

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 : Case No. 2009-2122
 :
 Plaintiff-Appellee, :
 :
 : Certified Conflict from the
 vs. :
 : Lucas County Court of Appeals
 :
 : Sixth Appellate District
 LINDA S. COOK, :
 :
 : C.A. Case No. L08-1301
 :
 Defendant-Appellant. :
 : C.P. Case No. CR07-2498

**MERIT BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLANT LINDA S. COOK**

JULIA R. BATES #0013426
Lucas County Prosecutor

EVY M. JARRETT #0062485
Assistant Lucas County Prosecutor

Lucas County Courthouse
700 Adams Street, Suite 250
Toledo, Ohio 43604
(419) 213-4700
(419) 213-4595 - Fax

**COUNSEL FOR APPELLEE,
STATE OF OHIO**

JOHN F. POTTS #0033846
405 Madison Avenue, Suite 1010
Toledo, Ohio 43604
(419) 255-2800
(419) 255-1105 - Fax

**COUNSEL FOR APPELLANT,
LINDA S. COOK**

PETER GALYARDT #0085439
Assistant State Public Defender

Office of the Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
E-mail: Peter.Galyardt@opd.ohio.gov

**COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER**

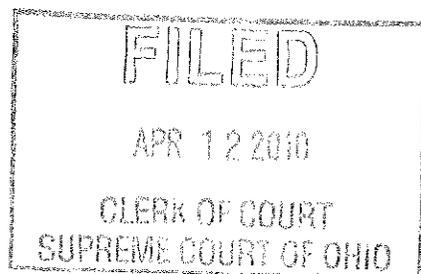


TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES..... ii

ISSUE.....1

STATEMENT OF THE CASE AND FACTS.....1

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE
OHIO PUBLIC DEFENDER1

ARGUMENT.....2

PROPOSITION OF LAW2

Revised Code Section 2901.13(B)(1) supersedes R.C. 2901.13(F) for
offenses of which an element is fraud or breach of a fiduciary
duty, and is the only mechanism within R.C. 2901.13 that can
operate to extend the limitation period defined in R.C.
2901.13(A)(1) for offenses of which an element is fraud or breach
of a fiduciary duty.

I. Revised Code Section 2901.13(B)(1) defines the limitation
period for offenses of which an element is fraud or breach
of a fiduciary duty.....3

II. Ohio case law and the actions of the General Assembly
require R.C. 2901.13(B)(1) to govern this case.....9

III. Applying R.C. 2901.13(B)(1) to this case required that the
State indict Ms. Cook within the default six-year period of
limitations set by R.C. 2901.13(A)(1).....21

IV. The Sixth District Court of Appeals’ decision in Ms.
Cook’s case is wrong, and inconsistent with its own
precedent.....21

CONCLUSION23

CERTIFICATE OF SERVICE.....24

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<i>Carter v. Cleveland</i> (1998), 83 Ohio St.3d 24, 697 N.E.2d 610.....	5
<i>Dupps Co., v. Lindley</i> (1980), 62 Ohio St.2d 305, 405 N.E.2d 716	13
<i>Meeks v. Papadopoulos</i> (1980), 62 Ohio St.2d 187, 404 N.E.2d 159	13
<i>Meyer v. UPS</i> , 122 Ohio St.3d 104, 2009-Ohio-2463	3
<i>Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.</i> (1986), 21 Ohio St.3d 21, 487 N.E.2d 301	13
<i>Pendergast v. United States</i> (1943), 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368.....	4
<i>Rice v. CertainTeed Corp.</i> (1999), 84 Ohio St.3d 417, 704 N.E.2d 1217	13
<i>Sears v. Weimer</i> (1944), 143 Ohio St. 312, 55 N.E.2d 413	13
<i>State v. Chippendale</i> (1990), 52 Ohio St.3d 118, 556 N.E.2d 1134.....	3
<i>State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.</i> (1999), 85 Ohio St.3d 582, 709 N.E.2d 1192	<i>passim</i>
<i>State v. Cook</i> , 184 Ohio App.3d 382, 2009-Ohio-4917, 921 N.E.2d 258	22
<i>State v. Dauwalter</i> (C.P. 1988), 43 Ohio Misc.2d 17, 540 N.E.2d 336	<i>passim</i>
<i>State v. Edwards</i> (1997), 119 Ohio App.3d 237, 695 N.E.2d 23	8
<i>State v. Evans</i> , 102 Ohio St.3d 240, 2004-Ohio-2659, 809 N.E.2d 11	5
<i>State v. Gravelle</i> , 6th Dist. Nos. H-06-042, H-06-043, H-06-044, and H-06-045, 2008-Ohio-4031	22,23
<i>State v. Hensley</i> (1991), 59 Ohio St.3d 136, 571 N.E.2d 711	<i>passim</i>
<i>State v. Lester</i> (1996), 111 Ohio App.3d 736, 676 N.E.2d 1270	10,11

TABLE OF AUTHORITIES

Page No.

CASES:

State v. Lozano (2001), 90 Ohio St.3d 560, 740 N.E.2d 7313

State v. Martin, 4th Dist. No. 00CA28, 2001-Ohio-2547, 2001 Ohio App. LEXIS 5250.....11,12

State v. McConville, Slip Opinion No. 2010-Ohio-958.....13

State v. Mitchell (1992), 78 Ohio App.3d 613, 605 N.E.2d 978.....9,10,11,16,19

State v. Price, 118 Ohio St.3d 144, 2008-Ohio-1974, 886 N.E.2d 852.....14,15

State v. Stephens, 2nd Dist. No. 96 CA 0117, 1997 Ohio App. LEXIS 3424.....10,11

State v. Williams, 2004-Ohio-3135, 2004 Ohio App. LEXIS 28168

State v. Young (1980), 62 Ohio St.2d 370, 406 N.E.2d 49914

State v. Young (1981), 2 Ohio App.3d 155, 440 N.E.2d 137923

State ex rel. Sears, Roebuck & Co. v. Ind. Comm. of Ohio (1990), 52 Ohio St. 3d 144.....14

Toussie v. United States (1970), 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed. 2d 156.....4

United States v. Bass (1971), 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 48814

United States v. Irvine (1878), 98 U.S. 450, 25 L.Ed. 1934

STATUTES:

R.C. 1.1211

R.C. 1.4213

R.C. 1.4714

R.C. 1.4914,15

TABLE OF AUTHORITIES

	<u>Page No.</u>
STATUTES:	
R.C. 1.52.....	17,18
R.C. 2901.04.....	5,14,15
R.C. 2901.13.....	<i>passim</i>
R.C. 2913.01.....	5
R.C. 2913.42.....	6,7
R.C. 2913.49.....	6
ADDITIONAL AUTHORITIES:	
Am. Sub. S.B. No. 17.....	20
Sub. H.B. No. 46.....	14,17
Section 3 of Sub. S.B. No. 219.....	16,17,18,19
Am. Sub. H.B. No. 511.....	8,17

ISSUE

Revised Code Section 2901.13(B)(1) addresses the expansion of the statute of limitations period for offenses of which an element is fraud or breach of a fiduciary duty. Revised Code Section 2901.13(F) begins the statute of limitations period at the time that the corpus delicti of an offense is discovered. Is it R.C. 2901.13(B)(1) or R.C.2901.13(F) that expands the limitation period for offenses of which an element is fraud or breach of a fiduciary duty?

STATEMENT OF THE CASE AND FACTS

Amicus adopts by reference the statement of the case and facts set forth by Appellant Linda S. Cook.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays an integral role in the promulgation of Ohio statutory law and procedural rules through its focus on criminal appeals. Its primary mission is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. Moreover, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle significant criminal cases in Ohio appellate courts. The OPD has an interest in the present case because this Court will determine the proper application of the statute of limitations on crimes committed in Ohio, as delineated in R.C. 2901.13. Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio's statute of limitations.

ARGUMENT

PROPOSITION OF LAW

Revised Code Section 2901.13(B)(1) supersedes R.C. 2901.13(F) for offenses of which an element is fraud or breach of a fiduciary duty, and is the only mechanism within R.C. 2901.13 that can operate to extend the limitation period defined in R.C. 2901.13(A)(1) for offenses of which an element is fraud or breach of a fiduciary duty.

This Court has suggested that R.C. 2901.13(F) does not operate to toll the periods of limitation in R.C. 2901.13(A) when the corpus delicti of the offense is discovered within those defined periods. See *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.* (1999), 85 Ohio St.3d 582, 588, 709 N.E.2d 1192. The Sixth District Court of Appeals used the approach proposed in the dissenting opinion in *Climaco* to hold the opposite. That decision, and the rationale formulating it, is wrong because of the specific offense with which Ms. Cook was charged. This Court's precedent and the legislative intent of R.C. 2901.13 prohibit the operation of R.C. 2901.13(F) in that

manner. (See Part II(A), pp. 9-12, *infra*). It may, however, be correct that R.C. 2901.13(F) operates to toll the period of limitations of R.C. 2901.13(A), irrespective of when the *corpus delicti* is discovered, if there is not a specific statutory provision within R.C. 2901.13 that governs the offense charged. But the facts of Ms. Cook's case do not afford this Court an opportunity to answer that question. In this case, there is a specific statutory provision within R.C. 2901.13 that governs the offense charged. That specific provision is R.C. 2901.13(B)(1). It, not R.C. 2901.13(F), controls the limitation period for the tampering-with-records charge against Ms. Cook. (See Part II(A) and (B), pp. 9-21, *infra*).

I. Revised Code Section 2901.13(B)(1) defines the limitation period for offenses of which an element is fraud or breach of a fiduciary duty.

"[W]here there is no manifest legislative intent that the general provision prevail over the specific provision, the specific provision applies." *Meyer v. UPS*, 122 Ohio St.3d 104, 2009-Ohio-2463, ¶21, citing *State v. Chippendale* (1990), 52 Ohio St.3d 118, 556 N.E.2d 1134. Three provisions within R.C. 2901.13 are germane to this case—Division (A)(1) is general in nature, providing the default period of limitations for criminal offenses; division (B)(1) is specific, providing the only available means to expand the default period of limitations for criminal offenses of which an element is fraud or breach of a fiduciary duty; and division (F) generally clarifies (A)(1) when there is not a specific provision on point. A provision detailing the limitation period for crimes with an element of fraud or breach of a fiduciary duty within the Revised Code is more specific than a provision governing the start of the default limitation period for all

crimes within the Revised Code. Also, there is no manifest legislative intent that division (F) control over (B)(1), but there is legislative intent that division (B)(1) supersedes (F) for offenses of which an element is fraud or breach of a fiduciary duty. (See Part II(B), pp. 13-21, *infra*). Consequently, R.C.2901.13(B)(1) controls over division (F) regarding the expansion of the limitation periods in (A)(1), when a case consists of criminal offenses of which an element is fraud or breach of a fiduciary duty.

A. Revised Code Section 2901.13(A)(1) establishes the default limitation period for criminal offenses.

At its core, a statute of limitations on criminal offenses limits “exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” *Toussie v. United States* (1970), 397 U.S. 112, 114-115, 90 S.Ct. 858, 25 L.Ed. 2d 156. Furthermore, limitation periods “normally begin to run when the crime is complete.” *Id.* at 115, citing *Pendergast v. United States* (1943), 317 U.S. 412, 418, 63 S.Ct. 268, 87 L.Ed. 368, and *United States v. Irvine* (1878), 98 U.S. 450, 452, 25 L.Ed. 193. Ohio codified this general limitation, and running of the clock, in R.C. 2901.13(A)(1), with the intent “to discourage inefficient or dilatory law enforcement rather than to give offenders the chance to avoid criminal responsibility for their conduct.” *State v. Hensley* (1991), 59 Ohio St.3d 136, 138, 571 N.E.2d 711. Revised Code Section 2901.13(A)(1) contains exceptions, providing:

Except as provided in division (A)(2) or (3) of this section or as otherwise provided in this section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:

- (a) For a felony, six years;
- (b) For a misdemeanor other than a minor misdemeanor, two years;
- (c) For a minor misdemeanor, six months.

[Emphasis added].

The meaning of “[e]xcept as provided in division (A)(2) or (3) of this section or as otherwise provided in this section” is clear. This section defines the statute of limitations for felony criminal offenses as six years, running from the date of the offense, unless R.C. 2913.01(A)(2) or (3), or another division of R.C. 2901.13, specifically increases that period. See *Hensley*, at 137; see, also, *State v. Evans*, 102 Ohio St.3d 240, 2004-Ohio-2659, 809 N.E.2d 11, ¶15, citing *Carter v. Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (holding that when the clause “except as provided in” appears in a statute, the other language of that provision is not absolute, and by its own express terms is subject to those identified exceptions). Only a specific statutory exception will change the absolute periods set in R.C. 2901.13(A)(1). *Hensley* at 137. This Court has commented that this operation ensures compliance with the rules of statutory construction stated in R.C. 2901.04(B) (“Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.”). See *Climaco*, at 586.

B. Revised Code Section 2901.13(B)(1) is the specific statutory exception that expands the default period of limitations for criminal offenses of which an element is fraud or breach of a fiduciary duty.

The General Assembly crafted a specific exception regarding the limitation

period for criminal offenses of which an element is fraud or breach of a fiduciary duty in R.C. 2901.13(B)(1). It reads:

Except as otherwise provided in division (B)(2) of this section, if the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense.

[Emphasis added].

This "special rule [extends] the time period for the commencement of prosecution for an offense of which an element is fraud or breach of a fiduciary duty." *Hensley* at 137. This rule is necessary for crimes of which an element is fraud or breach of a fiduciary duty because they, inherently, may not be discovered for an unknown period. The General Assembly specifically addressed this reality with division (B).

For crimes of which an element is fraud or breach of a fiduciary duty, the language of division (B)(1) elevates its mandates above all other portions of R.C. 2901.13. The only exception is that division (B)(2) governs the statute of limitations period for identity fraud under R.C. 2913.49. Consequently, R.C. 2901.13(B)(1) is the only mechanism within R.C. 2901.13 that extends the six-year limitation period defined in division (A)(1) for felony offenses of which an element is fraud or breach of a fiduciary duty, excluding identity fraud. If not, division (B) is superfluous. (See Part II(B)(2), pp. 16-21, *infra*).

In the present case, Ms. Cook was indicted on one count of tampering with records, a violation of R.C. 2913.42(A)(1) and (B)(4) and a third-degree felony. Fraud is

an element of tampering with records. See R.C. 2913.42(A). Thus, R.C. 2901.13(B)(1) governs the limitation period in this case.

C. If R.C. 2901.13(F) operates to toll the limitation periods of 2901.13(A)(1), when the corpus delicti is discovered within those defined periods, it does so only when there is not a more specific provision of R.C. 2901.13 applicable to the charge(s).

Revised Code Section 2901.13(F) may determine the specific time at which the periods of limitation defined in R.C. 2901.13(A) begin to run for certain criminal offenses not otherwise addressed in R.C. 2901.13. See *Climaco*, at 591 (Moyer, C.J., dissenting). It reads: "The period of limitation shall not run during any time when the corpus delicti remains undiscovered." Revised Code 2901.13(F), however, is superseded by other divisions of R.C. 2901.13. For example, R.C. 2901.13(B)(1) solely governs the limitation period for offenses of which an element is fraud or breach of a fiduciary duty. Similarly, R.C. 2901.13(C) exclusively controls the limitation period for offenses involving misconduct in office by a public servant, and R.C. 2901.13(I) wholly determines the limitation period for criminal offenses involving abuse or neglect of children under 18 years of age, or mentally retarded, developmentally disabled, or physically impaired children under 21 years of age. Thus, R.C. 2901.13(F) does not apply to these offenses.

This Court has repeatedly rejected an expansive reading of R.C. 2901.13(F). See *Climaco*, at 588; *Hensley*, at 139. An expanded application of R.C. 2901.13(F) "could subject a person to criminal liability indefinitely with virtually no time limit, and thus frustrate the legislative intent of a statute of limitations on criminal prosecutions."

Hensley at 139. In interpreting the legislative intent of R.C. 2901.13, this Court has highlighted:

* * * The section [R.C. 2901.13] gives various special rules for determining when the time limits begin to run and for tolling the time limits, so that the basic thrust of the measure is to discourage inefficient or dilatory law enforcement rather than give offenders the chance to avoid criminal responsibility for their conduct. * * * The rationale for limiting criminal prosecutions is that they should be based on reasonably fresh, and therefore more trustworthy evidence.

Hensley at 138, citing the Comment by the Legislative Service Commission to Am. Sub. H.B. No. 511.

When determining the appropriate limitation period, the objective of a court “is to strike a proper balance between the need to place some restriction on the time period within which a criminal case may be brought, and the need to ensure that those [who commit crimes] do not escape criminal responsibility for their actions.” *Hensley* at 139. This description of the balancing nature of R.C. 2901.13(F) suggests it is a safety provision, for use solely in unique circumstances. See, also, *State v. Edwards* (1997), 119 Ohio App.3d 237, 242, 695 N.E.2d 23. In *Hensley*, the sexual abuse of children provided the unique circumstances. Another offense that could require this operation is perjury, because that offense generally consists of two actions, each of which may occur many years apart. See *State v. Williams*, 2004-Ohio-3135, 2004 Ohio App. LEXIS 2816, ¶37. These examples, although not exhaustive, illustrate that R.C. 2901.13(F) provides the general mechanism to achieve the balance described in *Hensley*, but only for offenses in which the General Assembly has not otherwise expanded the default limitation periods

defined in R.C. 2901.13(A)(1).

II. Ohio case law and the actions of the General Assembly require R.C. 2901.13(B)(1) to govern this case.

A. Ohio case law, including this Court’s precedent, demonstrates that R.C. 2901.13(B)(1) supersedes R.C. 2901.13(F) in cases involving offenses of which an element is fraud or breach of a fiduciary duty.

Hensley and *Climaco* instruct that R.C. 2901.13(B)(1) controls the statute of limitations period for offenses of which an element is fraud or breach of a fiduciary duty. This Court’s decision in *Hensley* limited R.C. 2901.13(F) to the unique circumstances surrounding the charges in that case, and warned against the overexpansion of R.C. 2901.13(F), highlighting that such an extension would frustrate the “legislative intent of a statute of limitations on criminal prosecutions.” *Hensley* at 139. In *Climaco*, this Court rejected the Tenth District Court of Appeals’ expansive reading and application of R.C. 2901.13(F)—determining instead that division (F) is inapplicable in circumstances in which the corpus delicti of the offense was discovered within the default limitation periods of R.C. 2901.13(A)(1)—and commented that many portions of R.C. 2901.13 are “of no consequence if subsection (F) controls all circumstances.” *Climaco* at 587.

Likewise, Ohio courts have consistently determined that R.C. 2901.13(B) supersedes division (F). The conflict case before this Court demonstrates the proper reconciliation of R.C. 2901.13(B)(1)¹ and (F). See *State v. Mitchell* (1992), 78 Ohio App.3d

¹ The functional equivalent of the provision presently codified in R.C. 2901.13(B)(1) was codified in R.C. 2901.13(B) at the time of *Mitchell* and *Dauwalter*. See R.C. 2901.13(B) - (Anderson 1992).

613, 605 N.E.2d 978. In that decision, the Eighth District Court of Appeals confirmed the trial court's application of, and adopted the reasoning of *State v. Dauwalter* (C.P. 1988), 43 Ohio Misc.2d 17, 540 N.E.2d 336. The court in *Dauwalter* held:

Prosecution for a fraud offense is barred by the six-year limitations period specified in R.C. 2901.13(A) unless the indictment is returned either: (1) within the original six-year period if the offense is discovered sooner than five years from the date of the offense, or (2) within one year after discovery of the offense where discovery occurs at some time during the fifth year of the six-year limitations period, or (3) within one year after discovery of the offense if discovery occurs after the six-year limit has run.

Dauwalter, at paragraph one of the syllabus.

Both the trial court and the appellate court in *Mitchell* adopted the *Dauwalter* approach. The appellate court noted that the statute requires this operation:

Were we to endorse the state's argument [that R.C. 2901.13(F) should control], the intent of the General Assembly in enacting R.C. 2901.13, particularly in cases dealing with fraud, to wit, to discourage inefficient and dilatory law enforcement, would be frustrated and R.C. 2901.13(B) would be ineffectual and superfluous.

Mitchell at 616.

The *Dauwalter* court reached the same conclusion:

Under such interpretation [treating R.C. 2901.13(F) as controlling in cases with an offense of which an element is fraud or breach of a fiduciary duty], however, subsection (B) becomes a complete nullity, and does so in every conceivable situation. However, if subsection (F) is interpreted as only tolling the statute for a one-year period after the date of discovery, then the two subsections are reconciled and compatible.

Dauwalter at 18.

This decision and rationale have been widely embraced. See *State v. Stephens*,

2nd Dist. No. 96 CA 0117, 1997 Ohio App. LEXIS 3424; *State v. Lester* (1996), 111 Ohio App.3d 736, 676 N.E.2d 1270; *State v. Martin*, 4th Dist. No. 00CA28, 2001-Ohio-2547, 2001 Ohio App. LEXIS 5250. *Stephens* and *Lester* are direct confirmations and applications of *Mitchell* and *Dauwalter*. The court in *Martin*, however, commented that R.C. 2901.13(B)² and (F) could both apply to a charge of which an element is fraud or breach of a fiduciary duty, under circumstances in which the corpus delicti of the offense was not discovered until after the six-year limitation period had expired. The *Martin* court stated:

[Revised Code Section] 2901.13(F) may apply here because the offense was not discovered until after the six-year statute of limitations (as measured from the date of the offense[]) had expired. * * * [W]e find that the two provisions are not necessarily inconsistent. R.C. 2901.13(F) tolls the statute of limitations until anyone discovers the corpus delicti, while R.C. 2901.13(B) tolls the statute of limitations until the party aggrieved by the fraud discovers the corpus delicti. Thus, R.C. 1.12 does not apply because the two provisions are not inconsistent. However, in addressing *Martin's* argument, we assume that R.C. 2901.13(B) applies here.

[Emphasis added]. *Martin*, 2001 Ohio App. LEXIS 5250, at *28-29.

Revised Code Section 1.12 is the statutory codification of the rule of statutory interpretation as detailed by this Court. It reads:

When a special provision is made in a remedial law as to service, pleadings, competency of witnesses, or in any other respect inconsistent with the general provisions of sections of the Revised Code relating to procedure in the court of common pleas and procedure on appeal, the special provision shall govern, unless it appears that the provisions are cumulative.

² The functional equivalent of the provision presently codified in R.C. 2901.13(B)(1) was codified in R.C. 2901.13(B) at the time of *Martin*. See R.C. 2901.13(B) - (Anderson 2001).

The *Martin* court's assertion that R.C. 2901.13(B) and (F) are not inconsistent is not relevant to this case. That application of R.C. 2901.13(B) in *Martin* was proper, and was most likely implemented because, in practical application, there is no functional difference between "anyone" triggering prosecution, and an "aggrieved person or their representative" triggering prosecution. Notably, however, if divisions (B) and (F) are not inconsistent, it is because (F) yields to (B) in specific circumstances involving offenses of which an element is fraud or breach of a fiduciary duty. See *Dauwalter*, at 18. Nonetheless, the *Martin* decision determined that division (F) does not apply to offenses of which an element is fraud or breach of a fiduciary duty when the corpus delicti is discovered within the limitation periods of division (A). *Martin* at *29. Thus, *Dauwalter*, *Mitchell*, *Stephens*, *Lester*, and *Martin* all hold that R.C. 2901.13(B) controls the limitation period for offenses of which an element is fraud or breach of a fiduciary duty. Applying those holdings to the facts of Ms. Cook's case must lead this Court to the conclusion that Ms. Cook's indictment was brought outside the appropriate statute of limitations period.

The corpus delicti in the present case was discovered within the six-year limitation period of R.C. 2901.13(A)(1). An element of Ms. Cook's charged offense is fraud. There is no reason for this Court to depart from its own precedent, or to alter the longstanding interpretation of R.C. 2901.13 by lower courts. In fact, legislative intent prohibits such a divergence.

B. Legislative intent establishes that R.C. 2901.13(B)(1) is the exclusive statutory means to alter the default limitation periods in R.C. 2901.13(A)(1) for offenses of which an element is fraud or breach of a fiduciary duty.

The starting point of statutory analysis is the text of the statute. This Court has long explained the need for adherence to both statutory text and to the underlying legislative intent that the text embodies. Both the plain language of R.C. 2901.13 and the actions of the General Assembly substantiate that division (B)(1) is the sole means of adjusting the limitation periods defined in (A)(1) for offenses of which an element is fraud or breach of a fiduciary duty. If R.C. 2901.13(F) is ever to be applied in a case involving offenses identified in divisions (B), (C), and (I), then it must surrender to the time period defined in those divisions. Division (B)(1) was precisely designed to govern cases involving offenses of which an element is fraud, such as this case.

1. The plain language of R.C. 2901.13(B) is ineffectual if it surrenders to division (F) for offenses of which an element is fraud or breach of a fiduciary duty.

When interpreting the language of a statute, a court must give effect to both the words used and their context. See R.C. 1.42. In giving effect to the words used, a court should not add or take away from those words. *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217. And a court should look at the entire statute in its context. See R.C. 1.47(B); *Dupps Co., v. Lindley* (1980), 62 Ohio St.2d 305, 307, 405 N.E.2d 716. Furthermore, "there is no need for this court to apply the rules of statutory interpretation when the language of a statute is plain and unambiguous and conveys a clear and definite meaning." *State v. McConville*, Slip Opinion No. 2010-Ohio-958, citing *Meeks v. Papadopoulos* (1980), 62 Ohio St.2d 187, 190, 404 N.E.2d 159, and *Sears v. Weimer*

(1944), 143 Ohio St. 312, 55 N.E.2d 413, paragraph five of the syllabus; see, also, *State v. Lozano* (2001), 90 Ohio St.3d 560, 563, 740 N.E.2d 73, quoting *Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.* (1986), 21 Ohio St.3d 21, 23, 487 N.E.2d 301 (“Absent ambiguity, a statute is to be construed without resort to a process of statutory construction.”). Similarly, a court should not modify unambiguous language. See *State ex rel. Sears, Roebuck & Co. v. Ind. Comm. of Ohio* (1990), 52 Ohio St. 3d 144, 148.

For ambiguous provisions this Court considers, among other things, the object sought to be obtained and the consequences of a particular construction. See R.C. 1.49. And, “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.” *State v. Young* (1980), 62 Ohio St.2d 370, 374, 406 N.E.2d 499, quoting *United States v. Bass* (1971), 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488; see, also, *State v. Price*, 118 Ohio St.3d 144, 2008-Ohio-1974, 886 N.E.2d 852, ¶36. Additionally, R.C. 2901.04(A) mandates that sections of the Revised Code that define offenses “shall be strictly construed against the state, and liberally construed in favor of the accused.” See R.C. 2901.04(A).

On January 1, 1974, the original version of R.C. 2901.13 became effective. It was unambiguous, and contained both divisions (B) and (F). See R.C. 2901.13 – (Anderson 1974). Division (F) has not changed since inception. Division (B), although amended by H.B. 46 in 2008, functions in the same manner as it did when it initially became effective. The 2008 amendment added the language of division (B)(2) and the following phrase: “(1) Except as otherwise provided in division (B)(2) of this section, if....” See Sub. H.B. No. 46. The two 1974 divisions were functionally equivalent to today’s

version. Those versions read:

(B) If the period of limitation provided in division (A) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person, or by his legal representative who is not himself a party to the offense.

* * * (F) The period of limitation shall not run during any time when the corpus delicti remains undiscovered.

See R.C. 2901.13 - (Anderson 1974).

Reading the statute as a whole, and in context, division (B) must supersede (F) to maintain meaning. If division (F) controls over (B) for crimes of which an element is fraud or breach of a fiduciary duty, then the statute of limitations period does not begin to run until the act and its criminal agency is discovered. See *Hensley*, at 138 (“[C]orpus delicti is the body or substance of the crime and is made up of two elements: (1) the act itself and (2) the criminal agency of the act.”). Logic dictates that discovery of a criminal act and knowledge that it is a crime will trigger prosecution when discovery occurred by or was made known to either the aggrieved person or his representative, or a government agency. In 1974 and today, for offenses of which an element is fraud or breach of a fiduciary duty, division (B) is not needed if division (F) applies. The statutory language makes this implication unambiguous and definite.

Alternatively, if the divisions are ambiguous, the object sought to be obtained by each division and the consequences of applying division (F) to offenses of which an element is fraud or breach of a fiduciary duty must be considered. See R.C. 1.49. Also, the divisions must be strictly construed against the State and all doubts must be

resolved in favor of Ms. Cook. See R.C. 2901.04(A); *Price* at ¶36. Division (B) seeks to ensure that offenses of which an element is fraud or breach of a fiduciary duty do not go unpunished because it was not known that the prohibited act had occurred.

Division (F) aims to guarantee that any crime committed does not go unpunished because it was not known that the prohibited act had occurred. The object sought to be obtained by division (F) encompasses that of (B). Moreover, the consequence of applying division (F) to offenses of which an element is fraud or breach of a fiduciary duty is that (B) has no effect in any conceivable situation. If R.C. 2901.13(F) applies to offenses of which an element is fraud or breach of a fiduciary duty, then division (B) is redundant and a nullity. Therefore, strictly construing these provisions against the State, and resolving doubt in Ms. Cook's favor, division (B) must exclusively control the expansion of the limitation period for offenses of which an element is fraud or breach of a fiduciary duty.

2. **The actions of the General Assembly demonstrate manifest legislative intent that R.C. 2901.13(B)(1) is the exclusive statutory means to alter the default limitation periods in R.C. 2901.13(A)(1) for offenses of which an element is fraud or breach of a fiduciary duty.**

Two comments regarding R.C. 2901.13 from the Legislative Service Commission, and Section 3 of Sub. S.B. No. 219 illustrate that the General Assembly intended R.C. 2901.13(B)(1) to operate in the manner detailed by the courts in *Dauwalter* and *Mitchell*. In 1974, the Legislative Service Commission summarized the operation of R.C. 2901.13, stating:

* * * The section [R.C. 2901.13] gives various special rules for determining when the time limits begin to run and for tolling the

time limits, so that the basic thrust of the measure is to discourage inefficient or dilatory law enforcement rather than give offenders the chance to avoid criminal responsibility for their conduct. * * * The rationale for limiting criminal prosecutions is that they should be based on reasonably fresh, and therefore more trustworthy evidence.

Comment by the Legislative Service Commission to Am. Sub. H.B. No. 511.

This commentary demonstrates that the General Assembly intended that the special rules in the various provisions of R.C. 2901.13 govern the commencement and tolling of the default limitation periods for certain identified offenses within the statute.

In 2008, the Legislative Service Commission noted the operation for divisions (B) and (C):

Section 2901.13 of the Revised Code is amended by Sub. H.B. 46 and S.B. 219 of the 127th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

Comment by the Legislative Service Commission to Sub. H.B. No. 46 and S.B. No. 219.

These observations clarify that the General Assembly intended for the entirety of R.C. 2901.13(B)—the provisions amended by Sub. H.B. No. 46—and the entirety of R.C. 2901.13(C)—the provisions amended by Sub. S.B. No. 219—to be reconcilable and harmonized under R.C. 1.52(B). See Sub. H.B. No. 46 and S.B. No. 219. Revised Code Section 1.52(B) explains how statutory provisions are to be harmonized whenever possible:

If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are

substantively irreconcilable, the latest in date of enactment prevails. The fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation.

R.C. 1.52(B).

Revised Code Sections 2901.13(B) and (C) are easily harmonized. If an offense involves misconduct by a public servant or is directly related to misconduct by a public servant, irrespective of whether or not an element of the offense is fraud or breach of a fiduciary duty, division (C) controls the limitation period. For all other offenses with an element of fraud or breach of a fiduciary duty, R.C. 2901.13(B) governs the limitation period. This operation, and required harmonization of divisions (B) and (C), demonstrates that the General Assembly intended for the specific provisions within R.C. 2901.13 to control over portions of the statute that do not identify specific crimes.

Section 3 of Sub. S.B. No. 219 explained that the General Assembly intended to supersede this Court's ruling in *Climaco*:

In amending section 2901.13 of the Revised Code, it is the intent of the General Assembly to supersede the effect of the holding of the Ohio Supreme Court in *State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A.* (1999), 85 Ohio St.3d 582, with respect to the running of the criminal statute of limitations for certain offenses having a direct relation to certain public servants, whether or not the discovery of the corpus delicti of those offenses occurs within or outside of the otherwise generally applicable period of limitation for criminal prosecution under section 2901.13 of the Revised Code.

This confirms that the General Assembly has endorsed the reconciliation of R.C.

2901.13(B) and (C) as described above. The General Assembly added 2901.13(C) to govern the limitation period of all offenses involving misconduct by a public servant or directly related to misconduct by a public servant. Section 3 of Sub. S.B. No. 219 demonstrates the General Assembly's manifest intent that R.C. 2901.13(C) supersedes this Court's ruling in *Climaco* because the General Assembly took issue with that result. Importantly, the General Assembly opposed how this Court started the statutory clock under R.C. 2901.13 for certain offenses having a direct relation to public servants. Aiming to correct the law and that decision, the General Assembly amended R.C. 2901.13 with a specific provision targeting misconduct by a public servant. It did not alter R.C. 2901.13(F), but instead, addressed the class of offense presented in *Climaco*. Thus, the plain language of R.C. 2901.13 and the limited commentary surrounding its creation and amendments demonstrate a manifest legislative intent to extend the limitation periods for identified offenses with specific provisions.

If the General Assembly intended for the general tolling provision of R.C. 2901.13(F) to control specific situations identified elsewhere in the statute, then its amendments and commentary would have reflected that intent. As an example, this provision of S.B. 219 states specifically that R.C. 2901.13(C) controls offenses involving misconduct by a public servant, irrespective of when the offense occurs. This demonstrates the General Assembly's intent for R.C. 2901.13(C) to encompass the functional tolling provisions of division (F) as advanced by the Sixth District Court of Appeals in this case. If division (F) was already intended to operate in those situations identified in (C), the commentary either would have stated so, or there would not have

been any comment at all. Notably, there is no similar legislative intent—either through comments, provisions of the bill, or statutory language—regarding R.C. 2901.13(B). As a result, R.C. 2901.13(B)(1) operates exclusively as described in *Mitchell* and *Dauwalter*, and supersedes division (F) in cases involving an offense of which an element is fraud or breach of a fiduciary duty.

Likewise, the General Assembly's actions have mirrored the commentary, further demonstrating this intent. The General Assembly amended R.C. 2901.13 in 2006 through the passage of 2005 S.B. 17. See Am. Sub. S.B. No. 17. That amendment added the current version of division (I) to the statute to govern situations such as those addressed by this Court in *Hensley*. Revised Code Section 2901.13(I) reads:

The period of limitation for a violation of any provision of Title XXIX of the Revised Code that involves a physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of a child under eighteen years of age or of a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age shall not begin to run until either of the following occurs:

- (1) The victim of the offense reaches the age of majority.
- (2) A public children services agency, or a municipal or county peace officer that is not the parent or guardian of the child, in the county in which the child resides or in which the abuse or neglect is occurring or has occurred has been notified that abuse or neglect is known, suspected, or believed to have occurred.

Rather than rely on judicial interpretations of this Court's ruling the General Assembly again targeted specific offenses. It expressly defined and expanded the appropriate period of limitations for offenses of child abuse and neglect. This action further illustrates that the General Assembly intended for the special rules within R.C.

2901.13 to operate exclusively with division (A) to control all aspects of the limitation periods for those identified offenses.

III. Applying R.C. 2901.13(B)(1) to this case required that the State indict Ms. Cook within the default six-year period of limitations set by R.C. 2901.13(A)(1).

Revised Code Section 2901.13(B)(1) controls the limitation period in Ms. Cook's case. The State was required to indict Ms. Cook within the default six-year period of limitations set by R.C. 2901.13(A)(1). Revised Code Section 2901.13(B)(1) aims to increase the default six-year limitation period for felony offenses with fraud or breach of a fiduciary duty as an element in two factual situations: When the fraud or breach of fiduciary duty was discovered after the six-year period had expired, and when the fraud or breach of fiduciary duty was discovered less than one year before that six-year period had expired. Neither of these unique circumstances applied to Ms. Cook's case. If division (F) is in any way required to operate in this case, it must yield to the time period defined in (B)(1). Because 2901.13(B)(1) was not satisfied so as to be applied in this case, division (F) is also precluded from extending the limitation period. Thus, the default limitation period established in R.C. 2901.13(A)(1) must not be altered, and the limitation period could not be extended beyond the established six years.

Consequently, Ms. Cook had to be indicted on the tampering-with-records offense by July 12, 2007, six years after the date of the offense—July 12, 2001. The State did not indict Ms. Cook on the tampering-with-records charge within the statute of limitations.

IV. The Sixth District Court of Appeals' decision in Ms. Cook's case is wrong, and inconsistent with its own precedent.

Revised Code Section 2901.13(B)(1) operates to define the limitation period for a

criminal offense of which an element is fraud or breach of a fiduciary duty. Ms. Cook was charged with a crime of which an element is fraud. The limitation period in her case can be succinctly stated as: “Either one year from the date of discovery of the offense by an aggrieved person or their legal representative, or the entire applicable period established in R.C. 2901.13(A)(1), whichever is greater.” In this case, the greater period was six years from the date of the offense—July 12, 2001. Thus, the limitation period expired on July 12, 2007. The fraud was discovered by a trustee of the church on an unidentified day in February of 2004. See *State v. Cook*, 184 Ohio App.3d 382, 2009-Ohio-4917, 921 N.E.2d 258, ¶14. The court of appeals identified that date as beginning the limitation period. *Id.* at ¶37. In the terms of R.C. 2901.13, that would be the aggrieved person or the aggrieved person’s legal representative of division (B). Therefore, the court correctly characterized this offense as being governed by division (B). If satisfied, 2901.13(B)(1) would require the indictment to be filed by the end of February 2005 at the latest. Because R.C. 2901.13(B)(1) is designed to extend the default limitation periods defined in division (A)(1), it cannot be used to decrease that period. Therefore, the limitation period should have remained the six-year period from the date of the offense, as established by R.C. 2901.13(A)(1). The State did not indict Ms. Cook until July 18, 2007. The statute of limitations as defined by R.C. 2901.13 had expired.

The Sixth District Court of Appeals has previously interpreted R.C. 2901.13(B) to control in cases involving charges with fraud as an element of the offense. In *State v. Gravelle*, the court of appeals ruled that fraud was not an element of the indicted offenses, and therefore, the default limitation periods of R.C. 2901.13(A) controlled. See

State v. Gravelle, 6th Dist. Nos. H-06-042, H-06-043, H-06-044, and H-06-045, 2008-Ohio-4031, ¶23. The ruling in *Cook* is inconsistent with *Gravelle*. The *Gravelle* decision held that when a charge contains an element of fraud, R.C. 2901.13(B) is applicable and controls the period of limitations. Although the holding of *Gravelle* does not offer the entire solution in this case, it does provide the appropriate starting point. In Ms. Cook's case, the court of appeals failed to properly apply precedent from its own district. Had it done so, it would have been less likely to err in its interpretation of R.C. 2901.13.

CONCLUSION

This Court has held that the State bears the burden of proving that the offense was committed within the appropriate statute of limitations. See *Climaco*, at 587, citing *State v. Young* (1981), 2 Ohio App.3d 155, 440 N.E.2d 1379. As demonstrated above, the appropriate statute of limitations in this case expired on July 12, 2007. Consequently, the State did not meet its burden to indict Ms. Cook within the appropriate limitation period, and the Sixth District Court of Appeals erred in reversing the trial court's dismissal of the tampering-with-records offense. For these reasons Amicus Curiae, Office of the Ohio Public Defender, joins Ms. Cook and asks this Court to reverse the court of appeals' decision and remand to the trial court for dismissal of the tampering-with-records charge.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



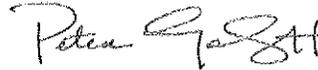
PETER GALYARDT #0085439
Assistant State Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - Fax
E-mail: Peter.Galyardt@opd.ohio.gov

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellant Linda S. Cook** was forwarded by regular U.S. Mail, postage prepaid to Evy M. Jarrett, Assistant Lucas County Prosecutor, addressed to her office at the Lucas County Courthouse, 700 Adams Street, Suite 250, Toledo, Ohio 43604; and John F. Potts, addressed to his office at 405 Madison Avenue, Suite 1010, Toledo, Ohio 43604, on this 12th day of April, 2010.



PETER GALYARDT #0085439
Assistant State Public Defender

COUNSEL FOR AMICUS CURIAE,
OHIO PUBLIC DEFENDER