IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	:	**Case No. 09-1997**
Plaintiff-Appellee	:	
-vs-	:	**On Appeal from the Hamilton County Court of Appeals, First Appellate District**
	:	
KENNETH HODGE,	:	**Court of Appeals Case No. C080968**
	:	
Defendant-Appellant.	:	**Trial Court No. B-0805818-A**
	:	

Merit Brief of Appellant Kenneth Hodge

COUNSEL FOR APPELLANT:
Janet Moore (0080506)
Counsel of Record
Janet Moore, Attorney at Law LLC
205 Worthington Avenue
Wyoming, Ohio 45215
513.600.4757
janetm323@cinci.rr.com

David A. Singleton (0074556)
Angelina N. Jackson (0077937)
Peter C. Link*
The Indigent Defense Clinic
OHIO JUSTICE & POLICY CENTER
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202
(513) 421-1108 ext. 12
Fax No. (513) 562-3200

COUNSEL FOR APPELLEE:
Joseph T. Deters (0012084P)
Ronald W. Springman, Jr. (0041413)
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3178
Fax No. (513) 946-3021

FILED
APR 26 2010
CLERK OF COURT
SUPREME COURT OF OHIO

*Practicing under Ohio Gov. Bar R. II's limited license rule for third-year law students

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS AND OF THE CASE 1

ARGUMENT 4

PROPOSITION OF LAW: By abrogating State v. Foster, Oregon v. Ice automatically and retroactively revived Ohio's consecutive sentencing statutes, R.C. 2929.14(E)(4), 2929.19(B)(2)(c), 2929.41(A), and 2953.08(G) 4

A. *Ice* Abrogated *Foster* With Respect to Consecutive Sentencing 4

B. *Ice* Automatically and Retroactively Reactivated Ohio's Consecutive Sentencing Statutes 5

C. The State Cannot Prove the Error Harmless Beyond a Reasonable Doubt 6

1. R.C. 2953.08(G)(1) Requires Remand 7

2. The Sentence is Disproportionate and Inconsistent 8

3. The Sentence Imposes an Unnecessary Burden on Government Resources 10

CONCLUSION 11

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey (2000), 530 U.S. 466, 147 L.Ed.2d 435 ..... 1, 2

Blakely v. Washington (2004), 542 U.S. 296, 159 L.Ed.2d 403 ..... 1, 2

Chapman v. California (1967), 386 U.S. 18, 24, 17 L. Ed. 2d 705. 6

Griffith v. Kentucky (1987), 479 U.S. 314, 93 L. Ed. 2d 649 ..... 5, 6

Hicks v. Oklahoma (1980), 447 U.S. 343 6

Iowa v. O'Neil (Ia.1910), 147 Iowa 513 5

Jawish v. Morlet (D.C. App. 1952), 86 A.2d 96 5

Klick v. Snaveley (1928), 199 Ohio St. 308, 164 N.E. 233: 9

Limbach v. Hooven and Allison Co. (1984), 466 U.S. 353, 80 L.Ed.2d 356 4

Martin v. Hunter's Lessee (1816), 1 Wheat. 304 4

Newsome v. Brunsman (N.D. Ohio 2010), __ F.Supp.2d.___, 2009 U.S. Dist. LEXIS 123590 5

Oregon v. Ice (2009), ___ U.S.___, 129 S.Ct. 711, 172 L.Ed.2d 517 ..... *passim*

Peerless Electric Co. v. Bowers (1955), 164 Ohio St. 209, 210 5

People v. Wagener (Ill.2001), 196 Ill. 2d 269, 752 N.E.2d 430, 256 Ill. Dec. 550 2

Pierce v. Pierce (Ind.1874), 46 Ind. 86 6

State v. Abdul-Mumin, 10th Dist. Nos. 04AP-485, 04AP-486, 2005-Ohio-522 2

State ex rel. Badgett v. Lee (Fla.1945), 156 Fla. 291 5

State v. Bambao (Jan. 26, 2009), Hamilton Cty. C.P. No. B 0805966 9

State v. Benford (Sept. 16, 2009), Hamilton Cty. C.P. No. B 0809131 9

State v. Carter, 6th Dist. No. L-00-1082, 2002-Ohio-3433 2

State v. Cooper (June 23, 2009), Hamilton Cty. No. B 0802017 9

State v. Crosky, 10th Dist. No. 09AP-57, 2009-Ohio-4216 3

State v. Daniels (Aug. 28, 2008), Hamilton Cty. No. B 0801766 9

State v. Davis, 2d Dist. Nos. 2007 CA 71, 2008 CA 55, 2009-Ohio-4583 3

State v. Dodds (April 30, 2009), Hamilton Cty. C.P. No. B 0806779 9

State v. Eatmon, 8th Dist. No. 92048, 2009-Ohio-4564 4

State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *overruled in part, Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517 ..... *passim*

State v. Gambrel, 2nd Dist. No. 2000-CA-29, 2001 Ohio App. LEXIS 339 2

State v. Hardy (July 23, 2008), Hamilton Cty. C.P. No. B 0800191, unreported 9

State v. Hodge (July 28 and Sept. 8, 2008), Hamilton Cty. C.P. No. B-0805818, unreported 3, 8, 9

State v. Hodge (Sept. 16, 2009), 1st Dist. No. C-080968 ..... 3, 7

State v. Ice (Ore.2007), 343 Ore. 248, 170 P.3d 1049 2

State v. Ice, (Ore.2009) 346 Ore. 95, 204 P.3d 1290 ..... 2, 4

State v. Ingersol (Dec. 26, 2008), Hamilton Cty. C.P. No. B 0802675, unreported 9

State v. Johnson (Feb. 25, 2009), Hamilton Cty. C.P. No. B 0804934-A, unreported 9

State v. Jones (Aug. 5, 2008), Hamilton Cty. C.P. No. B 0803366, unreported 9

State v. Keene (Me.2007), 2007 ME 84, 927 A.2d 398 2

State v. Krug, 11th Dist. No. 2008-L-085, 2009-Ohio-3815 3

State v. Kues (Oct. 20, 2008), Hamilton Cty. No. B 0800324, unreported 9

State v. Lee (Aug. 21, 2009), Hamilton Cty. C.P. No. B 0808033, unreported 9

State v. Lewis, 12th Dist. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684 3

State v. Miller, 6th Dist. L-08-1314, 2009-Ohio-3908 3

State v. Montgomery (1st Dist.), 159 Ohio App. 3d 752, 2005-Ohio-1018, 825 N.E.2d 250 2

State v. Moore (Dec. 12, 2008), Hamilton Cty. C.P. No. B 0804365, unreported 9

State v. Quezambra (June 11, 2009), Hamilton Cty. C.P. No. B 0805005, unreported 9

State v. Richardson (Nov. 13, 2008), Hamilton Cty. C.P. No. B 0806347, unreported 9

State v. Sprawl (July 10, 2009), Hamilton Cty. C.P. No. B 0809372, unreported 9

State v. Smith, 5th Dist. No. 09-CA-31, 2009-Ohio-6449 ..... 4, 6

State v. Starett, 4th Dist. No. 07CA30, 2009-Ohio-744 3

State v. Sullivan (Feb. 25, 2009), Hamilton Cty. C.P. No. B 0804934, unreported 9

State v. Taylor (11th Dist.), 158 Ohio App.3d 597, 2004-Ohio-5939, 821 N.E.2d 192 2

State v. Vandriest, 5th Dist. No. 09-COA-032, 2010-Ohio-997 6

State v. Walston (Mar. 27, 2009), Hamilton Cty. C.P. No. B 0807960, unreported 9

State v. Weaver (Mar. 6, 2009), Hamilton Cty. C.P. No. B 0807846, unreported 9

State v. Williams, 5th Dist. No. CT2009-0006, 2009-Ohio-5296 3

State v. Williams (June 19, 2009), Hamilton Cty. C.P. No. B 0805967, unreported 9

State v. Yett (July 27, 2009), Hamilton Cty. C.P. No. B 0809428, unreported 9

United States v. Booker (2005), 543 U.S. 220, 160 L. Ed. 2d 621 ..... 1. 2

Statutes

O.R.S. 137.123 4

O.R.S. 137.123(1) 4

O.R.S. 137.123(4) 4

O.R.S. 137.123(5) 4

O.R.S. 137.123(5)(a) 4

O.R.S. 137.123(5)(b) 4

R.C. 2929.11 ..... 4, 6

R.C. 2929.11(B) 8

R.C. 2929.13(A) 6, 10

R.C. 2929.14(E)(4) ..... *passim*

R.C. 2929.19(B)(2)(c) 1, 6

R.C. 2929.41(A) ..... *passim*

R.C. 2953.08(G) ..... *passim*

Legislative Materials

Am.Sub.H.B. 95 2

Am.Sub.H.B. 130 2

Am.Sub.H.B. 137 2

Am.Sub.H.B. 280 2

Am.Sub.H.B. 461 2

Am.Sub.S.B. 10 2

Am.Sub.S.B. 260 2

Sub.S.B. 184 2

Sub.S.B. 220 2

Sub.S.B. 281 2

Treatises

Griffin & Katz (2007), *Ohio Felony Sentencing Law* 7

Constitutional Provisions

Ohio Const. Art. II. 6

U.S. Const. Art. III 4

U.S. Const. Amend. VI 1

U.S. Const. Amend. XIV 1, 6

Other Authorities

Briefs Amicus Curiae of Ohio Attorney General, and Ohio Prosecuting Attorneys Association, *State v. Foster,* No. 04-1658, *State v. Quinones,* No. 04-1771, *and State v. Elmore,* No. 04-0041, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *overruled in part, Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517 1

Briefs Amici Curiae of Ohio Association of Criminal Defense Lawyers and Ohio ACLU, *State v. Foster,* No. 04-1658, and *State v. Quinones,* No. 04-1771, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *overruled in part, Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517 1

Diroll (2009), "Monitoring Sentencing Reform: Survey of Judges, Prosecutors, Defense Attorneys and Code Simplification," 10

Latessa, *et al* (2009)., "Creation and Validation of the Ohio Risk Assessment System: Final Report" 9

Martin (2009), "Ohio Prison Population Projections and Intake Estimates: FY 2010 - FY 2018 10

State's Memorandum in Response to Defendant's Motion in Support of Jurisdiction, *State v. Krois,* No. 05-1207, 2005 WL 5431429 (Ohio) 1

Appendix

Notice of Appeal A-2

Judgment Entry and Opinion, *State v. Hodge,* (Sept. 16, 2009), 1st Dist. No. C-080968 ..... A-4

U.S. Const. Art. III A-6

U.S. Const. Amend. VI A-7

U.S. Const. Amend. XIV A-8

Ohio Const. Art. 2 ..... A-9

R.C. 2929.14(E)(4) A-16

R.C. 2929.19(B)(2)(c) A-21

R.C. 2929.41(A) A-24

R.C. 2953.08(G) A-26

O.R.S. 137.123 ..... A-30

STATEMENT OF FACTS AND OF THE CASE

History of Blakely-Foster Litigation

Between 2000 and 2005, defendants across Ohio mounted increasing challenges to Ohio's sentencing laws under the Sixth and Fourteenth Amendments. Defendants based their claims on the United States Supreme Court's *Apprendi-Blakely-Booker* line of cases.[1] One challenge focused on Ohio's consecutive-sentencing laws.[2] Defendants alleged that the Sixth Amendment required juries to find specified facts beyond a reasonable doubt before judges could impose consecutive sentences for separate offenses. Defendants' arguments were supported by Amici Curiae the Ohio Association of Criminal Defense Lawyers and the Ohio ACLU.[3]

In response, Ohio prosecutors defended the constitutionality of Ohio's consecutive-sentencing laws. They were joined by Amici Curiae the Ohio Attorney General and the Ohio Prosecuting Attorneys Association.[4] Successful defenses included the following reasoning:

> The imposition of consecutive sentences does not violate *Blakely v. Washington* because *Blakely* does not deal with consecutive versus concurrent sentences.

---

[1]*Apprendi v. New Jersey* (2000), 530 U.S. 466, 147 L.Ed.2d 435; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *United States v. Booker* (2005), 543 U.S. 220, 160 L. Ed. 2d 621.

[2]R.C. 2929.41(A) (presumption favoring concurrent sentences); R.C. 2929.14(E)(4) (requiring fact-finding to overcome presumption favoring concurrent sentences); R.C. 2929.19(B)(2)(c) (requiring findings on the record); *and* R.C. 2953.08(G) (right to appeal sentencing decisions).

[3]*See* Briefs of Amici Curiae Ohio Association of Criminal Defense Lawyers and Ohio ACLU, *State v. Foster,* No. 04-1658, and *State v. Quinones,* No. 04-1771, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *overruled in part, Oregon v. Ice* (2009), __ U.S. __, 129 S.Ct. 711, 172 L.Ed.2d 517.

[4]Briefs Amicus Curiae of Ohio Attorney General, Propositions of Law Nos. 4, 3, and 6, respectively *and* Briefs Amicus Curiae of Ohio Prosecuting Attorneys Association, Propositions of Law Nos. 1, 3, and 4, respectively, *State v. Foster,* No. 04-1658, *State v. Quinones,* No. 04-1771, *and State v. Elmore,* No. 04-0041, *State v. Foster, supra* n.3; State's Memorandum in Response to Defendant's Motion in Support of Jurisdiction, *State v. Krois,* No. 05-1207, 2005 WL 5431429 (Ohio) at. 2-3.

> *Apprendi, Blakely,* and *Booker* only concerned the limits of punishment for one specific crime. They did not address whether the sentences for multiple, but separate, crimes should be served concurrently or consecutively. To apply *Blakely* to the imposition of consecutive sentences would be to unnecessarily expand the Sixth Amendment jurisprudence articulated by the Supreme Court ... the imposition of consecutive sentences does not violate the Sixth Amendment if the individual sentence for each count does not exceed the statutory maximum for the corresponding offense.[5]

Similar reasoning was accepted in some states facing comparable challenges to their consecutive-sentencing laws.[6] But other courts, including the Oregon Supreme Court and this Court, were persuaded that, where statutes require fact-finding to support consecutive sentences, the Sixth Amendment requires those facts to be found by juries instead of judges.[7] And while this Court felt itself constrained to sever Ohio's consecutive-sentencing statutes in *State v. Foster*, the General Assembly never repealed the statutes. Instead, the General Assembly retained these statutes repeatedly, and *in toto*, while amending other aspects of Ohio's sentencing laws.[8]

On 14 January 2009, the conflict over the constitutionality of judicial fact-finding as a prerequisite for consecutive sentencing was resolved by a 5-4 vote in *Oregon v. Ice* (2009), __

---

[5]State's Memorandum at 2-3, *Krois, supra* n.4.

[6]*People v. Wagener* (Ill.2001), 196 Ill. 2d 269, 283-286, 752 N.E.2d 430, 440-442, 256 Ill. Dec. 550; *State v. Keene* (Me.2007), 2007 ME 84, 927 A.2d 398; *see also* State's Memorandum at 2-3, *Krois, supra* n.4 (*citing, inter alia, State v. Montgomery* (1st Dist.),159 Ohio App. 3d 752, 2005-Ohio-1018, 825 N.E.2d 250); *State v. Taylor* (11th Dist.), 158 Ohio App.3d 597, 2004-Ohio-5939, 821 N.E.2d 192); *State v. Carter,* 6th Dist. No. L-00-1082, 2002-Ohio-3433, at ¶ 25; *State v. Gambrel,* 2nd Dist.. No. 2000-CA-29, 2001 Ohio App. LEXIS 339; *State v. Abdul-Mumin,* 10th Dist. Nos. 04AP-485, 04AP-486, 2005-Ohio-522, at ¶ 30).

[7]*Foster, supra* n. 3; *State v. Ice,* (Ore.2007), 343 Ore. 248, 170 P.3d 1049; *overruled by Ice,* 129 S.Ct. 711, *and modified by State v. Ice* (Ore.2009), 346 Ore. 95, 204 P.3d 1290.

[8]Am.Sub.H.B. 95 (effective August 3, 2006), Am.Sub.H.B. 137 (effective July 11, 2006), Am.Sub.H.B. 137 (effective August 3, 2006), Am.Sub.S.B. 260 (effective January 2, 2007), Sub.S.B. 281 (effective January 4, 2007), Am.Sub.H.B. 461 (effective April 4, 2007), Am.Sub.S.B. 10 (effective January 1, 2008), Sub.S.B. 184 (effective September 9, 2008), Sub.S.B. 220 (effective September 30, 2008), Am.Sub.H.B. 280 (effective April 7, 2009), Am.Sub.H.B. 130 (effective April 7, 2009).

U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517. *Ice* overruled the Oregon Supreme Court and abrogated this Court's decision in *State v. Foster* by approving the constitutionality, under the Sixth Amendment, of judicial fact-finding as a basis for imposing consecutive sentences. *Ice*, 172 L.Ed.2d at 524-525 & n.7 (citing *Foster*).

Yet in September 2009, the First Appellate District found itself unable to follow *Ice* in the instant appeal.[9] The issue arose when Kenneth Hodge challenged the lack of judicial fact-finding to support stacked sentences on his aggravated robbery convictions. He was 18 years old and had no felony record when he joined two other young men in robbing Boy Scouts who were selling Christmas trees in Cincinnati.[10] He pled guilty as charged to nine felonies. Five aggravated robbery charges merged with four robbery counts. The judge imposed five consecutive three-year terms with no supporting fact-findings.[11] (Tpp. 3-10, 30). The judge stated, "This is a very heinous offense," and asked, "How could you even think about robbing a bunch of Boy Scouts selling Christmas trees?" (Tp. 29).

On appeal, Hodge sought a new sentencing hearing or, in the alternative, concurrent sentences based on the partial overruling of *Foster* by *Oregon v. Ice*. After briefing on the merits, the First District agreed that no judicial fact-findings were made, but nevertheless affirmed Hodge's sentence. The First District held itself "bound" by *Foster* to ignore *Ice* "[a]bsent a contrary decision" by this Court.[12] This Court granted review on 10 February 2010.

---

[9] *State v. Hodge* (Sept. 16, 2009), 1st Dist. No. C-080968, at 2.
[10] *State v. Hodge* (July 28 and Sept. 8, 2008), Hamilton Cty. C.P. No. B-0805818, Tpp. 10-16.
[11] There was no challenge to the imposition of an additional 3-year gun specification.
[12] *Hodge*, 1st Dist. No. C-080968, p. 2. *See also State v. Lewis* (12th Dist.), Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684, at ¶10 (declining to follow *Ice* absent this Court's directive); *State v. Krug* (11th Dist.), No. 2008-L-085, 2009-Ohio-3815 at n.1, (same); *State v. Crosky* (10th Dist.), No. 09AP-57, 2009-Ohio-4216, at ¶ 8 (same); *State v. Miller* (6th Dist.), L-08-1314, 2009-Ohio-3908, at ¶ 18 (same); *State v. Williams* (5th Dist.), No. CT2009-0006, 2009-Ohio-5296 at ¶ 19 (same); *State v. Starett* (4th Dist.), No. 07CA30, 2009-Ohio-744, at ¶ 34 (same); *State v. Davis*

ARGUMENT

PROPOSITION OF LAW: By abrogating *State v. Foster*, *Oregon v. Ice* automatically and retroactively revived Ohio's consecutive sentencing statutes, R.C. 2929.14(E)(4), 2929.19(B)(2)(c), 2929.41(A), and 2953.08(G).

A. *Ice* Abrogated *Foster* With Respect to Consecutive Sentencing

The United States Supreme Court bears final responsibility for interpreting federal law. U.S. Const. Art. III; *Martin v. Hunter's Lessee* (1816), 1 Wheat. 304. Accordingly, when the U.S. Supreme Court remanded the *Ice* appeal to the Oregon Supreme Court, that Court modified its prior decision to hold that the Sixth Amendment allows consecutive sentences to rest on judicial fact-findings. *State v. Ice,* (2009) 346 Ore. 95, 204 P.3d 1290. The same modification of *State v. Foster* is required here. *See Limbach v. Hooven and Allison Co.* (1984), 466 U.S. 353, 80 L.Ed.2d 356 (equating abrogation with direct overruling). As illustrated below, the relevant Oregon and Ohio statutes are nearly identical in substance:

Point of Comparison	*Oregon*	*Ohio*
Statute requires guided discretion in consecutive sentencing	O.R.S. 137.123	R.C. 2929.11-15, -19, 2929.41, 2953.08(G)
Statute favors concurrent sentences	O.R.S. 137.123(1), (4)	R.C. 2929.41(A)
Statute requires judicial fact-finding to impose consecutive sentences	O.R.S. 137.123(5)	R.C. 2929.14(E)(4)
Statute specifies fact-finding related to course of conduct	O.R.S. 137.123(4)-(5)	R.C. 2929.14(E)(4)(b)
Statute specifies fact-finding related to risk of recidivism	O.R.S. 137.123(5)(a)	R.C. 2929.14(E)(4)(a), (c)
Statute specifies fact-finding on harm	O.R.S. 137.123(5)(b)	R.C. 2929.14(E)(4)(b)

(2d Dist.), Nos. 2007 CA 71, 2008 CA 55, 2009-Ohio-4583, ¶ 32 (same); *but see State v. Eatmon* (8th Dist.), No. 92048, 2009-Ohio-4564 at ¶ 24 (two judges interpreting this Court's decision in *State v. Elmore* as refusing to follow *Ice*); *State v. Smith* (5th Dist.), No. 09-CA-31, 2009-Ohio-6449 (following *Ice,* but limiting retroactivity).

Oregon provides for guided discretion in consecutive sentencing. So does Ohio. Oregon has a presumption favoring concurrent sentences. So does Ohio. Oregon's presumption must be overcome by specified judicial fact-finding. So must Ohio's. Oregon allows consecutive sentences even when the offenses arise from a continuous course of conduct. So does Ohio. Oregon's fact-findings relate to victim harm and the risk of recidivism. So do Ohio's. There is no basis to distinguish *Ice*.[13]

B. *Ice* Automatically and Retroactively Reactivated Ohio's Consecutive Sentencing Statutes

As a new constitutional rule governing criminal procedure, *Ice* applies retroactively. *Griffith v. Kentucky* (1987), 479 U.S. 314, 328, 93 L. Ed. 2d 649. The effect of *Ice* is not that the *Foster* severance "was bad law, but that it never was the law." *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210. Put differently, *Ice* automatically revived these statutes, which were "dormant, but not dead" under *Foster*:

> [The courts] are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require re-enactment by the legislature in order to restore its operative force. They proceed on the principle that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long as the decision stands the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date.

Jawish v. Morlet (D.C. App. 1952), 86 A.2d 96 (citing, inter alia, *State ex rel. Badgett v. Lee* (Fla.1945), 156 Fla. 291, 294-295, 22 So. 2d 804; *Iowa v. O'Neil* (Ia.1910), 147 Iowa 513, 515, 126 N.W. 454 ("It is, of course, well settled that a statute which has been held unconstitutional

---

[13]Federal courts have acknowledged that *Foster* conflicts with *Ice* with respect to consecutive sentencing. *See, e.g., Evans v. Hodge* (6th Cir. 2009), 575 F.3d 560, 566 (*Ice* "changed the applicable law" and bars *habeas* attacks on consecutive sentences based on judicial fact-findings); *Newsome v. Brunsman* (N.D. Ohio 2010), ___ F.Supp.2d.___ at n.7, 2009 U.S. Dist. LEXIS 123590 ("*Foster* has been abrogated in part" by *Ice*); *see also Smith,* 2009-Ohio-6449.

... is valid and enforceable without reenactment when the supposed constitutional objection has been removed, or has been found not to exist"); *Pierce v. Pierce* (Ind.1874), 46 Ind. 86, 95 (same)).

Moreover, *Foster* merely severed R.C. 2929.14(E)(4), 2929.19(B)(2)(c), 2929.41(A), and 2953.08(G) pursuant to R.C. 1.50. *Foster* did not, and could not, repeal the statutes. The power to enact, amend, and repeal legislation lies exclusively with the General Assembly. Ohio Const. Art. II. The General Assembly never repealed these statutes. To the contrary, they were repeatedly reenacted. *See supra* n. 8.

Mr. Hodge has a due process liberty interest in state compliance with prescribed sentencing procedures. *See Hicks v. Oklahoma* (1980), 447 U.S. 343, 346. His case was pending appeal when *Ice* was decided. He is therefore entitled to the full retroactive application of *Ice* to his case as mandated by *Griffith* and *Hicks.*[14]

C. The State Cannot Prove the Error Harmless Beyond a Reasonable Doubt

The State must prove the constitutional error harmless. *Chapman v. California* (1967), 386 U.S. 18, 24, 17 L. Ed. 2d 705. The State cannot carry its burden. R.C. 2929.41(A) and 2929.14(E)(4) require specific fact-finding to overcome the presumption favoring concurrent sentences. Stripping Mr. Hodge of those statutory protections effectively tripled his potential prison time from six to eighteen years. Moreover, the sentence runs afoul of the General Assembly's intent to promote proportionality and consistency in sentencing while reserving costly prison cells for the most serious offenders. R.C. 2929.11, 2929.13(A); Griffin & Katz

[14]To the extent that panels of the Fifth Appellate District have sought to link *Ice* retroactivity to the date of indictment, conviction, or sentence instead of determining whether the appeal was pending on 14 January 2009, those holdings violate *Griffith. See Smith,* 2009-Ohio-6449 *and State v. Vandriest* (5th Dist.), 2010-Ohio-997.

(2007), *Ohio Felony Sentencing Law* 1258 (sentencing policy balances concerns for "protecting the public and punishing the offender without an unnecessary burden on government resources but within a framework of fairness").

1. R.C. 2953.08(G)(1) Requires Remand

Ohio Revised Code section 2929.41(A) imposes a mandatory presumption that sentences "shall be served concurrently" instead of consecutively absent fact-findings specified in R.C. 2929.14(E)(4). The latter statute allows consecutive sentences only upon findings that stacking is (1) necessary to protect the public or punish the offender, *and* (2) not disproportionate to the seriousness of the offense and to the danger the offender poses to the public, *and* (3) one or more of the following: (a) the crimes were committed while the offender was awaiting trial or sentencing, or was under sanction or post-release control; (b) the harm caused by multiple offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of his offense; or (c) the offender's criminal history shows that consecutive sentences are necessary to protect the public from future crime.

At the time of the offense Mr. Hodge was not awaiting trial or sentencing, nor was he under sanction or post-release control. Therefore, that factor is inapplicable. The First Appellate District agreed that none of the other required findings were made in this case.[15] Therefore, the case must be remanded for resentencing. R.C. 2953.08(G)(1). That statute requires appellate courts to give trial courts the first opportunity to evaluate the whole record, to determine whether any of the R.C. 2929.14(E)(4) criteria exist, and, if so, to decide whether those factors overcome the presumption favoring concurrent sentences. *Id.*

---

[15] *Hodge*, 1st Dist. No. C-080968, at 2.

2. The Sentence is Disproportionate and Inconsistent

In *Foster*, this Court acknowledged that the General Assembly's intent in enacting S.B. 2 was "to introduce certainty and proportionality to felony sentencing." *Foster*, at ¶34. R.C. 2929.14(E)(4) requires that punishment be proportional to the offense itself and to the risk posed by the offender to public safety. In addition, R.C. 2929.11(B) requires that sentencing be "consistent with sentences imposed for similar crimes committed by similar offenders." The United States Supreme Court echoed this Court's acknowledgement of the "salutary objectives" served by such "legislative innovations" to guide discretion in consecutive sentencing, including "promoting sentences proportionate to 'the gravity of the offense,' [] and of reducing disparities in sentence length[.]" *Ice*, 129 S.Ct. 711, 719 (internal citations omitted).

Mr. Hodge's multiple charges arose from a single incident involving four victims and two co-defendants. One of his co-defendants stuck a sawed-off shotgun in a Boy Scout's face. The other co-defendant broke open the Scouts' cashbox and took $130. Mr. Hodge did not wield the shotgun. He did not break into the cashbox. He did punch two victims. One was an adult. The other was a 12-year-old Scout. The prosecutor told the court that there were no serious injuries.[16]

The prosecutor also told the court that Mr. Hodge not only "admitted his involvement," but "also provided the police with information about the involvement of the other two individuals." The prosecutor also retracted a prior mistaken accusation that Hodge had "pistol-whipped" the Boy Scout. The prosecutor clarified that it was Mr. Hodge's brother, not Mr. Hodge, who "helped get rid of the weapon after the robbery."[17] Mr. Hodge had no prior felony record. The state did not present any victim statements or discuss any victim impact reports.

---

[16] *Hodge*, Hamilton Cty. C.P. No.B-0805818, Tpp. 10-12.
[17] *Id.* Tpp. 12, 17, 27.

There was no evidence of any statistically reliable risk/needs assessment to support any conclusion that Mr. Hodge has a propensity for violence, is unamenable to rehabilitation, or poses a high risk of recidivism.[18] To the contrary, the record showed that Mr. Hodge's father had recently become more actively involved in his son's life. Mr. Hodge had been attending church with his family. He was trying to enlist in the military and obtain his G.E.D. He had the support of family, friends, and pastors.[19]

The record in this case indicates the disproportionality of the sentence. A comparison of this case with others underscores its disproportionality and its inconsistency. For example, most of the 20 defendants who were convicted of voluntary manslaughter in Hamilton County on charges filed in 2008 received multiple violent felony convictions and additional gun specifications. All pled guilty. Half received sentences ranging from 6 to 12 years – far less than Mr. Hodge's 18-year sentence.[20] While the conduct in the instant case was serious, each defendant in these homicide cases was convicted of knowingly killing another human being. Yet only three of these defendants received sentences that matched or exceeded Hodge's.

---

[18]*See*, e.g., Latessa, *et al.*, "Creation and Validation of the Ohio Risk Assessment System: Final Report" (July 2009) at pp. 5-6 ("the majority of supervision and treatment resources [should] be reserved for the highest risk cases").

[19]*Hodge*, Hamilton Cty. C.P. No. B-0805818, Tpp. 14-23.

[20]This Court can take judicial notice of the following Hamilton County court records, *see Klick v. Snaveley* (1928), 199 Ohio St. 308, 164 N.E. 233: *State v. Hardy* (July 23, 2008), C.P. No. B 0800191; *State v. Kues* (Oct. 20, 2008), No. B 0800324 ; *State v. Daniels* (Aug. 28, 2008), C.P. No. B 0801766; *State v. Cooper* (June 23, 2009), C.P. No. B 0802017; *State v. Jones* (Aug. 5, 2008), C.P. No. B 0803366; *State v. Ingersol* (Dec. 26, 2008), C.P. No. B 0802675; *State v. Moore* (Dec. 12, 2008), C.P. No. B 0804365; *State v. Quezambra* (June 11, 2009), C.P. No. B 0805005; *State v. Sullivan* (Feb. 25, 2009), C.P. No. B 0804934-C; *State v. Johnson* (Feb. 25, 2009), C.P. No. B 0804934-A; *State v. Bambao* (Jan. 26, 2009), C.P. No. B 0805966; *State v. Williams* (June 19, 2009), C.P. No. B 0805967; *State v. Richardson* (Nov. 13, 2008), C.P. No. B 0806347; *State v. Dodds* (April 30, 2009), C.P. No. B 0806779; *State v. Weaver* (Mar. 6, 2009), C.P. No. B 0807846; *State v. Walston* (Mar. 27, 2009), C.P. No. B 0807960; *State v. Lee* (Aug. 21, 2009), C.P. No. B 0808033; *State v. Sprawl* (July 10, 2009), C.P. No. B 0809372; *State v. Benford* (Sept. 16, 2009), C.P. No. B 0809131; and *State v. Yett* (July 27, 2009), C.P. No. B 0809428.

3. The Sentence Imposes an Unnecessary Burden on Government Resources

R.C. 2929.13(A) mandates that sentences "shall not impose an unnecessary burden on state or local government resources." The sentence in this case illustrates the harm caused when the General Assembly's sentencing policies are not put into effect. *Ice* revived R.C. 2929.41(A)'s presumption favoring concurrent sentencing absent mandated fact-findings under R.C. 2929.14(E)(4). Absent those findings, Mr. Hodge's potential sentence effectively tripled. With no evidence-based evaluation to support the investment of scarce public resources in his lengthy incarceration, *see supra* n. 18, his sentence does appear to impose an unnecessary burden on Ohio taxpayers.

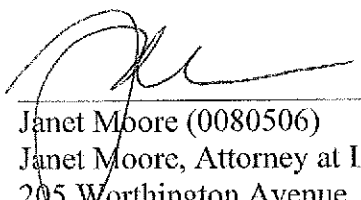
Indeed, the January 2009 assessment of the Ohio Sentencing Commission bluntly blamed *Foster's* "eliminating the presumption of concurrent terms and the findings previously required to support consecutive terms" for the fact that "[c]onsecutive prison terms are much more likely today than at any point in recent Ohio history[.]" Diroll (2009), "Monitoring Sentencing Reform: Survey of Judges, Prosecutors, Defense Attorneys and Code Simplification," at p. 27. ODRC concurs that "The data continue to point to an emerging upward trend overall in average sentence length" and that *Foster* caused a "substantial inflationary pressure from increased length of stay. The upward shift in sentencing patterns has so far grown steadily over time." Average sentences increased from one to seven months post-*Foster*, "with greater increases among the higher felony levels." This shift "translates to a prison population increase of about 6,700 beds." The data indicate that this increased burden on ODRC, which is directly attributable to *Foster*, would likely escalate with the rising population of F1-F3 felons. Martin (2009), "Ohio Prison Population Projections and Intake Estimates: FY 2010 - FY 2018," at pp. 8-9.

The record shows that Mr. Hodge was improperly included in that rising population. His sentence must be vacated in order for the trial court to consider the complete record and impose a sentence that complies with Ohio's consecutive sentencing statutes.

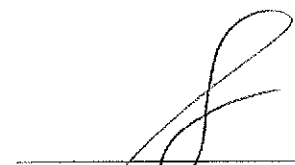
CONCLUSION

For the foregoing reasons, the judgment of the First Appellate District must be reversed and Mr. Hodge must receive a sentence in compliance with Ohio's consecutive-sentencing laws.

Respectfully submitted,

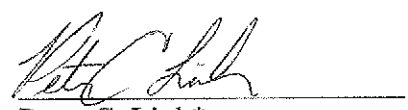


Janet Moore (0080506)
Janet Moore, Attorney at Law LLC
205 Worthington Avenue
Wyoming, Ohio 45215
513.600.4757
janetm323@cinci.rr.com



David A. Singleton (0074556)

Angelina N. Jackson (0077937)

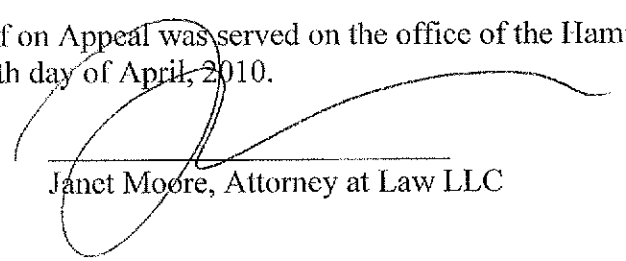


Peter C. Link*
The Indigent Defense Clinic
OHIO JUSTICE & POLICY CENTER
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202
(513) 421-1108 ext. 17
Fax No. (513) 562-3200

*Practicing under Ohio Gov. Bar R. II's limited license rule for third-year law students

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief on Appeal was served on the office of the Hamilton County Prosecuting Attorney this, the 26th day of April, 2010.



Janet Moore, Attorney at Law LLC

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 09-1997
	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
Plaintiff-Appellee	:	
-vs-	:	
	:	Court of Appeals Case No. C080968
	:	
KENNETH HODGE,	:	Trial Court No. B-0805818-A
	:	
Defendant-Appellant.	:	

Appendix to Merit Brief of Appellant Kenneth Hodge

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-1997

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

KENNETH HODGE,

Defendant-Appellant.

On Appeal from the Hamilton County Court of Appeals, First Appellate District

Court of Appeals Case No. C080968

Trial Court No. B-0805818-A

NOTICE OF APPEAL OF APPELLANT KENNETH HODGE

COUNSEL FOR APPELLANT:

Janet Moore (0080506)
Counsel of Record
jmoore@ohiojpc.org
Peter C. Link*
The Indigent Defense Clinic
OHIO JUSTICE & POLICY CENTER
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202
(513) 421-1108 ext. 21
Fax No. (513) 562-3200

COUNSEL FOR APPELLEE:

Joseph T. Deters (0012084P)
James Michael Keeling (0068810P)
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3178
Fax No. (513) 946-3021

FILED
NOV 02 2009
CLERK OF COURT
SUPREME COURT OF OHIO

*Practicing under Ohio Gov. Bar R. II's limited license rule for third-year law students

RECEIVED
NOV 02 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

Appellant Kenneth Hodge hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case No. C080968 on 16 September 2009.

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

Respectfully submitted,

Janet Moore (0080506)
jmoore@ohiojpc.org
Peter C. Link*
The Indigent Defense Clinic
OHIO JUSTICE & POLICY CENTER
215 East Ninth Street, Suite 601
Cincinnati, Ohio 45202
Phone: (513) 421-1108
Fax: (513) 562-3200

*Practicing under Ohio Gov. Bar R. II's limited license rule for third-year law students

CERTIFICATE OF SERVICE

I certify a copy of this document was served on the office of the Hamilton County Prosecuting Attorney this 30th day of October, 2009.

Janet Moore

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

KENNETH HODGE,

Defendant-Appellant.

ENTERED:
SEP 16 2009

APPEAL NO. C-080968
TRIAL NO. B-0805818

JUDGMENT ENTRY.

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Kenneth Hodge appeals his convictions for aggravated robbery. We affirm the judgment of the trial court.

Hodge pleaded guilty to five counts of aggravated robbery with specifications. The trial court sentenced him to five consecutive three-year terms for the aggravated-robbery offenses and to a consecutive three-year term for a gun specification. The total sentence was 18 years' confinement.

In his sole assignment of error, Hodge asserts that the trial court erred when it imposed consecutive sentences without making the requisite factual findings under R.C. 2929.14(E) and 2929.41(A).

Hodge acknowledges that, in *State v. Foster*, the Ohio Supreme Court held that R.C. 2929.14 and 2929.41(A) were unconstitutional because they required judicial factfinding.[2] But he urges this court to conclude that *Foster* is no longer

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.
[2] 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph three of the syllabus.

D85085221

valid with respect to consecutive sentences in light of the United States Supreme Court's decision in *Oregon v. Ice*.[3] In that case, the Court concluded that Oregon's sentencing statute, which, like Ohio's, requires judicial factfinding before the presumption of concurrent sentences can be overcome and consecutive sentences can be imposed, was constitutional.[4] But we agree with other Ohio appellate districts that have considered the issue.[5] We remain bound by the Ohio Supreme Court's decision in *Foster*. The Ohio Supreme Court has not directly addressed the effect of *Oregon v. Ice* on Ohio's sentencing law. Absent a contrary decision by the Ohio Supreme Court, *Foster* still applies to consecutive sentences. The trial court did not err when it imposed consecutive sentences without making findings of fact. The sole assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

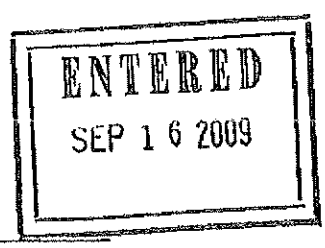
A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 16, 2009

per order of the Court _____.
Presiding Judge



[3] (2009), __U.S. ___, 129 S.Ct. 711.
[4] Id. at 719.
[5] See *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908; *State v. Robinson*, 8th Dist. No. 92050, 2009-Ohio-3379; *State v. Mickens*, 10th Dist. Nos. 08AP-743, 08AP-744, and 08AP-745, 2009-Ohio-2554; *State v. Krug*, 11th Dist. No. 2008-L-085, 2009-Ohio-3815.

Article III.

Section. 1.

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

United States Constitution

Amendment VI

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

Amendment XIV

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

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

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

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

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

Article 2 - Legislative

§ 01 In whom power vested
The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

§ 15 How bill shall be passed
(A) The general assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected to each house. Bills may originate in either house, but may be altered, amended, or rejected in the other.

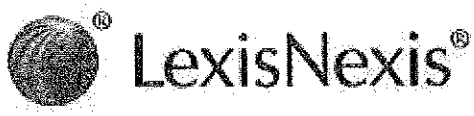
(B) The style of the laws of this state shall be, "be it enacted by the general assembly of the state of Ohio."

(C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending and every amendment been made available upon a member's request.

(D) No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

(E) Every bill which has passed both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the governor for his approval.

(F) Every joint resolution which has been adopted in both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for adoption have been met and shall forthwith be filed with the secretary of state.



LEXSTAT O.R.C. 1.50

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.50 (2010)

§ 1.50. Severability of Code section provisions

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

HISTORY:

134 v H 607. Eff 1-3-72.

LEXSTAT O.R.C. 2929.14(A)

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2929.14 (2010)

§ 2929.14. Basic prison terms

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section or in division (D)(6) of *section 2919.25 of the Revised Code* and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

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

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

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

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

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

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section, in *section 2907.02, 2907.05*, or *2919.25 of the Revised Code*, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

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

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

(C) Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in *section 2919.25 of the Revised Code*, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may im-

pose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

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

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

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

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

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

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

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

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of *section 2923.12* or *2923.123 [2923.12.3] of the Revised Code*. The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 [2923.12.2] that involves a

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

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

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

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

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

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

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

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

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

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

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of

the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

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

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

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

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

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

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

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

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

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

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in ac-

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

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

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

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

(7) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323 [2907.32.3], or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 [2941.14.22] of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised.

(b) The prison term imposed under division (D)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of *section 2903.11, 2903.12,* or *2903.13 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1423 [2941.14.23] of the Revised Code* that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the same degree as the violation.

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

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

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

(d) If a mandatory prison term is imposed upon an offender pursuant to division (D)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

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

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

seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

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

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

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

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

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

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

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

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

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

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

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

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

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

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

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

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

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

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

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

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of *section 2907.22, 2907.23, 2907.24, 2907.241 [2907.24.1]*, or *2907.25 of the Revised Code* and also was convicted of or pleaded guilty to a specification of the type described in *section 2941.1421 [2941.14.21] of the Revised Code* regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

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

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

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

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

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

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

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

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 88 (Eff 9-3-96); 146 v H 445 (Eff 9-3-96); 146 v H 154 (Eff 10-4-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 151 (Eff 9-16-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 2 (Eff 1-1-99); 148 v S 1 (Eff 8-6-99); 148 v H 29 (Eff 10-29-99); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 130. Eff 4-7-2003; 149 v S 123, § 1, eff. 1-1-04; 150 v H 12, §§ 1, 3, eff. 4-8-04*; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v H 137, § 1, eff. 7-11-06; 151 v H 137, § 3, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 184, § 1, eff. 9-9-08; 152 v S 220, § 1, eff. 9-30-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT ORC ANN. 2929.19

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2929.19 (2010)

§ 2929.19. Sentencing hearing

(A) The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony and before resentencing an offender who was convicted of or pleaded guilty to a felony and whose case was remanded pursuant to *section 2953.07* or *2953.08 of the Revised Code.* At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with *section 2930.14 of the Revised Code*, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. The court shall inform the offender of the verdict of the jury or finding of the court and ask the offender whether the offender has anything to say as to why sentence should not be imposed upon the offender.

(B) (1) At the sentencing hearing, the court, before imposing sentence, shall consider the record, any information presented at the hearing by any person pursuant to division (A) of this section, and, if one was prepared, the presentence investigation report made pursuant to *section 2951.03 of the Revised Code* or *Criminal Rule 32.2*, and any victim impact statement made pursuant to *section 2947.051 [2947.05.1] of the Revised Code.*

(2) The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

(a) Unless the offense is a violent sex offense or designated homicide, assault, or kidnapping offense for which the court is required to impose sentence pursuant to division (G) of *section 2929.14 of the Revised Code*, if it imposes a prison term for a felony of the fourth or fifth degree or for 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, its reasons for imposing the prison term, based upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and any factors listed in divisions (B)(1)(a) to (i) of *section 2929.13 of the Revised Code* that it found to apply relative to the offender.

(b) If it does not impose a prison term for a felony of the first or second degree or for a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and for which a presumption in favor of a prison term is specified as being applicable, its reasons for not imposing the prison term and for overriding the presumption, based

upon the overriding purposes and principles of felony sentencing set forth in *section 2929.11 of the Revised Code*, and the basis of the findings it made under divisions (D)(1) and (2) of *section 2929.13 of the Revised Code*.

(c) If it imposes consecutive sentences under *section 2929.14 of the Revised Code*, its reasons for imposing the consecutive sentences;

(d) If the sentence is for one offense and it imposes a prison term for the offense that is the maximum prison term allowed for that offense by division (A) of *section 2929.14 of the Revised Code* or *section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term;

(e) If the sentence is for two or more offenses arising out of a single incident and it imposes a prison term for those offenses that is the maximum prison term allowed for the offense of the highest degree by division (A) of *section 2929.14 of the Revised Code* or *section 2929.142 [2929.14.2] of the Revised Code*, its reasons for imposing the maximum prison term.

(3) Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

(a) Impose a stated prison term and, if the court imposes a mandatory prison term, notify the offender that the prison term is a mandatory prison term;

(b) In addition to any other information, include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications;

(c) Notify the offender that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. If a court imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of *section 2967.28 of the Revised Code. Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of this section and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under *section 2967.28 of the Revised Code* after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(3)(c) of this section. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of this section and failed to notify the offender pursuant to division (B)(3)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code*, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(e) of this section that the parole board may impose a prison term as described in division (B)(3)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of *section 2967.131 [2967.13.1] of the Revised Code* or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of *section 2967.28 of the Revised Code*, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. *Section 2929.191 [2929.19.1] of the Revised Code* applies if, prior to July 11, 2006, a court imposed a

sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(c) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(f) Require that the offender not ingest or be injected with a drug of abuse and submit to random drug testing as provided in *section 341.26, 753.33*, or *5120.63 of the Revised Code*, whichever is applicable to the offender who is serving a prison term, and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.

(4) (a) The court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender, and the court shall comply with the requirements of *section 2950.03 of the Revised Code* if any of the following apply:

(i) The offender is being sentenced for a violent sex offense or designated homicide, assault, or kidnapping offense that the offender committed on or after January 1, 1997, and the offender is adjudicated a sexually violent predator in relation to that offense.

(ii) The offender is being sentenced for a sexually oriented offense that the offender committed on or after January 1, 1997, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iii) The offender is being sentenced on or after July 31, 2003, for a child-victim oriented offense, and the offender is a tier III sex offender/child-victim offender relative to that offense.

(iv) The offender is being sentenced under *section 2971.03 of the Revised Code* for a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007.

(v) The offender is sentenced to a term of life without parole under division (B) of *section 2907.02 of the Revised Code.*

(vi) The offender is being sentenced for attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19]*, or *2941.1420 [2941.14.20] of the Revised Code.*

(vii) The offender is being sentenced under division (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* for an offense described in those divisions committed on or after January 1, 2008.

(b) Additionally, if any criterion set forth in divisions (B)(4)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (G) of *section 2929.14 of the Revised Code*, the court shall impose sentence on the offender as described in that division.

(5) If the sentencing court determines at the sentencing hearing that a community control sanction should be imposed and the court is not prohibited from imposing a community control sanction, the court shall impose a community control sanction. The court shall notify the offender that, if the conditions of the sanction are violated, if the offender commits a violation of any law, or if the offender leaves this state without the permission of the court or the offender's probation officer, the court may impose a longer time under the same sanction, may impose a more restrictive sanction, or may impose a prison term on the offender and shall indicate the specific prison term that may be imposed as a sanction for the violation, as selected by the court from the range of prison terms for the offense pursuant to *section 2929.14 of the Revised Code.*

(6) Before imposing a financial sanction under *section 2929.18 of the Revised Code* or a fine under *section 2929.32 of the Revised Code*, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

(7) If the sentencing court sentences the offender to a sanction of confinement pursuant to *section 2929.14* or *2929.16 of the Revised Code* that is to be served in a local detention facility, as defined in *section 2929.36 of the Revised Code*, and if the local detention facility is covered by a policy adopted pursuant to *section 307.93, 341.14, 341.19, 341.21, 341.23, 753.02, 753.04, 753.16, 2301.56*, or *2947.19 of the Revised Code* and *section 2929.37 of the Revised Code*, both of the following apply:

(a) The court shall specify both of the following as part of the sentence:

(i) If the offender is presented with an itemized bill pursuant to *section 2929.37 of the Revised Code* for payment of the costs of confinement, the offender is required to pay the bill in accordance with that section.

(ii) If the offender does not dispute the bill described in division (B)(7)(a)(i) of this section and does not pay the bill by the times specified in *section 2929.37 of the Revised Code*, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(7)(a)(ii) of this section.

(8) The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(3)(a) of this section or to include in the sentencing entry any information required by division (B)(3)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

(C) (1) If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory term of local incarceration in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose additional sanctions as specified in *sections 2929.15, 2929.16, 2929.17*, and *2929.18 of the Revised Code*. The court shall not impose a prison term on the offender except that the court may impose a prison term upon the offender as provided in division (A)(1) of *section 2929.13 of the Revised Code*.

(2) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the court shall impose the mandatory prison term in accordance with that division, shall impose a mandatory fine in accordance with division (B)(3) of *section 2929.18 of the Revised Code*, and, in addition, may impose an additional prison term as specified in *section 2929.14 of the Revised Code*. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, the court also may impose a community control sanction on the offender, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(D) The sentencing court, pursuant to division (K) of *section 2929.14 of the Revised Code*, may recommend placement of the offender in a program of shock incarceration under *section 5120.031 [5120.03.1] of the Revised Code* or an intensive program prison under *section 5120.032 [5120.03.2] of the Revised Code*, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 349 (Eff 9-22-2000); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 137, § 1, eff. 7-11-06; 151 v S 260, § 1, eff. 1-2-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v H 130, § 1, eff. 4-7-09.

LEXSTAT ORC ANN. 2929.41

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
MULTIPLE SENTENCES

Go to the Ohio Code Archive Directory

ORC Ann. 2929.41 (2010)

§ 2929.41. Multiple sentences

(A) Except as provided in division (B) of this section, division (E) of section 2929.14, or division (D) or (E) of *section 2971.03 of the Revised Code*, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B) (3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

(B) (1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of *section 2907.322, 2921.34*, or *2923.131 of the Revised Code.*

When consecutive sentences are imposed for misdemeanor under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months.

(2) If a court of this state imposes a prison term upon the offender for the commission of a felony and a court of another state or the United States also has imposed a prison term upon the offender for the commission of a felony, the court of this state may order that the offender serve the prison term it imposes consecutively to any prison term imposed upon the offender by the court of another state or the United States.

(3) A jail term or sentence of imprisonment imposed for a misdemeanor violation of *section 4510.11, 4510.14, 4510.16, 4510.21*, or *4511.19 of the Revised Code* shall be served consecutively to a prison term that is imposed for a felony violation of *section 2903.06, 2903.07, 2903.08*, or *4511.19 of the Revised Code* or a felony violation of *section 2903.04 of the Revised Code* involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively.

When consecutive jail terms or sentences of imprisonment and prison terms are imposed for one or more misdemeanors and one or more felonies under this division, the term to be served is the aggregate of the consecutive terms imposed, and the offender shall serve all terms imposed for a felony before serving any term imposed for a misdemeanor.

HISTORY:

134 v H 511 (Eff 1-1-74); 137 v H 202 (Eff 10-9-78); 139 v S 1 (Eff 10-19-81); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 142 v H 51 (Eff 3-17-89); 143 v S 258 (Eff 11-20-90); 144 v H 561 (Eff 4-9-93); 145 v H 571 (Eff 10-6-94); 146 v S 2 (Eff 7-1-96); 146 v H 154 (Eff 10-4-96); 146 v H 180 (Eff 1-1-97); 148 v S 107 (Eff 3-23-2000); 148 v S 22. Eff 5-17-2000; 149 v H 490, § 1, eff. 1-1-04; 149 v S 123, § 1, eff. 1-1-04.

LEXSTAT O.R.C. 2953.08

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 30, 2010 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 3, 2010 ***

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

Go to the Ohio Code Archive Directory

ORC Ann. 2953.08 (2010)

§ 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 Re-*

vised 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 *sec-*

tion 2947.06 or *2951.03 of the Revised Code* or *Criminal Rule 32.2* in connection with the appeal of a sentence under this section shall comply with division (D)(3) of *section 2951.03 of the Revised Code* when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of *section 2951.03 of the Revised Code* and does not cause that report to become a public record, as defined in *section 149.43 of the Revised Code*, following the appellate court's use of the report.

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

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

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

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

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

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

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

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

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

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

The president of the senate, the speaker of the house of representatives, the chief justice of the supreme court, the Ohio prosecuting attorneys association, and the county commissioners association of Ohio shall make the initial appointments to the committee of the appointed members no later than ninety days after July 1, 1996. Of those initial appointments to the committee, the members appointed by the speaker of the house of representatives and the Ohio prosecuting attorneys association shall serve a term ending two years after July 1, 1996, the member appointed by the chief justice of the supreme court shall serve a term ending three years after July 1, 1996, and the members appointed by the president of the senate and the county commissioners association of Ohio shall serve terms ending four years after July 1, 1996. Thereafter, terms of office of the appointed members shall be for four years, with each term ending on the same day of the same month as did the term that it succeeds. Members may be reappointed. Vacancies shall be filled in

the same manner provided for original appointments. A member appointed to fill a vacancy occurring prior to the expiration of the term for which that member's predecessor was appointed shall hold office as a member for the remainder of the predecessor's term. An appointed member shall continue in office subsequent to the expiration date of that member's term until that member's successor takes office or until a period of sixty days has elapsed, whichever occurs first.

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

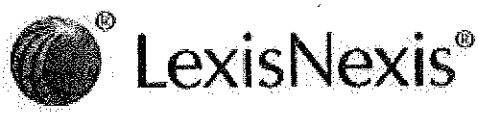
The chief justice of the supreme court or the representative of the supreme court appointed by the chief justice shall serve as chairperson of the committee. The committee shall meet within two weeks after all appointed members have been appointed and shall organize as necessary. Thereafter, the committee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

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

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

HISTORY:

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



LEXSTAT ORS 137.123

OREGON REVISED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2009 REGULAR SESSION ***
*** OF THE 75TH LEGISLATIVE ASSEMBLY ***
*** ANNOTATIONS CURRENT THROUGH FEBRUARY 23, 2010 ***

TITLE 14 PROCEDURE IN CRIMINAL MATTERS GENERALLY
Chapter 137 - Judgment and Execution; Parole and Probation by the Court
JUDGMENT
(Term and Place of Confinement)

GO TO OREGON REVISED STATUTES ARCHIVE DIRECTORY

ORS § 137.123 (2009)

137.123 Provisions relating to concurrent and consecutive sentences.

(1) A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the same defendant. The court may provide for consecutive sentences only in accordance with the provisions of this section. A sentence shall be deemed to be a concurrent term unless the judgment expressly provides for consecutive sentences.

(2) If a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct, or if the defendant previously was sentenced by any other court within the United States to a sentence which the defendant has not yet completed, the court may impose a sentence concurrent with or consecutive to the other sentence or sentences.

(3) When a defendant is sentenced for a crime committed while the defendant was incarcerated after sentencing for the commission of a previous crime, the court shall provide that the sentence for the new crime be consecutive to the sentence for the previous crime.

(4) When a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court complies with the procedures set forth in subsection (5) of this section.

(5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:

(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or

(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

HISTORY: 1987 c.2 § 12; 1991 c.67 § 29; 1991 c.111 § 14; 1995 c.657 § 2; 2003 c.14 § 58