

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

DANNY WAYNE ROBERTS,

Defendant-Appellant.

Case No. 2007-1475

On Appeal from the Hamilton  
County Court of Appeals  
First Appellate District

C.A. Case No. C-060675

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**MERIT BRIEF  
OF DEFENDANT-APPELLANT DANNY WAYNE ROBERTS**

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Hamilton County Prosecutor  
Counsel of Record

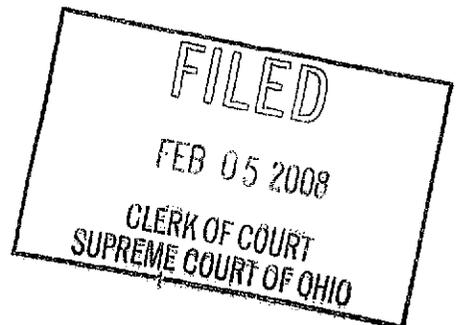
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### PROPOSITION OF LAW

**Where the Appellant served the prison sentence specified by the Court of Appeals, and the Ohio Department of Corrections released him, to re-arrest and re-sentence Appellant to additional prison time violates due process and the double jeopardy provisions of the U. S. Constitution and the Ohio Constitution.**

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## STATEMENT OF THE CASE AND OF THE FACTS

In 2004, after a jury trial, Appellant was acquitted on a rape charge, but was found guilty on five separate counts of gross sexual imposition, in violation of Sec. 2907.05(A)(1), each a felony of the third degree. On August 12, 2004, Appellant was sentenced to a total of 8 years confinement : 4years on counts 1 & 2 to run consecutive, and 4 years on counts 3, 4, & 6, concurrent to each other and concurrent with the sentence imposed on counts 1 & 2. See Judgment Entry of Trial Court, dated August 12, 2004, attached as App. B.

On appeal to the First District Court of Appeals, the appellate court affirmed the trial court but modified the sentence to one year on each count, leaving the consecutive and concurrent features unchanged, for a total of two years. See the Appellate Court Decision and Judgment Entry dated September 16, 2005, attached as App. C.

In 2006, Appellant, having served the mandated two years, was released from confinement and placed on post release control. Three months later, Appellant was arrested and returned to the trial court. The trial court re-sentenced the Appellant to two years on each count, all to run consecutive to each other, for a total of eight years confinement. The Appellant was returned to prison to serve the balance of the new sentence. See the Trial Court Judgment dated July 13, 2006, attached as App. D. A Motion For New Trial was filed and was overruled. An Appeal was filed to the First district Court of Appeals, where the trial court decision was affirmed by decision dated June 27, 2007, copy attached as AppE. The within appeal followed.

The Supreme Court of Ohio accepted the appeal by Entry dated December 12, 2007, and ordered the transcript from the Court of Appeals, and the parties to brief the case.

## PROPOSITION OF LAW

**Where the Appellant served the prison sentence specified by the Court of Appeals, and the Ohio Department of Corrections released him, to re-arrest and re-sentence Appellant to additional prison time violates due process and the double jeopardy provisions of the U. S. Constitution and the Ohio Constitution.**

The trial court Judgment Entry dated August 12, 2004, App. B, was appealed to the First District Court of Appeals at No. C-040575 & C-050005. The Appellate court affirmed the trial court judgment but modified the sentence to one year on each of the five counts, citing *State v. Montgomery, 159 Ohio App.3d .752, 2005-Ohio-1018, 825 N.E. 2d. 250*. The Appellate Court specified the exact sentence for Appellant as a total of two years: one year on counts 1 & 2, consecutive, and one year on counts 3, 4, & 6, concurrent with each other and concurrent to counts 1 & 2.

The Appellant served the two year sentence and was released from prison and placed on post release control on March 24, 2006. The Appellant was re-arrested in June, 2006, and was returned to the trial court. The trial court re-sentenced Appellant to a total of 8 years and Appellant was returned to prison. This was the third time Appellant was sentenced. Appellant, with counsel, objected at the sentencing stating that the Appellate Court set the sentence of two years which was controlling, and the trial court thus had no authority. See Tp. Pgs.2-4, and the Sentencing Memorandum of Defendant, filed in the trial court July 13, 2006.

A Motion for new Trial was filed again raising and emphasizing the Appellate Court decision. The Motion was overruled.

The State relies upon *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856, and the stay that was issued in that case. Thus, since Appellant's case was pending, the State could re-arrest Defendant and return him to the trial court and re-sentence him. However, Appellant's case is unique because the State of Ohio and the Department of Corrections ignored the stay and released the Appellant because he had served the prison sentence set by the Court of Appeals.

The Appellant appealed the new sentence ordered by the trial court to the First District Court of Appeals, because the new sentence was a violation of double jeopardy. The Appellate Court noted that although the Appellant was erroneously released from prison, it was of no constitutional significance. See Appellate Court decision(C060675, 2007) attached, App. E.

The double jeopardy clause of the Fifth Amendment to the U. S. Constitution and Section 10, Art. I of the Ohio Constitution precludes multiple prosecutions and the imposition of multiple punishments in separate and successive proceedings. *State v. Gustafson* (1996), 76 Ohio St.3d.425, 668 N.E.2d.435, 1996-Ohio-425; *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d.656(1969). "The constitutional guaranty against multiple punishments provided by the double jeopardy clause.....requires that punishment already exacted must be fully credited in imposing sentence upon a new conviction for the same offense.... the theory of double jeopardy being that a person need run the gauntlet only once". *North Carolina v. Pearce, supra*.

"Once a tribunal has decided an issue of ultimate fact in the defendant's favor, the double jeopardy doctrine precludes a second jury from ever considering that same identical issue in a later trial." *Sate v. Lovejoy*, 79 Ohio St. 3d. 440, 443, 1997-Ohio- 371, 683 NE 2d. 1112(1997).

(No. C-040575 & C-050005), and set a modified sentence of two years. Jeopardy attached. If there was any doubt about the jeopardy attaching, it clearly attached when the state again acted by granting him liberty and freedom, releasing the Defendant-Appellant from prison in 2006 because he had served the court ordered two years. The State acted again by placing the Defendant-Appellant on parole. The State's actions firmly established jeopardy. The Defendant-Appellant was in complete compliance with parole. Tp.3. The State arrested the Defendant-Appellant and returned him to the trial court. He is approaching four years of incarceration on what was ordered as a two year sentence.

The trial court cited *Foster, supra, and* resented Appellant to eight years and remanded him to the Department of Corrections to complete the sentence. Tp.2. This was the third sentence for the same offense. Imposing separate and successive punishments for the same offense violates due process and the double jeopardy clause. Defendant-Appellant had completely served the sentence ordered by the Court of Appeals and he was released. The state had acted and the punishment was over and finished. It was not right and it was not due process and it violated double jeopardy for the government to impose a new and third sentence.

"Once a defendant's journalized sentence has expired, however, resentencing is not an option". The trial court lacks authority to resentence where the defendant has served his sentence. *State v. Bristow*(6<sup>th</sup> Dist),2007 Ohio 1864, 2007 Ohio App. Lexis 1692. " The goal of truth in sentencing statutes is that when the prosecutor, the defendant, and the victims leave the courtroom following a sentencing hearing, they know precisely the nature and duration of the restrictions that have been imposed by the trial court on the defendant's personal liberty." Id.

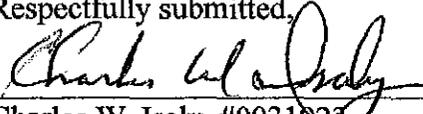
Once the defendant has served the prison term ordered by the court, he cannot be subject to resentencing. *State v. Bezak* 114 Ohio St. 3<sup>rd</sup> 94, 2007 Ohio 3250. *State v. White*(1<sup>st</sup> Dist)2007 Ohio 6335, 2007 Ohio App.Lexis 5564.

Where the Defendant has served his sentence there is an expectancy of finality. *U.S. v. Daddino* (C.A.7, 1993), 5 Fed. 3d.262. There is a due process right to finality. *Breest v. Helgemore* (C.A.1, 1978), 579 F2d. 95, 101. The trial court should be estopped from changing the sentence. See *State v. Duncan*(1<sup>st</sup> Dist.) 154 Ohio App.3d 254, 266, 2003-OHIO-4695; 796 N.E. 2d 1006.

### CONCLUSION

For the reasons above discussed, the Court of Appeals decision was wrong in finding that there was no constitutional significance in what occurred. There is a substantial constitutional issue. Double jeopardy and due process have been violated. The Defendant-Appellant requests that this Court affirm the government's actions in sentencing him to two years and releasing him, and give the Defendant-Appellant full credit for the completed sentence, releasing him from prison and restoring him to post release control, in order to correct this manifest injustice.

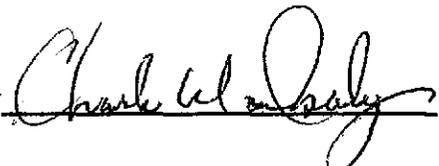
Respectfully submitted,

  
Charles W. Isaly, #0031923

Attorney for Appellant  
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### CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary mail to counsel for Appellee, Joseph T. Deters, Hamilton County Prosecutor, 230 E. Ninth St., Cincinnati, OH 45202, this        day of February, 2008.

Charles W. Isaly 

**APPENDIX A**

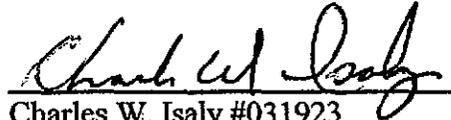


**NOTICE OF APPEAL OF APPELLANT DANNY WAYNE ROBERTS**

Appellant Danny Wayne Roberts hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C060675 on June 27, 2007.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,



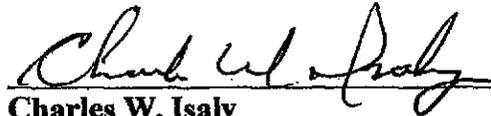
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COUNSEL FOR DEFENDANT-  
APPELLANT

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing NOTICE OF APPEAL was forwarded by regular U.S. Mail to Joseph T. Deters, Hamilton County Prosecuting Attorney, 230 E. Ninth St., 4<sup>th</sup> Floor, Cincinnati, OH 45202, this 1<sup>st</sup> day of August, 2007.



Charles W. Isaly  
Attorney for  
APPELLANT

**APPENDIX B**

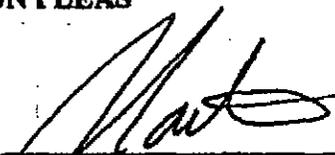
THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/12/2004

code: GJEI

judge: 207

Entered	8-12-04
Date:	
Image:	444

  
Judge: STEVEN E MARTIN

NO: B 0401654

STATE OF OHIO  
VS.  
DANNY WAYNE ROBERTS

JUDGMENT ENTRY: SENTENCE:  
INCARCERATION

Defendant was present in open Court with Counsel EDWARD O KELLER on the 12th day of August 2004 for sentence.

The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:

count 1: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3  
count 2: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3  
count 3: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3  
count 4: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3  
count 6: GROSS SEXUAL IMPOSITION, 2907-05A1/ORCN,F3  
count 5: RAPE, 2907-02A1B/ORCN, JUDGMENT ENTRY OF ACQUITTAL

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

count 1: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS  
count 2: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS  
count 3: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS  
count 4: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS  
count 6: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS

**THE SENTENCE IN COUNTS #1 AND #2 ARE TO BE SERVED  
CONSECUTIVELY TO EACH OTHER.**

**THE SENTENCE IN COUNTS #3, #4 AND #6 ARE TO BE SERVED  
CONCURRENTLY WITH EACH OTHER AND CONCURRENTLY WITH THE  
SENTENCE IMPOSED IN COUNTS #1 AND #2.**

**TOTAL SENTENCE IS EIGHT (8) YEARS IN THE DEPARTMENT OF  
CORRECTIONS.**



THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 08/12/2004

code: GJEI

judge: 207

Entered: 8-12-04
Date: 8-12-04
Image: 445

  
Judge: STEVEN E MARTIN

NO: B 0401654

STATE OF OHIO  
VS.  
DANNY WAYNE ROBERTS

JUDGMENT ENTRY: SENTENCE:  
INCARCERATION

THE DEFENDANT IS GIVEN CREDIT OF ONE HUNDRED FORTY TWO (142) DAYS TIME SERVED.

THE DEFENDANT WAS FOUND TO BE A SEXUALLY ORIENTED OFFENDER.

AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT IS SUBJECT TO THE POST RELEASE CONTROL SUPERVISION OF R.C. 2967.28.



**APPENDIX C**



**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-040575
		C-050005
Plaintiff-Appellee,	:	TRIAL NO. B-0401654 ✓
vs.	:	<i>JUDGMENT ENTRY</i>
DANNY WAYNE ROBERTS,	:	
Defendant-Appellant	:	

This cause having been heard upon the appeal, the record and the briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the trial court is affirmed as modified for the reasons set forth in the Opinion filed herein and made a part hereof.

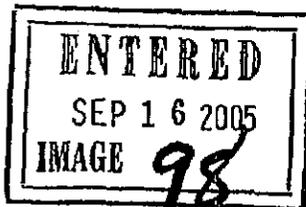
Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and Orders that costs are taxed in compliance with App. R. 24.

The Court further Orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution pursuant to App. R. 27.

**To The Clerk:**

**Enter upon the Journal of the Court on September 16, 2005 per Order of the Court.**

By:   
Acting Presiding Judge



*Pickaway - A 477719*

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO

STATE OF OHIO, : APPEAL NOS. C-040575  
 : C-050005  
 Plaintiff-Appellee, : TRIAL NO. B-0401654  
 vs. : *OPINION*  
 : PRESENTED TO THE CLERK  
 DANNY WAYNE ROBERTS, : OF COURTS FOR FILING  
 Defendant-Appellant : SEP 16 2005

COURT OF APPEALS

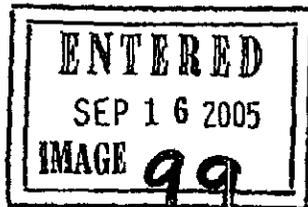
Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed as Modified

Date of Judgment Entry on Appeal: September 16, 2005

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,  
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*William R. Gallagher*, for Defendant-Appellant.



GORMAN, Presiding Judge.

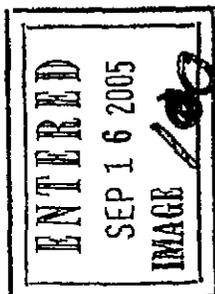
{¶1} The defendant-appellant, Danny Wayne Roberts, appeals from the order of the trial court overruling his motion for a new trial after a jury had found him guilty of five counts of gross sexual imposition involving the minor daughter of a former girlfriend. In his six assignments of error, Roberts asserts that (1) he was denied due process and subjected to double jeopardy because the indictment failed to adequately differentiate the counts against him; (2) the trial court erred by sentencing him to greater than the minimum sentence on each count; (3) the trial court's sentencing findings were contrary to law; (4) the trial court erred in denying his motion for a new trial based on newly discovered evidence; (5) he was denied effective assistance of counsel; and (6) his convictions were contrary to the manifest weight of the evidence.

{¶2} For the following reasons, we hold that the first as well as the third through sixth assignments of error lack merit. However, the second assignment is well taken, and therefore we reverse the trial court's imposition of greater than the minimum sentence on each count.

#### SUFFICIENCY OF THE INDICTMENT

{¶3} In his first assignment of error, Roberts argues that the indictment was defective because it failed to adequately differentiate the separate counts of gross sexual imposition and therefore failed to give him sufficient notice of the charges and thus protect him against double jeopardy. We disagree.

{¶4} Pursuant to Crim.R. 12(B)(2), any objection to an indictment must be raised before trial in order to be preserved. As the state correctly points out, Roberts



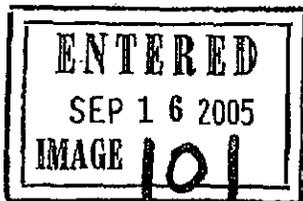
OHIO FIRST DISTRICT COURT OF APPEALS

failed to challenge the indictment at any point either before, during, or after the trial. In *State v. Frazier* (1995), 73 Ohio St.3d 323, 332, 652 N.E.2d 1000, the Ohio Supreme Court held that a failure to comply with Crim.R. 12(B)(2) constitutes a waiver of all but plain error.

{¶5} In order to be plain error, the error must have clearly determined the outcome of the trial. Crim.R. 52(B). An appellate court should be cautious in recognizing plain error, reserving the doctrine for only exceptional circumstances to avoid a manifest miscarriage of justice. See *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804.

{¶6} Here, the indictment informed Roberts in counts one through four and six that he was being charged with having sexual contact with "A.T.," the initials of his former girlfriend's daughter. The fifth count charged him with engaging in sexual conduct with A.T., "to wit, vaginal intercourse." The first through fifth counts identified the date of each offense as sometime between January 1, 1998, and January 1, 1999. The sixth count, which included the charge that Roberts had engaged in sexual contact with A.T. by force or threat of force, identified the date of the offense as May 25, 2002.

{¶7} The state's bill of particulars provided greater specificity. The state identified the particular sexual contact in the first four counts as Roberts having had A.T. sit on his lap while straddling him. The bill of particulars continued, "On one occasion [Roberts] took A.T.'s panties off and rubbed her vagina while placing his hand down his pants. On three occasions [Roberts] fondled A.T.'s genital region over her panties." The bill of particulars then identified the rape as having occurred when Roberts got into the shower with A.T., pinning her against the wall and inserting his penis into her vagina.



Finally, the state specified that the incident that occurred on May 25, 2002, as charged in the sixth count, involved Roberts rubbing his genital region over A.T.'s panties by the use or threat of force. The first five counts were described as having occurred at A.T.'s residence on Lowell Avenue in Cincinnati, when A.T. was less than thirteen years old, while the sixth count was described as having occurred at Camvic Terrace in the Cincinnati neighborhood of Cheviot.

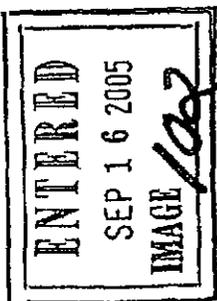
{¶8} Roberts concedes that the indictment contained all the elements of the charged offenses. However, he contends that even with the specificity added by the bill of particulars, he was not adequately apprised of "what occurrences formed the basis of the charges." Rather, he claims that he was convicted "of a generic pattern of abuse rather than four separate incidents," in other words, of committing "the same basic offense over and over again."

{¶9} We disagree and hold that the indictment in combination with the bill of particulars was sufficient to apprise Roberts of each of the separate charges against him. See *Russell v. United States* (1962), 369 U.S. 749, 763-764, 82 S.Ct. 1038. We cannot say that the indictment and the bill of particulars gave rise to any error, let alone plain error.

{¶10} Accordingly, Roberts's first assignment of error is overruled.

#### MORE THAN THE MINIMUM

{¶11} In his second assignment of error, Roberts challenges the trial court's imposition of more than the minimum sentence on each of the gross-sexual-imposition counts. Because Roberts, as both parties agree, had not previously served a prison term, R.C. 29229.14(B) required that the court impose the shortest term on each count unless it



OHIO FIRST DISTRICT COURT OF APPEALS

found that the shortest term “would demean the seriousness of the offense or w[ould] not adequately protect the public from future crime.” As we stated in *State v. Montgomery*, 159 Ohio App.3d 752, 2005-Ohio-1018, 825 N.E.2d 250, “a plain reading of the statute indicates that R.C. 2929.14(B) entitles an offender who has not previously served a prison term to a presumption that the imposition of the minimum term is sufficient. Thus, before imposing a term greater than the minimum, the sentencing court must make an additional finding under R.C. 2929.14(B).” *Id.* at ¶8.

{¶12} We also held in *Montgomery* that the United States Supreme Court’s recent decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 446, 120 S.Ct. 2348, *Blakely v. Washington* (2004), 542 U.S. \_\_\_, 124 S.Ct. 2531, and *United States v. Booker* (2005), \_\_\_ U.S. \_\_\_, 125 S.Ct. 738, render the findings under R.C. 2929.14(B) unconstitutional when they are made by the court based upon facts that have been neither found by the jury nor admitted by the defendant. See *Montgomery*, supra, at ¶12. The only exception is when the findings are expressly based upon the defendant’s history of prior convictions, see *State v. Lowery*, 160 Ohio App.3d 138, 2005-Ohio-1181, 826 N.E.2d 340, and/or juvenile adjudications. See *State v. Deters* (Aug. 5, 2005), 1st Dist. No. C-010645.

{¶13} Here, the trial court found that more than the minimum sentences were justified based upon both of the factors set forth in R.C. 2929.14(B): that minimum sentences would have both (1) demeaned the seriousness of the crimes, and (2) failed to adequately protect the public from future crime. Neither finding was based upon a history of prior convictions or juvenile adjudications since, as the parties agree, Roberts had no



criminal record. Both findings, therefore, were unconstitutional under our holding in *Montgomery*.

{¶14} Although the state challenges *Montgomery* and our interpretation of *Apprendi*, *Blakely*, and *Booker*, we decline its invitation to revisit our previous analysis, and we adhere to our own precedent. Accordingly, we hold that the trial court's findings necessary to impose more than the minimum sentences must be stricken, and that Roberts was therefore entitled to the minimum prison term on each count. The five counts of gross sexual imposition were all felonies of the third degree, carrying minimum sentences of one year. Thus, we modify Roberts's sentence on each count to the one-year minimum as opposed to the four-year terms imposed by the trial court.

{¶15} The trial court ordered the sentences for the first and second counts to be served consecutively. The imposition of consecutive sentences is not affected by our decision in *Montgomery*. See *Montgomery*, supra, at ¶16. The trial court ordered the sentences for the remaining counts to be served concurrently with each other and concurrently with the sentences imposed for the first and second counts, for a total of eight year's imprisonment. As we recalculate Roberts's total sentence, he is now to serve a total of two years, and we modify his sentence accordingly.

#### OTHER SENTENCING ISSUES

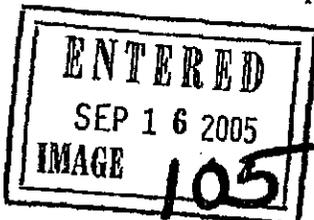
{¶16} In his third assignment of error, Roberts contends that it was error for the trial court to use "elements of the offense and the convictions themselves [to] serve as facts to increase a sentence." He claims, also, that the sentencing findings made by the trial court "do not comport with the evidence in this case." He asserts that it was improper for the state to elevate the seriousness of the offense from a misdemeanor to a



felony because of the age of the victim (gross sexual imposition becomes a third-degree felony when performed on a victim age thirteen or younger), and then for the court to cite the victim's age as one of the factors under R.C. 2929.12(B) that rendered the crimes more serious. He argues that there were, in fact, no factors to support a prison term for his crimes, and that there were also no factors to support the trial court's order that the prison terms on the first and second count be served consecutively.

{¶17} We agree with the state that there is no rule of law that would preclude the age of the victim from being both an element of the offense and a sentencing factor. Although Roberts claims that this duality amounts to "double counting," the term itself is meaningless unless somehow related to the jurisprudence of double jeopardy, and Roberts provides no analysis providing such a link. We also agree with the state that the actual age of the victim (i.e., thirteen or below) is certainly a relevant consideration for the trial court to use in assessing the severity of the crime, as arguably the younger victim, the more heinous and psychologically damaging the crime.

{¶18} Further, although Roberts challenges the imposition of consecutive sentences on the first and second counts, we hold that the record supports the trial court's finding that consecutive sentences were justified under the criteria set forth in R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(d). On its felony sentencing worksheet, the court indicated that consecutive sentences were necessary "to protect the public and/or punish the offender" and that consecutive sentences were "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." The court then separately specified that it considered that Roberts's criminal history showed "a need to protect the public" and explained that his crimes demonstrated "a

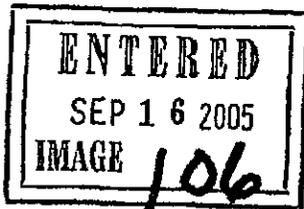


pattern of sexual abuse that lasted for years.” Given that the offenses occurred between 1998 and 1999, and then reoccurred in 2002, we cannot clearly and convincingly say that such findings were in error.

**MOTION FOR A NEW TRIAL**

{¶19} In his fourth assignment of error, Roberts contends that the trial court erred in overruling his motion for a new trial. Specifically, he argues that documentation that he presented with the motion—two letters, one written from the victim to a friend, and the other from the victim’s grandmother, characterizing her granddaughter as manipulative and untruthful—met the definition of newly discovered evidence under Crim.R. 33. We disagree.

{¶20} Initially, we note that the trial court’s decision to grant or deny a new trial based upon newly discovered evidence must be affirmed absent an abuse of discretion. See *State v. Larkin* (1996), 111 Ohio App.3d 516, 523, 676 N.E.2d 906. But a trial court has no discretion to grant a new trial unless the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted; (2) has been discovered since trial; (3) could not in the exercise of due diligence have been discovered before trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence. *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus. As we held in *Larkin*, the question whether the new evidence meets the six criteria of *Petro*, or whether it is merely cumulative or serves only to impeach or contradict former evidence, is reviewable as a question of law. *Larkin*, supra, at 523, 676 N.E.2d 906.



{¶21} As for the letter from the victim's grandmother, we agree with the state that this evidence failed to satisfy the requirements of *Petro*, as it served only to impeach the former evidence. In many respects, the letter was similar to the evidence in *Larkin*, which consisted of persons questioning the veracity of the prosecuting witness but having no personal knowledge of the facts.

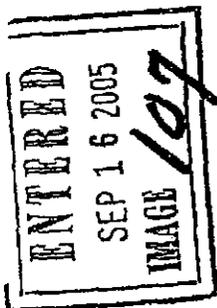
{¶22} As for the letter of the victim to a friend, we agree with the state that this letter did not meet another requirement of *Petro*: that it possess a strong probability of altering the outcome in a new trial. The letter was not an admission of falsehood. According to Roberts, in the letter the victim revealed herself as having a different personality than the one the prosecution attempted to portray at trial. But this letter, written to a friend, was subject to various interpretations, and we do not consider it to be the type of revelation that would have probably brought the jury to a different conclusion.

{¶23} We hold that the evidence proffered by Roberts in his motion did not satisfy the requirements of *Petro* and would not have entitled him to a new trial. The trial court did not, therefore, abuse its discretion in denying the motion.

#### INEFFECTIVE ASSISTANCE OF COUNSEL

{¶24} In his fifth assignment of error, Roberts argues that his trial attorney was unconstitutionally ineffective because of his failure to make use of the letter that the victim wrote to a friend, which, in Roberts's view, revealed a darker side to her character, one that was capable of being manipulative and deceitful, and was a far cry from the fragile creature that the state attempted to portray to the jury. Again, we disagree.

{¶25} In order to demonstrate reversible error on a claim of ineffective assistance of counsel, Roberts must show not only that his attorney's performance fell



below a reasonable standard, but also that his attorney's deficits were prejudicial to him, meaning that there is a reasonable probability that the jury would have otherwise acquitted him. See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; and *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶26} Initially, we note that although Roberts claims that the letter in question was in the possession of his trial counsel, he does not cite to a place in the record where this was established. And even if we assume that trial counsel had the letter in his possession, or at least was aware of it, we cannot say that either of the two prongs of *Strickland* and *Bradley* has been met. First, we cannot say that counsel's decision to forego use of the letter to establish that the victim had a darker side was other than a valid strategy in light of the questionable success of such a gambit, and therefore we cannot even say that counsel's performance was deficient. Second, it would be pure speculation whether such a gambit would have had any appreciable effect on the jury. And we cannot say that the decision to forego its use was prejudicial. As the state points out, using the letter in an attempt to portray the victim as concealing another personality could have easily backfired, engendering greater sympathy for her.

WEIGHT OF THE EVIDENCE

{¶27} In his sixth and final assignment of error, Roberts challenges his convictions on the manifest weight of the evidence. He argues specifically that the victim's testimony was not worthy of belief because of the lack of any physical evidence to support it. Citing also the lack of any other witnesses to his alleged crimes, Roberts argues that the state's case was simply too weak to sustain his convictions, particularly in light of the behavior of the victim, who failed to disclose the abuse when it supposedly

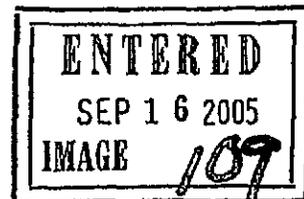
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IMAGE 108

first occurred, and whose statements to her mother, when she first confronted her daughter about it, suggested that no such abuse had happened.

{¶28} When an appellate court reviews the record on a weight-of-the-evidence challenge, the court sits as a “thirteenth juror” and may disagree with the factfinder’s resolution of disputed facts. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. If, after reviewing the record and weighing the evidence and testimony, the reviewing court determines that the jury clearly lost its way and created a manifest miscarriage of justice, then a conviction should be reversed and a new trial ordered. But the power to do so is discretionary and should be exercised only “in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *State v. Martin* (1989), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶29} Having reviewed the record as a thirteenth juror, we cannot say that this is the exceptional case in which the weight of the evidence falls heavily on the side of an acquittal. Granted, the case devolved into a credibility determination between the testimony of Roberts and that of the alleged victim, but it is well settled that the jury is in the better position to assess the credibility of witnesses, having the opportunity to observe their demeanor. From our vantage point, examining a transcription of that testimony, we cannot say that the victim’s version of events was not worthy of belief, or that Roberts’s denial of the charges was so persuasive that it deserved credit from the jury. The absence of physical evidence was not dispositive. *State v. Parmore* (Sept. 19, 1997), 1st Dist. No. C-960799.

{¶30} In sum, we hold that the jury’s verdicts were not contrary to the manifest weight of the evidence.



CONCLUSION

{¶31} Robert's first and third through sixth assignments of error are overruled. His second assignment of error is sustained, but only insofar as he is entitled to a modification of his sentences from four years on each count to one year on each count, with the sentences on the first and second counts to be served consecutively. His total prison term is thus modified from eight to two years. In all other respects, the judgment of the trial court is affirmed.

Judgment affirmed as modified.

SUNDERMANN and HENDON, JJ., concur.

*Please Note:*

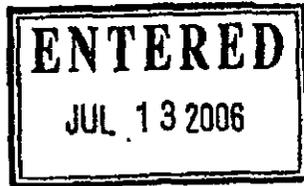
The court has placed of record its own entry in this case on the date of the release of this Opinion.

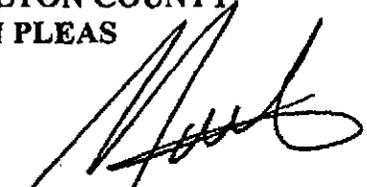


**APPENDIX D**

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 07/13/2006  
code: GJEI  
judge: 207



  
Judge: STEVEN E MARTIN

NO: B 0401654

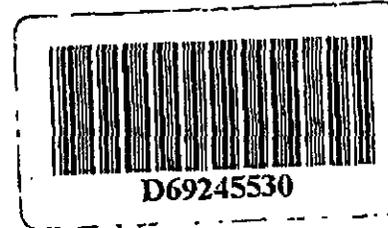
STATE OF OHIO  
VS.  
DANNY WAYNE ROBERTS

JUDGMENT ENTRY: SENTENCE:  
INCARCERATION  
\*\*\*RE-SENTENCE\*\*\*

Defendant was present in open Court with Counsel CHARLES W ISALY on the 13th day of July 2006 for sentence.

The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:

- count 1: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3
- count 2: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3
- count 3: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3
- count 4: GROSS SEXUAL IMPOSITION, 2907-05A4/ORCN,F3
- count 5: RAPE, 2907-02A1B/ORCN, JUDGMENT OF ACQUITTAL
- count 6: GROSS SEXUAL IMPOSITION, 2907-05A1/ORCN,F3



The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

- count 1: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS
- count 2: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS
- count 3: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS
- count 4: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS
- count 5: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS
- count 6: CONFINEMENT: 4 Yrs DEPARTMENT OF CORRECTIONS

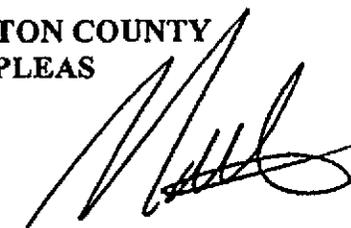
**THE SENTENCES IN COUNTS #1 AND #2 ARE TO BE SERVED CONSECUTIVELY TO EACH OTHER BUT CONCURRENTLY WITH THE SENTENCES IMPOSED IN COUNTS #3, #4, #5, AND #6.**

**THE SENTENCES IN COUNTS #3, #4, #5, AND #6 ARE TO BE SERVED CONCURRENTLY WITH EACH OTHER.**

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 07/13/2006  
code: GJEI  
judge: 207



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Judge: STEVEN E MARTIN

NO: B 0401654

STATE OF OHIO  
VS.  
DANNY WAYNE ROBERTS

JUDGMENT ENTRY; SENTENCE:  
INCARCERATION  
\*\*\*RE-SENTENCE\*\*\*

**DEFENDANT TO RECEIVE CREDIT FOR SEVEN HUNDRED TWENTY-NINE (729) DAYS TIME SERVED.**

**FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.**

**AS PART OF THE SENTENCE IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE ( 5 ) YEARS.**

**IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE ( 9 ) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT ( 50% ) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE ( 12 ) .**

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY  
COURT OF COMMON PLEAS

date: 07/13/2006  
code: GJEI  
judge: 207

  
Judge: STEVEN E MARTIN

NO: B 0401654

STATE OF OHIO  
VS.  
DANNY WAYNE ROBERTS

JUDGMENT ENTRY: SENTENCE:  
INCARCERATION  
\*\*\*RE-SENTENCE\*\*\*

MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE  
SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE  
NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

\*\*\*RE-SENTENCE\*\*\*

**APPENDIX E**



D73913092

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO



STATE OF OHIO,	:	APPEAL NO. C-060675
	:	TRIAL NO. B-0401654
Plaintiff-Appellee,	:	
	:	JUDGMENT ENTRY.
vs.	:	
	:	
DANNY WAYNE ROBERTS,	:	
	:	
Defendant-Appellant.	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant, Danny Wayne Roberts, appeals the judgment of the Hamilton County Court of Common Pleas sentencing him to a total of eight years' imprisonment for five counts of gross sexual imposition.

Roberts was found guilty of the offenses after a jury trial. He appealed, and this court reduced his sentence to a total of two years' imprisonment.<sup>2</sup>

The state then appealed, and the Supreme Court of Ohio stayed this court's judgment.<sup>3</sup> Despite the stay of our judgment, Roberts was released from prison after serving the two-year term mandated by our holding.

While the state's appeal was pending, the supreme court invalidated a large portion of the state's sentencing statutes in *State v. Foster*.<sup>4</sup> The supreme court then

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.  
<sup>2</sup> See *State v. Roberts*, 1st Dist. Nos. C-040575 and C-050005, 2005-Ohio-4848.  
<sup>3</sup> See *State v. Roberts*, 106 Ohio St.3d 1554, 2005-Ohio-5531, 836 N.E.2d 580.

remanded the instant cause for resentencing in light of *Foster*.<sup>5</sup> Roberts was taken into custody, and the trial court imposed the original eight-year sentence.

In his first assignment of error, Covington now argues that the trial court erred in resentencing him under *Foster*. We recently rejected this argument in *State v. Bruce*.<sup>6</sup> Because *Bruce* is controlling, we find no error in the application of *Foster*, and we overrule the first assignment of error.

In the second and final assignment of error, Roberts argues that the trial court violated his double-jeopardy rights by resentencing him after he had served the two-year prison term mandated by this court's holding. We disagree.

Although this case presents the unusual circumstance of Roberts having been erroneously released after the stay of this court's judgment, that circumstance was of no constitutional significance. In light of the stay granted by the supreme court, Roberts could claim no vested right to be released after serving two years. The trial court was bound by the supreme court's order under *Foster*, and we find no error in the resentencing. Accordingly, we overrule the second assignment of error.

But we do note that the trial court committed a clerical error in imposing a sentence on one count of rape for which Roberts had been acquitted. Although the error did not affect the aggregate sentence, we hereby vacate the sentence for rape and discharge Roberts from any further prosecution for that offense.

In all other respects, we overrule the assignments of error and affirm the judgment of the trial court.

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<sup>4</sup> 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

<sup>5</sup> See *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.

<sup>6</sup> 170 Ohio App.3d 92, 2007-Ohio-175, 866 N.E.2d 44.

OHIO FIRST DISTRICT COURT OF APPEALS

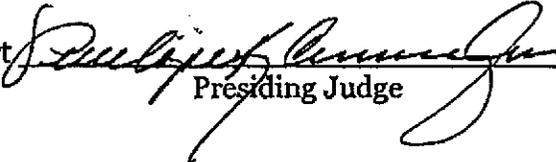
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Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**PAINTER, P.J., HILDEBRANDT and SUNDERMANN, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on June 27, 2007

per order of the Court   
Presiding Judge