

IN THE OHIO SUPREME COURT

S.CT. NO: 2008-0661

STATE OF OHIO : On Appeal from the Eighth District  
 : Court of Appeals CA 89456  
 Plaintiff-Appellee :  
 vs. :  
 HUGH HUNTER :  
 Defendant-Appellant :

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APPELLANT'S MERIT BRIEF

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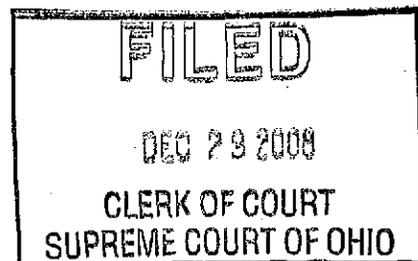


TABLE OF CONTENTS

	<u>PAGES</u>
<b>TABLE OF AUTHORITIES</b> .....	iii
<b>STATEMENT OF THE CASE</b> .....	1
<b>STATEMENT OF FACTS</b> .....	3
<b>LAW AND ARGUMENT</b> .....	4
<i>Proposition of Law I:</i> The RVO-enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury	
A. REPEAT VIOLENT OFFENDER (RVO) SPECIFICATION (PRE-HB 95 AND PRE- <i>FOSTER</i> ).....	4
B. THE RVO PENALTY ENHANCEMENT IN FORMER R.C. 2929.14(D)(2)(B) VIOLATES THE SIXTH AMENDMENT .....	6
C. THIS COURT SEVERED FORMER R.C. 2929.14(D)(2)(B) IN ITS ENTIRETY TO REMEDY THE SIXTH AMENDMENT VIOLATION .....	8
D. THE FAILURE TO COMPLETELY SEVER THE RVO PENALTY ENHANCEMENT WOULD VIOLATE HUNTER’S CONSTITUTIONAL RIGHTS .....	12
E. SUMMARY.....	18
<b>CONCLUSION</b> .....	19
<b>CERTIFICATE OF SERVICE</b> .....	20

**APPENDIX**

Notice of Appeal to the Ohio Supreme Court (Case No. 2008-0661) .....	A-1
Opinion from the Eighth District Court of Appeals (Case No. 89456).....	A-3
RVO Verdict from the Cuyahoga County Common Pleas (Case No. CR-04-456999).....	A-16
Article I, Section 10 of the United States Constitution -----	A-17
Sixth Amendment, United States Constitution-----	A-18
Fourteenth Amendment, United States Constitution -----	A-19
Article I, Section 16 of the Ohio Constitution-----	A-20
Article II, Section 28 of the Ohio Constitution-----	A-21
Former R.C. 2929.01-----	A-22
R.C. 2929.01 -----	A-29
R.C. 2929.11 -----	A-36
Former R.C. 2929.14-----	A-37
R.C. 2929.14 -----	A-44
R.C. 2941.149-----	A-55

TABLE OF AUTHORITIES

CASES

<i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466 -----	7, 8, 14
<i>Blakely v. Washington</i> (2004) 542 U.S. 296-----	7, 8, 15
<i>Bowie v. South Carolina</i> (1964), 378 U.S. 347-----	16
<i>Cunningham v. California</i> (2007), 549 U.S. 270, 127 S.Ct. 856-----	7
<i>Dale v. Haeberlin</i> (C.A. 6 1989), 878 F.2d 930 -----	17
<i>Devine v. New Mexico Dep't of Corrections</i> (C.A. 10 1989), 866 F.2d 339-----	17
<i>In re Ohio Crim. Sentencing Statutes Cases</i> (2006), 109 Ohio St. 3d 313-----	10
<i>Lindsey v. Washington</i> (1937), 301 U.S. 397-----	16
<i>Miller v. Florida</i> (1987), 482 U.S. 423-----	16, 19
<i>Rogers v. Tennessee</i> (2001), 532 U.S. 451 -----	16
<i>Shepard v. United States</i> (2005), 544 U.S. 13-----	15
<i>State v. Chandler</i> (2006), 109 Ohio St. 3d 223 -----	10
<i>State v. Comer</i> (1999), 99 Ohio St. 3d 463 -----	11, 17
<i>State v. Edmonson</i> (1999), 86 Ohio St. 3d 324-----	17
<i>State v. Foster</i> (2006), 109 Ohio St.3d 1-----	4, 8, 13
<i>State v. Goldick</i> , Montgomery App. No. 21263, 2006 Ohio 2825 -----	15
<i>State v. Malcom</i> , Cuyahoga App. No. 85351, 2005 Ohio 4133-----	15
<i>State v. Mathis</i> (2006), 2006 Ohio 855-----	19
<i>State v. Payne</i> , Lake App. No. 2004-L-118, 2005 Ohio 7043 -----	15
<i>State v. Short</i> , Cuyahoga App. No. 83804, 2005 Ohio 4578-----	10
<i>State v. Torres</i> , Lorain App. No. 2003-L-153, 2006 Ohio 1877-----	15
<i>United States v. Booker</i> (2005), 543 U.S. 220 -----	7

STATUTES

Former R.C. 2929.01-----	5, 14
Former R.C. 2929.14-----	5, 6, 17
R.C. 2929.01 -----	14
R.C. 2929.11 -----	11
R.C. 2929.14 -----	passim
R.C. 2941.149-----	5, 15

CONSTITUTIONAL PROVISIONS

Article I, Section 10 of the United States Constitution -----	16
Article II, Section 28 and Article I, Section 16 of the Ohio Constitution -----	16
Fourteenth Amendment, United States Constitution -----	16
Sixth Amendment, United States Constitution-----	6, 8, 15

STATEMENT OF THE CASE

This case presents the question of whether a trial court can impose a repeat violent offender (“RVO”) penalty-enhancement under former R.C. 2929.14(D)(2)(b). This Court should hold that a trial court cannot impose an RVO enhancement under former R.C. 2929.14(D)(2)(b) for one of two reasons: (1) such an enhancement was severed by this Court in *State v. Foster* (2006), 109 Ohio St.3d 1; or, (2) if *Foster* did not completely sever this provision, then it remains unconstitutional.

On September 1, 2004, defendant Hugh Hunter was indicted on a single count of felonious assault with a repeat violent offender specification and a notice of prior conviction. The repeat violent offender specification charged that:

[T]he offender was convicted of or pleaded guilty to, and served a prison term for committing a felony of the first or second degree or any substantially equivalent offense, which resulted in death to a person or physical harm to a person, to wit: the said Hugh Hunter, with counsel, on or about the 13<sup>th</sup> day of February 1990, in the Court of Common Pleas, Cuyahoga County, Ohio, Case No. CR 240691, having been convicted of the crime of Felonious Assault, in violation of Revised Code Section 2903.11 of the State of Ohio.

After lengthy pre-trial proceedings, Mr. Hunter’s case proceeded to a jury trial on the felonious assault charge and a bench trial on the RVO specification. After Hunter was convicted of felonious assault by the jury, the trial court held a bench trial on the RVO specification. Hunter’s counsel objected to the RVO specification on “constitutional grounds.” (Tr. at 243 and 252-53). The trial court rejected defense counsel’s constitutional arguments explaining that the “repeat violent offender specifications are constitutional” and that the State may pursue an RVO specification “so long as there is a factual basis and so long as the specification is proved to the trier of fact.” (Tr. at 253-54). Ultimately, the trial court found the defendant guilty of the RVO specification, concluding, among other things, that the victim in the prior case “suffered physical

harm at the hand of Mr. Hugh Hunter for which Mr. Hugh Hunter was convicted and I believe served a prison sentence.” (Tr. at 254).

The trial court imposed a maximum eight-year sentence for felonious assault and enhanced that sentence with an additional two years for the repeat violent offender specification. (Tr. at 259).

Mr. Hunter filed a timely appeal with the Eighth District Court of Appeals. On appeal, he raised three assignments of error including the following:

Assignment of Error II: The RVO enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury.

On February 28, 2008, the Eighth District affirmed Mr. Hunter’s conviction and sentence. *State v. Hunter*, Cuyahoga App. No. 89456, 2008 Ohio 794.

On April 7, 2008, appellant Hugh Hunter filed an appeal with this Court raising, among other things, the following proposition of law:

Proposition of Law I: The RVO-enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury.

With this proposition of law, appellant contends that the trial court erred in imposing an RVO penalty enhancement because such an enhancement had been excised by this Court in *State v. Foster* (2006), 109 Ohio St. 3d 1 and/or because such an enhancement is unconstitutional. This Court accepted Mr. Hunter’s appeal on his first proposition of law, stayed briefing, and held the case for its decision in a related case, *State v. Sanchez*, Ohio Supreme Court Case Nos. 2008-215 and 2008-429. However, when *Sanchez* was dismissed due to a jurisdictional flaw, this Court lifted the briefing stay and ordered briefing by both parties.

Mr. Hunter’s merit brief follows.

## STATEMENT OF FACTS

The felonious assault charge and repeat violent offender specification were bifurcated and tried in separate proceedings. For the sake of clarity, Mr. Hunter similarly separates the evidence adduced at both proceedings.

### **A. Evidence Presented to the Jury (Felonious Assault Charge)**

On September 1, 2004, Hugh Hunter physically assaulted Andrew McAuliffe at a church in Cleveland. (Tr. at 145-46). After the conclusion of an early mass, McAuliffe knocked on a restroom door and told the person inside that he needed to leave because the church was closing. (Tr. at 146 and 148). According to McAuliffe, Hunter came out of the restroom and, without saying a word, “started swinging” and “started hitting.” (Tr. at 146-48 and 160). McAuliffe testified that everything “happened in kind of blur” and that the entire incident lasted about a minute. (Tr. at 148, 153-54, and 157).

When McAuliffe yelled for help, Hunter “got up and left.” (Tr. at 146 and 150). As Hunter walked out of the church, McAuliffe observed him take his shoes off, leave them on the steps, and walk away. (Tr. at 150-51). Hunter was quickly apprehended by police near the church. (Tr. at 163-64 and 168). McAuliffe was treated at the hospital for several facial fractures, lacerations, and bruising. (Tr. at 149).

### **B. Evidence Presented to the Trial Court (RVO Specification)**

At the bench trial, Mr. Hunter, through counsel, stipulated to his indictment and conviction for felonious assault in CR 240691 and to medical records associated with that case. (Tr. at 242-43 and 249-50). A deputy sheriff then testified about his investigation of the incident. (Tr. at 244). He explained that, in 1989, corrections officer Gregory Rickett was assaulted by Hugh Hunter in the “psych pod” of the Cuyahoga County Jail. (Tr. at 245). According to the

deputy sheriff, Rickett had been struck on the chin and received a laceration that required stitches. (Tr. at 246).

### LAW AND ARGUMENT

Proposition of Law I: The RVO-enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury.

In this case, the trial court rendered a verdict, based on judicial fact-finding, that Hunter was a repeat violent offender *and* imposed two additional years in prison based on that verdict. Hunter maintains that the trial court erred in imposing the two-year penalty enhancement because the RVO penalty enhancements *either* were severed by this Court in *State v. Foster* (2006), 109 Ohio St.3d 1 *or* remain unconstitutional as they are predicated on judicial fact-finding. Because the statutory basis for the two-year penalty enhancement no longer exists or is unconstitutional, this Court must vacate the RVO penalty enhancement imposed upon Hunter.

Hunter begins his analysis by discussing the applicable RVO law and the United States Supreme Court's recent Sixth Amendment sentencing jurisprudence. He then considers the status of RVO penalty enhancements after *Foster* and demonstrates that the trial court's imposition of the RVO penalty enhancement was improper.

#### **A. Repeat Violent Offender (RVO) Specification (pre-HB 95 and pre-Foster)**

At the outset, it should be noted that the General Assembly amended the statutory provisions related to RVO specifications with House Bill 95 (effective date of 8/03/06). However, because the criminal conduct in this case occurred almost two years prior to the effective date of those amendments, the prior RVO law applies (pre-HB 95).<sup>1</sup>

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<sup>1</sup> Absent a "clear pronouncement by the General Assembly" that a particular statute is to be applied retroactively, the statute may be applied prospectively only. *State v. Lasalle* (2002), 96

Pursuant to R.C. 2941.149(A), the State must charge the repeat violent offender specification in the indictment, and the determination of whether someone is a repeat violent offender *must* be made by the trial court. Former R.C. 2929.01 (DD) provides, in pertinent part, that an individual is a repeat violent offender if he or she:

- “[H]as been convicted of or has pleaded guilty to, and is being sentencing for committing . . . a felony of the second degree that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person;” *and*
- “[P]reviously was convicted of or pleaded guilty to, and previously served or, at the time of the offense was serving, a prison term for . . . a felony of the first or second degree that resulted in the death of a person or in physical harm to a person.”

In this case, the trial court could only find Mr. Hunter to be a repeat violent offender if, in addition to his present conviction for felonious assault, it finds, beyond a reasonable doubt that Hunter was previously convicted of a first or second degree felony that resulted in death or physical harm *and* that he served prison time on that prior conviction.<sup>2</sup>

Under pre-HB 95 law, the repeat violent offender specification, if found, carries several potential consequences. First, the trial court could impose any sentence within the statutory range, even the maximum, without making any additional findings. Former R.C. 2929.14 (D)(2)(a). Second, any prison time imposed is mandatory and cannot be reduced. Former R.C. 2929.14(D)(2)(a). Third, the trial court must impose the maximum sentence if it finds that the present offense caused physical harm that “carried a substantial risk of death to a person or

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Ohio St. 3d 178, 181. This is no clear pronouncement of retroactively in HB 95. Moreover, the application of HB 95 to criminal conduct which pre-dated its effective date would constitute an unconstitutional *Ex Post Facto* law in violation of United States Constitution and impermissible retroactive legislation in violation of Article II, Section 28 of the Ohio Constitution.

<sup>2</sup> Although there are specific crimes that might result in a repeat violent offender classification, none of these crimes are relevant to this case.

substantial permanent disfigurement of a person.” Former R.C. 2929.14(D)(2)(a). Fourth, the trial court could impose an RVO enhanced sentence of 1-10 years in prison in addition to the statutory maximum (hereinafter referred to as “penalty enhancements”), if it finds that the maximum prison sentence is both:

- “[I]nadequate 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;” and,
- “[D]emeaning 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.”

Former R.C. 2929.14(D)(2)(b).

In other words, the trial court must find several facts in order to find Mr. Hunter to be a repeat violent offender (previously convicted for a first or second degree felony that caused death or physical harm and served prison time on that offense) and several additional facts to impose an RVO penalty enhancement (maximum term inadequate to punish the offender and protect the public and demeaning to the seriousness of the offense).

**B. The RVO penalty enhancement in former R.C. 2929.14(D)(2)(b) violates the Sixth Amendment.**

1. United States Supreme Court’s recent Sixth Amendment jurisprudence related to sentencing

It is well-settled that the United States Constitution protects every criminal defendant “against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged” and gives him “the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.” *United States v. Booker*

(2005), 543 U.S. 220, 230 (citations omitted). Beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court has applied these venerable principles of criminal law to modern sentencing schemes, rendering sentences predicated on most judge-found facts unconstitutional. In *Apprendi v. New Jersey*, the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (2000) 530 U.S. 466, 489. *Apprendi* creates a “bright-line rule” to which there is but one exception (existence of a prior conviction). *Cunningham v. California* (2007), 549 U.S. 270, 127 S.Ct. 856, 868-69.<sup>3</sup>

The United States Supreme Court, in *Blakely v. Washington*, explained that the “statutory maximum” referred to in *Apprendi* is the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” (2004) 542 U.S. 296, 303-304 (emphasis in original). “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Id.*; *see also Cunningham*, 127 S.Ct. at 860.

After *Blakely*, it is clear that a sentencing judge “exceeds his proper authority” when he inflicts punishment which “the jury’s verdict alone does not allow.” *Id.* This is true whether the enhanced sentence is dependent on his finding “a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as [*in Blakely*])” and “[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it.” *Id.* at 305, n.8 (emphasis in original). If the sentencing judge must find an additional fact of any kind (other

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<sup>3</sup> Moreover, the continued viability of that exception is in doubt as a majority of the United States Supreme Court now recognizes that the decision establishing the prior conviction exception was wrongly decided. *Shepard v. United States* (2005), 544 U.S. 13, 27-28 (Thomas, J., *concurring*).

than existence of a prior conviction) to impose a longer prison term, the sentencing scheme does not comport with the Sixth Amendment. *Cunningham*, 127 S.Ct. at 869.

2. Foster and RVO specifications

In *Foster*, this Court considered the constitutional implications of *Blakely* and *Apprendi* on Ohio's felony sentencing structure. Ohio's repeat violent offender penalty enhancement was among those sentencing provisions analyzed for violations of the Sixth Amendment. *Foster*, 109 Ohio St.3d at 23-25.

When this Court turned its attention, in *Foster*, to the RVO penalty enhancements in former R.C. 2929.14(D)(2)(b), which enable a sentencing court to exceed the normal statutory maximum, it found a constitutional problem. Specifically, it explained that this subsection violates *Blakely* and the Sixth Amendment because it "requires the court to make findings before imposing an additional penalty on repeat violent offenders." *Id.* at 24. Recognizing this constitutional problem, this Court "excised R.C. 2929.14(D)(2)(b)." *Id.* at 29. The meaning of the language has been debated by lower courts post-*Foster*. As discussed below, *Foster* excised former R.C. 2929.14(D)(2)(b) in its entirety to alleviate the Sixth Amendment violation caused by the RVO penalty enhancement.

**C. This Court severed former R.C. 2929.14(D)(2)(b) in its entirety to remedy the Sixth Amendment violation.**

One of the questions presented here is whether this Court, in *Foster*, eliminated RVO penalty enhancements by completely excising former R.C. 2929.14(D)(2)(b) or whether it merely severed former 2929.14(D)(2)(b) in mid-sentence (as concluded by the Eighth District) and thus kept the penalty enhancements for repeat violent offenders.

1. Foster severed the RVO penalty enhancements in their entirety.

*Foster* did not remove specific portions of (D)(2)(b), but rather simply "excised R.C.

2929.14(D)(2)(b).” *Id.* at 29. In summarizing the effect of its severance remedy, this Court explained that courts were left with “full discretion to impose a prison term *within the basic ranges of R.C. 2929.14(A)* based upon a jury verdict or admission of the defendant without the mandated judicial findings that *Blakely* prohibits.” *Id.* at 30 (emphasis added). Thus, *Foster* eliminated RVO penalty enhancements.

Despite language clearly exercising former R.C. 2929.14(D)(2)(b), Hunter recognizes that the *Foster* opinion does create some ambiguity about the continued viability of RVO penalty enhancements in subsection (D)(2)(b). Specifically, this Court also noted in *Foster* that: “[a]fter the severance, judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender specifications.” *Id.* at 29-30. Although this statement, standing alone, could be interpreted to mean that only the fact-finding within former R.C. 2929.14(D)(2)(b) has been removed and that the penalty enhancements survive, this alternative interpretation of *Foster* requires severance of former R.C. 2929.14(D)(2)(b) in mid-sentence (severed portions crossed out):

(b) If the court imposing a prison term on a repeat violent offender imposes the longest prison term from the range of terms authorized for the offense under division (A) of this section, the court may impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years ~~if the court finds that both of the following apply with respect to the prison terms imposed on the offender pursuant to division (D)(2)(a) of this section and, if applicable, divisions (D)(1) and (3) of this section:~~

~~(i) terms so imposed 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.~~

~~(ii) terms so imposed 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.~~

And there is nothing in *Foster* that suggests that this Court parsed the language of (D)(2)(b) in such a fashion.

Any lingering ambiguity about the impact of *Foster* on RVO penalty enhancements is resolved by this Court's treatment of major drug offender (MDO) penalty enhancements. In *Foster*, this Court found the very same constitutional flaw with MDO and RVO penalty enhancements and employed the same remedy. 109 Ohio St. 3d at 24 and 29 (explaining that "[a]s with R.C. 2929.14(D)(2)(b), R.C. 2929.14(D)(3)(b) cannot withstand a *Blakely* challenge because judicial factfinding is required and a court may not add the additional penalties based solely on the jury's verdict.") As such, this Court's treatment of MDO penalty enhancements informs its intention with respect to RVO penalty enhancements. In *State v. Chandler* this Court made clear that *Foster* excised the MDO penalty enhancement in its entirety:

As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed.

(2006), 109 Ohio St. 3d 223, 228. Likewise, in the aftermath of *Foster*, this Court affirmed this Eighth District's decision in *State v. Short*, Cuyahoga App. No. 83804, 2005 Ohio 4578, ¶ 39, which vacated a two-year MDO penalty enhancement as unconstitutional. *In re Ohio Crim. Sentencing Statutes Cases* (2006), 109 Ohio St. 3d 313. In light of this Court's decision in *Chandler* and its affirmance of *Short*, it is clear that *Foster* eliminated MDO penalty enhancements. Because *Foster* treated MDO and RVO penalty enhancements in an identical fashion, it is equally apparent that RVO penalty enhancements have been eliminated.

2. This Court's decision to sever the RVO penalty enhancements is consistent with its severance doctrine.

In crafting its remedy in *Foster*, this Court emphasized that the severance remedy, as

applied, “does not detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender.” R.C. 2929.11(A). After severance of the RVO penalty enhancements, trial courts are still left with the discretion to impose the maximum sentence for the underlying felony offense and to impose that sentence consecutively to other sentences. Thus, trial courts still have ample tools to impose long prison terms to protect the public and punish the offender.

Severance of the penalty enhancements is also consistent with the “general purpose of S.B. 2 of “introduc[ing] certainty and proportionality to felony sentencing.” *Foster*, 109 Ohio St. 3d at 12. Had this Court simply eliminated some of the fact-finding required by the RVO statute which guided trial courts’ imposition of RVO penalty-enhancements, the result would have been widely disparate sentences. Similarly situated individuals who commit a second-degree felony, like Hunter, could receive a prison sentence anywhere between two and eighteen years (two to eight years on the underlying felony and one to ten years on the enhancement). It was this kind of disproportionate and inconsistent sentencing that S.B. 2 was designed, in part, to address. *See State v. Comer* (1999), 99 Ohio St. 3d 463, 468 (“Consistency and proportionality are hallmarks of the new sentencing law.”)

Partial severance of former R.C. 2929.14(D)(2)(b), whereby all objective criteria for imposing RVO penalty enhancements would be eliminated, is inconsistent with the General Assembly’s intent. When the RVO penalty enhancements were first enacted, the General Assembly established specific criteria, above and beyond the repeat violent offender finding, that had to be met prior to the imposition of the penalty enhancement. The General Assembly’s continued commitment, to limiting RVO penalty enhancements to the “worst of the worst” cases, is evidenced by its post-*Foster* amendments to R.C. 2929.14(D)(2)(b) in H.B. 95. These

amendments continue to require more than mere proof that someone is a repeat violent offender before a penalty enhancement can be imposed.

**D. The failure to completely sever the RVO penalty enhancement would violate Hunter's constitutional rights.**

This Court's decision to sever the RVO penalty enhancement in its entirety was not only consistent with the severance doctrine and the principles underlying Senate Bill 2 but was also necessary to avoid two separate constitutional violations. First, the Eighth District's severance of only a portion of R.C. 2929.14(D)(2)(b) does not cure the Sixth Amendment violation resulting from the RVO penalty enhancement. Second, the imposition of an RVO penalty enhancement, without the findings previously required by R.C. 2929.14(D)(2)(b), violates appellant's due process rights.

1. Partial severance of R.C. 2929.14(D)(2)(b) would not have cured the Sixth Amendment violation.

*Foster* cannot be interpreted as merely excising a portion of subsection (D)(2)(b) because, under such a reading, the RVO penalty enhancements would still depend on judicial fact-finding and would thus continue to violate the Sixth Amendment. In this case, the trial court made explicit findings of fact that the victim in the prior case "suffered physical harm at the hand of Mr. Hugh Hunter for which Mr. Hugh Hunter was convicted and I believe served a prison sentence." (Tr. at 254). Such judicial fact-finding, which served as a prerequisite for enhancing Mr. Hunter's sentence by two additional years, is unconstitutional.

Ohio law requires the trial court (and not the jury) to make the determination of whether someone is a repeat violent offender, as defined by R.C. 2929.01(DD). R.C. 2941.149. In finding someone to be a repeat violent offender under the law in effect at the time of this offense, the trial court must find the following facts:

1. Defendant was previously convicted of aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration, or a felony of the first or second degree;
2. If the prior conviction involved a felony of the first or second degree (other than the specifically listed offenses), the offense resulted in death or physical harm;
3. Defendant served (or was serving) prison time for that prior conviction; and,
4. If the current offense involved a felony of the first or second degree (other than certain specifically listed offenses), the offense involved an attempt to cause serious physical harm to a person or did result in serious physical harm.

Former R.C. 2929.01(DD). It is by now well-established that such judicial fact-finding may not serve as the basis for increasing a criminal defendant's sentence. *See e.g. Apprendi*, 530 U.S. at 489; *Blakely*, 542 U.S. at 303-304. For instance, if an increase in a defendant's sentence depends on a finding that he or she had served a prison term, the Sixth Amendment requires that a jury (not a judge) make that finding. *State v. Goldick*, Montgomery App. No. 21263, 2006 Ohio 2825, ¶ 15 (explaining that a judicial finding about prior prison term violates the Sixth Amendment); *State v. Torres*, Lorain App. No. 2003-L-153, 2006 Ohio 1877, ¶ 15 (same); *see also Shepard v. United States* (2005), 544 U.S. 13, 24-26. Indeed, even before *Foster* was decided, several courts had concluded that the RVO penalty enhancement was unconstitutional because it was predicated on judicial fact-finding that a defendant was a repeat violent offender. *State v. Malcom*, Cuyahoga App. No. 85351, 2005 Ohio 4133, ¶¶ 4-5 and 9-10; *see also State v. Payne*, Lake App. No. 2004-L-118, 2005 Ohio 7043, ¶¶ 113-19.

In short, the determination of whether or not an individual is a repeat violent offender, as defined by former R.C. 2929.01(DD), requires judicial fact-finding. Because this Court in *Foster* did not sever the statutory requirement that a judge determine whether a defendant is a repeat

violent offender, R.C. 2941.149, or the judicial fact-finding attendant to that determination, it must have excised the RVO penalty enhancements in their entirety. If this Court had only severed a portion of R.C. 2929.14(D)(2)(b), leaving the penalty enhancements intact, the RVO penalty enhancements would remain unconstitutional because they would still depend on the judicial fact-finding required by former R.C. 2929.01(DD). Given the comprehensive review conducted by this Court in *Foster*, it is highly unlikely that it overlooked that issue. Instead, it more logical to conclude that, having eliminated the RVO penalty enhancements, this Court found it unnecessary to address the fact-finding required to determine that a defendant was a repeat violent offender.

2. The imposition of an RVO penalty enhancement, without the findings previously required by R.C. 2929.14(D)(2)(b), violates appellant's due process rights.

The retroactive application of a *partially* severed RVO penalty enhancement provision (as interpreted by the Eighth District below) violates appellant's state and federal due process rights because it effectively changes appellant's presumptive sentence to his detriment. The *ex post facto* principles inherent in the Due Process Clause of the Fourteenth Amendment and the prohibition on retroactive laws in Article II, Section 28 and Article I, Section 16 of the Ohio Constitution forbid the retroactive application of the Eighth District's partial severance remedy.

*a. Basic Principles of Ex Post Facto and Due Process*

The *Ex Post Facto* Clause of Article I, Section 10 of the United States Constitution prohibits, among other things, any legislation that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." *Miller v. Florida* (1987), 482 U.S. 423, 429 (quoting *Calder v. Bull* (1798), 3 Dall. 386, 390). The *Ex Post Facto* clause "looks to the *standard of punishment* proscribed by the statute, rather than to the sentence actually imposed." *Lindsey v. Washington* (1937), 301 U.S. 397, 401. Regardless of whether the

change “technically” increased the punishment for the crime, the legislative enactment falls within the *ex post facto* prohibition if it: 1) is retrospective; and 2) disadvantages the offender affected by it. *Miller*, 482 U.S. at 432-33.

Although the *Ex Post Facto* Clause “does not of its own force apply to the Judicial Branch of government,” the United States Supreme Court has recognized “that limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process.” *Rogers v. Tennessee* (2001), 532 U.S. 451, 456. Given the similar impact of judicial decisionmaking and legislation on the rights of criminal defendants, the fundamental principle that “the required criminal law must have existed when the conduct in issue occurred” must be applied to restrict the retroactive application of both. *Bowie v. South Carolina* (1964), 378 U.S. 347, 354. In short, the Court explained:

If a state legislature is barred by the Ex Post Facto Clause from passing [a retroactive law], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

*Id.* at 353. While *Bowie* involved a judicial attempt to expand the reach of a criminal statute, subsequent courts have held that the Due Process Clause likewise proscribes “judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing a criminal act.” *Dale v. Haeblerlin* (C.A. 6 1989), 878 F.2d 930, 934; *see also Devine v. New Mexico Dep’t of Corrections* (C.A. 10 1989), 866 F.2d 339, 344-45.

b. *Partial severance of former R.C. 2929.14(D)(2)(b) violates appellant’s due process rights.*

Pursuant to former R.C. 2929.14(D)(2)(b), Mr. Hunter enjoyed a presumption that he would not receive an RVO penalty enhancement. The trial court could only impose on him an RVO penalty enhancement of one to ten additional years in prison if it found that an eight-year

prison sentence was *both* “inadequate to punish the offender and protect the public from future crime” and “demeaning to the seriousness of the offense.” Former R.C. 2929.14(D)(2)(b). Moreover, because Ohio’s pre-*Foster* sentencing law “provide[d] precise guidance for criminal sentencing within clearly defined constraints” and required trial courts to follow “an articulated process when determining a sentence,” it “accord[ed] meaningful review of these sentencing decisions by the appellate courts.” *State v. Comer* (2003) 99 Ohio St. 3d 463, 465-66. A trial court could only impose a sentence that exceeds the presumption if it made the statutorily required findings, gave reasons for those findings, and “clearly align[ed]” its reasons with the findings they purport to justify. *Id.* at 467-68; *see also State v. Edmonson* (1999), 86 Ohio St. 3d 324, 325 and 328-29. If the trial court failed to precisely follow the articulated process provided by the statute or if its findings and/or reasons were insufficient, the sentence would be vacated and reversed. In short, Mr. Hunter had a presumptive sentence that could only be enhanced with an RVO add-on after statutorily prescribed judicial fact-finding, and he also possessed the meaningful ability to appeal any enhanced sentence.

If this Court were to adopt the Eighth District’s partial severance remedy, Mr. Hunter would be substantially disadvantaged in two critical respects. First, he would be divested of the presumption against an RVO add-on for his felonious assault conviction. In this case, the trial court imposed an RVO penalty enhancement on Hunter without making the findings required by former R.C. 2929.14(D)(2)(b). In other words, the trial court was able to impose the RVO add-on without finding that an eight-year sentence was both “inadequate to punish the offender and protect the public from future crime” and was “demeaning to the seriousness of the offense.” Instead, the trial court simply stated that, based on Hunter’s “pattern of behavior that puts the community at risk as a whole,”

An appropriate sentence in the penal system is warranted in this case, and a long sentence, frankly, is warranted.

I'm going to impose a sentence of eight years for the felonious assault of Mr. Andrew McAuliffe. I'm going to also impose additional time for the repeat violent offender specification. In that regard, I'm going to impose an additional two years at the Lorain Correctional Institution to be served consecutively.

(Tr. at 259). By removing the factors which previously limited the imposition of an RVO add-on, partial severance of former R.C. 2929.14(D)(2)(b) permits trial courts to impose RVO add-on's in situations in which they would previously have been unable.

Second, partial severance of R.C. 2929.14(D)(2)(b) would cause Hunter to lose significant appellate rights which previously existed. As this Court explained in *Comer*, the statutorily required findings and reasons are necessary so "an appellate court can conduct a meaningful review of the sentencing decision." 99 Ohio St. 3d at 468. Thus before partial severance, Mr. Hunter had a presumption that he would not receive an RVO enhancement, and, if he did receive such a penalty enhancement, as he did here, he could be assured a new sentencing hearing if the trial court failed to make the necessary findings or made unreasoned findings. *Cf. State v. Mathis* (2006), 2006 Ohio 855, ¶ 34 and 37 (explaining that "pre-*Foster*, R.C. 2953.08(G)(1) provided an opportunity for remand to the trial court if required findings were missing" for a *de novo* sentencing hearing).

For the reasons expressed in *Miller v. Florida* (1987), 482 U.S. 423, the *Ex Post Facto* Clause would clearly prohibit the Ohio legislature from eliminating the statutory presumptions in Ohio's felony sentencing law and applying that change retroactively. As in *Miller*, Ohio defendants had the expectation of no RVO penalty enhancement which could only be overcome with specific evidence and had appellate rights which would ensure that any enhanced sentence rested squarely on a permissible basis. The elimination of the presumption against an RVO add-

on and the ability to challenge a deviation from that presumption for lacking the requisite findings and/or reasons substantially disadvantages criminal defendants. Accordingly, such legislation could not be retroactively applied to defendants whose offense conduct pre-dated the legislation.

Just as the *Ex Post Facto* Clause would prohibit the legislature from retroactively eliminating beneficial sentencing presumptions, the Due Process Clause, as explained in *Bowie* and *Dale*, forbids the retroactive application of a partial severance remedy. For defendants, like Mr. Hunter, whose criminal conduct pre-dates February 27, 2006, the partial severance remedy is unavailable as a matter of constitutional law. As recognized by this Court, its decision to abolish sentencing presumptions for criminal defendants constitutes a marked and unpredictable departure from the law passed by Ohio's General Assembly. *See Foster*, 2006 Ohio 856, ¶ 87 (explaining that "[t]he General Assembly undoubtedly never anticipated that the judicial-finding requirements contained within S.B. 2 would be held unconstitutional). Given this unexpected and detrimental departure, due process precludes the retroactive application of the RVO penalty enhancement provision as altered by the Eighth District.

#### **E. Summary**

Given that *Foster* excised that statutory provision authorizing RVO enhanced sentences, the trial court erred when it, over objection, imposed an additional two years based on the RVO specification charged in the indictment. (Tr. at 243, 253, and 259). Even if this Court decides that *Foster* did not excise the RVO penalty enhancement provision (former R.C. 2929.14(D)(2)(b)) in its entirety, the RVO enhanced penalty would nonetheless be improper and unconstitutional for two reasons: 1) it depended on judge-found facts (a prior conviction involving physical harm to the victim and defendant served a prior prison term for that

conviction) in violation of the defendant's right to a trial by jury; *and* 2) its imposition without the findings previously required by former R.C. 2929.14(D)(2)(b) violates the ex post facto implications of the state and federal due process clauses.

Accordingly, this Court should vacate the two-year RVO penalty enhancement imposed by the trial court.

#### CONCLUSION

For the foregoing reasons, Defendant-Appellant Mr. Hugh Hunter respectfully asks this Court to adopt his first proposition of law, reverse the decision of the Eighth District Court of Appeals, and vacate his two-year RVO penalty enhancement.

Respectfully Submitted,



CULLEN SWEENEY, ESQ.  
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Merit Brief was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 23 day of December, 2008.



CULLEN SWEENEY, ESQ.  
Counsel for Appellant

## **APPENDIX**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :

Plaintiff-Appellee :

vs :

HUGH HUNTER :

Defendant-Appellant :

**08-0661**

On Appeal from the  
Cuyahoga County Court of  
Appeals, Eighth Appellate  
District 89456

---

NOTICE OF APPEAL OF APPELLANT HUGH HUNTER

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COUNSEL FOR APPELLEE:

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**FILED**  
APR 07 2008  
CLERK OF COURT  
SUPREME COURT OF OHIO

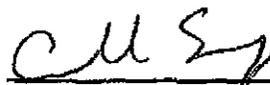
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CLERK OF COURT  
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT

Appellant Hugh Hunter hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 89456 on February 28, 2008 journalized March 10, 2008.

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

Respectfully submitted,



CULLEN SWEENEY, ESQ.  
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this \_ day of April, 2008.



CULLEN SWEENEY, ESQ.  
Counsel for Appellant

*Judge Villanueva*

# Court of Appeals of Ohio

2008 MAR 14 A 9:41 EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

*M(ACI)*

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION  
No. 89456

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HUGH HUNTER

*A520054*

DEFENDANT-APPELLANT

FEE  
3  
TAXED

**JUDGMENT:  
AFFIRMED**

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-456999

**BEFORE:** Kilbane, J., Gallagher, P.J., and McMonagle, J.

**RELEASED:** February 28, 2008

**JOURNALIZED:** MAR 10 2008

CA07089456

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VOL 0653 PG 0276



MARY EILEEN KILBANE, J.:

Hugh Hunter ("Hunter") appeals from his conviction and sentence received in the Cuyahoga County Common Pleas Court. Hunter argues that the trial court erred when it failed to conduct a second competency hearing and when it imposed an unconstitutional sentence. For the following reasons, we affirm the decision of the trial court.

On September 1, 2004, Hunter attacked Andrew McAuliffe ("McAuliffe") as McAuliffe was closing up the church after attending the 7:00 o'clock morning mass at Saint Malachi church on 2459 Washington Street in Cleveland, Ohio. Without provocation, Hunter started beating McAuliffe in the face, causing multiple fractures and lacerations. Cleveland Police Officers arrested Hunter that same day.

On September 29, 2004, a Cuyahoga County Grand jury indicted Hunter with felonious assault with repeat violent offender and notice of prior conviction specifications. On October 12, 2004, the trial court referred Hunter to the Court Psychiatric Clinic ("Clinic") for competency and sanity evaluations. On November 10, 2004, the Clinic reported that Hunter "refused to cooperate with the evaluation" and it was therefore unable to render an opinion as to his competency. The trial court ordered that Hunter be transferred to Northcoast

-2-

Behavioral Healthcare Center for a twenty-day inpatient competency evaluation. On December 16, 2004, this case was transferred to the mental health docket.

On February 25, 2005, the trial court re-referred Hunter to the Clinic for competency and sanity evaluations. On April 20, 2005, the trial court ordered Hunter to "take his prescribed medications including injectable medications" and authorized the Cuyahoga County Corrections staff to "administer such medications using reasonable force, if necessary." On April 26, 2005, the trial court referred Hunter to the Clinic for a status update. Eventually, the Clinic filed two competency evaluations, dated March 21 and May 11, 2005, both of which concluded that Hunter was competent to stand trial. The State of Ohio ("State") and defense counsel stipulated to the evaluations, and on May 23, 2005, the trial court adopted the findings, concluding that Hunter was competent to stand trial.

After determining Hunter's competency, the trial court attempted to hold a plea hearing. The trial court, through the advice of defense counsel, anticipated that Hunter would plead guilty to felonious assault and the State would dismiss the specifications. However, during the court's discussion with Hunter, it appeared that Hunter believed his attorney did not understand his

-3-

position. The trial court postponed the hearing. On June 2, 2005, the trial court held another change of plea hearing. However, at the hearing, Hunter was adamant that he did not want to plead guilty. Because of this decision, the trial court referred Hunter to the Clinic for the fourth time to be re-evaluated for competency and sanity.

On July 28, 2005, the trial court ordered Hunter to undergo an inpatient competency evaluation at Twin Valley Behavioral Healthcare ("Twin Valley") in Columbus. On December 8, 2005, after Hunter returned from Twin Valley, the trial court referred him to the Clinic for a sanity evaluation. However, Hunter refused to cooperate with the Clinic, and on January 11, 2006, the trial court referred him to Twin Valley for an inpatient sanity evaluation. On January 18, 2006, the trial court issued its second order requiring Hunter to take all prescribed medications and permitting staff to use "reasonable force" in administering them. On April 4, 2006, the trial court ordered Hunter returned from Twin Valley.

On May 18, 2006, the trial court conducted its third change of plea hearing and, once again, Hunter stated that he was not going to plead guilty. During a brief hearing on July 13, 2006, the trial court questioned Hunter about whether he was taking his medications. Hunter told the court that he felt

-4-

he did not need them, but that he was not feeling well. After that, Hunter slipped off of his chair, fell to one knee, and then lay prone on the floor. The trial court issued its third order requiring Hunter to take all prescribed medications. On July 27, 2006, the trial court referred Hunter, for the sixth time, to the Clinic for competency evaluations.

On October 23, 2006, Hunter's case proceeded to trial. Hunter stipulated to the notice of prior conviction specification and asked that the repeat violent offender specification be bifurcated and determined by the trial court. The court agreed. During trial, the State called two witnesses and rested; defense counsel did not present witnesses. The jury retired and, after deliberating, found Hunter guilty of felonious assault as charged in the indictment.

After the jury's verdict, but prior to the bench trial on the repeat violent offender specification, the parties discussed a possible plea agreement. The potential agreement involved Hunter pleading guilty on an additional felony case in return for the dismissal of the repeat violent offender specification in the present case. Once again, Hunter displayed confusion and ultimately decided he did not want to plead guilty.

That same day, the trial court began Hunter's trial on the repeat violent offender specification. During this portion of his trial, Hunter stipulated to his

-5-

indictment and conviction for felonious assault in CR240691 and to the medical records associated with that case. Deputy Sheriff Jimmy Fields testified about his investigation into the 1989 incident. Deputy Sheriff Fields stated that in 1989, Hunter assaulted corrections officer Gregory Rickett while he was in the psychiatric "pod" of the Cuyahoga County Jail. According to Deputy Sheriff Fields, Rickett received a laceration that required stitches. The trial court determined that the "physical harm specification has been proved beyond a reasonable doubt" and proceeded immediately to sentencing.

At the sentencing hearing, the trial court imposed a maximum sentence of eight years on the felonious assault charge and an additional two years for the repeat violent offender specification. The trial court ordered the time to be served consecutively for a total prison sentence of ten years. Hunter appeals, raising three assignments of error.

In his first assignment of error, Hunter argues as follows:

**"The trial court's failure to hold a subsequent competency hearing when new issues regarding appellant's competency arose prior to trial violated R.C. 2945.37 and R.C. 2945.371 and denied appellant due process of law."**

As the Ohio Supreme Court has observed, "fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial." *State v. Berry*, 72 Ohio St.3d 354, 359, 1995-Ohio-310.

*State v. Halder*, Cuyahoga App. No. 87974, 2007-Ohio-5940. The test used to determine if a criminal defendant is competent to stand trial was articulated in *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788:

**“[T]he test must be whether he [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - - and whether he has a rational as well as factual understanding of the proceedings against him.”**

The right to a hearing on the issue of competency rises to the level of a constitutional guarantee where the record contains “sufficient indicia of incompetence” that an inquiry into the defendant’s competency is necessary to ensure his right to a fair trial. *Berry*, supra, quoting *Drope v. Missouri* (1975), 420 U.S. 162, 95 S.Ct. 896.

By statute, Ohio recognizes the right of a criminal defendant not to be tried or convicted of a crime while incompetent. R.C. 2945.37(B) provides:

**“In a criminal action in a court of common pleas, a county court or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant’s competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after trial has commenced, the court shall hold a hearing on the issue only for good cause shown \*\*\*.”**

**“A defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing under this section that because of his present mental**

-7-

condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense.” *State v. Vrabel* (Mar. 2, 2000), Mahoning App. No. 95 CA 221.

Under constitutional due process principles, the standard for determining competency to stand trial is the same as the standard for determining competency to enter a guilty plea or a plea of no contest. *Halder, supra; State v. Kovacek* (May 30, 2001), 9<sup>th</sup> Dist. No. 00CA007713. The burden of establishing incompetence, however, is upon the defendant. *Halder, supra*. In reviewing a judge’s determination of competency, we examine whether the conclusion was supported by competent, credible evidence. *State v. Hicks* (1989), 43 Ohio St.3d 72, 79. A judge’s decision on competency will not be disturbed absent an abuse of discretion. *Halder, supra*.

In the present case, Hunter’s competency to stand trial was raised before the trial started. The record establishes that the trial court complied with the mandates of R.C. 2945.37 before the trial started. The court ordered numerous mental examinations to ensure that Hunter was competent to stand trial. In addition, the trial court conducted a hearing and all parties were given an opportunity to present evidence. In fact, the State and defense counsel stipulated to the competency evaluations prepared by the Clinic. After hearing the stipulations, the trial court adopted the reports and found Hunter

-8-

competent to stand trial. In *State v. O'Neill*, Mahoning App. No. 03 MA 188, 2004-Ohio-6805, the Seventh Appellate District determined that "where the parties stipulate to the contents of the competency reports which opine that the defendant is competent, the parties stipulate to competency and waive the competency hearing."

Nonetheless, Hunter argues that because over a year passed between his competency hearing and the time of trial, and issues of competency had been raised, the trial court should have conducted a second competency hearing. We note that Hunter's trial counsel never requested a second competency hearing and was comfortable enough with the trial court's decisions referring him for further competency and sanity evaluations and ordering Hunter to take his prescribed medications. In addition, at each stage in the process, the trial court took the time to question Hunter to determine if he was able to assist in his own defense. While no one disputes that Hunter suffers from "profound mental health issues," incompetency to stand trial "must not be equated with mere mental or emotional instability or even outright insanity." *State v. Bock* (1986), 28 Ohio St.3d 108; *Halder*, supra.

After reviewing the entire record before us and examining the totality of the evidence on the issue of competency, we conclude that there was competent,

credible evidence before the trial court to support a finding of competency to stand trial. We further find that the trial court did not abuse its discretion when it failed to conduct a second competency hearing. The trial court had sufficient evidence to indicate that Hunter was presently capable of consulting with his attorneys. Accordingly, we overrule Hunter's first assignment of error.

In his second assignment of error, Hunter argues as follows:

**"The RVO enhanced sentence imposed upon appellant constituted a deprivation of his liberty without due process of law and a violation of his constitutional right to a trial by jury."**

Hunter argues that the repeat violent offender ("RVO") specification is unconstitutional under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 and, therefore, the trial court erred when it sentenced him to additional prison time under the RVO specification. Hunter asks this court to vacate the additional two-year sentence imposed under the RVO specification. We disagree and affirm the actions of the trial court.

This court recently addressed this identical issue in *State v. Fitzer*, Cuyahoga App. No. 88177, 2007-Ohio-2496, and held as follows:

**"In *State v. Foster* syllabus 6, the Ohio Supreme Court held: 'R.C. 2929.14(D)(2)(b) and (D)(3)(b) are capable of being severed. After the severance, judicial factfinding is not required before imposition of additional penalties for repeat violent offender and major drug offender**

specifications. (*United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738.) We read this to mean that only the offending portion of R.C. 2929.14(D)(2)(b) is severed. Consequently, the imposition of an additional penalty for the RVO violation is constitutional. Thus, a judge may impose an additional one-to-ten year sentence on an RVO specification without judicial factfinding. Consequently, this case is *Blakely-Booker-Foster* compliant.”

In the present case, the record indicates that the grand jury indicted Hunter on the RVO specification on September 29, 2004. The record further indicates that after a bench trial in which the State presented evidence, the trial court concluded that the RVO specification had been proven beyond a reasonable doubt. Accordingly, the additional sentence was imposed without judicial fact finding. See, also, *State v. Roberson*, Cuyahoga App. No. 88338, 2007-Ohio-2772.

For the reasoning stated in *Fitzer*, supra, and *Roberson*, supra, we overrule Hunter’s second assignment of error.

In his third and final assignment of error, Hunter argues as follows:

“Appellant was deprived of his liberty without due process of law when he was sentenced under a judicially altered, retroactively applied, and substantially disadvantageous statutory framework.”

In this assigned error, Hunter argues that *Foster*, supra, should not apply to his case because his crime occurred prior to the *Foster* decision. Hunter also

-11-

claims his due process rights were violated with an ex post facto application of *Foster* because the crime occurred before *Foster* was released. In *State v. Mallette*, Cuyahoga App. No. 87984, 2007-Ohio-715, this court concluded that the remedial holding of *Foster* does not violate a defendant's due process rights or the ex post facto principles contained therein.

Based on this court's precedent, we overrule Hunter's third and final assignment of error.

The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
\_\_\_\_\_  
MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and  
CHRISTINE T. MCMONAGLE, J., CONCUR



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A-16

# IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO  
Plaintiff

HUGH HUNTER  
Defendant

Case No: CR-04-456999-A

Judge: JOSE' A VILLANUEVA

INDICT: 2903.11 FELONIOUS ASSAULT /RVOS /NPC

## JOURNAL ENTRY

**\*\*THIS A MENTAL HEALTH DOCKET CASE\*\***

DEFENDANT IN COURT. COUNSEL GIAN DECARIS PRESENT.

COURT REPORTER JULIANN ADAMS PRESENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 - F2 UNDER THE INDICTMENT.

THE COURT FINDS DEFENDANT GUILTY OF THE REPEAT VIOLENT OFFENDER SPECIFICATIONS AND NOTICE OF PRIOR CONVICTION.

DEFENDANT ADDRESSES THE COURT.

THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.

THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 10 YEAR(S).

2 YEARS ON THE REPEAT VIOLENT OFFENDER SPECIFICATIONS TO RUN PRIOR TO AND CONSECUTIVE WITH 8 YEARS ON THE BASE CHARGE OF FELONIOUS ASSAULT (TOTAL OF 10 YEARS).

POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 3 YEARS FOR THE ABOVE FELONY(S) UNDER R.C.2967.28.

JAIL CREDIT DAYS TO DATE TO BE CALCULATED BY THE SHERIFF.

THE DEFENDANT IS ORDERED TO PAY RESTITUTION.

DEFENDANT ADVISED OF APPEAL RIGHTS.

DEFENDANT INDIGENT, COURT APPOINTS PUBLIC DEFENDER AS APPELLATE COUNSEL.

TRANSCRIPT AT STATE'S EXPENSE.

DEFENDANT IS TO PAY COURT COSTS.

PENDING TRIAL IN CR 461239,

DEFENDANT REMANDED.

10/25/2006

CPDMB 10/26/2006 09:01:11

*[Handwritten Signature]* 10-29-06

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Judge Signature Date

2006 OCT 31 A 8:45

GEN. CLERK OF COURTS  
CUYAHOGA COUNTY

FILED

SENT  
10/25/2006

Sheriff Signature MA 10-31-06

*Laci & cat*

Unites States Constitution  
Article I, Section 10, Clause 1

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.



LII / Legal Information Institute

# United States Constitution

## Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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- [Previous Amendment --Next Amendment](#)
  - [Table of Articles and Amendments](#)
  - [Overview of Full Constitution](#)
-

Ohio Constitution  
Article I, Section 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Constitution  
Article II, Section 28

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

67 of 134 DOCUMENTS

PAGE'S OHIO REVISED CODE ANNOTATED  
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\*\*\* ARCHIVE MATERIAL \*\*\*

\* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY \*  
\* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 18, 2005 \*  
\* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2005 \*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
IN GENERAL

*ORC Ann. 2929.01 (2005)*

§ 2929.01. Definitions

As used in this chapter:

(A) (1) "Alternative residential facility" means, subject to division (A)(2) of this section, any facility other than an offender's home or residence in which an offender is assigned to live and that satisfies all of the following criteria:

(a) It provides programs through which the offender may seek or maintain employment or may receive education, training, treatment, or habilitation.

(b) It has received the appropriate license or certificate for any specialized education, training, treatment, habilitation, or other service that it provides from the government agency that is responsible for licensing or certifying that type of education, training, treatment, habilitation, or service.

(2) "Alternative residential facility" does not include a community-based correctional facility, jail, halfway house, or prison.

(B) "Bad time" means the time by which the parole board administratively extends an offender's stated prison term or terms pursuant to *section 2967.11 of the Revised Code* because the parole board finds by clear and convincing evidence that the offender, while serving the prison term or terms, committed an act that is a criminal offense under the law of this state or the United States, whether or not the offender is prosecuted for the commission of that act.

(C) "Basic probation supervision" means a requirement that the offender maintain contact with a person appointed to supervise the offender in accordance with sanctions imposed by the court or imposed by the parole board pursuant to *section 2967.28 of the Revised Code*. "Basic probation supervision" includes basic parole supervision and basic post-release control supervision.

(D) "Cocaine," "crack cocaine," "hashish," "L.S.D.," and "unit dose" have the same meanings as in *section 2925.01 of the Revised Code*.

(E) "Community-based correctional facility" means a community-based correctional facility and program or

## ORC Ann. 2929.01

district community-based correctional facility and program developed pursuant to *sections 2301.51 to 2301.56 of the Revised Code*.

(F) "Community control sanction" means a sanction that is not a prison term and that is described in *section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code* or a sanction that is not a jail term and that is described in *section 2929.26, 2929.27, or 2929.28 of the Revised Code*. "Community control sanction" includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004.

(G) "Controlled substance," "marihuana," "schedule I," and "schedule II" have the same meanings as in *section 3719.01 of the Revised Code*.

(H) "Curfew" means a requirement that an offender during a specified period of time be at a designated place.

(I) "Day reporting" means a sanction pursuant to which an offender is required each day to report to and leave a center or other approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center.

(J) "Deadly weapon" has the same meaning as in *section 2923.11 of the Revised Code*.

(K) "Drug and alcohol use monitoring" means a program under which an offender agrees to submit to random chemical analysis of the offender's blood, breath, or urine to determine whether the offender has ingested any alcohol or other drugs.

(L) "Drug treatment program" means any program under which a person undergoes assessment and treatment designed to reduce or completely eliminate the person's physical or emotional reliance upon alcohol, another drug, or alcohol and another drug and under which the person may be required to receive assessment and treatment on an outpatient basis or may be required to reside at a facility other than the person's home or residence while undergoing assessment and treatment.

(M) "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(N) "Education or training" includes study at, or in conjunction with a program offered by, a university, college, or technical college or vocational study and also includes the completion of primary school, secondary school, and literacy curricula or their equivalent.

(O) "Firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

(P) "Halfway house" means a facility licensed by the division of parole and community services of the department of rehabilitation and correction pursuant to *section 2967.14 of the Revised Code* as a suitable facility for the care and treatment of adult offenders.

(Q) "House arrest" means a period of confinement of an offender that is in the offender's home or in other premises specified by the sentencing court or by the parole board pursuant to *section 2967.28 of the Revised Code* and during which all of the following apply:

(1) The offender is required to remain in the offender's home or other specified premises for the specified period of confinement, except for periods of time during which the offender is at the offender's place of employment or at other premises as authorized by the sentencing court or by the parole board.

## ORC Ann. 2929.01

(2) The offender is required to report periodically to a person designated by the court or parole board.

(3) The offender is subject to any other restrictions and requirements that may be imposed by the sentencing court or by the parole board.

(R) "Intensive probation supervision" means a requirement that an offender maintain frequent contact with a person appointed by the court, or by the parole board pursuant to *section 2967.28 of the Revised Code*, to supervise the offender while the offender is seeking or maintaining necessary employment and participating in training, education, and treatment programs as required in the court's or parole board's order. "Intensive probation supervision" includes intensive parole supervision and intensive post-release control supervision.

(S) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.

(T) "Jail term" means the term in a jail that a sentencing court imposes or is authorized to impose pursuant to *section 2929.24 or 2929.25 of the Revised Code* or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction.

(U) "Mandatory jail term" means the term in a jail that a sentencing court is required to impose pursuant to division (G) of *section 1547.99 of the Revised Code*, division (E) of *section 2929.24 of the Revised Code*, division (E) of *section 2903.06* or division (D) of *section 2903.08 of the Revised Code*, division (B) of *section 4510.14 of the Revised Code*, or division (G) of *section 4511.19 of the Revised Code* or pursuant to any other provision of the Revised Code that requires a term in a jail for a misdemeanor conviction.

(V) "Delinquent child" has the same meaning as in *section 2152.02 of the Revised Code*.

(W) "License violation report" means a report that is made by a sentencing court, or by the parole board pursuant to *section 2967.28 of the Revised Code*, to the regulatory or licensing board or agency that issued an offender a professional license or a license or permit to do business in this state and that specifies that the offender has been convicted of or pleaded guilty to an offense that may violate the conditions under which the offender's professional license or license or permit to do business in this state was granted or an offense for which the offender's professional license or license or permit to do business in this state may be revoked or suspended.

(X) "Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains at least one thousand grams of hashish; at least one hundred grams of crack cocaine; at least one thousand grams of cocaine that is not crack cocaine; at least two thousand five hundred unit doses or two hundred fifty grams of heroin; at least five thousand unit doses of L.S.D. or five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form; or at least one hundred times the amount of any other schedule I or II controlled substance other than marijuana\* that is necessary to commit a felony of the third degree pursuant to *section 2925.03, 2925.04, 2925.05, or 2925.11 of the Revised Code* that is based on the possession of, sale of, or offer to sell the controlled substance.

(Y) "Mandatory prison term" means any of the following:

(1) Subject to division (Y)(2) of this section, the term in prison that must be imposed for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (14) of *section 2929.13* and division (D) of *section 2929.14 of the Revised Code*. Except as provided in *sections 2925.02, 2925.03, 2925.04, 2925.05, and 2925.11 of the Revised Code*, unless the maximum or another specific term is required under *section 2929.14 of the Revised Code*, a mandatory prison term described in this division may be any prison term authorized for the level of offense.

(2) The term of sixty or one hundred twenty days in prison that a sentencing court is required to impose for a

## ORC Ann. 2929.01

third or fourth degree felony OVI offense pursuant to division (G)(2) of section 2929.13 and division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code* or the term of one, two, three, four, or five years in prison that a sentencing court is required to impose pursuant to division (G)(2) of *section 2929.13 of the Revised Code*.

(3) The term in prison imposed pursuant to *section 2971.03 of the Revised Code* for the offenses and in the circumstances described in division (F)(11) of *section 2929.13 of the Revised Code* and that term as modified or terminated pursuant to *section 2971.05 of the Revised Code*.

(Z) "Monitored time" means a period of time during which an offender continues to be under the control of the sentencing court or parole board, subject to no conditions other than leading a law-abiding life.

(AA) "Offender" means a person who, in this state, is convicted of or pleads guilty to a felony or a misdemeanor.

(BB) "Prison" means a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction but does not include a violation sanction center operated under authority of *section 2967.141 of the Revised Code*.

(CC) "Prison term" includes any of the following sanctions for an offender:

(1) A stated prison term;

(2) A term in a prison shortened by, or with the approval of, the sentencing court pursuant to *section 2929.20, 2967.26, 5120.031 [5120.03.1], 5120.032 [5120.03.2], or 5120.073 [5102.07.3] of the Revised Code*;

(3) A term in prison extended by bad time imposed pursuant to *section 2967.11 of the Revised Code* or imposed for a violation of post-release control pursuant to *section 2967.28 of the Revised Code*.

(DD) "Repeat violent offender" means a person about whom both of the following apply:

(1) The person has been convicted of or has pleaded guilty to, and is being sentenced for committing, for complicity in committing, or for an attempt to commit, aggravated murder, murder, involuntary manslaughter, a felony of the first degree other than one set forth in Chapter 2925. of the Revised Code, a felony of the first degree set forth in Chapter 2925. of the Revised Code that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person, or a felony of the second degree that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person.

(2) Either of the following applies:

(a) The person previously was convicted of or pleaded guilty to, and previously served or, at the time of the offense was serving, a prison term for, any of the following:

(i) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under *section 2907.12 of the Revised Code* prior to September 3, 1996, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(ii) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed under division (DD)(2)(a)(i) of this section and that resulted in the death of a person or in physical harm to a person.

(b) The person previously was adjudicated a delinquent child for committing an act that if committed by an adult would have been an offense listed in division (DD)(2)(a)(i) or (ii) of this section, the person was committed to the department of youth services for that delinquent act.

(EE) "Sanction" means any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense. "Sanction" includes any sanction imposed pursuant to any provision of *sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code*.

(FF) "Sentence" means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.

(GG) "Stated prison term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to *section 2929.14 or 2971.03 of the Revised Code*. "Stated prison term" includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense and any time spent under house arrest or house arrest with electronic monitoring imposed after earning credits pursuant to *section 2967.193 [2967.19.3] of the Revised Code*.

(HH) "Victim-offender mediation" means a reconciliation or mediation program that involves an offender and the victim of the offense committed by the offender and that includes a meeting in which the offender and the victim may discuss the offense, discuss restitution, and consider other sanctions for the offense.

(II) "Fourth degree felony OVI offense" means a violation of division (A) of *section 4511.19 of the Revised Code* that, under division (G) of that section, is a felony of the fourth degree.

(JJ) "Mandatory term of local incarceration" means the term of sixty or one hundred twenty days in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility that a sentencing court may impose upon a person who is convicted of or pleads guilty to a fourth degree felony OVI offense pursuant to division (G)(1) of *section 2929.13 of the Revised Code* and division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code*.

(KK) "Designated homicide, assault, or kidnapping offense," "violent sex offense," "sexual motivation specification," "sexually violent offense," "sexually violent predator," and "sexually violent predator specification" have the same meanings as in *section 2971.01 of the Revised Code*.

(LL) "Habitual sex offender," "sexually oriented offense," "sexual predator," "registration-exempt sexually oriented offense," "child-victim oriented offense," "habitual child-victim offender," and "child-victim predator" have the same meanings as in *section 2950.01 of the Revised Code*.

(MM) An offense is "committed in the vicinity of a child" if the offender commits the offense within thirty feet of or within the same residential unit as a child who is under eighteen years of age, regardless of whether the offender knows the age of the child or whether the offender knows the offense is being committed within thirty feet of or within the same residential unit as the child and regardless of whether the child actually views the commission of the offense.

(NN) "Family or household member" has the same meaning as in *section 2919.25 of the Revised Code*.

(OO) "Motor vehicle" and "manufactured home" have the same meanings as in *section 4501.01 of the Revised Code*.

(PP) "Detention" and "detention facility" have the same meanings as in *section 2921.01 of the Revised Code*.

(QQ) "Third degree felony OVI offense" means a violation of division (A) of *section 4511.19 of the Revised Code* that, under division (G) of that section, is a felony of the third degree.

(RR) "Random drug testing" has the same meaning as in *section 5120.63 of the Revised Code*.

(SS) "Felony sex offense" has the same meaning as in *section 2967.28 of the Revised Code*.

(TT) "Body armor" has the same meaning as in *section 2941.1411 [2941.14.11] of the Revised Code*.

## ORC Ann. 2929.01

(UU) "Electronic monitoring" means monitoring through the use of an electronic monitoring device.

(VV) "Electronic monitoring device" means any of the following:

(1) Any device that can be operated by electrical or battery power and that conforms with all of the following:

(a) The device has a transmitter that can be attached to a person, that will transmit a specified signal to a receiver of the type described in division (VV)(1)(b) of this section if the transmitter is removed from the person, turned off, or altered in any manner without prior court approval in relation to electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with, that can transmit continuously and periodically a signal to that receiver when the person is within a specified distance from the receiver, and that can transmit an appropriate signal to that receiver if the person to whom it is attached travels a specified distance from that receiver.

(b) The device has a receiver that can receive continuously the signals transmitted by a transmitter of the type described in division (VV)(1)(a) of this section, can transmit continuously those signals by telephone to a central monitoring computer of the type described in division (VV)(1)(c) of this section, and can transmit continuously an appropriate signal to that central monitoring computer if the receiver is turned off or altered without prior court approval or otherwise tampered with.

(c) The device has a central monitoring computer that can receive continuously the signals transmitted by telephone by a receiver of the type described in division (VV)(1)(b) of this section and can monitor continuously the person to whom an electronic monitoring device of the type described in division (VV)(1)(a) of this section is attached.

(2) Any device that is not a device of the type described in division (VV)(1) of this section and that conforms with all of the following:

(a) The device includes a transmitter and receiver that can monitor and determine the location of a subject person at any time, or at a designated point in time, through the use of a central monitoring computer or through other electronic means.

(b) The device includes a transmitter and receiver that can determine at any time, or at a designated point in time, through the use of a central monitoring computer or other electronic means the fact that the transmitter is turned off or altered in any manner without prior approval of the court in relation to the electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with.

(3) Any type of technology that can adequately track or determine the location of a subject person at any time and that is approved by the director of rehabilitation and correction, including, but not limited to, any satellite technology, voice tracking system, or retinal scanning system that is so approved.

(WW) "Non-economic loss" means nonpecuniary harm suffered by a victim of an offense as a result of or related to the commission of the offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(XX) "Prosecutor" has the same meaning as in *section 2935.01 of the Revised Code*.

(YY) "Continuous alcohol monitoring" means the ability to automatically test and periodically transmit alcohol consumption levels and tamper attempts at least every hour, regardless of the location of the person who is being monitored.

## ORC Ann. 2929.01

(ZZ) A person is "adjudicated a sexually violent predator" if the person is convicted of or pleads guilty to a violent sex offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that violent sex offense or if the person is convicted of or pleads guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that designated homicide, assault, or kidnapping offense.

**HISTORY:** 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v H 480 (Eff 10-16-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 378 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 148 v S 222 (Eff 3-22-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327, Eff 7-8-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 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.

**NOTES:**

The provisions of § 3 of H.B. 473 (150 v --) read as follows:

SECTION 3. \* \* \* Sections 2929.01, 2929.13, and 2929.14 of the Revised Code are presented in this act as composites of the sections as amended by both Sub. H.B. 52 and Am. Sub. H.B. 163 of the 125th General Assembly. \* \* \* The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composites are the resulting versions of the sections in effect prior to the effective date of the sections as presented in this act.

The effective date is set by section 4 of H.B. 490.

Not analogous to former RC § 2929.01 (134 v H 511; 136 v H 300; 137 v H 565; 139 v S 199; 140 v S 210; 142 v H 261; 145 v H 571; 145 v S 186, repealed 146 v S 2, § 2, eff 7-1-96.

The provisions of § 5 of S.B. 123 (149 v --), as amended by § 3 of H.B. 163 (150 v --), read as follows:

SECTION 5. Notwithstanding division (B) of section 1.58 of the Revised Code, the provisions of the Revised Code amended or enacted in Sections 1 and 2 of this act shall apply only in relation to conduct and offenses committed on or after January 1, 2004. Conduct and offenses committed prior to January 1, 2004, shall be governed by the law in effect on the date the conduct or offense was committed.

See provisions, § 4 of HB 327 (149 v --) following RC § 2919.25.

See provisions, § 11 of SB 179 (148 v --) following RC § 2923.36.

**EFFECT OF AMENDMENTS**

150 v H 473, effective April 29, 2005, inserted "violent sex offense" in (KK); added (ZZ); and made minor stylistic changes.

150 v H 163, effective September 23, 2004, inserted "division (E) of section 2929.24 of the Revised Code" in (U); added "or the term of one ... of the Revised Code" to the end of (Y)(2); and added (WW).

150 v H 52, effective June 1, 2004, in (M), inserted "direct and proximate", and added the last sentence; in (U), inserted "division (E) of section 2903.06 or division (D) of section 2903.08 of the Revised Code"; and added (WW) and (XX).

S.B. 57, Acts 2003, effective January 1, 2004, in (M), substituted "offense" for "felony" twice, and made related changes.

Section 3, S.B. 5, Acts 2003, effective January 1, 2004, inserted ""registration-exempt sexually oriented offense," "child-victim oriented offense," "habitual child-victim offender," and "child-victim predator" in (LL); and added (UU) and (VV).

S.B. 123, Acts 2002, effective January 1, 2004, substituted "OVI" for "OMVI" in (Y)(2), (II), (JJ), and (QQ); substituted "(G)(1)(d)" for "(A)(4)", "(e)" for "(8)" and "4511.19" for "4511.99" in (Y)(2); inserted "division (G) of that" and deleted "4511.99 of the Revised Code" preceding "is a felony of the forth degree" in (II); substituted "(G)(1)(d)" for "(A)(4)", "(e)" for "(8)" and "4511.19" for "4511.99" in (JJ); in (QQ), inserted "division (G) of that" and

## **2929.01 Penalties and sentencing general definitions.**

As used in this chapter:

(A)(1) "Alternative residential facility" means, subject to division (A)(2) of this section, any facility other than an offender's home or residence in which an offender is assigned to live and that satisfies all of the following criteria:

(a) It provides programs through which the offender may seek or maintain employment or may receive education, training, treatment, or habilitation.

(b) It has received the appropriate license or certificate for any specialized education, training, treatment, habilitation, or other service that it provides from the government agency that is responsible for licensing or certifying that type of education, training, treatment, habilitation, or service.

(2) "Alternative residential facility" does not include a community-based correctional facility, jail, halfway house, or prison.

(B) "Bad time" means the time by which the parole board administratively extends an offender's stated prison term or terms pursuant to section 2967.11 of the Revised Code because the parole board finds by clear and convincing evidence that the offender, while serving the prison term or terms, committed an act that is a criminal offense under the law of this state or the United States, whether or not the offender is prosecuted for the commission of that act.

(C) "Basic probation supervision" means a requirement that the offender maintain contact with a person appointed to supervise the offender in accordance with sanctions imposed by the court or imposed by the parole board pursuant to section 2967.28 of the Revised Code. "Basic probation supervision" includes basic parole supervision and basic post-release control supervision.

(D) "Cocaine," "crack cocaine," "hashish," "L.S.D.," and "unit dose" have the same meanings as in section 2925.01 of the Revised Code.

(E) "Community-based correctional facility" means a community-based correctional facility and program or district community-based correctional facility and program developed pursuant to sections 2301.51 to 2301.58 of the Revised Code.

(F) "Community control sanction" means a sanction that is not a prison term and that is described in section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code or a sanction that is not a jail term and that is described in section 2929.26, 2929.27, or 2929.28 of the Revised Code. "Community control sanction" includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004.

(G) "Controlled substance," "marihuana," "schedule I," and "schedule II" have the same meanings as in section 3719.01 of the Revised Code.

(H) "Curfew" means a requirement that an offender during a specified period of time be at a designated place.

(I) "Day reporting" means a sanction pursuant to which an offender is required each day to report to and leave a center or other approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center.

(J) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(K) "Drug and alcohol use monitoring" means a program under which an offender agrees to submit to random chemical analysis of the offender's blood, breath, or urine to determine whether the offender has ingested any alcohol or other drugs.

(L) "Drug treatment program" means any program under which a person undergoes assessment and treatment designed to reduce or completely eliminate the person's physical or emotional reliance upon alcohol, another drug, or alcohol and another drug and under which the person may be required to receive assessment and treatment on an outpatient basis or may be required to reside at a facility other than the person's home or residence while undergoing assessment and treatment.

(M) "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(N) "Education or training" includes study at, or in conjunction with a program offered by, a university, college, or technical college or vocational study and also includes the completion of primary school, secondary school, and literacy curricula or their equivalent.

(O) "Firearm" has the same meaning as in section 2923.11 of the Revised Code.

(P) "Halfway house" means a facility licensed by the division of parole and community services of the department of rehabilitation and correction pursuant to section 2967.14 of the Revised Code as a suitable facility for the care and treatment of adult offenders.

(Q) "House arrest" means a period of confinement of an offender that is in the offender's home or in other premises specified by the sentencing court or by the parole board pursuant to section 2967.28 of the Revised Code and during which all of the following apply:

(1) The offender is required to remain in the offender's home or other specified premises for the specified period of confinement, except for periods of time during which the offender is at the offender's place of employment or at other premises as authorized by the sentencing court or by the parole board.

(2) The offender is required to report periodically to a person designated by the court or parole board.

(3) The offender is subject to any other restrictions and requirements that may be imposed by the sentencing court or by the parole board.

(R) "Intensive probation supervision" means a requirement that an offender maintain frequent contact with a person appointed by the court, or by the parole board pursuant to section 2967.28 of the Revised Code, to supervise the offender while the offender is seeking or maintaining necessary employment and participating in training, education, and treatment programs as required in the court's or parole board's order. "Intensive probation supervision" includes intensive parole supervision and intensive post-release control supervision.

(S) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.

(T) "Jail term" means the term in a jail that a sentencing court imposes or is authorized to impose pursuant to section 2929.24 or 2929.25 of the Revised Code or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction.

(U) "Mandatory jail term" means the term in a jail that a sentencing court is required to impose pursuant to division (G) of section 1547.99 of the Revised Code, division (E) of section 2903.06 or division (D) of section 2903.08 of the Revised Code, division (E) of section 2929.24 of the Revised Code, division (B) of section 4510.14 of the Revised Code, or division (G) of section 4511.19 of the Revised Code or pursuant to any other provision of the Revised Code that requires a term in a jail for a misdemeanor conviction.

(V) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.

(W) "License violation report" means a report that is made by a sentencing court, or by the parole board pursuant to section 2967.28 of the Revised Code, to the regulatory or licensing board or agency that issued an offender a professional license or a license or permit to do business in this state and that specifies that the offender has been convicted of or pleaded guilty to an offense that may violate the conditions under which the offender's professional license or license or permit to do business in this state was granted or an offense for which the offender's professional license or license or permit to do business in this state may be revoked or suspended.

(X) "Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains at least one thousand grams of hashish; at least one hundred grams of crack cocaine; at least one thousand grams of cocaine that is not crack cocaine; at least two thousand five hundred unit doses or two hundred fifty grams of heroin; at least five thousand unit doses of L.S.D. or five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form; or at least one hundred times the amount of any other schedule I or II controlled substance other than marijuana that is necessary to commit a felony of the third degree pursuant to section 2925.03, 2925.04, 2925.05, or 2925.11 of the Revised Code that is based on the possession of, sale of, or offer to sell the controlled substance.

(Y) "Mandatory prison term" means any of the following:

(1) Subject to division (Y)(2) of this section, the term in prison that must be imposed for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (14) of section 2929.13 and division (D) of section 2929.14 of the Revised Code. Except as provided in sections 2925.02, 2925.03, 2925.04, 2925.05, and 2925.11 of the Revised Code, unless the maximum or another specific term is required under section 2929.14 or 2929.142 of the Revised Code, a mandatory prison term described in this division may be any prison term authorized for the level of offense.

(2) The term of sixty or one hundred twenty days in prison that a sentencing court is required to impose for a third or fourth degree felony OVI offense pursuant to division (G)(2) of section 2929.13 and division (G)(1)(d) or (e) of section 4511.19 of the Revised Code or the term of one, two, three, four, or five years in prison that a sentencing court is required to impose pursuant to division (G)(2) of section 2929.13 of the Revised Code.

(3) The term in prison imposed pursuant to division (A) of section 2971.03 of the Revised Code for the offenses and in the circumstances described in division (F)(11) of section 2929.13 of the Revised Code or pursuant to division (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of section 2971.03 of the Revised Code and that term as modified or terminated pursuant to section 2971.05 of the Revised Code.

(Z) "Monitored time" means a period of time during which an offender continues to be under the control of the sentencing court or parole board, subject to no conditions other than leading a law-abiding life.

(AA) "Offender" means a person who, in this state, is convicted of or pleads guilty to a felony or a misdemeanor.

(BB) "Prison" means a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction but does not include a violation sanction center operated under authority of section 2967.141 of the Revised Code.

(CC) "Prison term" includes any of the following sanctions for an offender:

(1) A stated prison term;

(2) A term in a prison shortened by, or with the approval of, the sentencing court pursuant to section 2929.20, 2967.26, 5120.031, 5120.032, or 5120.073 of the Revised Code;

(3) A term in prison extended by bad time imposed pursuant to section 2967.11 of the Revised Code or imposed for a violation of post-release control pursuant to section 2967.28 of the Revised Code.

(DD) "Repeat violent offender" means a person about whom both of the following apply:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (DD)(1)(a) of this section.

(2) The person previously was convicted of or pleaded guilty to an offense described in division (DD)(1)(a) or (b) of this section.

(EE) "Sanction" means any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense. "Sanction" includes any sanction imposed pursuant to any provision of sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code.

(FF) "Sentence" means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.

(GG) "Stated prison term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to section 2929.14, 2929.142, or 2971.03 of the Revised Code. "Stated prison term" includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense and any time spent under house arrest or house arrest with electronic monitoring imposed after earning credits pursuant to section 2967.193 of the Revised Code.

(HH) "Victim-offender mediation" means a reconciliation or mediation program that involves an offender and the victim of the offense committed by the offender and that includes a meeting in which the offender and the victim may discuss the offense, discuss restitution, and consider other sanctions for the offense.

(II) "Fourth degree felony OVI offense" means a violation of division (A) of section 4511.19 of the Revised Code that, under division (G) of that section, is a felony of the fourth degree.

(JJ) "Mandatory term of local incarceration" means the term of sixty or one hundred twenty days in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility that a sentencing court may impose upon a person who is convicted of or pleads guilty to a fourth degree felony OVI offense pursuant to division (G)(1) of section 2929.13 of the Revised Code and division (G)(1)(d) or (e) of section 4511.19 of the Revised Code.

(KK) "Designated homicide, assault, or kidnapping offense," "violent sex offense," "sexual motivation specification," "sexually violent offense," "sexually violent predator," and "sexually violent predator specification" have the same meanings as in section 2971.01 of the Revised Code.

(LL) "Sexually oriented offense," "child-victim oriented offense," and "tier III sex offender/child-victim offender," have the same meanings as in section 2950.01 of the Revised Code.

(MM) An offense is "committed in the vicinity of a child" if the offender commits the offense within thirty feet of or within the same residential unit as a child who is under eighteen years of age, regardless of whether the offender knows the age of the child or whether the offender knows the offense is being committed within thirty feet of or within the same residential unit as the child and regardless of whether the child actually views the commission of the offense.

(NN) "Family or household member" has the same meaning as in section 2919.25 of the Revised Code.

(OO) "Motor vehicle" and "manufactured home" have the same meanings as in section 4501.01 of the Revised Code.

(PP) "Detention" and "detention facility" have the same meanings as in section 2921.01 of the Revised Code.

(QQ) "Third degree felony OVI offense" means a violation of division (A) of section 4511.19 of the Revised Code that, under division (G) of that section, is a felony of the third degree.

(RR) "Random drug testing" has the same meaning as in section 5120.63 of the Revised Code.

(SS) "Felony sex offense" has the same meaning as in section 2967.28 of the Revised Code.

(TT) "Body armor" has the same meaning as in section 2941.1411 of the Revised Code.

(UU) "Electronic monitoring" means monitoring through the use of an electronic monitoring device.

(VV) "Electronic monitoring device" means any of the following:

(1) Any device that can be operated by electrical or battery power and that conforms with all of the following:

(a) The device has a transmitter that can be attached to a person, that will transmit a specified signal to a receiver of the type described in division (VV)(1)(b) of this section if the transmitter is removed from the person, turned off, or altered in any manner without prior court approval in relation to electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with, that can transmit continuously and periodically a signal to that receiver when the person is within a specified distance from the receiver, and that can transmit an appropriate signal to that receiver if the person to whom it is attached travels a specified distance from that receiver.

(b) The device has a receiver that can receive continuously the signals transmitted by a transmitter of the type described in division (VV)(1)(a) of this section, can transmit continuously those signals by telephone to a central monitoring computer of the type described in division (VV)(1)(c) of this section, and can transmit continuously an appropriate signal to that central monitoring computer if the receiver is turned off or altered without prior court approval or otherwise tampered with.

(c) The device has a central monitoring computer that can receive continuously the signals transmitted by telephone by a receiver of the type described in division (VV)(1)(b) of this section and can monitor continuously the person to whom an electronic monitoring device of the type described in division (VV)(1)(a) of this section is attached.

(2) Any device that is not a device of the type described in division (VV)(1) of this section and that conforms with all of the following:

(a) The device includes a transmitter and receiver that can monitor and determine the location of a subject person at any time, or at a designated point in time, through the use of a central monitoring computer or through other electronic means.

(b) The device includes a transmitter and receiver that can determine at any time, or at a designated point in time, through the use of a central monitoring computer or other electronic means the fact that the transmitter is turned off or altered in any manner without prior approval of the court in relation to the electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with.

(3) Any type of technology that can adequately track or determine the location of a subject person at any time and that is approved by the director of rehabilitation and correction, including, but not limited to, any satellite technology, voice tracking system, or retinal scanning system that is so approved.

(WW) "Non-economic loss" means nonpecuniary harm suffered by a victim of an offense as a result of or related to the commission of the offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(XX) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(YY) "Continuous alcohol monitoring" means the ability to automatically test and periodically transmit alcohol consumption levels and tamper attempts at least every hour, regardless of the location of the person who is being monitored.

(ZZ) A person is "adjudicated a sexually violent predator" if the person is convicted of or pleads guilty to a violent sex offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that violent sex offense or if the person is convicted of or pleads guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that designated homicide, assault, or kidnapping offense.

(AAA) An offense is "committed in proximity to a school" if the offender commits the offense in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises, regardless of whether the offender knows the offense is being committed in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises.

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## **2929.11 Purposes of felony sentencing.**

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

Effective Date: 07-01-1996

72 of 134 DOCUMENTS

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\*\*\* ARCHIVE MATERIAL \*\*\*

\* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY \*  
\* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 18, 2005 \*  
\* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2005 \*

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

*ORC Ann. 2929.14 (2005)*

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), or (G) 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), or (G) of this section, in *section 2907.02 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) 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. 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) 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. A court shall not impose more than one additional prison term on an offender under division (D)(1)(f) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(2) (a) If 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 2941.149 [2941.14.9] of the Revised Code* that the offender is a repeat violent offender, the court shall impose a prison term from the range of terms authorized for the offense under division (A) of this section that may be the longest term in the range and 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 the court finds that the repeat violent offender, in committing the offense, caused any physical harm that carried a substantial risk of death to a person or that involved substantial permanent incapacity or substantial permanent disfigurement of a person, the court shall impose the longest prison term from the range of terms authorized for the offense under division (A) of this section.

(b) If the court imposing a prison term on a repeat violent offender imposes the longest prison term from the range of terms authorized for the offense under division (A) of this section, the court may impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if the court finds that both of the following apply with respect to the prison terms imposed on the offender pursuant to division (D)(2)(a) of this section and, if applicable, divisions (D)(1) and (3) of this section:

(i) The terms so imposed 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.

(ii) The terms so imposed 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.

(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)(b)(i) and (ii) 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 2941.1413 [2941.14.13] 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*, 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*

## ORC Ann. 2929.14

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 2941.1414 [2941.14.14] 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 2941.1414 [2941.14.14] 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.

## ORC Ann. 2929.14

(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. 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.

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

(F) If a court imposes a prison term of a type described in division (B) of *section 2967.28 of the Revised Code*, 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 prison term of a type described in division (C) of that 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.

(G) If a person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and, in relation to that offense, the offender is adjudicated a sexually violent predator, the court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment.

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

(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.

**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.

## **2929.14 Definite 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, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life

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

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

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

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

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

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

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G) (2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding

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

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

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

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

(E)(1)(a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is

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

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

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

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

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

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

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the

Revised Code, or was under post-release control for a prior offense.

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

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

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

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) 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 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

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

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

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

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

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

(4) A person is convicted of or pleads guilty to a violation of section 2905.01 of the Revised Code committed on or after 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, 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 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

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

(J)(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 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, or 2907.25 of the Revised Code and to a specification of the type described in section 2941.1421 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, 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 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, 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 of the Revised Code or for placement in an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

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

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

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

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

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

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## **2941.149 Repeat violent offender specification.**

(A) The determination by a court that an offender is a repeat violent offender is precluded unless the indictment, count in the indictment, or information charging the offender specifies that the offender is a repeat violent offender. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender is a repeat violent offender)."

(B) The court shall determine the issue of whether an offender is a repeat violent offender.

(C) At the arraignment of the defendant or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use a certified copy of the entry of judgment of a prior conviction as proof of that prior conviction. The defendant must then give notice to the prosecuting attorney of the defendant's intention to object to the use of the entry of judgment. If the defendant pursuant to Criminal Rule 12 does not give notice of that intention to the prosecuting attorney before trial, the defendant waives the objection to the use of an entry of judgment as proof of the defendant's prior conviction, as shown on the entry of judgment.

(D) As used in this section, "repeat violent offender" has the same meaning as in section 2929.01 of the Revised Code.

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