

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : Case No. 2007-2373
 :
 vs. : On Appeal from the Cuyahoga
 : County Court of Appeals
 : Eighth Appellate District
 PARRIS BOSWELL, :
 : C.A. Case Nos. 88292 and 88293
 Defendant-Appellee. :

MERIT BRIEF OF APPELLEE PARRIS BOSWELL

WILLIAM D. MASON (0037540)
Cuyahoga County Prosecuting Attorney

THORIN FREEMAN (0079999)
Assistant Prosecuting Attorney
Counsel of Record

The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

COUNSEL FOR APPELLANT
STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

KELLY K. CURTIS (0079282)
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street – 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – FAX
E-mail: kelly.curtis@opd.ohio.gov

COUNSEL FOR APPELLEE
PARRIS BOSWELL

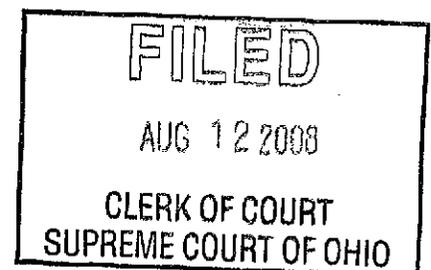


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I. STATEMENT OF THE CASE AND FACTS

On February 15, 2000, Paris Boswell was indicted for aggravated burglary and misdemeanor assault. On March 6, 2000, Mr. Boswell was separately indicted for aggravated robbery with an attendant firearm specification, felonious assault with an attendant firearm specification, and having a weapon while under a disability. In exchange for the State's promise not to seek consecutive sentences, on May 15, 2000, Mr. Boswell pleaded guilty to all five crimes as charged in the two indictments. In total, Mr. Boswell pleaded guilty to two first degree felonies, one second degree felony, and one misdemeanor.

At Mr. Boswell's plea hearing, the trial court accurately explained the prison terms associated with each of the offenses to which he was pleading guilty. (Plea Hr'g Tr. 9-11). But, at the time of the plea, the trial court did not inform Mr. Boswell that he was subject to a mandatory five-year term of postrelease control, or explain the consequences for violating postrelease control. During the plea colloquy, the trial court made only a passing reference to postrelease control when it incorrectly informed Mr. Boswell that "[a]fter you do your time, you may be subject to postrelease control." (Id. at 18, 19).

At a subsequent sentencing hearing, the trial court sentenced Mr. Boswell to a total prison term of sixteen years. (Sentencing Entry, June 14, 2000). The sentencing entry did not indicate that Mr. Boswell was subject to postrelease control. (Id.). Additionally, the trial court failed to mention postrelease control during Mr. Boswell's sentencing hearing. (Sent. Hr'g Tr. 3-19). Neither the State nor Mr. Boswell filed a timely appeal challenging this unlawful sentence.

On September 9, 2004, Mr. Boswell filed a motion for delayed appeal in the Eighth District Court of Appeals, but the court denied leave to appeal. On April 4, 2005, Mr. Boswell filed a second motion for delayed appeal, which was also denied. Finally, on June 8, 2005, Mr. Boswell filed a motion to withdraw his guilty plea with the trial court. The trial court granted

Mr. Boswell's motion on May 9, 2006. The State appealed, and on November 5, 2007, the court of appeals affirmed the judgment of the trial court. This appeal timely followed.

II. LAW AND ARGUMENT

As set forth in the jurisdictional memoranda, this case presents a single proposition of law: whether the court of appeals changed the law regarding postsentence motions to withdraw guilty pleas by eliminating the prejudice requirement. In fact, the State's memorandum in support of jurisdiction was addressed solely to the application and effect of "substantial compliance" to those cases in which the trial court misinforms a defendant about post-release control during the plea colloquy. This was the only issue that this Court accepted for review. Nonetheless, this is a case in which the attorneys and the lower courts overlooked a serious jurisdictional defect, which requires that the instant appeal be remanded to the trial court for a de novo sentencing hearing.

A. The trial court lacked jurisdiction to impose Mr. Boswell's sentence, and his sentence is, therefore, void.

Throughout this litigation, the State has consistently declared that it would not attempt to add postrelease control to Mr. Boswell's sentence. In its memorandum in support of jurisdiction the State admitted that it had "indicated to the appellate court in its brief and oral argument that the State has not, **and will not**, take any steps to add post-release control to this sentence." (Appellant's MISJ at 3). Moreover, the State went "on the record" with this Court and affirmatively represented that "the State will not take any steps to add post-release control to this sentence." (Id. at 4). As a result of the State's concession that it would not seek to add postrelease control, the parties did not brief, and the lower courts did not consider, the effect of the trial court's failure to impose a mandatory term of postrelease control.

Notwithstanding its unequivocal representations to this Court, and the court of appeals, that it would not seek to impose postrelease control, the State now asks this Court “to remand the matter to the trial court” for that very purpose. (Appellant’s Merit Brief at 13-14). Underlying the State’s remand request is its belief that Mr. Boswell’s sentence is void.¹ Mr. Boswell disagrees with the State’s spurious method in presenting this issue for the first time in its merit brief to this Court, but nonetheless agrees that his sentence is, in fact, void. (See Appellant’s Merit Brief at 13).

I. A felony sentence that lacks a mandatory term of postrelease control is void and a de novo resentencing is the only proper remedy.

Mr. Boswell pleaded guilty to multiple first degree felonies. As a result, the trial court erred when it failed to impose a mandatory five-year term of postrelease control pursuant to R.C. 2929.14(F)(1) and 2967.28. As this Court recently held, “in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void” *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus. This Court further held that the only remedy for a void sentence is to vacate and remand for a de novo sentencing hearing. *Id.* at ¶22.

In *Simpkins*, this Court merely reiterated its longstanding precedent establishing that “a sentence that does not contain a statutorily mandated term is a void sentence.” *Simpkins* at ¶14 (citing *State v. Beasley* (1984), 14 Ohio St.3d 74); see also *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250; *Jordan*, 2004-Ohio-6085. The underpinning of this rule is the “fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law.” *Simpkins*, 2008-Ohio-1197, at ¶20. In this case, Mr. Boswell’s sentence does

¹ In support of this argument the State relies upon this Court’s decision in *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, which was decided long before this case was brought in the court of appeals.

not conform to the statutory mandates requiring the imposition of postrelease control and is void. *Id.* at ¶22. Therefore, his sentence must be vacated and remanded for a de novo sentencing hearing.

2. *A hearing pursuant to R.C. 2929.191 is an insufficient remedy.*

Having conceded that Mr. Boswell's sentence is void, the State argues that this Court "must remand the matter to the trial court to hold a R.C. 2929.191 hearing." According to the State, R.C. 2929.191 provides the appropriate mechanism to impose postrelease control. But Section 2929.191 is an insufficient remedy in this case for two reasons. First, R.C. 2929.191 only permits, but does not require, a trial court to correct its failure to notify a defendant about postrelease control. Second, R.C. 2929.191 is addressed solely to the failure to notify a defendant about postrelease control and not to the failure to impose the sanction at all.

In its merit brief, the State conflates notice of postrelease control with the imposition of postrelease control. A trial court must perform both functions. While R.C. 2929.191 is an attempt to resolve the notice problem, it is wholly insufficient as a remedy to correct the failure to impose postrelease control. The plain language of R.C. 2929.191 demonstrates that it concerns only the problem of notice at the sentencing hearing and the "fail[ure] . . . to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14. . . ." But, as this Court noted in *Simpkins*, when a trial court fails to impose postrelease control as required, "the sentence is void and the state is entitled to a new sentencing hearing in order to have postrelease control imposed on the defendant unless the defendant has completed his sentence." *Simpkins* at ¶6.

Moreover, this Court has held that "the effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment." *Simpkins*,

2008-Ohio-1197, at ¶19 (internal citations omitted). A sentence that is a “mere nullity” and that puts the parties “in the same position as if there had been no judgment” cannot be “corrected” with the additional notice that R.C. 2929.191 permits. Both the State and the defendant are entitled to a sentencing hearing to establish the correct sentence.

3. *The trial court lacked subject matter jurisdiction, and as a result this Court should remand on the authority of *Simpkins* and refuse to consider the State’s unrelated Proposition of Law.*

As a general rule, sentencing errors are not jurisdictional and do not render a judgment void. See, e.g., *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642; *State ex rel. Massie v. Rogers* (1997), 77 Ohio St.3d 449. But there are exceptions to this general rule. For example, sentencing errors that are “contrary to law,” are void because they have been “imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act” *Simpkins*, 2008-Ohio1197, at ¶12-15 (internal citations omitted). Moreover, a void judgment is “a judgment that has no legal force or effect, the invalidity of which may be asserted by any party whose rights are affected at any time and any place, whether directly or collaterally.” BLACK’S LAW DICTIONARY (8th Ed. 2004) at 861.

In this case, the trial court acted without authority when it failed to impose a nondiscretionary sanction required by a sentencing statute. *Simpkins*, 2008-Ohio-1197, at ¶21 (citing *Beasley*, 14 Ohio St.3d at 75). As a result, the trial court lacked jurisdiction and the parties are in the same position as they were had there been no sentence. *Id.* at ¶22. In a successful challenge to a void sentence, “a court lacks the authority to do anything but announce its lack of jurisdiction and dismiss.” *Payne*, 2007-Ohio-4642, at ¶34 (Lanzinger, J., dissenting) (citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980).

Given the ongoing jurisdictional defect in this case, this Court should decline to consider the sole proposition of law, which does not address, or even consider, that the underlying

judgment is void. As a result, this Court should decline to consider the State's Proposition of Law, and remand this case to the trial court on the authority of *State v. Simpkins*. However, if this Court disagrees that this case should be remanded on the authority of *Simpkins*, and considers the merits of the State's Proposition of Law, the decision of the court of appeals should be affirmed.

B. Proposition of Law No. I: The Eighth District Court of Appeals did not change the law regarding postsentence motions to withdraw guilty pleas by eliminating the prejudice requirement.

In its sole proposition of law, the State asserts that the court of appeals changed the law regarding postsentence motions to withdraw guilty pleas by eliminating the prejudice requirement. But the State's merit brief contains no discussion of this Court's precedent with respect to motions to withdraw guilty pleas, and fails to explain how the court of appeals misapplied this law. Rather, the State's brief is addressed solely to the issue of "substantial compliance" with Crim.R. 11 as it relates to the trial court's failure to properly notify a defendant about postrelease control during a plea colloquy. Review of the substantive arguments set out by the State in its brief reveals that its true motive in this appeal is nothing more than error correction.

In itself, the State's single proposition of law makes little sense. The standard governing a postsentence motion to withdraw a guilty is not whether the defendant was "prejudiced," but whether withdraw is necessary to correct a manifest injustice. See Crim.R. 32.1; *State v. Xie* (1992), 62 Ohio St.3d 521, 525 ("Thus, the rule [Crim.R. 32.1] gives a standard by which postsentence withdrawals of guilty pleas may be evaluated—the "manifest injustice" standard."). It is, therefore, a paradox that the court of appeals managed to change the law by eliminating a non-existent "prejudice requirement." What the State seems to ignore is the fact that different standards govern postsentence motions to withdraw guilty pleas and challenges to the

voluntariness of a plea based upon a failure to comply with Crim.R. 11. While the former involves no prejudice analysis, the latter often requires the reviewing court to consider whether the defendant was prejudiced by the error. Because the State has focused its brief to Crim.R. 11 jurisprudence, rather than the standard for postsentence motions to withdraw guilty pleas, Mr. Boswell has done the same.

1. Mr. Boswell's plea was not knowing and voluntary.

It is well-settled that “[w]hen a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily.” *State v. Engle* (1996), 74 Ohio St.3d 252, 257; see also *Boykin v. Alabama* (1969), 395 U.S. 238. For a plea to be knowing, intelligent and voluntary, the trial court must ensure that a defendant “has a full understanding of what the plea connotes *and of its consequences.*” *Boykin*, 395 U.S. at 244 (emphasis added). In Ohio, Crim.R. 11 governs the process of entering a plea, and requires the trial court to inform the defendant “of the maximum penalty involved.” Postrelease control constitutes a portion of the “maximum penalty involved.” *State v. Cortez*, 8th Dist. App. No. 87578, 2007-Ohio-261 (citing *Woods v. Telb*, 89 Ohio St.3d 504, 2000-Ohio-171).

In several recent cases, this Court has established a “multitiered analysis” to determine the effect of a trial court’s failure to strictly comply with Crim.R. 11. *State v. Clark*, 2008-Ohio-3748, ¶30. First, the reviewing court must determine whether the trial court failed to explain constitutional or nonconstitutional rights. *Id.* at ¶31. Second, if the trial court failed to explain a nonconstitutional right, such as the right to be informed of the maximum possible penalty, the court must conduct a substantial compliance analysis. *Id.* Finally, if the trial court failed to substantially comply with Crim.R. 11 in regard to a nonconstitutional right, the reviewing court must determine whether the trial court partially complied or failed to comply. *Id.* at ¶32.

Applying this “multitiered analysis” to the facts of this case demonstrates that Mr. Boswell’s plea was not knowing and voluntary.

a. The trial court failed to explain Mr. Boswell’s nonconstitutional rights.

Within the framework of Crim.R. 11, the trial court is required to inform the defendant of the constitutional rights being waived (i.e. right to trial by jury) and certain nonconstitutional matters (i.e. the nature of the charges and the maximum penalty involved). *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, at ¶29. Notice of the maximum penalty involved is a nonconstitutional right. *Id.* at ¶45.

While the record in the instant case indicates that the trial court did inform Mr. Boswell of the constitutional rights he was waiving by pleading guilty, it is undisputed that the trial court did not inform Mr. Boswell, as Crim.R. 11(C)(2)(a) requires, that he would be subject to a mandatory term of postrelease control. As a result, his plea is subject to review under the substantial-compliance standard. The State agrees with Mr. Boswell that his plea is subject to review under the substantial-compliance standard. (Appellant’s Merit Brief at 5).

b. The trial court did not substantially comply with Crim.R. 11.

While literal compliance with Crim.R. 11 is the preferred practice, a guilty plea will not be vacated if there was substantial compliance. See *State v. Nero* (1990), 56 Ohio St.3d 106; *State v. Stewart* (1977), 43 Ohio St.2d 163. Substantial compliance means that “under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving.” *Nero*, 56 Ohio St.3d at 108. Reviewing the totality of the circumstances in this case demonstrates that Mr. Boswell did not, and could not, understand the implications of his plea because the trial court failed to provide a meaningful and accurate explanation of postrelease control during his plea colloquy.

This Court has unequivocally held that a trial court does not “substantially comply” with Crim. R. 11 if it “fails during the plea colloquy to advise a defendant that the sentence will include a mandatory term of postrelease control.” *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, at ¶25. In reaching this conclusion, this Court observed that “[w]hen Sarkozy pleaded guilty, he was not advised that he was subject to a mandatory five-year term of postrelease control . . . nor was he advised that violating postrelease control could carry further incarceration of up to 50 percent of his original prison sentence.” *Id.* at 15.

Thus, in *Sarkozy*, this Court relied on two dispositive facts to conclude that his plea was not entered knowingly and intelligently—that the defendant: (1) did not know postrelease control was mandatory under the sentencing statute; and (2) did not understand that a violation of postrelease control could lead to a significant amount of additional incarceration. The same facts control in this case. First, Mr. Boswell was not informed that postrelease control was mandatory. Instead he was inaccurately advised that he was subject to discretionary postrelease control. Second, Mr. Boswell was never informed of the length of his term of postrelease control. Finally, the trial court provided no information to Mr. Boswell regarding the consequences of violating the terms of his postrelease control. The totality of these circumstances is not sufficient to demonstrate that Mr. Boswell subjectively understood the implications of his plea.

c. The trial court completely failed to comply with Crim.R. 11.

According to this Court’s holding in *Clark*, if the trial court partially complied with Crim.R. 11, the plea may be vacated only if the defendant demonstrates prejudicial effect. *Clark*, 2008-Ohio-3748, at ¶32. However, if the trial court completely failed to comply with Crim.R. 11, the plea must be vacated without an independent analysis of prejudice. *Id.* (citing *Sarkozy*, 2008-Ohio-509, at ¶22). The record in this case evidences a complete failure by the trial court

to comply with Crim.R. 11. Therefore, the State's argument that Mr. Boswell must prove prejudice is not supported by law or the facts.

According to the State, the mere utterance of the words "postrelease control" during the plea colloquy is sufficient to trigger prejudice analysis. *Clark* was decided after the State submitted its merit brief in this case, but the crux of the State's argument is that any mention of the words "postrelease control" is sufficient to satisfy the "partial compliance" test. But *Clark* should not be read so broadly.

In *Clark*, this Court stated that a trial court could partially comply with Crim.R. 11 by "mentioning mandatory postrelease control without explaining it." *Clark*, 2008-Ohio-3748, at ¶32. Similarly, in *Sarkozy*, this Court suggested that misinforming a defendant about whether postrelease control was mandatory or discretionary may not be enough to demonstrate a failure to comply with Crim.R. 11. *Sarkozy*, 2008-Ohio-509, at ¶22. But nothing in *Clark*, or any other decision from this Court, supports the proposition that a trial court partially complies with Crim.R. 11 when it (1) mentions postrelease control without explaining it; (2) fails to inform the defendant of the length of his term of postrelease control; and (3) misinforms the defendant about whether his postrelease control was mandatory. All of these errors, taken together, constituted a complete failure of the trial court to comply with the mandates of Crim.R. 11. Therefore, Mr. Boswell's, plea must be vacated without consideration of prejudice.

C. The trial court did not abuse its discretion by granting Mr. Boswell's postsentence motion to withdraw his guilty plea.

Conspicuously absent from the State's brief is any reference to the standard of review in this case. As the court of appeals correctly observed, the decision to grant a motion to withdraw a guilty plea is reviewed only for an abuse of discretion. *State v. Boswell*, Cuyahoga App. Nos. 88292, 88293, 2007-Ohio-5718, at ¶4. This Court's review is similarly limited as a motion made

pursuant to Crim.R. 32.1 is left to the sound discretion of the trial court and it is that court which determines the credibility of a defendant's claim in support of the motion. *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67.

The State has not provided this Court with any argument explaining how the trial court abused its discretion when it granted Mr. Boswell's motion to withdraw his guilty plea. The State may disagree with the trial court's decision, but an abuse of discretion "constitutes more than just an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Far from being an abuse of discretion, the trial court's decision is supported by substantial evidence in the record demonstrating that Mr. Boswell was unaware of the maximum penalty involved at the time he entered his plea. The trial court's failure to discharge its duty to ensure that Mr. Boswell understood the consequences of his decision to plead guilty was a manifest injustice that could only be corrected through the withdrawal of his uninformed plea.

D. Mr. Boswell's claims are not barred by res judicata.

It is a well-established principle of law in Ohio that a party cannot raise an issue for the first time in this Court. See, e.g., *Sherman v. Haines* (1995), 73 Ohio St.3d 125, 126; *Zakany v. Zakany* (1984), 9 Ohio St.3d 192, 193. Similarly, this Court routinely declines to consider propositions of law that were not raised in the memorandum in support of jurisdiction. See *Al Minor & Assoc. v. Martin* (2008), 117 Ohio St.3d 58, 60; *In re Timken Mercy Medical Center* (1991), 61 Ohio St.3d 81, 87. Nonetheless, in its merit brief the State argues for the first time to this Court that Mr. Boswell's claims are barred by the doctrine of res judicata.² This issue was

² The State did assert res judicata in its merit brief to the Eighth District, but failed to separately argue it in its brief, in violation of App.R. 16(A). As a result, the court of appeals refused to consider this portion of the State's appeal. *Boswell*, 2008-Ohio-5718, at ¶13.

not raised, or even alluded to, in the State's memorandum in support of jurisdiction. As a result, this Court should limit its review to the proposition of law properly presented and accepted for review, and should decline to consider the State's argument that res judicata bars Mr. Boswell's claims.

Assuming, for the sake of argument, that the State has properly presented its res judicata argument, this Court should summarily reject the proposition that res judicata bars a defendant from raising in a Crim.R. 32.1 motion any issue that could have been raised on direct appeal. Instead, this Court should hold that a criminal defendant's right to file a direct appeal does not preclude, through res judicata, the option of pursuing a Crim.R. 32.1 motion. Such a rule is consistent with this Court's statement in *Sarkozy* that "a defendant may dispute the knowing, intelligent, and voluntary nature of the plea **either by filing a motion to withdraw the plea or upon direct appeal.**" *Sarkozy*, 2008-Ohio-509, at syllabus paragraph 1 (emphasis added).

Under Ohio Law, a criminal defendant has three options to obtain review of a guilty plea: a direct appeal, a petition for post-conviction relief under R.C. 2953.21, and a motion to withdraw a guilty plea pursuant to Crim.R. 32.1. This Court has unequivocally held that res judicata bars a defendant from pursuing in a petition for post-conviction relief any issue that could have been addressed on direct appeal. See *State v. Szefcyk* (1996), 77 Ohio St.3d 93. However, this Court has never applied the doctrine of res judicata to a Crim.R. 32.1 motion. The State makes no effort to explain why it is necessary or advisable to impose a restrictive doctrine upon Crim.R. 32.1, which is not a part of the language of the rule or the case law interpreting it.

The State makes two primary arguments in support of its contention that Mr. Boswell's claims are barred by res judicata. First, the State argues that by failing to raise "postrelease control misadvisement" on direct appeal, Mr. Boswell "forfeited his right to collaterally attack the plea colloquy" by way of a Crim.R. 32.1 motion to withdraw. Second, the State notes that

res judicata applies to “any proceeding” initiated after a final judgment of conviction and direct appeal. See *Szefcyk*, 77 Ohio St.3d 93, 95. Thus, the State reasons that because a Crim.R. 32.1 motion would be included within the definition of “any proceeding,” that res judicata would bar any part of that motion that could have been raised on direct appeal. Both of the State’s arguments conflict with this Court’s holding in *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993.

In *Bush*, this Court explicitly rejected the State’s argument that a Crim.R. 32.1 motion is a collateral attack on the plea. *Id.* at ¶13 (holding that a postsentence motion to withdraw is not a “collateral challenge to the validity of a conviction or sentence”). Moreover, the holding in *Bush* implicitly rejected the State’s second contention that Crim.R. 32.1 motions fall within *Szefcyk*’s “any proceeding” language. In *Bush*, this Court was faced with a Crim.R. 32.1 motion that was filed three years after the guilty plea. Despite the obvious fact that the postsentence motion to withdraw was filed well outside the time limit proscribed by App.R. 4(A), this Court gave no consideration to the effect of res judicata on Mr. Bush’s motion. *Id.* at ¶2-3.

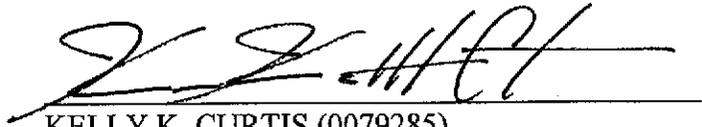
This Court has already held that Crim.R. 32.1 does not prescribe a time limitation. *Id.* at ¶14. Nonetheless, the State effectively seeks to amend the language of Crim.R. 32.1 to include a thirty-day time limitation. This Court rejected a similar effort in *Bush* and held that the postconviction statute does not govern the timeliness of a Crim.R. 32.1 motion. *Id.* Undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and filing of a motion under Crim.R. 32.1 should remain a factor in determining the merits of the motion. But a postsentence Crim.R. 32.1 motion should ultimately be governed by the unique manifest injustice standard set forth in the rule itself and the well-developed body of case law interpreting that standard.

III. CONCLUSION

For the foregoing reasons, this Court should remand this case to the trial court for a de novo sentencing hearing. In the alternative, this Court should affirm the decision of the court of appeals and remand this case for trial.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



KELLY K. CURTIS (0079285)
Assistant State Public Defender
(COUNSEL OF RECORD)

8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
kelly.curtis@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLEE
PARRIS BOSWELL

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing MERIT BRIEF OF APPELLEE was served by ordinary U.S. Mail, postage-prepaid, this 12TH day of August, 2008 to Thorin Freeman, Assistant Prosecuting Attorney, Cuyahoga County Prosecutor's Office, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



KELLY K. CURTIS (0079285)
Assistant State Public Defender

COUNSEL FOR DEFENDANT-APPELLANT
PARRIS BOSWELL

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH AUGUST 1, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

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

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ORC Ann. 2929.14 (2008)

§ 2929.14. Basic prison terms

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

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

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

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

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

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

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

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

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

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

(D) (1) (a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141 [2941.14.1]*, *2941.144 [2941.14.4]*, or *2941.145 [2941.14.5]* of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 [2941.14.4]* of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 [2941.14.5]* of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 [2941.14.1]* of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to *section 2929.20*, *section 2967.193 [2967.19.3]*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (D)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 [2923.16.1]* of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 [2941.14.6]* of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 [2923.16.1]* of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to *section 2929.20*, *section 2967.193 [2967.19.3]*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 [2941.14.11]* of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to *section 2929.20*, *section 2967.193 [2967.19.3]*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.12* or *2923.123 [2923.12.3]* of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of *section 2923.122 [2923.12.2]* that involves a deadly weapon that is a firearm other than a dangerous ordnance, *section 2923.16*, or *section 2923.121 [2923.12.1]* of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.13* of the Revised Code unless all of the following apply:

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

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

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 [2941.14.12] of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer as defined in *section 2941.1412 [2941.14.12] of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to *section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code*. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (D)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

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

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

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

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

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

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

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

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender.

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

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

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

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193 [2967.19.3], or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

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

(3) (a) Except when an offender commits a violation of *section 2903.01 or 2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03 or 2925.11 of the Revised Code* and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161 [3719.16.1], 4729.37, or 4729.61, division (C) or (D) of section 3719.172 [3719.17.2], division (C) of section 4729.51, or division (J) of *section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 [2941.14.10] of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

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

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any

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

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 [2941.14.14] of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section 2935.01 of the Revised Code*, or an investigator of the bureau of criminal identification and investigation, as defined in *section 2903.11 of the Revised Code*, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to *section 2929.20, section 2967.193 [2967.19.3]*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1415 [2941.14.15] of the Revised Code* that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 [2941.14.15] of the Revised Code*, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to *section 2929.20, section 2967.193 [2967.19.3]*, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

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

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

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

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates *section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code*, if an offender who is under detention at a detention facility commits a felony violation of *section 2923.131 [2923.13.1] of the Revised Code*, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of *section 2921.34 of the Revised Code*, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of *section 2911.01 of the Revised Code*, a violation of division (A) of *section 2913.02 of the Revised Code* in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of *section 2921.331 [2921.33.1] of the Revised Code*, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

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

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

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

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code*. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 [2929.14.2] of the Revised Code*.

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

(F) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of *section 2967.28 of the Revised Code*. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-

release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) The court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section 2907.02 of the Revised Code*, or division (B) of *section 2907.02 of the Revised Code* provides that the court shall not sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418 [2941.14.18]*, *2941.1419 [2941.14.19]*, or *2941.1420 [2941.14.20] of the Revised Code*.

(4) A person is convicted of or pleads guilty to a violation of *section 2905.01 of the Revised Code* committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of *section 2929.022 [2929.02.2]*, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of *section 2929.03*, or division (A) or (B) of *section 2929.06 of the Revised Code* requires the court to sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code*.

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of *section 2929.02 of the Revised Code* requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the *Revised Code*, *section 2929.142 [2929.14.2] of the Revised Code*, or *section 2971.03 of the Revised Code*, or any other provision of law, *section 5120.163 [5120.16.3] of the Revised Code* applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.142 [2941.14.2] of the Revised Code* that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J) (1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.143 [2941.14.3] of the Revised Code* that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2) (a) If an offender is convicted of or pleads guilty to a felony violation of *section 2907.22, 2907.24, 2907.241 [2907.24.1]*, or *2907.25 of the Revised Code* and to a specification of the type described in *section 2941.1421 [2941.14.21] of the Revised Code* and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (J)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of *section 2907.22, 2907.23, 2907.24, 2907.241 [2907.24.1]*, or *2907.25 of the Revised Code* and also was

convicted of or pleaded guilty to a specification of the type described in section 2941.1421 [2941.14.21] of the Revised Code regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (J)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (J)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of *section 2907.22, 2907.24, 2907.241 [2907.24.1], or 2907.25 of the Revised Code* and any residential sanction imposed for the violation under *section 2929.16 of the Revised Code*. A sanction imposed under this division shall be considered to be a community control sanction for purposes of *section 2929.15 of the Revised Code*, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under *section 5120.031 [5120.03.1] of the Revised Code* or for placement in an intensive program prison under *section 5120.032 [5120.03.2] of the Revised Code*, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in *section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the Revised Code*, whichever is applicable, that the offender is eligible for the placement.

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

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

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

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in *section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the Revised Code*, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in *section 5120.031 [5120.03.1] or 5120.032 [5120.03.2] of the Revised Code* and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A) (1) of *section 2903.06 of the Revised Code* and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to *section 2929.142 [2929.14.2] of the Revised Code*.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 88 (Eff 9-3-96); 146 v H 445 (Eff 9-3-96); 146 v H 154 (Eff 10-4-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 2 (Eff 1-1-99); 148 v S 1 (Eff 8-6-99); 148 v H 29 (Eff 10-29-99); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 130 (Eff 4-7-2003); 149 v S 123, § 1, eff. 1-1-04; 150 v H 12, §§ 1, 3, eff. 4-8-04*; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 137, § 1, eff. 7-11-06; 151 v H 137, § 3, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 184, § 1, eff. 9-9-08; 152 v S 220, § 1, eff. 9-30-08.

LEXSTAT ORC ANN. 2929.191

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*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2929.191 (2008)

§ 2929.191. Correction to judgment of conviction concerning post-release control

(A) (1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of *section 2929.14 of the Revised Code*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of *section 2929.19 of the Revised Code* and failed to notify the offender pursuant to that division that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of *section 2929.14 of the Revised Code*, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison.

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(c) of *section 2929.19 of the Revised Code* or that the offender may be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(d) of that section.

(B) (1) If, prior to the effective date of this section, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(c) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of *section 2929.19 of the Revised Code*, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code* the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

(2) If the court prepares and issues a correction to a judgment of conviction as described in division (B)(1) of this section before the offender is released from imprisonment under the term, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(3)(e) of *section 2929.19 of the Revised Code* regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

HISTORY:

151 v H 137, § 1, eff. 7-11-06.

LEXSTAT ORC ANN. 2953.21

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES
POSTCONVICTION REMEDIES

Go to the Ohio Code Archive Directory

ORC Ann. 2953.21 (2008)

§ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under *sections 2953.71 to 2953.81 of the Revised Code* or under *section 2953.82 of the Revised Code* and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of *section 2953.74 of the Revised Code* provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under *sections 2953.71 to 2953.81 of the Revised Code* or under *section 2953.82 of the Revised Code* been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of *section 2953.74 of the Revised Code* no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in *section 2953.23 of the Revised Code*, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in *section 2953.23 of the Revised Code*, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in *section 2953.23 of the Revised Code*, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court

may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or *section 120.06, 120.16, 120.26, or 120.33 of the Revised Code* and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by *section 2953.08 of the Revised Code*, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

HISTORY:

131 v 684 (Eff 7-21-65); 132 v H 742 (Eff 12-9-67); 141 v H 412 (Eff 3-17-87); 145 v H 571 (Eff 10-6-94); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 258 (Eff 10-16-96); 149 v H 94. Eff 9-5-2001; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06.

LEXSTAT ORC ANN. 2967.28

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2967. PARDON; PAROLE; PROBATION

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ORC Ann. 2967.28 (2008)

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

(1) "Monitored time" means the monitored time sanction specified in *section 2929.17 of the Revised Code*.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.

(3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after the effective date of this amendment, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of *section 2929.19 of the Revised Code* of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of *section 2929.14 of the Revised Code* a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of

up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to the effective date of this amendment, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(d) of *section 2929.19 of the Revised Code* regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of *section 2929.14 of the Revised Code* a statement regarding post-release control.

(D) (1) Before the prisoner is released from imprisonment, the parole board shall impose upon a prisoner described in division (B) of this section, may impose upon a prisoner described in division (C) of this section, and shall impose upon a prisoner described in division (B)(2)(b) of section 5120.031 [5120.03.1] or in division (B)(1) of *section 5120.032 [5120.03.2] of the Revised Code*, one or more post-release control sanctions to apply during the prisoner's period of post-release control. Whenever the board imposes one or more post-release control sanctions upon a prisoner, the board, in addition to imposing the sanctions, also shall include as a condition of the post-release control that the individual or felon not leave the state without permission of the court or the individual's or felon's parole or probation officer and that the individual or felon abide by the law. The board may impose any other conditions of release under a post-release control sanction that the board considers appropriate, and the conditions of release may include any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17, and 2929.18 of the Revised Code*. Prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall review the prisoner's criminal history, all juvenile court adjudications finding the prisoner, while a juvenile, to be a delinquent child, and the record of the prisoner's conduct while imprisoned. The parole board shall consider any recommendation regarding post-release control sanctions for the prisoner made by the office of victims' services. After considering those materials, the board shall determine, for a prisoner described in division (B) of this section, division (B)(2)(b) of section 5120.031 [5120.03.1], or division (B)(1) of *section 5120.032 [5120.03.2] of the Revised Code*, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances or, for a prisoner described in division (C) of this section, whether a post-release control sanction is necessary and, if so, which post-release control sanction or combination of post-release control sanctions is reasonable under the circumstances. In the case of a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, the board shall presume that monitored time is the appropriate post-release control sanction unless the board determines that a more restrictive sanction is warranted. A post-release control sanction imposed under this division takes effect upon the prisoner's release from imprisonment.

Regardless of whether the prisoner was sentenced to the prison term prior to, on, or after the effective date of this amendment, prior to the release of a prisoner for whom it will impose one or more post-release control sanctions under this division, the parole board shall notify the prisoner that, if the prisoner violates any sanction so imposed or any condition of post-release control described in division (B) of *section 2967.131 [2967.13.1] of the Revised Code* that is imposed on the prisoner, the parole board may impose a prison term of up to one-half of the stated prison term originally imposed upon the prisoner.

(2) At any time after a prisoner is released from imprisonment and during the period of post-release control applicable to the releasee, the adult parole authority may review the releasee's behavior under the post-release control sanctions imposed upon the releasee under this section. The authority may determine, based upon the review and in accordance with the standards established under division (E) of this section, that a more restrictive or a less restrictive sanction is appropriate and may impose a different sanction. Unless the period of post-release control was imposed for an offense described in division (B)(1) of this section, the authority also may recommend that the parole board reduce the duration of the period of post-release control imposed by the court. If the authority recommends that the board reduce the duration of control for an offense described in division (B)(2), (B)(3), or (C) of this section, the board shall review the releasee's behavior and may reduce the duration of the period of control imposed by the court. In no case shall the board reduce the duration of the period of control imposed by the court for an offense described in division (B)(1) of this section, and in no case shall the board permit the releasee to leave the state without permission of the court or the releasee's parole or probation officer.

(E) The department of rehabilitation and correction, in accordance with Chapter 119. of the Revised Code, shall adopt rules that do all of the following:

(1) Establish standards for the imposition by the parole board of post-release control sanctions under this section that are consistent with the overriding purposes and sentencing principles set forth in *section 2929.11 of the Revised Code* and that are appropriate to the needs of releasees;

(2) Establish standards by which the parole board can determine which prisoners described in division (C) of this section should be placed under a period of post-release control;

(3) Establish standards to be used by the parole board in reducing the duration of the period of post-release control imposed by the court when authorized under division (D) of this section, in imposing a more restrictive post-release control sanction than monitored time upon a prisoner convicted of a felony of the fourth or fifth degree other than a felony sex offense, or in imposing a less restrictive control sanction upon a releasee based on the releasee's activities including, but not limited to, remaining free from criminal activity and from the abuse of alcohol or other drugs, successfully participating in approved rehabilitation programs, maintaining employment, and paying restitution to the victim or meeting the terms of other financial sanctions;

(4) Establish standards to be used by the adult parole authority in modifying a releasee's post-release control sanctions pursuant to division (D)(2) of this section;

(5) Establish standards to be used by the adult parole authority or parole board in imposing further sanctions under division (F) of this section on releasees who violate post-release control sanctions, including standards that do the following:

- (a) Classify violations according to the degree of seriousness;
- (b) Define the circumstances under which formal action by the parole board is warranted;
- (c) Govern the use of evidence at violation hearings;
- (d) Ensure procedural due process to an alleged violator;
- (e) Prescribe nonresidential community control sanctions for most misdemeanor and technical violations;
- (f) Provide procedures for the return of a releasee to imprisonment for violations of post-release control.

(F) (1) Whenever the parole board imposes one or more post-release control sanctions upon an offender under this section, the offender upon release from imprisonment shall be under the general jurisdiction of the adult parole authority and generally shall be supervised by the field services section through its staff of parole and field officers as described in *section 5149.04 of the Revised Code*, as if the offender had been placed on parole. If the offender upon release from imprisonment violates the post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* that are imposed on the offender, the public or private person or entity that operates or administers the sanction or the program or activity that comprises the sanction shall report the violation directly to the adult parole authority or to the officer of the authority who supervises the offender. The authority's officers may treat the offender as if the offender were on parole and in violation of the parole, and otherwise shall comply with this section.

(2) If the adult parole authority determines that a releasee has violated a post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* imposed upon the releasee and that a more restrictive sanction is appropriate, the authority may impose a more restrictive sanction upon the releasee, in accordance with the standards established under division (E) of this section, or may report the violation to the parole board for a hearing pursuant to division (F)(3) of this section. The authority may not, pursuant to this division, increase the duration of the releasee's post-release control or impose as a post-release control sanction a residential sanction that includes a prison term, but the authority may impose on the releasee any other residential sanction, nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to *sections 2929.16, 2929.17, and 2929.18 of the Revised Code*.

(3) The parole board may hold a hearing on any alleged violation by a releasee of a post-release control sanction or any conditions described in division (A) of *section 2967.131 [2967.13.1] of the Revised Code* that are imposed upon the releasee. If after the hearing the board finds that the releasee violated the sanction or condition, the board may increase the duration of the releasee's post-release control up to the maximum duration authorized by division (B) or (C) of this section or impose a more restrictive post-release control sanction. When appropriate, the board may impose as a post-release control sanction a residential sanction that includes a prison term. The board shall consider a prison term as

a post-release control sanction imposed for a violation of post-release control when the violation involves a deadly weapon or dangerous ordnance, physical harm or attempted serious physical harm to a person, or sexual misconduct, or when the releasee committed repeated violations of post-release control sanctions. The period of a prison term that is imposed as a post-release control sanction under this division shall not exceed nine months, and the maximum cumulative prison term for all violations under this division shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence. The period of a prison term that is imposed as a post-release control sanction under this division shall not count as, or be credited toward, the remaining period of post-release control.

If an offender is imprisoned for a felony committed while under post-release control supervision and is again released on post-release control for a period of time determined by division (F)(4)(d) of this section, the maximum cumulative prison term for all violations under this division shall not exceed one-half of the total stated prison terms of the earlier felony, reduced by any prison term administratively imposed by the parole board, plus one-half of the total stated prison term of the new felony.

(4) Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. The offender is not eligible for final release under *section 2967.16 of the Revised Code* until the post-release control period otherwise would have ended.

(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period.

(c) If an offender is subject to more than one period of post-release control, the period of post-release control for all of the sentences shall be the period of post-release control that expires last, as determined by the parole board. Periods of post-release control shall be served concurrently and shall not be imposed consecutively to each other.

(d) The period of post-release control for a releasee who commits a felony while under post-release control for an earlier felony shall be the longer of the period of post-release control specified for the new felony under division (B) or (C) of this section or the time remaining under the period of post-release control imposed for the earlier felony as determined by the parole board.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 147 v S 111 (Eff 3-17-98); 148 v S 107 (Eff 3-23-2000); 149 v H 327 (Eff 7-8-2002); 149 v H 510; Eff 3-31-2003; 151 v H 137, § 1, eff. 7-11-06.

LEXSTAT OHIO APP R 4

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Ohio Rules Of Appellate Procedure
Title II Appeals From Judgments And Orders Of Court Of Record

Ohio App. Rule 4 (2008)

Review Court Orders which may amend this Rule

Rule 4. Appeal as of right--when taken

(A) Time for appeal.

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

(B) Exceptions.

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

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

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

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

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

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

(C) Premature notice of appeal.

Ohio App. Rule 4

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

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

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

HISTORY: Amended, eff 7-1-72; 7-1-85; 7-1-89; 7-1-92; 7-1-96; 7-1-02.

LEXSTAT OHIO APP. RULE 16

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Ohio Rules Of Appellate Procedure
Title III General Provisions

Ohio App. Rule 16 (2008)

Review Court Orders which may amend this Rule

Rule 16. Briefs

(A) Brief of the appellant.

The appellant shall include in its brief, under the headings and in the order indicated, all of the following:

- (1) A table of contents, with page references.
- (2) A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where cited.
- (3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.
- (4) A statement of the issues presented for review, with references to the assignments of error to which each issue relates.
- (5) A statement of the case briefly describing the nature of the case, the course of proceedings, and the disposition in the court below.
- (6) A statement of facts relevant to the assignments of error presented for review, with appropriate references to the record in accordance with division (D) of this rule.
- (7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.
- (8) A conclusion briefly stating the precise relief sought.

(B) Brief of the appellee.

The brief of the appellee shall conform to the requirements of divisions (A)(1) to (A)(8) of this rule, except that a statement of the case or of the facts relevant to the assignments of error need not be made unless the appellee is dissatisfied with the statement of the appellant.

(C) Reply brief.

The appellant may file a brief in reply to the brief of the appellee, and, if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the assignments of errors presented by the cross-appeal. No further briefs may be filed except with leave of court.

(D) References in briefs to the record.

Ohio App. Rule 16

References in the briefs to parts of the record shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(E) Reproduction of statutes, rules, regulations.

If determination of the assignments of error presented requires the consideration of provisions of constitutions, statutes, ordinances, rules, or regulations, the relevant parts shall be reproduced in the brief or in an addendum at the end or may be supplied to the court in pamphlet form.

HISTORY: Amended, eff 7-1-72; 7-1-92.

LEXSTAT OHIO CRIM R 11

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2008)

Review Court Orders which may amend this Rule

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim. R. 32*.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of *Crim. R. 44(B)* and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

HISTORY: Amended, eff 7-1-76; 7-1-80; 7-1-98.

LEXSTAT OHIO CRIM. R. 32.1

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32.1 (2008)

Review Court Orders which may amend this Rule

Rule 32.1. Withdrawal of Guilty Plea

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

HISTORY: Amended, eff 7-1-98.