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**EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Michael Goldsberry's case is of great public and general interest because it concerns the guarantees of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution. Those provisions protect a defendant in a criminal case against deprivation of liberty without due process of law. In the case before the bar, Mr. Goldsberry's liberty has been taken because the Third District Court of Appeals sua sponte dismissed his appeal for want of jurisdiction.

Michael Goldsberry's case offers this Court an opportunity to demand that Ohio courts remain vigilant in protecting criminal defendants' right to not lose their liberty when an appellate court refuses jurisdiction in a case, when it has previously accepted jurisdiction in similar cases. Consequently, Mr. Goldsberry's case presents a substantial constitutional question in that it challenges the decision of the Third District Court of Appeals declining jurisdiction in a case by arguing the trial court's sentencing entry is not a final appealable order; regardless of the fact the defendant is in prison.

This matter continues to be a great public interest beyond Mr. Goldsberry, for if this Court upholds the rationale of the Third District Court of Appeals that it does not have jurisdiction under this fact pattern, then it opens the door for a multitude of habeas corpus cases in Union County, Ohio and in every other jurisdiction under this Court.

**STATEMENT OF THE CASE**

This appeal arises from Michael Goldsberry's conviction for five counts of nonsupport of dependents, a violation of Ohio Revised Code Section 2919.21(A)(2) and five counts of nonsupport of dependents in violation of Ohio Revised Code Section 2919.21(B), all felonies of the fifth degree, on March 23, 2005. The trial court initially placed him on three years of

community control. He violated the terms of his community control and placed back on community control on November 3, 2005. Mr. Goldsberry again violated the terms of his community control and the trial court sentenced him to six months on each of the ten counts of nonsupport of dependents and that the sentences were to be served consecutively to one another. He appealed his sentence to the Union County Court of Appeals, challenging the trial court's ability to impose a prison sentence when it failed to notify him of a specific prison sentence at his first community control violation hearing. On October 15, 2007, the Union County Court of Appeals dismissed Mr. Goldsberry's appeal, stating it did not have jurisdiction to hear the appeal because the original sentencing entry from March 23, 2005 was not a final appealable order. Mr. Goldsberry now files this timely Memorandum in Support of Jurisdiction, asking this Court to grant him leave to appeal.

#### **STATEMENT OF THE FACTS**

Michael Goldsberry pled guilty to ten counts of nonsupport of dependents. On March 23, 2005 the court advised Mr. Goldsberry that he could receive a maximum prison term of up to 120 months, then placed him on three years community control.

Mr. Goldsberry violated the terms of community control and at a community control violation hearing on November 3, 2005, Mr. Golsberry admitted the violations and the court continued his community control under the same conditions that the court previously ordered.

Mr. Goldsberry once again found himself in front of the court for community control violations on January 5, 2007. This time the trial court imposed a prison sentence of six months on each of the tens counts to be served consecutive to one another.

Mr. Goldsberry timely filed his appeal to the Union County Court of Appeals. The Court of Appeals dismissed the case, citing it lacked jurisdiction to hear the matter because the trial

court's original sentencing entry was not a final appealable order. The appellate court said it was not a final appealable order because the trial court failed to distinguish which of the ten counts the three years community control was associated with; whether the trial court intended to place Mr. Goldsberry on community control for three years on each count to be served concurrent to one another or where they to be served consecutive to each other.

## ARGUMENT

### PROPOSITION OF LAW

**A criminal defendant is deprived of due process of law when an appellate court makes inconsistent rulings on when it accepts jurisdiction in some cases and refuses jurisdiction in other cases based on similar underlying fact patterns, specifically the fact pattern when a trial court places a criminal defendant on community control after the criminal defendant has been found guilty or pled guilty to multiple felony counts. The resulting imprisonment in cases when the court of appeals declines jurisdiction is illegal and a violation of the criminal defendant's due process rights and denies the criminal defendant his right to appeal.**

Ohio Revised Code Section 2929.15(A)(1) grants trial court authority to place criminal defendants on community in lieu of serving prison terms. However, the statute is very clear that “[T]he duration of *all* community control sanctions imposed on an offender under this section shall not exceed five years.

It seems rather clear that the legislature intended that under a single indictment, regardless of the number of counts in the indictment, a criminal defendant could not be placed on community control for more than five years.

Some appellate courts have ruled that unless a trial court places a criminal defendant on community control for each count in the indictment, then there is not a final appealable order. See, *State v. Garner*, (Sept. 26, 2003) 11<sup>th</sup> App. Dist. No. 2002-T-0025, 2003 Ohio 5222, P10. That case suggests that a trial court, on a multiple count indictment, could impose consecutive

community control "sentences" which could result in a community control sanction greater than five years.

However, the court in *State v. Lehman*, (Feb. 4, 2000) 6<sup>th</sup> App. Dist. No. L-99-1140, found that a court could not impose consecutive placements in a residential facility for multiple counts when the court placed the criminal defendant on community control.

The issue is how to interpret community control and does it encompass a single indictment or, should it only apply to each count of the indictment? And when is there a final appealable order?

Mr. Goldsberry asks this Court to find that any time a trial court finds that community control is imposed, whether it be right out of the gate at the original sentencing or after an application to be released from prison to be placed on community control, the trial court need only place a criminal defendant on community control for a specified period of time per case number, not to exceed five years, rather than to place the criminal defendant on community control for each count of the case, which still should be limited to a maximum period of five years. And either way the criminal defendant is placed on community control, it is a final appealable order.

In the case at bar, the biggest concern is the Union County Court of Appeals is in conflict with itself. The Union County Court of Appeals accepted jurisdiction in cases similar to Mr. Goldsberry's case wherein there was a multiple count indictment, the trial court placed the criminal defendant on a blanket community control, the criminal defendant violated the terms of community control and went back before the judge on the violations. Appeals were taken based on the ultimate prison sentence imposed and the Union County Court of Appeals accepted

jurisdiction with identical original sentencing entries. See, *State v. Botkins*, (March 5, 2007) Union County App. Dist. No. 14-06-18.

These conflicting decisions occur within the same appellate district.

To find that the Union County Court of Appeals is correct in this case, this Court will deprive multiple criminal defendants a right of appeal because they were placed directly on community control and do not realize that they do not have a "final appealable sentencing entry" until they violate the terms of community control and appeal any errors that may have occurred during that proceeding. Applying the rationale of the Union County Court of Appeals, there is the potential for the deprivation of liberty of many criminal defendants because they are being incarcerated for alleged community control violations, when in fact they were never properly placed on community control because the underlying sentencing entry was not a final appealable order.

Therefore, it is uncertain how many criminal defendants are currently incarcerated or on community control based on what are considered non-final appealable orders based on the Union County Court of Appeals flawed interpretation of Ohio Revised Code Section 2929.15(A)(1). Not only is it a flawed interpretation, it is in direct conflict of the same court accepting jurisdiction in *State v. Botkins*, supra.

To permit this interpretation of Ohio Revised Code Section 2929.15 violates' public policy and creates an enormous amount of criminal defendants that are currently serving time in prison illegally, in direct violation of their, and specifically Mr. Goldsberry's right to liberty and due process.

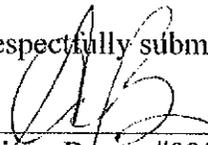
This Court has not yet addressed the misapplication of Ohio Revised Code Section 2929.15 to cases where courts of appeals decline jurisdiction when the trial court does not

enunciate a specific community control term for each of the counts that a criminal defendant has been convicted of or pled guilty. The present case presents a question of public and great general importance and involves a substantial constitutional question concerning a fundamental concept of our criminal justice system: that no criminal defendant should lose his liberty without due process of law. By applying Ohio Revised Code Section 2929.15 that way it has been applied in this case and other jurisdictions, courts are depriving criminal defendants' their first right of appeal while they remain incarcerated on a non-appealable order. There is a problem here and Mr. Goldsberry respectfully requests this Court accept jurisdiction of this appeal.

### CONCLUSION

For the reasons detailed above, Appellant Michael Goldsberry respectfully requests that this Court grant him leave to appeal.

Respectfully submitted,

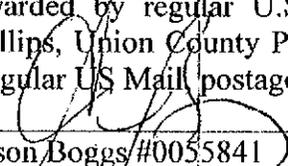


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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Michael Goldsberry** was forwarded by regular U.S. Mail this 26<sup>th</sup> day of November, 2007 to the office of David W. Phillips, Union County Prosecutor, 221 West Fifth Street, Suite 333, Marysville, Ohio 43040, by regular US Mail postage prepaid.



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Alison Boggs #0055841  
Counsel of Record  
COUNSEL FOR MICHAEL GOLDSBERRY



IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

UNION COUNTY

STATE OF OHIO,

CASE NUMBER 14-07-06

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

MICHAEL GOLDSBERRY,

DEFENDANT-APPELLANT.

*Carol S. Stinson*  
CLERK

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COURT OF APPEALS  
UNION COUNTY

For the reasons stated in the opinion of this Court it is the judgment and order of this Court that the appeal is dismissed for want of jurisdiction at the costs of the appellant for which judgment is rendered, and that the cause be remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of the opinion filed concurrently with this entry to the trial judge and parties of record.

*Vernon L. Ruston*

*John B. Williamson*  
JUDGES

DATED: October 15, 2007

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COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
UNION COUNTY

COURT OF APPEALS  
UNION COUNTY

2007 OCT 15 AM 10:50

*Alison Boggs*  
CLERK

STATE OF OHIO,

CASE NUMBER 14-07

PLAINTIFF-APPELLEE,

v.

OPINION

MICHAEL GOLDSBERRY,

DEFENDANT-APPELLANT.

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CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Appeal dismissed.

DATE OF JUDGMENT ENTRY: October 15, 2007

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Rogers, P.J.,

{¶1} Defendant-Appellant, Michael E. Goldsberry, appeals the judgment of the Union County Court of Common Pleas sentencing him to sixty months in prison. On appeal, Goldsberry argues that the trial court erred when it imposed a prison sentence at his second community control violation hearing. Finding that the trial court failed to sentence Goldsberry on each count of his conviction, we dismiss Goldsberry's appeal for lack of a final appealable order.

{¶2} In January 2005, the Union County Grand Jury indicted Goldsberry for five counts of nonsupport of dependants in violation of R.C. 2919.21(A)(2), felonies of the fifth degree, and five counts of nonsupport of dependants in violation of R.C. 2919.21(B), felonies of the fifth degree. Subsequently, Goldsberry entered a plea of not guilty as to all counts in the indictment.

{¶3} In March 2005, Goldsberry withdrew his plea of not guilty and entered a plea of guilty as to all counts in the indictment. The trial court accepted Goldsberry's guilty plea, convicted him, and sentenced him to three years of community control, stating that:

**The Court finds that [Goldsberry] has been convicted of: Five counts of Nonsupport of Dependants in violation of Ohio Revised Code Section 2919.21(A)(2), and Five counts of Nonsupport of Dependants in violation of ORC 2919.21(B), each a felony of the fifth degree.**

**It is therefore ORDERED: [Goldsberry] be and hereby is placed on 3 years of Community Control[.] \* \* \***

(March 2005 Journal Entry, p. 1).

{¶4} In November 2005, the trial court held a community control violation hearing and found that Goldsberry had violated the terms of his community control. The trial court then ordered Goldsberry to complete an additional one-hundred hours of community service, stating that “[t]he Defendant is advised that if he violates any of the terms or conditions of community control, the Court may impose a more restrictive community control or the Defendant will be sent to prison for one hundred twenty (120) months.” (November 2005 Journal Entry, pp. 1-2).

{¶5} In January 2007, the trial court held a second community control violation hearing and found that Goldsberry had again violated the terms of his community control. The trial court then sentenced Goldsberry to a six month prison term on each conviction of nonsupport of dependants to be served consecutively for a total of sixty months.

{¶6} It is from this judgment that Goldsberry appeals, presenting the following assignment of error for our review.

**THE TRIAL COURT ERRED WHEN IT IMPOSED A PRISON SENTENCE AT APPELLANT'S SECOND PROBATION VIOLATION HEARING WHEN THE COURT FAILED TO NOTIFY APPELLANT OF A SPECIFIC SENTENCE AT BOTH HIS ORIGINAL SENTENCING HEARING AND AT HIS FIRST PROBATION VIOLATION HEARING.**

{¶7} In his sole assignment of error, Goldsberry argues that the trial court erred when it imposed a prison sentence at his second community control violation hearing

because it failed to notify him of a specific sentence at both his original sentencing hearing and at his first community control violation hearing. Specifically, Goldsberry asserts that the trial court could not impose a prison sentence on him if it did not previously advise him of a specific prison term that it would impose upon violation of the terms of community control. Because this Court lacks jurisdiction, we do not address the merits of Goldsberry's argument.

{¶8} Appellate jurisdiction is limited to review of lower courts' final judgments. Section 3(B)(2), Article IV of the Ohio Constitution. To be a final, appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Crim.R. 32(C). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88; *Centex Home Equity Co., L.L.C. v. Williams*, 3d Dist. No. 6-06-07, 2007-Ohio-902, ¶12. Additionally, the issue of whether a judgment is a final appealable order is a jurisdictional question, which an appellate court may raise sua sponte. *Chef Italiano Corp.*, 44 Ohio St.3d at 87. In criminal cases, "[t]he necessity of journalizing an entry in accordance with Crim.R. 32(C) is jurisdictional. Without a properly journalized judgment of conviction, this court has no power to hear this appeal." *State v. Moore*, 3d Dist. No. 14-06-53, 2007-Ohio-4941, ¶7, quoting *State v. Teague*, 3d Dist. No. 9-01-25, 2001-Ohio-2286; see also *Maple Heights v. Pinkney*, 8th Dist. No. 81514, 2003-Ohio-3941, ¶1.

{¶9} In a case factually similar to Goldsberry's, this Court recently addressed the effect of noncompliance with Crim.R. 32(C) on jurisdiction and found "[t]hat a journal entry which did not dispose of the court's rulings as to each charge renders the order merely interlocutory." *Moore*, 2007-Ohio-4941, at ¶10, citing *State v. Hayes* (May 24, 2000), 9th Dist. No. 99CA007416. See also *State v. Pace* (June 5, 1998), 1st Dist. No. C-970546; *State v. Taylor* (May 26, 1995), 4th Dist. No. 94 CA 585; *State v. Huntsman* (March 13, 2000), 5th Dist. No. 1999-CA-00282; *State v. Yingling* (December 30, 1993), 6th Dist. No. L-93-076; *State v. Waters*, 8th Dist. No. 85691, 2005-Ohio-5137, ¶16; *State v. Garner*, 11th Dist. No. 2002-T-0025, 2003-Ohio-5222, ¶7.

{¶10} In *Moore*, supra, a defendant pled guilty to five counts of deception to obtain a dangerous drug and the trial court imposed a lump sentence of three years of community control. However, the journal entry of sentence did not specify to which count or counts the three year community control sentence applied. On appeal, the defendant asserted that she had not been properly notified of a specific prison term that would be imposed upon a community control violation. This Court dismissed the appeal, finding that the journal entry of sentence did not comply with Crim.R. 32(C). *Id.*, at ¶18. See also *State v. Hoelscher*, 9th Dist. No. 05CA0085-M, 2006-Ohio-3531, ¶10.

{¶11} Here, Goldsberry initially pled guilty to and was convicted of five counts of nonsupport of dependants in violation of R.C. 2919.21(A)(2) and five counts of nonsupport of dependants in violation of R.C. 2919.21(B). Instead of sentencing

Goldsberry on each count of the conviction, the trial court sentenced Goldsberry to a lump sum of three years of community control. As in *Moore*, the journal entry of sentence did not specify to which count or counts the sentence applied, and, therefore, does not comply with Crim.R. 32(C). Consequently, pursuant to our decision in *Moore*, we must dismiss Goldsberry's appeal for lack of jurisdiction.

*Appeal Dismissed.*

**PRESTON and WILLAMOWSKI, JJ., concur.**

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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

UNION COUNTY

STATE OF OHIO,  
PLAINTIFF-APPELLEE,  
v.  
CANDY L. BOTKINS,  
DEFENDANT-APPELLANT.

CASE NUMBER 14-06-35

JOURNAL

ENTRY

*Donna S. ...*  
CLERK

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COURT OF APPEALS  
UNION COUNTY

This appeal, having been heretofore placed on the accelerated calendar, is being considered pursuant to App.R. 11.1(E) and Loc.R. 12. Pursuant to Loc.R. 12(5), we have elected to render our decision by summary journal entry, which shall not be considered controlling authority except as between the parties to this action.

Defendant-appellant Candy Botkins appeals the judgment of the Union County Court of Common Pleas. For the reasons that follow, we reverse the trial court's judgment.

On January 20, 2004, Botkins pled guilty to twelve counts of forgery, in violation of R.C. 2913.31(A)(3) all fifth degree felonies; and one count of theft, in violation of R.C. 2913.02(A)(1), and a fifth degree felony. The trial court held a sentencing hearing on February 25, 2004, and sentenced Botkins to three years of community control.

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Thereafter, Botkins admitted that she violated the terms of her community control. The trial court ordered Botkins to serve six months in the Monday program and extended Botkins community control to February 25, 2007.

On July 7, 2006, Botkins again admitted to a community control violation. As a result, the trial court sentenced Botkins to twelve months on each of the twelve forgery counts and ordered the sentences be served concurrent to each other. The trial court also sentenced Botkins to twelve months on the theft count and ordered the sentence to be served consecutively to the forgery counts.

It is from this sentence that Botkins appeals and sets forth one assignment of error for our review.

#### ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED WHEN IT IMPOSED A PRISON SENTENCE AT APPELLANT'S SECOND PROBATION HEARING WHEN THE COURT FAILED TO NOTIFY APPELLANT OF A SPECIFIC SENTENCE AT BOTH HER ORIGINAL SENTENCING HEARING AND AT HER FIRST PROBATION VIOLATION HEARING.**

In her sole assignment of error, Botkins argues the trial court failed to notify her at either her initial sentencing hearing or her community control violation hearing of the specific prison sentence the trial court would impose if she violated her community control. Thus, Botkins argues that the trial court could not properly impose a prison sentence when she subsequently violated her community control.

104 P 00 '6

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R.C. 2929.15(B) provides,

**If the conditions of a community control sanction are violated or if the offender violates a law or leaves the state without the permission of the court or the offender's probation officer, the sentencing 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 pursuant to Section 2929.14 of the Revised Code. The prison term, if any, imposed upon a violator pursuant to this division shall be within the range of prison terms available for the offense for which the sanction that was violated was imposed and shall not exceed the prison term specified in the notice provided to the offender at the sentencing hearing pursuant to division (B)(3) of Section 2929.19 of the Revised Code.\* \* \***

The Ohio Supreme Court has held that "[p]ursuant to R.C. 2929.19(B)(5) and 2929.15(B), a trial court sentencing an offender to a community control sanction must, *at the time of the sentencing*, notify the offender of the *specific* prison term that may be imposed for a violation of the conditions of the sanction, as a prerequisite to imposing a prison term on the offender for a subsequent violation." *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, at paragraph two of the syllabus (emphasis added).

In *State v. Fraley*, the trial court sentenced the defendant to five years of community control, however, the trial court failed to notify the defendant at the sentencing hearing of the specific prison term he faced if he violated his community control. 105 Ohio St.3d 13, 2004-Ohio-7110, 821 N.E.2d 995, at ¶1. Fraley subsequently violated his community control two additional times and each time the trial court sentenced him to community control. *Id.* at ¶ 2-3. The third

114 P 600 '7

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time Fraley violated his community control the trial court warned him at the sentencing hearing of the specific prison term that the trial court would impose if he again violated his community control. *Id.* at ¶ 4. Thereafter, Fraley violated his community control and the trial court sentenced him to prison. *Id.* at ¶ 5. The Ohio Supreme Court found that the trial court properly sentenced Fraley to a term of imprisonment since Fraley was notified at his third community control violation hearing of the specific prison term which would be imposed if he again violated his community control. *Id.* at ¶ 19. In the instant case it appears that the defendant was never advised of a specific prison term to be imposed should she violate community control sanctions.

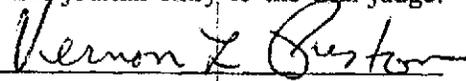
The appellee has not filed a brief in the present case. As a result, this court “may accept the appellant’s statement of the facts and issues as correct, and reverse the judgment if the appellant’s brief reasonably appears to sustain such action.” App.R. 18(C). Pursuant to App.R. 18(C), this court elects to accept Botkins’ statement of the facts and issues as correct. Since Botkins’ brief reasonably appears to sustain a reversal, we reverse the judgment of the trial court and remand for resentencing. On remand, the trial court must resentence Botkins; however, the trial court cannot impose a prison term unless that prison term is reserved in the event of a future violation of a community control sanction. See *Brooks*, 2004-Ohio-4746, at ¶33; *Fraley*, 2004-Ohio-7110, at ¶17-19.

114 P.00 '8

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For the aforementioned reasons, it is the order of this court that the judgment of the Union County Court of Common Pleas be, and hereby is, reversed and remanded at the costs of the appellee for whom judgment is rendered, and the cause be, and hereby is, remanded to the trial court for the execution of the judgment of costs.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by App.R. 27 or by any other provision of law, and also furnish a copy of this journal entry to the trial judge.

  
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JUDGES

DATED: March 5, 2007

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