ask Judge Bettis if he has something he wants to say.

JUDGE BETTIS: I think you covered it very well, Judge.

JUDGE HENDERSON: It is depending upon the outcome of the hearing on the motion for continuance. It is my suggestion that we, at least since this is a matter which the Court of Appeals has opened up for us and said "now pending" before it and this motion of yesterday was not pending before it, I'm not sure that we can hear that other motion without the consent of the Court of Appeals. However, Mr. Tingle, on your motion for continuance, if you wish to present anything?

MR. TINGLE: Thank you, Your Honor. The sequence of events leading to the request for the continuance, this case had been set for hearing last week and scheduled on everyone's calendar. After the setting of that hearing, I did receive a letter

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from John Stumpf or that letter came to my attention in which he advised me of the statements which are listed in the motion for continuance that he attributes to Clyde Daniel Wesley. I have the letter. It is the original which I have provided to the Prosecutor and also marked as Defendant's Exhibit "1" which is offered in Court. After receipt of that letter, I did prepare an affidavit or the form of an affidavit and sent it out to Mr. Stumpf at Lucasville. There has not been sufficient time for the mail to reach him for him to obtain an affidavit and to send it back even if that were the case, the letter indicates that Clyde Daniel Wesley wishes to consult with his own attorney, Donald Brown, before taking any action in that regard. Today---this afternoon today we did contact Attorney Donald Brown, and in this afternoon's mail he did receive a letter from Clyde Daniel Wesley requesting advice from Mr. Brown on the issues relative to the John Stumpf case that just came to Mr. Brown's office today in this afternoon's mail. He would not divulge to us due to the private situation, the content, or what Mr. Wesley was requesting of him other than advise as to whether or not he would sign

the affidavit. That was not divulged either, but as a professional statement to the Court. I did contact Mr. Brown and he did verify that that letter did come in today to him. That information, because of this past week which has been transpiring in this Court, there has not been sufficient time to obtain an affidavit even if Mr. Wesley had had an opportunity to consult with Mr. Brown, which he has not.

The basis for our request for continuance, because it does directly relate to the same issue we raised in the motion, which we're prepared to go forward with, and that is the testimony of James Eastman, which, I believe, can be stipulated, which conforms to what is stated in the letter from Mr. Stumpf to me. It would be a matter of the same issue being raised by this motion and a subsequent motion for the continuance of the entire matter until all available evidence can be provided to the Court. Rule (33) does speak to the 120 day time limit from the date of entry. The trial of Clyde Daniel Wesley did not occur, or at least Mr. Wesley did not testify, until April 23 and 24 of 1985. We did file the motion within 120 days following that after trying to verify some additional

information, but it was not available to us. In fact, did not exist within 120 days after the date of sentencing of John David Stumpf. It only occurred upon Mr. Eastman's testimony in this Court as provided by the State of Ohio. For those reasons, we would request the Court a continuance in the matter to allow us time to pursue the question of whether Clyde Daniel Wesley will, in fact, sign an affidavit as outlined in the letter from John David Stumpf.

JUDGE BETTIS: Well, Lew, the letter itself is dated September 19, 1985. What have you been doing on the letter since September 19? Hasn't that given you some time at least to make a trip down and see your client? You didn't tell this Court about it until yesterday. Why didn't you tell us immediately about this?

MR. TINGLE: The letter came in the 23rd.

JUDGE BETTIS: Sure, I accept your professional word on that. But the letter itself is dated September 19. Since September 23rd, why didn't you at least give this Court the courtesy of telling us you had such a letter until yesterday afternoon?

MR. TINGLE: Because the letter did not come to my attention. I had skimmed over the letter very quickly, as I

did this past week. And then on Saturday as I was trying to go through some additional mail, went through the letter again, saw the content of that letter, and at that point dictated a letter out with an affidavit form to Mr. Stumpf. It is simply I've been in another case this past week that it did not come to my attention earlier.

JUDGE BETTIS: We're all involved in other matters.

JUDGE HENDERSON: Mr. Scott or Mr. Plummer, on the question of continuance.

MR. SCOTT: If the Court please, with regard to the letter, I received a copy of the letter at 2:32 p.m. today. I was first made aware of the existence of the letter or the---rather, the possibility that Mr. Wesley may recant the sworn testimony he gave in his own trial and be willing to sign an affidavit; otherwise, testify on behalf of Stumpf to the effect he apparently will say he fired the fatal shot, now that he is no longer in jeopardy on the death penalty.

The other parts of this motion dealing with the Eastman testimony and dealing with the request to withdraw the previous plea of "guilty" as the Court has stated, have been pending since June. Realizing the problem that the Court faced with

the death of Judge Rice and the uncertainty as to proper method of proceeding and given the fact that the Stumpf case is on appeal, I would think that this Court could at least proceed. The problem, as I see it, and I really don't have the answer, is twofold. One is that the law provides under, I believe, 2945.06 that this three judge panel can act by a majority in all matters of law and fact with the exception of the finding of "guilty" and the imposition of the death penalty. It seems to me that the question of whether or not the guilty plea should be withdrawn is a matter of law, and this Court, if the two remaining Judges can agree, can dispose of that motion; and, if I might with the Court's permission, direct some comments towards that motion, if I might?

JUDGE HENDERSON: Let's stick with the matter of the continual

Do you have anything further to say on that

MR. SCOTT: I have no privilege---I'm not privy to any of the information Mr. Tingle is talking about. It seem to me we're at a "if come maybe proposition" at this point. We don't know for certain whether or not, after conferring with his attorney, whether Mr. Wesley will be willing to do as Mr. Stumpf indicates he thinks he will do in that letter. I can

see where as a practical matter if I were counsel for Mr. Wesley with an appeal pending from his sentence with twenty years to the parole board and so forth, I would have some serious misgivings by advising him to admit, effectively admit, perjury and effectively undercut any appeal, it seems to me if he does this. I don't know---we don't know that that's going to happen. I would suggest that the Court may wish to proceed with the existing motion and if and when these other events take place regarding Mr. Wesley's willingness to do what he, Stumpf, thinks he's going to do, deal with that at the appropriate time. That would be my thought.

JUDGE HENDERSON: Did you have anything further, Mr. Tingle?

MR. TINGLE: Not on that issue, no.

JUDGE HENDERSON: On your motion, Mr. Tingle, for continuance, we're going to deny that motion. And if you do at some future time, then if it's appropriate you desire to find yourself in a position to file a motion along the lines that are suggested in your motion for continuance, then you may do so. I think we're going to hear the motion that you filed some weeks ago at this time. And let me mention

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also that this matter being before the Court of Appeals and they limit us on this matter of what we can determine, it was remanded to the trial court for the purpose of the determination of any and all motions now pending before it. And at the time that we received your motion for a continuance, it was not pending before this Court. So we're going to deny your motion for a continuance and we'll hear the motion that you filed in June.

MR. TINGLE: If the Court please, the motion which has been filed on behalf of the defendant requests in the alternative the withdrawal or leave to withdraw the plea of "guilty" previously entered by the defendant and in the alternative for a new hearing to be conducted concerning the penalty to be imposed against this defendant. In support of that motion, I believe the State of Ohio, the Prosecuting Attorney, will agree to a stipulation that the testimony adduced at the trial of Clyde Daniel Wesley by or from one James Eastman, Case #9692, and also the testimony of Clyde Daniel Wesley in that same case can be admitted for consideration of the Court as it relates to the motion filed by the defendant as the testimony in the entirety of both witnesses.

MR. SCOTT: Upon the representation of the Court Reporter that what Mr. Tingle has is, in fact, the entire testimony of Mr. Wesley and the entire testimony of the witness Eastman, I'll agree that it be stipulated that that is what it is and nothing more rather than bringing the Court Reporter to the stand and doing all those things. If she indicates to us that that is the complete transcript of those two people, I have no problem in putting it in.

JUDGE HENDERSON: Do I understand the stipulation is that the testimony of these two individuals, Clyde Daniel Wesley and Mr. Eastman, that may be received in evidence in this manner?

MR. SCOTT: As to that's what it is and nothing more, that that was the testimony as given in the Wesley case.

JUDGE HENDERSON: Very well.

MR. TINGLE: On that basis, I would offer Defendant's Exhibit "2" and "3" then.

JUDGE HENDERSON: And on that basis, those are admitted, "2" and "3".

MR. TINGLE: If the Court please, in support of the motion then that is the only testimony or physical evidence which will be offered in support of the motion. I would like to address the Court on

the issue itself.

JUDGE HENDERSON: Very well.

MR. TINGLE: If the Court please, the basis upon which the motion is filed or brought to the Court's attention is the fact that at the time of sentencing, this Court, as required by law, issued a written finding; and part of that finding was or were the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The first of those items listed under number 1 that the Court finds beyond a reasonable doubt that the defendant was the principal offender in Count 1 of the indictment. The State of Ohio during the trial of Clyde Daniel Wesley, Case #9692, produced a witness by the name of James Eastman. To summarize briefly, Mr. Eastman had been a cell mate of Clyde Daniel Wesley while he was incarcerated in the Guernsey County Jail following his extradition from the State of Texas. It was the testimony of Mr. Eastman that during the course of their companionship in that cell, Mr. Wesley related to him the story of this crime and how it occurred. The testimony of Mr. Eastman, found on page 11 of that transcript of his testimony,

does indicate, and he stated directly, that as they were getting ready to leave, Wesley related to him he heard her moan, meaning Mrs. Stout, or cry out something, turned around and shot her again. Wesley said he went back and shot Mrs. Stout again. Put into the context of the entire testimony, the shooting of Mrs. Stout as related by Mr. Eastman, James Eastman, occurred in two phases. She was shot, they left the room, as they were leaving they heard her moan, she was shot again. Comparing that to the testimony of Clyde Daniel Wesley as offered at trial, that scenario is followed fairly closely. But when questioned about how James Eastman could have known these things or where he got his information, Mr. Wesley's explanation was that during the course of their companionship in that jail cell, he had a transcript of the case of "State versus John Stumpf" to use in his own trial preparation, that he discussed the case somewhat with Mr. Eastman and Mr. Eastman had access to that transcript and read the account in the transcript; thereby, acquiring the knowledge

that he testified to. The problem with Wesley's explanation is the fact that there is no account that matches that situation or that scenario in the transcript of John David Stumpf. There is no account which states Mrs. Stout was shot, they left the room, heard her moan, went back and shot her again. The only place that that appears is in the case of Clyde Daniel Wesley. It would have been impossible for Mr. Eastman to have acquired that knowledge from the transcript of John David Stumpf. It, therefore, follows that he must have acquired that knowledge from Clyde Daniel Wesley personally.

On that basis, it does indicate that the Court's finding that the defendant, John Stumpf, was the principal offender. In other words, the one who shot Mary Jane Stout is contradicted by the testimony of James Eastman, and the explanation of Clyde Daniel Wesley is not sufficient to contradict James Eastman's testimony. It's on that basis, then that we have filed this motion, brought it to the Court's attention, asking for the alternate forms of relief. Thank you.

JUDGE BETTIS: Well, you were counsel for Mr. Stumpf, and I'm sure he pled 'guilty', and I'm sure you reviewed

the details of his plea with him many, many times. Both of you are very competent counsel, I heard you. At least, that's my view. Didn't you, Lew?

MR. TINGLE: Yes.

JUDGE BETTIS: How many hours did you spend with Mr. Stumpf in discussing the case with him before you pled him guilty?

MR. TINGLE: Quite a few, Your Honor. Accurately, I couldn't tell you, but it was a substantial number.

JUDGE BETTIS: All right, thank you.

JUDGE HENDERSON: Mr. Scott.

MR. SCOTT: If the Court please, I believe we need to talk about two other things before we get to the substance of what Eastman had to say and what Wesley had to say. Initially, I think we need to look at Section 2945.06 which talks about a three judge panel in a death penalty case and what procedurally is necessary. As I mentioned earlier, the statute says that this Court can determine matters of law and fact by a majority decision. However, decisions regarding the guilt, or in this case the imposition of the death penalty, must be unanimous. With that in mind, I think we need to look at what the defendant is asking by means of this motion. Essentially, the defendant is asking for a withdrawal

of the previous plea of "guilty". It seems to me that is a matter of law and does not go to the question of the imposition of the death penalty nor to the question of guilt. And that can be initially, I believe, determined by the remaining two judges in this panel, being a majority of the original panel. As far as the merits of that motion, there is no indication as the Court has inquired that Mr. Stumpf was not fully aware of what he was doing when he entered the plea of "guilty". It was, if you'll recall, a negotiated plea wherein he entered a plea of "guilty" to certain counts and to certain specifications to those counts in return for the State dismissing certain other counts or certain other specifications. I believe in our memorandum in opposition to the motion we cite the provision of Criminal Rule (3) which states that a motion to withdraw a "guilty plea is directed to the sound discretion of the Court. And I'll quote, "A motion to withdraw a plea of "guilty" or "no contest" may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court, after sentence, may set aside the judgment of conviction and permit the

defendant to withdraw his plea". We cite a case or two in here which indicates that if the defendant knew what he was doing and in the absence of coercion or mistake or something of that nature which casts doubt on the voluntariness of it or whatever, the motion should be denied. We heard nothing from the defense in this case in support of this motion to indicate that the defendant was anything than fully informed and that he intelligently made the decision with the assistance of his counsel after having everything explained to him that pertains to this plea of "guilty" and that he agreed and that the "guilty" plea proceedings were, in fact, undertaken and the inquiry of the Court made at that time, which I believe is all a matter of record in this case.

So, therefore, I think that the initial motion by the defendant to withdraw the "guilty" plea should be denied because there's been nothing shown to the Court to justify doing anything else.

With regard to the other alternative relief requested by the motion, it is tantamount to a motion for a new trial, at least in part, with regard to the sentencing phase of the former trial. The Court, having following the plea of "guilty",

heard the evidence and found the defendant "guilty" of the offense, guilty of the specifications by unanimous decision of the three judge panel. There is no reason to disturb that finding because of the fact that this is not a case where the trial proceeded on a "not guilty" plea; but the defendant admitted in open Court, as we cite in our memorandum, that there is nothing more solemn or whatever than a plea of "guilty" where he admitted that he did, in fact, purposely kill Mary Jane Stout and pleaded "guilty" to certain of those specification. It seems to me that in order to determine this part of the motion, the State would take the position that the remaining two judges can handle that as well because it is not a matter at this point directly dealing with the imposition of the death penalty nor is it a matter dealing with guilt, the finding of guilt. It is a question or a request to vacate the former sentence which would be a matter of law, arguably at least. There is very little, if any, authority that I could find on this exact problem where we don't have an intact panel left; but it would be our position that the two remaining judges can make that decision because it is a matter of law. And whether or no

the Court feels that the presence of the witness Eastman is necessary in order to do that or whether the Court can read the record and determine from the record of his testimony in the Wesley case, is a matter for the Court to determine. I would hasten to go on and say that although the Court did in it's unanimous opinion setting forth the reasons why the aggravating circumstances outweighed the mitigating circumstances shown, did make a finding that the defendant, Stumpf, was the principal offender in the case, that finding was not necessary under the specifications to which the defendant entered his plea. That even if the Court found that the defendant was an aider and abettor or even if the evidence showed that the defendant was an aider and abettor under those specifications, the death penalty still can be imposed. The question really before the Court is whether or not the information provided now to the Court would change the Court's finding because the evidence is in conflict on the point that is, that Mr. Wesley testified at his own trial, and the Court has that testimony that he did not fire the fatal shot. Eastman's testimony was as to a conversation with Wesley which occurred long after the Stumpf trial.

had been concluded. The circumstantial evidence, the ballistics evidence certainly supports the Court's original finding that Stumpf was the--- in effect, the shooter or the principal offender.

Now, it would seem to me the Court's first determination would be as to whether or not this new information, being the testimony of Wesley and the testimony of Eastman, is sufficient to change the Court's opinion as to whether or not the evidence still showed or did not show that Stumpf was the principal offender. And if the Court should then conclude that the evidence now, the newly discovered evidence if you will, does change the picture to the point where that finding is not proper, whether or not that makes any difference; nevertheless, on the imposition of the death penalty--

JUDGE BROWN: Of course Mr. Scott, pardon me for interrupting, but if we had not been satisfied that Stumpf was, in fact, the trigger man, the principal offender, and we were satisfied that he was, in fact, an aider and abettor, that may very well have had an effect upon this Court's determination of whether the death penalty should follow. I'm not saying it would, but it's possible.

MR. SCOTT: That's right. I think the first decision this Court would have to make is whether or not this additional information changes the picture as to that finding that was previously made. And if it does, does that, in turn, change the appropriateness of the death penalty in this case in the judgment of the Court?

JUDGE BETTIS: Let me follow that up. My recollection was that Wesley was in jail in Texas at the time of the Stumpf trial.

MR. SCOTT: That's correct, sir.

JUDGE BETTIS: You were aware of that, were you not, Mr. Scott?

MR. SCOTT: Yes, I knew of that.

JUDGE BETTIS: And you were aware of it too?

MR. SCOTT: Everybody was aware of it.

JUDGE BETTIS: There wasn't anything to prevent either the State or the defense from talking to Mr. Wesley. Now, as a practical matter, he probably wasn't going to have very much to say to anybody; but you didn't ask him, did you?

MR. DINGLE: The defense did not, no, Your Honor.

JUDGE BETTIS: Or anyone on behalf of the defense. He was never asked by anybody, so he was available?

MR. SCOTT: I believe that's correct, yes, Your Honor.

JUDGE BETTIS: We know he was in Texas, defense knew that.

MR. TINGLE: He was fighting extradition. Though, as far as availability for trial, he was not available.

JUDGE BETTIS: You and I know as a practical matter he probably wasn't going to give you the time of day if you went down. But the point is, you never asked him what he did in relation to Mrs. Stout or anybody else, did you?

MR. TINGLE: I think the prosecution was in Texas at that time during the period he was fighting extradition. What transpired between them and Wesley and Wesley's counsel in Texas I'm not privy to.

JUDGE BETTIS: Okay, but you didn't.

MR. SCOTT: I can tell you, but there's no record on it.

JUDGE BETTIS: Let me follow up. No one for the defense asked Mr. Wesley; and at least at this point, all we have is verbiage, it's not evidence. We have verbiage, we have a statement by Mr. Tingle that this is what Wesley would do, and we have a letter allegedly signed by Mr. Stout. So is there any evidence from anybody?

MR. SCOTT: I have nothing to present, Your Honor.

JUDGE BETTIS: In the record so far that, in fact, Wesley was the trigger man.

MR. TINGLE: Eastman's testimony, Your Honor. At Wesley's trial.

JUDGE BETTIS: Okay. And isn't there some---don't we have some right to read that and determine whether that is, in fact, credible testimony?

MR. TINGLE: Very definitely, Your Honor.

JUDGE BETTIS: I haven't read it. I'm certainly going to take the privilege to do so.

MR. TINGLE: And compared also against Wesley's testimony.

JUDGE BETTIS: I'm going to read both Eastman and Wesley because I didn't have the privilege of hearing that testimony.

MR. SCOTT: If it's appropriate, I can tell you what happened in Texas when I talked to his Texas lawyer.

JUDGE HENDERSON: I don't believe that's necessary at this time. We're hearing the matter of Eastman at this time, and we're not hearing the motion which has not been made yet.

MR. SCOTT: The inquiry was made, and I have an answer. But if you don't want to hear it at this point, that's fine.

JUDGE BETTIS: It's a motion of the defendant, not the State.

MR. SCOTT: But I have nothing other to say than it seems to me I don't presume to advise this Court how to proceed. We are under a set of circumstances, which to my knowledge, has not occurred under our present set-up with regard to capital cases. It

seems to me the Court must first look at what you have on the record there that was presented today to determine if you can determine from that alone whether or not Eastman's testimony is of sufficient credibility to warrant further consideration or whether you need to hear testimony from Eastman live. It seems to me that's the first thing you need to consider and once you have made that determination as to whether or not a new trial is warranted on the basis of that evidence. I believe that this Court procedurally--this Court can proceed with the two remaining members of the panel because we are not dealing directly with the imposition of the death penalty nor directly with the adjudication of guilt. We are dealing with a matter of law as to whether or not the previously imposed sentence shall be vacated. Thank you.

JUDGE HENDERSON: Anything further, Mr. Tingle?

MR. TINGLE: Nothing further, Your Honor.

JUDGE HENDERSON: We'll take this matter under advisement.

The Court is going to, so that they don't get lost, is going to present two items: the letter from Mr. Damiani, Supreme Court, which I think all counsel have received a copy of, and the judgment entry of the

Court of Appeals which remands this case, if necessary. I believe it says for the purpose of the determination of any and all motions now, parenthesis, then pending before it. Those two matters, I believe, we'll just have them put into the record.

Anything further? We'll take this matter under advisement.

(Whereupon, at 3:17 o'clock p.
the foregoing proceedings were
terminated.)

BR 11-12
ON COURT

NO. 86-1118

BTF

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS OF GUERNSEY COUNTY
IN CASES NUMBERED CA-760 AND CA-793

STATE OF OHIO

Plaintiff-Appellee

v.

JOHN DAVID STUMPF

Defendant-Appellant

BRIEF OF APPELLANT

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PROPOSITION OF LAW NUMBER 11

The denial of a motion to vacate a sentence, or to withdraw a plea of guilty which is based upon evidence that did not exist at the time of trial and which the Defendant could not have presented at trial, should be granted to correct manifest injustice and the denial of such a motion is an abuse of discretion.

Evidence which is not in existence at the time of trial is not newly discovered evidence as contemplated by Criminal Rule 33.

ARGUMENT

During the trial of the Co-Defendant, Clyde Daniel Wesley, the State of Ohio produced evidence in the form of the testimony of James Eastman (Wesley Transcript pages 2512-2544). The testimony disclosed that Eastman had been a cell mate of Clyde Daniel Wesley during his incarceration in the Guernsey County Jail prior to trial. The State of Ohio produced this witness to provide evidence that Clyde Daniel Wesley was in fact, the individual who pulled the trigger of the gun which killed Mary Jane Stout. This was in direct contradiction of the position of the State of Ohio in the trial of John David Stumpf and directly contradicted a specific finding of the Trial Court in that case. The Trial Court in the Stumpf case found that John David Stumpf was the principal offender.

James Eastman testified as to a discussion with Clyde Daniel Wesley in which Wesley described how the shooting of Mary Jane Stout occurred. It was Eastman's testimony that Wesley related that Mrs. Stout had been shot once and as they were

leaving the residence, they heard her moan. Wesley then recounted how he went back into the room and shot her a second time. This is in direct contradiction of the Trial Court's findings in the present case. The Trial Court made a specific finding that John David Stumpf was the principal offender, even though this finding was not necessary under the specification upon which he was convicted. During his own testimony, Clyde Daniel Wesley attempted to deny the conversation with James Eastman. Wesley characterizes Eastman's testimony as a fabrication. His explanation is found at Page 2717 of the Wesley transcript. When asked if he ever told Eastman how the crime occurred, his response was: "No, I didn't. Him and I reviewed Stumpf's case because I had an opportunity to review his case thoroughly through the transcript that's laying there on the defense table" It is Wesley's explanation that Eastman obtained his information from the transcript of the John David Stumpf trial. But, what Clyde Daniel Wesley failed to realize was that no account of the shooting of Mary Jane Stout in the terms described by Eastman appears in the Stumpf transcript. The credibility of James Eastman's testimony is established through the testimony of Clyde Daniel Wesley himself. This was the only place where any mention of the shooting of Mary Jane Stout occurring in two (2) separate phases appears (Wesley transcript pages 2787-2788).

The sequence of events as recounted by Wesley and as related by Eastman fit together. But, after bragging about his act, Wesley tried to come up with an explanation to discredit Eastman's testimony. The available testimony supports the credibility of Eastman and discredits Wesley. Eastman could not have acquired the knowledge for his testimony from the transcript as Wesley alleges. The only source of that information is Clyde Daniel Wesley himself.

While the State of Ohio may not be required to vouch for the testimony of the witnesses it calls, there is absolutely no reason for the State to offer James Eastman as a witness unless they believe in the credibility of his testimony. If the State of Ohio believed that James Eastman was lying, it is certain that they would not have offered him as a witness. The State of Ohio had already obtained a death sentence against one (1) of the Defendants (John David Stumpf) in which the Court issued a finding that he was the principal offender. The State of Ohio did not need the testimony of James Eastman for anything else other than to prove that he, in fact, was the one who shot Mary Jane Stout. This is not a case in which Co-Defendants are each pointing the finger of guilt at the other. This is a case in which the State of Ohio has prosecuted an individual claiming him to be the principal offender and then turns around and offers direct evidence against a Co-Defendant that he is the principal offender. The position is not tenable.

In one of these cases, the State of Ohio has misled the Court. This is not a case in which the same evidence can be used to arrive at different conclusions. This is a case in which different evidence was used to arrive at the same conclusion. The State of Ohio certainly would not have admit to producing evidence which they believed to be false. Due to the fact that Clyde Daniel Wesley was fighting extradition in the State of Texas during the trial of this Defendant, the evidence provided by James Eastman did not exist at the time of John David Stumpf's trial. But, if that testimony had been in existence at the time of John David Stumpf's trial, would the State of Ohio have withheld that evidence? The State of Ohio is now in the position of trying to maintain a death sentence upon this Defendant after having offered evidence in the case of a Co-Defendant which would mitigate against that death penalty.

The Trial Court conducted a hearing on the Defendant's motion with only two (2) of the original three (3) judges present. Judge Raymond Rice was deceased at the time of the hearing. The Court proceeded upon the hearing by indicating that direction to do so had been issued by the Supreme Court. The Defendant contends that the Trial Court was not properly constituted and, therefore, lacked jurisdiction to issue its order.

PROPOSITION OF LAW NUMBER 12

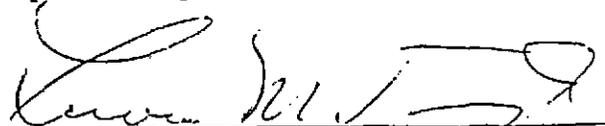
Ohio Revised Code Section 2945.06 requires that the trial of a capital case, without a jury, be conducted by a three-judge panel, and consideration of post-sentence proceedings by less than the entire panel is not authorized and violates the Defendant's right to due process in equal protection of the law.

ARGUMENT

Subsequent to the position of sentence in this case, the Defendant filed a motion to vacate his sentence or in the alternative, for consent to withdraw his plea of guilty. Prior to the hearing of this motion, Judge Raymond Rice, a member of the original panel, died. The remaining two judges conducted a hearing upon the Defendant's motion and denied the same.

Section 2945.06 of the Ohio Revised Code requires the proceedings to be conducted by a three-judge panel and does not authorize action by only two of the judges of the original panel. The Defendant is entitled to consideration by three judges in such a case.

Respectfully submitted,



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IN THE SUPREME COURT OF OHIO
1986

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

Case No. 86-1118

BR12-5

JOHN DAVID STUMPF,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF APPEALS
FOR GUERNSEY COUNTY, OHIO, FIFTH APPELLATE DISTRICT

MERIT BRIEF OF THE STATE OF OHIO,
PLAINTIFF-APPELLEE

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SUPREME COURT OF OHIO
JAMES W. KELLY, Clerk

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PROPOSITION OF LAW ELEVEN

THE DECISION TO PERMIT OR DENY MOTIONS TO WITHDRAW A GUILTY PLEA AND FOR A NEW SENTENCING HEARING ARE ADDRESSED TO THE SOUND DISCRETION OF THE TRIAL COURT.

(The eleventh proposition of law was separately briefed in case number CA-793 below.)

A motion to withdraw a guilty plea is addressed to the sound discretion of the trial court.

"A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea."
Criminal Rule 32.1.

After sentence has been imposed, a defendant seeking to withdraw a guilty plea bears the burden of establishing manifest injustice under Criminal Rule 32.1. State v. Smith (1977), 49 Ohio St. 2d 261. Construing the virtually identical federal counterpart to Ohio Criminal Rule 32.1, the United States Court of Appeals for the Third Circuit has observed that:

"[t]he withdrawal of a plea of guilty is not a matter of right. A motion for leave to withdraw a plea of guilty and substitute a plea of not guilty is addressed to the sound discretion of the court and should be denied if the defendant knew and understood what was being done and there were not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of his plea."
United States v. Ptomey (3rd Cir., 1966), 366 F. 2d 759, 760.
(Emphasis supplied.)

A plea of guilty is a complete admission of the defendant's guilt. By entering his guilty plea to the principal charge and to the specifications, appellant admitted that he purposely murdered Mary Jane Stout during the course of an aggravated robbery and that he did so for the express purpose of avoiding detection, apprehension, trial or punishment for his crime of attempting to murder Norman Stout during an aggravated robbery. In short, by pleading guilty, appellant admitted that he killed Mary Jane Stout to make good his getaway. A guilty plea is the highest form of confession known in jurisprudence.

Appellant makes no claim that his plea was not entered knowingly, intelligently and voluntarily. Review of the record clearly demonstrates the plea was properly taken. Having confessed through his guilty plea in open court that he committed the offense, appellant bears a heavy burden to demonstrate that manifest injustice will occur if his plea is not withdraw. In point of fact, defendant has advanced absolutely no reason to permit withdrawal of his guilty plea.⁴

⁴An accused may not preclude imposition of the death penalty by simply pleading guilty to capital charges. State v. Jackson, supra., 50 Ohio St. 2d at 258-259. Imposition of the death sentence based on a guilty plea certainly is not unknown. See State v. Frohner (1948), 150 Ohio St. 53; State v. Ferguson (1964), 175 Ohio St. 390. There is no requirement that mercy must be extended to one who pleads guilty to a capital offense. "True he is young, but true also is the fact that he was guilty of a cold-blooded, heinous offense." Frohner, supra., at 117.

"Neither manifest injustice nor an abuse of discretion is shown merely because [a defendant] chose to test the water and found it too fervid."
United States v. Prince (5th Cir., 1976),
533 F. 2d 205, 209.

Appellant's single basis for withdrawal of his plea or for a new sentencing hearing is that during co-defendant Wesley's trial, jail inmate James Eastman testified that Wesley admitted to him that Wesley shot Mary Jane Stout. The panel which sentenced appellant Stumpf found, inter alia, that Stumpf was the principal offender in that slaying. Appellant urges that as a result, he should be permitted to withdraw his plea or be resentenced.

"One indicted as an aider and abettor of the crime of murder may be placed on trial, convicted and sentenced for that offense notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only."
State v. Goins (1889), 49 Ohio St. 457,
syllabus paragraph three.

The criteria for imposing the death penalty in a capital offense are set forth in Section 2929.04, Revised Code. The requirement that the actor be either the principal or to have acted with prior calculation and design applies solely to the specification set forth in subparagraph seven. The defendant herein admitted his guilt to the specification set forth in subparagraph three; that he killed Mary Jane Stout to avoid detection, apprehension, trial or punishment for attempted aggravated murder (shooting Norman Stout in the head) and for aggravated robbery. That the death penalty is authorized for aiders and abettors is further exemplified by

subparagraph (B)(6), mitigation. Under that subparagraph, the sentencing authority may consider the offender's degree of participation in the offense as mitigation where the offender was not the principal offender.

It is apparent that execution of an aider and abettor is authorized by Revised Code Section 2929.04. Therefore, while the trial court found from the evidence that defendant Stumpf actually shot Mary Jane Stout, that finding was not a condition precedent to imposing the death penalty. As testified to by Norman Stout, appellant had the chrome pistol which was identified as the pistol which killed Mrs. Stout. Norman Edmonds (who remained in the car while appellant and Wesley walked to the Stout's home) testified he gave the gun to Stumpf in the car; Norman Stout was positive that Stumpf held the chrome pistol and that Stumpf shot him with the chrome pistol. Regaining consciousness after being twice shot in the head by Stumpf, Mr. Stout heard the two defendants in a discussion after which he heard the four additional shots which killed his wife, Mary Jane.⁵ The bullet from the top of Norman Stout's head was fired from the same gun which killed Mrs. Stout. The partial slug taken from

⁵The inference to be drawn from this discussion is obvious. Stumpf and Wesley were not about to leave witnesses behind to identify them; Mrs. Stout had to die. In view of the fact that the slaying was done to silence a witness (Revised Code Section 2929.04(A)(3)), it matters not one whit which hand actually fired the four fatal bullets.

between Mr. Stout's eyes had the same characteristics. That gun was carried by appellant Stumpf. By his guilty plea, appellant admitted he shot Mary Jane Stout.

Appellant attempts to make much of the fact that during Wesley's trial, the state offered inmate Eastman's testimony that Wesley admitted his guilt in the slaying. Appellant intimates some improper act on the part of the state, asserting the state "has misled the court." (Brief, p. 40) Appellant concedes that Wesley was not in Ohio and therefore, the events subject of Eastman's testimony had not occurred at the time appellant Stumpf pleaded guilty to this slaying. (Brief, p. 40)

It is the responsibility of the state to present all relevant evidence in the prosecution of crime. The state is not in the position of being able to suppress relevant evidence and clearly did not do so either in this case or that of co-defendant Wesley. As noted above, the requirement that an actor be either the principal offender or act with prior calculation and design applies only to the specification set forth in subparagraph seven of Revised Code Section 2929.04. Appellant admitted he acted under subparagraph three. See State v. Goins, supra.

Moreover, one may act as a principal even as one also aids a co-defendant in committing a crime. For example, should co-defendants, armed respectively with .22 and .38 caliber weapons, both fire their pistols into the body of a victim, the mere fact that the .22 caliber weapon was found to

cause the death does not lessen the fact that the defendant wielding the .38 remains a principal offender. Should one co-defendant hold a victim while the other inflicts the fatal blow, is the former less a principal than the latter? Obviously, the General Assembly did not intend to limit the term "principal" to only those who actually fire the fatal bullet, thrust the fatal knife or inflict the fatal blow. The term "principal" does not equate solely with the vernacular "triggerman." Under the facts of this case, appellant was a "principal offender" within contemplation of the statute whether or not he actually fired the fatal bullets that killed Mary Jane Stout. To hold otherwise would permit equally guilty offenders to avoid the death penalty by acting in concert in slaying a victim, each performing only one half of the fatal act, thereby permitting each to claim he was not the "principal." This is not only an untenable, unjust result, but clearly was not the intent of the General Assembly. The trial court was well within its sound discretion in denying leave to withdraw appellant's guilty plea and denying the motion for resentencing.

Finally, for the reasons advanced in appellee's response to the twelfth proposition of law, infra., the death of Judge Rice did not deprive the trial court of jurisdiction to rule on appellant's post-sentence motions.

The eleventh proposition of law is without merit.

PROPOSITION OF LAW TWELVE

FOLLOWING THE VERDICT AND SENTENCE IN A CAPITAL CASE HEARD BY A THREE-JUDGE PANEL PURSUANT TO REVISED CODE SECTION 2945.06, POST-SENTENCE MOTIONS ARE HEARD AND DECIDED BY THE TRIAL JUDGE.

In his final proposition of law, appellant asserts that the trial court was without jurisdiction to act on his post-sentence motions because Judge Raymond Rice, a member of the three judge panel which tried appellant, was deceased when the post-trial motions were decided. We respectfully disagree.

It is clear that in any case where the defendant has the right to and elects trial by jury, the trial judge does not try the facts of the case but does determine pre-and post-trial motions as well as those legal issues occurring during trial. Once a jury verdict is returned, the defendant sentenced, and the jury discharged, the trial judge retains jurisdiction to rule upon post-trial motions. Where the accused is charged with an offense punishable by death, the accused may elect to waive trial by jury and be tried by not one but by three judges sitting as trier of the facts. Revised Code Section 2945.06, appendix, infra. The same is true upon a guilty plea. We invite the court's attention to the pertinent parts of that section.

"In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and

in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty."
(Emphasis supplied.)

It is readily apparent from the plain wording of the statute that the composition of the three judge trial court is for the trial of the case, the ascertaining of facts, equivalent to the function of a jury where a jury is not waived. Once a jury has completed its fact finding task, a jury is discharged and all further duties in that cause are handled by the trial judge. In the case of trial before a three judge panel called pursuant to Revised Code Section 2945.06, once the fact finding or jury function of that panel is complete and the sentence imposed, further duties devolve upon the original presiding judge to whom the case was first assigned. While appellant had the benefit of having two of the members of the panel rule on his post-trial, post-sentence motions, he was entitled only to have the original presiding trial judge rule on his post-trial motions. He was not entitled to more. Having gratuitously received more benefit than he was entitled to, he cannot show that he was in any way

prejudiced below.

Appellant pleaded guilty to the charge that he murdered Mary Jane Stout to avoid detection for his offense of attempting to murder Norman Stout. The panel which heard appellant's case reached the proper judgment in imposing the death sentence for these crimes. Under the facts of this case, appellant was properly found to be a "principal offender" as that term is used in the Ohio statutes, whether or not he actually fired the fatal shots into Mrs. Stout's body. Appellant's sentence was not imposed arbitrarily, capriciously or indiscriminately and is not disproportionate to other offenses of a similar nature. State v. Jenkins, supra. The panel of judges lawfully tried appellant's case under Revised Code Section 2945.06. Post-trial motions are properly ruled upon by the original judge presiding in the case. Appellant's twelfth proposition of law is without merit.