

In the
Supreme Court of Ohio

STATE OF OHIO, : Case No. 2007-1462
: :
Appellant, : :
: :
v. : On Appeal from the
: :
CHARLES W. BARTHOLOMEW, : Crawford County
: :
: Court of Appeals,
: Third Appellate District
: :
Appellee. : Court of Appeals Case
: :
: No. 3-06-16
: :

MERIT BRIEF OF APPELLANT STATE OF OHIO

STANLEY FLEGM* (0006846)
Crawford County Prosecutor
**Counsel of Record*

CLIFFORD J. MURPHY (0063519)
Assistant Prosecutor
112 E. Mansfield St., 3rd Floor
Bucyrus, Ohio 44820
419-562-9782

Counsel for State of Ohio

JOHN SPIEGEL (0024737)
222 W. Charles St., P.O. Box 1024
Bucyrus, Ohio 44820
419-562-6624

Counsel for Defendant-Appellant
Charles W. Bartholomew

MARC DANN (0039425)
Attorney General of Ohio

WILLIAM P. MARSHALL (0038077)
Solicitor General

BENJAMIN C. MIZER (admitted *pro hac vice*)
Deputy Solicitor

MELANIE CORNELIUS (0029808)
Assistant Attorney General

30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for State of Ohio

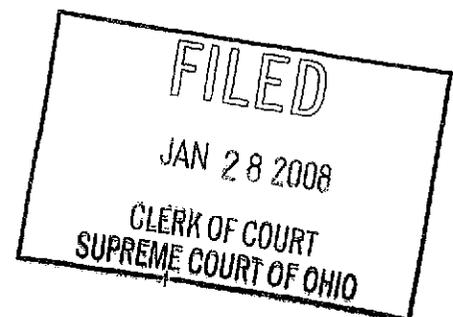


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	2
A. Restitution payments play a central role under Ohio law in punishing offenders and compensating their victims	2
B. The trial court ordered Bartholomew to pay restitution to compensate for counseling his daughter received after he raped her	3
C. The appeals court vacated the restitution award on the ground that the Victims Fund is not an eligible recipient.....	4
ARGUMENT	6
 <u>Appellant State of Ohio’s Proposition of Law:</u>	
<i>The restitution statute, R.C. 2929.18(A)(1), and the repayment provision, R.C. 2743.72(E), authorize the trial court to designate the Attorney General’s Crime Victims Fund as the agency to receive a restitution payment.....</i>	
A. Two separate statutes specifically authorize the payment of restitution awards to the Victims Fund.....	6
B. Restitution awards to the Victims Fund fulfill the constitutional promise of respect for crime victims’ rights	11
CONCLUSION.....	14
CERTIFICATE OF SERVICE	unnumbered
APPENDIX OF EXHIBITS	
Notice of Appeal.....	Ex. 1
Journal Entry and Opinion, Third Appellate District, June 25, 2007 (date-stamped copy).....	Ex. 2
<i>State v. Bartholomew</i> (3d Dist.), 2007-Ohio-3130 (LEXIS copy)	Ex. 3

Judgment Entry, Court of Common Pleas, Crawford County, July 6, 2006 (time-stamped copy)	Ex. 4
R.C. 2929.18	Ex. 5
R.C. 2743.72	Ex. 6
Ohio Constitution, Article I, § 10a	Ex. 7

TABLE OF AUTHORITIES

Cases	Page
<i>Akron Home Medical Services, Inc. v. Lindley</i> (1986), 25 Ohio St. 3d 107	7
<i>East Ohio Gas Co. v. PUCO</i> (1988), 39 Ohio St. 3d 295	8
<i>Kelly v. Robinson</i> (1986), 479 U.S. 36	11
<i>Ohio Boys Town, Inc. v. Brown</i> (1982), 69 Ohio St. 2d 1	7
<i>State ex rel. Merydith Constr. Co. v. Dean</i> (1916), 95 Ohio St. 108	10
<i>State v. Bartholomew</i> (3d Dist.), 2007-Ohio-3130	3, 5
<i>State v. Carswell</i> , 114 Ohio St. 3d 210, 2007-Ohio-3723	10
<i>State v. Frost</i> (1979), 57 Ohio St. 2d 121	10
<i>State v. Kreischer</i> , 109 Ohio St. 3d 391, 2006-Ohio-2706	<i>passim</i>
Statutes and Rules	Page
R.C. 119.01(A)(1)	7
R.C. 2743.52(A)	6
R.C. 2743.72(E)	1, 2, 6, 9
R.C. 2907.02(A)(1)(b)	3
R.C. 2929.18	<i>passim</i>

Other Authorities	Page
148 Ohio Laws, Part IV, 8674, 8767	5, 8
2003 Sub. H.B. No. 52	5
2005 Ohio HB 461	7
2006 Ohio HB 241	7
Note, <i>Victim Restitution in the Criminal Process</i> , 97 Harv. L. Rev. 931 (1984).....	11
Office of Ohio Attorney General Marc Dann, Ohio Victims of Crime Compensation Program, 2007 Annual Report.....	3
Ohio Attorney General’s Office, Crime Victims Section Annual Report 2006, <i>available at</i> http://www.ag.state.oh.us/victim/pubs/ann_rpt_cv_2006.pdf	3
Ohio Const. Art. 1, § 10a	11

INTRODUCTION

Ohio's Victims of Crime Reparations Fund ("Victims Fund") provides vital services to victims of violent crime, hit-and-run collisions, and drunk driving by helping to ease the financial toll that these crime so often exact on their victims. Created by the General Assembly in 1976, the Victims Fund provides victims with access to the care they require up front, when they need it most, by paying for medical care and counseling, among a host of other things.

One of the most important streams of revenue to the Victims Fund is restitution payments from the offenders. These restitution payments—which courts routinely order convicted offenders to pay to the Victims Fund during sentencing—serve two important goals. First, they aid in punishing and rehabilitating the offender by forcing him to internalize the financial costs of his crime. Second, they remedy a public wrong by restoring to the State's coffers the money that the Victims Fund has spent to make the victim whole as a result of the crime.

The appeals court in this case held that courts may no longer order restitution payments to the Victims Fund. That erroneous decision would eliminate nearly \$1.5 million in outstanding restitution awards pending statewide. The ruling also grants a windfall to convicted criminals, who, under the Third District's rule, could avoid ever having to pay for the costs of their crimes.

The appeals court's decision runs directly contrary to the text of two separate statutes stating that restitution awards may be directed to the Victims Fund. First, the felony restitution statute provides that "the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, *or to another agency designated by the court,*" R.C. 2929.18(A)(1) (emphasis added), and the Victims Fund undeniably is an "agency" of the State. Second, the Crime Victims Repayment, Reimbursement, and Subrogation Provision ("repayment provision"), R.C. 2743.72(E)—one provision in the broader statutory scheme that creates and governs the Crime

Victims Compensation System, see R.C. 2743.51 *et seq.*—complements the restitution statute by designating the Victims Fund as “an eligible recipient for payment of restitution.” R.C. 2743.72(E). Both of these provisions help to fulfill the constitutional promise that the State will protect victims of crime. Ohio Const., Art. 1, § 10a.

The appeals court neither addressed nor distinguished these provisions; indeed, it did not even cite them. Instead, it insisted that this Court’s decision in *State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706, precluded restitution to the Victims Fund. But the *Kreischer* decision addressed an earlier version of the restitution statute and expressly noted that the General Assembly had since amended the provision. *Kreischer* therefore cannot be held to govern statutory language that was not before the Court.

The Third District’s ruling has significant ramifications for the State’s ability to continue to provide much-needed help to victims of violent crime, and for courts’ ability to ensure that convicted criminals take steps to make their victims whole. The Court should reverse the appeals court’s erroneous judgment.

STATEMENT OF THE CASE AND FACTS

A. Restitution payments play a central role under Ohio law in punishing offenders and compensating their victims.

The Crime Victims Compensation Program (“Victims Program”) helps victims recover from the effects of violent crime by providing financial assistance to victims and their families to alleviate the economic and emotional burdens of victimization. Using money from the Victims Fund, the Victims Program pays for victims’ medical care, rehabilitation, and counseling, and it reimburses the victims for both lost income and their dependents’ economic loss. The Fund also covers crime scene cleanup costs and funeral expenses for victims. Through these and other

means, the Victims Program softens the financial blow that all too often results from violent crime.

To remain fiscally solvent while providing these vital services without using taxpayer money, the Victims Fund receives deposits from a variety of sources, including restitution awards. Of the \$27.5 million received by the Victims Program in 2006, the largest sources of income were court costs (\$16.5 million), federal grants under the Victims of Crime Act (\$6.4 million), and driver's license reinstatement fees (\$3.8 million). See Ohio Attorney General's Office, Crime Victims Section Annual Report 2006, at 8, *available at* http://www.ag.state.oh.us/victim/pubs/ann_rpt_cv_2006.pdf. The fourth-largest source of income—subrogation collections—includes court-ordered restitution payments collected by the Attorney General's Crime Victims Subrogation and Restitution Unit ("Subrogation and Restitution Unit"). See *id.* at 6. The Subrogation and Restitution Unit collected \$487,786 in 2006. *Id.*

The numbers for the federal fiscal year ending October 1, 2007, were similar. Subrogation and restitution collections were the fourth-largest source of deposits to the Fund, totaling \$532,145. See Office of Ohio Attorney General Marc Dann, Ohio Victims of Crime Compensation Program, 2007 Annual Report. Approximately 25% of that sum—\$132,046—consisted of restitution payments. *Id.*

B. The trial court ordered Bartholomew to pay restitution to compensate for counseling his daughter received after he raped her.

In March 2006, a Crawford County grand jury indicted Charles W. Bartholomew for raping his twelve-year-old daughter. He pled guilty to one count of violating R.C. 2907.02(A)(1)(b). See *State v. Bartholomew* (3d Dist.), 2007-Ohio-3130, at ¶¶ 1-3.

After a hearing, the trial court sentenced Bartholomew to ten years in prison and classified him as a sexually oriented offender. *Id.* at ¶ 4. In addition to fees and costs, the court ordered

Bartholomew to “pay \$426.00 restitution to the Attorney General’s Victims of Crime for reimbursement to the victim.” *Id.* The amount of the restitution award reflected expenses that Bartholomew’s wife incurred in obtaining counseling for their daughter after the rape. Because the Victims Fund had already reimbursed Bartholomew’s wife for the counseling costs, the court directed payment of the restitution to the Victims Fund. Bartholomew did not object to the restitution award. *Id.* at ¶ 21.

C. The appeals court vacated the restitution award on the ground that the Victims Fund is not an eligible recipient.

On direct appeal, the court of appeals affirmed Bartholomew’s prison sentence but vacated the restitution award. Bartholomew argued that the counseling expenses did not constitute “economic loss” within the meaning of the restitution statute. *Id.* at ¶ 20. Noting that Bartholomew had not objected to the restitution award, the appeals court applied a plain error standard to the claim and sustained Bartholomew’s objection to the restitution award, but on different reasoning. *Id.* at ¶ 21.

The appeals court looked first at the language of the statutory provision authorizing restitution awards. The restitution statute provides:

[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender’s crime or any survivor of the victim, in an amount based on the victim’s economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court.

R.C. 2929.18(A)(1).

The court of appeals then interpreted the restitution statute in light of language in *State v. Kreisler*, 109 Ohio St. 3d 391, 2006-Ohio-2706. In *Kreisler*, this Court considered whether a

former version of the restitution statute entitled a third-party medical insurer to restitution of medical costs it paid to a crime victim. 2006-Ohio-2706 at ¶ 2. Before a 2004 amendment, the provision “expressly stated that restitution may include ‘a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim.’” *Id.* at ¶ 13 (quoting 148 Ohio Laws, Part IV, 8674, 8767). In concluding that the statutory language authorized restitution to the insurer, the *Kreischer* Court observed that its decision would “likely affect only those cases arising prior to the June 1, 2004 effective date of the statutory change, because on that date, the legislature amended R.C. 2929.18 to delete all references to restitution for third parties.” *Id.* at ¶ 1 (citing 2003 Sub. H.B. No. 52).

Although this statement in *Kreischer* addressed only the potential effect of the 2004 amendment on private third parties such as insurers, the court of appeals in this case nonetheless concluded that *Kreischer* also held that the revised restitution statute did not authorize restitution to the Victims Fund. “[U]nder the current version of R.C. 2929.18,” the appeals court held, “financial sanctions which can be imposed against a felony offender do not include reimbursement to third parties for amounts paid on behalf of the victim.” 2007-Ohio-3130 at ¶ 26. The court therefore determined that “the trial court committed plain error, because it did not have the authority to order Bartholomew to pay restitution to a third party, the Ohio Victim’s [sic] of Crimes fund, in the amount of \$426.00.” *Id.* In reaching that holding, the appeals court ignored the other statutory provisions that expressly allowed restitution to be paid to the Victims Fund.

ARGUMENT

Appellant State of Ohio's Proposition of Law:

The restitution statute, R.C. 2929.18(A)(1), and the repayment provision, R.C. 2743.72(E), authorize the trial court to designate the Attorney General's Crime Victims Fund as the agency to receive a restitution payment.

A. Two separate statutes specifically authorize the payment of restitution awards to the Victims Fund.

1. The restitution statute expressly provides for restitution awards as reimbursement to state agencies such as the Victims Fund.

The restitution statute expressly authorizes trial courts to order defendants to pay restitution either to the victim directly or to the Victims Fund as reimbursement. The statute provides that “the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, *or to another agency designated by the court.*” R.C. 2929.18(A)(1) (emphasis added). The italicized clause was part of the statute both before and after the legislature amended the provision in 2004 to remove the language concerning reimbursement to third parties. Compare *id.* with *Kreischer*, 2006-Ohio-2706 at ¶ 10 (quoting prior version of R.C. 2929.18(A)(1)).¹

The Victims Fund qualifies as an “agency” that can be designated under the restitution statute because it is a branch of the Attorney General’s office. The Victims of Crimes Act specifically places the Victims Program under the Attorney General’s supervision by providing that “[t]he attorney general shall make awards of reparations for economic loss arising from criminally injurious conduct, if satisfied by a preponderance of the evidence that the

¹ The court of appeals noted that the restitution statute was amended effective April 1, 2007, and explained that it was “consider[ing] the statute in effect when the offense occurred.” *Bartholomew*, 2007-Ohio-3130 at ¶ 24 n.1. In fact, the legislature has amended the provision twice since Bartholomew’s offense. See 2005 Ohio HB 461; 2006 Ohio IIB 241. Neither amendment affected the language of the restitution statute at issue here.

requirements for an award of reparations have been met.” R.C. 2743.52(A). Ohio law defines an “agency,” in pertinent part, as “the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state.” R.C. 119.01(A)(1). “Undisputedly, the Attorney General’s office is an agency within the meaning of R.C. 119.01(A)” *Ohio Boys Town, Inc. v. Brown* (1982), 69 Ohio St. 2d 1, 4. As an arm of the Attorney General’s office, then, the Victims Program is an “agency” under Ohio law. And it therefore constitutes an agency qualified to receive restitution payments under the final clause of the restitution statute.

Reading the final clause of the restitution provision to include payment to the Victims Fund is also consistent with the canons of statutory construction. The statute specifies that the court may order the defendant to pay restitution “to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court.” R.C. 2929.18(A)(1). “Under the canon of statutory construction commonly referred to as *ejusdem generis* (literally ‘of the same kind’), whenever words of general meaning follow the enumeration of a particular class, then the general words are to be construed as limited to those things which pertain to the particularly enumerated class.” *Akron Home Med. Servs., Inc. v. Lindley* (1986), 25 Ohio St. 3d 107, 109. When that canon is applied here, the final, general clause is best read as including public agencies, like probation offices and court clerks, that are involved in the administration of justice. The Attorney General’s Crime Victims Program is just such a public agency. Thus, the most natural reading of the statute reinforces the statutory definitions that qualify the Victims Fund as an “agency” that may receive restitution payments.

Violating fundamental principles of statutory construction, the court of appeals entirely ignored the operative statutory language allowing a court to order restitution “to another agency

designated by the court.” Cf. *East Ohio Gas Co. v. PUCO* (1988), 39 Ohio St. 3d 295, 299 (explaining that words in a statute should not be ignored). Instead, the court focused exclusively on the suggestion in *Kreischer* that “the legislature amended R.C. 2929.18 to delete all references to restitution for third parties.” 2006-Ohio-2706 at ¶ 1. But that language in *Kreischer* is beside the point in this case for two basic reasons. First, the dispute in *Kreischer* implicated only the old statute; the Court had no occasion to consider the amended statute. *Kreischer*’s holding therefore cannot govern the meaning of the current statutory language, which was not before the Court.

Second, to the extent *Kreischer* sheds any light on the meaning of the revised restitution statute, it speaks only to reimbursement to a nongovernmental third party—in that case, a medical insurance carrier—not to a state agency. The 2004 amendment removed language providing that “restitution . . . may include a requirement that reimbursement be made *to third parties* for amounts paid to or on behalf of the victim . . . for economic loss resulting from the offense.” *Kreischer*, 2006-Ohio-2706 at ¶ 10 (quoting 148 Ohio Laws, Part IV, 8674, 8767). A state agency, however, stands in different shoes from a third-party insurer, because, as noted above, the statute—both before and after the 2004 amendment—explicitly authorizes restitution to an “agency designated by the court.” R.C. 2929.18(A)(1). Thus, it might well be true that the *insurance carrier* in *Kreischer* would not be entitled to reimbursement as a third party under the amended law. But that change has no bearing on the *Victims Fund*’s entitlement to payment as an “agency” under statutory language still in force.

The text of the restitution statute provides further support for treating private third parties differently from state entities when it comes to reimbursement. The statute allows the restitution payment to go to the victim himself or herself, “to the adult probation department that serves the

county on behalf of the victim, to the clerk of courts, or to another agency designated by the court.” R.C. 2929.18(A)(1). The General Assembly contemplated that the victim may have been compensated by a state agency and wanted to ensure reimbursement to the public coffers. It accordingly listed the possible state entities and provided a catch-all for other public agencies that the court might name. Private third parties, however, are differently situated. Their payments to a victim are not a product of the State’s efforts to restore the victims of violent crime through its largess; they are instead funds paid out by private entities—often, as in *Kreischer*, insurers that are contractually obligated to compensate policy holders. There is a good reason, then, why the General Assembly would choose to treat restitution to private third parties differently from restitution to a public agency: because the criminal law is concerned with redressing public wrongs and protecting society, not with compensating for private wrongs. The restitution statute, simply put, is about restoring to the public fisc any outlays caused by the offender’s crime; it is not about reimbursing a third-party insurer for payments it contracted to make.

2. The repayment provision also expressly authorizes the court to direct a restitution award to the Victims Fund.

Even if the restitution statute, standing alone, were not enough to allow restitution to the Victims Fund—and it is—it is not the only statutory text that authorizes restitution payments to the Attorney General. The repayment provision specifies that the Victims Fund “is an eligible recipient for payment of restitution.” R.C. 2743.72(E). In enacting this provision, the General Assembly determined that the Victims Fund should receive reimbursement for monies paid out on victims’ behalf, and that the simplest form of repayment would be restitution awards against defendants. It therefore stated in plain terms that “payment of restitution” may be directed to the Victims Fund.

This provision fits naturally with the language of the restitution statute allowing restitution payments to state agencies. Indeed, read together, the provisions are complementary: Courts are authorized to award restitution to state agencies; the Attorney General is an agent of the State who oversees the Victims Fund; the Fund is authorized to receive restitution payments. Thus, when the Victims Fund pays out money to benefit a crime victim, the restitution statute and the repayment provision work together to ensure that the State gets its money back from the offender for the expenses he or she created.

The appeals court's contrary ruling necessarily means that the 2004 amendment that removed "third parties" from the restitution scheme impliedly repealed the repayment provision's designation of the Victims Fund as "an eligible recipient for payment of restitution." But that reading defies settled rules of statutory construction. The text designating the Victims Fund as "an eligible recipient for payment of restitution" was in place before the 2004 amendment. Under familiar canons of statutory interpretation, the General Assembly is assumed to have legislated with the existing statutory text in mind and to have intended to harmonize its amendment with the text it left in place. See *State v. Frost* (1979), 57 Ohio St. 2d 121, 125 ("[I]t will be assumed that the General Assembly has knowledge of prior legislation when it enacts subsequent legislation."). Since "repeals by implication are disfavored as a matter of judicial policy," *State v. Carswell*, 114 Ohio St. 3d 210, 2007-Ohio-3723, ¶ 8, the text of the repayment provision remains in force and was not affected by the 2004 amendment. See *State ex rel. Merydith Constr. Co. v. Dean* (1916), 95 Ohio St. 108, 115 ("All laws newly passed by the general assembly must be presumed to harmonize with existing statutes on kindred subjects not either expressly or impliedly repealed.").

B. Restitution awards to the Victims Fund fulfill the constitutional promise of respect for crime victims' rights.

The clear provisions of the restitution statute and the repayment provision also must be read in light of the Ohio Constitution's command to respect the rights of crime victims. The Constitution provides in part:

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process.

Ohio Const. Art. 1, § 10a. Statutorily authorized restitution payments to the Victims Fund serve this constitutional purpose in three important ways.

First, restitution advances the objectives of the criminal law in deterring, rehabilitating, and punishing offenders while bringing justice to victims. The notion of restitution as a form of sanction has deep roots. Ancient legal texts from the Code of Hammurabi to the Torah, among others, required the offender to reimburse the victim or his or her family for any loss that the crime caused. See Note, *Victim Restitution in the Criminal Process*, 97 Harv. L. Rev. 931, 933 & n.18 (1984). Restitution was viewed as “a means by which the offender could buy back the peace he had broken.” *Id.* at 933. Many of the earliest American penal codes incorporated some form of restitution, and many states continue to impose restitution as a criminal penalty. *Id.* at 934.

The justice system has long recognized, then, that “[r]estitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.” *Kelly v. Robinson* (1986), 479 U.S. 36, 49 n.10. Because the calculations are based on the actual harm to the victim, restitution also has a “more precise deterrent effect than a traditional fine.” *Id.* And restitution plays a vital role in affording crime victims a sense that

justice has been served by holding the offender financially accountable for the economic costs of his or her crime.

Second, directing restitution payments to the Victims Fund as reimbursement rather than directly to the victim ensures that the victim receives the prompt financial assistance he or she needs. Restitution payments are typically slow in coming: They are paid out by the offender over a matter of years while he or she serves time in prison or on parole or probation. This trickle of payments does little good for the victim, who needs immediate help to pay medical or counseling bills and to meet other expenses incurred as a result of the crime. These financial obligations often accrue while the victim is unable to work and draw an income because of the crime. The victim is therefore best served when the Victims Fund compensates him or her immediately and then waits for gradual restitution from the offender.

Third, restitution payments restore a portion of the funds paid out on victims' behalf and help to maintain the Victims Fund's financial integrity. By working with courts, prosecutors, and other agencies to increase the number of cases where restitution is ordered, the Subrogation and Restitution Unit has secured more than a quarter of a million dollars in subrogation and restitution payments every year since 2001, the first full year in which restitution payments to the Victims Fund were authorized by statute. At present, 300 restitution accounts remain open, meaning that courts have ordered restitution and the Subrogation and Restitution Unit is awaiting payment. Those pending accounts total \$1,456,168.

Restitution payments therefore constitute an important stream of reimbursement to the Victims Fund. Since the General Assembly restructured the Victims Program by statute in 2000, the number of claims on the Victims Fund's coffers has increased, and the amount of deposits

has not kept pace. As a result, the Victims Fund is under increasing strain, and that strain means that restitution reimbursements are critical to maintaining the solvency of the Victims Fund.

This Court need go no further than the text of the restitution statute and repayment provision to see the error in the decision below. Even if the text were not clear, the Ohio Constitution requires an interpretation that allows the State to continue to provide help to victims of violent crime. The appeals court's decision did not just wipe out the \$426 restitution award in this case, affording a windfall to a convicted offender. The ruling also jeopardizes nearly \$1.5 million in outstanding restitution payments statewide. With no basis in the statute, the appeals court's decision needlessly places the Victims Fund at financial risk.

CONCLUSION

For the above reasons, the Court should reverse the decision below.

Respectfully submitted,



STANLEY FLEGM* (0006846)

Crawford County Prosecutor

**Counsel of Record*

CLIFFORD J. MURPHY (0063519)

Assistant Prosecutor

112 E. Mansfield St., 3rd Floor

Bucyrus, Ohio 44820

419-562-9782

MARC DANN (0039425)

Attorney General of Ohio

WILLIAM P. MARSHALL (0038077)

Solicitor General

BENJAMIN C. MIZER (admitted *pro hac vice*)

Deputy Solicitor

MELANIE CORNELIUS (0029808)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

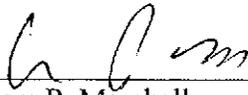
Counsel for State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant State of Ohio was served by
U.S. mail this 28th day of January 2008 upon the following counsel:

John Spiegel
222 W. Charles St. P.O. Box 1024
Bucyrus, Ohio 44820

Counsel for Defendant-Appellant
Charles W. Bartholomew



William P. Marshall
Solicitor General

EXHIBIT 1

In the
Supreme Court of Ohio 07 - 1462

STATE OF OHIO, : Case No. _____
: :
Plaintiff-Appellant, : :
: : On Appeal from the
v. : : Crawford County
: : Court of Appeals,
BARTHOLOMEW, : : Third Appellate District
: :
Defendant-Appellee. : : Court of Appeals Case
: : No. 3-06-16
: :

NOTICE OF APPEAL OF APPELLANT
STATE OF OHIO

STANLEY FLEGM* (0006846)
Crawford County Prosecutor

**Counsel of Record*

CLIFFORD MURPHY (0063519)

Assistant Prosecutor
112 E. Mansfield St., 3rd Floor
Bucyrus, Ohio 44820
419-562-9782

Counsel for State of Ohio

JOHN SPIEGEL (0024737)
222 W. Charles St., P.O. Box 1024
Bucyrus, Ohio 44820
419-562-6624

Counsel for Defendant-Appellant
Charles W. Bartholomew

MARC DANN (0039425)
Attorney General of Ohio

WILLIAM P. MARSHALL (0038077)
Solicitor General

BENJAMIN C. MIZER (*pro hac vice*
pending)

Deputy Solicitor

MATTHEW HELLMAN (0071628)

MELANIE CORNELIUS (0029808)

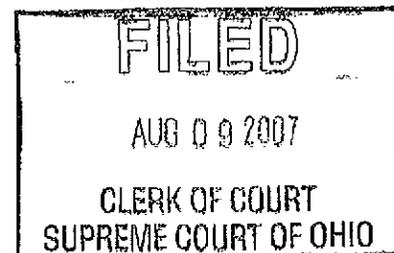
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

wmarshall@ag.state.oh.us

Counsel for State of Ohio



**NOTICE OF APPEAL OF APPELLANT
STATE OF OHIO**

Appellant State of Ohio gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Crawford County Court of Appeals, Third Appellate District, journalized in Case No. 3-06-16 on June 25, 2007. Date-stamped copies of the Third District's Journal Entry and Opinion are attached as Exhibits 1 and 2, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

August 9, 2007


STANLEY FLEGM* (0006846)
Crawford County Prosecutor
**Counsel of Record*
CLIFFORD J. MURPHY (0063519)
Assistant Prosecutor
112 E. Mansfield St., 3rd Floor
Bucyrus, Ohio 44820
419-562-9782

MARC DANN (0039425)
Attorney General of Ohio

WILLIAM P. MARSHALL (0038077),
Solicitor General
BENJAMIN C. MIZER (*pro hac vice*
pending)
Deputy Solicitor
MATTHEW HELLMAN (0071628)
MELANIE CORNELIUS (0029808)
Assistant Attorneys General
30 East Broad Street, 17th Floor

Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
wmarshall@ag.state.oh.us

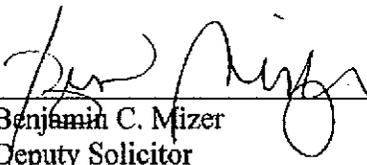
Counsel for State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Appellant State of Ohio was served by U.S. mail this 9th day of August 2007 upon the following counsel:

JOHN SPIEGEL
222 W. Charles St., P.O. Box 1024
Bucyrus, Ohio 44820

Counsel for Defendant-Appellant
Charles W. Bartholomew



Benjamin C. Mizer
Deputy Solicitor

EXHIBIT 2

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

STATE OF OHIO,

CASE NUMBER 3-06-16

PLAINTIFF-APPELLEE,

JOURNAL

v.

ENTRY

CHARLES W. BARTHOLOMEW,

DEFENDANT-APPELLANT.

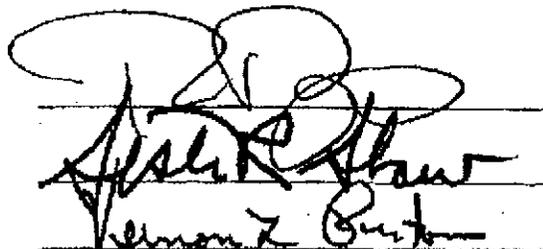
FILED IN THE COURT OF APPEALS

JUN 25 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

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



JUDGES

DATED: June 25, 2007

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
CRAWFORD COUNTY**

FILED IN THE COURT OF APPEALS

JUN 25 2007

SUE SEEVERS
CRAWFORD COUNTY CLERK

STATE OF OHIO,

CASE NUMBER 3-06-16

PLAINTIFF-APPELLEE,

v.

OPINION

CHARLES W. BARTHOLOMEW,

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

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

DATE OF JUDGMENT ENTRY: June 25, 2007

ATTORNEYS:

JOHN SPIEGEL
Attorney at Law
Reg. #0024737
222 West Charles Street
P.O. Box 1024
Bucyrus, OH 44820
For Appellant.

CLIFFORD J. MURPHY
Assistant Prosecuting Attorney
Reg. #0063519
112 E. Mansfield Street, Suite 305
Bucyrus, OH 44820
For Appellee.

Rogers, P.J.,

{¶1} Defendant-Appellant, Charles W. Bartholomew, appeals his sentence from the Crawford County Court of Common Pleas, wherein he was sentenced to ten years in prison after pleading guilty to one count of rape. On appeal, Bartholomew argues that the trial court erred in sentencing him to the maximum sentence of ten years; that his incarceration is an unnecessary burden on government resources and is disproportionate to his criminal act; that the trial court failed to properly apply *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; that the trial court improperly considered uncharged conduct, which he allegedly committed; that the trial court failed to consider his advanced age when it sentenced him; and, that the trial court erred in ordering him to pay restitution in the form of counseling expenses. Finding that the trial court properly sentenced Bartholomew, but committed plain error when it ordered him to pay restitution, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

{¶2} In March 2006, the Crawford County Grand Jury indicted Bartholomew on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Bartholomew pled not guilty.

{¶3} In May 2006, Bartholomew moved to withdraw his former plea of not guilty and to enter a plea of guilty to the charge in the March 2006 indictment.

The trial court found Bartholomew's motion well taken, accepted his guilty plea, found Bartholomew guilty on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, and found Bartholomew to be a sexually oriented offender.

{¶4} In June 2006, the trial court held a sentencing hearing. In July 2006, the trial court filed its sentencing judgment entry, which provided in pertinent part:

The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code section 2929.11, and has balanced the seriousness and recidivism factors (Sic.) Ohio Revised Code section 2929.12.

*** * ***

Upon consideration of the pre-sentence investigation and attachments, the purposes and principles of sentences, the record and the statements/exhibits of counsel; the State requesting prison:

It is ORDERED that the defendant shall be sentenced to a prison term of ten (10) years. The defendant was determined a sexually oriented offender as contained in the file-stamped May 4, 2006 separate Judgment Entry and Notice of Duties to Register as an Offender of a Sexually Oriented or Child-Victim Offense. The defendant shall pay \$426.00 restitution to the Attorney General's Victims of Crime for reimbursement to the victim. The defendant shall pay the costs of this case and any fees permitted pursuant to Revised Code section 2929.18(a).

(July 2006 Judgment Entry pp. 1-2).

{¶5} It is from this judgment Bartholomew appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO PRISON FOR A MAXIMUM SENTENCE OF TEN YEARS.

Assignment of Error No. II

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE SUCH INCARCERATION IS AN UNNECESSARY BURDEN ON GOVERNMENT RESOURCES AND IS DISPROPORTIONATE TO HIS CRIMINAL ACT.

Assignment of Error No. III

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE THE TRIAL COURT FAILED TO PROPERLY APPLY STATE V POSTER WHEN SENTENCING THE DEFENDANT.

Assignment of Error No. IV

THE TRIAL COURT ERRED BY IMPROPERLY CONSIDERING UNCHARGED CONDUCT ALLEGEDLY COMMITTED BY DEFENDANT.

Assignment of Error No. V

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE ADVANCED AGE OF THE DEFENDANT.

Assignment of Error No. VI

THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY RESTITUTION IN THE FORM OF COUNSELING EXPENSES.

Assignments of Error Nos. I & III

{¶6} In his first assignment of error, Bartholomew argues that the trial court erred in sentencing him to ten years in prison. In his third assignment of error, Bartholomew argues that the trial court failed to properly apply *Foster*, when he was sentenced. Specifically, Bartholomew asserts that the trial court failed to use its judicial discretion. We disagree.

{¶7} The Ohio Supreme Court in *Foster*, supra, 2006-Ohio-856, at paragraph seven of the syllabus, held that “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” In addition, the Court stated “[o]ur remedy does not rewrite the statutes, but leaves courts with full discretion to impose prison terms within the basic ranges of R.C. 2929.14(A) based upon a jury verdict or admission of the defendant without the mandated judicial findings of fact that *Blakely* prohibits.” *Id.* at ¶102. “Courts shall consider these portions of the sentencing code that are unaffected by today’s decision and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively.” *Id.* at ¶105.

{¶8} In addition, *Foster* altered the appellate court's standard of review for most sentencing appeals from "clear and convincing" to "abuse of discretion." Id. at ¶¶100 & 102; see *State v. Ramos*, 3d Dist. No. 4-06-24, 2007-Ohio-767, ¶23 (noting "the clear and convincing evidence standard of review set forth under R.C. 2953.08(G)(2) remains viable with respect to those cases appealed under the applicable provisions of R.C. 2953.08(A), (B), and (C)"). Accordingly, we must review this sentence under the abuse of discretion standard. In order to find an abuse of discretion, we must find that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. Id.

{¶9} The range of sentences for a first degree felony is three to ten years in prison. R.C. 2929.14(A)(1). While the trial court sentenced Bartholomew to the statutory maximum of ten years in prison, we cannot say that the trial court abused its discretion when it sentenced Bartholomew within the statutory range. Accordingly, McDaniel's first and third assignments of error are overruled.

Assignment of Error No. II

{¶10} In his second assignment of error, Bartholomew argues that the trial court erred by incarcerating him for ten years, because his prison term places an

unnecessary burden on government resources, under R.C. 2929.13(A), and is disproportionate to his criminal act, under R.C. 2929.11(B).

{¶11} In support, Bartholomew claims that only the worst offenders should be placed in prison and since he is not a worst offender, his placement in jail places an unnecessary burden on government resources and is disproportionate to his criminal act. However, Bartholomew directs this Court to no precedent in support of his argument. Moreover, the trial court stated, during Bartholomew's sentencing hearing, "I have considered the effect of my sentence on the community resources. I've also considered my responsibility to this community to protect it. And, quite frankly, your conduct, that you've admitted to, that I read in the pre-sentence report is so far outside the bounds that any civilized society could, could (Sic.) tolerate, that words literally fail me." (Tr. p. 6). Therefore, we cannot find that Bartholomew's ten year prison sentence constitutes an unnecessary burden upon state or local government or is incommensurate with or demeaning to the seriousness of the conduct.

{¶12} Accordingly, Bartholomew's second assignment of error is overruled.

Assignment of Error No. IV

{¶13} In his fourth assignment of error, Bartholomew argues that the trial court improperly considered uncharged conduct, which he allegedly committed.

Specifically, Bartholomew argues that the trial court should not have relied upon information contained within the pre-sentence investigation report. We disagree.

{¶14} As we stated in *State v. Wentling*, 3d Dist. No. 16-06-03, 2007-Ohio-217, ¶10,

In *Mathis*, decided the same day as *Foster*, the Ohio Supreme Court provided:

As we have held in *Foster*, however, trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. Now that such findings are no longer mandated, on resentencing, the trial court will have discretion to sentence within the applicable range, following R.C. 2929.19 procedures. R.C. 2929.19 provides that “[t]he court shall hold a sentencing hearing before imposing a sentence * * * and before *resentencing* an offender who was convicted of or pleaded guilty to a felony and whose case was remanded.”

Mathis, 2006-Ohio-955, (Sic.) at ¶37, citing R.C. 2929.19(A)(1) (emphasis in original). Additionally, the [Ohio Supreme] Court noted that a trial court “shall consider the record, any information presented at the hearing, any pre-sentence investigation report, and any victim-impact statement.” *Id.* citing R.C. 2929.19(B)(1).

{¶15} As in *Wentling*, it is undisputed that, as required, the trial court considered the record, information presented at the sentencing hearing, the pre-sentence investigation report, and the victim impact statement when it sentenced Bartholomew. As a result, Bartholomew’s argument is without merit.

{¶16} Accordingly, Bartholomew’s fourth assignment of error is overruled.

Assignment of Error No. V

{¶17} In his fifth assignment of error, Bartholomew argues that the trial court failed to properly consider his advanced age when it sentenced him to ten years in prison. We disagree.

{¶18} In support, Bartholomew relies on the “catch-all” phrase of R.C. 2929.12(A), which provides, “in addition, [the trial court] may consider any other factors that are relevant to achieving those purposes and principles of sentencing.” However, Bartholomew fails to provide us with any case law supporting his contention and failed to raise this matter in the trial court. Since this issue was not raised in the trial court, it will not be considered here. *State v. Park*, 3d Dist. No. 3-06-14, 2007-Ohio-1084, ¶9.

{¶19} Accordingly, Bartholomew’s fifth assignment of error is overruled.

Assignment of Error No. VI

{¶20} In his sixth assignment of error, Bartholomew argues that the trial court erred by ordering him to pay restitution for counseling expenses. Specifically, Bartholomew argues that counseling expenses of the victim do not constitute an “economic loss.” We agree with Bartholomew that the trial court erred by ordering him to pay restitution for counseling expenses, but for a different reason.

{¶21} At Bartholomew's sentencing hearing, the victims advocate noted "the Attorney General's office has asked that you would direct restitution payment in the amount of four hundred twenty-six dollars (\$426.00). That was bills from counseling that [victim's mother] had received originally, that she's since been reimbursed through the [Ohio Victim's of Crime fund]" and the trial court ordered him to pay "restitution to the Ohio Victim's of Crime fund in the amount of Four Hundred Twenty-six dollars (\$426.00)." (Tr. p. 6). At the outset, we note that Bartholomew failed to enter an objection to the restitution ordered at the time of the hearing. Although it is a long-standing general rule that an appellate court need not consider alleged errors which were not objected to in the trial court, *State v. Williams* (1977), 51 Ohio St.2d 112, we find it necessary to examine this issue on the basis of plain error.

{¶22} Relevant case law states that plain error exists only in the event that it can be said that "but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 431, 1997-Ohio-204; see *State v. Johnson*, 3d Dist. No. 2-98-39, 1999-Ohio-825. For the following reasons, we conclude that plain error exists in this instance.

{¶23} R.C. 2743.52 permits the Attorney General to make awards of reparations to victims for economic losses arising from criminally injurious conduct. R.C. 2743.52(A). Here, it is undisputed that the Attorney General paid

Case No. 3-06-16

the victim's mother \$426.00 out of the Ohio Victim's of Crime fund, under R.C. 2743.52, and has sought reimbursement through an award of restitution in this criminal action.

{¶24} R.C. 2929.18(A)¹ provides financial sanctions, which can be imposed against a felony offender. Specifically, R.C. 2929.18(A) provides in pertinent part:

[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section * * *. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime * * *, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court.

(Emphasis added).

{¶25} In *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, the Ohio Supreme Court reviewed a former version of R.C. 2929.18(A)(1) and provided: "our resolution of this case will likely affect only those cases arising prior to the June 1, 2004 effective date of the statutory change, because on that date, the legislature amended R.C. 2929.18 to delete all references to restitution for third

parties. See 2003 Sub.H.B. No. 52.” Id. at ¶1. Specifically, the Court noted, “former R.C. 2929.18(A)(1) expressly stated that restitution may include ‘a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim.’ 148 Ohio Laws, Part IV, 8674, 8767. * * * Accordingly, the General Assembly authorized trial courts to exercise discretion when imposing financial sanctions on a defendant and permitted those sanctions to include reimbursement to third parties for amounts paid on behalf of a victim.” Id. at ¶13. Further, the Court held, “[i]n this case, the trial court exercised its discretion and ordered payment to the medical-insurance provider in accordance with former R.C. 2929.18(A)(1). Therefore, although our decision is limited in scope because this portion of the Revised Code has since been amended, we answer the certified question in the affirmative because at the time of its ruling, the trial court had discretion to include reimbursement to third parties for amounts paid on behalf of the victim * * *.” Id. See also, *State v. Christy*, 3d Dist. No. 16-06-01, 2006-Ohio-4319, ¶13 (“We note that, under former R.C. 2929.18(A)(1), a trial court may order a felony offender to pay the [Ohio Victim’s of Crimes fund] for money the [Fund] paid on a victim’s behalf.”)

{¶26} Thus, under the current version of R.C. 2929.18, financial sanctions which can be imposed against a felony offender do not include reimbursement to

¹ We note that R.C. 2929.18(A)(1) was amended effective April 4, 2007 under 2006 H 461. Therefore, we will consider the statute in effect when the offense occurred, which was February 2006, and all references

third parties for amounts paid on behalf of the victim. Therefore, the trial court committed plain error, because it did not have the authority to order Bartholomew to pay restitution to a third party, the Ohio Victim's of Crimes fund, in the amount of \$426.00.

{¶27} Accordingly, Bartholomew's sixth assignment of error is sustained.

{¶28} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued in his first, second, third, fourth, and fifth assignments of error, but having found error prejudicial to the appellant herein, in the particulars assigned and argued in his sixth assignment of error, we affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

*Judgment Affirmed in Part and
Reversed in Part and Cause Remanded.*

SHAW and PRESTON, JJ., concur.

r

EXHIBIT 3

LEXSEE 2007 OHIO 3130

STATE OF OHIO, PLAINTIFF-APPELLEE, v. CHARLES W. BARTHOLOMEW,
DEFENDANT-APPELLANT.

CASE NUMBER 3-06-16

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, CRAW-
FORD COUNTY

2007 Ohio 3130; 2007 Ohio App. LEXIS 2884

June 25, 2007, Date of Judgment Entry

SUBSEQUENT HISTORY: Discretionary appeal allowed by *State v. Bartholomew*, 2007 Ohio 6518, 2007 Ohio LEXIS 3267 (Ohio, Dec. 12, 2007)

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

DISPOSITION: Judgment affirmed in part and judgment reversed in part and cause remanded.

COUNSEL: JOHN SPIEGEL, Attorney at Law, Bucyrus, OH, For Appellant.

CLIFFORD J. MURPHY, Assistant Prosecuting Attorney, Bucyrus, OH, For Appellee.

JUDGES: Rogers, P.J., SHAW and PRESTON, JJ., concur.

OPINION BY: Rogers, P.J., SHAW and PRESTON

OPINION

Rogers, P.J.,

[*P1] Defendant-Appellant, Charles W. Bartholomew, appeals his sentence from the Crawford County Court of Common Pleas, wherein he was sentenced to ten years in prison after pleading guilty to one count of rape. On appeal, Bartholomew argues that the trial court erred in sentencing him to the maximum sentence of ten years; that his incarceration is an unnecessary burden on government resources and is disproportionate to his criminal act; that the trial court failed to properly apply *State v. Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470; that the trial court improperly considered uncharged conduct, which he allegedly committed; that

the trial court failed to consider his advanced age when it sentenced him; and, that the trial court erred in ordering him to pay restitution in the form of counseling expenses. Finding that the trial court [**2] properly sentenced Bartholomew, but committed plain error when it ordered him to pay restitution, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

[*P2] In March 2006, the Crawford County Grand Jury indicted Bartholomew on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree. Bartholomew pled not guilty.

[*P3] In May 2006, Bartholomew moved to withdraw his former plea of not guilty and to enter a plea of guilty to the charge in the March 2006 indictment. The trial court found Bartholomew's motion well taken, accepted his guilty plea, found Bartholomew guilty on one count of rape in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree, and found Bartholomew to be a sexually oriented offender.

[*P4] In June 2006, the trial court held a sentencing hearing. In July 2006, the trial court filed its sentencing judgment entry, which provided in pertinent part:

The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code section 2929.11, and has balanced the seriousness and recidivism [3] factors (Sic.) Ohio Revised Code section 2929.12.**

* * *

Upon consideration of the presentence investigation and attachments,

the purposes and principles of sentences, the record and the statements/exhibits of counsel; the State requesting prison:

It is ORDERED that the defendant shall be sentenced to a prison term of ten (10) years. The defendant was determined a sexually oriented offender as contained in the file-stamped May 4, 2006 separate Judgment Entry and Notice of Duties to Register as an Offender of a Sexually Oriented or Child-Victim Offense. The defendant shall pay \$ 426.00 restitution to the Attorney General's Victims of Crime for reimbursement to the victim. The defendant shall pay the costs of this case and any fees permitted pursuant to *Revised Code section 2929.18(A)*.

(July 2006 Judgment Entry pp. 1-2).

[*P5] It is from this judgment Bartholomew appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO PRISON FOR A MAXIMUM SENTENCE OF TEN YEARS.

Assignment of Error No. II

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE SUCH INCARCERATION IS AN UNNECESSARY BURDEN [**4] ON GOVERNMENT RESOURCES AND IS DISPROPORTIONATE TO HIS CRIMINAL ACT.

Assignment of Error No. III

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE THE TRIAL COURT FAILED TO PROPERLY APPLY STATE V FOSTER WHEN SENTENCING THE DEFENDANT.

Assignment of Error No. IV

THE TRIAL COURT ERRED BY IMPROPERLY CONSIDERING UNCHARGED CONDUCT ALLEGEDLY COMMITTED BY DEFENDANT.

Assignment of Error No. V

THE TRIAL COURT ERRED BY INCARCERATING THE DEFENDANT FOR TEN YEARS, WHERE THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE ADVANCED AGE OF THE DEFENDANT.

Assignment of Error No. VI

THE TRIAL COURT ERRED BY ORDERING THE DEFENDANT TO PAY RESTITUTION IN THE FORM OF COUNSELING EXPENSES.

Assignments of Error Nos. I & III

[*P6] In his first assignment of error, Bartholomew argues that the trial court erred in sentencing him to ten years in prison. In his third assignment of error, Bartholomew argues that the trial court failed to properly apply *Foster*, when he was sentenced. Specifically, Bartholomew asserts that the trial court failed to use its judicial discretion. We disagree.

[*P7] The Ohio Supreme Court in *Foster, supra*, 2006 Ohio 856, at paragraph seven of the syllabus, held that "[t]rial courts [**5] have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." In addition, the Court stated "[o]ur remedy does not rewrite the statutes, but leaves courts with full discretion to impose prison terms within the basic ranges of *R.C. 2929.14(A)* based upon a jury verdict or admission of the defendant without the mandated judicial findings of fact that *Blakely* prohibits." *Id. at P102*. "Courts shall consider these portions of the sentencing code that are unaffected by today's decision and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively." *Id. at P105*.

[*P8] In addition, *Foster* altered the appellate court's standard of review for most sentencing appeals from "clear and convincing" to "abuse of discretion." *Id. at PP100 & 102*; see *State v. Ramos, 3d Dist. No. 4-06-24, 2007 Ohio 767, P23* (noting "the clear and convincing evidence standard of review set forth under *R.C.*

2953.08(G)(2) remains viable with respect [**6] to those cases appealed under the applicable provisions of R.C. 2953.08(A), (B), and (C)". Accordingly, we must review this sentence under the abuse of discretion standard. In order to find an abuse of discretion, we must find that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing court may not simply substitute its judgment for that of the trial court. *Id.*

[*P9] The range of sentences for a first degree felony is three to ten years in prison. R.C. 2929.14(A)(1). While the trial court sentenced Bartholomew to the statutory maximum of ten years in prison, we cannot say that the trial court abused its discretion when it sentenced Bartholomew within the statutory range. Accordingly, McDaniel's first and third assignments of error are overruled.

Assignment of Error No. II

[*P10] In his second assignment of error, Bartholomew argues that the trial court erred by incarcerating him for ten years, because his prison term places an unnecessary burden on government resources, under R.C. 2929.13(A), and is disproportionate to his criminal act, under R.C. 2929.11(B).

[*P11] In support, [**7] Bartholomew claims that only the worst offenders should be placed in prison and since he is not a worst offender, his placement in jail places an unnecessary burden on government resources and is disproportionate to his criminal act. However, Bartholomew directs this Court to no precedent in support of his argument. Moreover, the trial court stated, during Bartholomew's sentencing hearing, "I have considered the effect of my sentence on the community resources. I've also considered my responsibility to this community to protect it. And, quite frankly, your conduct, that you've admitted to, that I read in the pre-sentence report is so far outside the bounds that any civilized society could, could (Sic.) tolerate, that words literally fail me." (Tr. p. 6). Therefore, we cannot find that Bartholomew's ten year prison sentence constitutes an unnecessary burden upon state or local government or is incommensurate with or demeaning to the seriousness of the conduct.

[*P12] Accordingly, Bartholomew's second assignment of error is overruled.

Assignment of Error No. IV

[*P13] In his fourth assignment of error, Bartholomew argues that the trial court improperly considered uncharged conduct, which he allegedly [**8] commit-

ted. Specifically, Bartholomew argues that the trial court should not have relied upon information contained within the pre-sentence investigation report. We disagree.

[*P14] As we stated in *State v. Wentling*, 3d Dist. No. 16-06-03, 2007 Ohio 217, P10,

In *Mathis*, decided the same day as *Foster*, the Ohio Supreme Court provided:

As we have held in *Foster*, however, trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences. Now that such findings are no longer mandated, on resentencing, the trial court will have discretion to sentence within the applicable range, following R.C. 2929.19 procedures. R.C. 2929.19 provides that "[t]he court shall hold a sentencing hearing before imposing a sentence * * * and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded."

***Mathis*, 2006 Ohio 955, (Sic.) at P37, citing R.C. 2929.19(A)(1) (emphasis in original). Additionally, the [Ohio Supreme] Court noted that a trial court "'shall consider the record,' any information presented at the [**9] hearing, any presentence investigation report, and any victim-impact statement." *Id.* citing R.C. 2929.19(B)(1).**

[*P15] As in *Wentling*, it is undisputed that, as required, the trial court considered the record, information presented at the sentencing hearing, the pre-sentence investigation report, and the victim impact statement when it sentenced Bartholomew. As a result, Bartholomew's argument is without merit.

[*P16] Accordingly, Bartholomew's fourth assignment of error is overruled.

Assignment of Error No. V

[*P17] In his fifth assignment of error, Bartholomew argues that the trial court failed to properly consider his advanced age when it sentenced him to ten years in prison. We disagree.

[*P18] In support, Bartholomew relies on the "catch-all" phrase of *R.C. 2929.12(A)*, which provides, "in addition, [the trial court] may consider any other factors that are relevant to achieving those purposes and principles of sentencing." However, Bartholomew fails to provide us with any case law supporting his contention and failed to raise this matter in the trial court. Since this issue was not raised in the trial court, it will not be considered here. *State v. Park*, 3d Dist. No. 3-06-14, 2007 Ohio 1084, P9.

[*P19] Accordingly, [**10] Bartholomew's fifth assignment of error is overruled.

Assignment of Error No. VI

[*P20] In his sixth assignment of error, Bartholomew argues that the trial court erred by ordering him to pay restitution for counseling expenses. Specifically, Bartholomew argues that counseling expenses of the victim do not constitute an "economic loss." We agree with Bartholomew that the trial court erred by ordering him to pay restitution for counseling expenses, but for a different reason.

[*P21] At Bartholomew's sentencing hearing, the victims advocate noted "the Attorney General's office has asked that you would direct restitution payment in the amount of four hundred twenty-six dollars (\$ 426.00). That was bills from counseling that [victim's mother] had received originally, that she's since been reimbursed through the [Ohio Victim's of Crime fund]" and the trial court ordered him to pay "restitution to the Ohio Victim's of Crime fund in the amount of Four Hundred Twenty-six dollars (\$ 426.00)." (Tr. p. 6). At the outset, we note that Bartholomew failed to enter an objection to the restitution ordered at the time of the hearing. Although it is a long-standing general rule that an appellate court need not consider [**11] alleged errors which were not objected to in the trial court, *State v. Williams (1977)*, 51 Ohio St.2d 112, 364 N.E.2d 1364, we find it necessary to examine this issue on the basis of plain error.

[*P22] Relevant case law states that plain error exists only in the event that it can be said that "but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 431, 1997 Ohio 204, 678 N.E.2d 891; see *State v. Johnson*, 3d Dist. No. 2-98-39, 1999 Ohio 825. For the following reasons, we conclude that plain error exists in this instance.

[*P23] *R.C. 2743.52* permits the Attorney General to make awards of reparations to victims for economic losses arising from criminally injurious conduct. *R.C. 2743.52(A)*. Here, it is undisputed that the Attorney General paid the victim's mother \$ 426.00 out of the Ohio Victim's of Crime fund, under *R.C. 2743.52*, and has

sought reimbursement through an award of restitution in this criminal action.

[*P24] *R.C. 2929.18(A)*¹ provides financial sanctions, which can be imposed against a felony offender. Specifically, *R.C. 2929.18(A)* provides in pertinent part:

[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction [12] or combination of financial sanctions authorized under this section * * *. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:**

(1) Restitution by the offender to the victim of the offender's crime * * *, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court.

(Emphasis added).

1 We note that *R.C. 2929.18(A)(1)* was amended effective April 4, 2007 under 2006 H 461. Therefore, we will consider the statute in effect when the offense occurred, which was February 2006, and all references to *R.C. 2929.18(A)* will be to the statute in effect when the offense occurred, unless otherwise specified.

[*P25] In *State v. Kreisler*, 109 Ohio St.3d 391, 2006 Ohio 2706, 848 N.E.2d 496, the Ohio Supreme Court reviewed a former version of *R.C. 2929.18(A)(1)* and provided: "our resolution of this case will likely affect only those cases arising prior to the June 1, 2004 effective date of the statutory change, because [**13] on that date, the legislature amended *R.C. 2929.18* to delete all references to restitution for third parties. See 2003 Sub.H.B. No. 52." *Id. at P1*. Specifically, the Court noted, "former *R.C. 2929.18(A)(1)* expressly stated that restitution may include 'a requirement that reimbursement be made to third parties for amounts paid to or on behalf of the victim.' 148 Ohio Laws, Part IV, 8674, 8767. * * * Accordingly, the General Assembly authorized trial courts to exercise discretion when imposing financial sanctions on a defendant and permitted those sanctions to include reimbursement to third parties for amounts paid on behalf of a victim." *Id. at P13*. Further, the Court held, "[i]n this case, the trial court exercised its

discretion and ordered payment to the medical-insurance provider in accordance with former *R.C. 2929.18(A)(1)*. Therefore, although our decision is limited in scope because this portion of the Revised Code has since been amended, we answer the certified question in the affirmative because at the time of its ruling, the trial court had discretion to include reimbursement to third parties for amounts paid on behalf of the victim * * *." *Id.* See also, *State v. Christy, 3d Dist. No. 16-06-01, 2006 Ohio 4319, P13* [**14] ("We note that, under former *R.C. 2929.18(A)(1)*, a trial court may order a felony offender to pay the [Ohio Victim's of Crimes fund] for money the [Fund] paid on a victim's behalf.")

[*P26] Thus, under the current version of *R.C. 2929.18*, financial sanctions which can be imposed against a felony offender do not include reimbursement to third parties for amounts paid on behalf of the victim. Therefore, the trial court committed plain error, because it did not have the authority to order Bartholomew to pay

restitution to a third party, the Ohio Victim's of Crimes fund, in the amount of \$ 426.00.

[*P27] Accordingly, Bartholomew's sixth assignment of error is sustained.

[*P28] Having found no error prejudicial to the appellant herein, in the particulars assigned and argued in his first, second, third, fourth, and fifth assignments of error, but having found error prejudicial to the appellant herein, in the particulars assigned and argued in his sixth assignment of error, we affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

Judgment Affirmed in Part and Reversed in Part and Cause Remanded.

SHAW and PRESTON, JJ., concur.

EXHIBIT 4

FILED CLERKS OFFICE
05 JUL -3 PM 1:08

COURT OF COMMON PLEAS, CRAWFORD COUNTY, OHIO

301 E. SLEEVES
CRAWFORD COUNTY

STATE OF OHIO, :
PLAINTIFF, : CASE NO. 06-CR-0032
vs : JUDGMENT ENTRY

CHARLES W. BARTHOLOMEW,:

DEFENDANT.

On June 28, 2006 defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. J. Andrew Motter, Esq., counsel for defendant and Clifford J. Murphy, Assistant Prosecuting Attorney were present as was defendant who was afforded all rights pursuant to Crim. R.32. The Court has considered the record, oral statements, any victim impact statement and presentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code section 2929.11, and has balanced the seriousness and recidivism factors Ohio Revised Code section 2929.12.

The Court finds that the defendant was found guilty of Rape in violation of Ohio Revised Code Sec. 2907.02(A)(1)(b), a felony one.

Upon consideration of the pre-sentence investigation and attachments, the purposes and principles of sentencing, the record and the statements/exhibits of counsel; the State requesting prison:

It is **ORDERED** that the defendant shall be sentenced to a prison term of ten (10) years. The defendant was determined a sexually oriented offender as contained in the file-stamped May 4, 2006 separate Judgment Entry and Notice of Duties to Register as an Offender of a Sexually Oriented or Child-Victim Offense. The defendant shall pay \$426.00

VOL 0434 PG 0507

restitution to the Attorney General's Victims of Crime for reimbursement to the victim. The defendant shall pay the costs of this case and any fees permitted pursuant to Revised Code section 2929.18(a). The defendant is hereby granted 128 days of jail-time credit, and the Sheriff of Crawford County shall certify any future credit days while the defendant awaits transportation to prison.

Upon completion of the prison term, the offender shall be subject to a mandatory period of post release control up to five years as determined by the Parole Board pursuant to R.C. 2967.28. The defendant was advised of his appellate rights.

The defendant is hereby remanded to the custody of the Crawford County Sheriff where the defendant shall await transfer to the Lorain Correctional Institution and the clerk of this Court is Ordered to prepare the necessary paperwork for the conveyance of the Defendant to the Lorain Correctional Institution. The Sheriff of Crawford County is ordered to certify to the institution of confinement the future custody days while Defendant awaits transportation to the Lorain Correctional Institution. Bond released.



JUDGE RUSSELL B. WISEMAN

Copies to: Crawford County Prosecutor's Office
J. Andrew Motter, Esq., Counsel for defendant
Crawford County Sheriff
Probation

805094 PG 0508
VOL 0434 PG 0508

EXHIBIT 5

LEXSTAT OHIO REV CODE 2929.18

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2008 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 15, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2929.18 (2008)

§ 2929.18. Financial sanctions; restitution

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to *section 2947.23 of the Revised Code*, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in *section 2929.32 of the Revised Code*, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments.

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(2) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision, or as described in division (B)(2) of this section to one or more law enforcement agencies, with the amount of the fine based on a standard percentage of the offender's daily income over a period of time determined by the court and based upon the seriousness of the offense. A fine ordered under this division shall not exceed the maximum conventional fine amount authorized for the level of the offense under division (A)(3) of this section.

(3) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

- (a) For a felony of the first degree, not more than twenty thousand dollars;
- (b) For a felony of the second degree, not more than fifteen thousand dollars;
- (c) For a felony of the third degree, not more than ten thousand dollars;
- (d) For a felony of the fourth degree, not more than five thousand dollars;
- (e) For a felony of the fifth degree, not more than two thousand five hundred dollars.

(4) A state fine or costs as defined in *section 2949.111 of the Revised Code*.

(5) (a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including the following:

(i) All or part of the costs of implementing any community control sanction, including a supervision fee under *section 2951.021 of the Revised Code*;

(ii) All or part of the costs of confinement under a sanction imposed pursuant to *section 2929.14, 2929.142 [2929.14.2], or 2929.16 of the Revised Code*, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement.

(b) If the offender is sentenced to a sanction of confinement pursuant to *section 2929.14 or 2929.16 of the Revised Code* that is to be served in a facility operated by a board of county commissioners, a legislative authority of a municipal corporation, or another local governmental entity, if, pursuant to *section 307.93, 341.14, 341.19, 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*, the board, legislative authority, or other local governmental entity requires prisoners to reimburse the county, municipal corporation, or other entity for its expenses incurred by reason of the prisoner's confinement, and if the court does not impose a financial sanction under division (A)(5)(a)(ii) of this section, confinement costs may be assessed pursuant to *section 2929.37 of the Revised Code*. In addition, the offender may be required to pay the fees specified in *section 2929.38 of the Revised Code* in accordance with that section.

(c) Reimbursement by the offender for costs pursuant to *section 2929.71 of the Revised Code*.

(B) (1) For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

(2) Any mandatory fine imposed upon an offender under division (B)(1) of this section and any fine imposed upon an offender under division (A)(2) or (3) of this section for any fourth or fifth degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code shall be paid to law enforcement agencies pursuant to division (F) of *section 2925.03 of the Revised Code*.

(3) For a fourth degree felony OVI offense and for a third degree felony OVI offense, the sentencing court shall impose upon the offender a mandatory fine in the amount specified in division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code*, whichever is applicable. The mandatory fine so imposed shall be disbursed as provided in the division pursuant to which it is imposed.

(4) Notwithstanding any fine otherwise authorized or required to be imposed under division (A)(2) or (3) or (B)(1) of this section or *section 2929.31 of the Revised Code* for a violation of *section 2925.03 of the Revised Code*, in addition to any penalty or sanction imposed for that offense under *section 2925.03* or *sections 2929.11 to 2929.18 of the Revised Code* and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender for a violation of *section 2925.03 of the Revised Code* may impose upon the offender a fine in addition to any fine imposed under division (A)(2) or (3) of this section and in addi-

tion to any mandatory fine imposed under division (B)(1) of this section. The fine imposed under division (B)(4) of this section shall be used as provided in division (H) of *section 2925.03 of the Revised Code*. A fine imposed under division (B)(4) of this section shall not exceed whichever of the following is applicable:

(a) The total value of any personal or real property in which the offender has an interest and that was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of *section 2925.03 of the Revised Code*, including any property that constitutes proceeds derived from that offense;

(b) If the offender has no interest in any property of the type described in division (B)(4)(a) of this section or if it is not possible to ascertain whether the offender has an interest in any property of that type in which the offender may have an interest, the amount of the mandatory fine for the offense imposed under division (B)(1) of this section or, if no mandatory fine is imposed under division (B)(1) of this section, the amount of the fine authorized for the level of the offense imposed under division (A)(3) of this section.

(5) Prior to imposing a fine under division (B)(4) of this section, the court shall determine whether the offender has an interest in any property of the type described in division (B)(4)(a) of this section. Except as provided in division (B)(6) or (7) of this section, a fine that is authorized and imposed under division (B)(4) of this section does not limit or affect the imposition of the penalties and sanctions for a violation of *section 2925.03 of the Revised Code* prescribed under those sections or *sections 2929.11 to 2929.18 of the Revised Code* and does not limit or affect a forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code.

(6) If the sum total of a mandatory fine amount imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* under division (B)(1) of this section plus the amount of any fine imposed under division (B)(4) of this section does not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court may impose a fine for the offense in addition to the mandatory fine and the fine imposed under division (B)(4) of this section. The sum total of the amounts of the mandatory fine, the fine imposed under division (B)(4) of this section, and the additional fine imposed under division (B)(6) of this section shall not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*. The clerk of the court shall pay any fine that is imposed under division (B)(6) of this section to the county, township, municipal corporation, park district as created pursuant to *section 511.18 or 1545.04 of the Revised Code*, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender pursuant to division (F) of *section 2925.03 of the Revised Code*.

(7) If the sum total of the amount of a mandatory fine imposed for a first, second, or third degree felony violation of *section 2925.03 of the Revised Code* plus the amount of any fine imposed under division (B)(4) of this section exceeds the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or *section 2929.31 of the Revised Code*, the court shall not impose a fine under division (B)(6) of this section.

(C) (1) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by the department of rehabilitation and correction in operating a prison or other facility used to confine offenders pursuant to sanctions imposed under *section 2929.14, 2929.142 [2929.14.2], or 2929.16 of the Revised Code* to the treasurer of state. The treasurer of state shall deposit the reimbursements in the confinement cost reimbursement fund that is hereby created in the state treasury. The department of rehabilitation and correction shall use the amounts deposited in the fund to fund the operation of facilities used to confine offenders pursuant to *sections 2929.14, 2929.142 [2929.14.2], and 2929.16 of the Revised Code*.

(2) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a county pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code* to the county treasurer. The county treasurer shall deposit the reimbursements in the sanction cost reimbursement fund that each board of county commissioners shall create in its county treasury. The county shall use the amounts deposited in the fund to pay the costs incurred by the county pursuant to any sanction imposed under this section or *section 2929.16 or 2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code*.

(3) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a municipal

corporation pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code* to the treasurer of the municipal corporation. The treasurer shall deposit the reimbursements in a special fund that shall be established in the treasury of each municipal corporation. The municipal corporation shall use the amounts deposited in the fund to pay the costs incurred by the municipal corporation pursuant to any sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* or in operating a facility used to confine offenders pursuant to a sanction imposed under *section 2929.16 of the Revised Code*.

(4) Except as provided in *section 2951.021 [2951.02.1] of the Revised Code*, the offender shall pay reimbursements imposed pursuant to division (A)(5)(a) of this section for the costs incurred by a private provider pursuant to a sanction imposed under this section or *section 2929.16* or *2929.17 of the Revised Code* to the provider.

(D) Except as otherwise provided in this division, a financial sanction imposed pursuant to division (A) or (B) of this section is a judgment in favor of the state or a political subdivision in which the court that imposed the financial sanction is located, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(5)(a)(ii) of this section upon an offender who is incarcerated in a state facility or a municipal jail is a judgment in favor of the state or the municipal corporation, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed upon an offender pursuant to this section for costs incurred by a private provider of sanctions is a judgment in favor of the private provider, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of restitution imposed pursuant to this section is an order in favor of the victim of the offender's criminal act that can be collected through execution as described in division (D)(1) of this section or through an order as described in division (D)(2) of this section, and the offender shall be considered for purposes of the collection as the judgment debtor. Imposition of a financial sanction and execution on the judgment does not preclude any other power of the court to impose or enforce sanctions on the offender. Once the financial sanction is imposed as a judgment or order under this division, the victim, private provider, state, or political subdivision may bring an action to do any of the following:

(1) Obtain execution of the judgment or order through any available procedure, including:

- (a) An execution against the property of the judgment debtor under Chapter 2329. of the Revised Code;
- (b) An execution against the person of the judgment debtor under Chapter 2331. of the Revised Code;
- (c) A proceeding in aid of execution under Chapter 2333. of the Revised Code, including:
 - (i) A proceeding for the examination of the judgment debtor under *sections 2333.09 to 2333.12 and sections 2333.15 to 2333.27 of the Revised Code*;
 - (ii) A proceeding for attachment of the person of the judgment debtor under *section 2333.28 of the Revised Code*;
 - (iii) A creditor's suit under *section 2333.01 of the Revised Code*.
- (d) The attachment of the property of the judgment debtor under Chapter 2715. of the Revised Code;
- (e) The garnishment of the property of the judgment debtor under Chapter 2716. of the Revised Code.

(2) Obtain an order for the assignment of wages of the judgment debtor under *section 1321.33 of the Revised Code*.

(E) A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.

(F) Each court imposing a financial sanction upon an offender under this section or under *section 2929.32 of the Revised Code* may designate the clerk of the court or another person to collect the financial sanction. The clerk or other person authorized by law or the court to collect the financial sanction may enter into contracts with one or more public agencies or private vendors for the collection of amounts due under the financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*. Before entering into a contract for the collection of amounts due from an offender pursuant to any financial sanction imposed pursuant to this section or *section 2929.32 of the Revised Code*, a court shall comply with *sections 307.86 to 307.92 of the Revised Code*.

(G) If a court that imposes a financial sanction under division (A) or (B) of this section finds that an offender satisfactorily has completed all other sanctions imposed upon the offender and that all restitution that has been ordered has been paid as ordered, the court may suspend any financial sanctions imposed pursuant to this section or *section 2929.32 of the Revised Code* that have not been paid.

(H) No financial sanction imposed under this section or *section 2929.32 of the Revised Code* shall preclude a victim from bringing a civil action against the offender.

EXHIBIT 6

LEXSTAT OHIO REV CODE 2743.72

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2008 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 15, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2743. COURT OF CLAIMS
REPARATION AWARDS TO VICTIMS OF CRIMES

Go to the Ohio Code Archive Directory

ORC Ann. 2743.72 (2008)

§ 2743.72. Reimbursement, repayment, subrogation rights of reparations fund

(A) The payment of an award of reparations from the reparations fund established by *section 2743.191 [2743.19.1] of the Revised Code* creates a right of reimbursement, repayment, and subrogation in favor of the reparations fund from an individual who is convicted of the offense that is the basis of the award of reparations. For purposes of establishing an individual's liability under this provision, a certified judgment of the individual's conviction together with the related indictment is admissible as evidence to prove the individual's liability.

(B) The payment of an award of reparations from the reparations fund creates a right of reimbursement, repayment, and subrogation in favor of the reparations fund from a third party who, because of an express or implied contractual or other legal relationship, had an obligation to pay any expenses for which an award of reparations was made.

(C) If an award of reparations is made to a claimant under *sections 2743.51 to 2743.72 of the Revised Code* and if it is discovered that the claimant actually was not eligible for the award or that the award otherwise should not have been made under the standards and criteria set forth in *sections 2743.51 to 2743.72 of the Revised Code*, the fund is entitled to recover the award from the claimant.

(D) If an award of reparations is made to a claimant under *sections 2743.51 to 2743.72 of the Revised Code* and if the claimant receives compensation from any other person or entity, including a collateral source, for an expense that is included within the award, the fund is entitled to recover from the claimant the part of the award that represents the expense for which the claimant received the compensation from the other person or entity.

(E) The reparations fund is an eligible recipient for payment of restitution.

(F) The subrogation right of the reparations fund includes the amount of an award of reparations actually paid to a claimant or to another person on the claimant's behalf and a right of prepayment for the anticipated future payment of an award of reparations to be paid by reason of criminally injurious conduct.

(G) The subrogation right of the reparations fund is enforceable through the filing of an action in the Franklin county court of common pleas within six years of the date of the last payment of any part of an award of reparations from the fund. The time of an offender's imprisonment shall not be computed as any part of this period of limitation. This subrogation right may be established and enforced in the Franklin county court of common pleas as against the heirs and assigns of a subrogation debtor.

(H) As a prerequisite to bringing an action to recover an award related to criminally injurious conduct upon which compensation is claimed or awarded, the claimant must give the attorney general prior written notice of the proposed

action. If an action is initiated prior to a claimant filing a reparations claim or supplemental reparations claim, the claimant must give the attorney general written notice of the existence of the action. After receiving either notice, the attorney general promptly shall do one of the following:

- (1) Join in the action as a party plaintiff to recover any reparations awarded;
- (2) Require the claimant to bring the action in the claimant's individual name as trustee on behalf of the state to recover any reparations awarded;
- (3) Reserve the rights described in division (H)(1) or (2) of this section.

If, as requested by the attorney general, the claimant brings the action as trustee and the claimant recovers compensation awarded by the reparations fund, the claimant may deduct from the compensation recovered on behalf of the state the reasonable expenses including attorney's fees allocable by the court for that recovery.

(I) A claimant shall not settle or resolve any action arising out of criminally injurious conduct without written authorization from the attorney general to do so. Any attempt by a third party or an offender, or an agent, an insurer, or attorneys of third parties or offenders, to settle an action is void and shall result in no release from liability to the reparations fund.

(J) If there is more than one offender in connection with an instance of criminally injurious conduct, each offender is jointly and severally liable to pay to the reparations fund the full amount of the reparations award.

(K) The right of the reparations fund to repayment, reimbursement, and subrogation under *sections 2743.711 [2743.71.1] and 2743.72 of the Revised Code* is automatic, regardless of whether the reparations fund is joined as a party in an action by a claimant against an offender or third party in connection with criminally injurious conduct.

(L) The reparations fund, through the attorney general, may assert its repayment, reimbursement, or subrogation rights through correspondence with the claimant, offender, or third party, or their legal representatives. The assertion is not to be considered the assertion of a consumer debt.

(M) The reparations fund, through the attorney general, may institute and pursue legal proceedings against an offender, third party, or overpaid claimant. In actions against an offender or third party, the claimant and victim are not necessary parties to the action.

(N) The costs and attorney's fees of the attorney general in enforcing the reparations fund's reimbursement, repayment, or subrogation rights are fully recoverable from the liable offender, third party, or overpaid claimant.

(O) All moneys that are collected by the state pursuant to its rights of subrogation as provided in this section or pursuant to the attorney general's authority to recover some or all of an award of reparations that is granted pursuant to this section shall be deposited in the reparations fund.

EXHIBIT 7

LEXSTAT OH CONST ART. 1, SEC 10A

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2008 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 15, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Go to the Ohio Code Archive Directory

Oh. Const. Art. I, § 10a (2008)

§ 10a. Rights of victims of crime

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(Adopted November 8, 1994)