

In the  
**Supreme Court of Ohio**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee :  
 :  
 vs. : CASE NO. 07-2182  
 : On Appeal from the Union  
 : County Court of Appeals  
 : Third Appellate District  
 MICHAEL GOLDSBERRY, : C.A. Case No. 14-07-06  
 :  
 Defendant-Appellant. :

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**MEMORANDUM IN RESPONSE AND IN SUPPORT OF JURISDICTION  
OF THE STATE OF OHIO**

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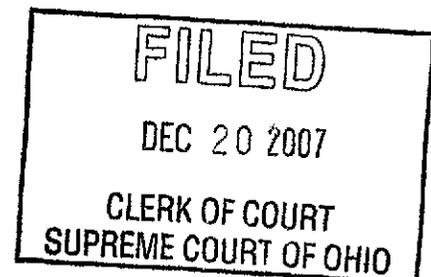


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION .....	1
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	7
<u>Proposition of Law No. 1.</u>	
IMPOSING A COMMUNITY CONTROL SANCTION ON AN OFFENDER FOR MULTIPLE OFFENSES DISPOSES OF ALL CHARGES IN AN INDICTMENT IN COMPLIANCE WITH CRIM. R. 32 AND DOES NOT VIOLATE THE "SENTENCING PACKAGE" DOCTRINE REJECTED BY THIS COURT IN STATE V. SAXON. ....	7
<u>Proposition of Law No. 2</u>	
THE ENTRY SENTENCING APPELLANT TO PRISON AS A RESULT OF A COMMUNITY CONTROL VIOLATION WAS A FINAL APPEALABLE ORDER .....	10
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	12

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

This cause presents a critical issue for the people of the State of Ohio in that the decision of the court of appeals calls into question the finality of hundreds, if not thousands, of sentencing entries placing criminal defendants in prison following the imposition of a community sanction in multiple count cases. This case also presents an opportunity for the Court to resolve the controversy regarding the status of Community Control sanctions.

In this case, the court of appeals dismissed the defendant appellant's appeal of a community control violation which sentenced him to prison. The appellant had challenged his sentence in the court below, claiming that there was a *Brooks* violation; appellant claimed he was not advised of the specific prison term that would be imposed for a violation of his community control sanctions. See, *State v. Brooks*, 2004- Ohio-4746.

The appellate court *sua sponte* raised the question of the finality of the *original* sentencing entry. Because the trial court sentenced the appellant to of three years community control as a whole, rather than a sentence of three years community control on each count of non-support, the appellate opined found that the trial court's entry sentencing appellant to community control was interlocutory. Therefore, the court reasoned that the original order failed to meet the mandates of Crim. R. 32(C) and was not a final order. Relying on its prior decision in *State v. Moore*, 2007-Ohio-4941, the court dismissed the case without deciding the case on the merits.

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In so finding, the appellate court has created a situation where the finality of criminal cases throughout the state is called into question. Defendants whose appellate rights have long since expired may now seek to withdraw their pleas of guilty, be resentenced, or file long delayed appeals. Defendants who have been sentenced to prison may seek to challenge the imposition of a prison term after a community control violation, claiming that the matter is still pending in the trial court on what is in effect an interlocutory order.

Of particular note in this matter is that the defendant-appellant was sentenced as a result of a community control violation which occurred in 2007. This is the sentencing entry appealed from. The original journal entry of sentence placed the defendant on community control, and which the Third District found to be interlocutory, was filed in 2005. The 2007 entry which imposed a prison sentence upon appellant provided that "defendant is ordered confined to the Correction Reception Center in Orient, Ohio for a term of 6 months *on each* of ten (10) counts \* \* \* to be served consecutively to each other." It was not, therefore, a "lump sum" sentence, and was a final appealable order.

In dismissing the appeal below, the Third District ignored this Court's prior holding in *State v. Fraley*, 2004-Ohio-7110, that "[f]ollowing a community control violation, the trial court conducts a second sentencing hearing. At this second hearing, *the court sentences the offender anew* and must comply with the relevant sentencing statutes."

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The Third District and other courts have consistently held that a sentence of community control is not appealable until a prison sentence is imposed. *State v. Greer* (Dec. 1, 1999), 3rd Dist. No. 14-99-26, 1999 Ohio 940, unreported.

Accepting this case to resolve these questions will give guidance to the trial and intermediate appellate courts and answer questions about community control, including whether it is permissible for a trial court to impose a term of community control for multiple violation; and whether the court can impose different community control sanctions for multiple violations. See, *State v. Culgan*, 147 Ohio. App.3d 19, 2001 Ohio 1944, 768 N.E.2d 712, P28.(Community control violations may be consecutive) and see, *State v. Lehman* (Feb. 4, 2000), 6th Dist. No. L-99-1140, 2000 Ohio App. LEXIS 307, at 3-4 holding that community control sanctions for different offenses cannot be ordered to be served consecutively); or whether a "split sentence," i.e. one with both a community control sanction and a prison sentence, can be imposed. Compare, *State v. Vlad*, 2003-Ohio-2930 (No; trial courts need to decide which sentence is more appropriate) and *State v. O'Connor*, 2004-Ohio-6562 (Yes; a court may impose a term of community control consecutive to a term of imprisonment).

The appellate court raised this issue *sua sponte* in this and other appeals, without giving either party the chance to brief the issue of whether the trial court may impose a community control sanction upon multiple count offenders. See, *State v. Goldsberry*; and *State v. Moore*, 2007-Ohio-4941. These *sua sponte* dismissal has deprived both the State and the defendant of the opportunity to challenge or argue the issue advanced by the Third District in the case below. This Court should accept jurisdiction to resolve this question.

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The decision therefore also implicates the defendant's fundamental right to appellate review. *State v. Nickles*, 159 Ohio St. 353, 50 Ohio Op. 322, 112 N.E.2d 531, 1953 Ohio LEXIS 583 (1953) (A reading of Article IV of the Constitution of Ohio is convincing that it is the spirit of our fundamental law that a litigant shall be entitled not only to a fair and impartial trial but shall have at least one review if he so desires).

### **STATEMENT OF THE CASE AND FACTS**

In January of 2005, the Union County Grand Jury indicted Appellant, Michael E. Goldsberry, on five counts of nonsupport of dependents in violation of R.C. 2919.21(A)(2) and five counts of nonsupport of dependents in violation of R.C. 2919.21(B). *See, State v. Goldsberry*, Union County C.P. Ct. Case No. 2005 CR 0008.

Appellant was arraigned on January 21, 2005, at which time he entered a not guilty plea. A scheduling conference was set for March 2, 2005. The Union County Public Defenders Office was appointed Appellant's counsel on January 25, 2005. The State filed a bill of particulars and discovery three days later.

Because of a conflict in the trial court's calendar, the scheduling conference was continued until March 3, 2005. On that date, defendant withdrew his previously entered plea of not guilty and entered a plea of guilty to the indictment. The trial court accepted Goldsberry's plea of guilty, convicted him and ordered a pre-sentence report. The matter was set for sentencing on March 23, 2005.

On March 23, 2005, the Appellant was sentenced to community control for a period of three years. At that time, Appellant was orally advised that if he violated the terms of community control, he "would" receive 120 months in prison.[Tr. of

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proceedings, 5/23/2005 at p. 9]. The journal entry of sentence, however, reflected that the Appellant “could” receive 120 months in prison if he violated the terms of his community control. [J.E. of sentence].

Appellant did, in fact, violate the terms of his community control sanction, and on November 3, 2005, the court re-imposed the community control sanctions, ordering Appellant to perform an additional 100 hours of community service for violating the terms of community control. This time, the court indicated to Appellant that he “will” receive 120 months in prison if he again violated the terms of community control. [J.E. 11/3/2005] This new sentence was compliant with Ohio law, as Appellant was advised that he faced a specific prison term of 120 months in prison for a violation of his community control. See, *State v. Fraley*, 2004-Ohio-7110.

Despite this warning, Appellant violated the terms of his community control sanction for a second time by failing to make payments on his child support, failing to make payments on his arrearage and failing to complete his community service as ordered by the court. Appellant, who was represented by counsel, admitted these violations in open court on January 5, 2007. As a result of this second violation of the community control sanctions, the court ordered Appellant “confined to the Correction Reception Center in Orient, Ohio for a term of 6 months on each of ten (10) counts of Non-Support of Dependents \* \* \* to be served consecutively to each other.” (J.E. 128, pg 17).

On February 5, 2007, Appellant appealed the judgment and entry of sentence to the Third District Court of Appeals. Appellant was appointed counsel to prosecute his appeal.

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On June 13, 2007, during the pendency of the appeal, Appellant filed two *pro se* post-conviction motions titled “Petition to Vacate and Set aside the Sentence Pursuant to Section 2953.21 & 2953.23 of the Ohio Revised Code” and “Motion to Vacate and Set Aside Sentence Pursuant to Civil Rule 60 of the Ohio Rules of Court<sup>1</sup>.” These motions generally addressed the issue which was pending before the Third District Court of Appeals, that is, whether the 60-month sentence imposed by the trial court was lawful. The motions and the appeal both asserted that there was a *Brooks* violation, claiming that Appellant was not advised of the specific prison term that would be imposed for a violation of the community control sanction<sup>2</sup>. See, *State v. Brooks*, 2004- Ohio- 4746.

Briefs were filed on behalf of the Appellant and the State of Ohio in the appeal. oral argument was scheduled August 14, 2007.

On October 15, 2007, the Third District Court of Appeals *sua sponte* raised the issue of whether it had jurisdiction to hear the Appellant’s appeal. The Third District held that the *original sentencing entry* did not comply with Crim. R. 32(C) because the original sentence did not specify to which count or counts the community control sentence applied, but rather had sentenced the Appellant to a “lump sum” of three years of community control. Finding the trial court’s entry of sentence to be interlocutory and not a final order, the appellate court dismissed Appellant’s appeal for want of jurisdiction. *State v. Goldsberry*, 2007-Ohio-4833. The decision was rendered by the Appellate court on October 15, 2007.

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<sup>1</sup> See, *State ex. rel. Goldsberry v. Union County Court of Common Pleas*, Ohio Supreme Court, Case No. 07-2180, wherein appellant filed a *pro se* complaint for a writ of procedendo.

<sup>2</sup> The State does not concede that *Brooks* was violated. The trial court did advise the appellant both orally and by entry of the potential maximum sentence.

On November 29, 2007, Appellant filed an appeal the Third District's decision to this court.

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**IMPOSING A COMMUNITY CONTROL SANCTION ON AN OFFENDER FOR MULTIPLE OFFENSES DISPOSES OF ALL CHARGES IN AN INDICTMENT IN COMPLIANCE WITH CRIM. R. 32 AND DOES NOT VIOLATE THE "SENTENCING PACKAGE" DOCTRINE REJECTED BY THIS COURT IN STATE V. SAXON.**

Felony sentencing reform as enacted by Senate bill 2 requires the trial court to undergo a statutory analytic process to impose a sentence. *State v. Comer* 2003-Ohio-4165. As part of this process, the court must first determine whether to give the defendant community control sanction or a penitentiary sentence, taking into account the need for incapacitation, deterrence, rehabilitation, and the likelihood of recidivism. See generally Griffin & Katz, Ohio Felony Sentencing Law (2007 Ed.) 748-749 § T2.10.

A community control sanction is defined as a sanction that is not a prison term and that is described in sections 2929.15, 2929.16, 2929.17 or 2929.18 of the Revised Code. R.C. §2929.01. Community control sanctions essentially replace the concept of "probation" in Ohio's criminal justice system. See generally Griffin & Katz, Ohio Felony Sentencing Law (2007 Ed.) 978-981, §§ T6.1 – T6.4. After the judge determines that a community control sanction would be appropriate, the judge must then decide what community control sanction to impose. Once a prison sentence is determined not to be necessary, the judge must decide the least burdensome local sanctions that will adequately protect the public and punish the offender. *Id.* at at p. 757, §2.13.

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Appellant was convicted of ten counts of criminal non-support. As a result of his convictions, the appellant was sentenced to a community control sanction for a period of three years. Appellant was advised that if he violated the terms of community control, he would receive 120 months in prison for a violation the terms of community control.

This sentence disposed of each of the ten counts of non-support – the defendant was placed on community control. The imposition of a community control sanction on multiple count offenders is not unusual. *See*, for example, *State v. McClure* 2005-Ohio-777 (defendant sentenced to five years of community control on two counts of felonious assault). Indeed, in *State v. Talty*, 2004-Ohio-4888, this Court addressed the issue of whether a court could impose a condition of community control that ordered appellant to make "all reasonable efforts to avoid conceiving another child" during his five-year probationary period. In that case, the trial court had sentenced the defendant to a community control sanction for five years for two counts of nonsupport.

Similarly, in *State v. Barnhouse*, 2004-Ohio-2942, this Court held that a trial court may not impose consecutive jail sentences under R.C. 2929.16(A)(2). In that case, the defendant had pleaded guilty to two counts of nonsupport of a dependent and was sentenced to a term of five years community control. The defendant also was sentenced to five years of community control on two fourth degree felony non-support cases. When Barnhouse violated his community control sanction, the trial court imposed consecutive six-month sentences. This court found that consecutive sentences were not permitted, even though Barnhouse had multiple felony convictions.

Under the reasoning of the court below, neither *Talty* nor *Barnhouse* should have been decided by this court. In both instances, the trial court imposed the "lump sum"

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community control sanction which the Third District found objectionable. Under the logic of appellate court's decision herein, each of those cases should have been dismissed, as the appellate courts lacked jurisdiction.

This is not a "package" sentence, prohibited by *State v. Saxon*, 2006-Ohio 1245. In *Saxon*, the "sentencing package" doctrine was rejected by this court, finding that the doctrine has no applicability to Ohio sentencing laws: the sentencing court may not employ the doctrine when sentencing a defendant and appellate courts may not utilize the doctrine when reviewing a sentence or sentences.

The court's prohibition against multiple offense sentences as set forth in *Saxon* has no application to a community control sanction. This is because of this Court's holding in *State v. Fraley*, 2004-Ohio-7110, that "[f]ollowing a community control violation, the trial court conducts a second sentencing hearing. At this second hearing, the court sentences the offender anew and must comply with the relevant sentencing statutes."

This case is also distinguishable from the authority relied upon by the Third District in its decision. The Court relied upon its own decision in *State v. Moore*, 2007-Ohio-4941, which in turn relied upon *State v. Hayes*, (May 24, 2000), 9<sup>th</sup> Dist. No. 99CA007416.

In *Hayes*, the Ninth District found that "Defendant was never sentenced for [two] specifications \* \* \* . Such an omission renders the judgment entry not final and appealable." *Id.* at 3. In the instant case, however, the trial court disposed of all of the ten counts by placing the appellant on community control. The same distinction applies to each of the authorities – all deal with the situation where the entry fails to deal with one

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or more counts. None of the authorities deal with the situation where the trial court imposes community control on multiple counts.

When appellant violated the terms of his community control, the court held another sentencing hearing, and imposed a sentence of 6 months on *each* of the ten counts to run consecutively to each other. This sentencing entry from the third sentencing hearing imposing a prison sentence upon appellant was a final, appealable order. See, *State v. Greer, supra; State v. Ogle*, 2002-Ohio-860.

## II. THE ENTRY SENTENCING APPELLANT TO PRISON AS A RESULT OF A COMMUNITY CONTROL VIOLATION WAS A FINAL APPEALABLE ORDER

Appellant is challenging the sentence imposed by the trial court upon the violation of his community control sanctions. It has been held that "a sentence reserved in the event of a violation of community control sanctions is not ripe for review until the trial court has imposed the sentence for the violation of a defendant's community control." *State v. Smith, Defiance App. No. 4-06-18*, 2006 Ohio 5149, citing *State v. Ogle*, Wood App. No. WD-01-040, 2002 Ohio 860; see, also, *State v. Brown* (Mar. 22, 2001), Cuyahoga App. No. 77875, 2001 Ohio App. LEXIS 1370. This is because:

"The basic principle of ripeness may be derived from the conclusion that "judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote." \*\*\* The prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.' (Citation omitted.)" *Id.*

In *State v. Miller*, (Dec. 30, 1999) 1999 Ohio App. LEXIS 6543, Tuscarawas App.No. 1999 AP 02 0010, unreported, the state argued that the defendant should have

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appealed an alleged error in regard to the notice of sentence for violation of community control at the time of the entry sentencing him to community control. In rejecting this argument, the Fifth Appellate District stated:

"When an individual such as appellant is placed on community control, the sentencing is merely postponed until it is determined whether or not the individual has violated the terms and conditions of his or her community control. Appellant, therefore, could not have appealed his sentence from the court's [entry sentencing him to community control.]"

In *State v. Brown*, (Mar. 22, 2001) 2001 Ohio App. LEXIS 1370, Cuyahoga App.No. 77875, unreported, in response to a defendant's argument that the trial court erred in determining the length of the prison term to which he could be sentenced if he violated his community control, the Eighth Appellate District stated:

"Additionally, when the defendant violates community control sanctions, a second sentencing hearing is conducted. The sentence imposed in this second sentencing hearing must comply with R.C. 2929.14. (Citations omitted.) Appellant's rights to appeal a prison sentence \* \* \* are fully protected, because appellant can appeal the sentencing order imposing the prison term." See, also, *State v. Fraley*, 2004-Ohio-7110, that "[f]ollowing a community control violation, the trial court conducts a second sentencing hearing."

In this case, a third sentencing hearing was held following appellant's second community control violation. At that hearing, the trial court imposed a prison sanction on each of the ten counts. This entry imposing the prison term thus fully complied with Crim. R. 32 and was a final appealable order.

As such, the time for appellant to assert his appeal is now ripe. The court below erred in dismissing the appeal.

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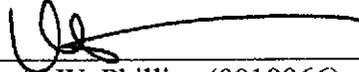
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**CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Appellee, the State of Ohio respectfully requests this court accept jurisdiction of the within cause so that the issues presented will be reviewed on the merits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and accurate copy of the foregoing Memorandum In Response to Alison Boggs, 240 West Fifth Street, Suite A, Marysville, Ohio 43040 by ordinary U.S. Mail this 19<sup>th</sup> day of December, 2007.

Respectfully submitted,

  
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