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APPELLANT'S PROPOSITION OF LAW AND MERIT BRIEF

This matter comes before this court as a discretionary appeal.

INTRODUCTION

Mr. Carlisle is asking this Court to hold that a trial court retains authority to modify a sentence prior to its execution regardless of whether an appeal has been filed. Such a determination is consistent with well accepted precedent and sound policy, and it provides a clear bright line rule that, while repeatedly recognized in the District Court's of Appeal, has not yet been explicitly embraced by this Court.

The Eighth District's decision, holding that once a criminal defendant notes his appeal, the trial court loses jurisdiction to modify the sentence, even one that has not yet been put into execution. *State v. Carlisle*, 2010 Ohio 3407, ¶ 47. That decision was unprecedented. Heretofore, no court has ruled that a trial court lacks jurisdiction to modify an unexecuted sentence. In fact, until now, a trial court was well within its sound discretion to modify its own sentence prior to execution.

In reaching this decision, the Eighth District claimed to rely largely on this Court's opinion in *State ex rel. Special Prosecutors v. Judges of Belmont Cty. Court of Common Pleas*, 55 Ohio St. 2d 94 (1978). In that case this Court held that a trial court lacked jurisdiction to grant a motion to withdraw a guilty plea "subsequent to an appeal and an affirmance by the appellate court" because doing so would, in effect, "vacate a judgment which has been affirmed by the appellate court." *Id.*

It is well established, that execution of a sentence begins when a criminal Defendant who has been sentenced to a term of imprisonment is delivered to a penal institution to begin serving that sentence. *State v. Addison*, (1987), 40 Ohio App.3d 7. “Once a Defendant has been delivered into the custody of the penal institution in which he is to serve his sentence, a trial court's authority to suspend or to modify a sentence is limited to those instances specifically provided by the General Assembly.” *State v. Gilmore*, Cuyahoga App. No. 67575, (8th Dist, April 6, 1995). “When the full sentence of a Defendant involves imprisonment, the execution of the sentence is commenced when the Defendant is delivered from the temporary detention facility of the judicial branch to the penal institution of the executive branch.” *United States v. Benz*, (1931), 282 U.S. 304 “Both historically and as a matter of policy, a trial court may resentence a Defendant who has not begun to serve the sentence to a more severe sentence without violating the multiple sentence protections of the double jeopardy clause. The reason is that, before its execution, a sentence lacks the constitutional finality of a verdict of acquittal.” *United States v. DiFrancesco*, (1980), 449 U.S. 117..

STATEMENT OF THE CASE AND FACTS

Case Background

Mr. Carlisle was originally charged with rape, GSI and kidnapping stemming from allegations that he sexually molested his six-year-old grandniece on May 12, 2006. Mr. Carlisle professed his innocence and pleaded not guilty.

Mr. Carlisle has consistently denied sexually assaulting his six year old niece, K.C. Although there is little doubt that K.C. was molested by someone, Mr. Carlisle maintains that he

was not the perpetrator. He has challenged the fairness of his trial, arguing that the trial court's construction of the rape shield statute prevented him from mounting a valid defense to these charges.¹ Nevertheless, this issue is not before this court, and he will not press it here, given the case's current posture. Suffice to say, Mr. Carlisle rejects the factual account of the case that the Eighth District adopted in this appeal. See, *State v. Carlisle*, 2010-Ohio-3407, ¶¶ 38- 40.

After his first trial ended in a hung jury and mistrial, Carlisle proceeded to a second trial, where the jury acquitted him of rape, but found him guilty of kidnapping and GSI. The trial court merged the GSI and kidnapping counts and sentenced Mr. Carlisle to a term of three years. After concluding that Mr. Carlisle was unlikely to reoffend, the court categorized him as a sexually oriented offender.

While awaiting trial Mr. Carlisle was initially detained in the Cuyahoga County Jail. During that time his kidneys failed, and the trial court placed Carlisle on home confinement so that he could obtain necessary medical treatment. After imposing sentence in this case, the trial court released him on bond, so that his treatment could continue while he pursued his direct appeal.

Mr. Carlisle's sentence remained suspended throughout the direct appeal. On September 8, 2008, the Eighth District Court of Appeals journalized an opinion affirming Mr. Carlisle's conviction and "ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence." *State v. Carlisle*, Cuyahoga App. No. 90223, 2008 Ohio 3818, p. 27. On October 2, 2008, the Court of Appeals granted Mr. Carlisle's request to continue to suspend the execution of his sentence so that he

¹ To that end, he is currently litigating the validity constitutionality of the trial that led to his

could seek leave to appeal in the Ohio Supreme Court. This Court denied leave to appeal on February 4, 2009.

On February 18, 2009, before the sentence suspension had been lifted, Mr. Carlisle asked the trial court to reconsider and modify his sentence. Mr. Carlisle suffered from end stage kidney disease and his physical condition had deteriorated to such an extent that he required hemodialysis treatments three times a week, along with frequent doctor visits. Accommodating those healthcare needs in prison would be challenging and expensive. Under the circumstances, Mr. Carlisle maintained, alternative sanctions to imprisonment were more appropriate and even necessary. Over the State's objection, the court granted the motion.

Mr. Carlisle's Physical Illness

Mr. Carlisle's health has been chronically poor for some time. He has suffered from diabetes and high blood pressure for many years. In 2003, however, following a stroke, doctors diagnosed him with congestive heart failure. Accordingly, in May of 2006, when K.C. accused him of abusing her, he was struggling with an array of physical problems which routinely left him too weak and exhausted at the end of the day to do anything other than fall asleep. In fact, at trial Mr. Carlisle tried to demonstrate that his physical limitations rendered him incapable of committing the charged misconduct.

When Mr. Carlisle asked the trial court to stay the execution of his sentence, and later to modify that sentence, he did so because his physical condition had worsened. The medical records provided in support of his modification request document a lengthy history of illness. Several years ago, Mr. Carlisle suffered a heart attack and two successive strokes. Although he survived, his doctors linked these acute incidents to a number of chronic life-threatening

convictions in Federal District Court.

conditions. Those illnesses include congestive heart failure, coronary artery disease, hypertension, and diabetes. (Motion to Modify, Exs. 2, 3) Over time, Mr. Carlisle has had to undergo dialysis treatments of increasing duration and intensity. (Ex. Motion to Modify, Ex. 3, Silver, Discharge Summary) While awaiting trial in the Cuyahoga County Jail, Mr. Carlisle's kidneys failed, and he was subsequently diagnosed with end-stage kidney disease.

In a letter provided to the trial court, Mr. Carlisle's nephrologist, Dr. Marcia Silver, clarified that he must receive hemodialysis treatment every other day just to survive. Those dialysis treatments last more than five hours at a time. He must also take daily scheduled medications and conform to a special diet. (Motion to Modify, Ex. 2) Mr. Carlisle, who is currently 60 years old, is a candidate for an organ replacement and has completed most of the protocol required for eligibility. Mr. Carlisle advised the trial court that he will be removed for the transplant eligibility if he goes to prison.

Even with the continuous medical treatment Mr. Carlisle receives, his prognosis is questionable. Kidney failure is always fatal unless treated, which is why ongoing dialysis or a kidney transplant is necessary. During a typical dialysis treatment, the patient's blood is circulated outside the body through a dialyzer. The dialyzer acts as an artificial kidney, processing and filtering waste from the bloodstream before circulating the blood back into the patient. Each of Mr. Carlisle's dialysis treatments removes between four and five kilograms of accumulated fluid from his body.² (Tr. 13)

²These dialysis treatments are time consuming and have lately become difficult for Carlisle to tolerate. In the wake of this appeal, Mr. Carlisle's doctor switched him to peritoneal dialysis. This process is accomplished at home, five times daily. (Motion to Suspend Further Execution of Sentence Pending Appeal to the Supreme Court of Ohio, filed on August 27, 2010, Exhibits II, and III) Peritoneal dialysis requires the patient to follow a strict aseptic technique, a clean/safe place to store supplies, and a quiet clean room to undertake the dialysis. (See, 8/27/10 Motion, Ex. III) If the Eighth District's decision to reverse the sentencing modification is

Resentencing Hearing

At his March 9, 2009 resentencing, Mr. Carlisle explained that the medical treatment he required was extraordinarily costly. His medical statement for the year immediately preceding the hearing reflected that the cost of his dialysis alone exceeded \$275,000. Documents presented confirmed that Mr. Carlisle's overall medical treatment costs amounted to hundreds of thousands of dollars annually.

Mr. Carlisle explained that as long as he remained in the community, as opposed to State custody, the medical costs would be covered by a combination of Medicare and Aetna (private) insurance. Once imprisoned, however, that medical coverage is lost. Under the circumstances, not only would the state be forced to assume the burden of providing and delivering Mr. Carlisle's medical treatment, it would also be obliged to pay for it. (Baker, Michael, *The Catalyst*, Medicare May Help those with Kidney Ailments, Univ. South Carolina, 2/12/09)

When the court determined that community control sanctions were more appropriate than the three-year prison term it originally imposed, the court first acknowledged that the offense was serious. Nevertheless, the court resolved that other considerations weighed in favor of a punishment that did not involve a prison term:

This is a discretionary sentence, and I feel that based on all the facts that I have heard here, the worsening of the defendant's condition, and while it is not the only factor that I considered, the State and local resources are important because we need to preserve them for those serious crimes that the Court feels where the defendants cannot be out on the street.

We know they are cutting budgets everywhere. Not only in the County but on a state-wide level. And the costs in this situation are going to be astronomical.

reversed, Mr. Carlisle will not be able to continue with the peritoneal dialysis he currently receives.

The court also noted that Mr. Carlisle did not pose a future threat to the community, and that he would have no contact with children under the terms of the order, and that he would be amply supervised by probation and sheriff's department under his reclassification as a Tier III sex offender.

Based on all of the evidence presented, including Carlisle's worsening condition, and the costs of assuming his medical treatment while incarcerated, the court imposed a five-year term of community control sanctions under supervision of the adult probation department with numerous conditions.

State Appeal and Subsequent Proceedings

The state appealed and, on July 22, 2010, the Eighth District Court of Appeals reversed the trial court's decision to modify the sentence. Relying on this Court's decision in *State ex rel. Special Prosecutors v. Judge, Court of Common Pleas* (1978), 55 Ohio St.2d 94, that court concluded that -

Once a notice of appeal from a judgment is filed, the trial court is divested of jurisdiction and can only take action in aid of the appeal. And when an appeal has been decided and a mandate is issued ordering a sentence into execution, the mandate rule requires execution of the sentence.

State v. Carlisle, 2010 Ohio 3407, p. 21.

On October 28, 2010, the Eighth District denied Mr. Carlisle's motion for rehearing en banc. This Court accepted jurisdiction over this case on March 2, 2011. The trial court has trial court has continued the previously issued sentence suspension, while this appeal is pending.

LAW AND ARGUMENT

Proposition of Law:

This Court's holding in Special Prosecutors does not create a rule divesting the trial court of its jurisdiction to modify a sentence that has not yet been put into execution even if the sentence modification occurs following the direct appeal.

A trial court has the authority and discretion, consistent with the applicable law and the facts of the case, to vacate a defendant's sentence and impose a new one before execution of that sentence has commenced. *State v. Ballard* (1991), 77 Ohio App. 3d 595, 596. As a general rule, the execution of a criminal sentence commences when a defendant has been sentenced to a term of imprisonment and the defendant has been delivered to a penal institution of the executive branch. *State v. Addison* (1987), 40 Ohio App.3d 7, 530 N.E.2d 1335. Thus, once a defendant has been delivered into the custody of the penal institution in which he is to serve his sentence, a trial court's authority to suspend or to modify a sentence is limited to those instances specifically provided by the General Assembly. *State v. Gilmore* (Apr. 6, 1995), Cuyahoga App. No. 67575, 1995 WL 168748.

This position has been universally adopted by most, if not all, the district courts of appeal in Ohio. See, e.g., *State v. Evans* (2005), 161 Ohio App.3d 24 (4th District); *State v. Hundzsa* (2008), Portage App. No. 2008-P-0012, ¶ 25 (11th District); *State v. Addison* (1987), 40 Ohio App.3d 7 (10th District); *State v. Plunkett* (2009), 186 Ohio App.3d 408 (2nd District); *State v. Lambert*, Richland App. No. 03-CA-65, 2003-Ohio-6791, 2003 WL 22950390, ¶ 14 (5th District);

Eighth District Opinion

When it reversed the trial court's decision to modify Mr. Carlisle's sentence, the Eighth District acknowledged the well settled idea that a trial court retains jurisdiction to modify a sentence until it is put into execution. Nevertheless, it also concluded that

Once a notice of appeal is filed, however, the trial court is divested of jurisdiction and can only take action in aid of the appeal. And when an appeal has been decided and a mandate is issued ordering a sentence into execution, the mandate rule requires execution of the sentence. The only applicable exception to the mandate rule is when "extraordinary circumstances" exist that would render the appellate mandate void or otherwise imperfect. But an extraordinary circumstances exception is not intended as a means of second-guessing a sentence that has been affirmed on appeal and ordered into execution by mandate of a superior court.

Carlisle II, 2010 Ohio 3407, ¶ 47. In so holding, the Eighth District created a new rule that 1) further eviscerates a function - customarily reserved to the trial court - to impose a fair and proper sentence based on the unique characteristics of the case and the offender; and 2) forces the defendant to choose between seeking a sentence modification and appealing the validity of his conviction.

Eighth District concluded that its holding was necessary because when it affirmed Mr. Carlisle's conviction on direct appeal, it has resolved all matters within the scope or compass of the judgment. Therefore, according to the Eighth District, even though Mr. Carlisle's sentence has not been put into execution, any modification to it, is barred by the principles of res judicata, the mandate rule, and this Court's holding in *State ex rel. Special Prosecutors v. Judge, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97. As discussed further below this reasoning is flawed in several respects.

Res Judicata

Should not apply res judicata state that "[a] valid, final judgment rendered

upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Tapp.*, 73 Ohio St.3d 379,1995-Ohio-331, 653 N.E.2d 226, syllabus.. These principles apply to appellate review, and state that "issues that could have been raised on direct appeal and were not are res judicata and not subject to review in subsequent proceedings." *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, at ¶6.

This Court's decision in *Special Prosecutors* does not categorically bar post-appeal new trial motions.

In *Special Prosecutors*, this Court addressed the concern that a post-appeal Crim. R. 32.1 motion to withdraw a guilty plea might be used improperly to "affect the decision of [a] reviewing court." 55 Ohio St. 2d at 98. This Court explained that a trial court lacks jurisdiction to grant a motion to withdraw a guilty plea when such action is "inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea." *Id.* at 97. In *Special Prosecutors*, the court of appeals had specifically rejected a challenge to the voluntariness of the defendant's plea and then the trial court granted the defendant's motion to withdraw the plea. *Id.* at 96. In seeking a writ of prohibition, the State argued that the trial court had no authority to grant the motion because "the Court of Appeals' decision on the voluntariness of the plea became the law of the case and the trial court was bound to follow it." *Id.* This Court agreed and concluded that the issue had already been raised, addressed and the trial court was duty bound to follow it. In *Special Prosecutors*, this Court held that a trial court lacks jurisdiction to grant a motion to withdraw a guilty plea when such action is "inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea." 55 Ohio

St. 2d at 97. The key question in this case is when is a trial court's action in ruling on a motion for a new trial "inconsistent with the judgment of the Court of Appeals" which previously affirmed the conviction on appeal. Such a conclusion should have no bearing on Mr. Carlisle's case. The length or severity of Mr. Carlisle's sentence, though impliedly part of the conviction and judgment entered against him, was within the scope of the appeal, nor could it be.

Despite some broad language, *Special Prosecutors'* concern rests with trial court actions which are directly inconsistent with specific appellate court rulings. *State v. Gaston*, Cuyahoga

App. No. 82628, 2003 Ohio 5825, ¶¶ 4-5. Properly understood, the legal doctrine underlying

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Special Prosecutors is a "part of the law of the case doctrine, which bars the relitigation of issues resolved in appellate decisions." *Id.* at ¶ 5; see also *Hawley v. Ritley* (1988), 35 Ohio St. 3d 157, 160 (citing Special Prosecutors as an example of the law of the case doctrine). In other words, Special Prosecutors makes clear that a trial court cannot revisit issues in a post-appeal Rule 32.1 motion to withdraw a plea that were previously addressed on appeal. "Where an appellate court has already ruled on an issue in a direct appeal, a trial court's 'reconsideration' of that same issue is inconsistent with the appellate court's exercise of jurisdiction and the doctrine of the law of the case." *State ex rel. Rogers v. Marshall*, Scioto App. No. 05CA3004, 2008 Ohio 6341, 1133 (emphasis added).

On the other hand, a trial court retains jurisdiction to rule on post-appeal motions or petitions if the motion is based on different grounds. *Id.* at ¶ 31. For instance, a trial court has jurisdiction to rule on post-appeal motions to reopen a judgment pursuant to Rule 60(B) as long as it involves a different issue. See *Id.* at 1131; *Puls v. Puls*, Montgomery App. No. 21029, 2005 Ohio 6839, ¶ 20; *Polaris Ventures IV, LTD. v. SinerFnan*, Delaware App. No. 2005 CA E-11-0080, 2006 Ohio 4138, ¶ 19. A trial court has jurisdiction to rule on post-appeal motions to withdraw a guilty plea as long as it involves a different issue. See e.g. *State v. Duvall*,

Cuyahoga App. No. 80316, 2002 Ohio 4574, ¶¶ 24-29 (affirming denial of motion to withdraw guilty plea) and *State v. Duvall*, Cuyahoga App. No. 83107, 2004 Ohio 640, ¶114-5 (reversing denial of subsequent motion to withdraw a guilty plea).

New trial

The Eighth District then resolves that for purposes of appellate review, res judicata implicates two doctrines, the law of the case that the mandate rule is controlled by under the

That authority is circumscribed by law, because, “[o]nce a Defendant has been delivered into the custody of the penal institution in which he is to serve his sentence, a trial court’s authority to suspend or to modify a sentence is limited to those instances specifically provided by the

General Assembly.” *State v. Gilmore*, Cuyahoga App. No. 67575, (8th Dist, April 6, 1995).

Accordingly, “[w]hen the full sentence of a Defendant involves imprisonment, the execution of the sentence is commenced when the Defendant is delivered from the temporary detention facility of the judicial branch to the penal institution of the executive branch.” *United States v.*

Benz, (1931), 282 U.S. 304

Historically and as a matter of policy, a trial court may resentence a defendant who has not begun to serve the sentence to a more or less severe sentence without violating the due process, double jeopardy or any other constitutional consideration. The jurisdiction to do so stems from that fact that before its execution, a sentence lacks the constitutional finality of a verdict of acquittal.” *United States v. DiFrancesco*, (1980), 449 U.S. 117. When it vacated the modified sentence the trial court imposed in Mr. Carlisle’s case, the Eighth District construed the

mandate rule, *res judicata*, and law of the case doctrine to completely circumscribe the trial court's authority on remand. This ruling simply goes too far in light of the prevailing authority.

At the outset, *res judicata* did not bar the sentence modification. When this Court affirmed Mr. Carlisle's conviction initially, it did not address in any fashion, the three year sentence imposed. The notion that any issue pertaining to that sentence is barred from future challenge on *res judicata* grounds, reflects a misunderstanding of the doctrine. If this issue could have been raised - but wasn't, then *res judicata* applies. Here, however, the issue was simply not ripe.

While the law of the case doctrine requires the trial court to accept and apply all legal rulings of the reviewing court, the doctrine should not have barred the sentence modification in Mr. Carlisle's case because the Eighth District did not address or rule on the sentence's propriety. In any event, the law of the case doctrine is "a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. In *Nolan*, this Court held that where the trial court is confronted with substantially the same facts as those addressed in the prior appeal, the court is bound to adhere to the appellate court's prior determination of the applicable law. *Id.* at 3. That was not what happened in Mr. Carlisle's case.

If Mr. Carlisle had returned to the trial court and repeated the same challenge to the rape shield statute that he made on direct appeal, then *res judicata* and the law of the case doctrines would apply. But he did not do that. The trial court was not made aware of the nature of Mr. Carlisle's treatment and its costs until after this Court affirmed his conviction.

The law of the case was intended to ensure consistency in the results of a case. *State ex rel. Potain v. Matthews* (1979), 59 Ohio St.2d 29, 32. Those results were consistent here. Mr. Carlisle was convicted. He remains convicted, notwithstanding his challenges to that conviction. The modification (which, based on the law applicable at the time of the offense, the court could have imposed from the beginning) was prompted by a perceived change in circumstances. The modification was a reasonable exercise of judicial discretion and should have been affirmed

Shortly before it decided Mr. Carlisle's case, the Eighth District issued an opinion in *State v. Holloway*, Cuyahoga App. No. 93809, 2020-Ohio-3315. Unlike the *Carlisle* decision, in *Holloway*, the court noted that a trial court does not exceed the scope of an order of remand when it takes action that does not fall within the parameters of the Court's prior decision. *Id.* at ¶ 22 "A reversal upon one ground alone does not necessarily amount to an implied approval of everything else done in the trial to the extent of establishing the law of the case." *Id.*, at ¶26, quoting *Hann v. Perkins Twp.*, Erie App. No. E-03-025, 2004-Ohio-3445, par. 8 (internal citation omitted). *Holloway* does not stand for, and in fact cautions against, the rigorous adherence to the mandate rule announced in the instant case. The two decisions simply cannot be reconciled.

In reversing the decision to modify, the Eighth District acknowledged that "the court had the authority, in the abstract, to modify the sentence." *Carlisle*, at ¶ 13. Nevertheless, according to the Eighth District, the trial court lost that authority after the Court of Appeals affirmed Mr. Carlisle's conviction on direct appeal. *Id.* at ¶ 47. Again, this creates an impossible choice for an individual, like Mr. Carlisle, who wishes to exercise his right to direct appeal, but also requires sentencing relief due to illness. The Eighth District's resolution of this case defies logic and any

semblance of fairness. Accordingly, this Court should take jurisdiction over this matter and resolve the wide reaching and terrible implications of the Eighth District's decision.

Citing a conflict within the Eighth District, Mr. Carlisle also asked the court for rehearing en banc. In so moving, Carlisle maintained that the Eighth District's decision in his case conflicted with a ruling it issued just the previous week in *State v. Holloway*, Cuyahoga App. No. 93809, 2010-Ohio-3315.

In *Holloway*, the issue was whether, following a remand for the express purpose of imposing post-release control, the trial court exceeded its authority by sua sponte dismissing one of the indicted counts. In finding that it did not, the Eighth District panel in *Holloway* concluded that a trial court does not exceed the scope of a remand when it takes action that does not fall within the parameters of its prior decision. *Id.* at ¶ 22. Explaining further, the court noted that, “[a] reversal upon one ground alone does not necessarily amount to an implied approval of everything else done in the trial to the extent of establishing the law of the case.” *Id.*, at ¶26, quoting *Hann v. Perkins Twp.*, Erie App. No. E-03-025, 2004-Ohio-3445, par. 8 (internal citation omitted). Accordingly, Mr. Carlisle maintained that the Eighth District's decision affirming his conviction, but not addressing the original sentence's propriety, did not bar the trial court's reconsideration of that sentence, where 1) the sentence had not yet been put into execution; and 2) new developments compelled a modified sentence.

(Appended to this Memorandum along with the original decision) In the opinion reflecting that dissent those judges noted that the panel's original decision in Mr. Carlisle's case

conflicted with an opinion on this subject the Court previously reached in *State v. Raymond Williams*, Cuyahoga App. No. 90006, 2008 Ohio 2808.

CONCLUSION

In light of the foregoing, Defendant-Appellant Jack Carlisle asks that this Court reverse his convictions and remand this case to the trial court to ascertain whether and the extent to which any of the charges alleged in Counts 1-19 can be retried.

Respectfully submitted,

Erika B. Cunliffe by [Signature]
Erika B. Cunliffe, Asst. Public Defender (0069895)
Counsel for Defendant-Appellant per telephonic
Charles Freeman authorization
5/13/2011

CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 14th day of March, 2011.

Erika B. Cunliffe by [Signature]
ERIKA B. CUNLIFFE (0069895)
per telephonic
authorization
5/13/2011

2949.02 Execution of the sentence or judgment suspended.

(A) If a person is convicted of any bailable offense, including, but not limited to, a violation of an ordinance of a municipal corporation, in a municipal or county court or in a court of common pleas and if the person gives to the trial judge or magistrate a written notice of the person's intention to file or apply for leave to file an appeal to the court of appeals, the trial judge or magistrate may suspend, subject to division (A)(2)(b) of section 2953.09 of the Revised Code, execution of the sentence or judgment imposed for any fixed time that will give the person time either to prepare and file, or to apply for leave to file, the appeal. In all bailable cases, except as provided in division (B) of this section, the trial judge or magistrate may release the person on bail in accordance with Criminal Rule 46, and the bail shall at least be conditioned that the person will appeal without delay and abide by the judgment and sentence of the court.

(B) Notwithstanding any provision of Criminal Rule 46 to the contrary, a trial judge of a court of common pleas shall not release on bail pursuant to division (A) of this section a person who is convicted of a bailable offense if the person is sentenced to imprisonment for life or if that offense is a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2905.01, 2905.02, 2905.11, 2907.02, 2909.02, 2911.01, 2911.02, or 2911.11 of the Revised Code or is felonious sexual penetration in violation of former section 2907.12 of the Revised Code.

(C) If a trial judge of a court of common pleas is prohibited by division (B) of this section from releasing on bail pursuant to division (A) of this section a person who is convicted of a bailable offense and not sentenced to imprisonment for life, the appropriate court of appeals or two judges of it, upon motion of such a person and for good cause shown, may release the person on bail in accordance with Appellate Rule 8 and Criminal Rule 46, and the bail shall at least be conditioned as described in division (A) of this section.

Effective Date: 09-03-1996

2949.03 Further suspension of sentence.

If a judgment of conviction by a court of common pleas, municipal court, or county court is affirmed by a court of appeals and remanded to the trial court for execution of the sentence or judgment imposed, and the person so convicted gives notice of his intention to file a notice of appeal to the supreme court, the trial court, on the filing of a motion by such person within three days after the rendition by the court of appeals of the judgment of affirmation, may further suspend, subject to division (A)(2)(b) of section 2953.09 of the Revised Code, the execution of the sentence or judgment imposed for a time sufficient to give such person an opportunity to file a notice of appeal to the supreme court, but the sentence or judgment imposed shall not be suspended more than thirty days for that purpose.

Effective Date: 03-17-1987

2949.05 Execution of sentence or judgment.

If no appeal is filed, if leave to file an appeal or certification of a case is denied, if the judgment of the trial court is affirmed on appeal, or if post-conviction relief under section 2953.21 of the Revised Code is denied, the trial court or magistrate shall carry into execution the sentence or judgment which had been pronounced against the defendant.

Effective Date: 03-17-1987

2953.09 Execution of the sentence or judgment suspended.

(A)(1) Upon filing an appeal in the supreme court, the execution of the sentence or judgment imposed in cases of felony is suspended.

(2)(a) If a notice of appeal is filed pursuant to the Rules of Appellate Procedure by a defendant who is convicted in a municipal or county court or a court of common pleas of a felony or misdemeanor under the Revised Code or an ordinance of a municipal corporation, the filing of the notice of appeal does not suspend execution of the sentence or judgment imposed. However, consistent with divisions (A)(2)(b), (B), and (C) of this section, Appellate Rule 8, and Criminal Rule 46, the municipal or county court, court of common pleas, or court of appeals may suspend execution of the sentence or judgment imposed during the pendency of the appeal and shall determine whether that defendant is entitled to bail and the amount and nature of any bail that is required. The bail shall at least be conditioned that the defendant will prosecute the appeal without delay and abide by the judgment and sentence of the court.

(b)(i) A court of common pleas or court of appeals may suspend the execution of a sentence of death imposed for an offense committed before January 1, 1995, only if no date for execution has been set by the supreme court, good cause is shown for the suspension, the defendant files a motion requesting the suspension, and notice has been given to the prosecuting attorney of the appropriate county.

(ii) A court of common pleas may suspend the execution of a sentence of death imposed for an offense committed on or after January 1, 1995, only if no date for execution has been set by the supreme court, good cause is shown, the defendant files a motion requesting the suspension, and notice has been given to the prosecuting attorney of the appropriate county.

(iii) A court of common pleas or court of appeals may suspend the execution of the sentence or judgment imposed for a felony in a capital case in which a sentence of death is not imposed only if no date for execution of the sentence has been set by the supreme court, good cause is shown for the suspension, the defendant files a motion requesting the suspension, and only after notice has been given to the prosecuting attorney of the appropriate county.

(B) Notwithstanding any provision of Criminal Rule 46 to the contrary, a trial judge of a court of common pleas shall not release on bail pursuant to division (A)(2)(a) of this section a defendant who is convicted of a bailable offense if the defendant is sentenced to imprisonment for life or if that offense is a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2905.01, 2905.02, 2905.11, 2907.02, 2909.02, 2911.01, 2911.02, or 2911.11 of the Revised Code or is felonious sexual penetration in violation of former section 2907.12 of the Revised Code.

(C) If a trial judge of a court of common pleas is prohibited by division (B) of this section from releasing on bail pursuant to division (A)(2)(a) of this section a defendant who is convicted of a bailable offense and not sentenced to imprisonment for life, the appropriate court of appeals or two judges of it, upon motion of the defendant and for good cause shown, may release the defendant on bail in accordance with division (A)(2) of this section.

Effective Date: 09-03-1996

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO

Plaintiff-Appellee

vs

JACK CARLISLE

Defendant-Appellant

10-2158

On Appeal from the
Cuyahoga County Court of
Appeals, Eighth Appellate
District 93266

NOTICE OF APPEAL OF APPELLANT JACK CARLISLE

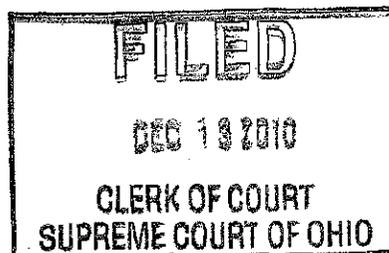
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NOTICE OF APPEAL OF APPELLANT

Appellant, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 93266 on July 22, 2010 and journalized (following its denial of Carlisle's Motion for Rehearing En Banc) on October 28, 2010.

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

Respectfully submitted,


ERIKA CUNLIFFE, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 13th day of December, 2010.


ERIKA CUNLIFFE, ESQ.
Counsel for Appellant

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93266

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JACK CARLISLE

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-481858

BEFORE: Stewart, J., Kilbane, P.J., and Blackmon, J.

RELEASED: July 22, 2010

JOURNALIZED: JUL 22 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 22 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
DEP

MELODY J. STEWART, J.:

Following the affirmance of defendant-appellee Jack Carlisle's sentence on direct appeal, the trial court modified his three-year sentence for kidnapping and gross sexual imposition to a five-year term of community control. The court ordered the modification due to a change in circumstances with Carlisle's health. The state of Ohio appeals from the sentence modification, arguing that the court lacked jurisdiction to modify a sentence that had been affirmed on direct appeal and that the court in any event failed to justify the modification as required by law.

I

A jury found Carlisle guilty of kidnapping and gross sexual imposition. The victim was his six-year-old foster child. The court sentenced Carlisle to concurrent three-year terms for both counts and continued Carlisle's bond pending his appeals. We affirmed Carlisle's conviction in 2008. See *State v. Carlisle*, 8th Dist. No. 90223, 2008-Ohio-3818. The Ohio Supreme Court declined to hear his appeal. *State v. Carlisle*, 120 Ohio St.3d 1508, 2009-Ohio-361, 900 N.E.2d 624.

Before the trial court could take any action to revoke Carlisle's appellate bond following the exhaustion of his direct appeals, Carlisle filed a motion to reconsider and modify his sentence to a term of community control. He sought

modification for health reasons, claiming that he suffered from "an array of chronic life threatening illnesses, including end stage kidney failure, congestive heart failure, coronary artery disease, and diabetes" and argued that a three-year sentence might well prove to be "a death sentence" given his diminishing health. He offered evidence showing that he received kidney dialysis three times per week, paid for by a combination of private health insurance and Medicare. A prison term, he suggested, would cause him to lose that coverage, requiring the state to pay his rather substantial medical costs during the term of his incarceration. Given his infirmity and the low likelihood of reoffending, Carlisle maintained that his incarceration would impose an undue financial burden on the state.

The state opposed the motion, arguing that most of Carlisle's medical conditions preexisted the commission of his crimes and that community control would allow him to benefit from his medical condition. It noted the age of Carlisle's victim and cited to expert testimony at trial showing that Carlisle had, in any event, potentially exaggerated the scope of his problems. For example, Carlisle claimed that he was impotent because of his medical condition yet the state offered evidence to show the presence of semen on his trousers, thus refuting his claim. On that basis, it argued that a lighter sentence would demean the seriousness of the offense.

The court conducted a hearing on the motion and considered billing statements from Carlisle's health insurance company. Carlisle's attorney told the court that she wished to "underscore the fact that this [motion to modify sentence] is really about Mr. Carlisle's health." She noted that since he committed his crimes, he began suffering from end stage kidney disease and said that his dialysis cost between \$25,000 and \$30,000 per month exclusive of doctors visits and tests.

The court acknowledged that Carlisle committed a very serious offense and had served 278 days in jail, but posed no future threat to the community or the victim. The court also found that Carlisle's "worsening" condition would lead to financial costs that presumably outweighed any need for punishment:

"We know they are cutting budgets everywhere. Not only in the County but on a state-wide level. And the costs in this situation are going to be astronomical."

Finding that community control would adequately protect the public and would not demean the seriousness of Carlisle's offenses, the court modified his sentence to a term of five years of supervised community control.

II

The state first argues that the trial court lacked jurisdiction to modify a sentence that had been affirmed on appeal and that modification of the sentence

was barred by principles of res judicata. These arguments raise interconnected questions concerning the court's authority to modify a sentence and whether a post-appeal modification of a sentence that has been affirmed on appeal conflicts with a direct mandate of this court.

A

As a general proposition, a court has no authority to reconsider its own valid final judgments. *Brook Park v. Necak* (1986), 30 Ohio App.3d 118, 120, 506 N.E.2d 936. In criminal cases, a judgment is not considered final until the sentence has been ordered into execution. In *State v. Garretson* (2000), 140 Ohio App.3d 554, 558-559, 748 N.E.2d 560, the court of appeals stated:

"In *Columbus v. Messer* (1982), 7 Ohio App.3d 266, 7 OBR 347, 455 N.E.2d 519, the Court of Appeals for Franklin County addressed the question of exactly when the execution of the sentence has begun: 'Where the full sentence involves imprisonment, *the execution of the sentence is commenced when the defendant is delivered from the temporary detention facility of the judicial branch to the penal institution of the executive branch.*' (Emphasis added.) As a result, a trial court does not have jurisdiction to modify a valid sentence of imprisonment once imprisonment has begun. Should a trial court retain jurisdiction to modify an otherwise valid sentence 'the defendant would

have no assurance about the punishment's finality.' *Brook Park v. Nacak* (1986), 30 Ohio App.3d 118, 120, 30 OBR 218, 220, 506 N.E.2d 936, 938."

In other words, a criminal judgment is not final and the court retains the authority to modify the sentence until the defendant is delivered to a penal institution to start serving a sentence.¹ The court granted Carlisle appellate bond throughout the appeals process, and he remained on bond at the time he filed his motion to modify his sentence. At no point had his sentence been ordered into execution with his delivery to a penal institution, so the court had jurisdiction to address the motion to modify sentence. See *State v. Dawkins*, 8th Dist. No. 88022, 2007-Ohio-1006, at ¶7.

B

Even though the court had the authority, in the abstract, to modify Carlisle's sentence because he had not yet been delivered to a prison facility to begin serving his sentence, we must consider the effect of our affirmance of his direct appeal. The state argues that regardless of whether the sentence had been ordered into execution, the court lacked authority to modify the sentence because it was affirmed on direct appeal by this court. It cites to *State ex rel. Special Prosecutors v. Judge, Court of Common Pleas* (1978), 55 Ohio St.2d 94,

¹The finality of a criminal case for purposes of modifying an order is separate and distinct from a final, appealable order under R.C. 2505.02.

97, 378 N.E.2d 162, for the proposition that a judgment of a reviewing court is “controlling upon the lower court as to all matters within the compass of the judgment.”

Principles of res judicata state that “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus. These principles apply to appellate review, and state that “issues that could have been raised on direct appeal and were not are res judicata and not subject to review in subsequent proceedings.” *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, at ¶6.

For purposes of appellate review, res judicata incorporates two separate doctrines: the law of the case and the mandate rule. The “law of the case” is a judicially crafted policy that “expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power.” *Messenger v. Anderson* (1912), 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152. As such, law of the case is necessarily “amorphous” in that it “directs a court’s discretion,” but does not restrict its authority. *Arizona v. California* (1983), 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318. It is a rule of practice that is not

considered substantive, but merely discretionary. *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, at ¶22.

The law of the case is not to be confused with the “mandate rule.” An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court’s judgment. Under the “mandate rule,” a lower court must “carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest.” *Sprague v. Ticonic Natl. Bank* (1939), 307 U.S. 161, 168, 59 S.Ct. 777; see, also, *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, at ¶32 (“We have expressly held that the Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.”). The lower court may, however, rule on issues left open by the mandate. *Id.* But when the mandate leaves nothing left to decide, the lower court is bound to execute it. *Id.* We have stated that the mandate rule “provides that a lower court on remand must implement both the letter and the spirit of the appellate court’s mandate and may not disregard the explicit directives of that court.” *State v. Larkins*, 8th Dist. No. 85877, 2006-Ohio-90, at ¶31.

In criminal cases, the mandate rule is set forth in R.C. 2949.05, which states:

"If no appeal is filed, if leave to file an appeal or certification of a case is denied, if the judgment of the trial court is affirmed on appeal, or if post-conviction relief under section 2953.21 of the Revised Code is denied, the trial court or magistrate shall carry into execution the sentence or judgment which had been pronounced against the defendant."

Likewise, App.R. 27 states in part: "A court of appeals may remand its final decrees, judgments, or orders, in cases brought before it on appeal, to the court or agency below for specific or general execution thereof, or to the court below for further proceedings therein." Pursuant to App.R. 27, this court issues a special mandate in all of its decisions, whether civil or criminal. In our opinion affirming Carlisle's conviction and sentence, we gave the following mandate:

"It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence."

Our mandate specifically ordered the trial court to execute Carlisle's sentence. Both the letter and spirit of the mandate required the court to

execute Carlisle's sentence; that is, remand him to a penal institution. By modifying Carlisle's sentence, the court did not execute the sentence and therefore failed to obey our mandate. See *State v. Craddock*, 8th Dist. No. 91766, 2009-Ohio-1616, at ¶15.

In reaching this conclusion, we note that our decision to stay execution of sentence and grant Carlisle's motion for bond pending appeal to the Ohio Supreme Court did not affect the validity of our mandate. As a general rule, the trial court is divested of jurisdiction when an appeal is taken, except to take action in aid of the appeal. See *Special Prosecutors*, 55 Ohio St.2d at 97. Our order staying execution of our mandate ordering Carlisle's sentence into execution had no effect on the validity of our mandate. The mandate remained in full force and effect — our stay simply delayed execution of the mandate pending appeal. The trial court had no authority to countermand our mandate, even if that mandate had been stayed pending further appeal to the supreme court.

C

There is an exception to the law of the case doctrine for extraordinary circumstances, such as an intervening decision by a superior court. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 5, 462 N.E.2d 410. The supreme court has not defined the term "extraordinary circumstances" in this instance, so we give that

term its plain meaning as something exceptional in character, amount, extent, or degree. Given the very strong requirement that a lower court follow the mandate of a superior court, we think that a deviation from an appellate mandate can only occur when external circumstances have rendered that mandate void or moot. For example, the basis cited in *Nolan* as an exception to the law of the case doctrine — an “intervening decision by a superior court” — is one that would plainly supersede an appellate mandate. This is because supreme court decisions are binding and no lower court is entitled to deviate from them, even if the mandate of an intermediate court was to require otherwise. *Thacker v. Bd. of Trustees of Ohio* (1971), 31 Ohio App.2d 17, 21, 285 N.E.2d 380.

Carlisle's motion to modify his sentence was based on two factors: his medical condition and the cost of providing his treatment while imprisoned. He claimed to have a “debilitating illness” that required dialysis and left his prognosis “questionable.” He further claimed that the cost of his medical treatment would place an undue burden on state resources given the very low likelihood of harm he posed to the public.

Carlisle's medical condition did not constitute an extraordinary circumstance justifying modification of his sentence in the face of our mandate on appeal. Nor did his medical condition serve to vitiate this court's mandate.

In fact, Carlisle's medical condition was known to the court months in advance of his sentencing: a November 2006 pretrial order reducing Carlisle's bond noted that he was "presently undergoing dialysis three times weekly." The court imposed a three-year sentence despite knowing that Carlisle had been in renal failure. Plainly, the court did not consider Carlisle's need for dialysis at the time of sentencing to be a debilitating medical condition sufficient to rule out a prison term.

Carlisle offered nothing in his motion to modify sentence that would suggest that his condition had significantly deteriorated from the time of sentencing to the time of his motion. The most current of the medical records submitted with the motion were from March 2008. A doctor's progress note on Carlisle's medical condition described Carlisle as well-developed, well-nourished, not in apparent distress, alert, cogent, and without a foul or unpleasant smell associated with kidney failure. The doctor further noted that Carlisle's medical history showed him "doing well at HD [hemodialysis]" and his "dialysis going fine." The note further stated that Carlisle had no chest pain or shortness of breath. The note concluded by stating: "Patient is stable on hemodialysis and plan is to continue current treatment approach[.]"

The March 2008 progress note was consistent with an October 2007 progress note that stated Carlisle's medical history as "overall doing well, no

problems with dialysis." The note indicated that Carlisle had no complaints of chest pain or shortness of breath, and that he had good energy and had been eating well.

The court heard no evidence to contradict the medical records offered with the motion to modify the sentence. While Carlisle undeniably suffers from very serious medical conditions, those conditions, with the exception of his dialysis, predated his crimes. And the record plainly shows that the court knew at the time it originally imposed sentence that Carlisle had been receiving dialysis. The only evidence in the record at the time of the hearing showed that Carlisle remained stable on dialysis. Indeed, Carlisle's motion for release on bond pending appeal made no mention of any ill health; in fact, the motion mentioned that he had been employed at the time of his initial incarceration that "it is entirely possible that defendant could immediately re-enter the work force upon the decision of this appeal if favorable to defendant." There was no evidence to prove a deterioration of his condition sufficient to qualify as an extraordinary circumstance requiring deviation from our mandate to execute sentence.

Carlisle's primary basis for seeking modification of his sentence was that it would be prohibitively expensive for the state to imprison him. In his motion he claimed that his dialysis alone cost at least \$51,152 annually and that the

cost was currently borne through a combination of Medicare and private insurance. At the hearing on the motion to modify, Carlisle offered statements from his health insurer showing the cost of dialysis to be between \$25,000-\$30,000 per month. He maintained that if imprisoned, the state would be required to assume the cost of his treatment. Claiming to pose no risk of reoffending due to the court's refusal to classify him as a sexual predator, he said that the need to forcefully punish him became "less weighty [] when considered in light of the financial burden of medically caring for him * * *."

The state conceded that it would be expensive to imprison Carlisle but said that it was willing to absorb that cost. While noting that "nothing has changed except for the economy[.]" it argued that it would otherwise demean the seriousness of Carlisle's offenses to permit him to avoid prison time.

The court appeared to agree with Carlisle's claim that his incarceration would place an undue burden on state financial resources. It noted that apart from the cost of dialysis, the state would be required to provide transportation to dialysis and assign a corrections officer to monitor Carlisle while he received treatment. The court acknowledged the seriousness of Carlisle's offenses and the "worsening" of his medical condition. It then stated that "while not the only factor I considered," that state and local resources were important "because we need to preserve them for those serious crimes that the Court feels where [sic]

the defendant cannot be out on the street." It acknowledged that "they are cutting budgets everywhere" and that "the costs in this situation are going to be astronomical." Finding that Carlisle did not pose a threat to the community, it modified his sentence to community control.

It is true that the special medical needs of some inmates make the cost of their incarceration significantly higher than those of other inmates. The cost of incarceration can be a relevant factor for the court to consider at sentencing. See R.C. 2929.13(A) (a "sentence shall not impose an unnecessary burden on state or local government resources."). Yet it is undeniably self-serving for Carlisle to seek to avoid a prison term on the basis that it would cost too much to incarcerate him. Carlisle has offered evidence to show that his medical treatment is extremely costly. But the court was aware of Carlisle's medical condition at the time it originally sentenced him, and it ordered a prison term despite knowing of his need for dialysis and, presumably, the substantial costs associated with that treatment. With no new evidence to show that these costs had escalated beyond what it had been at the time of the original sentence, the cost of Carlisle's treatment could not have been an extraordinary circumstance justifying deviation from our mandate to execute his sentence.

Moreover, to the extent that Carlisle's medical treatment would be a financial burden to the state, the court was required to find that the cost of

treatment was an "unnecessary" burden. "Just what constitutes a 'burden' on state resources is undefined by the statute, but the plain language suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration." *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, 797 N.E.2d 580, at ¶5. The trial courts are not required to elevate resource conservation above seriousness and recidivism factors, *State v. Wolfe*, Columbiana App. No. 03 CO 45, 2004-Ohio-3044, at ¶15, and apart from financial considerations relating to the burden of incarcerating an offender, "[t]he court must also consider the benefit to society in assuring that an offender will not be free to reoffend." *Vlahopoulos*, 154 Ohio App.3d at ¶5.

The court found that Carlisle's current medical condition made him no reasonable threat to the community or the victim's family, but that conclusion found no support in the record. The state correctly notes that apart from a need for dialysis that arose after the offense had been committed, the bulk of Carlisle's physical maladies were manifest prior to the commission of his crimes. Those maladies did not deter his actions. And it bears noting that Carlisle himself overstated his medical condition when first questioned by claiming that his medical condition had for years left him impotent — his wife contradicted that claim by saying that they engaged in intercourse several

months earlier. The presence of semen on pants worn by Carlisle on the night of the offense appeared to remove all doubt about his impotency. Tellingly, Carlisle did not reassert a claim of impotence as proof of his inability to reoffend for purposes of his motion to modify his sentence, and none of his medical records showed any complaint of impotence. With the most recent medical information available to the court suggesting that Carlisle's condition remained stable on dialysis, the court's conclusion that Carlisle posed no threat to the community lacked a basis in evidence.

We likewise reject Carlisle's argument that the court's refusal to classify him as a sexual predator constituted a finding that he was no threat to reoffend because those findings are conceptually distinct. A sexual predator classification under former R.C. 2950.01(E) was a finding that clear and convincing evidence showed that the offender was "likely to engage in the future in one or more sexually oriented offenses." This was a much different standard than the R.C. 2929.11(A) sentencing factor requiring the court to protect the public from "future crimes of the offender[.]" Cf. *State v. Futo*, 8th Dist. No. 89791, 2008-Ohio-3360 (rejecting argument that court acted inconsistently by ordering offender to serve mandatory maximum sentences consecutively despite refusing to classify him as a sexual predator).

Finally, to the extent that Carlisle's need for treatment while imprisoned would impose a burden on the state's financial resources, there was no basis for finding that burden to be "unnecessary." The prosecuting attorney told the court that "the State is willing to absorb the cost" of Carlisle's incarceration. This position was entitled to significant weight because the prosecuting attorney is the elected representative of the state of Ohio and is entitled to voice an opinion on behalf of the people of this state. See R.C. 309.08(A).

It requires no citation to authority for the proposition that acts of sexual abuse committed against children are considered among the most heinous of crimes. The current registration requirements for sexual offenders were motivated by child sexual abuse cases. See *State v. Williams*, 88 Ohio St.3d 513, 516-517, 2000-Ohio-428, 728 N.E.2d 342. "Although Ohio's version [of Megan's Law], R.C. Chapter 2950, does not differentiate between crimes against children and crimes against adults, recidivism among pedophile offenders is highest." *State v. Eppinger*, 91 Ohio St.3d 158, 160, 2001-Ohio-247, 743 N.E.2d 881. The current sexual offender registration laws are based on the federal Adam Walsh Child Protection and Safety Act of 2006. "The General Assembly's stated purpose in enacting the Adam Walsh Act [was] 'to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually

oriented offense or a child-victim oriented offense[.],” *Adamson v. State*, 11th Dist. No. 2008-L-045, 2009-Ohio-6996, at ¶93.

Carlisle was convicted of committing an act of gross sexual imposition against his six-year-old foster child. Our statement of facts in Carlisle’s direct appeal is as follows:

“K.C. testified that Carlisle entered the room, closed the door behind him, sat on his bed and told her to come to him, but she continued to watch television. K.C. testified that Carlisle came over to her, picked her up, and placed her on the bed. K.C. testified that Carlisle laid her on her back, then removed his pants, put lotion on his penis, climbed on top of her, and inserted his penis inside her.” *Carlisle*, 2008-Ohio-3818, at ¶7.

At trial, the jury heard that Carlisle committed these acts despite knowing that the victim’s nine-year-old brother had been hiding in the closet of the victim’s bedroom at the time. *Id.* at ¶10 (“Carlisle said ‘get out of the closet,’ but [the brother] remained hidden under some clothes”). So apart from the seriousness of committing an act of sexual abuse with a child less than ten years of age, Carlisle abused his position of trust as a foster parent and molested the victim despite knowing that there was a potential witness in the closet. Although acquitted of rape charges, medical evidence showed that the

victim's "entire vaginal area was swollen, severely red and irritated." Id. at ¶25.

Carlisle was convicted for committing very grave acts of sexual abuse against a child less than ten years of age — acts that society has deemed worthy of significant punishment. As the representative of the people of Ohio, the state's desire to bear the cost of Carlisle's medical care in order to see him punished for his crime was reasonable.

Moreover, the costs of Carlisle's imprisonment, while potentially substantial, were limited. The court imposed a three-year sentence and noted during the modification proceedings that Carlisle "served 278 days incarceration in the County Jail." With a credit for time held in confinement pending trial, see R.C. 2967.191, the term of Carlisle's imprisonment would be considerably less than three years. The state could rationally have concluded that Carlisle's imprisonment would not subject the state to an indefinite financial burden.

And even if the state was to change its mind as to post-execution of sentence about Carlisle's need for imprisonment due to the cost of his medical care, R.C. 2967.03 creates a mechanism for medical release. The statute allows a medical release if the adult parole authority finds the release to be in "the interests of justice and be consistent with the welfare and security of society"

and the governor so agrees. A "Fiscal Note & Local Impact Statement" for then-pending HB 130, prepared by the Ohio Legislative Service Commission, states:

"The bill streamlines the process for obtaining the medical release of an inmate facing serious illnesses. There is a procedure under current law for the release of inmates in imminent danger of death within six months. This process, however, tends to be procedurally time consuming and the inmate often dies before the release is granted. DRC estimates that such a streamlined program would affect between 20 and 50 inmates annually and could save over \$1 million in operational expenditures. Depending on the medical condition of the inmate and the specific treatment regimen required, streamlined release procedures could save the Department even more in medical expenditures."

R.C. 2967.03 plainly envisions that the cost of inmate care can become so burdensome that a medical release is advised. The availability of an early medical release in conjunction with the very limited time Carlisle had left to serve shows that the cost of Carlisle's imprisonment would be contained to a relatively short period of time.

In the end, the court could only deviate from our mandate to order Carlisle's sentence into execution by showing that extraordinary circumstances existed that would nullify or otherwise render our mandate imperfect. We find no such circumstances existed. There was no evidence that Carlisle's medical

condition, while serious, had significantly deteriorated from the time of the original sentencing to the time of modification. Moreover, while Carlisle's imprisonment would place a financial burden on the state, the short and definite nature of that term of imprisonment would not create an unnecessary financial burden.

D

We stress that nothing in our holding should be construed as a limitation on a trial judge's ability to modify a sentence prior to execution of sentence when no direct appeal is taken from the conviction. Once a notice of appeal is filed, however, the trial court is divested of jurisdiction and can only take action in aid of the appeal. And when an appeal has been decided and a mandate is issued ordering a sentence into execution, the mandate rule requires execution of the sentence. The only applicable exception to the mandate rule is when "extraordinary circumstances" exist that would render the appellate mandate void or otherwise imperfect. But an extraordinary circumstances exception is not intended as a means of second-guessing a sentence that has been affirmed on appeal and ordered into execution by mandate of a superior court.

With those caveats, we sustain the state's second assignment of error and reverse the court's modification of sentence.

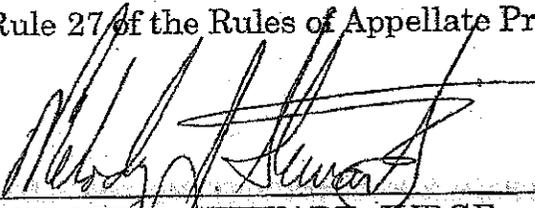
This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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



MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellant

COA NO
93266

LOWER COURT NO.
CP CR-481858

COMMON PLEAS COURT

-vs-

JACK CARLISLE

Appellee

MOTION NO. 436241

Date 10/28/2010

Journal Entry

This matter is before the court on appellee's motion for consideration en banc. Pursuant to *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, and Loc.App.R. 26, we are obligated to resolve legitimate conflicts on a point of law within our district through en banc proceedings should the court determine such a conflict exists.

The parties are reminded that the en banc procedure is not designed to resolve factual distinctions between cases, but is mandated to resolve legitimate conflicts on questions of law. A proper request for en banc consideration should, in a clear and concise statement, identify the specific point of law that presents a conflict. The failure to do so may result in the court summarily dismissing an en banc request. Any party or counsel seeking consideration en banc for any



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reason other than those specified under Loc App.R. 26(A) is subject to sanctions.

Appellee Jack Carlisle contends that our decision rendered in his case, *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407, conflicts with a prior decision of this court in *State v. Holloway*, 8th Dist. No. 93809, 2010-Ohio-3315. The dissenting opinion expresses the view that *Carlisle* conflicts also with *State v. Williams*, 8th Dist. No. 90006, 2008-Ohio-2808.

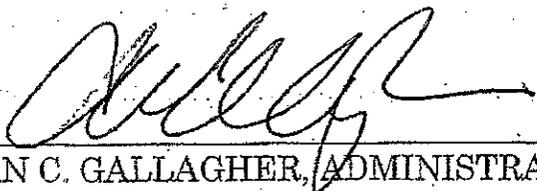
In *Carlisle*, we reversed the trial court's decision to modify Carlisle's sentence after his conviction and sentence were affirmed on direct appeal, holding that our mandate in the direct appeal specifically ordered the trial court to execute Carlisle's sentence; that is, remand him to a penal institution. By modifying Carlisle's sentence, the trial court did not execute the sentence and therefore failed to obey our mandate. See *State v. Craddock*, 8th Dist. No. 91766, 2009-Ohio-1616, at ¶15. We recognized that there are exceptions to the law of the case doctrine, like an intervening decision from a superior court or extraordinary circumstances, but we found that this case was not an exception.

We also noted that our holding should not be construed as a limitation on the trial court's ability to modify a sentence prior to execution of sentence when no direct appeal is taken from the conviction. But once a notice of appeal is filed, the trial court is divested of jurisdiction and can only take action in aid of the appeal.

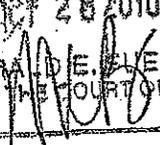
State v. Holloway dealt with the trial court correcting an error, unrelated to the appeal, upon remand from this court. On remand, the trial court noticed that it had convicted Holloway of a count that had been nolle. This error was not raised on appeal and went unnoticed during the appeals process. The trial court, sua sponte, corrected the error. Noting that the trial court exceeded the scope of the remand order by conducting a complete resentencing hearing, the panel in *Holloway* stated, “[w]e will not construe our reversal of the prior judgment solely on the issue of postrelease control to preclude the trial court from correcting this error.” Id. at ¶26. This court also noted that even correcting the error sua sponte, the trial court “accepted and applied the law as stated in our previous opinions.” Id. at ¶2.

In *State v. Williams*, there was no direct appeal of the defendant’s original conviction and sentence. The trial court, therefore, was well within its authority to modify Williams’s sentence prior to his being delivered to prison.

Having reviewed appellee’s motion and finding no legitimate conflict on a question of law, appellee’s motion for consideration en banc is denied.


 SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

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 ALL PARTIES. COPIES TAKEN

Concurring:

PATRICIA A. BLACKMON, J.,
FRANK D. CELEBREZZE, JR., J.,
ANN DYKE, J.,
KENNETH A. ROCCO, J.,
MELODY J. STEWART, J., and
JAMES J. SWEENEY, J.

Dissenting:

COLLEEN CONWAY COONEY, J.,
LARRY A. JONES, J.,
MARY EILEEN KILBANE, J.,
CHRISTINE T. MCMONAGLE, J., and
MARY J. BOYLE, J., (SEE DISSENTING OPINION)

MARY J. BOYLE, J., DISSENTING:

I write separately to point out that the holding in *Carlisle* is, in my opinion, in conflict with our court's decision in *State v. Raymond Williams*, 8th Dist. No. 90006, 2008-Ohio-2808. In this case, we specifically hold that the trial court did not commit error and did not lack authority "because the trial court modified Williams' sentence before he was delivered to prison." *Carlisle* was out on bond when the Eighth District rendered its opinion and ordered his sentence into execution. Thus, he was not even in custody, let alone delivered to prison.

Therefore, it is my opinion that the trial court, based upon *Williams*, still had the authority to modify its sentence in an oral hearing and upon *Carlisle's* motion to do so.