ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellant,

v.

Jason Singleton,

Defendant-Appellee.

Case No. 2008-1255

On appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. 90042

Merit Brief of Appellee Jason Singleton

William D. Mason, 0037540
Cuyahoga County Prosecutor

T. Allan Regas, 0067336
Assistant Prosecuting Attorney
(Counsel of Record)

Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
(216) 698-2270 - Fax

Counsel for Plaintiff-Appellant

Office of the Ohio Public Defender

By: Stephen P. Hardwick, 0062932
Assistant Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
stephen.hardwick@opd.ohio.gov

Counsel for Defendant-Appellee

FILED
APR 22 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

Page No.

Table of Contents i

Table of Authorities iv

Introduction 1

Statement of the Case and the Facts 3

Argument 4

Appellee's Proposition of Law No. I:

Revised Code Section 2929.191 is consistent with the de novo resentencing required to correct a void sentence 4

I. Section 2929.191 does not require a trial court to merely tack postrelease control onto a previously-imposed prison term. 4

A. The text of the statute is silent as to the scope of the hearing undefined. 4

B. The words "correction" and "nunc pro tunc" do not prevent a de novo resentencing 4

1. A trial court can correct a judgment entry by resentencing a defendant de novo for a particular offense 4

2. The General Assembly is using the term "nunc pro tunc" differently than this Court traditionally has. 5

C. Nothing in R.C. 2929.191 indicates that it provides the exclusive and exhaustive remedy to correct illegal sentences 6

II. Interpreting R.C. 2929.191 to permit de novo resentencing avoids constitutional difficulties and other undesirable results 7

A. If R.C. 2929.191 were interpreted to permit the State to correct error in a voidable, instead of a void, sentence, res judicata would bar most actions under the statute 7

Table of Contents

Page No.

B. When the sentence for an offense is void, there is nothing to which a term of postrelease control can attach. 8

C. Interpreting R.C. 2929.191 to permit de novo sentencing hearing avoids multiple constitutional problems 8

Proposition of Law No. II:

Trial and appellate judges should affirm, reverse or modify sentences on a count-by-count basis, not a sanction-by-sanction basis. 10

I. R.C. 2929.191 permits the "correction" of a judgment entry, leaving the scope of the resentencing of a void sentence. 10

II. Because R.C. 2929.191 does not change the unit of measure for correcting an illegal sentence, the State's brief is simply a request to overrule Bezak. 10

III. This Court decided Bezak correctly. Under R.C. 2929.01(EE) and R.C. 2953.08, the unit of measure for review is the offense, not the sanction for each offense 11

A. Courts impose and review sentences offense by offense, not case by case or sanction by sanction 11

B. Evans did not overrule Saxon 12

C. Many trial courts likely imposed a higher prison term because they reasonably believed that postrelease control would not attach to the sentence. 13

D. Fixing a void sentencing is not a one-way ratchet. 14

Conclusion 14

Certificate of Service 15

Table of Contents

Page No.

Appendix:

Fifth Amendment, United States Constitution A-1

Fourteenth Amendment, United States Constitution A-2

R.C. 2929.12 ..... A-3

R.C. 2929.13 ..... A-5

R.C. 2953.08 ..... A-11

R.C. 2953.21 ..... A-15

Crim.R. 32 ..... A-18

Crim.R. 43 ..... A-19

Crim.R. 44 ..... A-20

Article 1, §1.10a, Ohio Constitution A-21

TABLE OF AUTHORITIES

Page No.

Cases:

City of Akron v. Rowland (1993), 67 Ohio St.3d 374 9

Co-operative Legislative Commt. of the Transp. Bhds. & Bhd. of Maintenance of Way Emp. v. Pub. Util. Comm. (1964), 177 Ohio St. 101 9

State v. Ferrell, 8th Dist. No. 85821, 2005-Ohio-5992, discretionary appeal not allowed, 108 Ohio St.3d 1418, 2006-Ohio-179 6

Helle v. Public Utilities Com. (1928), 118 Ohio St. 434 5

Hernandez v. Kelly, 108 Ohio St.3d 395, 2006-Ohio-126 1

Myers v. Toledo, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176 6

State v. Beasley (1984), 14 Ohio St.3d 74 1,9

State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250; ..... *passim*

State v. Duncan (Apr. 14, 2000), Hamilton App. No. C-990582, 2000 Ohio App. LEXIS 1641 13

State v. Evans, 113 Ohio St.3d 100, 2007-Ohio-861 2,5,12,13

State v. Houston, 73 Ohio St.3d 346, 1995-Ohio-317 7

State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085 1,9

State v. Perry (1967), 10 Ohio St.2d 175 7,8

State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245 ..... *passim*

State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197 8

State v. Were, 120 Ohio St.3d 85, 2008-Ohio-5277 7

State ex rel. Mosley v. Nichols (Jul. 24, 2000), Ross App. No. 00CA2542, 2000 Ohio App. LEXIS 3399 13

United States v. Cronic (1984), 466 U.S. 648 7

Table of Authorities

Page No.

Cases:

United States v. DiFrancesco (1980), 449 U.S. 117, 66 L. Ed. 2d 328, 101 S. Ct. 426 9

Witt v. United States (1995), 515 U.S. 389 9

Woods v. Telb (Jun. 23, 1999), Lucas App. No. L-99-1083, 1999 Ohio App. LEXIS 3017 13

Woods v. Telb (2000), 89 Ohio St.3d 504 13

Constitutional Amendments:

Fifth Amendment, United States Constitution 9

Fourteenth Amendment, United States Constitution 9

Article 1, §1.10a, Ohio Constitution 7

Statutes:

R.C. 2929.01 2,11,12,13,14

R.C. 2929.11 2,12,13

R.C. 2929.12 2,12,13

R.C. 2929.13 12

R.C. 2929.191 ..... *passim*

R.C. 2953.08 11,12

R.C. 2953.21 6

R.C. 2967.28 5,12

Rules:

Crim.R. 32 7

Crim.R. 43 7

Crim.R. 44 7

Introduction

The controversy surrounding R.C. 2929.191 is much ado about very little. The language of the statute requires virtually nothing and, when read in the context of other statutes, rules, and constitutional provisions, it is both constitutional and consistent with this Court's holdings in Beasley,[1] Jordan,[2] Hernandez,[3] and Bezak.[4] The words of the statute do not limit a trial court to merely tacking postrelease control onto a prison term. A court can, consistent with R.C. 2929.191, hold a de novo sentencing hearing and issue a corrected judgment entry of conviction that reflects the defendant's entire new sentence.

Although in hindsight, the statute has little, if any, effect, it was not irrational at the time it was passed. The statute was enacted after this Court announced Hernandez but before it announced Bezak. In that time, lower courts were uncertain whether judgments that did not impose postrelease control were void ab initio or merely voidable. Many criminal defendants were arguing that the judgments were merely voidable, and the State would have no means of fixing judgments more than thirty days old. If that theory had prevailed, hundreds, if not thousands, of ex-offenders would have avoided postrelease control. So the General Assembly stepped in and quickly passed a measure that authorized trial courts to revisit old judgments. But about a year later, this Court issued Bezak, which did more than merely *authorize* trial

---

[1] State v. Beasley (1984), 14 Ohio St.3d 74.
[2] State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085.
[3] Hernandez v. Kelly, 108 Ohio St.3d 395, 2006-Ohio-126.
[4] State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250.

courts to fix illegal sentences. This court *required* trial courts to fix illegal sentences, so long as the defendant was still in prison.

Any other conclusion could lead to constitutional difficulties. And, like any other statute, this Court should construe R.C. 2929.191 to avoid constitutional difficulties. If the term "corrected" means that the original sentence were merely voidable, res judicata would almost always bar the State from availing itself of R.C. 2929.191, and defendants would largely escape any attempt to add postrelease control to their sentences.

Further, nothing in the text of R.C. 2929.191 changes the fact that R.C. 2929.01(EE)[5] and 2953.08 look at the combination of sanctions on a count-by-count basis rather than a sanction-by-sanction basis. State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245; State v. Evans, 113 Ohio St.3d 100, 2007-Ohio-861. In practice many trial judges, following local appellate rulings that postrelease control was unconstitutional, chose a prison term sufficiently long to punish the defendant without postrelease control. Tacking postrelease control onto a prison term calculated to be sufficient without postrelease control violates the letter of R.C. 2929.01(E) and the spirit for the balancing factors in R.C. 2929.11 and 2929.12.

Section 2929.191 provides a framework that is entirely consistent with the remedy this Court followed in Bezak—a de novo resentencing. This Court should affirm the decision of the court of appeals and remand this case to the trial court for a new sentencing hearing.

---

[5] The definition of "sentence" was codified in R.C. 2929.01(FF) at the time of Saxon and Evans. It is now codified as R.C. 2929.01(EE).

Statement of the Case and the Facts

Appellee accepts Appellant's statement of the case and the facts.

Argument

Appellee's Proposition of Law No. I:

Revised Code Section 2929.191 is consistent with the de novo resentencing required to correct a void sentence.

I. Section 2929.191 does not require a trial court to merely tack postrelease control onto a previously-imposed prison term.

A. The text of the statute is silent as to the scope of the hearing.

The State's brief assumes that R.C. 2929.191 requires a trial court to merely tack postrelease control onto the previously imposed prison term. The words of the statute do not support the State's assumption. As the court of appeals correctly held, R.C. 2929.191 does not specify whether the hearing to correct the judgment is a de novo sentencing hearing or merely a form-over-substance notification. Slip Op. at page 9. The statute merely authorizes a court to hold a hearing to orally impose postrelease control and to issue a "correction" of a judgment entry that does not impose the sanction. No words in the statute prohibit a de novo resentencing. The statute leaves open the scope of the hearing.

B. The words "correction" and "nunc pro tunc" do not prevent a de novo resentencing.

1. A trial court can correct a judgment entry by resentencing a defendant de novo for a particular offense.

The "correction" of the "judgment of conviction" is consistent with a de novo resentencing for those offenses with void sentences. A trial court can "correct" a void sentence in a judgment entry that is otherwise valid. As this

Court held in State v. Saxon, 109 Ohio St.3d 176, 2006-Ohio-1245 and State v. Evans, 113 Ohio St.3d 100, 2007-Ohio-861, the unit of measure in Ohio criminal law is the "offense." Frequently, prosecutors combine offenses under a single case number, but that is only an administrative convenience. As this Court recognized in State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, within a given case number, a judgment of conviction could be valid as to some offenses, but void as to others. Citing Saxon, this Court held that "[w]hen a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense." Bezak, at the syllabus. Accordingly, if the sanction for an offense is illegal and void, a trial court can "correct" a judgment entry by resentencing the defendant de novo.

2. The General Assembly is using the term "nunc pro tunc" differently than this Court traditionally has.

The General Assembly does not appear to be using the term "nunc pro tunc" in the same way the courts use the term because R.C. 2929.191 authorizes a "nunc pro tunc" entry to correct substantive error. This Court has held that "[i]t is not the province of a nunc pro tunc order to correct a mistake in judgment, its sole function being that of correcting a clerical error in the execution of a ministerial act." Helle v. Public Utilities Com. (1928), 118 Ohio St. 434, 438. But the General Assembly appears to be using a more flexible definition that includes correcting errors in a judgment. The General Assembly might have been relying on two aberrant decisions from the Eighth Appellate

District that authorize the use of the term to correct error in the sentencing hearing, not just to make the entry conform to what occurred in open court. State v. Ferrell, 8th Dist. No. 85821, 2005-Ohio-5992, at ¶10, discretionary appeal not allowed, 108 Ohio St.3d 1418, 2006-Ohio-179 (court can use nunc pro tunc to correct illegal sentence even outside the defendant's presence).

Like R.C. 2929.191, the cursory court of appeals decision in Ferrell does not answer the question of the scope of the error to be corrected in any given case. Accordingly, the term "nunc pro tunc" in R.C. 2929.191 neither prohibits nor requires a de novo resentencing.

C. Nothing in R.C. 2929.191 indicates that it provides the exclusive and exhaustive remedy to correct illegal sentences.

Trial courts imposing a sentence under R.C. 2929.191 must necessarily look to other statutes, rules and constitutional provisions in order to do their work. Nothing in R.C. 2929.191 states that it is the exclusive remedy to correct void judgments. The General Assembly knows how to declare that a remedy is exclusive. See, e.g., R.C. 2953.21(J) ("the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence"). The lack of a provision similar to that in R.C. 2953.21(J) demonstrates that the General Assembly did not intend for R.C. 2929.191 to be the exclusive remedy to "correct" sentences that are both illegal and void. See, Myers v. Toledo, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶24. ("The canon expressio unius est exclusio

alterius tells us that the express inclusion of one thing implies the exclusion of the other").

When resentencing a defendant under R.C. 2929.191, trial courts must comply with Crim.R. 32(C) to follow the requirement to allow the requirement as to form and content of the judgment entry of sentence. Trial courts must also look to Crim.R. 32(A) to afford the victims the right to speak as required under Article 1, §1.10a. A trial court must look to Crim.R. 43 and 44, as well as to United States v. Cronic (1984), 466 U.S. 648, to determine under what circumstances the defendant can be excluded from the courtroom. Section 2929.191 is but one of many statutes, rules, constitutional provisions and court decisions to which trial courts must look when exercising their duty to correct an illegal sentence.

II. Interpreting R.C. 2929.191 to permit de novo resentencing avoids constitutional difficulties and other undesirable results.

A. If R.C. 2929.191 were interpreted to permit the State to correct error in a voidable, instead of a void, sentence, res judicata would bar most actions under the statute.

If the term "correction" in R.C. 2929.191 means that the original sentence was merely voidable, then res judicata would almost always bar the State from availing itself of R.C. 2929.191. The existence of a remedy does not eliminate defenses to that remedy. See, e.g. State v. Were, 120 Ohio St.3d 85, 2008-Ohio-5277, at ¶7, quoting State v. Houston, 73 Ohio St.3d 346, 347, 1995-Ohio-317 ("Res judicata may be applied to bar further litigation [in an App.R. 26(B) application] of issues that were raised previously or could have been raised previously in an appeal"); and State v. Perry (1967), 10 Ohio St.2d

175 (res judicata may bar issues litigated in a postconviction petition). Because the State almost always had the opportunity to object in the trial court when postrelease control was not imposed and to appeal when the judgment did not include the sanction, res judicata would bar most actions under the statute.

By contrast, when a sentence is void, res judicata does not apply. State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶24-5. Accordingly, a de novo sentencing hearing to issue a valid sentence is the only means by which the State can avoid a res judicata bar.

B. When the sentence for an offense is void, there is nothing to which a term of postrelease control can attach.

If a defendant has never been lawfully sentenced, he has never been lawfully sentenced. An add-on hearing is insufficient to correct the void sentence because there is nothing to add the new sanction onto. If R.C. 2929.191 requires a trial court to merely add postrelease control to a defendant's punishment, the statute would not be sufficient to correct the problem. A defendant who has postrelease control merely tacked onto a void sentence still has a void sentence.

C. Interpreting R.C. 2929.191 to permit de novo sentencing hearing avoids multiple constitutional problems.

If R.C. 2929.191 meant what the State claimed, the Fifth Amendment Double Jeopardy provision would bar the State from using the statute. When "it is reasonably possible, validly enacted legislation must be construed in a manner 'which will avoid rather than . . . raise serious questions as to its

constitutionality.'" City of Akron v. Rowland (1993), 67 Ohio St.3d 374, 380 (Ohio 1993), quoting Co-operative Legislative Commt. of the Transp. Bhds. & Bhd. of Maintenance of Way Emp. v. Pub. Util. Comm. (1964), 177 Ohio St. 101, paragraph two of the syllabus (ellipsis in Rowland). Construing R.C. 2929.191 to require that trial courts merely tack postrelease control onto a previous prison term would create double jeopardy and due process problems.

Merely tacking postrelease control onto a defendant's sentence violates his Fifth and Fourteenth Amendment right to be free from double jeopardy for two reasons. First, the addition of postrelease control long after the prison term had already been imposed constitutes multiple punishments. See, generally, Witt v. United States (1995), 515 U.S. 389, 391 ("the Double Jeopardy Clause of the Fifth Amendment to United States Constitution prohibits successive prosecution or multiple punishment for 'the same offence'")'; and Jordan at ¶25. Second, a defendant has a legitimate expectation of finality in the original judgment entry. Once a defendant has a legitimate expectation of finality, the right to be free from double jeopardy prohibits the state from increasing a criminal sentence. United States v. DiFrancesco (1980), 449 U.S. 117, 137 (defendant "has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired"). This Court's application of the Beasley remedy in Bezak avoided the constitutional problems inherent in adding punishment to a valid sentence.

Proposition of Law No. II:

Trial and appellate judges should affirm, reverse or modify sentences on a count-by-count basis, not a sanction-by-sanction basis.

I. R.C. 2929.191 permits the "correction" of a judgment entry, leaving the scope of the resentencing of a void sentence undefined.

As explained above, R.C. 2929.191 permits, but does not require, trial courts to "correct[]" judgment entries of sentence. Nothing in the section speaks to the scope of that "correction." The General Assembly left the scope of the correction to other statutes and to this Court.

II. Because R.C. 2929.191 does not change the unit of measure for correcting an illegal sentence, the State's brief is simply a request to overrule Bezak.

Section 2929.191 does not change the legislature's instruction to courts to examine criminal sentences count-by-count—not case-by-case or sanction-by-sanction. Accordingly, the State is essentially asking this Court to overrule its syllabus holding in Bezak:

> When a defendant is convicted of or pleads guilty to one or more offenses and postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void. The offender is entitled to a new sentencing hearing for that particular offense.

This Court correctly decided Bezak. Section 2929.191 does not affect the holding of the case. This Court should not overrule a decision it issued only two years ago.

III. This Court decided Bezak correctly. Under R.C. 2929.01(EE) and R.C. 2953.08, the unit of measure for review is the offense, not the sanction for each offense.

A. Courts impose and review sentences offense by offense, not case by case or sanction by sanction.

The State erroneously asserts that problems with criminal sentences are to be addressed on a sanction-by-sanction basis. But this Court has firmly established that the unit of measure is the count. In Saxon, this Court clearly, unequivocally, and repeatedly instructed trial and appellate courts to view criminal sentences on a count-by-count basis. "Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on *one offense at a time.*" Saxon at ¶8 (emphasis supplied). In rejecting the sentencing package doctrine, this Court expressly required trial courts to look at sentences on a count-by-count basis: "[A] judge sentencing a defendant pursuant to Ohio law must consider each offense individually and impose a separate sentence for each offense." Id. at ¶9.

Further, postrelease control is one of the "combination of sanctions" that makes up the "sentence" for a criminal offense. Saxon at ¶12, quoting then R.C. 2929.01(FF). And after recognizing "the availability of multiple sanctions for a single offense[,]" this Court held that the unit of measure for imposing and reviewing sentences remained the offense. Id. This Court also noted that "If the legislature had intended to package sentencing together, it easily could have defined 'sentence' as the sanction or combination of sanctions imposed for all offenses." Id. at ¶13.

Likewise, if the legislature had intended courts to impose and review sentences on a sanction-by-sanction basis, the legislature could have equated "sentence" and "sanction." But it did not. A "sentence" can consist of one or multiple sanctions for an offense. If the legislature wished courts to vacate individual sanctions, it could have said so in R.C. 2929.191 or 2953.08. Instead, the legislature has directed trial and appellate courts to use the offense as the unit of measure.

B. Evans did not overrule Saxon.

In Evans, this Court noted that the sanctions for a specification are specifically tied only to that specification, not to the underlying offense, but nothing in that decision abrogates the statutory requirement to look at a case on an offense-by-offense basis. When the General Assembly attaches a specification to an offense, it is because the General Assembly has determined, as a matter of policy, that all defendants who engage in the extra behavior described in the specification deserve an extra punishment. Decreasing a prison term by three years to account for a three-year firearm specification would mostly defeat the purpose of a specification. But in contrast, postrelease control is part of the "combination of sanctions" required whenever a prison term is imposed. R.C. 2929.01(EE); 2967.28. Under R.C. 2929.11, 2929.12, and 2929.13, a trial court must consider the amount of punishment needed to protect the public and punish the offender. Given that R.C. 2929.01(EE) treats a sentence as "the sanction or combination of sanctions imposed by the sentencing court on an offender[,]" a trial court should logically consider the

available postrelease sanctions when exercising its discretion to chose among the range of available prison terms.

C. Many trial courts likely imposed a higher prison term because they reasonably believed that postrelease control would not attach to the sentence.

Many trial courts likely calculated prison terms with the idea that the defendants would be immediately released. Although it is not the case in this case, many defendants were sentenced when the lower courts had ruled that postrelease control was unconstitutional. Before this Court issued Woods v. Telb, 89 Ohio St.3d 504, 2000-Ohio-171, several courts of appeals had ruled that postrelease control was unconstitutional. See, e.g., State v. Duncan (Apr. 14, 2000), Hamilton App. No. C-990582, 2000 Ohio App. LEXIS 1641; State ex rel. Mosley v. Nichols (Jul. 24, 2000), Ross App. No. 00CA2542, 2000 Ohio App. LEXIS 3399; Woods v. Telb (Jun. 23, 1999), Lucas App. No. L-99-1083, 1999 Ohio App. LEXIS 3017. Trial judges had a good faith reason to not impose the sanction. Further, a trial judge who believed that a defendant would be released from prison without postrelease control would likely impose a longer prison term in order to sufficiently protect the public and punish the offender. R.C. 2929.11 and 2929.12. In those cases it only makes sense to revisit, as required by the Saxon, Evans, Bezak, and R.C. 2929.01(EE), the entire set of sanctions for the offense with the void sentence, not just the postrelease control term.

D. Fixing a void sentencing is not a one-way ratchet.

The General Assembly has not instructed this Court that correcting a void sentence should be a one-way ratchet. A criminal sentence is the "the sanction or combination of sanctions imposed by the sentencing court on an offender." R.C. 2929.01(EE). When a "sentence" for an offense is void, the "combination of sanctions" for that offense is void. Sentences for non-void counts remain in place, but the General Assembly has directed that trial courts must impose one complete and lawful "combination of sanctions" for each offense.

Conclusion

Section 2929.191 is not an island unto itself. It is but one rule of many that explain the procedures a trial court may follow when exercising its discretion. In the case of a defendant with a void sentence for an offense, a trial court must resentence the defendant for that offense. As the court of appeals correctly held, nothing in R.C. 2929.191 even purports to abrogate a trial court's duty to hold a de novo resentencing to issue a lawful and correct judgment of sentence.

This Court should either affirm the decision of the court of appeals, or dismiss this case as improvidently allowed.

Respectfully submitted,

Office of the Ohio Public Defender

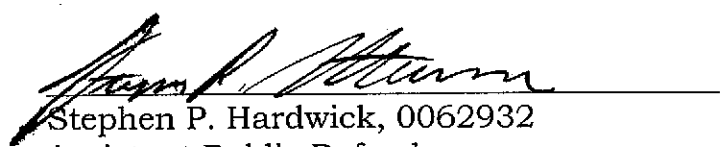
By: Stephen P. Hardwick, 0062932
Assistant Public Defender

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)

Counsel for Jason Singleton

Certificate of Service

I certify a copy of the foregoing **Merit Brief of Appellee Jason Singleton** has been sent by regular U.S. mail, postage-prepaid, to T. Allan Rogers, Assistant Cuyahoga County Prosecutor, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 22nd day of April, 2009.



Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Jason Singleton

#281959

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellant,

v.

Jason Singleton,

Defendant-Appellee.

Case No. 2008-1255

On appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Case No. 90042

Appendix to

Merit Brief of Appellee Jason Singleton

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

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 or 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.

LEXSTAT ORC ANN. 2929.12

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 31, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2929.12 (2009)

§ 2929.12. Seriousness and recidivism factors

(A) Unless otherwise required by *section 2929.13* or *2929.14 of the Revised Code*, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of *section 2903.11, 2903.12*, or *2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, the offender

committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to *section 2929.16*, *2929.17*, or *2929.18 of the Revised Code*, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of *section 2967.16* or *section 2929.141 [2929.14.1] of the Revised Code*.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.

LEXSTAT ORC ANN. 2929.13

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 31, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2929.13 (2009)

§ 2929.13. Guidance by degree of felony; monitoring of sexually oriented offenders by global positioning device

(A) Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in *sections 2929.14* to *2929.18 of the Revised Code*. The sentence shall not impose an unnecessary burden on state or local government resources.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to *section 2929.18 of the Revised Code* or a sanction of community service pursuant to *section 2929.17 of the Revised Code* as the sole sanction for the offense. Except as otherwise provided in this division, if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court also shall impose any financial sanction pursuant to *section 2929.18 of the Revised Code* that is required for the offense and may impose any other financial sanction pursuant to that section but may not impose any additional sanction or combination of sanctions under *section 2929.16* or *2929.17 of the Revised Code*.

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code* and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under *section 2929.16* or *2929.17 of the Revised Code*. If the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of *section 2929.15 of the Revised Code* relative to the offender, including imposing a prison term on the offender pursuant to that division.

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (D)(4) of *section 2929.14 of the Revised Code* or a community control sanction as described in division (G)(2) of this section.

(B) (1) Except as provided in division (B)(2), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a sex offense that is a fourth or fifth degree felony violation of *section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321 [2907.32.1], 2907.322 [2907.32.2], 2907.323 [2907.32.3]*, or *2907.34 of the Revised Code.*

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

(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(i) The offender committed the offense while in possession of a firearm.

(2) (a) If the court makes a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in *section 2929.12 of the Revised Code*, finds that a prison term is consistent with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code* and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in *section 2929.12 of the Revised Code*, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*, the court shall impose a community control sanction or combination of community control sanctions upon the offender.

(C) Except as provided in division (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under *section 2929.11 of the Revised Code* and with *section 2929.12 of the Revised Code.*

(D) (1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of *section 2907.05 of the Revised Code* for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under *section 2929.11 of the Revised Code.* Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of *section 2907.05 of the Revised Code.*

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of *section 2907.05 of the Revised Code*, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under *section 2929.12 of the Revised Code* that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(E) (1) Except as provided in division (F) of this section, for any drug offense that is a violation of any provision of Chapter 2925. of the Revised Code and that is a felony of the third, fourth, or fifth degree, the applicability of a presumption under division (D) of this section in favor of a prison term or of division (B) or (C) of this section in determining whether to impose a prison term for the offense shall be determined as specified in *section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36*, or *2925.37 of the Revised Code*, whichever is applicable regarding the violation.

(2) If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code.*

(3) A court that sentences an offender for a drug abuse offense that is a felony of the third, fourth, or fifth degree may require that the offender be assessed by a properly credentialed professional within a specified period of time. The court shall require the professional to file a written assessment of the offender with the court. If the offender is eligible for a community control sanction and after considering the written assessment, the court may impose a community control sanction that includes treatment and recovery support services authorized by *section 3793.02 of the Revised Code.* If the court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after considering the assessment and recommendation of treatment and recovery support services providers.

(F) Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under *sections 2929.02* to *2929.06, section 2929.14, section 2929.142 [2929.14.2]*, or *section 2971.03 of the Revised Code* and except as specifically provided in *section 2929.20* or *2967.191 [2967.19.1] of the Revised Code* or when parole is authorized for the offense under *section 2967.13 of the Revised Code* shall not reduce the term or terms 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 for any of the following offenses:

(1) Aggravated murder when death is not imposed or murder;

(2) Any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape if, had the offender completed the rape that was attempted, the offender would have been guilty of a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* and would be sentenced under *section 2971.03 of the Revised Code*;

(3) Gross sexual imposition or sexual battery, if the victim is less than thirteen years of age and if any of the following applies:

(a) Regarding gross sexual imposition, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and the victim of the previous offense was less than thirteen years of age;

(b) Regarding gross sexual imposition, the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation.

(c) Regarding sexual battery, either of the following applies:

(i) The offense was committed prior to August 3, 2006, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(ii) The offense was committed on or after August 3, 2006.

(4) A felony violation of *section 2903.04, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13*, or *2907.07 of the Revised Code* if the section requires the imposition of a prison term;

(5) A first, second, or third degree felony drug offense for which *section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99*, or *4729.99 of the Revised Code*, whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses;

(7) Any offense that is a third degree felony and either is a violation of *section 2903.04 of the Revised Code* or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

(a) 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;

(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 listed in division (F)(7)(a) of this section that resulted in the death of a person or in physical harm to a person.

(8) Any offense, other than a violation of *section 2923.12 of the Revised Code*, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (D)(1)(a) of *section 2929.14 of the Revised Code* for having the firearm;

(9) Any offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (D)(1)(d) of *section 2929.14 of the Revised Code* for wearing or carrying the body armor;

(10) Corrupt activity in violation of *section 2923.32 of the Revised Code* when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree;

(11) Any violent sex offense or designated homicide, assault, or kidnapping offense if, in relation to that offense, the offender is adjudicated a sexually violent predator;

(12) A violation of division (A)(1) or (2) of *section 2921.36 of the Revised Code*, or a violation of division (C) of that section involving an item listed in division (A)(1) or (2) of that section, if the offender is an officer or employee of the department of rehabilitation and correction.

(13) A violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* if 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*, with respect to the portion of the sentence imposed pursuant to division (D)(5) of *section 2929.14 of the Revised Code*;

(14) A violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* if the offender has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 [2941.14.15] of the Revised Code*, or three or more violations of any combination of those divisions and offenses, with respect to the portion of the sentence imposed pursuant to division (D)(6) of *section 2929.14 of the Revised Code*;

(15) Kidnapping, in the circumstances specified in *section 2971.03 of the Revised Code* and when no other provision of division (F) of this section applies;

(16) Kidnapping, abduction, compelling prostitution, promoting prostitution, engaging in a pattern of corrupt activity, illegal use of a minor in a nudity-oriented material or performance in violation of division (A)(1) or (2) of *section 2907.323 [2907.32.3] of the Revised Code*, or endangering children in violation of division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code*, if the offender is convicted of or pleads guilty to a specification as described in *section 2941.1422 [2941.14.22] of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense;

(17) A felony violation of division (A) or (B) of *section 2919.25 of the Revised Code* if division (D)(3), (4), or (5) of that section, and division (A)(6) of that section, require the imposition of a prison term;

(18) A felony violation of *section 2903.11*, *2903.12*, or *2903.13 of the Revised Code*, if the victim of the offense was a woman that the offender knew was pregnant at the time of the violation, with respect to a portion of the sentence imposed pursuant to division (D)(8) of *section 2929.14 of the Revised Code*.

(G) Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

(1) If the offender is being sentenced for a fourth degree felony OVI offense and if the offender has not been convicted of and has not pleaded guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code*, the court may impose upon the offender a mandatory term of local incarceration of sixty days or one hundred twenty days as specified in division (G)(1)(d) of *section 4511.19 of the Revised Code*. The court shall not reduce the term pursuant to section 2929.20, 2967.193 [2967.19.3], or any other provision of the Revised Code. The court that imposes a mandatory term of local incarceration under this division shall specify whether the term is to be served in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility, and the offender shall serve the term in the type of facility specified by the court. A mandatory term of local incarceration imposed under division (G)(1) of this section is not subject to any other Revised Code provision that pertains to a prison term except as provided in division (A)(1) of this section.

(2) If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in *section 2941.1413 [2941.14.13] of the Revised Code* or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of *section 4511.19 of the Revised Code* if the offender has not been convicted of and has not pleaded guilty to a specification of that type. The court shall not reduce the term pursuant to section 2929.20, 2967.193 [2967.19.3], or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory term of local incarceration pursuant to division (G)(1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of *section 4511.19 of the Revised Code*. In addition to the mandatory prison term described in division (G)(2) of this section, the court 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 the prison term prior to serving the community control sanction. The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to *section 5120.033 [5120.03.3] of the Revised Code* if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement. Upon the establishment of the initial intensive program prison pursuant to *section 5120.033 [5120.03.3] of the Revised Code* that is privately operated and managed by a contractor pursuant to a contract entered into under *section 9.06 of the Revised Code*, both of the following apply:

(a) The department of rehabilitation and correction shall make a reasonable effort to ensure that a sufficient number of offenders sentenced to a mandatory prison term under this division are placed in the privately operated and managed prison so that the privately operated and managed prison has full occupancy.

(b) Unless the privately operated and managed prison has full occupancy, the department of rehabilitation and correction shall not place any offender sentenced to a mandatory prison term under this division in any intensive program prison established pursuant to *section 5120.033 [5120.03.3] of the Revised Code* other than the privately operated and managed prison.

(H) If an offender is being sentenced for a sexually oriented offense or child-victim oriented offense that is a felony committed on or after January 1, 1997, the judge shall require the offender to submit to a DNA specimen collection procedure pursuant to *section 2901.07 of the Revised Code.*

(I) If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under *sections 2950.04, 2950.041 [2950.04.1], 2950.05,* and *2950.06 of the Revised Code,* and the duration of the duties. The judge shall inform the offender, at the time of sentencing, of those duties and of their duration. If required under division (A)(2) of *section 2950.03 of the Revised Code,* the judge shall perform the duties specified in that section, or, if required under division (A)(6) of *section 2950.03 of the Revised Code,* the judge shall perform the duties specified in that division.

(J) (1) Except as provided in division (J)(2) of this section, when considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit an offense in violation of *section 2923.02 of the Revised Code,* the sentencing court shall consider the factors applicable to the felony category of the violation of *section 2923.02 of the Revised Code* instead of the factors applicable to the felony category of the offense attempted.

(2) When considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense, the sentencing court shall consider the factors applicable to the felony category that the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

(K) As used in this section, "drug abuse offense" has the same meaning as in *section 2925.01 of the Revised Code.*

(L) At the time of sentencing an offender for any sexually oriented offense, if the offender is a tier III sex offender/child-victim offender relative to that offense and the offender does not serve a prison term or jail term, the court may require that the offender be monitored by means of a global positioning device. If the court requires such monitoring, the cost of monitoring shall be borne by the offender. If the offender is indigent, the cost of compliance shall be paid by the crime victims reparations fund.

HISTORY:

146 v S2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 293 (Eff 3-17-98); 147 v H 122 (Eff 7-29-98); 148 v S 142 (Eff 2-3-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 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 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 H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 183, § 1, eff. 9-11-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT ORC ANN. 2953.08

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 31, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2953.08 (2009)

§ 2953.08. Grounds for appeal by defendant or prosecutor of sentence for felony; appeal cost oversight committee

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of *section 2929.14* or *section 2929.142 [2929.14.2] of the Revised Code*, the sentence was not imposed pursuant to division (D)(3)(b) of *section 2929.14 of the Revised Code*, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of *section 2929.13 of the Revised Code* for purposes of sentencing, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of *section 2929.13 of the Revised Code* to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of *section 2971.03 of the Revised Code*, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of *section 2971.03 of the Revised Code* is the longest term available for the offense from among the range of terms listed in *section 2929.14 of the Revised Code*. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in *section 2971.01 of the Revised Code*. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in *section 2929.01 of the Revised Code*, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(2)(a) of *section 2929.14 of the Revised Code.*

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(3)(b) of *section 2929.14 of the Revised Code.*

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under *section 2929.20 of the Revised Code* of a sentence that was imposed for a felony of the first or second degree.

(C) (1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (E)(3) or (4) of *section 2929.14 of the Revised Code* and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (D)(2)(a) or (b) of *section 2929.14 of the Revised Code* if the additional sentence is for a definite prison term that is longer than five years.

(D) (1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (D)(2)(b) of *section 2929.14 of the Revised Code.* Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (D)(2)(c) of *section 2929.14 of the Revised Code.*

(3) A sentence imposed for aggravated murder or murder pursuant to *sections 2929.02* to *2929.06 of the Revised Code* is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in *Rule 4(B) of the Rules of Appellate Procedure*, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to *section 2947.06* or *2951.03 of the Revised Code* or *Criminal Rule 32.2* in connection with the appeal of a sentence under this section shall comply with division (D)(3) of *section 2951.03 of the Revised Code* when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the

contents of that report as described in division (D)(1) of *section 2951.03 of the Revised Code* and does not cause that report to become a public record, as defined in *section 149.43 of the Revised Code*, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of *section 2929.20 of the Revised Code*.

(G) (1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of *section 2929.20 of the Revised Code* relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (I) of *section 2929.20 of the Revised Code*, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

(I) (1) There is hereby established the felony sentence appeal cost oversight committee, consisting of eight members. One member shall be the chief justice of the supreme court or a representative of the court designated by the chief justice, one member shall be a member of the senate appointed by the president of the senate, one member shall be a member of the house of representatives appointed by the speaker of the house of representatives, one member shall be the director of budget and management or a representative of the office of budget and management designated by the director, one member shall be a judge of a court of appeals, court of common pleas, municipal court, or county court appointed by the chief justice of the supreme court, one member shall be the state public defender or a representative of the office of the state public defender designated by the state public defender, one member shall be a prosecuting attorney appointed by the Ohio prosecuting attorneys association, and one member shall be a county commissioner appointed by the county commissioners association of Ohio. No more than three of the appointed members of the committee may be members of the same political party.

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the member appointed by the chief justice of the supreme court shall serve a term ending three years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty days has elapsed, whichever occurs first.

If the chief justice of the supreme court, the director of the office of budget and management, or the state public defender serves as a member of the committee, that person's term of office as a member shall continue for as long as that person holds office as chief justice, director of the office of budget and management, or state public defender. If the chief justice of the supreme court designates a representative of the court to serve as a member, the director of budget and management designates a representative of the office of budget and management to serve as a member, or the state public defender designates a representative of the office of the state public defender to serve as a member, the person so designated shall serve as a member of the commission for as long as the official who made the designation holds office as chief justice, director of the office of budget and management, or state public defender or until that official revokes the designation.

The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the committee shall meet at least once every six months or more often upon the call of the chairperson or the written request of three or more members, provided that the committee shall not meet unless moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section and the moneys so appropriated then are available for that purpose.

The members of the committee shall serve without compensation, but, if moneys have been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing financial assistance to counties under division (I)(2) of this section, each member shall be reimbursed out of the moneys so appropriated that then are available for actual and necessary expenses incurred in the performance of official duties as a committee member.

(2) The state criminal sentencing commission periodically shall provide to the felony sentence appeal cost oversight committee all data the commission collects pursuant to division (A)(5) of *section 181.25 of the Revised Code.* Upon receipt of the data from the state criminal sentencing commission, the felony sentence appeal cost oversight committee periodically shall review the data; determine whether any money has been appropriated to the judiciary budget administered by the supreme court specifically for the purpose of providing state financial assistance to counties in accordance with this division for the increase in expenses the counties experience as a result of the felony sentence appeal provisions set forth in this section or as a result of a postconviction relief proceeding brought under division (A)(2) of *section 2953.21 of the Revised Code* or an appeal of a judgment in that proceeding; if it determines that any money has been so appropriated, determine the total amount of moneys that have been so appropriated specifically for that purpose and that then are available for that purpose; and develop a recommended method of distributing those moneys to the counties. The committee shall send a copy of its recommendation to the supreme court. Upon receipt of the committee's recommendation, the supreme court shall distribute to the counties, based upon that recommendation, the moneys that have been so appropriated specifically for the purpose of providing state financial assistance to counties under this division and that then are available for that purpose.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 148 v S 107 (Eff 3-23-2000); 148 v H 331. Eff 10-10-2000; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 461, § 1, eff. 4-4-07; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT ORC ANN. 2953.21

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 31, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2953.21 (2009)

§ 2953.21. Petition for postconviction relief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HISTORY:

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

LEXSTAT OH CRIM.R. 32

OHIO RULES OF COURT SERVICE
Copyright © 2009 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** RULES CURRENT THROUGH APRIL 1, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32 (2009)

Review Court Orders which may amend this Rule.

Rule 32. Sentence

(A) Imposition of sentence.

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

LEXSTAT OHIO CRIM. R. 43

OHIO RULES OF COURT SERVICE
Copyright © 2009 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** RULES CURRENT THROUGH APRIL 1, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 43 (2009)

Review Court Orders which may amend this Rule.

Rule 43. Presence of the Defendant

(A) Defendant's presence.

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(2) Notwithstanding the provisions of division (A)(1) of this rule, in misdemeanor cases or in felony cases where a waiver has been obtained in accordance with division (A)(3) of this rule, the court may permit the presence and participation of a defendant by remote contemporaneous video for any proceeding if all of the following apply:

(a) The court gives appropriate notice to all the parties;

(b) The video arrangements allow the defendant to hear and see the proceeding;

(c) The video arrangements allow the defendant to speak, and to be seen and heard by the court and all parties;

(d) The court makes provision to allow for private communication between the defendant and counsel. The court shall inform the defendant on the record how to, at any time, communicate privately with counsel. Counsel shall be afforded the opportunity to speak to defendant privately and in person. Counsel shall be permitted to appear with defendant at the remote location if requested.

(e) The proceeding may involve sworn testimony that is subject to cross examination, if counsel is present, participates and consents.

(3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.

(B) Defendant excluded because of disruptive conduct.

Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence or by remote contemporaneous video, and judgment and sentence may be pronounced as if the defendant were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

LEXSTAT OHIO CRIM. R. 44

OHIO RULES OF COURT SERVICE
Copyright © 2009 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** RULES CURRENT THROUGH APRIL 1, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 44 (2009)

Review Court Orders which may amend this Rule.

Rule 44. Assignment of Counsel

(A) Counsel in serious offenses.

Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.

(B) Counsel in petty offenses.

Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.

(C) Waiver of counsel.

Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing.

(D) Assignment procedure.

The determination of whether a defendant is able or unable to obtain counsel shall be made in a recorded proceeding in open court.

LEXSTAT OH CONST I 10A

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 31, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

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

Go to the Ohio Code Archive Directory

Oh. Const. Art. I, § 10a (2009)

§ 10a. Rights of victims of crime

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

(Adopted November 8, 1994)