

NO. 2012-0118

ORIGINAL

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 96637

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

J.S. A MINOR CHILD,

Defendant-Appellee

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**MERIT BRIEF OF APPELLANT, STATE OF OHIO**

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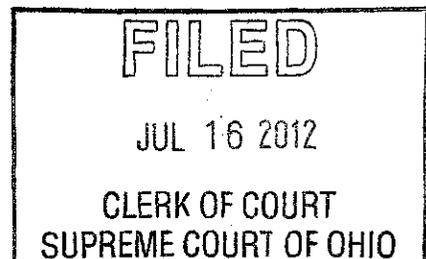
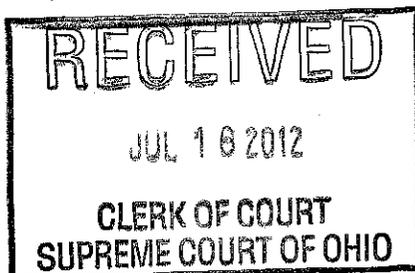
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## STATEMENT OF THE CASE AND FACTS

This case arises from a delinquency matter filed in the Cuyahoga County Juvenile Court. In 2006, J.S., a minor, was adjudicated delinquent of the following:

Count 1: Aggravated Robbery in violation of R.C. § 2911.01, with a one and three-year firearm specification

Count 2: Aggravated Robbery in violation of R.C. § 2911.01, with a one and three-year firearm specification

Count 3: Kidnapping in violation of R.C. § 2905.01, with a one and three-year firearm specification

Count 4: Rape in violation of R.C. § 2907.02, with a one and three-year firearm specification

The state sought a blended Serious Youthful Offender (SYO) sentence pursuant to R.C. § 2152.13. The juvenile court found J.S. to be a Serious Youthful Offender and ordered him to serve five years in Ohio Department of Youth Services custody along with an agreed upon nine year adult prison sentence, which was suspended pending the successful completion of the juvenile portion of his sentence. Both parties and the juvenile court agreed that J.S. would serve nine years in the adult prison system if he failed to be rehabilitated and continued to engage in criminal conduct while in ODYS custody. *In re: J.S.*, Cuyahoga App. No. 95365, 2010-Ohio-6199 (“*J.S. I*”). However, the journal entry of the court not only imposed the agreed-upon nine year sentence, but also indicated that J.S.’s first-degree felonies could be punishable by indefinite prison terms of three to ten years. Despite this discrepancy in J.S.’s original dispositional journal entry, neither side sought an appeal.

In 2007 while serving the juvenile portion of his sentence in ODYS custody, J.S. committed another act of first-degree felony rape. Based on J.S.’s commission of another rape, the State then moved to invoke the adult portion of J.S.’s blended

sentence pursuant to R.C. § 2152.14. On April 8, 2011, following a hearing, the juvenile court granted the State's motion to invoke J.S.'s nine year adult prison term. J.S. appealed this decision to the Eighth District Court of Appeals, which remanded the case for resentencing. The Court of Appeals held that the imposition and suspension of both definite and indefinite adult prison terms was improper. Since the appellate court was remanding the matter for sentencing *de novo*, the court found J.S.'s remaining issues on appeal to be moot. The Eighth District never discussed the applicability of R.C. § 2152.14 to J.S., nor did the court instruct to the juvenile court to do anything besides resentence J.S. so that no indefinite adult prison terms were imposed. *J.S. I*, at ¶ 7-9.

Upon remand, the juvenile court held a hearing on February 28, 2011. During that hearing, the court re-imposed the five year ODYS commitment and correctly imposed the mutually agreed upon definite nine year adult prison term which was suspended (along with a mandatory five year period of post release control.) (2/28/11 Tr. 27-30.) Also during that hearing, the court explained to J.S.:

Now, the issue, [J.S.], is this, that when you were at ODYS you picked up another offense. They filed a motion to then invoke your adult sentence. That came in for a hearing, and I did just that. What we were discussing why it took so long to come into court was how do we proceed? Can the court just essentially take what we did before, apply it now, and invoke your adult sentence? Your attorneys are arguing that there may be a problem because what the Court of Appeals essentially said was that your juvenile sentence hadn't been imposed properly. So we're imposing it now, I hope properly. But does an act that occurred, a conviction or adjudication that you received while serving the juvenile sentence, form the basis for re-imposing the adult sentence? So that's the issue at hand.

(2/28/11 Tr. 30-31.) Rather than address the motion to invoke the court set a hearing for March 8, 2011. (2/28/11 Tr. 33.)

At the March 8<sup>th</sup> hearing, the juvenile court heard arguments from both the State and counsel for J.S. regarding whether or not the adult portion of J.S.'s newly imposed

sentence could be invoked based on his 2007 act of rape while in ODYS custody. The State argued that it met its burden under R.C. § 2152.14 in that J.S.:

Was serving a juvenile sentence, that he was in the custody of the [ODYS] serving that sentence, and that he did have at least one incident of misconduct and that that occurred after he reach fourteen (14), and that the specific misconduct was either felony or first degree misdemeanor or created a substantial risk to the safety and security of the institution.

(3/8/11 Tr. 5.) The State went on to argue that even though the case had been remanded for resentencing, all of the requirements of R.C. § 2152.14 were met, and thus asked the juvenile court to invoke J.S.'s adult prison term. The defense argued that because the original sentence was reversed on appeal, no suspended adult prison term was in place at the time J.S. committed the 2007 rape. The juvenile court found that the defense's contention that the original sentencing never existed absurd. The court inquired, "Well, does that mean he wasn't there then and he couldn't even have committed the rape?"

(3/8/11 Tr. 9.) The court found the defense's contention that J.S. was never properly in the custody of the ODYS unconvincing. After hearing arguments, the court determined:

I think that's the conclusion this Court has to reach, that the [appellate] Court was essentially sending it back for clarification of the sentence. It's a re-sentence I think to make an argument that it was an invalid sentence, and, therefore, it cannot be considered that he committed another offense and invoke that adult sentence, I think is pure legal fiction. And if there's ever a situation where somebody would have to say that there's a technicality of the law that worked to the disadvantage of the community, that would certainly be it. So I may be wrong, but if it goes back to the Court of Appeals, I would hope that they would see it that way. So I want to make the ruling that we can consider the adjudication from Delaware County on the rape charge, [J.S.]'s admission there.

(3/8/11 Tr. 11-12.) The juvenile court found by clear and convincing evidence that all of the conditions in R.C. § 2152.14 were met, and once again invoked the adult portion of J.S.'s sentence. J.S. immediately appealed.

Upon review the Eighth District again reversed the juvenile court. This time the appellate court looked at the procedural history of the case and reasoned,

We are troubled by the fact that J.S. was serving a void sentence when he committed the act constituting rape. We are aware that the SYO law in Ohio is relatively new and this case appears to be one of first impression. An example of a similar situation is where an adult offender violates the community control sanctions portion of his or her sentence. If his or her sentence is later found to be void, can the person still be found to be a probation violator? We think not. That does not mean that the offender cannot be prosecuted for any crime he or she commits while under community control sanctions, the offender just cannot be found to have violated his or her community control sanctions in the underlying case. Likewise, in this case, J.S. could still be adjudicated delinquent for the rape case and have the appropriate disposition rendered in that case. In other words, just because J.S.'s sentence was void does not mean he cannot be held accountable for his actions in the rape case; the act constituting rape simply cannot serve as the predicate act for pursuing imposition of the adult portion of J.S.'s sentence in this case.

*In re: J.S.*, Cuyahoga App. No. 96637, 2011-Ohio-6280, ¶ 16 (“*J.S. II*”).

The State sought review in this Honorable Court. Upon consideration jurisdiction was granted. The State asks this Supreme Court to adopt its proposition of law that a sentencing error that is not timely appealed, and is unrelated to a juvenile court's decision to invoke an adult prison term against a serious youthful offender, cannot be used to nullify the adult portion of the juvenile's blended sentence. In support of its position on this issue, the State presents the following argument.

#### **LAW AND ARGUMENT**

***PROPOSITION OF LAW: A SENTENCING ERROR THAT IS NOT TIMELY APPEALED, AND IS UNRELATED TO A JUVENILE COURT'S DECISION TO INVOKE AN ADULT PRISON SENTENCE AGAINST A SERIOUS YOUTHFUL OFFENDER, CANNOT BE USED TO NULLIFY THE ADULT PORTION OF THE JUVENILE'S BLENDED SENTENCE.***

In this case, the Eighth District Court of Appeals found that an unrelated error in J.S.'s original sentencing entry nullified the adult portion of his blended sentence and,

therefore, the appellate court vacated the juvenile court's decision to invoke J.S.'s agree upon nine-year adult prison term. The appellate court's decision is unsound and it undermines the very purpose of serious youthful offender blended sentencing in the State of Ohio. The State asks this Honorable Court to (1) reverse the decision of the Eighth District Court of Appeals, (2) adopt the State's proposition of law, and (3) reinstate the judgment of the juvenile court that invoked the adult portion of J.S.'s blended sentence.

Reversal of the juvenile court's decision to invoke J.S.'s adult prison term under these circumstances frustrates the purpose of blended SYO sentences in Ohio's juvenile justice system:

Juvenile courts "occupy a unique place in our legal system." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919 ¶ 65, 874 N.E.2d 1177. The purpose of the juvenile courts is "to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services." R.C. § 2152.01; *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶ 28.

One such sanction that a juvenile court may impose is the "serious youthful offender" dispositional sentence. This sanction as explained in R.C. § 2152.13 is a blended sentence that is composed of a term of commitment in a juvenile correctional facility as well as an adult prison term that is suspended. R.C. § 2152.13(D)(1)(a)-(c). The adult prison term remains suspended unless the offender fails to successfully complete the juvenile commitment. R.C. § 2152.13(D)(1)(c). The imposition of a serious youthful offender sentence is reserved for mid-range juvenile offenders who can still benefit from the rehabilitative functions of a juvenile facility but are eligible for "a more

restrictive disposition” due to the severity of their criminal acts. *State v D.H.*, supra, at ¶ 28.

The factors that are to be weighed to determine whether a delinquent child is eligible for a blended sentence are outlined in R.C. 2152.11 (A) through (G), but summarized in R.C. § 2152.13 as follows:

“(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in R.C. § 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.”

R.C. § 2152.13(D)(2)(a)(i).

“Theoretically, the threat of the imposition of an adult sentence encourages a juvenile’s cooperation in his own rehabilitation, functioning as both carrot and stick.” *State v. D.H.* at ¶ 38. Despite the possibility of an adult prison term, the juvenile court retains jurisdiction over the offender and thus the goals of the juvenile court system (primarily rehabilitation and treatment) control his disposition. *Id.*

It is with these purposes and principles in mind that this Court must examine the terms of J.S.’s blended sentence. J.S. was adjudicated delinquent and guilty of two counts of aggravated robbery, one count of kidnapping, and one count of rape, all with firearm specifications. *J.S. II*, 2011-Ohio-6280, at ¶ 2. The State sought a serious youthful offender dispositional status and the court granted it. As such J.S. was originally sentenced to a five-year juvenile commitment, with an agreed upon nine-year adult prison sentence that would be stayed pending the successful completion of the

juvenile portion of J.S.'s disposition. (2/28/11 Tr. 6.) Unfortunately, J.S. was unsuccessful in his rehabilitation while in ODYS custody. While in detention, J.S. committed another first-degree felony rape. *J.S. II* at ¶ 3. The act of rape that J.S. committed while in ODYS custody formed the basis upon which the State moved to invoke the adult portion of his blended SYO sentence. *Id.*

When a juvenile such as J.S. continues to engage in criminal conduct while serving an ODYS commitment, the goal of the SYO blended sentence shifts. R.C. § 2152.14 outlines the procedure for invoking the adult portion of a blended sentence. R.C. § 2152.14(E)(1)(c) requires a juvenile court to find by clear and convincing evidence that “the person engaged in conduct or acts charged under division (A), (B), or (C) of this section, and the person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.” This section exhibits the primary intent of the Ohio General Assembly to attempt to rehabilitate the juvenile until it is clear that the juvenile is unlikely to be rehabilitated while subject to ODYS custody. Applied here, at the point when J.S. committed the additional act of rape, the State requested and the juvenile court found by clear and convincing evidence that J.S. was unlikely to be successfully rehabilitated in the juvenile facility. For this reason, the juvenile court invoked the adult portion of J.S.’s sentence. (3/8/2011 Tr. 12).

The primary purposes of adult felony sentences “are to protect the public from future crime by the offenders and others and to punish the offender.” R.C. § 2929.11(A). These goals were considered by the General Assembly when it passed the legislation authorizing serious youthful offender dispositions. Here, the juvenile court attempted to achieve the new goal of J.S.’s blended SYO sentence by invoking the suspended nine-

year adult prison term. However the court of appeals reversed the juvenile court's ruling, based on an unrelated error in J.S.'s original dispositional journal entry.

J.S.'s original sentencing entry imposed the ODYS commitment, the agreed-upon nine year adult prison term, and it also referred to an indefinite adult prison term. The Eighth District Court of Appeals found that the indefinite sentence language invalidated J.S.'s original dispositional entry. The appellate court found J.S.'s sentence to be void and remanded the case for resentencing. *J.S. I*, 2010-Ohio-6199, at ¶ 9.

Upon remand J.S. was given an identical disposition, minus the improper reference to an indefinite prison term. After the *de novo* resentencing on remand, the State again asked the juvenile court to invoke J.S.'s suspended adult prison term. *J.S. II*, at ¶ 5. As it had previously, the juvenile court again agreed with the State that J.S.'s 2007 act of rape that he committed while in ODYS custody was cause to invoke the suspended nine year adult sentence. *Id.* J.S. appealed the ruling and the appellate court reversed. *Id.* at ¶ 16.

In reversing the juvenile court's decision for the second time, the appellate court has completely and utterly prevented the State from pursuing the adult portion of J.S.'s SYO sentence—despite the fact that J.S. committed an act of rape while serving his ODYS commitment for the underlying rape, aggravated robbery, and kidnapping crimes in this case. *Id.* The Court of Appeals rationalized its decision stating “J.S. could still be adjudicated delinquent for the rape case and have the appropriate disposition rendered in that case. In other words, just because J.S.'s sentence was void does not mean he cannot be held accountable for his actions in the rape case.” *J.S. II*, at ¶ 16.

Allowing J.S. to evade his agreed upon adult prison term based on the wholly unrelated indefinite sentence language that was improperly contained in his original

juvenile dispositional entry flies in the face of justice. Holding that the suspended nine year adult prison term did not exist at the time J.S. committed that act of rape in 2007 defies logic and reason. The intent behind serious youthful offender dispositional sentences is clear and that purpose must not be thwarted by unsound rationales. The nine year adult prison term was agreed upon by the parties, jointly proposed to the juvenile court, and was properly imposed and suspended at the time of J.S.'s original disposition in 2006.

The decision of the appellate court cannot be left to stand. Left untouched, this appellate ruling will have a chilling effect on the State's decisions to seek SYO blended sentences in the future. Permitting isolated and easily corrected sentencing errors to void entire journal entries in this manner is not rational, causes a vast waste of judicial resources, and impedes—not achieves—justice. The significant risk of similar delayed attacks will cause juvenile courts to avoid effecting SYO dispositions in the future. Rather, the applicable statutes, case law, public policy, and the best interests of the community, must be considered and construed as to encourage reliance on serious youthful offender dispositions as these blended sentences hold great promise to deliver effectively as the mid-level rehabilitative and correctional tool that they were intended to be.

The sentencing error's voiding effect is limited to only the incorrect portion of the sentence, not the entire of the sentence:

The State acknowledges that the juvenile court's original journal entry referred to both the agreed upon nine year definite adult prison term as well as an indefinite term of three to ten years. The parties must also agree that the when the juvenile court first invoked the suspended adult sentence upon J.S., it invoked just the agreed upon nine

year term. *J.S. I*, at ¶ 5, and *J.S. II*, at ¶ 3. Accordingly, any voiding effect of the indefinite sentence must be limited to just that—voiding that portion of the original journal entry that referred to J.S.’s first degree felony offenses as being punishable by three to ten years of incarceration.

In limiting the voiding effect of the indefinite sentence in this case to voiding *only the indefinite sentence*, the juvenile court could undoubtedly use J.S.’s 2007 rape to invoke the agreed nine year adult prison term. Instead, in J.S.’s second appeal, the appellate court found that J.S. had no valid sentence upon him when he committed the rape conduct in 2007.

J.S. argued, and the appellate court wrongly agreed, that the indefinite sentencing error voided the entirety of J.S.’s SYO blended sentence. The appellate court reasoned that J.S. was serving a void sentence at the time J.S. committed the 2007 rape, and thus that act of rape could not serve as grounds to invoke his suspended adult sentence. *Id.* However, this reasoning is contrary to Ohio law.

This case presents this Supreme Court with the opportunity to decide the voiding effect of sentencing errors with respect to Ohio’s serious youthful offender blended sentencing scheme. In recent history, this Court has already decided a number of cases that deal with the voiding effect of sentences errors. For example, the error that occurred in the instant case parallels the issues presented in *State v. Jordan* and its progeny, which involved void adult criminal sentences due the lack of the statutorily mandated period of post-release control. *State v Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.

Starting with *Jordan*, this Court has consistently held that any sentence without a statutorily mandated term is contrary to law. Such a sentence is void and

requires resentencing. *Id.*, see also *State v. Beasley* (1984), Ohio St.3d 74, 471 N.E.2d 774. Yet this general rule is not without exceptions.

In *State v. Saxon*, the Court limited re-sentencing to only those sentences imposed on charges that were appealed—not necessarily all of the sentences involved in a case. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, ¶ 30. The Court found that a defendant who fails to appeal the sentence for a certain offense “cannot take advantage of an error in the sentence for an entirely separate offense to gain a second opportunity to appeal upon resentencing.” *Id.* at ¶ 13. This limit on resentencing promoted the interests of finality in sentences and judicial economy, as well as deference for the doctrine of *res judicata*. *Id.* at ¶ 11.

The Court continued along the same line of reasoning in *State v. Evans* when it ruled that “an appellate court may not remand an entire sentence imposed upon a defendant when the error in sentencing pertains only to a sanction imposed for one specification.” *State v. Evans*, 2007-Ohio-861, 113 Ohio St.3d 100, 863 N.E.2d 113. With this holding, the Court set forth that (even though specifications are entirely dependent upon the underlying offense) an error in sentencing for a specification does not affect the remainder of the sentence that was imposed. *Id.* at ¶ 16. “The decision by the court of appeals to vacate the part of Evan’s sentence attributable to an error in imposing sanctions for a specification does not affect the remaining parts of his sentence.” *Id.* at ¶ 17. Again, the decision to examine sanctions separately was driven by the principles of finality and judicial economy. *Id.* at ¶ 18.

Although the majority opinion in *State v. Bezak*, a 4-3 decision, requires a *de novo* sentencing hearing to correct an error, *Bezak* has since been modified. See *State v. Bezak*, 2007-Ohio-3250, 114 Ohio St.3d 94, 868 N.E.2d 961. The Court’s more recent

holding in *State v. Fischer* overruled the aspect of *Bezak* that required a fully *de novo* sentencing hearing where there is an error in just one portion of the sentence. *State v. Fischer*, 2010-Ohio-6238, 128 Ohio St.3d 92, 942 N.E. 2d 332, ¶ 27. Now the Court holds that “only the offending portion of the sentence is subject to review and correction.” *Id.* at ¶ 27. In coming to this decision, the Court reviewed the cases and doctrines that guided the holding in *Saxon*, namely finality and judicial economy. *Id.* at ¶ 16.

In *Fischer* the Court indicated “When an appellate court concludes that a sentence imposed by a trial court is in part void, only the portion that is void may be vacated or otherwise amended.” *Fischer* at ¶ 28. Because of this ruling, *res judicata* would apply to all other aspects of the case, including the valid portions of the sentence. *Id.* at ¶ 1. The Court stresses that “neither the constitution nor common sense commands anything more.” *Id.* at ¶ 26.

Applied here, J.S. was sentenced to a blended disposition containing both a juvenile ODYS commitment and an adult prison term that was suspended. The appellate court in *J.S. I* held that reversible error occurred when the trial court imposed indefinite terms in the adult portion of J.S.’s sentence. *J.S. I*, at ¶ 7. Such an error is akin to the post release control issues and errors that this Court has already evaluated. Accordingly, only the indefinite portion of J.S.’s sentence could be vacated.

Ohio courts have applied *Fischer* to similar void sentence issues that do not involve post release control—provided the void portion of the sentence is a criminal sanction that is required by statute. See, *State v Harris* 2012 WL 1556638, 2012-Ohio-1908, ¶ 14-6 (a five-year prison term for drug trafficking lacked the mandatory driver’s

license suspension was found to be void only with regard to the license suspension; defendant was not entitled to a complete resentencing per *Fischer*).

Here, in order to comply with R.C. § 2929.14(A)(1), an adult first degree felony sentence must be in definite terms of between three and ten years. R.C. § 2929.14(A)(1). As the adult prison term of J.S.'s blended sentence included both definite and indefinite terms, the indefinite portion of the sentence was contrary to law. *J.S. I* at ¶ 7. On the authority of *Fischer*, J.S. was entitled to a resentencing on remand for the purpose of correcting the void indefinite sentence. *Fischer* at ¶ 27.

The juvenile portion of J.S.'s sentence was never void, nor was the agreed upon nine year adult prison term. See *Fischer* at ¶ 26. Yet the appellate court found that "J.S. was serving a void sentence when he committed the act constituting rape." *J.S. II* at ¶ 16. In coming to this conclusion, the appellate court failed to separate the void indefinite terms from the remainder of J.S.'s sentence. Such reasoning is precisely what this Court found unnecessary and improvident in *Fischer*.

In *Fischer* the Court also addressed the issue of appellate review of matters involving void sentences. "R.C. 2953.08(G)(2)(b) permits an appellate court, upon finding that a sentence is clearly and convincingly contrary to law, to remand for resentencing. But a remand is just one arrow in the quiver." *Fischer* at ¶ 29. R.C. § 2953.08(G)(2) provides that an appellate court may "increase, reduce, or otherwise modify a sentence." *Id.* "Correcting the defect without remanding for resentencing can provide an equitable, economical, and efficient remedy for a void sentence." *Id.* at ¶ 30. In fact, full *de novo* sentencing should be limited to only those situations where justice demands it and, in all other cases, a resentencing on remand must be limited to only the portions of the sentence that are void. *Id.* at ¶ 26.

Here, the nine year adult prison term was clearly agreed upon and jointly proposed to the juvenile court by the parties. It was accepted and imposed by the juvenile court in 2006 and was suspended at that time pending J.S.'s successful completion of his ODYS commitment. In reviewing this matter, the appellate court might have readily deleted the superfluous indefinite prison term language from the judgment entry by its power under R.C. § 2953.08. "Correcting a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court, as here, had no sentencing discretion." *Fischer* at ¶ 29. "Correcting the defect without remanding for resentencing can provide and equitable, economical, and efficient remedy for a void sentence." *Id.* at ¶ 30. The indefinite term was erroneously included in J.S.'s original dispositional entry but the entirety of the record of this case demonstrates that all parties understood that if J.S. was unsuccessful in ODYS, he would be subject to nine years in an adult prison—not the indefinite range of three to ten. Moreover, when the adult term was first invoked, J.S. was sentenced to the agreed nine years (not the indefinite range.) *J.S. I* at ¶ 5.

The indefinite sentencing error in J.S.'s original disposition, in and of itself, did not warrant a fully *de novo* sentencing in the juvenile court. To the extent that this portion of J.S.'s sentence was unlawful; the error was corrected when the juvenile court re-imposed a substantially similar sentence that did not include the indefinite language. For the appellate court to later use J.S.'s resentencing on remand as a reason to preclude the invoking of J.S.'s agreed nine year adult prison term is a faulty decision that must not be left to stand.

As J.S. was serving a five year juvenile commitment in the custody of ODYS when J.S. committed the 2007 rape, the State's motion to invoke J.S.'s nine year adult prison term was properly granted by the juvenile court:

It is the goal of blended sentencing to give serious youthful offenders every possible opportunity to be rehabilitated. *State v. D.H.*, supra. Only if it is shown by the child's conduct that rehabilitation is unlikely will the suspended adult sentence ever be invoked. *Id.* at ¶ 38. When invoking the adult portion of an SYO sentence becomes necessary, a juvenile court must find by clear and convincing evidence that: the child is at least fourteen years of age; the child is in institutional custody, or an escapee from the custody, of the department of youth services; and, the child is serving the juvenile portion of a serious youthful offender dispositional sentence. R.C. § 2152.14(A)(1)(a-c). The decision of whether or not to invoke the adult portion of a serious youthful offender's suspended sentence is a decision that is best left to the expertise of the juvenile judge—who is familiar not only with the facts of each case, but is also most familiar with the juvenile justice system. *State v. D.H.*, at ¶ 55.

When J.S.'s adult prison term was first invoked, J.S. appealed “asserting that it was a void sentence being unauthorized by law and for failure to properly impose postrelease control.” *J.S. I* at ¶ 2. (Notably, J.S. did not claim that the juvenile court failed to personally advise J.S. of the five year mandatory post release control aspect of his sentence in court. *Id.* at FN2.)

Although there was no question that J.S. was serving a five year juvenile term in ODYS custody when J.S. committed the act of rape in 2007, at the time of the *J.S. I* appeal, the parties agreed that the juvenile court's original dispositional journal entry was unclear as to “what counts were being addressed in the juvenile portion of the

sentence.” *J.S. I* at ¶ 7. (Nonetheless, no appeal of that five year juvenile commitment was sought by either party when it was imposed in 2006.)

With respect to J.S.’s adult prison term, the appellate court in *J.S. I* determined “the adult portion of the sentence appears to impose an agreed sentence of nine years but also imposed indefinite sentences on each count, which are not authorized by law.” *Id.* The appellate court remanded for sentencing *de novo*. *Id.* In *J.S. I*, the appellate court never evaluated the appropriateness of the juvenile court’s decision to invoke J.S.’s suspended adult prison term, so the appellate court provided no direction to the lower court in this regard. *J.S. I* at ¶ 7-10. The matter was remanded for resentencing to correct the indefinite sentencing error. *Id.*, and *J.S. II* at ¶ 13 and FN2.

Upon remand, the juvenile court again imposed a five year ODYS commitment as well as the agreed upon nine year adult prison sentence—and omitted any reference to indefinite adult prison terms. *J.S. II* at ¶ 5. The juvenile court, who was in the best position to weigh the relevant facts and circumstances of the case, again invoked J.S.’s adult nine year adult prison term based on the 2007 rape.

J.S. sought review of the newly invoked adult prison term in the appellate court arguing that the juvenile court lacked the authority to invoke the adult sentence under R.C. § 2152.14(A)(1) “because he committed the act constituting rape while under a void sentence.” *J.S. II* ¶ 7. The appellate court agreed ruling “We are troubled by the fact that J.S. was serving a void sentence when he committed the act constituting rape” and “the act constituting rape simply cannot serve as the predicate act for pursuing imposition of the adult portion of J.S.’s sentence in this case.” *Id.* at ¶ 16.

However the juvenile court was correct in invoking the adult portion of J.S.’s blended sentence. R.C. § 2152.14(A)(1)(b) requires that the delinquent child be in

institutional custody, or an escapee from the custody of ODYS, before the adult portion of an SYO sentence can be invoked. Here, in 2006 J.S. was transferred to ODYS custody to serve the five year juvenile portion of his sentence. Then, "In 2007, while committed to the Ohio Department of Youth Services ("ODYS"), J.S. committed another act that constituted first-degree felony rape." *J.S. II* at ¶ 3.

At the second hearing to invoke J.S.'s adult sentence, after the remand in *J.S. I*, defense counsel acknowledged that "as a legal matter, his prior time in ODYS functioned as detention on the offenses, because he certainly was held on those offenses from this '06 case." (3/8/2011 Tr. 10.) The juvenile court found that "to make an argument that it was an invalid sentence, and, therefore, it can't be considered that he committed another offense and invoke the adult sentence, I think is pure legal fiction." *Id.* at ¶ 11. The juvenile court properly found by clear and convincing evidence that the ODYS custody requirement of R.C. § 2152.14(A)(1)(b) was satisfied. Therefore the juvenile court's decision to invoke J.S.'s nine year adult prison term must be reinstated.

The appellate court's ruling cannot be left to stand. J.S. understood from his original disposition that if he committed another act of delinquency while in ODYS custody, the agreed upon nine year adult prison term would be imposed on him. *J.S. II*, at ¶ 20. J.S. is precisely the type of candidate whom the General Assembly intended to reach by enacting Ohio's blended sentencing scheme. Yet the appellate court's ruling has allowed J.S. to completely avoid the nine year adult prison term even though he committed an act of rape while in ODYS custody. The appellate decision frustrates the principles and purposes of SYO sentencing and is inconsistent with Ohio law. As such, the State of Ohio respectfully requests this Court adopt its proposition of law and reinstate J.S.'s prison term.

**CONCLUSION**

This Honorable Court should adopt the State's proposition of law that a sentencing error that is not timely appealed, and is unrelated to a juvenile court's decision to invoke an adult prison sentence against a serious youthful offender, cannot be used to nullify the adult portion of the juvenile's blended sentence. The ruling of the appellate court should be reversed and the order invoking J.S.'s nine year adult prison term should be reinstated.

Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

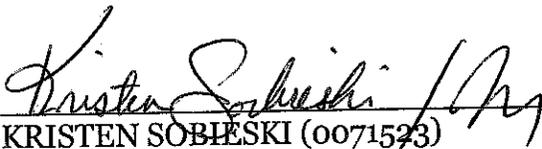
BY:   
KRISTEN SOBIESKI (0071523)  
Assistant Prosecuting Attorney  
1200 Ontario Street, 9<sup>th</sup> Floor  
Cleveland, Ohio 44113  
216.443.7800

**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing merit brief of appellant has been sent this the 13<sup>th</sup> day of July, 2012 via U.S. regular to:

Office of the Ohio Public Defender

Sheryl Trzaska  
Assistant State Public Defender  
250 East Broad Street, Suite 1400  
Columbus, OH 43215

  
KRISTEN SOBIESKI (0071523)  
Assistant Prosecuting Attorney

**ORIGINAL**

CASE NO. **12-0118**

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE EIGHTH DISTRICT COURT OF APPEALS  
CUYAHOGA COUNTY, Ohio

CA 96637

**STATE OF OHIO**  
Plaintiff-Appellant

vs.

**J.S.**  
Defendant-Appellee

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**NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO**

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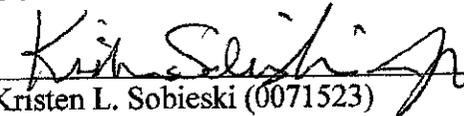
Now comes the State of Ohio to hereby give Notice of Appeal to this Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized December 8, 2011, which reversed and remanded the trial court's ruling. S.Ct. Prac. R. II, §2(A)(1).

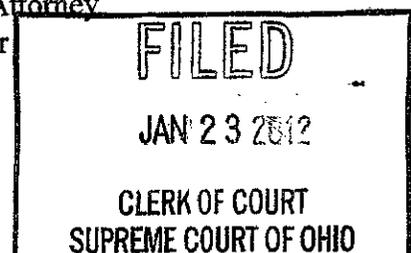
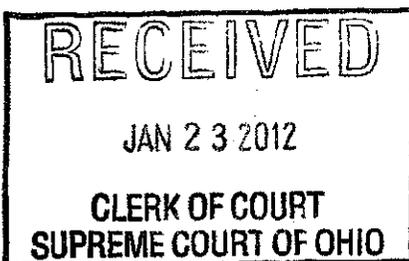
This cause did not originate in the Court of Appeals, it is a felony, it involves a substantial constitutional question, and it is of great general and public interest.

Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

BY:

  
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**CERTIFICATE OF SERVICE**

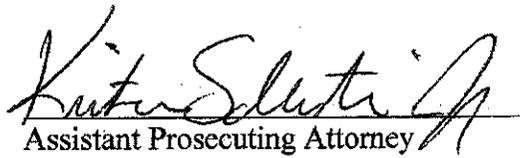
A true and accurate copy of the foregoing Notice of Appeal has been sent by regular

United States Mail on this 20<sup>th</sup> day of January 2012 to:

SHERYL TRZASKA  
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And

OHIO PUBLIC DEFENDER'S OFFICE  
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COLUMBUS, OH 43215

  
Assistant Prosecuting Attorney

[Cite as *In re J.S.*, 2011-Ohio-6280.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 96637

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**IN RE: J.S.  
A Minor Child**

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. DL 06104651

**BEFORE:** Jones, J., Boyle, P.J., and Sweeney, J.

**RELEASED AND JOURNALIZED:** December 8, 2011  
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LARRY A. JONES, J.:

{¶ 1} Appellant, J.S.,<sup>1</sup> appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Court Division, that invoked the adult portion of a serious youthful offender (“SYO”) sentence. For the reasons stated herein, we reverse.

{¶ 2} In 2006, the juvenile court adjudicated J.S. delinquent and guilty as to two counts of aggravated robbery, one count of kidnapping, and one count of rape, all with firearm specifications.

{¶ 3} The state sought a SYO dispositional sentence pursuant to R.C. 2152.13. The trial court found J.S. to be a SYO and ordered him to serve five years on the juvenile portion of his sentence and further ordered into effect an agreed-upon nine years in prison on the adult portion of his sentence. The adult sentence was stayed on condition that J.S. successfully complete the juvenile portion of the sentence. In 2007, while committed to the Ohio Department of Youth Services (“ODYS”), J.S. committed another act that constituted first-degree felony rape. The state subsequently moved to invoke the adult portion of his SYO sentence pursuant to R.C. 2152.14. The juvenile court held a hearing and ordered the adult portion of his SYO disposition into effect.

{¶ 4} J.S. subsequently appealed, raising sentencing issues. This court reversed and remanded the case for a de novo resentencing, finding there were a number of inconsistencies within the SYO disposition journal entry and J.S. was sentenced to prison terms that were not

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<sup>1</sup> Appellant is referred to herein by his initials in accordance with this court’s established

authorized by law because the trial court imposed the agreed sentence of nine years but also imposed indefinite sentences on each count. *In re J.S.*, Cuyahoga App. No. 95365, 2010-Ohio-6199 (“*J.S. I*”). This court further noted that J.S.’s remaining issues concerning the notification of postrelease control were moot. *Id.*

{¶ 5} In February 2011, the trial court held a resentencing hearing and again sentenced J.S. to a juvenile sentence of five years and imposed the agreed-upon sentence of nine years in prison for the adult portion of the sentence. The state again moved to invoke the adult portion of the sentence based upon J.S.’s adjudication of delinquent for the 2007 rape. The trial court granted the motion and invoked the adult part of J.S.’s sentence.

{¶ 6} J.S. appeals, raising the following assignment of error for our review:

“I. The juvenile court erred and violated statutory requirements when it invoked [J.S.’s] SYO prison terms based on conduct that occurred before [J.S.] was serving a legally-valid SYO disposition, and as [J.S.] had insufficient notice of the prison term he would serve if he did not successfully complete his juvenile disposition. R.C. 2152.12, R.C. 2152.14; Fifth and [Fourteenth] Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution.”

{¶ 7} J.S. raises two issues on appeal. First, J.S. contends that the trial court erred when it imposed the adult portion of his SYO sentence because he committed the act constituting rape while under a void sentence. Because this court found his original sentence void in *J.S. I*, he argues, any act committed before he was legally sentenced on his crimes could not be used to invoke the adult portion of his SYO sentence.

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policy regarding nondisclosure of identities of juveniles.

{¶ 8} R.C. 2152.13 allows for a juvenile court to impose a blended sentence upon a SYO. *In re Wells*, Allen App. No. 1-05-30, 2005-Ohio-6861. A “serious youthful offender” is defined as “a person who is eligible for a mandatory SYO or discretionary SYO but who is not transferred to the adult court under the mandatory or discretionary transfer.” *Id.*, R.C. 2152.02(X).

{¶ 9} R.C. 2152.14 governs the circumstances under which a juvenile court may invoke the adult portion of a SYO sentence. *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶31. The statute provides that upon a proper motion and after a hearing has been held, a court may invoke the adult portion of a SYO sentence if certain factors are shown by clear and convincing evidence. R.C. 2152.14(E) provides those factors as follows:

“The juvenile court may invoke the adult portion of a person’s serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

“(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

“(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

“(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.”

{¶ 10} As it relates to this case, “[t]he conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of

the rules of the institution or the conditions of supervision and that could be charged as any felony.” *D.H.* at ¶36.

¶ 11} Thus, R.C. 2152.14(E) provides that the adult portion of a SYO sentence may be invoked only if the child is serving the juvenile portion of the SYO sentence. In this case, J.S. argues, he was not serving the juvenile portion of his sentence because he had not yet been properly sentenced at the time he committed the rape offense. Therefore, according to J.S., the trial court did not have the authority to invoke the adult portion of his sentence.

¶ 12} The state argues that J.S.’s original sentence was remanded for resentencing pursuant to R.C. 2929.191, which involves resentencing when the trial court fails to properly advise a defendant on postrelease control. But this case does not concern postrelease control. Therefore, R.C. 2929.191 is inapposite.

¶ 13} As an initial matter, we note that this court remanded J.S.’s case for a de novo sentencing, finding his sentence was “void” because it was contrary to law.<sup>2</sup> In Ohio, the effect of determining that a judgment is void is well established. “It is as though such proceedings had never occurred; the judgment is a mere nullity \* \* \* and the parties are in the same position as if there had been no judgment.” *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267, 227 N.E.2d 223 (internal citations omitted).

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<sup>2</sup> R.C. 2929.14(A)(1) requires the imposition of a definite sentence for felonies of the first degree.

{¶ 14} Since J.S.'s entire original sentence was contrary to law, he was entitled to a de novo resentencing. See *J.S. I*. A discussion of dates relative to his resentencing is important. On February 28, 2011, the trial court resentenced J.S. to the juvenile portion of his SYO sentence. On March 1, 2011, the state moved to invoke the adult portion of his sentence. On March 2, the trial court ordered J.S. be returned from ODYS and set the motion for a hearing on March 8. On March 8, the trial court held a hearing on the state's motion and invoked the adult portion of J.S.'s SYO sentence.<sup>3</sup> But it was not until March 8, the day the court invoked the adult sentence, that the trial court journalized the February 28 sentencing journal entry.

{¶ 15} In its sentencing journal entry, the trial court found as follows:

“The Court finds by clear and convincing evidence that J.S. is at least [14] years of age, is serving the juvenile portion of a [SYO] dispositional sentence, and is in the institutional custody of or an escapee from the custody of [ODYS]; and that there is reasonable cause to believe that after the child reached [14] years of age: The child committed an act that is a violation of the rules of the institution and that could be charged as a felony or as a first degree misdemeanor offense of violence if committed by an adult and/or engaged in conduct that created a substantial risk to the safety or security of the institution, the community, or the victim.

“The Court further finds by clear and convincing evidence that the child has been admitted to a[n] [ODYS] facility or criminal charges are pending against the child, and the child's conduct demonstrates that the child is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.”

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<sup>3</sup> The journal entry from this hearing was filed and journalized on March 11, 2011.

{¶ 16} We are troubled by the fact that J.S. was serving a void sentence when he committed the act constituting rape. We are aware that the SYO law in Ohio is relatively new and this case appears to be one of first impression. An example of a similar situation is where an adult offender violates the community control sanctions portion of his or her sentence. If his or her sentence is later found to be void, can the person still be found to be a probation violator? We think not. That does not mean that the offender cannot be prosecuted for any crime he or she commits while under community control sanctions, the offender just cannot be found to have violated his or her community control sanctions in the underlying case. Likewise, in this case, J.S. could still be adjudicated delinquent for the rape case and have the appropriate disposition rendered in that case. In other words, just because J.S.'s sentence was void does not mean he cannot be held accountable for his actions in the rape case; the act constituting rape simply cannot serve as the predicate act for pursuing imposition of the adult portion of J.S.'s sentence in this case.

{¶ 17} Another somewhat analogous example occurs when an offender is charged with escape but the evidence affirmatively demonstrates that the adult parole authority lacked the authority to supervise the accused due to a faulty imposition of postrelease control; in this instance, the offender cannot be convicted of escape. Said another way, one cannot commit the crime of escape when the criminal act is predicated on the violation of a void sentence. See *State v. Cash*, Cuyahoga App. No. 95158, 2011-Ohio-938, cf., *State v. Billiter*, Stark App.

No. 2010CA00292, 2011-Ohio-2230 and *State v. Huber*, Cuyahoga App. No. 94382, 2010-Ohio-5598.

{¶ 18} Therefore, based on these facts, the trial court erred when it invoked the adult portion of J.S.'s SYO sentence.

{¶ 19} Second, J.S. argues that he did not have sufficient notice of the prison term he faced when he committed the rape offense. J.S. cites *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, 814 N.E.2d 837, in support of his contention. In *Brooks*, the sentencing journal entry provided that a violation of the defendant's community control sanctions could lead to a "prison term of 6 to 12 months." The *Brooks* court held that a defendant must be notified of the "definite prison term that awaits if community control is violated." *Id.* at ¶ 25. The court noted that "the purpose behind R.C. 2929.19(B)(5) notification \* \* \* [is] to make the offender aware before a violation of the specific term that he or she will face for a violation." *Id.* at ¶33.

{¶ 20} In *Brooks*, the court held that a trial court may not imprison an offender unless, before the violation, he has been warned of the specific term that will be imposed. But *Brooks* is inapposite to this case. *Brooks* dealt with a violation of community control sanctions and the court noted that its decision was based on "the particular nature of community control." *Id.* Here, J.S. was not sentenced to community control sanctions; rather, he was sentenced to confinement in ODYS. And although the trial court originally

improperly sentenced J.S. to an indefinite prison term as part of his adult sentence, the trial court did inform J.S. that his maximum sentence could be ten years in prison. Moreover, the trial court notified J.S. that the actual prison term, should the adult portion be invoked, would be the agreed-upon sentence of nine years in prison. Thus, J.S. had notice of the potential prison term he faced if the adult portion of his SYO sentence was invoked. Based on the foregoing, we find no merit to this claim.

{¶ 21} Therefore, the assignment of error is sustained in part and overruled in part.

{¶ 22} Accordingly, judgment is reversed and case is remanded for proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

LARRY A. JONES, JUDGE

MARY J. BOYLE, P.J., and  
JAMES J. SWEENEY, J., CONCUR



## **2152.01 Purpose of juvenile dispositions.**

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.

(B) Dispositions under this chapter shall be reasonably calculated to achieve the overriding purposes set forth in this section, commensurate with and not demeaning to the seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders. The court shall not base the disposition on the race, ethnic background, gender, or religion of the delinquent child or juvenile traffic offender.

(C) To the extent they do not conflict with this chapter, the provisions of Chapter 2151. of the Revised Code apply to the proceedings under this chapter.

Effective Date: 01-01-2002

<< OH ST § 2152.13 >>

Sec. 2152.13. (A) A juvenile court may impose a serious youthful offender dispositional sentence on a child only if the prosecuting attorney of the county in which the delinquent act allegedly occurred initiates the process against the child in accordance with this division, and the child is an alleged delinquent child who is eligible for the dispositional sentence. The prosecuting attorney may initiate the process in any of the following ways:

- (1) Obtaining an indictment of the child as a serious youthful offender;
- (2) The child waives the right to indictment, charging the child in a bill of information as a serious youthful offender;
- (3) Until an indictment or information is obtained, requesting a serious youthful offender dispositional sentence in the original complaint alleging that the child is a delinquent child;
- (4) Until an indictment or information is obtained, if+>> the original complaint does not request a serious youthful offender dispositional sentence, filing with the juvenile court a written notice of intent to seek a serious youthful offender dispositional sentence within twenty days after the later of the following, unless the time is extended by the juvenile court for good cause shown:
  - (a) The date of the child's first juvenile court hearing regarding the complaint;
  - (b) The date the juvenile court determines not to transfer the case under section 2152.12 of the Revised Code.

After a written notice is filed under division (A)(4) of this section, the juvenile court shall serve a copy of the notice on the child and advise the child of the prosecuting attorney's intent to seek a serious youthful offender dispositional sentence in the case.

(B) If an alleged delinquent child is not indicted or charged by information as described in division (A)(1) or (2) of this section and if a notice or complaint as described in division (A)(3) or (4) of this section indicates that the prosecuting attorney intends to pursue a serious youthful offender dispositional sentence in the

case, the juvenile court shall hold a preliminary hearing to determine if there is probable cause that the child committed the act charged and is by age eligible for, or required to receive, a serious youthful offender dispositional sentence.

(C) (1) A child for whom a serious youthful offender dispositional sentence is sought has the right to a grand jury determination of probable cause that the child committed the act charged and that the child is eligible by age for a serious youthful offender dispositional sentence. The grand jury may be impaneled by the court of common pleas or the juvenile court.

Once a child is indicted, or charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings. The time within which the trial is to be held under Title XXIX of the Revised Code commences on whichever of the following dates is applicable:

(a) If the child is indicted or charged by information, on the date of the filing of the indictment or information.

(b) If the child is charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date of the filing of the complaint.

(c) If the child is not charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date that the prosecuting attorney files the written notice of intent to seek a serious youthful offender dispositional sentence.

(2) If the child is detained awaiting adjudication, upon indictment or being charged by information, the child has the same right to bail as an adult charged with the offense the alleged delinquent act would be if committed by an adult. Except as provided in division (D) of section 2152.14 of the Revised Code, all provisions of Title XXIX of the Revised Code and the Criminal Rules shall apply in the case and to the child. The juvenile court shall afford the child all rights afforded a person who is prosecuted for committing a crime including the right to counsel

and the right to raise the issue of competency. The child may not waive the right to counsel.

(D) (1) If a child is adjudicated a delinquent child for committing an act under circumstances that require the juvenile court to impose upon the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(a) The juvenile court shall impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(b) The juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(c) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(2)(a) If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(ii) If a sentence is imposed under division (D)(2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20 and, if applicable, section 2152.17 of the Revised Code.

(iii) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(b) If the juvenile court does not find that a sentence should be imposed under division (D)(2)(a)(i) of this section, the juvenile court may impose one or more traditional juvenile dispositions under sections 2152.16, 2152.19, 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(3) A child upon whom a serious youthful offender dispositional sentence is imposed under division (D)(1) or (2) of this section has a right to appeal under division (A)(1), (3), (4), (5), or (6) of section 2953.08 of the Revised Code the adult portion of the serious youthful offender dispositional sentence when any of those divisions apply. The child may appeal the adult portion, and the court shall consider the appeal as if the adult portion were not stayed.

<< OH ST § 2152.14 >>

Sec. 2152.14. (A)(1) The director of youth services may request the prosecuting attorney of the county in which is located the juvenile court that imposed a serious youthful offender dispositional sentence upon a person to file a motion with that juvenile court to invoke the adult portion of the dispositional sentence if all of the following apply to the person:

(a) The person is at least fourteen years of age.

(b) The person is in the institutional custody, or an escapee from the custody, of the department of youth services.

(c) The person is serving the juvenile portion of the serious youthful offender dispositional sentence.

(2) The motion shall state that there is reasonable cause to believe that either of the following misconduct has occurred and shall state that at least one incident of misconduct of that nature occurred after the person reached fourteen years of age:

(a) The person committed an act that is a violation of the rules of the institution and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult.

(b) The person has engaged in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim.

(B) If a person is at least fourteen years of age, is serving the juvenile portion of a serious youthful offender dispositional sentence, and is on parole or aftercare from a department of youth services facility, or on community control, the director of youth services, the juvenile court that imposed the serious youthful offender dispositional sentence on the person, or the probation department supervising the person may request the prosecuting attorney of the county in which is located the juvenile court to file a motion with the juvenile court to invoke the adult portion of the dispositional sentence. The prosecuting attorney may file a motion to invoke the adult portion of the dispositional sentence even if no request is made. The motion shall state that there is reasonable cause to believe that either of the following

occurred and shall state that at least one incident of misconduct of that nature occurred after the person reached fourteen years of age:

(1) The person committed an act that is a violation of the conditions of supervision and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult.

(2) The person has engaged in conduct that creates a substantial risk to the safety or security of the community or of the victim.

(C) If the prosecuting attorney declines a request to file a motion that was made by the department of youth services or the supervising probation department under division (A) or (B) of this section or fails to act on a request made under either division by the department within a reasonable time, the department of youth services or the supervising probation department may file a motion of the type described in division (A) or (B) of this section with the juvenile court to invoke the adult portion of the serious youthful offender dispositional sentence. If the prosecuting attorney declines a request to file a motion that was made by the juvenile court under division (B) of this section or fails to act on a request from the court under that division within a reasonable time, the juvenile court may hold the hearing described in division (D) of this section on its own motion.

(D) Upon the filing of a motion described in division (A), (B), or (C) of this section, the juvenile court may hold a hearing to determine whether to invoke the adult portion of a person's serious juvenile offender dispositional sentence. The juvenile court shall not invoke the adult portion of the dispositional sentence without a hearing. At the hearing the person who is the subject of the serious youthful offender disposition has the right to be present, to receive notice of the grounds upon which the adult sentence portion is sought to be invoked, to be represented by counsel including counsel appointed under Juvenile Rule 4(A), to be advised on the procedures and protections set forth in the Juvenile Rules, and to present evidence on the person's own

behalf, including evidence that the person has a mental illness or is a mentally retarded person. The person may not waive the right to counsel. The hearing shall be open to the public. If the person presents evidence that the person has a mental illness or is a mentally retarded person, the juvenile court shall consider that evidence in determining whether to invoke the adult portion of the serious youthful offender dispositional sentence.

(E)(1) The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:

(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.

(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.

(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person's conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.

(2) The court may modify the adult sentence the court invokes to consist of any lesser prison term that could be imposed for the offense and, in addition to the prison term or in lieu of the prison term if the prison term was not mandatory, any community control sanction that the offender was eligible to receive at sentencing.

(F) If a juvenile court issues an order invoking the adult portion of a serious youthful offender dispositional sentence under division (E) of this section, the juvenile portion of the dispositional sentence shall terminate, and the department of youth services shall transfer the person to the department of rehabilitation and correction or place the person under another sanction imposed as part of the sentence. The juvenile court shall state in its order the total number of days that the person has been held in detention or in a facility operated by, or under contract with, the department of youth services under the

juvenile portion of the dispositional sentence. The time the person must serve on a prison term imposed under the adult portion of the dispositional sentence shall be reduced by the total number of days specified in the order plus any additional days the person is held in a juvenile facility or in detention after the order is issued and before the person is transferred to the custody of the department of rehabilitation and correction. In no case shall the total prison term as calculated under this division exceed the maximum prison term available for an adult who is convicted of violating the same sections of the Revised Code.

Any community control imposed as part of the adult sentence or as a condition of a judicial release from prison shall be under the supervision of the entity that provides adult probation services in the county. Any post-release control imposed after the offender otherwise is released from prison shall be supervised by the adult parole authority.

<< OH ST 2907.02 >> Rape

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was

less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section 2971.03 of the Revised Code applies, and the offender automatically is classified a sexual predator, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its

inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

## **2929.11 Purposes of felony sentencing.**

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

Effective Date: 07-01-1996

## **2953.08 Appeal as a matter of right - grounds.**

(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 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

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

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

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

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

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) 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 (C)(3) 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 (B)(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 (B)(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 (B)(2)(c) of section 2929.14 of the Revised Code.

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

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

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

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in

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

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

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

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

(G)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) of section 2929.14 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 (B)(2)(e) or (C)(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.

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

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