

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No.: 2007-1254
)	
Appellee	)	On Appeal from the Geauga
	)	County Court of Appeals,
vs.	)	Eleventh Appellate District
)	
WILLIAM J. SILSBY)	
)	
Appellant)	Court of Appeals
)	Case No.: 2006-G-2725
)	

MERIT BRIEF OF APPELLANT WILLIAM J. SILSBY

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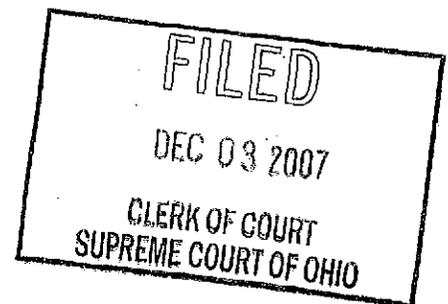


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STATEMENT OF FACTS

This case began upon the filing of an indictment by the State of Ohio against Appellant William J. Silsby on October 19, 2004. Appellant was indicted on one count of domestic violence, a felony of the third degree and one count of obstruction of official business, a felony of the fifth degree. Ultimately, a plea agreement was reached, and on October 6, 2005, Appellant pled guilty to obstructing official business as a felony of the fifth degree. As part of the plea agreement, the State recommended dismissal of the domestic violence count. The Trial Court accepted the plea agreement and found Appellant guilty of obstructing official business, a felony of the fifth degree and dismissed the domestic violence charge. (Appx. A-33)

At the time of sentencing, Appellant was already serving a prison sentence as the result of an unrelated case out of Lake County, Ohio. (T.p. at 13:17-19; 14:15-24) The State recommended that Appellant be sentenced concurrently on the obstruction charge and a less than maximum sentence. (T.p. at 27:11-14) Before entering its sentence upon Appellant, the Trial Court made certain findings of fact. The Trial Court found that the charges arose prior to the incidents which led to the Lake County sentence. (T.p. at 30:4-5) The Trial Court found that: Appellant served prior prison sentences (T.p. at 30:4-5); posed the greatest likelihood of committing future crimes (T.p. at 30:9-11); that a consecutive sentence was necessary to protect the public (T.p. at 30:11-13); that Appellant's "career criminal history" shows a consecutive sentence is necessary to protect the public (T.p. at 30:16-19); that Appellant demonstrated a history of causing injuries to people (T.p. at 30:20-22); that Appellant demonstrated a history of failing to comply with probation and community control sanctions and the law (T.p. at 30:23-31:1); and that Appellant was unable to control his behavior (T.p. at 31:1-2).

The Trial Court then sentenced Appellant to twelve months in prison with the sentence to run consecutively with the existing sentence from the Lake County Common Pleas Court on October 6, 2005. A final judgment of conviction was entered on October 19, 2005.

(Appx. A-33)

Appellant did not appeal as a matter of right but instead filed a pro se motion for leave to appeal on August 2, 2006. The Court of Appeals for the Eleventh District granted that motion on November 2, 2006. (Appx. A-30) After hearing the appeal on the merits, on May 14, 2007, the Eleventh District affirmed the judgment of the Trial Court. (Appx. A-9) The Eleventh District found that delayed appeal was not the same as direct appeal and therefore Appellant's case was not on direct review at the time that *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856, was decided. This made *Foster* inapplicable to Appellant's case according to the Eleventh District.

Appellant then moved to certify a conflict between the Eleventh District's opinion and the opinions of the Courts of Appeals in the cases of *State v. Jenkins*, 2nd Dist. No. 2006 CA 37, 2007-Ohio-1742 and *State v. Corbin*, 3rd Dist No. 1-06-23, 2006-Ohio-6092. In *Jenkins* and *Corbin*, the Courts of Appeals found *Foster* was applicable on delayed appeal and remanded in those cases for a new sentencing hearing. In *Jenkins*, the Second District held delayed appeal is the same as direct appeal within the meaning of *Foster*. In *Corbin*, the Court of Appeals for the Third District implicitly identified delayed appeal as equivalent with direct appeal.

The Eleventh District determined that a conflict existed (Appx. A-5) and Appellant filed a Notice of Certification of Conflict in this Court on July 13, 2007. (Appx. A-1) The instant appeal arises from this Court's determination, on September 26, 2007, that a conflict existed.

(Appx. A-29)

ARGUMENT

Certified Conflict Issue No. I:

Whether a delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*?

Answer and Proposition of Law No. I:

Yes. A delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*.

A. The Delayed Appeal

Criminal defendants have an automatic right of appeal granted to them by statute. R.C. §§2953.02 (Appx. A-69); 2953.08 (Appx. A-70). An appeal is perfected by filing a notice of appeal in the trial court within 30 days of the entry of the judgment or order appealed from. App.R. 4(A) (Appx. A-75).¹ Criminal defendants are given the option to file a motion for leave to appeal when the thirty day time period has passed and for good cause shown may then appeal with leave of court. App.R. 5(A) (Appx. A-77).²

The Ohio Rules of Appellate Procedure specify, not surprisingly, the procedure for a delayed appeal. After the court of appeals rules upon a defendant's motion, the Court is required to journalize its order. If the motion for leave to appeal is granted, "the further procedure shall

¹ Appeals under Ohio R. of App. Proc. 4(A) are known as appeals of right or direct appeals.

² Such an appeal is commonly known as a delayed appeal and will be referred to hereinafter.

be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.” App.R. 5(F) (Appx. A-78). Thus, the Rules contemplate that once a motion for a delayed appeal is granted, the delayed appeal is procedurally identical to an appeal of right. The crux of the certified question is whether delayed appeal is substantively the same as an appeal of right (i.e. whether the same law is applied on both). And the answer is yes.

B. This Court’s Case Law Shows Delayed Appeal is Equivalent to Direct Appeal

In *State v. Wallace* (1975), 43 Ohio St.2d 1, this Court considered the ability of the state to file a motion for leave to appeal and its failure to comply with the statutory provisions governing an appeal by the state. This Court held that App. R. 5(A) is applicable to appeals by the State in criminal cases. *Id.* at 3. More importantly, this Court noted: “Once leave to appeal has been granted, an appeal by the state in a criminal case shall proceed as would any other appeal.” *Id.* at 4. Thus, this Court thus early on recognized that delayed appeals were identical to appeals of right.

In *State v. Ishmail* (1981), 67 Ohio St.2d 16, this Court implicitly recognized the equivalency of an appeal of right and a delayed appeal when the Court stated: “No direct appeal was taken, either as a matter of right or as a delayed appeal.” *Id.* Here, the Court expressed its understanding that there is an equivalency for purposes of appellate review between an appeal of right and a delayed appeal.

Again, this Court equated a defendant’s initial motion for delayed appeal with direct appeal in *State v. Gover* (1995), 71 Ohio St.3d 577. In that case, Gover filed a motion for delayed appeal, due to the trial court’s failure to appoint appellate counsel, which the court of appeals denied. This Court affirmed that judgment finding that Gover had a remedy by way of a petition for post conviction relief. *Id.* at 580. Gover asserted that the court of appeals denied his

right to direct appeal provided by the Ohio Constitution. This Court noted that the court of appeals decision to deny his motion for delayed appeal was doubtful at best. *Id.* at 581. Gover had not filed his appeal to this Court in a timely manner. Therefore, this Court held that it need not consider Gover's constitutional arguments in favor of reinstating his right to a "direct appeal." *Id.* The Court, however, was referencing Gover's contention that he was denied his constitutional right to direct appeal by the Court of Appeals denial of his motion for delayed appeal. The Court by stating "direct appeal" thus again equated a delayed appeal with direct appeal.

Yet again, in *State ex rel. Rash v. Jackson*, 102 Ohio St.3d 145, 2004-Ohio-2053, this Court implicitly recognized that a defendant's delayed appeal is a direct appeal. *Id.* at ¶3, 12.

The precedents of this Court indicate that a delayed appeal is a direct appeal and that they are in fact substantively the same. Therefore the Court should answer the certified question in the affirmative.

C. This Court's Case Law Regarding Extraordinary Writs Shows that Delayed Appeal is Identical to Direct Appeal.

Each of the extraordinary writs of mandamus, prohibition, procedendo, and habeas corpus have a requirement that the petitioner not have an adequate remedy in the ordinary course of law. An appeal is one avenue considered to be an adequate remedy in the ordinary course of law. *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205 at ¶43. However, in cases involving the extraordinary writs, this Court recognizes that delayed appeal is an adequate remedy in the ordinary course of law. This Court has held that prohibition and mandamus will not issue if an appellant has an adequate remedy in the ordinary course of law and delayed appeal has been considered an adequate remedy by the

Court. *State ex rel. Ahmed v. Costine*, 103 Ohio St.3d 166, 2004-Ohio-4756 at ¶4-5. In *State ex rel. Sneed v. Anderson*, 114 Ohio St.3d 11, 2007-Ohio-2454, this Court determined that the petitioner in a habeas corpus proceeding had an adequate remedy by way of delayed appeal and was therefore not entitled to habeas relief. *Sneed* at ¶8. In *State ex rel. Bortoli v. Dinkelacker*, 105 Ohio St.3d 133, 2005-Ohio-779, the Court found a defendant had adequate remedies by motion for delayed appeal and a writ of procedendo was not necessary to compel a ruling upon the defendant's motion to vacate a plea which had already been ruled on. *Bortoli* at ¶3.

In the criminal context by holding that delayed appeal is an adequate remedy in the ordinary course of law for an extraordinary writ, this Court has implicitly again acknowledged that delayed appeal is equivalent to an appeal of right. A delayed appeal only arises when the time for filing an appeal of right has expired. But delayed appeal is an adequate remedy even when a defendant's time for appealing a challenged decision has elapsed. Thus delayed appeal must have the same effect or import that an appeal would have to be an adequate remedy in the ordinary course of law. A defendant must be able to obtain the same remedy or relief by delayed appeal that he would by an appeal of right to make delayed appeal an adequate remedy in the extraordinary writ context. But a defendant could only obtain that same relief or remedy by way of delayed appeal if the same substantive law applies in both appeals of right and delayed appeals. What is implicit in the Court's cases addressing extraordinary writs is the proposition that delayed appeals apply the same substantive law as appeals of right. Thus, if delayed appeals are procedurally identical to appeals of right after leave is granted and delayed appeals apply the same substantive law, then delayed appeals and appeals of right are identical for purposes of appellate review.

D. Pertinent Court of Appeals' Decisions on the Certified Question

The Courts of Appeals are divided on the answer to the certified question. The division goes even to appellate panels within appellate districts. The Courts of Appeals in the Second, Third, and Eight Districts have found in the context of a delayed appeal that a defendant's sentence must be vacated on the basis of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, when the defendant was sentenced prior to the announcement of *Foster* but raises the issues of an unconstitutional sentence on the basis of *Foster* in the appeal. See *State v. Jenkins*, 2nd Dist. No. 2006 CA 37, 2007-Ohio-1742; *State v. Corbin*, 3rd Dist. No. 1-06-23, 2006-Ohio-6092; *State v. Polk*, 8th Dist. No. 88639, 2007-Ohio-4436. While two of these cases have not directly answered the question, each case has reversed a defendant's sentence on the basis of *Foster*. The Court in *Jenkins* explicitly stated although Jenkins had filed a delayed appeal it considered his appeal to be on direct review within the meaning of *Foster*. *Jenkins* at ¶4. In so doing, the Courts have implicitly recognized that there is no distinction between a delayed appeal and an appeal of right in substantively reviewing a defendant's assignments of errors.

In the instant case from which the certified conflict case arose, the Court of Appeals for the Eleventh District thought otherwise. "Delayed appeal is not the same as direct appeal." *State v. Silsby*, 11th Dist. No. 2006-G-2725, 2007-Ohio-2308 at ¶14. The Eleventh District is not alone in its thinking on this question. The Sixth and Tenth District Courts of Appeals have likewise agreed in the context of a *Foster* appeal. See *State v. French*, 6th Dist. No. S-06-033, 2007-Ohio-2826; *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752.³

The Courts of Appeals have clearly divided over the question. Moreover, it is clear from a review of the case law that the proposition that delayed appeal is not the same as direct appeal

³ For a discussion that delayed appeal is not the same as direct appeal in a non-*Foster* context, see *State v. Bird* (2000), 138 Ohio App.3d 400, 404-405.

has arisen from litigation in the post conviction context and comments in those cases as to what a direct appeal is.

E. Distinctions Drawn by the Courts of Appeals in Post Conviction Relief Cases

The Courts of Appeals have also had occasion to address the distinction between delayed appeal and appeals as of right in the post conviction relief cases. The First District considered the question of whether delayed appeal is the same as direct appeal in the context of post conviction relief in *State v. Fuller*, 171 Ohio App.3d 260, 2007-Ohio-2018. The Court noted that the phrase “direct appeal” in R.C. §2953.21 applied to not just appeals of right but to delayed appeals as well as reopened appeals. The Court also noted that Rules of Appellate Procedure do not support a distinction between an appeal of right and delayed appeal. *Id.* at ¶13-18.

In *State v. Hill*, 160 Ohio App.3d 324, 2005-Ohio-1501, the Eight District held that a defendant must exhaust his direct appellate rights prior to the filing of a petition for post conviction relief. Hill had never directly appealed his conviction due to a failure of appellate counsel to be appointed. Instead Hill filed a petition for post conviction relief in the trial court which was granted. The State subsequently appealed and the Eight District held that Hill must exhaust his direct appellate rights by filing a motion for delayed appeal - thereby equating a delayed appeal with direct appeal. *Id.* at ¶15.

These cases are not exclusive however. Contrary results have been reached to the above decisions of the First and Eight Districts. See e.g. *State v. Johnson* (2001), 144 Ohio App.3d 222; *State v. Bird*, (2000), 138 Ohio App.3d 400, 741 N.E.2d 560, appeal dismissed (2000), 90 Ohio St.3d 1427, 736 N.E.2d 25. The law from the Courts of Appeals is mixed at best on the question. But the more compelling arguments are those espoused by the First District in *Fuller*. Such arguments are in keeping with the precedent of this Court.

F. The Certified Question has Already been Answered by the U.S. Supreme Court's Decisions.

When a federal issue is present, direct review ends when the U.S. Supreme Court has granted or denied a petition for certiorari or the time for the petition has expired. See e.g. *Brecht v. Abrahamson* (1993) 507 U.S. 619, 632. The U.S. Supreme Court has recently affirmed again that an intermediate appeal by leave of court from a plea that was negotiated is on direct review. *Halbert v. Michigan* (2005), 545 U.S. 605, 619.

Foster was made applicable to all cases pending on direct review. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 at ¶104, 106. This holding was based upon the U.S. Supreme Court's holding in *U.S. v. Booker* (2005), 543 U.S. 220, 268 and the rule of *Griffith v. Kentucky* (1987), 479 U.S. 314, 328, that a new rule of for the conduct of criminal prosecutions is to be applied retroactively to all cases on direct review or not yet final. *Foster* at ¶106. Because *Foster* gleaned its extent of application from *Booker*, the U.S. Supreme Court's understanding of direct review is determinative. *Halbert* is precisely on point in this matter and forecloses any further question as to whether Appellant's case was on direct review.

Since the U.S. Supreme Court's understanding of direct review is consistent and it does not differentiate based upon how an appeal is initiated, then the holdings of *Booker* and *Griffith* are applicable. These cases direct that a new rule, such as that announced in *Foster*, must be applied retroactively to all cases on direct review. Thus, the certified question should be answered in the affirmative.

G. Constitutional & Policy Concerns Also Counsel that the Certified Question Should be Answered in the Affirmative

It is both important for the Court to consider the constitutional and policy implications of how it answers the certified question. The Court should be cautious in answering the certified question in the negative as such an answer raises equal protection concerns.

The Equal Protection Clause prevents states from treating people differently under its laws on an arbitrary basis. *Harper v. Virginia State Bd. Of Elections* (1966) 383 U.S. 663, 681 (Harlan, J., dissenting) “Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected...”
Id.

If the Court answers the certified question in the negative, such a decision would allow two classes of defendants to be created – those who appeal a sentence as of right and those who appeal by motion for leave to appeal. In and of itself, this classification is not problematic. However, if the Court allows different substantive law to be applied, then defendants will be treated differently based upon what type of appeal they file. This is problematic since defendants will be faced with entirely different substantive law based upon the type of appeal they file. Moreover, there are excusable circumstances under which a defendant files a delayed appeal (e.g. the trial court’s failure to appoint appellate counsel or communicate the appointment to counsel). However, if the Court answers the question in the negative, then some defendants, who through no fault of their own fail to appeal their sentence, will now face a different substantive law.

The Equal Protection Clauses of the U.S. and Ohio Constitutions forbid exactly this type of separate treatment. The State cannot advance a feasible argument for a compelling

governmental interest in a judicial construction that creates a separate classification for defendants on delayed appeal when reviewing *Blakely-Foster* sentencing errors. Nor is any such distinction narrowly tailored to serve that interest. As such, the Court should be cautious in allowing the distinction between types of appeals which the Eleventh District created to stand as law.

The certified question also has broad implications for appellate review of criminal defendants' cases. Under the Eleventh District's theory, if delayed appeal is not the same as an appeal of right and a court is not required to apply the same substantive law, then any number of constitutional or statutory rights can be overlooked or given a lesser importance in reviewing a defendant's assignments of errors. However, this will do nothing less than open Pandora's box and result in massive litigation and appeals to this Court regarding the different standards that apply on delayed appeal. And such litigation is not likely to stay simply within the delayed appeal context but is likely to spill over into post conviction relief matters and into App. R. 26(B) appeals as well.

The implications of the Eleventh District's decision and those districts following it are profound. This Court should clarify the law and stem this potential avalanche of appeals regarding standards on delayed appeal and equal protection cases.

H. Application to the Instant Case

Appellant moved for delayed appeal. In his appeal, Appellant challenged the maximum and consecutive sentence imposed on him arguing that he was sentenced under unconstitutional statutes on the basis of *Foster*. T.d. at 11, Assignment of Error 1. The Eleventh District treated Appellant's assignment of error differently than one presented on an appeal of right, applied different substantive law, and refused to find *Foster* applicable and order a new sentencing.

(Appx. A-12-14). Because delayed appeal is the same as direct appeal for purpose of appellate review of as to whether a defendant was sentenced upon the basis of an unconstitutional statute under *Foster*, Appellant's sentence should be vacated and a new sentencing hearing ordered. For the reasons stated above, Appellant asks the Court to adopt his proposition of law and answer the first certified question in the affirmative.

Certified Conflict Issue No. II:

Whether a defendant's sentence must be reversed on the basis of *State v. Foster* when:

a) the defendant was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be unconstitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal?

Answer and Proposition of Law No. II:

Yes. A defendant's felony sentence must be reversed on the basis of *State v. Foster* when the defendant was sentenced prior to the announcement of *Foster*; was sentenced under the statutes found to be unconstitutional in *Foster*; and the defendant raises the issues of the constitutionality of the sentencing statutes on the basis of *Foster* on delayed appeal.

A. A Reviewing Court Must Apply the Same Substantive Law on Delayed Appeal as it does on Direct Appeal.

Part of the second certified question involves whether the defendant does not pursue a direct appeal but rather pursues a delayed appeal. Appellant incorporates by reference the argument to the first certified question as if fully rewritten herein. Without restating the case, it is adequate to note that this Court has equated appeals of rights and delayed appeals previously. See e.g. *State v. Ishmail* (1981), 67 Ohio St.2d 16; *State v. Gover* (1995), 71 Ohio St.3d 577;

State ex rel. Sneed v. Anderson, 114 Ohio St.3d 11, 2007-Ohio-2454. And the U.S. Supreme Court has stated that a case such as the instant one is on direct review. *Halbert*, 545 U.S. at 619. As argued above, Appellant submits that the first certified question should be answered in the affirmative and that that answer dictates that the same law applicable to appeals of right must be applied to delayed appeals. Thus for purposes of the second certified question, part c is answered by the first certified question.

B. The *Foster* Case and its Holding

The balance of the certified question is answered by a review of the applicable case law including *Foster* and later decisions.

In *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856, this Court held that Ohio Revised Code Sections 2929.14(C) and 2929.19(B)(2) are unconstitutional because they require judicial fact-finding prior to imposing a maximum sentence in violation of a defendant's Sixth Amendment Right to a jury trial under the U.S. Constitution. *Foster* at syllabus ¶1. The Court held similarly for R.C. Sections 2929.14(E) and 2929.41(A) with regard to consecutive sentences. *Id.* at syllabus 3. The remedy for the unconstitutional statutes was that the offending sections were severed and trial courts have full discretion to impose a sentence within the statutory range without making factual findings or give reasons for imposing the maximum or consecutive sentences. *Id.* at ¶100. The holding in *Foster* applies retroactively to all cases on direct review. *Id.* at ¶106. Moreover, this Court directed that all cases on direct review must be remanded for a new sentencing hearing. *Id.* at ¶104.

C. Post-*Foster* Case Law

Since *Foster* was decided, this Court has had occasion to pass on the *Blakely-Foster* concept again. In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, this Court held that a

failure to object at trial to a sentence that violates *Blakely* forfeits the issue on appeal. *Id.* at 1. Unless a knowing waiver of a *Blakely* sentencing error is made, then the plain error test is the appropriate test. *Id.* at ¶23-24. In *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, this Court applied *Payne* and again acknowledged that waived claims can still be considered for plain error. *Id.* at ¶206.

Payne is retrospective in nature as it affects all cases pending on direct review at the time it was announced. *State v. Ali*, 104 Ohio St.3d 328, 2004-Ohio-6592 at ¶6. Thus *Payne* is applicable to the instant case.

D. *Payne* and *Frazier*⁴ are Unconstitutional under the U.S. and Ohio Constitutions

Although *Payne* and *Frazier* represent the current state of Ohio law, both decisions as they stand are unconstitutional in several respects. Each case suffers from ex post facto problems as well as equal protection and due process problems as argued infra.

***Payne* and *Frazier* violate the Ex Post Facto Clause of the U.S. Constitution**

Section 10, Article I of the United States Constitution reads, "No State shall * * * pass any * * * ex post facto Law." "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, [which] the Constitution forbids." *Bowie v. Columbia* (1964), 378 U.S. 347, 353. A law is ex post facto if it is retrospective and disadvantages the offender affected by it. *Miller v. Florida* (1987), 482 U.S. 423, 430. A law must affect substantial rights and not merely procedural modes which do not affect substance. *Id.* "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" *Id.*

⁴ Appellant will refer throughout the Brief to *Payne* and *Frazier*. Appellant only challenges *Frazier* in as much as it incorporates *Payne*'s holding to non-capital felony sentences but does not challenge the balance of *Frazier*'s holdings.

Importantly in *Miller*, the U.S. Supreme Court addressed the argument raised in *Payne* that under a harmless error standard, a defendant cannot establish that but for a sentencing error he would not receive a more lenient sentence. The Court noted that the argument that a defendant cannot show that he is disadvantaged by a change in sentencing laws is barred by prior precedent. *Id.* at 432. “[O]ne is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old.” *Id.*

Payne has changed the law on sentencing with regard to *Blakely-Foster* errors. In *Foster*, this Court applied the severance remedy of *U.S. v. Booker*, 543 U.S. 220; it applied the holding to all cases on direct review; and lastly ordered that all cases pending on direct review be remanded for new sentencing hearings. *State v. Payne*, 14 Ohio St.3d 502, 2007-Ohio-4642 at ¶39 (Cupp, J. concurring in part and dissenting in part). The holding of *Foster* was broader than the remedy applied in *Booker* because unlike in *Booker*, this Court specifically ordered that new sentencing hearings for all cases on direct review. *Foster* at 104. Moreover, at least two members of this Court acknowledged that *Foster* had a broader remedy than *Booker* and that the uniform remedy of *Foster* should be applied to all defendants. *Payne* at ¶43-44 (Cupp, J. concurring in part and dissenting in part).

Payne and *Frazier* represent an elimination of substantive rights of defendants on direct review. Under *Foster*, all defendants on direct review were entitled to a new sentencing hearing based upon Sixth Amendment principles as espoused in U.S. Supreme Court cases and this Court’s interpretation of those cases to Ohio law. *Payne* eliminated the remedy of an automatic new sentencing hearing and instead applied a plain error analysis to *Blakely* type errors and instructed reviewing courts to look to see whether such errors were objected to at the trial level.

By eliminating the automatic right to a new sentencing hearing, *Payne* has disadvantaged defendants on direct review by raising the standard for them to obtain a new sentencing hearing.

Payne and *Frazier* clearly change the legal consequences of acts completed before their effective date. Appellant's case was pending as a certified conflict before this Court when *Payne* was decided. *Payne* changed the applicable law and changed Appellant's substantive rights as announced in *Foster* by decreasing the breadth of the Sixth Amendment holding of *Foster*. Under *Bouie*, *Payne* can operate by judicial construction as an ex post facto law. Both *Payne* and *Frazier* do so here and as such violate the prohibition of the U.S. Constitution against ex post facto laws.

***Payne and Frazier Violate the Equal Protection Clauses of
the U.S. Constitution and Ohio Constitutions***

The essence of the equal protection clause of the U.S. Constitution has been stated by the Ninth District Court of Appeals:

“The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states that no state shall deny to any person the equal protection of the laws. It prevents a state from treating people differently under its laws on an arbitrary basis. An equal protection claim arises, therefore, only in the context of an unconstitutional classification made by a state, i.e., when similarly situated individuals are treated differently.

In re R. R., 9th Dist. No. 23641, 2007-Ohio-4808 at ¶47 (citations omitted). The Ohio Constitution provides similarly. Section 2, Article 1, Ohio Constitution. This Court has treated the interpretation of the Ohio clause similarly to interpretations of the U.S. Constitution. *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 59.

When a fundamental constitutional right is at stake, a court must use a strict scrutiny standard – whether a discriminatory classification is narrowly tailored to serve a compelling

governmental interest. *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124 at ¶13. It is axiomatic that Appellant has a fundamental liberty interest in his freedom. Moreover, the right to trial by jury is fundamental as well. See *Blakely v. Washington*, 542 U.S. 296 syllabus paragraph b. Appellant has a fundamental liberty interest at stake in this certified conflict question which is affected by the ruling in *Payne*. Therefore strict scrutiny would apply.

The classification at issue here is created by *Payne* and the question it resolved therein. The classifications are those defendants who were sentenced pre-*Foster* and did not raise a *Blakely* challenge yet received the benefit of the *Foster* decision pre-*Payne* versus those defendants who were sentenced pre-*Foster* and did not raise a *Blakely* challenge and did not receive the benefit of the *Foster* decision because of *Payne*. In simpler form, those defendants to whom *Payne* is applicable versus those who were pre-*Payne*.

The State does not have a compelling governmental interest in the classification. The classification is more of a step backwards to the remedy prescribed in *Booker* but which was rejected initially in *Foster*. Although the State maintains an interest in the orderly processing of defendants through the criminal justice system, such an interest is not in play here. Because the classification is by judicial construction, the question is whether a compelling judicial interest requires this construction of Ohio law. No such interest can be articulated. While this Court maintains a prime function to declare what Ohio law is and to harmonize Ohio law, that interest does not require the construction of *Foster* that was advanced.

Even if the Court has a compelling governmental interest in its interpretation of *Foster* and its progeny, the *Payne* construction is not narrowly tailored to serve that interest. The *Payne* classification sweeps a large dividing line between those defendants whose appeals were being decided shortly after *Foster* and those whose appeals were decided later. Some defendants were

accorded the right to an automatic new sentencing hearing, while others such as Payne and Appellant, if *Payne* is applied to this case, will receive no automatic right to a new sentencing hearing. The Court having once granted the benefit to defendants under *Foster*, a benefit it was not required to give under *Booker*, cannot then take the benefit away from other members of the same class of defendants.

Because there is not a compelling governmental interest in creating a classification among defendants which abridges their Sixth Amendment rights and liberty interests, the *Payne* construction of *Foster* violates the equal protection clauses of the U.S. and Ohio Constitutions.

Payne & Frazier Deprive Appellant of a Liberty Interest Without Due Process of Law

The question of the constitutionality of *Payne* and *Frazier* are resolved by the U.S. Supreme Court case of *Hicks v. Oklahoma* (1980), 447 U.S. 343. In that case, after Hicks' conviction, the state criminal sentencing statute under which Hicks was sentenced was found to be unconstitutional by an Oklahoma court of appeals. Hicks then attempted to set aside his conviction on appeal based upon the unconstitutionality of the statute. While recognizing that the statute upon which Hicks was convicted was unconstitutional, the Oklahoma Criminal Court of Appeals found that Hicks was not prejudiced by the impact of the statute. The U.S. Supreme Court disagreed and reversed the conviction.

In its holding, the Court stated the following:

“It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion ...”

Hicks at 346.

This holding is analogous to the situation with Appellant and the second certified question. In *Foster*, this Court declared that the statutes requiring judicial findings of fact prior to imposition of a maximum or concurrent sentence are unconstitutional in violation of the Sixth Amendment right to jury trial. *Foster* directed that all cases pending on direct review must be remanded for new sentencing hearings. *Foster* at ¶104. By the Court's holding, Appellant had a legitimate expectation of a procedure that was designed to protect his liberty interests, to wit: a new sentencing hearing for a defendant on direct review who was sentenced under an unconstitutional statute.

Payne set aside paragraph 104 of *Foster* and limited it to situations where defendants on direct review had raised a *Blakely* objection at the time of sentencing. Now, defendants are not entitled to an automatic new sentencing hearing but instead would have to demonstrate that their sentences involved plain error. *Payne* at ¶30. *Frazier* involved the application of *Payne* to the case at hand and did not deviate from the rule announced in *Payne*. Thus, *Payne* changed the procedure for *Foster* defendants who had not raised a *Blakely* challenge at sentencing.

Appellant and similarly situated defendants had a legitimate expectation that the *Foster* procedure set in place by this Court would not be denied to them as it reflected the Court's most current understanding of the right to trial by jury. Just as in *Hicks*, Appellant had an expectation that he would only be sentenced by a "jury" (the new *Foster* procedure). As the U.S. Supreme Court noted in *Hicks*, it is not proper to say this is merely a matter of state procedural law. But rather, defendants who did not raise *Blakely* challenges at sentencing but were on direct review at the time of *Foster* had a legitimate expectation that they would only be deprived of their liberty interest in accord with the procedure set forth in *Foster*. *Hicks* at 346. It is important to note that the Court did not have to grant the mandate to an automatic new sentencing hearing under *Foster* but rather the Court chose to do go beyond the *Booker* remedy. Once this Court chose to extend the right to defendants on direct review, it cannot then

withhold it or limit the application thereof. The denial of that procedure is a deprivation of Appellant's liberty interest. Both *Payne* and *Frazier*, as it relates to *Blakely* error, are unconstitutional as they deny Appellant due process of law.

E. A New Sentencing Hearing as Announced in *Foster* is the Proper Remedy

Because *Payne* and *Frazier* are constitutionally infirm, they cannot be applied to answer the second certified question. The state of the law then must return to its position pre-*Payne*. That state of the law was that a *Blakely* error, whether raised or not, makes no difference in a case on direct review at the time *Foster* was decided. All cases on direct review at the time *Foster* was decided must be remanded for a new sentencing hearing.

F. Application to the Instant Case

Appellant was sentenced on October 6, 2005 and a final judgment of conviction entered on October 19, 2005. (Appx. A-33) *Foster* was decided on February 27, 2006. Appellant received a maximum and consecutive sentence and was therefore sentenced under R.C. §2929.14(C) and (E)(4) and §2929.41(A). Appellant did not file a direct appeal but rather moved for leave to appeal. (Appx. A-30) Appellant also raised the issue of his sentencing being unconstitutional under *Foster* on appeal for the first time. T.d. at 11, Assignment of Error 1.

As argued under the first certified question, Appellant's case was on direct review at the time *Foster* was decided. Appellant was entitled to have the rule of *Foster* applied to his case. Although *Payne* and *Frazier* were subsequently decided and are applicable to Appellant, those decisions are unconstitutional and should not be applied herein. As such the applicable law for Appellant is *Foster*. Under the mandate of *Foster*, all cases then pending on direct review must be remanded for a new sentencing hearing. Appellant, therefore, is entitled to a remand and new sentencing hearing.

CONCLUSION

Wherefore, Appellant submits that the certified questions should be answered in the affirmative, that Appellant's sentence should be vacated, that the case should be remanded for a new sentencing hearing in accord with the dictates of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant also submits that this Court should review its holding in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, and reverse said decision to the extent that review is necessary to answer the certified questions and to the extent they conflict with the Constitutions of the United States and the State of Ohio.

Respectfully Submitted,



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PROOF OF SERVICE

I hereby certify that a copy of this Appellant's Merit Brief was sent by regular U.S. Mail postage prepaid on this 3rd day of December 2007 to the following:

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Attorney for the Appellee
State of Ohio

A handwritten signature in black ink, appearing to read 'Derek Cek', written over a horizontal line.

Derek Cek #0072477
Counsel for the Appellant

IN THE SUPREME COURT OF OHIO

07-1254

STATE OF OHIO)

Appellee)

vs.)

WILLIAM J. SILSBY)

Appellant)

Case No.:

On Appeal from the Geauga
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No.: 2006-G-2725

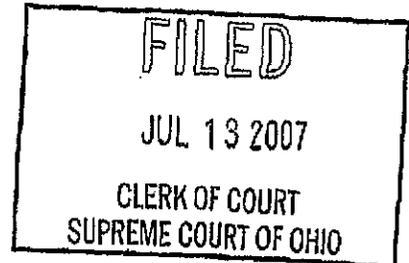
NOTICE OF CERTIFICATION OF CONFLICT
OF APPELLANT WILLIAM J. SILSBY

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COUNSEL FOR APPELLEE STATE OF OHIO



NOTICE OF CERTIFIED CONFLICT

Now comes the Appellant William J. Silsby, by and through counsel, and hereby gives notice that the Court of Appeals for the Eleventh Appellate District certified its decision in the within case of *State v. Silsby*, Geauga App. No. 2006-G-2725, 2007-Ohio-2308 to be in conflict with the decisions of the Second Appellate District in *State v. Jenkins*, Clark App. No. 2006 CA 37, 2007-Ohio-1742 and the Third Appellate District in *State v. Corbin*, Allen App. No. 1-06-23, 2006-Ohio-6092.

The Court of Appeals certified the following questions:

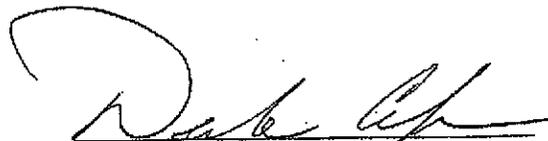
1. Whether a delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*?
2. Whether a defendant's sentence must be reversed on the basis of *State v. Foster* when: a) the defendant was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be unconstitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal?

On June 27, 2007, Appellant filed a notice of appeal and memorandum in support of jurisdiction arguing that a delayed appeal is the same as a direct appeal for application of the right to trial by jury in sentencing (as explained in *State v. Foster*). Appellant also argued that a court of appeals may not differentiate among defendants in its application of the constitutional

sentencing principles of *Foster* based upon how a defendant institutes his appeal without violating the equal protection clauses of the United States and Ohio Constitutions.

Therefore, Appellant asks this Court to determine that a conflict exists and to consolidate this case with Case No. 2007-1158 , State v. Silsby, Geauga Appeal No. 2006-G-2725.

Respectfully Submitted,



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PROOF OF SERVICE

I hereby certify that a copy of this Notice of Certification of Conflict was sent by regular U.S. Mail postage prepaid to Ms. Susan T. Wieland, Attorney for the Appellee, 231 Main St., Suite 3A, Chardon, Ohio 44024, this 12th day of July 2007.



Derek Cek #0072477
Counsel for the Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	Case No.:
)	
Appellee	)	On Appeal from the Geauga
	)	County Court of Appeals,
vs.	)	Eleventh Appellate District
)	
WILLIAM J. SILSBY)	
)	
Appellant	)	Court of Appeals
	)	Case No.: 2006-G-2725
)	

APPENDIX TO NOTICE OF CERTIFICATION OF CONFLICT
OF APPELLANT WILLIAM J. SILSBY

FILED
IN COURT OF APPEALS

JUL 06 2007

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY
) SS.

STATE OF OHIO
COUNTY OF GEAUGA

THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

WILLIAM J. SILSBY,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2006-G-2725

On May 21, 2007, appellant, William J. Silsby, filed a motion pursuant to App.R. 25 to certify this case to the Supreme Court of Ohio on the basis of a conflict. Appellant asserts that this court's decision in *State v. Silsby*, 11th Dist. No. 2006-G-2725, 2007-Ohio-2308, is in conflict with decisions of the Second and Third District Courts of Appeal. *State v. Jenkins*, 2d Dist. No. 2006 CA 37, 2007-Ohio-1742; and *State v. Corbin*, 3d Dist. No. 1-06-23, 2006-Ohio-6092.

Appellee, the state of Ohio, filed a response on May 31, 2007, specifically indicating that it "is not taking a position on [a]ppellant's [m]otion to [c]ertify a [c]onflict."

In *Jenkins*, supra, the appellant was sentenced on September 28, 2005. *Id.* at ¶1. He did not file a timely notice of appeal. *Id.* Rather, the appellant filed a delayed appeal after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, was

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decided. *Id.* at ¶4. The court granted the delayed appeal on May 3, 2006. *Id.* at ¶1. The appellant, relying upon the *Foster* decision, asserted that the trial court erred in sentencing him to more than the minimum sentence based upon an unconstitutional statute. *Id.* at ¶2. The Second District reversed the appellant's sentence and remanded the matter for a new sentencing hearing. *Id.* at ¶10. Specifically, the trial court held that the appellant's delayed appeal, filed after *Foster*, was considered to be on direct appeal within the meaning of *Foster*. *Id.* at ¶4.

Likewise, in *Corbin*, *supra*, the appellant was sentenced on January 23, 2006. *Id.* at ¶3. The appellant filed a direct appeal, which was dismissed because it was untimely. *Id.* at ¶4. He then filed a delayed appeal, which was granted on May 30, 2006. *Id.* The appellant asserted that the trial court erred in sentencing him under a statute found unconstitutional pursuant to *Foster*. *Id.* at ¶5. The Third District reversed the appellant's sentence on the basis of *Foster*. *Id.* at ¶14. By its action, the Third District equated delayed appeal with direct appeal.

In the instant matter, appellant was sentenced on October 19, 2005. *Silsby*, *supra*, at ¶4. He filed a motion for a delayed appeal on August 2, 2006, which was granted on November 2, 2006. *Id.* at ¶4, fn. 2. Thus, appellant was sentenced before *Foster* and filed a delayed appeal after the *Foster* decision. In affirming the decision of the trial court, this court held, at ¶14:

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"Here, appellant's case was not pending on direct review at the time of the *Foster* decision, which was decided on February 27, 2006. Appellant's August 2, 2006 filing of his delayed appeal, does not change the fact that the conviction and sentence had become final long before *Foster* was announced. 'Delayed appeal is not the same as direct appeal.' *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752, at ¶10, citing *State v. Bird* (2000), 138 Ohio App.3d 400 ***. 'Because appellant's case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court.' *Lewis* at ¶10." (Parallel citation omitted.)

Based upon the foregoing conflict, we certify the following issues for review by the Supreme Court of Ohio:

"1. Whether a delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*.

"2. Whether a defendant's sentence must be reversed on the basis of *State v. Foster* when: a) the defendant was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be unconstitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal."

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Appellant's motion to certify a conflict is granted.



JUDGE COLLEEN MARY O'TOOLE

CYNTHIA WESTCOTT RICE, P.J.,

MARY JANE TRAPP, J.,

concur.

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FILED

IN COURT OF APPEALS

STATE OF OHIO

MAY 14 2007

IN THE COURT OF APPEALS

COUNTY OF GEAUGA

SS.
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

ELEVENTH DISTRICT

STATE OF OHIO,

JUDGMENT ENTRY

Plaintiff-Appellee,

CASE NO. 2006-G-2725

- vs -

WILLIAM J. SILSBY,

Defendant-Appellant.

For the reasons stated in the opinion of this court, the assignments of error are not well-taken. It is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas is affirmed.


JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT

12/239

A-9

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS
MAY 14 2007
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2006-G-2725
WILLIAM J. SILSBY, :
Defendant-Appellant. :

Criminal Appeal from the Court of Common Pleas, Case No. 04 C 0000105.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Susan T. Wieland*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Plaintiff-Appellee).

Derek Cek, 3500 West Market Street, #4, Fairlawn, OH 44333 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, William J. Silsby, appeals from the October 19, 2005 judgment entry of the Geauga County Court of Common Pleas, in which he was sentenced for obstructing official business.

{¶2} On October 19, 2004, appellant was indicted by the Geauga County Grand Jury on two counts: count one, domestic violence, a felony of the third degree, in

violation of R.C. 2919.25(A); and count two, obstructing official business, a felony of the fifth degree, in violation of R.C. 2921.31(A). Appellant pleaded not guilty at his arraignment on January 25, 2005.

{¶3} On October 6, 2005, the trial court held a joint change of plea and sentencing hearing. Appellant withdrew his former not guilty plea, and pleaded guilty to count two, obstructing official business, a felony of the fifth degree, in violation of R.C. 2921.31(A). The trial court accepted appellant's guilty plea with respect to count two, and dismissed count one.

{¶4} Pursuant to its October 19, 2005 judgment entry, the trial court sentenced appellant to twelve months in prison, to be served consecutively with an existing sentence from Lake County, Ohio, Case No. 04 CR 000793, and placed him on post release control for a period of up to three years.¹ It is from that judgment that appellant filed the instant appeal and raises the following three assignments of error:²

{¶5} “[1.] The trial court erred when it sentenced appellant to the maximum

1. In the Lake County case, appellant was sentenced on September 29, 2005, to ten years for attempted murder, four years for having weapons while under disability, and one year for grand theft of a motor vehicle, to be served consecutively. The trial court also imposed an additional mandatory term of three years for a firearm specification with respect to the attempted murder count, to be served prior to and consecutive to the foregoing prison term. Thus, appellant was sentenced to a total prison term of eighteen years in the Lake County case. On October 27, 2005, in Case No. 2005-L-180, appellant filed a timely notice of appeal with this court. On October 20, 2006, we vacated appellant's sentence and reversed and remanded the matter to the trial court for resentencing and further proceedings consistent with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Silsby*, 11th Dist. No. 2005-L-180, 2006-Ohio-5500, at ¶17.

2. Appellant filed a motion for leave to file a delayed appeal pursuant to App.R. 5(A). Along with the motion, appellant filed his notice of appeal on August 2, 2006, almost nine months beyond the thirty-day requirement in App.R. 4(A). Appellant asserted the following: his trial counsel indicated that he would speak to the public defender's office and have someone file an appeal on his behalf; he did not receive anything in the mail about his appeal; he sent several letters to his trial attorney requesting certain information and did not receive anything from him since July 24, 2006; and he is not a lawyer and does not have any knowledge of the appellate process. No brief or memorandum in opposition was filed. Pursuant to this court's November 2, 2006 judgment entry, we determined that appellant satisfied the requirements of App.R. 5(A), and granted his motion for leave to file a delayed appeal.

sentence and consecutive sentences based upon findings of facts not found by a jury or admitted by the appellant in violation of appellant's federal and state constitutional rights to trial by jury.

{¶6} “[2.] The trial court’s sentence of appellant to the maximum sentence and a consecutive sentence was contrary to law.

{¶7} “[3.] The trial court denied appellant due process of law when it imposed a maximum and consecutive sentence which was not agreed to by appellant and the state in the plea agreement.”

{¶8} In his first assignment of error, appellant argues that the trial court erred when it sentenced him to the maximum and consecutive sentences based upon facts not found by a jury or admitted by him in violation of his federal and state constitutional rights to trial by jury.

{¶9} We note that the sentencing guidelines at issue have recently been addressed by this court in *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011.³ In *Elswick*, at ¶49, quoting *State v. Firouzmandi*, 5th Dist. No. 2006-CA-41, 2006-Ohio-5823, at ¶54-57, we stated:

{¶10} “**** appellate courts can find an “abuse of discretion” where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. *Cincinnati v. Clardy* (1978), 57 Ohio App.2d 153 *** (***). An “abuse of discretion” has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States* (1973), 478 F.2d 139, 147. The imposition by a trial judge of a sentence

3. In *Elswick*, the appeal dealt with more than the minimum sentences. However, the same analysis applies to maximum and consecutive sentences.

on a mechanical, predetermined or policy basis is subject to review. *Woosley*, supra, at 143-145. Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court's (sic) can reverse the sentence. *Woosley*, supra, at 147. *****

{¶11} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraphs one and three of the syllabus, the Supreme Court of Ohio held that R.C. 2929.14(C) and R.C. 2929.14(E)(4) are unconstitutional for violating the Sixth Amendment because they deprive a defendant of the right to a jury trial, pursuant to *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296. Further, pursuant to *United States v. Booker* (2005), 543 U.S. 220, the Supreme Court's remedy was to sever the unconstitutional provisions of the Revised Code, including R.C. 2929.14(C) and R.C. 2929.14(E)(4). After severance, judicial factfinding is not required before imposing maximum or consecutive sentences. *Foster* at paragraphs two and four of the syllabus. A trial court is no longer required to make findings or give its reasons for imposing maximum, consecutive or more than the minimum sentences. *Id.* at paragraph seven of the syllabus.

{¶12} The *Foster* decision did not announce a new constitutional right. *Foster* simply applied existing decisions of the United States Supreme Court to Ohio statutes. Any claim appellant may assert under *Foster* is actually based upon the *Apprendi* and *Blakely* decisions. *Apprendi* was decided in 2000, long before appellant entered his guilty plea and was sentenced. *Blakely* was decided on June 24, 2004, also before

appellant entered his guilty plea and was sentenced. Therefore, appellant could have raised a claim based on *Blakely* at the time he entered his negotiated guilty plea.

{¶13} “When a sentence is deemed void, the ordinary course is to vacate that sentence and remand to the trial court for a new sentencing hearing.” *Id.* at ¶103. However, the remedy of vacating a sentence following the *Foster* decision applies only to those cases pending on direct review. *Id.* at ¶104.

{¶14} Here, appellant's case was not pending on direct review at the time of the *Foster* decision, which was decided on February 27, 2006. Appellant's August 2, 2006 filing of his delayed appeal, does not change the fact that the conviction and sentence had become final long before *Foster* was announced. “Delayed appeal is not the same as direct appeal.” *State v. Lewis*, 10th Dist. No. 06AP-327, 2006-Ohio-2752, at ¶10, citing *State v. Bird* (2000), 138 Ohio App.3d 400. “Because appellant's case was final before *Foster* was decided, *Foster* cannot be a basis to vacate the judgment of the trial court.” *Lewis* at ¶10.

{¶15} Appellant's first assignment of error is without merit.

{¶16} In his second assignment of error, appellant contends that his sentence is contrary to law. He asserts three issues for our review. In his first issue, appellant alleges that the trial court erred in sentencing him to the maximum sentence for a single fifth degree felony because the evidence presented does not prove that he poses the greatest likelihood of committing future crimes. In his second issue, appellant stresses that the trial court erred in sentencing him to a consecutive sentence because it failed to consider the factor that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the

public. In his third issue, appellant maintains that a maximum twelve month sentence and a consecutive sentence is contrary to law since he pleaded guilty to a fifth degree felony and is already serving a sentence for other crimes.

{¶17} Because appellant's three issues are interrelated, we will address them together.

{¶18} On examining a felony sentence, an appellate court conducts a de novo review. R.C. 2953.08(G). However, "[a] reviewing court will not disturb a defendant's sentence absent a finding, by clear and convincing evidence, that the record does not support the sentence or that the sentence is contrary to law." *State v. Bush*, 11th Dist. No. 2005-P-0004, 2006-Ohio-4038, at ¶49, quoting *State v. Lloyd*, 11th Dist. No. 2002-L-069, 2003-Ohio-6417, at ¶6.

{¶19} As indicated in appellant's first assignment of error, a trial court is no longer required to make findings or give its reasons for imposing maximum, consecutive or more than the minimum sentences. *Foster*, supra, at paragraph seven of the syllabus. However, appellant's case was not pending on direct review at the time of the *Foster* decision. Again, his conviction and sentence had become final long before *Foster* was announced. Accordingly, the trial court was required to make the requisite findings before imposing sentence on October 19, 2005.

{¶20} At the sentencing hearing, the trial court stated the following:

{¶21} "I do find that the Domestic Violence and the Obstructing Official Business charges, and only addressing the plea on the Obstructing Official Business, occurred prior to the incidents leading on the Lake County sentence. I do find that [appellant] has served prior prison sentences. I find that the crime was committed while [appellant] was

subject to community control sanctions. I do find that [appellant] does pose the greatest likelihood of committing future crimes. I do find that a consecutive sentence is necessary to protect the public. And referring again to the fact that this crime was committed while he was on probation/community control. And [appellant's] career criminal history shows that a consecutive sentence is necessary to protect the public.

{¶22} "For reasons: [Appellant] in the Court's opinion has demonstrated a history of causing injuries to people. He's demonstrated a history of failing to comply with probation sanctions, community control sanctions, and the law. He's unable to control his own behavior.

{¶23} "Consequently, I am sentencing [appellant] to 12 months in prison; that sentence is consecutive to the sentence in Lake County. ****"

{¶24} In addition, the trial court made a similar pronouncement in its October 19, 2005 judgment entry. The trial court stated that it made the following findings:

{¶25} "a. The Court finds that [appellant] committed this crime prior to the incidents leading to the Lake County sentence.

{¶26} "b. The Court finds that [appellant] has served a prior prison sentence.

{¶27} "c. The Court finds that [appellant's] conduct presents the greatest likelihood of committing future crimes.

{¶28} "d. The Court further finds that [appellant] committed this crime while on community control.

{¶29} "e. The Court further finds that a consecutive sentence is necessary to protect the public. [Appellant] has demonstrated a history of causing injuries to people.

{¶30} "f. The Court further finds that [appellant's] conduct presents the greatest likelihood of committing future crimes.

{¶31} "g. The Court finds that [appellant] has a history of failure to comply with probation's sanctions, community control sanctions, and the law.

{¶32} "h. [Appellant] is unable to control his behavior."

{¶33} The trial court further indicated in its sentencing order that it considered the record, information presented by or on behalf of appellant, the prosecuting attorney, appellant's ability to pay financial sanctions, and any victim impact statement(s), as well as the principles and purposes of sentencing under R.C. 2929.11, and balanced the seriousness and recidivism factors under R.C. 2929.12.

{¶34} Based on the foregoing, we conclude that the trial court properly sentenced appellant on October 19, 2005, pursuant to R.C. 2929.14(C) and R.C. 2929.14(E)(4).

{¶35} Appellant's second assignment of error is without merit.

{¶36} In his third assignment of error, appellant alleges that the trial court denied him due process of law when it imposed a maximum sentence for a fifth degree felony and a consecutive sentence which was not agreed to by him and appellee, the state of Ohio, in the plea agreement.

{¶37} Appellant relies on *State v. Patrick*, 163 Ohio App.3d 666, 2005-Ohio-5332, for the proposition that a sentence is void if a trial court imposes a different sentence than that agreed on by a defendant and the state. In *Patrick*, the trial court acknowledged on the record its adoption of the plea agreement and sentencing recommendation prior to taking the plea. *Id.* at ¶12, 24. The Eighth District noted that

when a defendant is promised a sentence prior to a plea and then receives a different sentence, that sentence is void. *Id.* at ¶26, citing *State v. Adams* (May 22, 1997), 8th Dist. No. 70045, 1997 Ohio App. LEXIS 2215. The Eighth District further indicated that "[w]hile it is true that a trial court may accept or reject an agreed upon sentence, if a defendant and his attorney reached an agreement with the prosecutor and the trial court then accepted this agreement on the record, to impose anything other than the agreed upon sentence renders it void or voidable." *Id.* at ¶26.

{¶38} Appellant's reliance on *Patrick* is misplaced with respect to the facts in the instant matter. The trial court here never accepted the recommended sentence or indicated acceptance of that sentence on the record. The signed plea agreement specifies that appellee recommended a concurrent sentence, but that the judge is not bound by the terms of the plea agreement and may choose to accept or reject the agreement as he sees fit. In addition, at the sentencing hearing, the trial judge put appellant on notice, prior to the plea, that he was not bound by the plea agreement. The trial judge advised appellant that it was up to him, as the judge, to determine whether the sentence would run concurrent or consecutive. Appellant indicated that he understood.

{¶39} Appellant's third assignment of error is without merit.

{¶40} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Geauga County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,
MARY JANE TRAPP, J.,
concur.

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 2006 CA 37
v. : T.C. NO. 05 CR 309
KEITH W. JENKINS : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)

.....
OPINION

Rendered on the 13th day of April, 2007.
.....

WILLIAM H. LAMB, Atty. Reg. No. 0051808, 50 E. Columbia Street, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

CHRISTOPHER W. THOMPSON, Atty. Reg. No. 0055379, 130 West Second Street, Suite
2050, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....
WOLFF, P.J.

{¶ 1} Keith W. Jenkins pled guilty to one count of burglary in the Clark County Court of Common Pleas. On September 28, 2005, the court sentenced him to five years in prison. Jenkins did not file a timely appeal. However, Jenkins sought leave to file a delayed appeal, which we granted on May 3, 2006. Jenkins appeals his sentence based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

{¶ 2} In his sole assignment of error, Jenkins claims that the trial court imposed a non-minimum sentence under R.C. 2929.14(B), which the Supreme Court of Ohio held to be unconstitutional in *Foster*. Jenkins asserts that the court erroneously found that there was a high likelihood of recidivism and made findings regarding the seriousness of his offense. Jenkins requests that his sentence be reversed and his case be remanded for resentencing.

{¶ 3} In response, the state questions whether Jenkins's case was pending on direct appeal at the time *Foster* was decided, because he did not timely appeal and he was not granted a delayed appeal until after *Foster*. Although the state does not concede that Jenkins's argument on appeal is meritorious, it does not oppose a remand for resentencing.

{¶ 4} Although Jenkins's notice of appeal was not filed until after *Foster* was decided, we consider his case to be pending on direct appeal within the meaning of *Foster*. See *State v. January*, Clark App. No. 2006-CA-21, 2007-Ohio-435; *State v. Corbin*, Allen App. No. 1-06-23, 2006-Ohio-6902.

{¶ 5} On appeal, Jenkins claims that his sentence is unconstitutional in light of *Foster*. In *Foster*, the Supreme Court of Ohio held that portions of the sentencing statute are unconstitutional, because they require judicial fact-finding. The unconstitutional portions include R.C. 2929.14(B), (C), (D)(2)(b), (D)(3)(b), and (E)(4); R.C. 2929.19(B)(2); and R.C. 2929.41(A). The supreme court severed the provisions that it found to be unconstitutional.

{¶ 6} R.C. 2929.11 and R.C. 2929.12, which set forth statutory "considerations" and do not require judicial factfinding, were not affected by *Foster*. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶38. R.C. 2929.11 sets forth the

purposes of felony sentencing. R.C. 2929.12 instructs the court to consider seriousness and recidivism factors.

{¶ 7} R.C. 2929.13(D) also survived *Foster*. Indeed, the supreme court held in *Mathis* that "a trial court at sentencing is required to make judicial findings only for a downward departure pursuant to R.C. 2929.13(D) or a judicial release pursuant to 2929.20(H). When findings under R.C. 2929.13(D) or 2929.20(H) are missing from the appellate record, the appellate court shall remand the case to the sentencing court to state on the record the required findings pursuant to R.C. 2953.08(G)(1), after which the appellate court shall either affirm or modify the sentence, or vacate the sentence and remand the case for a hearing de novo if the sentence is contrary to law." *Mathis* at ¶36.

{¶ 8} During Jenkins's sentencing hearing, the trial court balanced the seriousness and recidivism factors under R.C. 2929.12. The court noted that the victim was elderly, that her economic injury was \$800, and that Jenkins knew her from having done some work for her. The court reviewed Jenkins's criminal history, as well as letters from his wife, mother-in-law, and daughter. Because Jenkins's offense carried a presumption in favor of a prison sentence, the trial court also considered whether the presumption was overridden under R.C. 2929.13(D). The court found it was not, and it sentenced Jenkins to five years in prison and ordered him to pay restitution of \$800 plus court costs. The court's judgment entry, dated September 28, 2005, likewise stated that the court considered factors under R.C. 2929.11, R.C. 2929.12, and R.C. 2929.13. The court did not expressly consider any portions of the statute which were subsequently held unconstitutional in *Foster*.

{¶ 9} *Foster* established a bright line rule that any pre-*Foster* sentence to which the statutorily required findings of fact applied (i.e. non-minimum, maximum and consecutive sentences), pending on direct appeal at the time that *Foster* was decided, must be reversed and remanded for resentencing, because judicial fact-finding violates a defendant's Sixth Amendment right to a trial by jury. *State v. Nunez*, Montgomery App. No. 21495, 2007-Ohio-1054, ¶4. In *Mathis*, the supreme court remanded for resentencing on the basis of *Foster* where the defendants received maximum and consecutive prison terms, even though the trial court had failed to make the findings that were required prior to *Foster*.

{¶ 10} Although the trial court here did not make express findings under the unconstitutional portions of the sentencing statute, the trial court imposed more than the minimum sentence for Jenkins's offense, a second degree felony. Accordingly, Jenkins was sentenced under a portion of the sentencing statute that was subsequently found to be unconstitutional and was severed from the sentencing statute. In accordance with *Foster* and *Mathis*, we must reverse Jenkins's sentence and remand this case for a new sentencing hearing. *Foster* at ¶¶104-105; see *State v. Caver*, Montgomery App. No. 21241, 2006-Ohio-4278.

{¶ 11} The assignment of error is sustained.

{¶ 12} The judgment of the trial court will be reversed and the cause remanded for resentencing.

.....
BROGAN, J. and DONOVAN, J., concur.

COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO

CASE NUMBER 1-06-23

PLAINTIFF-APPELLEE

v.

OPINION

DANTE L. CORBIN

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part, reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: November 20, 2006

ATTORNEYS:

MICHAEL L. SHORT
Attorney at Law
Reg. #0063156
138 West High Street
Lima, OH 45801
For Appellant.

JUERGEN WALDICK
Prosecuting Attorney
Jana E. Emerick
Reg. #0059550
204 North Main Street, Suite 302
Lima, OH 45801
For Appellee.

Shaw, J.

{¶1} The defendant-appellant, Dante L. Corbin (“Corbin”), appeals the January 24, 2006 Judgment of conviction and sentence entered in the Court of Common Pleas of Allen County, Ohio.

{¶2} On June 16, 2005, Corbin was indicted by the Allen County Grand Jury on Counts 1, 3 and 5 – trafficking in crack cocaine, in violation of R.C. 2925.03(A) and (C)(4)(d), felonies of the third degree; Count 2 – permitting drug abuse, in violation of R.C. 2925.13(A) and (C)(3), a felony of the fifth degree; and Count 4 -- trafficking in crack cocaine, in violation of R.C. 2925.03(A) and (C)(4)(d), a felony of the first degree.

{¶3} On December 13, 2005, Corbin entered into a negotiated plea arrangement and pled guilty to Counts 3, 4, and 5 of the indictment, in exchange for the dismissal of Counts 1 and 2. The trial court ordered a presentence investigation. On January 23, 2006, a sentencing hearing was held. Corbin was sentenced to two years in prison for Count 3, four years in prison for Count 4, and two years in prison for Count 5, with the sentences to be served consecutively.

{¶4} On February 28, 2006, Corbin filed a notice of appeal. On March 13, 2006, this Court dismissed the appeal for lack of jurisdiction because the appeal was untimely and filed outside the thirty days required by App.R. 4(A). On

April 6, 2006, Corbin filed a Motion for Delayed Appeal and a Notice of Appeal.

On May 30, 2006, this Court granted the Motion for Delayed Appeal.

{¶5} In Corbin's April 6, 2006 notice of appeal, he raised the following assignments of error:

Assignment of Error I

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT UNDER A STATUTE DECLARED UNCONSTITUTIONAL PURSUANT TO STATE v. FOSTER (2006) 109 Ohio St.3d 1.

Assignment of Error II

THE OHIO SENTENCING SCHEME IS UNCONSTITUTIONAL EVEN AFTER STATE v. FOSTER SINCE POST FOSTER SENTENCING REPRESENTS APPLICATION OF A LAW EX POST FACTO.

Assignment of Error III

THE SENTENCE IMPOSED BY THE TRIAL COURT VIOLATES THE RULE OF LENITY.

{¶6} Corbin's first assignment of error poses an issue concerning his felony sentencing. He alleges that his sentence is void because it is based upon statutes which have recently been found unconstitutional by the Ohio Supreme Court.

{¶7} The Supreme Court of Ohio recently addressed constitutional issues concerning felony sentencing in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Supreme Court of Ohio held that portions of Ohio's felony

sentencing framework are unconstitutional and void, including R.C. 2929.14(B) requiring judicial findings that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crimes by the offender. *Foster*, 2006-Ohio-856, at ¶ 97, 103. Pursuant to the ruling in *Foster*, Corbin's first assignment of error is sustained.

{¶8} Corbin asserts in his second assignment of error that the application of *Foster* to his case and sentence violates the ex post facto clause of the United States Constitution.

{¶9} This Court has recently held that violations of the ex post facto clause were not properly before the Court because the defendant was yet to be resentenced in conformity with *Foster* in *State v. Pitts* (2006), 3rd Dist. No. 1-06-02, 2006-Ohio-2796; *State v. Sanchez* (2006), 3rd Dist. No. 4-05-47, 2006-Ohio-2141; *State v. McKercher* (2006), 3rd Dist. No. 1-05-83, 2006-Ohio-1772. In each of those cases, the defendants were in the process of being remanded for resentencing in light of the *Foster* decision. Furthermore, a claim that rests upon future events that may not occur at all, or may not occur as anticipated, is not considered ripe for review. *State ex rel. Keller v. Columbus* (2005), 164 Ohio App.3d 648, at ¶ 20.

{¶10} In this case, the issues that Corbin raises regarding the ex post facto clause are not properly before us because Corbin has yet to be re-sentenced. Thus, the second assignment of error is deemed moot.

{¶11} Corbin argues in his third assignment of error that the “rule of lenity” requires that a defendant receive minimum and concurrent sentences because the rule cautions against increasing the penalty imposed on a particular offender where the increase is based on nothing more than a guess as to what criminal sanction the legislature intended.

{¶12} The “rule of lenity” was originally a common law rule of statutory construction that has been codified in R.C. 2901.04(A), which provides:

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.

{¶13} While courts are required to strictly construe statutes defining criminal penalties against the state, the rule of lenity applies only where there is ambiguity in a statute or conflict between multiple states. *United States v. Johnson* (2000), 529 U.S. 53, 59, 120 S.Ct. 1114, 146 L.Ed.2d 39; *United States v. Lanier* (1997), 520 U.S. 259, 266, 117 S.Ct. 1219 137 L.Ed.2d 432; *State v. Arnold* (1991), 61 Ohio St.3d 175, 178, 573 N.E.2d 1079. There exists no ambiguity in the sentencing statutes in Ohio because the Supreme Court of Ohio held that portions of Ohio’s felony sentencing framework was unconstitutional and

void in *State v. Foster, supra*. Therefore, the rule of lenity has no bearing on the present case because *Foster* can be easily understood to state that portions of the sentencing framework are unconstitutional and provides no ambiguity as to the unconstitutionality of certain statutes. Accordingly, Corbin's third assignment of error is overruled.

{¶14} Accordingly, Corbin's first assignment of error is sustained. His second assignment of error is deemed moot and his third assignment of error is overruled. Therefore, the January 24, 2006 Judgment of conviction and sentence entered in the Court of Common Pleas of Allen County, Ohio is affirmed in part, reversed in part and pursuant to the *Foster* decision, the matter is remanded for resentencing.

Judgment affirmed in part, reversed in part, and remanded for resentencing.

WALTERS, J., concurs.

ROGERS, J., concurs separately.

{¶15} ROGERS, J., concurring separately. I concur with the result reached by the majority in this case, and the majority's reasoning on the first and second assignments of error. However, I would find that our resolution of the first and second assignments of error renders the third assignment of error moot and I would decline to address it. App.R. 12(A)(1)(c).

WALTERS, J., sitting by assignment in the Third Appellate District.)

The Supreme Court of Ohio

FILED

SEP 26 2007

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2007-1254

v.

ENTRY

William J. Silsby

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

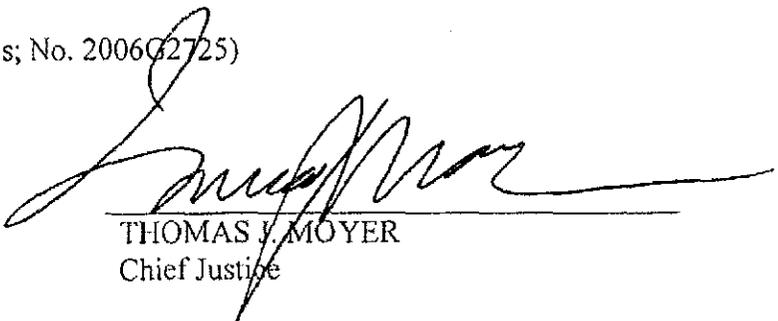
It is determined that a conflict exists. The parties are to brief the issue stated at page 3 of the court of appeals' Judgment Entry filed July 6, 2007, as follows:

"1. Whether a delayed appeal under Ohio Rule of Appellate Procedure 5(A) is identical to a direct appeal under Ohio Rule of Appellate Procedure 4(A) for purposes of appellate review as to whether a defendant was sentenced upon the basis of an unconstitutional statute under the guidelines of *State v. Foster*.

"2. Whether a defendant's sentence must be reversed on the basis of *State v. Foster* when: a) the defendant was sentenced prior to the announcement of *State v. Foster*; b) the defendant was sentenced under the statutes found to be unconstitutional in *State v. Foster*; c) the defendant does not pursue a direct appeal but rather files a delayed appeal; d) and raises the issues of unconstitutional sentencing on the basis of *Foster* for the first time on delayed appeal."

It is ordered by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Geauga County.

(Gauga County Court of Appeals; No. 200602725)



THOMAS J. MOYER
Chief Justice

FILED

IN COURT OF APPEALS

NOV 02 2006

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

STATE OF OHIO

COUNTY OF GEAUGA

) SS.

)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- VS -

WILLIAM J. SILSBY,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2006-G-2725

This matter is before this Court upon Appellant's pro se "Motion for Leave to File Notice of Appeal Out of Rule (Instanter)," construed by this Court as a motion for leave to file a delayed appeal, pursuant to App.R. 5(A). Appellant appeals from a judgment issued by the trial court on October 19, 2005, where he entered a plea of guilty to obstructing official business and was sentenced to serve twelve months in prison, to run consecutively to Lake C.P. No. 04 CR 000793. Along with the motion, Appellant filed his notice of appeal on August 2, 2006, almost nine months beyond the thirty-day requirement in App.R. 4(A).

As the basis for the motion, Appellant asserts that his trial counsel indicated that he would speak to the public defender's office and have someone file an appeal on Appellant's behalf. Appellant states that, to date, he has not received anything in the mail about his appeal. Further, he indicates that he sent several letters to his trial attorney requesting certain information and has not received

12/033

anything from him since July 24, 2006. Lastly, Appellant indicates that he is not a lawyer and does not have knowledge of the appellate process.

No brief or memorandum in opposition has been filed.

We find that Appellant has satisfied the requirements of App.R. 5(A), in that he has stated satisfactory reasons for filing his appeal beyond the thirty-day requirement in App.R. 4(A). Therefore, his motion for leave to file a delayed appeal is hereby granted.

It is further ordered that Appellant's motion for appointment of counsel is also granted. Attorney Derek Cek, 3500 W. Market Street, Suite 4, Fairlawn, OH 44333, is appointed as counsel to represent Appellant for purposes of appeal to this Court.

It is further ordered that Appellant is granted the transcript of proceedings at state's expense. The Court Reporter's time for filing the transcript of proceeding of the plea hearing is granted to November 27, 2006.

It is further ordered that Appellant is granted leave to file his brief to December 18, 2006.

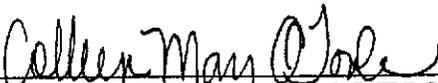
The Clerk of Courts is authorized to supplement the record with the transcript of proceedings, including any exhibits.

Counsel for Appellant is ordered to convey this transcript to the Clerk of Courts for the Court of Appeals for supplementation into the record of this appeal.

The Clerk of Courts is instructed to serve the Court Reporter, Anita Comella, with a time-stamped copy of this entry.

12/034

The Clerk of Courts is further instructed to serve Appellant, William J. Silsby,
PID: 492-753, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH
44430, with a time-stamped copy of this entry.



JUDGE COLLEEN MARY O'TOOLE

WILLIAM M. O'NEILL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.

12/035

A-32

006170

FILED
IN THE COURT OF COMMON PLEAS
2005 OCT 19 AM 9:04
GAUGA COUNTY, OHIO

STATE OF OHIO

CASE NO. 04 C 0000105

GERALD N. HENSH
CLERK OF COURTS
GAUGA COUNTY
Plaintiff

JUDGE FORREST W. BURT

-vs-

JUDGMENT OF CONVICTION

WILLIAM J. SILSBY
SSN: 269-82-7546
DOB: 11-27-1966

Defendant

A 12

This matter came on for hearing on the 6th day of October 2005, the defendant being present in court with his counsel, Gary H. Levine, Esq.; and the State of Ohio being represented by Janette M. Bell, Assistant Prosecuting Attorney.

The defendant advised the court that it was his desire to enter a plea of guilty to a violation of R.C. 2921.31(A), Obstructing Official Business, a felony of the fifth degree as charged in count two of the indictment.

The court accepted the defendant's plea after addressing the defendant personally and determining that he was making his plea knowingly and voluntarily, understanding of the nature of the charge and of the maximum penalty involved, determining that he understood the effect of his plea and that the court upon acceptance of said plea can proceed with judgment and sentence; informing him and determining that he understood that by his plea he is waiving his right to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove him guilty beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

The defendant was asked by the Court whether he had anything to say as to why sentence should not be imposed.

The Court afforded counsel an opportunity to speak on behalf of the defendant and also addressed the defendant personally and asked him if he wished to make a statement on his own behalf or present any evidence in mitigation of punishment.

Before imposing sentence, the Court made the following findings:

- a. The Court finds that the defendant committed this crime prior to the incidents leading to the Lake County sentence.
- b. The Court finds that the defendant has served a prior prison sentence.
- c. The Court finds that the defendant's conduct presents the greatest likelihood of committing future crimes.
- d. The Court further finds that the defendant committed this crime while on community control.
- e. The Court further finds that a consecutive sentence is necessary to protect the public. Mr. Silsby has demonstrated a history of causing injuries to people.
- f. The Court further finds that the defendant's conduct presents the greatest likelihood of committing future crimes.
- g. The Court finds that the defendant has a history of failure to comply with probation's sanctions, community control sanctions, and the law.
- h. The defendant is unable to control his behavior.

After consideration of the record; information presented by, or on behalf of, the defendant, the prosecuting attorney, the defendant's ability to pay financial sanctions; and any victim impact statement(s), the Court, based upon the purposes and principles of sentencing (R.C. 2929.11) and the sentencing factors [seriousness and recidivism (R.C. 2929.12)], imposed upon the defendant the following sentence:

1. For R.C. 2921.31(A), Obstructing Official Business, a felony of the fifth degree as charged in count two of the indictment.

- (a) A prison term of twelve (12) months in a state penal institution and the following period of PRC (Post-Release Control) after release from imprisonment, up to three (3) years as determined by the parole board.

Said period of incarceration to run consecutive with present sentence being served in Lake County for Case No. 04 CR 000793.

The Court further ordered the defendant is to have no contact with Amy Benedict.

Payment of court costs for which judgment is rendered (R.C. 2947.23) and execution may issue (R.C. 2949.09).

The defendant was notified and advised by the Court as required by R.C. 2929.19(B)(3) including post-release control.

The Court advised the defendant of his appellate rights.

The court granted the State of Ohio leave to dismiss count one of said indictment and said count is dismissed pursuant to Crim. R. 48(A).

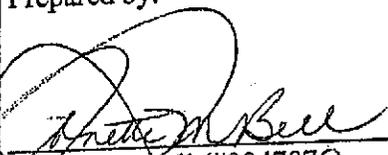
The defendant was remanded to the custody of the Sheriff of Geauga County for transport to the facility that is designated by the Department of Rehabilitation and Corrections for the reception of convicted felons within five (5) days excluding Saturdays, Sundays and legal holidays.

006173

The defendant has spent one (1) day in the Geauga County Jail for Case No. 04 C 000105. This credit includes jail time up to the date of this entry and does not include any subsequent time awaiting conveyance to the reception facility.


FORREST W. BURT, JUDGE

Prepared by:


Janette M. Bell (#0047076)
Assistant Prosecuting Attorney

cc: Gary H. Levine, Esq.
1350 Illuminating Bldg.
Cleveland, Ohio 44113

NOTED BY THAT THE FOLLOWING IS
A TRUE AND CORRECT COPY OF THE DOCUMENT
HEREIN AS ENTERED *Oct 18, 2005*
IN THE COURT AND SEAL OF SAID COURT
18 *7:00* *05*
CLERK OF COURT
Elizabeth J. Stollery

U.S. Constitution, Article I, Section 10

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

U.S. Constitution, 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.

Ohio Constitution, Article 1, Section 2

§ 1.02 Right to alter, reform, or abolish government, and repeal special privileges (1851)

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

2929.14 Definite prison terms.

This version is in effect until 01-01-2008

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

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

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

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

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

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

(D)(1)(a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender

one of the following prison terms:

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

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

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

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

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

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

(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

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

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

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

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

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

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

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

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

parole.

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

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

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

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

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

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

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

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

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

its findings explaining the imposed sentence.

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

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

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

sanction.

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

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

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

mandatory prison term previously or subsequently imposed upon the offender.

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

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

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

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

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

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

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

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

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

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

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

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

(G) If a person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender is adjudicated a sexually violent predator, if a person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after the effective date of this amendment and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code, or if a person is convicted of or pleads guilty to attempted rape committed on or after the effective date of this amendment and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, the court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section

2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

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

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

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

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

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

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

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

5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

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

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

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

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

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

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term

authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads

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

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

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

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

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

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

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

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

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

the offense with the greatest penalty.

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

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

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

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

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite

term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

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

subsequently imposed upon the offender.

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

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

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

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

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

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

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

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

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

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

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

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

(G) 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 if any of the following apply:

(1) 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.

(2) 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 January 2, 2007, 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.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(4) A person is convicted of or pleads guilty to a violation of section 2905.01 of the Revised Code committed on or after the effective date of this amendment, and that section requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after the effective date of this amendment, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of section 2929.06 of the Revised Code requires the court to sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(6) A person is convicted of or pleads guilty to murder committed on or after the effective date of this amendment, and division (B)(2) of section 2929.02 of the Revised Code requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

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

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

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

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 of the Revised Code or for placement in an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no

recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

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

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

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

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

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

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2929.19 Sentencing hearing.

This version is in effect until 01-01-2008

(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, 2941.1419, or 2941.1420 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 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 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 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, 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, 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 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 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 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 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 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 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, 2941.1419, or 2941.1420 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 of the Revised Code or an intensive program prison under section 5120.032 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.

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(A) 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.

(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 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 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 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 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 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 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 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 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) (a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of section 2950.03 of the Revised Code if any of the following apply:

(i) 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.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) 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 January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of section 2907.02 of the Revised Code.

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of section 2971.03 of the Revised Code for an offense described in those divisions committed on or after the effective date of this amendment.

(b) Additionally, if any criterion set forth in divisions (B)(4)(a)(i) to (vii) of this section is satisfied, 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 of the Revised Code or an intensive program prison under section 5120.032 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.

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2929.41 Concurrent and consecutive 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.

Effective Date: 01-01-2004

2953.02 Review of judgments on appeal.

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.

Effective Date: 09-21-1995

2953.08 Appeal as a matter of right - grounds.

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the sentence was not imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is 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, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D) (2)(a) of section 2929.14 of the Revised Code.

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D) (3)(b) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal

corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (D)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (D)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (D)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed,

the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (H) of section 2929.20 of the Revised Code.

(G)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of

court, to the supreme court.

(I)(1) There is hereby established the felony sentence appeal cost oversight committee, consisting of eight members. One member shall be the chief justice of the supreme court or a representative of the court designated by the chief justice, one member shall be a member of the senate appointed by the president of the senate, one member shall be a member of the house of representatives appointed by the speaker of the house of representatives, one member shall be the director of budget and management or a representative of the office of budget and management designated by the director, one member shall be a judge of a court of appeals, court of common pleas, municipal court, or county court appointed by the chief justice of the supreme court, one member shall be the state public defender or a representative of the office of the state public defender designated by the state public defender, one member shall be a prosecuting attorney appointed by the Ohio prosecuting attorneys association, and one member shall be a county commissioner appointed by the county commissioners association of Ohio. No more than three of the appointed members of the committee may be members of the same political party.

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the member appointed by the chief justice of the supreme court shall serve a term ending three years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty days has elapsed, whichever occurs first.

If the chief justice of the supreme court, the director of the office of budget and management, or the state public defender serves as a member of the committee, that person's term of office as a member shall continue for as long as that person holds office as chief justice, director of the office of budget and management, or state public defender. If the chief justice of the supreme court designates a representative of the court to serve as a member, the director of budget and management designates a representative of the office of budget and management to serve as a member, or the state public defender designates a representative of the office of the state public defender to serve as a member, the person so designated shall serve as a member of the commission for as long as the official who made the designation holds office as chief justice, director of the office of budget and management, or state public defender or until that official revokes the designation.

The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the

committee shall meet at least once every six months or more often upon the call of the chairperson or the written request of three or more members, provided that the committee shall not meet unless moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section and the moneys so appropriated then are available for that purpose.

The members of the committee shall serve without compensation, but, if moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section, each member shall be reimbursed out of the moneys so appropriated that then are available for actual and necessary expenses incurred in the performance of official duties as a committee member.

(2) The state criminal sentencing commission periodically shall provide to the felony sentence appeal cost oversight committee all data the commission collects pursuant to division (A)(5) of section 181.25 of the Revised Code. Upon receipt of the data from the state criminal sentencing commission, the felony sentence appeal cost oversight committee periodically shall review the data; determine whether any money has been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing state financial assistance to counties in accordance with this division for the increase in expenses the counties experience as a result of the felony sentence appeal provisions set forth in this section or as a result of a postconviction relief proceeding brought under division (A)(2) of section 2953.21 of the Revised Code or an appeal of a judgment in that proceeding; if it determines that any money has been so appropriated, determine the total amount of moneys that have been so appropriated specifically for that purpose and that then are available for that purpose; and develop a recommended method of distributing those moneys to the counties. The committee shall send a copy of its recommendation to the supreme court. Upon receipt of the committee's recommendation, the supreme court shall distribute to the counties, based upon that recommendation, the moneys that have been so appropriated specifically for the purpose of providing state financial assistance to counties under this division and that then are available for that purpose.

Effective Date: 10-10-2000; 04-29-2005; 08-03-2006; 04-04-2007

RULE 4. Appeal as of Right--When Taken

(A) Time for appeal.

A party shall file the notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

(B) Exceptions.

The following are exceptions to the appeal time period in division (A) of this rule:

(1) Multiple or cross appeals

If a notice of appeal is timely filed by a party, another party may file a notice of appeal within the appeal time period otherwise prescribed by this rule or within ten days of the filing of the first notice of appeal.

(2) Civil or juvenile post-judgment motion

In a civil case or juvenile proceeding, if a party files a timely motion for judgment under Civ. R. 50(B), a new trial under Civ. R. 59(B), vacating or modifying a judgment by an objection to a magistrate's decision under Civ. R. 53(E)(4)(c) or Rule 40(E)(4)(c) of the Ohio Rules of Juvenile Procedure, or findings of fact and conclusions of law under Civ. R. 52, the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.

(3) Criminal post-judgment motion

In a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered. A motion for a new trial on the ground of newly discovered evidence made within the time for filing a motion for a new trial on other grounds extends the time for filing a notice of appeal from a judgment of conviction in the same manner as a motion on other grounds. If made after the expiration of the time for filing a motion on other grounds, the motion on the ground of newly discovered evidence does not extend the time for filing a notice of appeal.

(4) Appeal by prosecution

In an appeal by the prosecution under Crim. R. 12(K) or Juv. R. 22(F), the prosecution shall file a notice of appeal within seven days of entry of the judgment or order appealed.

(5) Partial final judgment or order

If an appeal is permitted from a judgment or order entered in a case in which the trial court has not disposed of all claims as to all parties, other than a judgment or order entered under Civ. R. 54(B), a party may file a notice of appeal within thirty days of entry of the judgment or order appealed or the judgment or order that disposes of the remaining claims. Division (A) of this rule applies to a judgment or order entered under Civ. R. 54(B).

(C) Premature notice of appeal.

A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.

(D) Definition of "entry" or "entered."

As used in this rule, "entry" or "entered" means when a judgment or order is entered under Civ. R. 58(A) or Crim. R. 32(C).

[Effective: July 1, 1971; amended effective July 1, 1972; July 1, 1985; July 1, 1989; July 1, 1992; July 1, 1996; July 1, 2002.]

Staff Note (July 1, 2002 Amendment)

Appellate Rule 4 Appeal as of Right-How Taken

Appellate Rule 4(B)(4) Exceptions: Appeal by prosecution

The July 1, 2002, amendment to Appellate Rule 4 corrected two errors. First, in App. R. 4(B)(4), a cross-reference was changed from Criminal Rule 12(J) to Criminal Rule 12(K), which was necessitated by an amendment to Criminal Rule 12 that was effective July 1, 2001.

Second, in App. R. 4(D), a cross-reference was changed from Criminal Rule 32(B) to Criminal Rule 32(C), which was necessitated by an amendment to Criminal Rule 12 that was effective July 1, 1998.

No substantive amendment to Appellate Rule 4 was intended by either amendment.

RULE 5. Appeals by Leave of Court in Criminal Cases

(A) Motion by defendant for delayed appeal.

(1) After the expiration of the thirty day period provided by App. R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

- (a) Criminal proceedings;
- (b) Delinquency proceedings; and
- (c) Serious youthful offender proceedings.

(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney.

(B) Motion to reopen appellate proceedings.

If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant's constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment. The motion shall be filed with the clerk of the court of appeals within forty-five days after the conditional writ is granted. A certified copy of the conditional writ and any supporting opinion shall be filed with the motion. The clerk shall serve a copy of a defendant's motion on the prosecuting attorney.

(C) Motion by prosecution for leave to appeal.

When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant

who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.

(D)(1) Motion by defendant for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C).

When leave is sought from the court of appeals for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C), a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the reason why the consecutive sentences exceed the maximum prison term allowed. The motion shall be accompanied by a copy of the judgment and order stating the sentences imposed and stating the offense of which movant was found guilty or to which movant pled guilty. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the notice of appeal and a copy of the motion to the clerk of the court of appeals who shall serve the notice of appeal and the motion upon the prosecuting attorney.

(D)(2) Leave to appeal consecutive sentences incorporated into appeal as of right.

When a criminal defendant has filed a notice of appeal pursuant to App.R. 4, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to R.C. 2953.08(C), and this assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

(E) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(F) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. If the motion for leave to appeal is overruled, except as to motions for leave to appeal filed by the prosecution, the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. If the motion is sustained and leave to appeal is granted, the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

[Effective: July 1, 1971; amended effective July 1, 1988; July 1, 1992; July 1, 1994; July 1, 1996; July 1, 2003.]

Staff Notes - July 1, 2003 amendments

- Rule 5 Appeals by Leave of Court. The title of this rule was changed from Appeals by Leave of Court in Criminal Cases to Appeals by Leave of Court as a consequence of the amendment to division (A) described below.

- Rule 5(A) Motion by defendant for delayed appeal. The amendment to division (A) effective July 1, 2003, was in response to the Supreme Court's decision in *In re Anderson* (2001), 92 Ohio St. 3d 63, which held that adjudications of delinquency are not judgments to which App. R. 5(A) applies. The amendment made App. R. 5(A) apply to delinquency and serious youthful offender proceedings.
- Rule 5(B) Motion to reopen appellate proceedings. The addition of a new division (B) was to address state appellate proceedings following a federal court's granting of a conditional writ of habeas corpus that allows the prisoner to be freed if the state appellate court does not reopen appellate proceedings to address constitutional issues in the case. As a result of the addition of this new division (B), divisions (B) - (E) of the previous rule were relettered (C) - (F) respectively.