ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellant, vs. RICHARD L. UNDERWOOD, JR., Defendant-Appellee.	: : : : : : : : :	Case Nos. 2008-2133, 2008-2228 On Appeal from the Montgomery County Court of Appeals Second Appellate District C.A. Case No. 22454

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STATEMENT OF THE CASE AND FACTS

In August 2007, Richard L. Underwood, Jr. pleaded no contest to two counts of aggravated theft, violations of R.C. 2913.02(A)(3), and two counts of theft beyond the scope, violations of R.C. 2913.02(A)(2). The State and defense counsel forged a plea agreement in which Mr. Underwood's agreed sentence would be either community control with local incarceration or a prison term of two years or less at the Correctional Reception Center. (Plea Tr. 5-6). As a condition of receiving one of those two sentences, Mr. Underwood agreed to repay $40,000 of restitution before his sentencing hearing. Id. at 6.

A sentencing hearing was held in September 2007, in which it was determined that Mr. Underwood had not paid any restitution. (Sentencing Tr. 46). Mr. Underwood explained to the court that he had been unable to make restitution while in jail. Id. The trial court then sentenced Mr. Underwood to serve six-month terms of incarceration for the two counts of theft outside the scope, as well as one year of incarceration for one of the aggravated theft counts, and a two-year sentence for the other. As all sentences were ordered to be served concurrently, Mr. Underwood's aggregate sentence was two years of incarceration at the Correctional Reception Center.

Mr. Underwood timely appealed his conviction through counsel, who filed an *Anders* brief. The Second District Court of Appeals ordered counsel to file supplemental briefing, holding that is was at least arguable that Mr. Underwood's sentence contained allied offenses of similar import in violation of R.C. 2941.25(A). The State conceded in briefing that the charges were allied offenses, but argued that because Mr. Underwood had an agreed sentence, the convictions were not reviewable under R.C. 2953.08(D)(1). The court of appeals held that as the State had conceded that the offenses were allied, Mr. Underwood's sentence was improperly

imposed and therefore not authorized by law. *State v. Underwood*, 2nd Dist. No. 22454, 2008-Ohio-4748, at ¶26. The court of appeals vacated the allied convictions, holding that the trial court erred in imposing those sentences. The court also noted that the vacated convictions would not affect the overall length of Mr. Underwood's concurrent sentence.

The State of Ohio appealed the decision to this Court by filing the Notice of Certified Conflict, initiating case no. 2008-2228, which was consolidated with 2008-2133. This Court determined that a conflict existed as to the issue of whether an agreed and jointly recommended sentence is authorized by law under R.C. 2953.08(D) when it includes allied offenses of similar import. (Jan. 28, 2009 Entry, 2008-2228).

ARGUMENT

A jointly recommended sentence imposed by a sentencing judge is not reviewable "if the sentence is authorized by law." R.C. 2953.08(D)(1). That rule is informed by R.C. 2953.08(A)(4), which states that a defendant may appeal a sentence that is "contrary to law." Generally, a sentence that is "contrary to law" is a sentence that is not allowed by statute, often one that is outside the statutory range. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. In analyzing criminal sentencing, this Court has pointed out, "Crimes are statutory, as are the penalties therefor, and the only sentence which a trial court may impose is that provided for by statute." *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438.

Ohio Revised Code Section 2941.25(A) requires that when the same conduct by a defendant constitutes two or more allied offenses of similar import the trial court convict the defendant of only one. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶31. "A court has no power to substitute a different sentence for that provided for by statute or one that is either greater or lesser than that provided for by law." *Colegrove*, 175 Ohio St. at 438; citing

R.C. 5145.01. See, e.g., *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶20 (holding that no judge has the authority to disregard the law).

RESPONSE TO THE STATE'S FIRST PROPOSITION OF LAW

State's First Proposition of Law:

> A jointly recommended sentence is authorized by law, and thus, pursuant to R.C. 2953.08(D), not reviewable on appeal, regardless of whether such sentence includes multiple convictions on allied offenses of similar import.

A. A Jointly Recommended Sentence is Not "Authorized By Law" When It Includes a Sentence In Violation of R.C. 2941.25(A).

In order for a sentence to be authorized by law, it must comply with the law. A sentence that is imposed in violation of statutory requirements is not authorized, whether that violation be a sentence outside the statutory range or a sentence that fails to merge allied offenses of similar import. The State argues that appellate review is barred and sentences are lawful when they include allied offenses but are agreed sentences. (State's Brief, 4). However, the plain language of R.C. 2941.25(A) requires that there can be only one conviction when charges are allied offenses of similar import. See *Cabrales*, 2008-Ohio-1625, at ¶31. Such a statutory requirement cannot be bargained away in an agreed sentence, just as a defendant cannot "agree" to a sentence outside the statutory range. See, generally, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶29, fn.3 (noting that sentences outside the statutory range are contrary and outside of a court's jurisdiction). When a defendant enters into an agreed sentence that violates statutory sentencing requirements, it is not authorized by law and is reviewable on appeal. *State v. Underwood*, 2nd Dist. No. 22454, 2008-Ohio-4748; accord *State v. Manns*, 2nd Dist. No. 2000CA 58, 2001-Ohio-1822.

1. A sentence that is "contrary to law" is also not "authorized by law."

A sentence that is not authorized by law is necessarily contrary to law. This Court recently stated it is fundamental that no court has the authority to substitute a different sentence than the one that is required by law. *Simpkins*, 2008-Ohio-1197, at ¶20; citing *Colegrove*, 175 Ohio St. at 438. Moreover, in analyzing the term "contrary to law" in the context of judicial fact-finding following *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, this Court held that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence." *Kalish*, 2008-Ohio-4912, at ¶4. Applying the reasoning in *Kalish*, a trial court must follow all applicable sentencing rules and statutes in order to exact a sentence that is not "contrary to law."

"Authorized by law" is the logical inverse of "contrary to law." A sentence "authorized by law" necessarily follows all applicable sentencing rules and statutes. A sentence imposed in violation of any sentencing statute cannot be "authorized by law." The State contends that a sentence that is "contrary to law" can still be "authorized by law," by arguing that any sentence within the statutory range is "authorized by law." (State's Brief, 7). The State relies on the courts of appeals that are in conflict with the Second District Court of Appeals' decision in Mr. Underwood's case. Id. This Court's analysis of consecutive sentences in *Kalish* implies that a sentence "contrary to law" is not limited to sentences outside the statutory range. *Kalish*, 2008-Ohio-4912, at ¶15. Additionally, a sentence that is imposed in clear violation of a statute cannot be authorized by law, because such a sentence disregards what the statute intended.

The State mistakenly relies on this Court's analysis in *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, which held that a criminal defendant's sentence for aggravated murder was not reviewable under R.C. 2953.08(D). Id. at ¶17. Although the *Porterfield* Court discussed the

legislature's intent to protect agreed sentences from review generally, it did not suggest that sentences imposed in violation of applicable rules and statutes were not reviewable. Rather, the analysis in *Porterfield* related to R.C. 2953.08(D)(3), which places a clear prohibition of appellate review for aggravated murder convictions. Therefore, the case does not analyze "authorized by law" in the context of all agreed sentences and is not applicable here.

Additionally, the State misinterprets *State v. Lopez*, 2nd Dist. No. 2001 CA 08, 2002-Ohio-1807, arguing that the Second District has previously held that R.C. 2953.08(D) bars an appeal of a sentence that includes allied offenses. (State's Brief, 5). That is not the holding in *Lopez*, which is concerned with whether the trial court made proper findings under R.C. 2929.13. Id. *Lopez* does cite to *State v. Graham*, 10th Dist. No. 97APA11-1524, 1997 Ohio App. LEXIS 4676, in stating that other appellate courts have upheld agreed sentences, even in the face of allied offenses. Id. But the *Underwood* court distinguishes *Lopez*, holding that because that case did not address allied offenses, *Manns* is still controlling on the instant issue. *Underwood*, 2008-Ohio-4748, at ¶18.

As the State pointed out, courts must consider the legislature's intent in interpreting statutes. (State's Brief, 8; citing *State v. Wilson*, 77 Ohio St.3d 334, 336, 1997-Ohio-35). But the State would have this Court apply that wisdom only to R.C. 2953.08(D). If the legislature intended R.C. 2941.25(A) to apply only following jury trials, or to apply only in the light of a plea agreement that was not jointly recommended, appropriate language would have been incorporated. Rather, as R.C. 2941.25(A) does not include any limiting language, this Court must construe the statute to apply to all criminal sentences, regardless of whether they were jointly recommended. The Second District Court of Appeals did so in *Manns*, 2001-Ohio-1822, holding that because a sentence failed to merge allied offenses it was not "authorized by law."

See *Underwood*, 2008-Ohio-4748, at ¶26. As a result, any sentence that does not comply with R.C. 2945.21(A) is "contrary to law" and therefore not "authorized by law."

2. Ohio's courts of appeals need guidance in construing R.C. 2953.08(D) in the context of allied offenses.

Ohio's courts of appeals have varied widely in interpreting both "contrary to law" and "authorized by law." As a result, Ohio's courts of appeals have yielded conflicting results in assessing reviewability for agreed sentences that include allied offenses of similar import. See *Manns*, 2001-Ohio-1822 (holding that failure to merge allied offenses at sentencing creates a sentence not authorized by law); *Underwood*, 2008-Ohio-4748, at ¶26 (holding that failure to merge allied offenses at sentencing creates a sentence not authorized by law). Cf. *State v. Miller*, 5th Dist. No. 2007CA00142, 2007-Ohio-6272, at ¶11-12 (holding that allied offenses must be merged following a guilty plea); *State v. Williams*, 5th Dist. No. 02-CA-82, 2003-Ohio-256 (reviewing a guilty plea for allied offenses); *State v. Barajas-Larios*, 178 Ohio App.3d 613, 2008-Ohio-5460, at ¶18 (holding that an agreed sentence outside the statutory range is not authorized by law); *State v. Gooden*, 3rd Dist. No. 9-06-17, 2006-Ohio-5387 (reviewing a sentence following a guilty plea for allied offenses); *State v. Austin*, 8th Dist. No. 84142, 2004-Ohio-5736 (reviewing a guilty plea for allied offenses); *State v. Elder*, 12th Dist. No. CA-97-07-142, 1998 Ohio App. LEXIS 2116 (reviewing a guilty plea for allied offenses).

Other courts of appeals have held the opposite. Contra *State v. Turrentine*, 3rd Dist. No. 1-08-18, 2008-Ohio-3231, at ¶12-13 (declining to review an agreed sentence that includes allied offenses); *Graham*, 1997 Ohio App. LEXIS 4676 (holding that a knowing, intelligent, and voluntary plea to an agreed sentence withstands appellate review on allied offenses); *State v. Jackson*, 8th Dist. No. 86506, 2006-Ohio-3165 at ¶35 (holding that an agreed sentence that contains allied offenses is not plain error); *State v. Henderson*, 12th Dist. No. 99-01-002, 1999

Ohio App. LEXIS 4597 (holding that an agreed sentence including allied offenses is authorized by law as long as neither offense individually exceeds statutory maximums); *State v. Baird*, 7th Dist. No. 06-CO-4, 2007-Ohio-3400, at ¶11 (holding that an agreed sentence containing allied offenses is not reviewable).

Appellate courts should review sentences that fail to comport with statutory requirements, whether the failure be a sentence outside the statutory range or a failure to merge allied offenses of similar import. Refusal to do so by some courts leads to inconsistent results on review and criminal defendants with improper sentences. To eliminate inconsistent results, this Court must hold that agreed sentences that include allied offenses of similar import, in violation of R.C. 2941.25(A), are not "authorized by law" under R.C. 2953.08(D) and are reviewable on appeal.

B. A Jointly Recommended Sentence That Violates R.C. 2941.25(A) is Reviewable On Appeal under R.C. 2953.08.

1. A criminal defendant cannot agree to a sentence that violates R.C. 2941.25(A).

Generally, a criminal defendant can only enter a plea that is knowing, intelligent, and voluntary. *Bradshaw v. Stumpf* (2005), 545 U.S. 175, 183; citing *Brady v. United States* (1970), 397 U.S. 742, 748; see, also, Crim.R. 11. A plea agreement that is "properly administered" is to be encouraged. *Santobello v. New York* (1971), 404 U.S. 257, 260. But a criminal defendant cannot agree to an illegal sentence. *United States v. Greatwalker* (C.A.8, 2002), 285 F.3d 727, 729; *Baker v. Barbo* (C.A.3, 1999), 177 F.3d 149, 155. See, also, *Pickens v. Howes* (C.A.6, 2008), 549 F.3d 377, 381 (noting the holding in *Greatwalker* and *Baker* in the context of a sentence based on false information). For example, a criminal defendant cannot agree to plead guilty based on threats or promises. *State v. Bowen* (1977), 52 Ohio St.2d 27, 28. Even when the defendant, prosecutor, and court agree on a sentence, the court cannot give a sentence effect that is not authorized by law. *Greatwalker*, 285 F.3d at 730.

Here, Mr. Underwood's defense counsel and the prosecutor did jointly recommend his sentence. But because the sentence contained allied offenses of similar import that were not merged, the sentence is illegal and contrary to law. See R.C. 2941.25(A). For that reason, Mr. Underwood's sentence is reviewable under R.C. 2953.08(D).

2. Public policy considerations require that plea agreements be structured in conformity with Title 29 of the Ohio Revised Code.

Trial courts should be able to rely on prosecutors and defense counsel to craft plea agreements in keeping with the requirements of the Ohio Revised Code. Agreements in violation of sentencing statutes, even if agreed to by the parties, are not authorized by law and cannot stand. The State asserts that reviewing agreed sentences on appeal because they include allied offenses of similar import will undermine finality in judgments. (State's Brief, 11). The opposite is true. If trial courts, prosecutors, and defense counsel are held to the requirements of the Ohio Revised Code in forging agreed sentences, then there is no fear that such agreements will be dismantled on appeal. Rather, by crafting agreements that flagrantly violate applicable sentencing statutes like R.C. 2941.25(A), trial courts, prosecutors, and defense counsel bring the finality of judgments into question. That is demonstrated by the conflicting results coming from Ohio's courts of appeals in reviewing agreed sentences or guilty pleas that encompass allied offenses of similar import.

By holding that the trial courts must only accept agreed sentences that comport with the law, this Court is protecting finality in sentencing and sparing trial courts the arduous task of resentencing criminal defendants on improperly imposed sentences. It is true that some criminal defendants would pursue appellate review if this Court ruled that agreed sentences that include allied offenses are reviewable on appeal. Nevertheless, those defendants could not possibly outnumber the defendants who will continue to challenge their agreed sentences on appeal

generally with a spectrum of results. This Court must hold that agreed sentences which encompass multiple convictions for allied offenses of similar import are not authorized by law. Only such a ruling would preclude trial-level counsel from crafting improper agreements in the first place.

RESPONSE TO THE STATE'S SECOND PROPOSITION OF LAW

State's Second Proposition of Law:

> Where a defendant is sentenced to a jointly recommended sentence pursuant to a plea agreement, the failure to merge convictions on allied offenses cannot be said to constitute plain error.

A. A Trial Court's Failure to Impose a Sentence in Conformity with R.C. 2941.25 is Plain Error.

The State argues that even if this Court holds that an agreed sentence encompassing allied offenses is reviewable, the trial court's error in imposing the sentence is not reversible. (State's Brief, 13). Specifically, the State asserts that, because Mr. Underwood did not raise the issue of allied offenses of similar import at the trial level, he has waived all but plain error. Id. Mr. Underwood concedes that the standard of review is plain error, as he did not object to the allied offenses in his sentence until his direct appeal.

Plain errors and defects that affect substantial rights may be noticed on appeal. Crim.R. 52(B). Plain error requires: 1) an error or deviation from the legal rule, 2) when the error is plain, meaning obvious, and 3) affects substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. An affect on substantial rights is an error that affected the outcome of the trial. Id. Here, the trial court's failure to impose a sentence in compliance with the requirements of R.C. 2941.25(A) rises to the level of plain error. See *Underwood*, 2008-Ohio-4748, at ¶28;

citing *State v. Coffey*, 2nd Dist. No. 2006 CA 6, 2000-Ohio-21, at ¶11, 31; *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, at ¶26, 33-34, affirmed (2009), 2009-1059.

1. Imposition of a sentence in violation of R.C. 2941.25, even in light of a joint recommendation, is a deviation from the legal rule.

Ohio Revised Code Section 2941.25(A) lays out the rule for allied offenses, stating, "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." Convicting and sentencing a criminal defendant to allied offenses is a deviation from the legal rule. See *Cabrales*, 2008-Ohio-1625, at ¶31. Rather, this Court has made clear that when offenses are allied there can be only one conviction. Id. Multiple convictions for allied offenses is a deviation from R.C. 2941.25(A); therefore, it meets the first prong of the plain error test. Because there is no language of exclusion in the statute, an agreed sentence does not insulate a sentence from plain error review when it violates statutory requirements.

2. The error is obvious.

For an error to be plain, it must also be obvious. *Barnes*, 94 Ohio St.3d at 27. Here, R.C. 2941.25(A) has specific requirements for allied offenses of similar import. The State conceded in a sentencing memorandum at the trial level that Mr. Underwood's offenses were allied. *Underwood*, 2008-Ohio-4748, at ¶24. Moreover, the *Cabrales* Court recently clarified the strict application of R.C. 2941.25(A). *Cabrales*, 2008-Ohio-1625, at ¶31. Therefore, the trial court committed an obvious error in failing to merge the allied offenses.

3. A sentence that violates R.C. 2941.25 affects a defendant's substantial rights.

The State argues that the error did not affect the outcome in Mr. Underwood's case because he bargained for the outcome. (State's Brief, 14). The State asserts that Mr. Underwood

specifically bargained for the benefit of his plea. Id. By merging Mr. Underwood's allied offenses, Mr. Underwood gained the benefit of having fewer felony convictions on his record. However, that merger did not affect the overall length of his sentence, as the trial court ordered him to serve concurrent terms. Merging Mr. Underwood's allied offenses in compliance with R.C. 2941.25(A) does not bestow a shorter sentence on him. Rather, the merger brought Mr. Underwood's sentence into conformity with the law.

As any criminal defendant is prejudiced by additional convictions on his or her record when those convictions should be merged, the failure to merge allied offenses prejudiced Mr. Underwood. See *Coffey*, 2007-Ohio-21, at ¶14; *State v. Gordon*, 1st Dist. No. C910375, 1992 Ohio App. LEXIS 1179, at 2-3, citing *State v. Jennings* (1987), 42 Ohio App.3d 179. It affected the outcome of his plea and sentence because it resulted in four felony-level convictions instead of two. Therefore, Mr. Underwood was prejudiced by the plain deviation from R.C. 2941.25(A).

Likewise, the trial court's failure to impose a sentence in conformity with R.C. 2941.25(A) is not invited error. The doctrine of invited error holds that "a party is not entitled to take advantage of an error that he himself invited or induced the court to make." *State ex. rel. Kline v. Carroll*, 86 Ohio St.3d 404, 2002-Ohio-4849, at ¶27; citing *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. However, invited error should not be interpreted to encompass illegal agreed sentences. When an agreed sentence violates statutory requirements and is not authorized by law, even if the defendant agreed to the terms at the time, it is reviewable on appeal under R.C. 2953.08(D).

CONCLUSION

All sentences, even agreed sentences, are subject to statutory requirements. When a sentence fails to conform to those requirements, whether the sentence exceeds the statutory

maximum or includes multiple convictions for allied offenses of similar import, it is not authorized by law. Because such an agreed sentence is not authorized by law, it is reviewable on appeal under R.C. 2953.08. The General Assembly intended to protect agreed sentences from appellate review, but not when those sentences are illegal and improper under Ohio law. Therefore, Mr. Underwood respectfully requests that this Court affirm the decision of the Second District Court of Appeals vacating his allied convictions for aggravated theft and theft.

Respectfully submitted,

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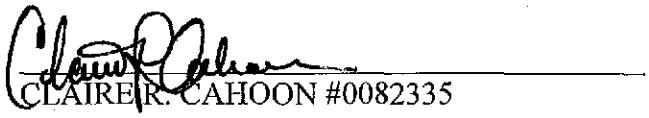
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Appellee Richard L. Underwood, Jr.'s Merit Brief** was forwarded by regular U.S. Mail, postage pre-paid, to Kelly D. Crammer, Montgomery County Assistant Prosecutor, 301 W. Third Street, Fifth Floor, Courts Building, Dayton, Ohio 45422, on this 12th day of May, 2009.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2008-2133, 2008-2228
Plaintiff-Appellant,	:	
	:	On Appeal from the Montgomery
vs.	:	County Court of Appeals
	:	Second Appellate District
RICHARD L. UNDERWOOD, JR.,	:	
	:	C.A. Case No. 22454
Defendant-Appellee.	:	

APPENDIX TO

APPELLEE RICHARD L. UNDERWOOD, JR.'S MERIT BRIEF

LEXSTAT ORC ANN. 2913.02

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

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2913. THEFT AND FRAUD
THEFT

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ORC Ann. 2913.02 (2009)

§ 2913.02. Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B) (1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in *section 2913.71 of the Revised Code*, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), or (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly

person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of *section 4510.02 of the Revised Code*, provided that the suspension shall be for at least six months.

(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by stealing rented property or rental services, the court may order that the offender make restitution pursuant to *section 2929.18* or *2929.28 of the Revised Code*. Restitution may include, but is not limited to, the cost of repairing or replacing the stolen property, or the cost of repairing the stolen property and any loss of revenue resulting from deprivation of the property due to theft of rental services that is less than or equal to the actual value of the property at the time it was rented. Evidence of intent to commit theft of rented property or rental services shall be determined pursuant to the provisions of *section 2913.72 of the Revised Code*.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

134 v H 511 (Eff 1-1-74); 138 v S 191 (Eff 6-20-80); 139 v S 199 (Eff 1-1-83); 140 v H 632 (Eff 3-28-85); 141 v H 49 (Eff 6-26-86); 143 v H 347 (Eff 7-18-90); 143 v S 258 (Eff 11-20-90); 146 v H 4 (Eff 11-9-95); 146 v S 2 (Eff 7-1-96); 147 v S 66 (Eff 7-22-98); 148 v H 2. Eff 11-10-99; 150 v H 7, § 1, eff. 9-16-03; 150 v H 179, § 1, eff. 3-9-04; 150 v H 12, § 1, eff. 4-8-04; 150 v H 369, § 1, eff. 11-26-04; 150 v H 536, § 1, eff. 4-15-05; 151 v H 530, § 101.01, eff. 6-30-06; 151 v H 347, § 1, eff. 3-14-07; 152 v S 320, § 1, eff. 4-7-09.

LEXSTAT ORC ANN. 2929.13

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

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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.

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 2941.25

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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2941. INDICTMENT
FORM AND SUFFICIENCY

Go to the Ohio Code Archive Directory

ORC Ann. 2941.25 (2009)

§ 2941.25. Multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

134 v H 511. Eff 1-1-74.

LEXSTAT ORC ANN. 2953.08

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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.

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. 5145.01

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TITLE 51. PUBLIC WELFARE
CHAPTER 5145. STATE CORRECTIONAL INSTITUTIONS
SENTENCE; TERMINATION

Go to the Ohio Code Archive Directory

ORC Ann. 5145.01 (2009)

§ 5145.01. Duration of sentences

Courts shall impose sentences to a state correctional institution for felonies pursuant to *sections 2929.13* and *2929.14 of the Revised Code*. All prison terms may be ended in the manner provided by law, but no prison term shall exceed the maximum term provided for the felony of which the prisoner was convicted as extended pursuant to *section 2929.141 [2929.14.1]* or *2967.28 of the Revised Code*.

If a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of *sections 2929.14* and *2929.41 of the Revised Code* apply. If sentenced consecutively, for the purposes of *sections 5145.01* to *5145.27 of the Revised Code*, the prisoner shall be held to be serving one continuous term of imprisonment.

If a court imposes a sentence to a state correctional institution for a felony of the fourth or fifth degree, the department of rehabilitation and correction, notwithstanding the court's designation of a state correctional institution as the place of service of the sentence, may designate that the person sentenced is to be housed in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse if authorized pursuant to *section 5120.161 [5120.16.1] of the Revised Code*.

If, through oversight or otherwise, a person is sentenced to a state correctional institution under a definite term for an offense for which a definite term of imprisonment is not provided by statute, the sentence shall not thereby become void, but the person shall be subject to the liabilities of such sections and receive the benefits thereof, as if the person had been sentenced in the manner required by this section.

As used in this section, "prison term" has the same meaning as in *section 2929.01 of the Revised Code*.

RS § 7388-6; 81 v 72; 81 v 186; 87 v 164, § 5; GC § 2166; 103 v 29; 109 v 64; 114 v 188; Bureau of Code Revision, 10-1-53; 129 v 1193 (Eff 10-26-61); 139 v S 199 (Eff 1-1-83); 140 v S 210 (Eff 7-1-83); 142 v H 455 (Eff 7-20-87); 145 v H 571 (Eff 10-6-94); 146 v S 2 (Eff 7-1-96); 149 v H 327. Eff 7-8-2002; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT OHIO CRIM.R. 11

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2009)

Review Court Orders which may amend this Rule.

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

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

(B) Effect of guilty or no contest pleas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) Misdemeanor cases involving serious offenses.

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

(E) Misdemeanor cases involving petty offenses.

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

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

(F) Negotiated plea in felony cases.

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

(G) Refusal of court to accept plea.

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

(H) Defense of insanity.

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

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

LEXSTAT OHIO CRIM.R. 52

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 52 (2009)

Review Court Orders which may amend this Rule.

Rule 52. Harmless Error and Plain Error

(A) Harmless error.

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.