

No. 2012-0216

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**IN THE SUPREME COURT OF OHIO**

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APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
Appellate Case No. 24894

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STATE OF OHIO,  
Appellee/Cross-Appellant

v.

DAVID WILLAN,  
Appellant/Cross-Appellee

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Cross-Appellant State of Ohio  
Merit Brief

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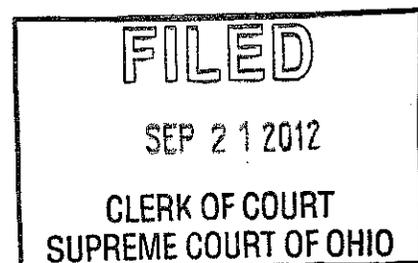
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## I. *Statement of Facts*

In December, 2007, the Summit County Grand Jury returned a multiple count indictment against David Willan [hereinafter "Willan"] and a number of other individuals. In July of 2008, an Assistant Attorney General from the Ohio Attorney General's Office was appointed to serve as a Special Prosecutor for the Summit County Prosecutor's Office to handle Willan's prosecution. Charges involving Willan were severed from the other Defendants and proceeded to trial on two separate dates. The first set of charges involving counts of Corrupt Activity and violations of the State's Securities laws, among others, were handled by the Special Prosecutor and proceeded to trial in December of 2008. The December trial resulted in a conviction on all sixty-eight charges that were presented to the jury.

In July, 2009, Willan was sentenced to a term of incarceration of sixteen years. The term of incarceration included a ten-year mandatory term for the conviction on the charge of Corrupt Activity pursuant to *R.C. 2929.14(D)(3)(a)*.

In August, 2009, Willan appealed his conviction to the Ninth Appellate District Court of Appeals. Eighteen months later, in December, 2011, the appellate court returned a decision which reversed many of the convictions. However, the appellate court upheld Willan's convictions on a charge of Corrupt Activity and several Securities violations for Making False Representations in the Registration of Securities. The Securities violations that were upheld were first degree felonies and classified as predicate offenses under the State's Corrupt Activity statute.

In January, 2012, Willan filed an Application for Reconsideration on the convictions the appellate court upheld. In February, 2012, Willan also filed a Memorandum in Support of Jurisdiction with this Court and the State filed a Cross-Appeal. This Court initially denied jurisdiction on the issues presented by both parties. The State then filed a Motion for Reconsideration on the mandatory sentencing issue based upon the provisions of *R.C.*

2929.14(D)(3)(a) that was accepted by this Court in August, 2012. The Appellate Court subsequently denied Willan's Application for Reconsideration on September 11, 2012.

## II. *Argument on Proposition of Law*

### *Proposition of Law:*

***R.C. 2929.14(D)(3)(a) Establishes a Mandatory 10-Year Sentence Where a Defendant is Found Guilty of a Corrupt Activity Where The Most Serious Offense in the Pattern of Corrupt Activity is a Felony of the First Degree***

A court may interpret a statute only where the statute is ambiguous. *State ex. Rel. Celebrezze v. Allen* (1987), 32 Ohio St.3d 24, 27. The intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. *Zumwalde v. Madeira and Indian Hill Joint Fire Dist., et. al.* (2011), 128 Ohio St. 3d 492, 2011-Ohio-1603, citing *Slingluff v. Weaver* (1902), 66 Ohio St. 621. It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretive effort is at an end, and the statute must be applied accordingly. *Zumwalde, supra, citing Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106.

The Constitution requires the Ohio General Assembly to write statutes in such a way that people of common intelligence may understand what conduct is required. *State v. Consilio* (2007), 114 Ohio St.3d 295, 2007-Ohio-4163. Indeed, the necessity to require the General Assembly to enunciate its intent in plain terms is directed at allowing the casual reader of the law to immediately know what the law requires or prohibits. *Cf. Id.*

A statute is ambiguous if its language is susceptible to more than one reasonable interpretation. *State ex. rel. Toledo Edison Co., v. Clyde* (1996), 76 Ohio St.3d 508, 513. Where the

language is unambiguous, a court must apply the clear meaning of the words used. *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127, 1996-Ohio-257. The statute must be applied as written and no further interpretation is necessary. *Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81.

Here, Willan was convicted of engaging in a pattern of corrupt activity, a first degree felony. The predicate offenses that made up the pattern of corrupt activity consisted of multiple first degree crimes, inclusive of three counts of making false representations in the registration of securities, which were affirmed by the appellate decision in this case. Since the most serious offense involved in the pattern of corrupt activity was a felony of the first degree, the sentence included a 10-year mandatory term of incarceration for the conviction on the charge of engaging in a pattern of corrupt activity, pursuant to the provisions of R.C. 2929.14(D)(3)(a)<sup>1</sup>. The Ninth Appellate District invalidated that portion of Willan's sentence concluding that it was not clear that the provisions of R.C. 2929.14(D)(3)(a) were intended to apply to the general offense of engaging in a pattern of corrupt activity. *Appellate Decision at 51*.

The decision that the language of R.C. 2929.14(D)(3)(a) was not meant to impose a mandatory term of incarceration for a conviction of engaging in a pattern of corrupt activity, when a defendant is convicted of a first degree predicate crime, is directly contrary to the plain language contained in the statute. R.C. 2929.14(D)(3)(a) states in pertinent part:

\*\*\*if the court imposing sentence upon an offender for a felony finds the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree,\*\*\*the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced\*\*\*

Without any question, the language used in this section of the statute is clear, unequivocal and definite. There is no ambiguity or doubt in the direct words the General Assembly chose to impose

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<sup>1</sup> The language of R.C. 2929.14(D)(3)(a) is now embodied within the provisions of R.C. 2929.14(B)(3).

a mandatory sentence for a conviction on a charge of a corrupt activity. In the entire Ohio Revised Code, the wording “corrupt activity” as an established crime can only be found in one place, R.C. 2923.32. Moreover, there is only one place in the entire Ohio Revised Code where the offenses that constitute the predicate crimes that comprise a “pattern” of corrupt activity can be found, *i.e.* 2923.31.

In accord with the standard rules of construction recognized by this Court, the Appellate Court’s interpretive effort in this case should have come to an end and the statute should have been applied accordingly. *Zumwalde, supra*. However, the Ninth Appellate District went on to note that R.C. 2929.14(D)(3)(a) did not include the statutory reference number for the offense of engaging in a pattern of corrupt activity. Consequently, the Appellate Court felt that it was necessary to embark upon a journey of statutory interpretation to examine the legal significance of this omission. *Appellate Decision at 45.*

There is no legal authority that requires the General Assembly to use *both* the name of a statute and the statutory reference number in order to reference a statute. Indeed, the guidance established by this Court discloses that the General Assembly is expected to use *plain words* to express its intention in such a manner that a casual reader of the law would immediately know what the law requires or prohibits. *Cf State v. Consilio, supra*. Looking at the plain words the General Assembly chose to use in R.C. 2929.14(D)(3)(a) to impose a mandatory sentence for a conviction on a charge of Corrupt Activity, that requirement was fully met.

Moreover, the case law discussed above demonstrates that the relevant inquiry involves whether the General Assembly *did express its intent*; not whether it expressed its intent in as many ways as possible. Again, the case law established by this Court, and reviewed herein, directs that laws are to be written in such a manner as to allow people, other than just lawyers, to understand what the laws require. Here, the inclusion of the Revised Code reference number of R.C. 2923.32

within the provisions of *R.C. 2929.14(D)(3)(a)* as suggested by the Appellate Court does not clarify the legislative intent for the casual reader of the law beyond the express plain words used by the General Assembly. If one looks to the Revised Code for *R.C. 2923.32*, one simply finds that it is engaging in a pattern of corrupt activity. Conversely, if one looks up the plain words “engaging in a pattern of corrupt activity”, one simply finds that it is *R.C. 2923.32*.

It should also be noted that the General Assembly’s use of plain words, rather than Revised Code reference numbers to identify statutory prohibitions or requirements, is not wildly unusual. For instance, *R.C. 1315.55(A)(1)*, establishing additional prohibited activities relating to money laundering, states, in plain english, that:

No person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the purpose of committing or furthering the commission of corrupt activity.

The Revised Code reference number *R.C. 2923.32* is not included. Similar to the sentencing provisions of *R.C. 2929.14(D)(3)(a)*, the plain words of the money laundering statute clearly and unmistakably identify the corrupt activity statute without resorting to use of the Revised Code reference number *R.C. 2923.32*.

Conspiracy under *R.C. 2923.01(A)* provides in pertinent part:

No person, with purpose to commit or to promote or facilitate the commission of aggravated murder,\*\*\*, engaging in a pattern of corrupt activity,\*\*\*shall do either of the following:\*\*\*

Once again, the Revised Code reference number is nowhere to be found. Thus, following the logic used by the Ninth Appellate District in this case, the lack of any Revised Code reference numbers, including *R.C. 2923.32*, would make the legislative intention to include the multiple crimes identified

by name under the Conspiracy statute, including aggravated murder and engaging in a pattern of corrupt activity, within the prohibitions for Conspiracy, vague.<sup>2</sup>

In this case, there was existing case law that addressed the question of whether the mandatory sentencing requirement of R.C. 2929.14(D)(3)(a) was ambiguous. In fact, the Ninth Appellate District demonstrated that it was well aware of a decision by the Eighth Appellate District in *State v. Schneider* (2010 Cuyahoga cty), 2010 Ohio App. LEXIS 1721; 2010-Ohio-2089, where the Defendant was convicted of engaging in a pattern of corrupt activity. Similar to this case, the first degree predicate offenses in *Schneider* that formed the pattern of corrupt activity involved violations of the State's Securities Laws. Importantly, before the Ninth Appellate District reached the decision under consideration here, the *Schneider* Court's review specifically recognized that the General Assembly was not vague in its intent to impose a mandatory sentence for a conviction of a Corrupt Activity when the most serious offense in the pattern of corrupt activity was a felony of the first degree. *State v. Schneider, supra*.

Faced with the fact that *Schneider* provided case law directly on point, the Ninth Appellate District proceeded to dismiss the import of that decision by simply stating the *Schneider* Court did not address the "legal significance regarding the absence of any reference to RC 2923.32 in the statute." *Appellate Decision at 45*.

While the decision of the Eighth Appellate District is certainly not binding upon the Ninth Appellate District, the statutory interpretation conducted in *Schneider* would have been instructive since the Ninth District failed to do what the *Schneider* Appellate Court did do, *i.e.* give effect to the basic rules of statutory interpretation announced by this Court. In sharp contrast to the review

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<sup>2</sup> See also, R.C. 4719.08(H) establishing notification requirements for telephone solicitors convicted of engaging in a pattern of corrupt activity; R.C. 2903.01 identifying crimes that constitute aggravating crimes for murder when a death is caused in conjunction with those offenses [no statutory reference numbers provided]; R.C. 2913.51, Receiving Stolen Property, simply specifies the property was obtained through commission of a "theft" offense. [no statutory reference numbers provided.]

conducted by the Appellate Court in this case, the *Schneider* Court did not look to other statutes to determine whether there was a *better way* for the General Assembly to say what it intended. The *Schneider* Court considered the language used by the General Assembly within the provisions of R.C. 2929.14(D)(3)(a) and determined *that language* disclosed the intent of the General Assembly to impose a mandatory sentence.

While there is language in other statutory sections that supports the position that the General Assembly intended to impose a ten-year mandatory sentence for a conviction of a Corrupt Activity through the provisions of R.C. 2929.14(D)(3)(a), the Ninth Appellate District determined that those provisions did not provide any relevant guidance for its analysis. R.C. 2929.13(F) provides in pertinent part that:

\*\*\*the court shall impose a prison term or terms under sections  
\*\*\*, 2929.14, \*\*\* for any of the following offenses:

(10) Corrupt activity in violation of section 2923.32 of the Revised Code when *the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree*; [emphasis added]

R.C. 2929.14 (D)(3)(a) provides in relevant part:

\*\*\*if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with *the most serious offense in the pattern of corrupt activity being a felony of the first degree*,\*\*\*, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced\*\*\*  
[emphasis added]

The Ninth Appellate District ignores the fact that the two statutes use the same terminology and summarily dismisses any insight this fact provides to legislative intent by simply stating there was no cross-reference to R.C. 2929.14(D)(3)(a) in R.C. 2929.13(F)(10). *Appellate Decision at 50*. The Appellate Court then stretches to conclude that a reasonable construction of R.C. 2929.13(F)(10) is that it applied to the general sentencing provisions of former R.C. 2929.14(A)(1). *Id.*

However, the Appellate Court myopically overlooks two key, interrelated points in reaching that conclusion. First, as shown above, the language used in R.C. 2929.13(F)(10) is almost exactly the same terminology used in R.C. 2929.14(D)(3)(a). Second, there is no similar language anywhere in the provisions of R.C. 2929.14(A)(1). In fact, unlike R.C. 2929.14(D)(3)(a), 2929.14(A)(1) makes absolutely no mention of a Corrupt Activity. Thus, the Appellate Court's conclusion that a reasonable construction of R.C. 2929.13(F)(10) is that it was to be applied to *subsection (A)(1)* is inherently, and fatally, flawed.

Finally, the role of the court is to evaluate a statute as a whole and give such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction that renders a provision meaningless or inoperative. *Boley v. Goodyear Tire & Rubber Co.* (2010), 125 Ohio St.3d 510; 2010 Ohio 2550, *citing State ex rel Myers v. Bd of Edn of Rural School Dist. of Spencer Twp., Lucas County* (1917), 95 Ohio St. 367; *State v. Dickey* (1991), 61 Ohio St.3d 175. Statutes may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act. *Boley v. Goodyear Tire & Rubber Co., supra* *citing Weaver v. Edwin Shaw Hospital* (2004), 104 Ohio St.3d 390; 2004 Ohio 6549.

Here, the appellate decision renders several lines in R.C. 2929.14(D)(3)(a) utterly superfluous and meaningless. The question becomes, if the specific words “ if the court imposing sentence upon an offender for a felony finds that the offender is guilty of *corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree*,\*\*\*, ,\*\*\*, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced\*\*\*” does not establish a mandatory sentence for the crime of a Corrupt Activity where the predicate crimes include a first degree felony, then what exactly does it mean? Accepting the reasoning of the Ninth Appellate District, the answer to the question can only be, it means nothing. Thus, the General

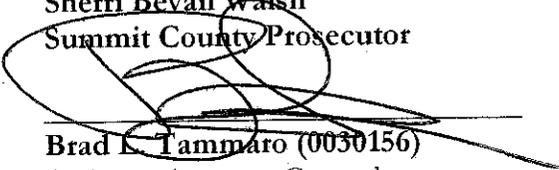
Assembly included several lines in a statute that are entirely superfluous. It follows that the Ninth Appellate Court's decision in this case creates a result that this Court expressly stated should be avoided by rendering an entire provision of a statute completely meaningless through interpretation.

### III. *Conclusion*

For the reasons stated herein, the Plaintiff-Appellee, State of Ohio respectfully requests this Court reverse the Ninth Appellate Court of Appeals and affirmatively state that the provisions of R.C. 2929.14(D)(3)(a) establish a mandatory ten-year sentence be imposed for a conviction on a charge of Corrupt Activity when the most serious offense in the pattern of corrupt activity is a felony of the first degree.

Respectfully Submitted,

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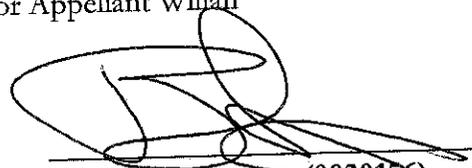
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ORIGINAL

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**NOTICE OF CROSS-APPEAL  
APPELLEE STATE OF OHIO**

**SHERRI BEVAN WALSH**  
Summit County Prosecutor

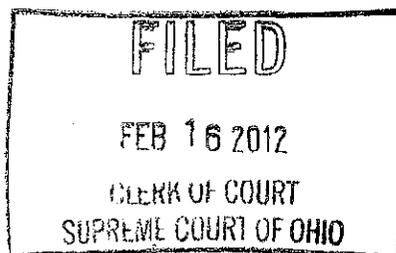
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**NOTICE OF CROSS-APPEAL OF  
APPELLEE, STATE OF OHIO**

Now comes the State of Ohio, as Appellant, and, pursuant to S.Ct. Prac. R. 2.2(A)(2), hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case Number 24894 on December 21, 2011. The Judgment Entry and Opinion are attached hereto.

This case involves a felony and is of public or great general interest. The case did not originate in the Court of Appeals.

Respectfully Submitted,

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**Certificate of Service**

This is to certify that the foregoing **Notice of Cross-Appeal of Appellee State of Ohio** was served upon the following by **US Mail**, this 16<sup>th</sup> day of February, 2012.

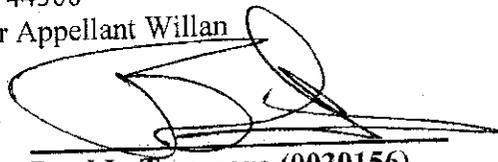
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Special Prosecuting Attorney

[Cite as *State v. Willan*, 2011-Ohio-6603.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     24894

Appellee

v.

DAVID WILLAN

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CR-2007-12-4233 (A)

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 21, 2011

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BELFANCE, Judge.

{¶1} Appellant, David Willan, appeals from his convictions of multiple offenses in the Summit County Court of Common Pleas. For the reasons that follow, we affirm Mr. Willan's convictions of three counts of false representation in the registration of securities, and one count each of engaging in a pattern of corrupt activity, tampering with records, and falsification, but reverse the remainder of his convictions.

BACKGROUND

{¶2} All of Mr. Willan's convictions stem from activity conducted by two of his businesses between 2002 and 2007. For several years, Mr. Willan was in the business of buying, renovating, and reselling homes under the name of Summit Redevelopment, a business he owned with a partner. Mr. Willan later bought the partner's interest and changed the company's name to Evergreen Homes, LLC. Although Mr. Willan later started building new homes through a business named Evergreen Builders, that entity is not connected to the convictions in this case.

Because many potential buyers of renovated homes lacked the ability to secure financing through traditional means, Summit Redevelopment and later Evergreen Homes assisted buyers in obtaining financing. Specifically at issue in this case, Evergreen Homes helped some of its homebuyers secure a first mortgage for approximately 80 percent of the purchase price and allowed the buyer to pay off the remaining balance over time. To secure its right to receive payment of the remaining 20 percent balance, Evergreen Homes retained a second mortgage on each of these properties.

{¶3} As Evergreen Homes' sales business grew, it developed a need for an influx of capital. By allowing the buyers to pay off 20 percent of the purchase price over time, Evergreen Homes received most of its profit from its home sales over time, as each home buyer paid the remaining 20 percent owed. Thus, Evergreen Homes' assets consisted, in part, of notes receivable. Although Evergreen Homes' assets were growing, it lacked the liquid funds it needed to purchase and renovate more homes. Mr. Willan hired an experienced partner in the regulatory and finance practice group of a reputable local law firm. He worked with attorneys at the firm for almost a year to develop a business plan to raise capital for Evergreen Homes. Mr. Willan continued to work with these attorneys for the next several years and repeatedly told them that he wanted to do whatever was necessary to ensure that his business complied with the law. Even when the law firm recommended action that exceeded that required under the law, Mr. Willan readily agreed to the firm's recommendations.

{¶4} To implement the business plan, Mr. Willan formed a separate company, Evergreen Investment Corporation. Evergreen Investment was formed to purchase and hold the second mortgages that Evergreen Homes had received through its home sales and to secure investors to provide capital that would enable it to purchase the mortgages from Evergreen

Homes. To accomplish this goal, Evergreen Investment sold debt securities, which earned interest at a set rate around 10 percent or above. This endeavor required Evergreen Investment to conform to the registration requirements connected with a securities offering. Eventually, Evergreen Homes secured capital directly through the sale of equity securities. These securities represented actual ownership interests in Evergreen Homes.

{¶5} In raising its capital through the issuance of debt securities, Evergreen Investment registered each offering with the Division of Securities of the Ohio Department of Commerce. Upon the advice of counsel, Mr. Willan hired a certified public accounting firm to prepare audited financial statements for Evergreen Investment to file with the Division prior to the initial offering. Although audited financials were not required by the Division, Mr. Willan followed his counsel's advice to fully disclose the financial condition of the company. With respect to the sale of its equity securities, Evergreen Homes did not register those securities with the Division of Securities, but instead filed forms with the Division to exempt the offerings of those securities from the state's registration requirements.

{¶6} Mr. Willan hired Daniel Mohler in early 2003 to sell homes for Evergreen Homes, but later asked him to manage the investment sales. Mohler had no experience with securities sales and was not licensed by the state to sell securities. It is not clear from the record exactly when Mohler began selling the securities or whether Mr. Willan might have handled the securities sales prior to Mohler. By the end of 2004, however, Mohler was the only person selling securities for the Evergreen companies. With the exception of a brief period of time during 2006 that he was paid a salary, Mohler received a commission for each security sale. Although Mohler eventually sold securities for both Evergreen Investment and Evergreen

Homes, the only sales offenses at issue in this case involve his sale of debt securities for Evergreen Investment.

{¶7} Evergreen Investment sold its debt securities through newspaper advertisements, which were approved by the Division prior to publication. The ads announced the availability of the high-risk, high-yield certificates and provided information about how prospective investors could obtain more information about the offering. The sales strategy was relatively simple: interested investors would be enticed by the ads to contact Evergreen Investment to request an offering circular and subscription agreement. The information provided warned the potential investor that the investment was high-risk, was dependent on fluctuations in the lending and housing market, and was not insured. After reviewing the information and determining whether the investment was appropriate, interested investors would purchase certificates. The certificates stated that the investments were unconditionally guaranteed by Evergreen Homes. Even though the investment was tied to the continued success of Evergreen Homes, numerous investors were attracted to the high rate of return and good reputation of the company. Mohler's job was to handle the paperwork when potential investors contacted the office. Although he occasionally met outside the office with potential investors who requested information, Mohler's sales role did not involve the active solicitation of new investors. Thus, Mohler was not the stereotypical salesman.

{¶8} During May 2006, when the Division conducted an audit of Mr. Willan's companies, it learned that Mohler was selling the securities and was receiving a commission for each sale. Both Mr. Willan and Mohler openly admitted that Mohler received a commission for each security sale. In fact, Mr. Willan made no attempt to conceal anything about his businesses during the audit, nor did he attempt to alter the companies' books to disguise the form or amount

of Mohler's compensation. Mr. Willan stated that he was not aware that he should not have been paying Mohler a commission. The Division described Mr. Willan as "fully cooperative" with its investigation. In furtherance of his cooperation, Mr. Willan agreed to travel to Columbus to give a deposition to the Division. There is no evidence suggesting that Mr. Willan did anything to impair or hinder the Division's investigation.

{¶9} Discovering that commissions were being paid in connection with each security sale was significant to the Division because, among other things, it felt that fact had been misrepresented on some of the securities filings. The Division also took the position that the payment of commissions to Mohler triggered the need for him to be licensed as a salesperson under Ohio law. The Division communicated with Mr. Willan's then-counsel, who had been unaware until that time that Mohler was selling the securities or that anyone was receiving commissions. After learning that Mohler was paid commissions to sell the securities, Mr. Willan's counsel informed the Division that Ohio law did not require Mohler to be licensed as a salesperson because he sold securities on behalf of the issuer, and therefore, the sales were exempted from state licensing requirements. Based on his counsel's advice, Mr. Willan maintained the position that the statutory prohibition on commissioned sales applied only to securities dealers, not salespeople. Nonetheless, in what appears to be an abundance of caution, Mr. Willan's counsel advised Mr. Willan to stop paying Mohler a commission and suggested that instead Mohler be paid a salary. Mr. Willan agreed. It appears that Mr. Willan's counsel believed that such action would be sufficient to resolve the matter with the Division.

{¶10} In addition to concerns of the Division of Securities that Evergreen Investment and Evergreen Homes were conducting business in violation of Ohio securities laws, the Summit County Sheriff's Department had become aware that many of the homes sold by Mr. Willan

were in foreclosure. The sheriff's department had been investigating Mr. Willan and his businesses and had learned that he had withdrawn large sums of money from his companies. It questioned whether these withdrawals had been made at the expense of investors and whether Evergreen Investment was financially solvent. The sheriff's department obtained warrants to search the offices of the Evergreen companies as well as Mr. Willan's current and former residences. On June 19, 2006, the sheriff's department seized numerous items from Mr. Willan's offices that included several computers and file cabinets full of business records of Evergreen Homes and Evergreen Investment. The Evergreen companies were "basically left with a shell of an office." It does not appear that any evidence was uncovered during the raid that would suggest that the purpose of Mr. Willan's endeavors was to defraud investors in the nature of a "Ponzi" scheme or that the entities were not legitimate operations.

{¶11} When an attorney at the Division of Securities first began investigating the Evergreen companies in March 2006, he discovered that the Division had received no complaints from any investors in either Evergreen company. Prior to the raid by the sheriff's department, all investors were paid everything they had been promised, and Evergreen Investment had honored all requests for redemption of certificates. After the raid, however, the Evergreen companies essentially screeched to a halt. The companies had little ability to continue operations because the sheriff's department had seized their computers and business records. Moreover, because the raid had generated a great deal of negative publicity, investors called to demand an immediate return of their investments and potential home sales customers apparently stopped doing business with the Evergreen companies. Although Mr. Willan's companies remained financially solvent with more than sufficient assets to cover the investments, because the bulk of the assets consisted of notes receivable and unsold homes, Mr. Willan lacked the liquidity to refund the investments

of everyone at once. Although no details are set forth in the record, at some point, Mr. Willan's Evergreen companies filed for bankruptcy protection.

{¶12} On December 19, 2007, Mr. Willan and many other co-defendants were charged in a 147-count secret indictment. Mr. Willan, the primary defendant who initially faced 108 charges, was tried separately from his co-defendants and the charges against him were severed into two jury trials. The trial judge granted a judgment of acquittal on many of the charges against Mr. Willan before and during the first jury trial, which commenced on November 17, 2008. After the close of evidence, the jury considered 68 counts against Mr. Willan: one count of engaging in a pattern of corrupt activity, five counts of false representation in the registration of securities, 20 counts of selling securities as an unlicensed dealer, one count of securities fraud, one count of aggravated theft, one count of theft from the elderly, 17 counts of violating the Ohio Small Loans Act, and 22 counts of acting as an unregistered second mortgage lender. The jury found Mr. Willan guilty of all 68 counts.

{¶13} On May 18, 2009, Mr. Willan's second trial began on the remaining nine counts in the indictment: one count of grand theft, six counts of money laundering, one count of tampering with records, and one count of falsification. The trial court granted a judgment of acquittal on the charge of grand theft and on five of the six counts of money laundering. The jury acquitted Mr. Willan of the remaining count of money laundering, but convicted him of one count of tampering with records and one count of falsification. He appeals from his convictions from both trials and raises six assignments of error.

#### SUFFICIENCY OF THE EVIDENCE

{¶14} Mr. Willan's first assignment of error is that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. "Inasmuch as a

court cannot weigh the evidence unless there is evidence to weigh,' this Court will consider his sufficiency argument before analyzing his argument regarding the manifest weight of the evidence." *State v. Rucker*, 9th Dist. No. 25081, 2010-Ohio-3005, at ¶8, quoting *Whitaker v. M.T. Auto. Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13. Moreover, although Mr. Willan purports to raise a manifest weight challenge, his arguments do not focus on the weight of the evidence before the trial court. Because Mr. Willan's arguments are confined to the sufficiency of the evidence supporting his convictions, this Court will limit its review accordingly.

{¶15} For the most part, the evidence presented by the State was not disputed by Mr. Willan. Although Mr. Willan presented witnesses on his own behalf at the first trial, his witnesses did not dispute the evidence that was already before the trial court but offered testimony to support his legal argument that his conduct, as demonstrated by the State, did not constitute the offenses for which he was charged. In fact, some of the witnesses called by the State provided testimony that supported Mr. Willan's position. This Court's review of the sufficiency of evidence supporting a conviction is a question of law that this Court reviews de novo. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced any rational trier of fact of Mr. Willan's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

#### **Mr. Willan's First Trial**

{¶16} Because Mr. Willan's convictions resulted from two separate jury trials, this Court will review the evidence presented at each trial separately. Mr. Willan's convictions following the first trial fall into two main categories: (1) licensing or registration offenses, based on the State's allegation that Mr. Willan, through Evergreen Homes and/or Evergreen

Investment, engaged in certain business practices without registering with the state or obtaining a state license; and (2) misrepresentation offenses, based on misrepresentations by Mr. Willan that no commissions would be paid in connection with the sale of Evergreen's securities. Mr. Willan's challenges to the sufficiency of the evidence supporting his convictions will be organized accordingly.

### **Licensing/Registration Offenses**

{¶17} Mr. Willan was convicted of engaging in the following business without obtaining a license or certificate of registration from the state: (1) selling securities; (2) issuing second mortgages; and (3) issuing small loans. Mr. Willan does not dispute that he conducted these types of activities or that he did so without obtaining a license or registration from the state. Instead, he argues that his business activities did not fall within the meaning of the applicable licensing or registration statutes.

### **Sale of Securities**

{¶18} The most serious of Mr. Willan's licensing convictions were 20 counts of violating R.C. 1707.44(A)(1) by selling securities without obtaining a license. Although both Evergreen Investment and Evergreen Homes eventually sold securities, the indictment and Mr. Willan's convictions pertained only to specific sales of Evergreen Investment debt securities. The State attempted to prove that Mr. Willan violated R.C. 1707.44(A)(1) by acting through Daniel Mohler in selling securities because Mohler was not licensed to sell securities, nor was Mr. Willan or either of his companies.

{¶19} At all times relevant in the indictment, R.C. 1707.44(A)(1) provided that "[n]o person shall engage in any act or practice that violates division (A), (B), or (C), of Section 1707.14 of the Revised Code, and no salesperson shall sell securities in this state without being

licensed pursuant to section 1707.16 of the Revised Code.” Divisions (A), (B), and (C) of R.C. 1707.14 regulate the licensing and registration of dealers. R.C. 1707.01(F)(1) defines a “salesperson” as “every natural person, other than a dealer, who is employed, authorized, or appointed by a dealer to sell securities within this state.” Thus, if Mr. Willan, Evergreen Investment, and Evergreen Homes were not dealers, Mohler could not be a salesperson. See R.C. 1707.01(F)(1). The basic definition of “dealer,” set forth in R.C. 1707.01(E)(1), includes:

“every person, other than a salesperson, who engages or professes to engage, in this state, for either all or part of the person’s time, directly or indirectly, either in the business of the sale of securities for the person’s own account, or in the business of the purchase or sale of securities for the account of others in the reasonable expectation of receiving a commission, fee, or other remuneration as a result of engaging in the purchase and sale of securities.”

{¶20} R.C. 1701.01(E)(1)(a) states that:

“‘[d]ealer’ does not mean \* \* \* [a]ny issuer, including any officer, director, employee, or trustee of, or member or manager of, or partner in, or any general partner of, any issuer, that sells, offers for sale, or does any act in furtherance of the sale of a security that represents an economic interest in that issuer, provided no commission, fee, or other similar remuneration is paid to or received by the issuer for the sale[.]”

We will refer to this as the “issuer exception.” “Issuer” means every person who has issued, proposes to issue, or issues any security.” R.C. 1707.01(G). “Person” includes “a natural person, firm, partnership, limited partnership, partnership association, syndicate, joint-stock company, unincorporated association, \* \* \* and a corporation or limited liability company organized under the laws of any state[.]” R.C. 1707.01(D).

{¶21} Mr. Willan concedes that the State presented evidence that while an employee of Evergreen Homes, Mohler handled and processed customer inquiries and requests for purchases of Evergreen Investment debt securities, that Evergreen Homes paid him commissions for the sales, that he was not licensed to sell securities, and that Evergreen Investment, Evergreen

Homes, and Mr. Willan were not licensed as dealers. Mr. Willan's argument is that Mohler was not a "salesperson" within the meaning of R.C. 1707.01(F)(1) because Mr. Willan and his Evergreen companies were not "dealers" within the meaning of R.C. 1707.01(E)(1).

{¶22} We turn to examining whether Mr. Willan, Evergreen Investment, and Evergreen Homes were dealers as contemplated by the Ohio Revised Code. It is clear from R.C. 1707.01(E)(1)(a) that, with respect to Evergreen Homes' own securities, it fell within the issuer exception. Thus, it is not surprising that Mr. Willan was not charged with any crimes under R.C. 1707.44(A)(1) concerning the sale of Evergreen Homes' own securities. The remaining question, therefore, becomes whether Evergreen Homes was a dealer of Evergreen Investment's securities through the action of its employee, Mohler. Again, the general definition of dealer, provides that a dealer is:

"every person, other than a salesperson, who engages or professes to engage, in this state, for either all or part of the person's time, directly or indirectly, either in the business of the sale of securities for the person's own account, or in the business of the purchase or sale of securities for the account of others in the reasonable expectation of receiving a commission, fee, or other remuneration as a result of engaging in the purchase and sale of securities." R.C. 1707.01(E)(1).

{¶23} Neither the phrase "for the person's own account[.]" nor the phrase "for the account of others" has been defined in the relevant chapter of the Ohio Revised Code. When words are not defined in a statute, they shall be given their ordinary meaning and construed according to common usage. See R.C. 1.42. However, even after considering the common meanings of the word "account[.]" it is unclear how the phrases should be interpreted. See Merriam-Webster's Collegiate Dictionary (11 Ed.2005) 8. The phrase "for the person's own account" could be viewed as analogous to the phrase "on one's own account[.]" which is defined as "on one's behalf[.]" Id. Thus, "for the person's own account" could mean on behalf of the person or for the person's benefit, whereas "for the account of others" could mean for the benefit

of others or on behalf of others. R.C. 1707.01(E)(1). Given that these are the broadest definitions of the phrases that we believe are applicable, we will proceed to consider the statute in light of those definitions.

{¶24} The latter half of the definition of dealer, discussing selling securities “for the account of others[,]” requires that the person, here Evergreen Homes, received a commission, fee, or similar remuneration for the sale of the securities. R.C. 1707.01(E)(1). Even assuming that Evergreen Homes was selling securities “for the account of others[,]” because Evergreen Homes did not receive a commission, fee, or similar remuneration for the sale of Evergreen Investment’s securities, it was not a dealer as contemplated by the second portion of the statutory definition. R.C. 1707.01(E)(1). Moreover, we note that neither Evergreen Homes nor Mohler *purchased* securities and, thus, could not be said to have received any commission, fee, or similar remuneration “as a result of engaging in the purchase *and* sale of securities.” (Emphasis added.) R.C. 1707.01(E)(1).

{¶25} With respect to the first portion of the definition, discussing the sale of securities “for the person’s own account,” it is unclear to what extent the sale would have to benefit the person to qualify as “for the person’s own account” under the statute. R.C. 1707.01(E)(1). For example, if the sale only indirectly benefited the person, it is unclear whether that would be sufficient for the sale to be “for the person’s own account[.]” R.C. 1707.01(E)(1). The evidence was undisputed that Evergreen Homes was not receiving any monetary payment whenever Evergreen Investment issued a debt certificate to a customer; moreover, because Evergreen Homes agreed to unconditionally guarantee Evergreen Investment’s obligations, every sale of a debt security actually created a significant financial obligation for Evergreen Homes. Nonetheless, it is possible that Evergreen Homes’ sale of Evergreen Investment’s securities

through Mohler could be seen as indirectly benefiting Evergreen Homes as Evergreen Investment was created to raise capital for Evergreen Homes. However, we believe that, if the legislature had intended such a tenuous benefit to qualify as "for the person's own account," it could have inserted language into the statute that would make such an interpretation more reasonable. R.C. 1707.01(E)(1). As the legislature did not do so, we conclude Evergreen Homes was not selling securities for its own account. Moreover, even if "for the person's own account" could be reasonably interpreted to encompass indirect benefits to that person, under the rule of lenity, any ambiguity in a criminal statute must be construed strictly so as to apply the statute only to conduct that is clearly proscribed. See *United States v. Lanier* (1997), 520 U.S. 259, 266; *State v. Cole* (1994), 94 Ohio App.3d 629, 638, citing R.C. 2901.04. Thus, we conclude that Evergreen Homes was not a dealer, as it was not selling securities for its own account.

{¶26} Next, we turn to examining whether Evergreen Investment was a dealer as contemplated by R.C. 1707.01(E)(1). Even assuming that the activities of Evergreen Investment satisfied the general definition of dealer, by being in the business of selling securities for its own account, R.C. 1707.01(E)(1), we conclude that Evergreen Investment fell within the issuer exception. Evergreen Investment was the issuer of the securities in question because it sold, offered for sale, or furthered the sale of securities which represented an economic interest in Evergreen Investment, and it did not receive any commission, fee, or similar remuneration for the sale. R.C. 1707.01(E)(1)(a). Further, as an officer of the issuer, Evergreen Investment, Mr. Willan also fit within the issuer exception with respect to Evergreen Investment. R.C. 1707.01(E)(1)(a).

{¶27} As Mr. Willan, Evergreen Investment, and Evergreen Homes were not dealers, Mohler was not a salesperson, and Mr. Willan could not be convicted of aiding and abetting him

as an unlicensed salesperson. See R.C. 1707.01(F)(1); R.C. 1707.44(A)(1). Therefore, the State failed to present sufficient evidence that Mr. Willan aided and abetted Mohler as an unlicensed salesperson of securities, as it failed to establish that Mohler was required to be licensed.

{¶28} Through each of the 20 counts at issue, the indictment contained allegations that Mr. Willan and Mohler:

“did commit the crime of **UNLICENSED DEALER**, in that they did, or did aid and/or abet another, to engage in an act or practice that violates division (A), (B), or (C) of section 1707.14, and/or as a salesperson sold securities in this state without being licensed pursuant to section 1707.16 of the Revised Code, to wit: one or more ‘certificates’ \* \* \* in violation of Section 1707.44(A)(1) of the Revised Code[.]”

{¶29} Although Mr. Willan requested a jury instruction that would have limited the jury to considering only whether he aided and abetted Mohler as an unlicensed salesperson, the trial court did not give his proposed instruction. Instead, the trial court broadly instructed the jury on the allegations in the indictment that either Mr. Willan or Mohler acted as an unlicensed dealer:

“The law of Ohio provides no person shall act as a dealer unless the person is licensed as a dealer by the Division of Securities, except when the person is transacting business through or with a licensed dealer or when the person is an issuer selling securities issued by it or by its subsidiary.”

{¶30} The trial court also gave the statutory definition of the term “dealer.” R.C. 1707.01(E) defines a “dealer” to include “every person, other than a salesperson, who engages \* \* \* in the business of selling securities for the account of others in the reasonable expectation of receiving a commission, fee, or other remuneration[.]” It was not disputed that Mohler was employed by Evergreen Homes and that, in the course of his employment, effectuated the sale of securities with the expectation of being paid commissions. The sole issue here is whether Mohler qualified as one who “engag[ed] \* \* \* in the business of” selling securities within the meaning of R.C. 1707.01(E).

{¶31} R.C. 1707.01 does not define the phrase “engages \* \* \* in the business,” nor does it otherwise specify the level of involvement required for one to “engage” in the business of selling securities and, therefore, fall within the definition of a “dealer.” The lengthy dictionary definition of “engage” encompasses levels of participation that range from merely “tak[ing] part [in]” to controlling the business by “begin[ning] and carry[ing] on an enterprise, esp. a business or profession.” Webster’s Third New International Dictionary (1993) 751. Courts construing this phrase in other contexts have resorted to the rules of construction after concluding that the ordinary meaning of “engaging” in a particular business “conceivably covers many classes of employment[,]” encompassing everyone from the proprietor of a business to its low-level employees. *Redding Foods, Inc. v. Berry* (Tex.Civ.App.1962), 361 S.W.2d 467, 469-470 (finding ambiguity in the phrase “engaging in the food business” in the context of contract interpretation). This phrase is used elsewhere in the Ohio Revised Code in contexts that apply to those who own and operate a certain type of business, not all clerical and sales employees involved in the business’s operation. See, e.g., R.C. 918.21(A) (“Poultry by-product manufacturer” defined as “any person engaged in the business of manufacturing or processing” certain animal food); R.C. 1315.21(B) (“Check-cashing business” defined as “any person that engages in the business of cashing checks for a fee”); R.C. 3901.32(D) (“Insurer” defined as “any person engaged in the business of insurance”); R.C. 5815.41(A) (“Art dealer” defined as “a person engaged in the business of selling works of art”).

{¶32} In *Van Meter v. Pub. Util. Comm.* (1956), 165 Ohio St. 391, the Ohio Supreme Court construed this phrase within the context of R.C. 4923.04, which prohibited operating as a “private motor carrier” on the state’s highways without a permit. R.C. 4923.02(A) defined “private motor carrier” to include, in relevant part, a “person \* \* \* engaged in the business of

private carriage of persons or property[.]” The question before the Court was whether Van Meter, as an employee of a trucking company, was “engaged in the business” by driving a truck for his employer. *Van Meter*, 165 Ohio St. at 396. The Court began its analysis by recognizing that “[i]n a broad sense, a servant, while engaged in the business of his master, may be said to be engaged in business.” *Id.* Nonetheless, the Court proceeded to explain why the statutory phrase “engaged in the business” should not be interpreted so broadly, but should be limited to those who direct the operation of the employee’s work. “If anyone is engaged in such business, it is the master who is in control of the mode and manner of operating the truck.” *Id.* at 397. Because Van Meter was not an independent contractor, but was strictly an employee under the direction and control of his employer, the Court held that he was not one “engaged in the business” of private motor carriage. *Id.* at paragraph two of the syllabus.

{¶33} Moreover, the meaning of R.C. 1707.01(E)(1) must be construed within the context of the statutory framework in which it was enacted. See R.C. 1.49; *State v. Moaning* (1996), 76 Ohio St.3d 126, 128. Sheldon Safko, formerly an attorney with the Division of Securities, described dealers as agents who are in the business of selling securities for issuers other than themselves, such as Charles Schwab and Merrill Lynch. He further explained that a dealer is one who can employ a salesperson. See R.C. 1707.01(F). In addition, he testified that, although an individual technically could qualify as a dealer, it was not the practice of the Division to license individuals as dealers and he did not think it was ever done; individuals were licensed as salespeople.

{¶34} Mohler, as an employee of Evergreen Homes, had no ability to employ salespeople, as he worked at the will and direction of Evergreen Homes. R.C. 1707.15, which governs the application and examination required for a dealer’s license, further requires that the

dealer have a “principal, officer, director, general partner, manager, or employee” who will take and pass an examination before the state will issue a dealer’s license. R.C. 1707.15(C). Mohler, who was strictly an employee of Evergreen Homes, had no “principal, officer, director, general partner, manager, or employee” who could have taken the dealer’s licensing exam, so it was not even possible for him to comply with the statutory requirement of becoming licensed as a dealer.

{¶35} Consequently, the language of R.C. 1707.01(E) can reasonably be construed to apply only to a person or entity that directs and controls the manner and means of the securities sales activity. The language of the definition is subject to conflicting interpretations, one of which does not apply to Mohler. See *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513. Under the rule of lenity, any ambiguity in a criminal statute must be construed strictly so as to apply the statute only to conduct that is clearly proscribed. See *Lanier*, 520 U.S. at 266; *Cole*, 94 Ohio App.3d at 638, citing R.C. 2901.04. Because it is not clear that R.C. 1707.01(E)(1)(a) was intended to define “dealer” to include an employee who performs merely clerical functions and works at the direction and control of his employer, this Court cannot construe it to apply to Mohler’s securities sales activities.

{¶36} Because the State failed to prove that Mohler, Mr. Willan, Evergreen Homes, or Evergreen Investment qualified as salespeople or dealers within the meaning of R.C. 1707.01(E) and (F), none of them was required to be licensed to sell the Evergreen Investment debt securities. Therefore, the State failed to present sufficient evidence to support Mr. Willan’s 20 convictions under R.C. 1707.44(A)(1).

#### Second Mortgages

{¶37} Mr. Willan was convicted of 22 counts of being a second mortgage lender without first obtaining the requisite certificate of registration from the Division of Financial Institutions

of the Ohio Department of Commerce. The State established that Evergreen Homes had retained second mortgages on 22 properties that it sold and that it had never obtained a certificate of registration to conduct business as a second mortgage lender.

{¶38} Again, Mr. Willan does not challenge the State's proof of those facts but raises a legal argument that his business activity did not require Evergreen Homes to register as a second mortgage lender under R.C. 1321.52. At the time Mr. Willan committed the alleged offenses, from February 21, 2003 through February 26, 2006, R.C. 1321.52(A)(1)(b) provided that "[n]o person \* \* \* shall \* \* \* without having first obtained a certificate of registration from the division of financial institutions \* \* \* [e]ngage in the business of lending or collecting the person's own \* \* \* money, credit, or choses in action for such loans[.]" R.C. 1321.52(A)(1)(a) explained that "such loans" are those "secured by a mortgage on a borrower's real estate which is other than a first lien on the real estate[.]"

{¶39} Evergreen Homes did not lend money to any of the homebuyers. The second mortgages at issue arose from an interest Evergreen Homes retained in the homes it sold. Evergreen Homes sold each of these properties using a similar financing arrangement: the homebuyer agreed to pay Evergreen Homes approximately 80 percent of the purchase price by borrowing money from a lending institution; the lender held a first mortgage on the property; and each homebuyer paid the remaining 20 percent balance to Evergreen Homes over time. The arrangement between Evergreen Homes and the homebuyer was something akin to a modified land contract, although Evergreen Homes did not retain title to the property. Instead, to protect its right to receive the 20 percent balance of the purchase price, Evergreen Homes held a second mortgage on each property and allowed the homebuyer to pay the remainder of the purchase price in installments.

{¶40} Mr. Willan maintains that this type of second mortgage arrangement did not fall within R.C. 1321.52(A)(1)(b) because Evergreen Homes was not conducting any business connected with “loans” secured by a second mortgage on real estate. The critical missing link for these convictions is that Evergreen Homes did not lend money to any of the homebuyers in exchange for its second mortgage. It merely retained an interest in the property to secure its right to payment of the 20 percent balance of the purchase price. Again, Mr. Willan has raised a persuasive legal argument that his business activity did not fall within the relevant statutory language.

{¶41} Although R.C. Chapter 1321 does not directly define the term “loan,” it explicitly recognized then and now that a “loan” involves the advancement of cash by the lender to, or on behalf of, the borrower. R.C. 1321.51(F) has long defined an “interest bearing loan” as one that is expressed as the “principal amount” plus interest computed on the unpaid principal balance. “Principal amount” is defined as “the amount of cash paid to, or paid or payable for the account of the borrower[.]” R.C. 1321.51(D).

{¶42} The New York Court of Appeals has held that this type of real estate transaction, in which a seller retains a mortgage on the property to secure his right to an unpaid balance of the purchase price, is not a “loan” because no money was advanced by the seller. See *10 East Realty, LLC v. Incorporated Village of Valley Stream* (2009), 12 N.Y.3d 212, 215; *Mandelino v. Fribourg* (1968), 23 N.Y.2d 145. “The fact that the consideration in this sale mentions an interest rate and a term of payment, or that a mortgage was taken as a security interest, does not make this transaction involving a deferred payment plan” a loan within the meaning of the state constitution. *10 East Realty*, at 215.

{¶43} The Ohio Revised Code likewise distinguishes a “loan” from a deferred payment plan within the context of retail consumer sales. A “retail installment sale” is a sale in which the retail seller transfers goods to the buyer and the “cash price may be paid in installments over a period of time.” R.C. 1317.01(A). A “purchase money loan,” on the other hand, involves “a cash advance that is received by a consumer from a creditor” that is applied to the consumer transaction. R.C. 1317.01(Q).

{¶44} This Court was unable to find any authority to support the State’s position that a “loan” under R.C. 1321.52 can encompass Evergreen Homes’ business practice of transferring homes to buyers before it had received full payment and allowing the buyers to pay the balance over time. As emphasized already, the statute must be strictly construed to apply “only to conduct that is clearly covered.” See *United States v. Lanier*, 520 U.S. at 266. Because Evergreen Homes did not advance any money to its homebuyers, it did not issue “loans” in connection with the second mortgages, and it did not fall within R.C. 1321.52(A)(1)(b) as a second mortgage lender. Consequently, the State failed to present sufficient evidence to support Mr. Willan’s 22 convictions of violating R.C. 1321.52(A)(1)(b).

#### Small Loans

{¶45} Mr. Willan was convicted of 17 counts of violating the Small Loans Act. Specifically, he was convicted under R.C. 1321.02, which provides now, as it did then, that “[n]o person shall engage in the business of lending money, credit, or choses in action in amounts of five thousand dollars or less \* \* \* without first having obtained a license from the division of financial institutions[.]”

{¶46} The State’s evidence that Mr. Willan issued small loans consisted solely of documentation that was seized in the search of his offices. The documents included promissory

notes payable to Evergreen Investment, as well as worksheets, other office documentation, and e-mail communications about some of the loans, which indicate that Evergreen Investment made several loans, in amounts of \$5,000 or less, at rates of interest of 12 and 18 percent. The State also presented evidence that the Division of Financial Institutions had never issued a license to Mr. Willan or Evergreen Investment to issue small loans.

{¶47} The State offered no testimony from any of the alleged borrowers, however, nor did Mr. Willan or anyone who worked for him testify about the alleged loans. The State sought to establish Mr. Willan's criminal liability based on the fact that he made loans without a license. It presented no evidence that he acted with any degree of culpability in violating the Small Loans Act, but instead proceeded on a theory that R.C. 1321.02 imposed strict liability on anyone who engaged in the business of issuing small loans without a license, regardless of their awareness of a need to be licensed.

{¶48} This Court found no legal authority to support the State's theory that R.C. 1321.02 imposes strict liability for issuing small loans without a license. Although Mr. Willan has focused upon the State's failure to specify the applicable interest rate as to the alleged loans, "[o]ne of the elements to be determined in a sufficiency of the evidence analysis is the mental state of the defendant in committing the [crime.]" *State v. Fusillo*, 11th Dist. No. 2004-T-0005, 2005-Ohio-6289, at ¶27.

{¶49} R.C. 1321.02 fails to specify any culpable mental state. R.C. 2901.21(B) provides that, "[w]hen the section defining an offense \* \* \* neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." There is no language in R.C. 1321.02 to plainly indicate a legislative purpose to impose strict liability.

{¶50} The Ohio Supreme Court has addressed the application of R.C. 2901.21(B) many times in recent years. See, e.g., *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301; *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830; *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225; *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325; *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732. As the Ohio Supreme Court emphasized in *Horner*, it has found legislative intent to impose strict liability where the legislature chose to include a level of culpability in one discrete clause, subsection, or division, but not in another part of that same statute. *Id.* at ¶54. It further stressed in *Johnson* that R.C. 2901.21(B) “is concerned with the offense as a whole” and applies only if the definition of the offense fails to include a mens rea element. 2010-Ohio-6301, at ¶37.

{¶51} Mr. Willan was convicted under R.C. 1321.02, a statute that includes no subsections, specifies no level of culpability for any element of the offense, and does not incorporate another offense that does. See *State v. Wharf* (1999), 86 Ohio St.3d 375, 377 (explaining that, although the definition of robbery under R.C. 2911.02(A)(1) includes no specific mens rea, it incorporates the mental state of a theft offense). In construing the language of a statute that specifies no level of culpability for any element of the offense, the Ohio Supreme Court has refused to infer a legislative intent to impose strict liability absent actual language to that effect in the statute. See, e.g., *State v. Collins* (2000), 89 Ohio St.3d 524, 530. Despite persuasive public policy arguments, the Court refused to write language into the statute that “simply is not there-language which the General Assembly could easily have included, but did not.” *Id.* at 529-530.

{¶52} The Supreme Court has also emphasized that “[t]he fact that the statute contains the phrase ‘No person shall’ does not mean that it is a strict criminal liability offense.” *State v.*

*Moody*, 104 Ohio St.3d 244, 2004-Ohio-6395, at ¶16. Instead, it stressed that “[t]here must be other language in the statute to evidence the General Assembly’s intent to impose strict criminal liability.” *Id.* There is no language in R.C. 1321.02 to suggest any legislative intent to impose strict liability. See *State v. Annable*, 194 Ohio App.3d 336, 2011-Ohio-2029, at ¶33-35 (refusing to construe similar language in R.C. 4731.41 as imposing strict liability for practicing medicine without a license).

{¶53} Lending money and charging interest is legal activity that is criminalized by R.C. 1321.02 if one lends repeatedly and does not obtain the requisite license. To construe this statute as imposing strict liability would also raise due process concerns because it criminalizes a failure to act, when the offender would not necessarily have any notice of his obligation to obtain a license. Although some statutes that criminalize an offender’s failure to act have been construed to impose strict liability, those statutes typically involve situations in which the offender would have had prior notice of his obligation to take action, such as through a prior court order or the rules pertaining to a license that he has already obtained. See, e.g., *State v. Hardy*, 9th Dist. No. 21015, 2002-Ohio-6457 (holding that R.C. 2950.06 imposes strict liability for a sexually oriented offender’s failure to verify his current address); *State v. Shaffer* (1996), 114 Ohio App.3d 97 (strict liability standard imposed for operating a licensed cemetery without an endowment care fund). See, also, *Collins*, 89 Ohio St.3d at 531-533 (Lundberg Stratton, J., concurring in part and dissenting in part) (disagreeing with majority that R.C. 2919.21(B), which criminalizes a failure to pay court-ordered support, was not a strict liability offense).

{¶54} Moreover, the potential criminal sanctions for violating R.C. 1321.02 provide further support for our conclusion that it should not be construed as creating a strict liability offense. Strict liability is not generally appropriate when an offense is punishable by

imprisonment. *U.S. v. U.S. Gypsum Co.* (1978), 438 U.S. 422, 443, fn.18, citing Sayre, Public Welfare Offenses (1933), 33 Colum.L.Rev. 55, 72; see, also, *State v. Brewer* (1994), 96 Ohio App.3d 413, 416. A violation of R.C. 1321.02 constitutes a fifth degree felony, which is punishable by a prison term of six to twelve months. R.C. 1321.99(A); R.C. 2929.14(A)(5).

{¶55} For all of these reasons, this Court concludes that, in addition to the elements explicitly set forth in the statute, R.C. 1321.02 requires proof that the offender acted recklessly with regard to whether he needed a small loan license. Because the State failed to present any evidence that Mr. Willan had any awareness of a need to have a small loan license or that he otherwise acted recklessly as to his need to obtain a license to issue small loans, there was insufficient evidence to support his convictions of issuing small loans without a license under R.C. 1321.02.

{¶56} The State failed to present sufficient evidence that Mr. Willan violated R.C. 1707.44(A)(1), 1321.52(A)(1)(b), or 1321.02 through his securities sales, second mortgage, or small loan business practices.

#### **Misrepresentation Offenses**

{¶57} Mr. Willan's misrepresentation convictions were based on his statements in the securities filings of Evergreen Homes and the offering circular of Evergreen Investment that no commissions would be paid in connection with the sale of the securities. These offenses focus on misrepresentations that were made on securities forms filed with the state and in the offering circular for the Evergreen Investment debt securities. Mr. Willan concedes that the representations were false because Mohler was paid a commission for most of the securities sales. His challenges to the sufficiency of evidence focus primarily on whether these

misrepresentations were material and/or whether he made them with knowledge that they were false or with a purpose to defraud anyone.

#### Registering Securities

{¶58} Mr. Willan was convicted of five counts of making a material false representation for the purpose of registering or exempting securities from registration when he registered two separate offerings of Evergreen Investment's debt securities and when he filed for an exemption from registration of three separate offerings of equity securities. Mr. Willan was alleged to have committed these offenses during 2004 and 2005. At that time, R.C. 1707.44(B)(1) provided that "[n]o person shall knowingly make \* \* \* any false representation concerning a material and relevant fact \* \* \* in any \* \* \* circular, description, application, or written statement, for any of the following purposes: [r]egistering securities \* \* \* or exempting securities \* \* \* from registration, under this chapter[.]"

{¶59} Although all of these convictions involved Mr. Willan's misrepresentations about the payment of commissions in connection with the securities sales, because he filed entirely different forms with the state for the two types of securities, this Court will address them separately. Counts two and five of the indictment focused on Mr. Willan's registration of two offerings of debt securities issued by Evergreen Investment. On February 18, 2004, Evergreen Investment filed forms with the Division of Securities of the Ohio Department of Commerce to register a \$5 million offering of debt securities. The securities consisted of certificates that would be sold at face value in multiples of \$500, earn interest at a set rate, and would mature at the end of six months, one year, or two years.

{¶60} The registration paperwork filed by Evergreen Investment included the required Form 6(A)(1), as well as the offering circular that Evergreen Investment would use to inform

investors about the Evergreen companies and each security offering. On June 10, 2005, Evergreen Investment filed similar paperwork to register a \$10 million offering of debt securities. Each offering circular stated that “[n]o commissions \* \* \* will be paid \* \* \* in connection with the sale of the Certificates.” The Form 6(A)(1) filed to register the securities did not include any misrepresentation about commissions. The only misrepresentation was in the offering circular that was filed along with the Form 6(A)(1).

{¶61} Although Mr. Willan concedes that the statement in the circular regarding commissions was false, and that the circular was filed along with his registration paperwork, he maintains that the State failed to prove that the false statements in the circular were made for the purpose of registering securities or that they were material to the registration process. He argues that the State’s evidence demonstrated that the purpose of the statements in the circular was to sell the securities, yet he was convicted of making false statements for the purpose of *registering* the securities, not the offense of making a false representation for the purpose of *selling* securities under R.C. 1707.44(B)(4).

{¶62} Although many federal cases involve material misrepresentations in the registration of securities, those cases provide little guidance because they involve civil suits brought by investors and, necessarily, focus on whether the misrepresentation was material to investors’ decisions to invest. See, e.g., *TSC Industries, Inc. v. Northway* (1976), 426 U.S. 438. The focus here was not whether investors’ decisions would have been affected by Mr. Willan’s misstatement about the commissions but whether the Division of Securities was materially misled in its decision to register the securities. The transaction at hand was registration, so the focus of this offense was on whether Mr. Willan’s misrepresentation likely would have

influenced the decision of the Division of Securities to process the registration of Evergreen Investment's securities.

{¶63} The State presented the testimony of Sheldon Safko, formerly an attorney with the Division of Securities, who testified that the Division reviews the offering circular as part of the registration process to make sure that investors will have the information they need to make a competent decision about whether to invest. He further explained that the offering circular is "like a road map for the investor." The circular should include information about the company and the investment product so an investor can make an informed decision whether to invest in the company. Safko did not testify, however, that this information would have affected the registration of Evergreen Investment's securities in any way. He gave no explanation of how the information about commissions, or any other information in the circular, has any bearing on the Division's decision to approve or process the registration of a securities offering. Although the State established that the information in the circular was relevant to the sale of securities, it offered no evidence that Mr. Willan made this misstatement for the purpose of registering the securities or that it was material or relevant to the registration of the security offering. Therefore, as to Mr. Willan's convictions under counts two and five of the indictment, the State presented insufficient evidence that he knowingly made material and relevant false statements for the purpose of registering the debt security offerings.

{¶64} Mr. Willan's remaining convictions of false representation in the registration of securities, as stated in counts three, four, and six of the indictment, focused on entirely different forms that Mr. Willan filed on behalf of Evergreen Homes to exempt its equity securities from state registration. On November 24, 2004, April 29, 2005, and July 25, 2005, Mr. Willan filed the requisite "Form D" with the Division of Securities to exempt a total of \$4 million in equity

securities offerings from state registration requirements. Again at issue is Mr. Willan's misrepresentation that no commissions would be paid in connection with the sale of these securities.

{¶65} The State introduced the Form Ds that are at issue in these counts to prove that Mr. Willan made misrepresentations on the Form D that was required to be filed to exempt the securities from registration. It argued that Mr. Willan falsely represented that no commissions would be paid in connection with the sales of the securities and that Mr. Willan failed to list the payment of commissions as an expense. At trial, the State focused its argument on Mr. Willan's failure to include the payment of commissions in the listing of expenses on each Form D. In particular, Section C, Item 4 of each Form D filed by Evergreen Homes included a line to list the amount of "Sales Commissions" that would be paid in connection with the offering. Each Form D filed by Evergreen Homes left the commission expense line blank and, consequently, no commissions were deducted from the gross amount of the offering to arrive at the "adjusted gross proceeds to the issuer." Mr. Willan maintained then and now that his failure to include the commissions as an expense did not constitute an affirmative misrepresentation and, therefore, could not constitute a violation of R.C. 1701.44(B)(1). However, this argument ignores the fact that Mr. Willan also made an affirmative representation that no commissions would be paid in connection with the sales of the securities.

{¶66} Although not emphasized by the State at trial, in addition to Mr. Willan's failure to include commissions as an expense to be deducted from the issuer's proceeds, each Form D included an affirmative misrepresentation that no commissions would be paid. Section B, Item 4 of each Form D required the issuer to include information about "each person who has been or will be paid or given, directly or indirectly, any commission or similar remuneration for

solicitation of purchasers in connection with sales of securities in the offering.” Section B, Item 4 included blank lines for the name, address, and other information about each person who would receive commissions. Each Form D filed by Evergreen Homes included the response “None.” to Section B, Item 4 and no other information.

{¶67} The State also established that the misrepresentation about the payment of commissions was relevant and material to the State’s review of whether these securities qualified for an exemption from state registration. Form D provides almost an entire page for information about the people who have been or will be paid commissions in connection with the sale of securities in the offering, including the name of their associated broker or dealer. The State presented the testimony of Sheldon Safko, who explained that information about who would receive commissions was relevant and material to the Division’s review of each Form D because the securities offering would not qualify for a Rule 506 registration exemption if the securities sales involved the payment of commissions to people who were not licensed with the state to sell securities.

{¶68} At the time Mr. Willan filed each Form D to qualify for the registration exemption, R.C. 1707.03(X) provided that an “offer or sale of securities made in reliance on the exemption provided in Rule 506 of Regulation D under the Securities Act of 1933 \* \* \* is exempt provided that all of the following apply:

“(1) The issuer makes a notice filing with the division on form D of the securities and exchange commission within fifteen days of the first sale in this state;

“(2) Any commission, discount, or other remuneration for sales of securities in this state is paid or given only to dealers or salespersons licensed under this chapter;

“(3) The issuer pays a filing fee of one hundred dollars to the division; however, no filing fee shall be required to file amendments to the form D of the securities and exchange commission.”

{¶69} By misrepresenting that no commissions would be paid, when in fact Mr. Willan knew that commissions would be paid to someone who was not a dealer or salesperson licensed in this state, Mr. Willan made material false statements on each Form D he filed. Had the commission payments to Mohler been disclosed, Evergreen Homes would have been required to fully register each of the three equity securities offerings with the state or commit another offense by selling unregistered securities. A reasonable inference from this evidence is that Mr. Willan's purpose in making the misrepresentation about the commissions was to qualify his securities offering for the registration exemption.

{¶70} Despite Mr. Willan's argument to the contrary, the State presented sufficient evidence that he made these misrepresentations with knowledge that they were false. Although Mr. Willan's former counsel completed each Form D, he sent the forms to Mr. Willan for him to review and sign. Each Form D was only a few pages long and included little information for Mr. Willan to review. The statement about the commissions would have been noticeable from even a brief review of the forms. Moreover, Mr. Willan signed each Form D directly below a series of statements, representing that he was familiar with the conditions that must be satisfied for the exemption, that he understood that the issuer had the burden of demonstrating that it qualified for the exemption, and that he had "read this notification and knows the contents to be true[.]"

{¶71} Although it is not clear exactly when Mr. Willan began paying Mohler commissions to sell the debt securities, the first Form D to exempt the equity securities from registration was not filed until November 24, 2004. The State presented evidence that, although Mohler initially worked for Evergreen selling homes, he had shifted to securities sales by the end of 2003. Mohler had been selling securities for Evergreen throughout 2004 and, by the end of that year, had earned over \$190,000 in commissions. Mohler testified that he first sold debt

securities for Evergreen Investment and then Mr. Willan asked him to sell the equity securities for Evergreen Homes when those sales began. Mohler further explained that Mr. Willan paid him a four-percent commission to sell the equity securities, which was a significant increase from the one-percent commission that he had been receiving for selling the debt securities. This evidence supported a reasonable inference that Mr. Willan knew that Mohler would be selling the equity securities and receiving a commission at the time he represented otherwise to the Division of Securities on each Form D. Therefore, the State presented sufficient evidence to support Mr. Willan's convictions of false representation in the registration of securities, as charged in counts three, four, and six of the indictment.

#### Theft Offenses

{¶72} Mr. Willan was convicted of aggravated theft and theft from the elderly under R.C. 2913.02(A)(3) for sales of his securities between January 1, 2003, and June 19, 2006. Throughout that period, R.C. 2913.02(A)(3) provided that “[n]o person, with purpose to deprive the owner of property \* \* \* shall knowingly obtain or exert control over \* \* \* the property \* \* \* [b]y deception[.]” Mr. Willan challenges the sufficiency of evidence supporting his theft convictions on several grounds, including that the State failed to prove that he obtained control over any investor's money by deception or that he acted with a purpose to deprive investors of their money.

{¶73} “Deception” has long been defined in R.C. 2913.01(A) as:

“knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.”

{¶74} The State presented the testimony of many alleged theft victims, who testified that they had invested amounts ranging from \$20,000 to several hundred thousand dollars in securities in one or both of Mr. Willan's two companies and that they never received a refund of their investment. Several of the witnesses testified that they were over 65 years old. The State offered no evidence, however, that Mr. Willan, Mohler, or anyone else associated with Mr. Willan had deceived any of the alleged victims about how their money would be invested.

{¶75} Most of the State's witnesses testified about investing in the debt securities sold by Evergreen Investment. They learned about the investment opportunity primarily from newspaper advertisements and had been drawn to the debt securities because they paid a very high rate of return, in excess of ten percent annually. One witness explained that it was "absolutely" a higher rate of return than many of her other investments. Almost every witness testified that they understood at the time they invested that a high rate of return was associated with a higher risk investment. Each had received a copy of the offering circular, which fully explained that this investment carried many risks. The circular explained that the investment was not federally insured but was directly tied to the success of the Evergreen Companies, which depended on the strength of the housing and mortgage lending markets, both of which were subject to economic fluctuations. As several witnesses explained, however, the housing market was strong at the time they invested and Evergreen Homes was a growing company, so they thought that this was a safe investment.

{¶76} The deception alleged by the State again focused on Mr. Willan's false representation in the offering circular that no commissions would be paid in connection with the sale of securities. There was no evidence, however, that any of these investors gave money to Mr. Willan's companies due to his false statement about commissions. One by one, the investors

testified that they had invested with Evergreen Investment or Evergreen Homes due to the high rate of return that the companies were paying on the investments. Most witnesses explained that they never considered how Mohler was paid or whether he was receiving commissions. The State did present one witness who testified that he had asked Mohler whether he was receiving a commission, because he had a bad experience several years earlier with a commissioned salesperson, and that Mohler told him that he was paid a salary. That witness did not further testify, however, that he had invested with Evergreen Investment due to Mohler's statement that he did not receive commissions.

{¶77} Moreover, even if one investor might have been deceived by the misinformation about the payment of commissions, the State failed to present any evidence that Mr. Willan acted with a purpose of depriving the investors of their money. Mr. Willan's position throughout these proceedings was that he was conducting a legitimate housing business and sought investors to provide capital to purchase more properties to improve. He maintained that his failure to return the investors' money was due to the eventual insolvency of his businesses. Despite the State's attempts to depict Mr. Willan's investment plan as a "Ponzi" scheme, it never presented any evidence to support that characterization. A so-called "Ponzi scheme" was named after Charles Ponzi, who defrauded investors of millions of dollars by convincing them that their money was earning a high rate of return when, in fact, he had not invested their money in anything. See *Cunningham v. Brown* (1924), 265 U.S. 1, 7-8. His scheme was a total sham because he "made no investments of any kind, so that all the money he had at any time was solely the result of loans by his dupes." *Id.* at 8. Nothing in the record before us supports the State's allegations that Mr. Willan's investment plan was a sham. Investors were told that their money would be

used to provide capital to allow Evergreen Homes to buy more homes to renovate. The State failed to present any evidence that the investors' money was not used for that purpose.

{¶78} There was evidence that a reputable accounting firm had prepared the income tax filings and financial statements for the Evergreen companies and that the companies were financially solvent through the end of 2005. At some point, both companies filed for bankruptcy protection, but the record fails to disclose when that happened or why. The State failed to present evidence to support even an inference that the eventual insolvency of the Evergreen companies, and the investors' resulting loss of the money they invested, was due to anything other than a downturn in the housing and mortgage markets and the bad publicity that surrounded the sheriff's department raid of their offices.

{¶79} Because the State failed to present evidence that Mr. Willan knowingly exerted control over investors' money by deception with a purpose of depriving them of their money, it failed to present sufficient evidence that Mr. Willan committed the offenses of aggravated theft or theft from the elderly.

#### Securities Fraud

{¶80} Mr. Willan was convicted of securities fraud under R.C. 1707.44(G) for acts he committed from January 1, 2003 through June 19, 2006. At that time, R.C. 1707.44(G) provided that "[n]o person in \* \* \* selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited." R.C. 1707.01(J) defined "fraudulent acts" to include "any \* \* \* scheme \* \* \* to obtain money or property by means of any false \* \* \* representation[.]"

{¶81} This conviction was based on allegations similar to those underlying the theft convictions, that Mr. Willan defrauded investors by telling them that no commissions would be

paid in connection with the sale of the securities. As explained already, the State failed to prove that anyone invested with his companies due to fraudulent misrepresentations or that the investment plan for his businesses involved anything other than a legitimate investment strategy. Again, Mr. Willan has demonstrated that the State failed to present sufficient evidence to support this conviction.

#### Engaging in a Pattern of Corrupt Activity

{¶82} Mr. Willan was convicted of engaging in a pattern of corrupt activity under R.C. 2923.32(A)(1) for acts that he committed between January 2002 and July 2006. During that period, R.C. 2923.32(A)(1) provided that “[n]o person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.”

{¶83} Mr. Willan’s challenge to this conviction is premised on his challenges to each of the predicate offenses at the first trial, which included false representation in the registration of securities, securities fraud, and the theft offenses. Although we have concluded that there was insufficient evidence to support some of these convictions, there was sufficient evidence to support his convictions under R.C. 1707.44(B)(1) of three counts of making a false representation in the Form D filings of three separate offerings of equity securities. R.C. 2923.31(I)(2)(a) explicitly defined “corrupt activity” to include a violation of “division (B), (C)(4), (D), (E), or (F) of section 1707.44 \* \* \* of the Revised Code.”

{¶84} A conviction under R.C. 2923.32 required proof that Mr. Willan acted through an “enterprise” and engaged in a “pattern” of corrupt activity. R.C. 2923.31(C) defines an enterprise to include “any individual, \* \* \* corporation \* \* \* or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity.”

R.C. 2923.31(E) defines a “[p]attern of corrupt activity” as “two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.”

{¶85} The State presented evidence that Mr. Willan, acting through his company Evergreen Homes, made false representations to the Division of Securities so he could exempt Evergreen Homes’ equity securities from state securities registration. In connection with three separate offerings of equity securities, in November 2004, April 2005, and July 2005, Mr. Willan misrepresented to the Division of Securities that his securities were exempt from registration requirements because no commissions would be paid in connection with their sale. Each act was directly related to providing funds for the affairs of his Evergreen companies and the acts were not isolated or so closely connected in time that they could be construed to constitute a single event. The pattern of corrupt activity involved a total of \$4 million in securities that Mr. Willan was able to exempt from state registration as a result of the false representation. Therefore, the State presented sufficient evidence to support Mr. Willan’s conviction of engaging in a pattern of corrupt activity.

#### **Mr. Willan’s Second Trial**

{¶86} Following his second jury trial, Mr. Willan was convicted of falsification under R.C. 2921.13(A)(5) and tampering with records under R.C. 2913.43(A)(1). These convictions stemmed from statements Mr. Willan made on two state applications that he had never been convicted of a criminal offense when, in fact, he had a 1992 misdemeanor conviction for passing a bad check. Although it was not legally necessary for him to have done so, Mr. Willan filed applications with the Division of Financial Institutions of the Ohio Department of Commerce, on

behalf of Evergreen Homes and Evergreen Investment, to register the companies as second mortgage lenders. Each application was received by the Division of Financial Institutions on June 9, 2005 and the misrepresentation made by Mr. Willan was the same on each application.

{¶87} Item number 15 of the application asks whether the applicant or any “partners, members, corporate officers, or directors \* \* \* [has] ever been arrested for, charged with or convicted of any violation of any federal, state or local civil or criminal statute[.]” The question explicitly excludes minor traffic violations, but includes no other exclusions or limitations. After item 15 of each form filed by Mr. Willan, the “No” response box was checked. Item 11 of the Schedule 17 attached to each application further asked, “Have you \* \* \* ever pleaded guilty \* \* \* or been found guilty by a judge or jury of any violation of any law of Ohio or elsewhere (excluding motor vehicle traffic laws)?” The response “no” was typed on the line below the question. Schedule 17 was signed and sworn by Mr. Willan and notarized by his former counsel.

{¶88} Each application also included the following attestation that was signed by Mr. Willan:

“I (We) swear that this application and any attachments have been \* \* \* carefully reviewed by me (us) and constitute a complete, truthful, and correct statement of all information required herein. I realize that any false or fraudulent representation \* \* \* will be grounds for a denial of this application \* \* \* and is subject to criminal prosecution under Section 2921.13 of the Ohio Revised Code.”

{¶89} Although the false statements by Mr. Willan led to his convictions of both tampering with records and falsification, he has not challenged the falsification conviction on appeal, nor did he challenge it with a Crim.R. 29 motion at trial. He essentially conceded that the State had presented sufficient evidence to support the falsification conviction, because he made a false statement about his prior conviction on a state application and the State had presented sufficient evidence that he had done so knowingly. See R.C. 2921.13(A)(5)

{¶90} Mr. Willan challenges the sufficiency of the evidence supporting his conviction of tampering with records under R.C. 2913.42(A)(1), which provided at the time of the alleged offense that “[n]o person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall \* \* \* [f]alsify \* \* \* any \* \* \* record[.]” “Defraud” meant to “knowingly obtain, by deception, some benefit for oneself or another[.]” R.C. 2913.01(B).

{¶91} Mr. Willan argues that the State failed to present sufficient evidence that he falsified the second mortgage application with purpose to defraud the Division of Financial Institutions. Proof of a defendant’s purpose or intent is typically established through circumstantial evidence, as direct evidence will seldom be available. *State v. Lott* (1990), 51 Ohio St.3d 160, 168.

{¶92} At trial, the parties attached significance to the fact that Mr. Willan obtained a criminal background check, but the results were never received by the Division of Financial Institutions. The background check was also part of the application process to register as a second mortgage lender. The defense attempted to establish that Mr. Willan properly completed the background check and directed that the results be forwarded to the Division, but that the Division apparently never received the results. It was unclear from this evidence whether Mr. Willan had properly directed that the background information be forwarded to the State. Moreover, the fact that he may have completed that component of the second mortgage application process did not change the fact that he made false statements on the application.

{¶93} There was sufficient evidence before the jury to support a reasonable inference that Mr. Willan knowingly gave false information about his prior conviction with a purpose of getting his second mortgage registration approved. The sole purpose of the application was to

obtain a certificate of registration as a second mortgage lender in Ohio. In response to two separate questions, Mr. Willan gave false information about his criminal background. He signed an attestation that he swore that he had carefully reviewed the application and attachments, that all information was complete and truthful, and that he realized that any false statements could subject him to criminal prosecution and/or a denial of his application. A reasonable juror could infer from this evidence that Mr. Willan knowingly lied about his prior conviction, with the intention that the Division would not discover the truth and allow him to register with the state as a second mortgage lender.

#### Sufficiency Summary

{¶94} In summary, the State failed to present sufficient evidence to support Mr. Willan's convictions in the first trial of unlicensed dealer, unregistered second mortgage lender, violating the Small Loans Act, the two counts of false representation in the registration of securities that pertained to the debt securities, securities fraud, aggravated theft, and theft from the elderly. His first assignment of error is sustained to the extent it challenges those convictions. The State did present sufficient evidence to support Mr. Willan's convictions in the first trial of false representation in the registration of securities as charged in counts three, four, and six of the indictment and engaging in a pattern of corrupt activity. It also presented sufficient evidence to support his convictions in the second trial of tampering with records and falsification. Mr. Willan's assignment of error as it pertains to those convictions is overruled.

#### VALIDITY OF SEARCH WARRANT

{¶95} Mr. Willan's third assignment of error is that the trial court erred in denying his motion to suppress all evidence seized in the June 6, 2006, raid of his companies' offices because the warrant to search each location was based on an affidavit that contained false information.

Mr. Willan points to a few isolated statements made by the affiant that were later proven to be false or exaggerated, at either the suppression hearing or at trial, both of which occurred more than two years after the State was able to verify the information that was the target of the search. “To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either ‘intentionally, or with reckless disregard for the truth.’” *State v. Waddy* (1992), 63 Ohio St.3d 424, 441, quoting *Franks v. Delaware* (1978), 438 U.S. 154, 155-156. Moreover, even if the affidavit included such false statements, the warrant remains valid unless “the affidavit’s remaining content is insufficient to establish probable cause[.]” *Id.*

{¶96} Mr. Willan has failed to demonstrate that the affiant intentionally made any false statements or that he made them with a reckless disregard for their truth. Moreover, he has failed to demonstrate that the isolated statements at issue were material to the overall validity of the warrant in any way. Mr. Willan pointed to a few statements that exaggerated the amount of money he had drawn from his companies and stated that the Division of Securities had initiated the criminal investigation when, in fact, it was the sheriff’s department. Although Mr. Willan also maintains that the affiant made a false statement that Evergreen Investment was insolvent as of May 2006, there is nothing in the record to establish whether that statement was true or false. Overall, the affidavit includes true statements about the nature of Mr. Willan’s businesses and his relationship to them, that he was drawing more than his allotted annual salary to the potential detriment of his investors, the interrelationship of the Evergreen companies and that Mr. Willan moved money between the two companies, that Mohler was selling securities and receiving commissions but was not licensed to sell securities, and that Mr. Willan had made misrepresentations to the state and investors about the payment of commissions to Mohler.

{¶97} Mr. Willan also maintains that the search warrants were overly broad and/or that the search conducted at the West Market Street office of the Evergreen companies went beyond the scope of the warrants because the affidavits and warrants pertained to the business of Evergreen Investment only, not Evergreen Homes or Evergreen Builders. The affidavits supporting these search warrants included facts to establish probable cause that Evergreen Investment was engaged in illegal activity, that its office was located in the same building as Evergreen Homes and Evergreen Builders, and that the three businesses were closely associated and owned by Mr. Willan. It further stated that Evergreen Investment was being used as a source of funding and that the affiant believed that Evergreen Homes was profitable and Evergreen Investment was insolvent at that time. It further stated information to support the affiant's belief that Evergreen Investment had become insolvent, at the expense of its creditors and for the advantage of Mr. Willan and his other companies.

{¶98} The warrants to search the West Market Street location did specify only "Evergreen Investment" as the business to be searched, but each warrant clearly indicated that Evergreen Investment was located in the same building as Evergreen Homes and Evergreen Builders, that the sign at the location read "Evergreen Homes," and one of the warrants included within its scope "any and all areas \* \* \* within the physical structure of 611 W. Market Street occupied by or associated with Evergreen Investment Corporation, Evergreen Homes LLC and Evergreen Builders LLC." Moreover, each warrant authorized the search and seizure of all documentation exhibiting the names or identifiers of any of these entities or Mr. Willan himself.

{¶99} Mr. Willan has failed to demonstrate that the trial court erred in denying his motion to suppress evidence seized during the search of his offices. The third assignment of error is overruled.

## INADMISSIBLE EVIDENCE

{¶100} Mr. Willan's fifth assignment of error is that the trial court erred in allowing the State to present evidence in each trial that was irrelevant to the offenses before the court and unduly prejudicial to him. He specifically points to evidence in his first trial about his prior conviction and his unsuccessful attempt to register as a second mortgage lender, as well as evidence in both trials that he withdrew large sums of money from his businesses and spent the funds on extravagant personal items for himself and others.

{¶101} To demonstrate reversible error, Mr. Willan must demonstrate that the evidence was wrongly admitted and that he suffered prejudice as a result. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14. "Prejudice occurs if there is a reasonable possibility that the error might have contributed to the conviction." *State v. Basen* (Feb. 16, 1989), 8th Dist. No. 55001, at \*6, citing *State v. Cowans* (1967), 10 Ohio St.2d 96, 105. Although the evidence at issue might have contributed to the jury's assessment of the evidence pertaining to some of Mr. Willan's convictions, such as the second mortgage registration, securities fraud, and theft offenses, this Court has reversed all of those convictions. Mr. Willan has failed to argue, much less demonstrate, how any of the evidence at issue might have contributed to his convictions of false representation in the registration of securities, engaging in a pattern or corrupt activity, tampering with records, or falsification. Consequently, as he has not demonstrated prejudice, his fifth assignment of error is overruled.

## CORRUPT ACTIVITY SENTENCE

{¶102} Mr. Willan's sixth assignment of error is that the trial court erred in imposing a ten-year term of incarceration under the former R.C. 2929.14(D)(3)(a) for his conviction of engaging in a pattern of corrupt activity. Pursuant to R.C. 2923.32(B)(1), Mr. Willan's

conviction of engaging in a pattern of corrupt activity was a first-degree felony because it was predicated on incidents of corrupt activity that constituted first-degree felonies. Although the State failed to prove that Mr. Willan committed the predicate offenses of aggravated theft and theft from the elderly, it did present sufficient evidence to prove that he committed three first-degree felony offenses of false representation in the registration of securities. Under the general sentencing provisions of R.C. 2929.14 at that time, if the trial court elected to or was required to impose a prison term for a conviction of a first-degree felony, it was required to impose a definite prison term of three, four, five, six, seven, eight, nine, or ten years. R.C. 2919.14(A)(1). The State persuaded the trial court, however, that it was further required by R.C. 2929.14(D)(3)(a) to impose a mandatory ten-year term of incarceration for Mr. Willan's conviction of engaging in a pattern of corrupt activity.

{¶103} At the time Mr. Willan began his alleged pattern of corrupt activity in November 2004, R.C. 2929.14(D)(3)(a) provided:<sup>1</sup>

“Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender, *if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree*, or if the offender is guilty of an attempted violation of section

<sup>1</sup> Effective September 30, 2011, R.C. 2929.14 was amended. Language was added to this provision and it was renumbered as R.C. 2929.14(B)(3).

2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, *the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.*" (Emphasis added.)

{¶104} Mr. Willan argues that R.C. 2929.14(D)(3)(a) was specifically designed to apply to major drug offenders. He contends that the trial court improperly applied the "corrupt activity" language of R.C. 2929.14(D)(3)(a) in isolation and that it ignored the reference to the specific drug offenses immediately preceding the "corrupt activity" language. He argues that the reference to "corrupt activity" in the statute cannot be construed in isolation but must be read within the context of the entire provision. See R.C. 1.42; *State ex rel. Rose v. Lorain Cty. Bd. of Elections* (2000), 90 Ohio St.3d 229, 231. Mr. Willan also asserts that, within the context of the entire provision, the statute was ambiguous as to whether the mandatory ten-year term applied to *all* convictions of engaging in a pattern of corrupt activity, or only those that involve the offenses that are explicitly identified in the statute. Thus, he argues that any ambiguity must be resolved in favor of lenity. We agree. The former R.C. 2929.14(D)(3)(a) did not unequivocally impose a mandatory 10-year prison term for any offender found guilty of the general offense of engaging in a pattern of corrupt activity set forth in R.C. 2923.32. Further, we do not discern any legislative intent to do so.

{¶105} The relevant "corrupt activity" language contained in R.C. 2929.14(D)(3)(a) appears more than halfway through this provision, after a lengthy passage of detailed language pertaining exclusively to specific drug offenses, as well as repeated references to major drug offenders, and immediately is followed by an explicit reference to certain offenses of attempted rape. Given the heavy emphasis on drug offenses and the major drug offender specification, the

mandatory ten-year term imposed by R.C. 2929.14(D)(3)(a) was associated primarily with major drug offenses. See, e.g., *State v. Moore*, 8th Dist. No. 85825, 2006-Ohio-305; *State v. Roper*, 9th Dist. No. 22102, 2005-Ohio-13; *State v. Fuller* (Sept. 30, 1998), 6th Dist. No. L-97-1426. Likewise, the mandatory ten-year term was typically imposed for corrupt activity convictions that were predicated on drug offenses. See, e.g., *State v. Baker*, 3rd Dist. No. 6-03-11, 2004-Ohio-2061; *State v. Phillips* (Dec. 13, 2001), 8th Dist. No. 79192.

{¶106} This Court was able to find only one appellate decision that upheld an application of R.C. 2929.14(D)(3)(a) to a corrupt activity conviction that was predicated on offenses other than those enumerated in the statute. See *State v. Schneider*, 8th Dist. No. 93128, 2010-Ohio-2089. *Schneider* argued on appeal that it was unclear whether R.C. 2929.14(D)(3)(a) applied to the general offense of engaging in a pattern of corrupt activity because the corrupt activity language did not expressly refer to R.C. 2923.32 and the corrupt activity language was preceded by a description of enumerated drug offenses. *Id.* at ¶17. However, the *Schneider* court addressed only the narrow argument of whether the corrupt activity language was ambiguous because it was immediately preceded by a description of drug offenses. *Id.* at ¶18. The *Schneider* court concluded that, because R.C. 2929.14(D)(3)(a) also identified the offense of attempted rape, it could not be interpreted as applying only to drug offenses and therefore was not ambiguous. *Id.*

{¶107} The *Schneider* court did not address the legal significance regarding the absence of any reference to R.C. 2923.32 in the statute. R.C. 2929.14(D)(3)(a) explicitly identified numerous drug offenses and the offense of attempted rape by their Revised Code section number, yet it did not identify the offense of engaging in a pattern of corrupt activity by its Revised Code section number, R.C. 2923.32. In light of the explicit application of the

mandatory sentence to sixteen different offenses identified by their Revised Code section number, and the failure to include any statutory reference to R.C. 2923.32, it is reasonable to infer that the mandatory ten-year prison term did not apply to *all* convictions of engaging in a pattern of corrupt activity where the most serious predicate offense was a first degree felony, but was only intended to apply to corrupt activity associated with the offenses that were explicitly enumerated in R.C. 2929.14(D)(3)(a). See *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, at ¶16.

{¶108} Given the apparent ambiguity created by the absence of any reference to convictions under R.C. 2923.32, this Court must construe the “corrupt activity” language in the former R.C. 2929.14(D)(3)(a) in a manner that carries out the intent of the legislature in enacting it. See *Sheet Metal Workers’ Internatl. Assn., Local Union No. 33 v. Gene’s Refrigeration, Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, at ¶29; *Watson v. Tax Commission* (1939), 135 Ohio St. 377, 380. To determine that intent, this Court looks to the language of the statute and the purpose that is to be accomplished by it. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, at ¶20. Although the legislature did not explicitly state its purpose for enacting R.C. 2929.14(D)(3)(a), this Court found guidance by looking at prior versions of the statute and amendments that have been made over the years.

{¶109} As originally enacted in 1996, R.C. 2929.14(D)(3)(a) specified only three drug offenses: trafficking under R.C. 2925.03, illegal manufacture of drugs under R.C. 2925.04, and possession under R.C. 2925.11, as well as certain forcible attempts to commit rape under R.C. 2907.02 and felonious sexual penetration under R.C. 2907.12. Through legislative amendments over the next four years, however, twelve more drug offenses were added to this provision, as well as a reference to the major drug offender specification under R.C. 2941.1410, each with its

Revised Code section identified. The most significant changes to R.C. 2929.14(D)(3)(a) pertained to increasing its focus on major drug offenders.

{¶110} We find further guidance by examining the statutory language of each of the enumerated offenses that were referenced in R.C. 2929.14(D)(3)(a). At the time of Mr. Willan's corrupt activity, the penalty provision of each of the enumerated offenses explicitly cross-referenced R.C. 2929.14(D)(3)(a), thereby signaling the potential for imposition of a mandatory ten-year prison term. For example, the offense of corrupting another with drugs described in R.C. 2925.02 expressly cross-referenced R.C. 2929.14(D)(3)(a) and provided that the court "shall impose" the mandatory ten-year term if the offender's violation of R.C. 2925.02 involved the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marijuana, and that the offender is found to be a major drug offender under the specification set forth in R.C. 2941.1410. R.C. 2925.02(E). Thus, it appears that the legislature intended to identify with particularity specific offenses that would trigger the imposition of a mandatory ten-year prison term. See, also R.C. 2925.03(C)(1)(f), (C)(2)(e), (C)(4)(g), (C)(5)(g), and (C)(6)(g); R.C. 2925.11(C)(1)(e), (C)(4)(f), (C)(5)(f), and (C)(6)(f); R.C. 2925.04(E); R.C. 2925.05(E); and R.C. 2925.36(E).

{¶111} In obvious contrast, the penalty provision for the offense of engaging in a pattern of corrupt activity then set forth in R.C. 2923.32 did not mention R.C. 2929.14(D)(3)(a), nor has it ever done so since the 1996 enactment of the mandatory ten-year term in R.C. 2929.14(D)(3)(a). It is reasonable to conclude that, if the legislature intended the mandatory ten-year term imposed by R.C. 2929.14(D)(3)(a) to apply to the general offense of engaging in a pattern of corrupt activity, it would have cross-referenced the mandatory penalty of R.C. 2929.14(D)(3)(a) in its explanation of the penalties associated with the general offense of

engaging in a pattern of corrupt activity set forth in R.C. 2923.32(B)(1), as it did in great detail for each of the specified drug offenses.

{¶112} Further evidence of the legislature's intent in employing the "corrupt activity" language in R.C. 2929.14(D)(3)(a) can be gleaned from legislative changes that have been made to R.C. 2923.32 subsequent to Mr. Willan's indictment for engaging in a pattern of corrupt activity. See *Montgomery v. John Doe 26* (2000), 141 Ohio App.3d 242, 251. Effective April 7, 2009, R.C. 2923.32 and several other criminal offenses were amended to enhance the penalties for convictions that included a human trafficking specification under R.C. 2941.1422. The human trafficking specification targets multiple felony violations of crimes including kidnapping and compelling prostitution, which sought to compel a victim or victims to engage in sexual activity for hire or to engage in a performance or modeling that is obscene, sexually oriented, or nudity oriented. See R.C. 2929.01(AAA). The human trafficking amendments explicitly applied to felony violations of certain enumerated offenses, including violations of R.C. 2923.32. See, e.g., R.C. 2929.01(AAA); R.C. 2941.1422.

{¶113} In contrast to the absence of any statutory cross-references between R.C. 2923.32 and R.C. 2929.14(D)(3)(a), the legislature clearly evidenced its intent that the mandatory prison term for human trafficking set forth in former R.C. 2929.14(D)(7) and current R.C. 2929.14(B)(7) would apply to violations of R.C. 2923.32. R.C. 2923.32 was explicitly identified by Revised Code section number in the former and current provision; R.C. 2923.32 is enumerated within the definition of human trafficking in R.C. 2929.01(AAA) and the human trafficking specification in R.C. 2941.1422; and R.C. 2923.32(B)(1) cross-references the mandatory 10-year sentence of R.C. 2929.14. R.C. 2923.32(B)(1) now provides that if an offender is convicted of engaging in a pattern of corrupt activity under R.C. 2923.32 and is also

convicted of the human trafficking specification under R.C. 2941.1422, “engaging in a pattern of corrupt activity is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in [R.C. 2929.14(B)(7)[.]”

{¶114} In enacting the human trafficking amendment to R.C. 2923.32, the legislature’s stated intent was “to increase the penalty for engaging in a pattern of corrupt activity if the offender is convicted of a [human trafficking] specification[.]” Am.Sub.H.B. No. 280, 2008 Ohio Session Laws. The mandatory prison term set forth in R.C. 2929.14 for a conviction of engaging in a pattern of corrupt activity under R.C. 2923.32 with a conviction of the human trafficking specification, however, is a term of “not less than five years and not greater than ten years[.]” which is less severe than the mandatory ten-year term imposed by former R.C. 2929.14(D)(3)(a). See R.C. former 2929.14(D)(7)(a)(i) and current R.C. 2929.14(B)(7)(a)(i). Consequently, given that the legislature intended to increase the penalties for corrupt activity under R.C. 2923.32 that were predicated on human trafficking, which could include the first-degree felony offense of kidnapping, it would be unreasonable to conclude that the legislature understood that such offenses under R.C. 2923.32 were already subject to a *more severe* penalty under former R.C. 2929.14(D)(3)(a) and current R.C. 2929.14(B)(3)(a).

{¶115} In an attempt to support its position that the mandatory ten-year term of former R.C. 2929.14(D)(3)(a) applied to the general offense of engaging in a pattern of corrupt activity, the State points to another sentencing provision, R.C. 2929.13(F)(10). This Court does not agree that the state’s construction of R.C. 2929.14(D)(3)(a) is supported by R.C. 2929.13(F)(10), which provides now, as it did then:

“[T]he court shall impose a prison term \* \* \* under \* \* \* section 2929.14 \* \* \* and \* \* \* shall not reduce the term[] pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for \* \* \* :

“(10) Corrupt activity in violation of section 2923.32 of the Revised Code when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree[.]”

{¶116} Although R.C. 2929.13(F)(10) does explicitly identify the offense of engaging in a pattern of corrupt activity by Revised Code section number, it does not refer to a mandatory ten-year term in R.C. 2929.14, nor does it cross-reference R.C. 2929.14(D)(3)(a). It merely cross-references R.C. 2929.14, a lengthy sentencing statute.

{¶117} A reasonable construction of R.C. 2929.13(F)(10) is that it applied to the general sentencing provisions of former R.C. 2929.14(A)(1). Construing the two provisions together, if an offender was convicted of engaging in a pattern of corrupt activity and the most serious predicate offense was a first-degree felony, the court was required to impose a prison term of three, four, five, six, seven, eight, nine, or ten years and that term “cannot be reduced” pursuant to R.C. 2929.20, R.C. 2967.193, or any other provision of R.C. Chapter 2967 or R.C. Chapter 5120.

{¶118} Not only does R.C. 2929.13(F)(10) fail to support the state’s construction of former R.C. 2929.14(D)(3)(a), but it provides further evidence that the legislature did not intend to apply the mandatory ten-year term of R.C. 2929.14(D)(3)(a) to the general offense of engaging in a pattern of corrupt activity. This Court must construe R.C. 2929.13(F)(10) to have operative effect, rather than as unnecessary or redundant legislation. See *Ohio Bell Telephone Co. v. Antonelli* (1987), 29 Ohio St.3d 9, 11. The legislature had already provided in R.C. 2929.14(D)(3)(a) that the trial court must impose a mandatory ten-year prison sentence “that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.” If this language were intended to apply to the general offense of engaging in a pattern of corrupt activity, the additional language set forth in R.C. 2929.13(F)(10) that required the court to

impose a prison sentence and that it “shall not reduce the term” would be completely unnecessary.

{¶119} Because the language and legislative history of former R.C. 2929.14(D)(3)(a) do not clearly indicate that the mandatory ten-year term of incarceration was intended to apply to the general offense of engaging in a pattern of corrupt activity under R.C. 2923.32, this ambiguity in the statute must be resolved in favor of Mr. Willan. See *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, at ¶18. Consequently, we conclude that the trial court erred by imposing a mandatory ten-year term under former R.C. 2929.14(D)(3)(a) for Mr. Willan’s conviction of engaging in a pattern of corrupt activity based on the first-degree felony offenses of false representation in the registration of securities. Mr. Willan’s sixth assignment of error is sustained.

#### REMAINING ASSIGNMENTS OF ERROR

{¶120} Mr. Willan’s remaining assignments of error need not be addressed because they have been rendered moot by our disposition of his first assignment of error. See App.R. 12(A)(1)(c).

#### CONCLUSION

{¶121} Mr. Willan’s sixth assignment of error is sustained and his first assignment of error is sustained to the extent that it challenges the sufficiency of the evidence supporting his convictions of unlicensed dealer, unregistered second mortgage lender, violating the Small Loans Act, the two counts of false representation in the registration of securities that pertained to the debt securities, securities fraud, aggravated theft, and theft from the elderly. The remainder of Mr. Willan’s first assignment of error, as well as his third and fifth assignments of error are overruled. Mr. Willan’s second and fourth assignments of error were not addressed because they

are moot. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,  
reversed in part,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

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EVE V. BELFANCE  
FOR THE COURT

DICKINSON, P. J.  
CONCURS

CARR, J.

CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶122} I respectfully dissent from the majority's disposition of Willan's first assignment of error, insofar as it concludes that many of his convictions were not supported by sufficient evidence. I disagree with the majority opinion for the following reasons:

Securities Sales Convictions

{¶123} The majority takes too narrow of an approach in construing the definitions of "dealer" and "salesperson" in R.C. 1707.01, which are broad enough to encompass the activities of Willan and Mohler in selling Evergreen Investment debt securities. The obvious legislative intent of the state's licensing requirements was to protect the investing public. Due to the lack of state oversight in this case, investors lost hundreds of thousands of dollars in a bad investment, without ever being adequately advised of its high risk.

{¶124} Mohler conceded that he had absolutely no training or experience in the area of securities sales or financial investment. He further testified that he did not advise investors about the high risk of these securities, nor did he assure that investors read the explanations of risk set forth in the offering circular. Willan paid him a six-figure income to serve a clerical role by assisting investors in obtaining and completing the necessary paperwork to purchase the debt certificates. Because Willan paid him on a commission basis, however, Mohler was encouraged to bring in a high volume of sales and did, in fact, raise millions of dollars for Willan's Evergreen Investment. Although these securities sales funded the growth of Willan's business with many investors' life savings, Mohler had not been trained to advise them or ensure that they read the offering circular, nor were his activities overseen by state regulators.

### Second Mortgage Convictions

{¶125} Willan's second mortgage business did not fall outside the state's licensing requirements for second mortgage lenders simply because he did not actually advance money to the buyers of Evergreen's rehabbed homes. Aside from lacking an actual advancement of cash, these transactions had the same effect as second mortgage loans. Willan advanced homes to buyers who had not yet paid the full purchase price; he allowed them to pay the balance due over time, at a significant rate of interest; and he encumbered their homes with a second mortgage. The fact that there was no technical exchange of money was inconsequential to the legal effect of these transactions.

### Small Loan Convictions

{¶126} I would not analyze the level of culpability required for a violation of R.C. 1321.02 because Willan conceded at trial and on appeal that this is a strict liability offense. Moreover, I am not persuaded by the merits of the majority's strict liability analysis.

### Securities Registration Convictions

{¶127} I would affirm Willan's two convictions of making false representations in the registration of the Evergreen Investment debt securities. Because he was required to file the Evergreen Investment offering circular for approval by the Division of Securities when he registered each offering of debt securities, all representations in the offering circular were material and relevant to the registration process, including his false representation that no commissions would be paid in connection with the sale of the securities.

### Theft Convictions

{¶128} Although the state focused on the offering circular's misrepresentation about the payment of commissions as one act of deception by Willan, it also focused on the his

representation on the back of each certificate, a boldfaced "GUARANTY OF PAYMENT," which explained that Evergreen Homes "unconditionally guarantees" payment of the principal and interest due on each certificate. Although the 20-page offering circular included further explanations that the certificates were not insured or federally guaranteed, but were dependent upon the financial liquidity of the Evergreen companies, many of the investors testified that they did not remember seeing or did not read the offering circular. Because Mohler was not a trained financial advisor, he did not fully explain the risk to each investor, nor did he assure that each read the offering circular before purchasing certificates. The state's evidence was sufficient to establish that at least some of the investors, several of whom were elderly, were deceived into investing thousands of dollars in Evergreen Investment debt certificates that were far more risky than they had been led to believe and, as a result, they lost their investments.

{¶129} For these reasons, I believe that all of Willan's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence and would overrule his first assignment of error. I concur in the majority's disposition of Willan's sixth assignment of error and would overrule his remaining assignments of error.

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## 2010 Ohio Revised Code

### Title [29] XXIX CRIMES - PROCEDURE

### Chapter 2929: PENALTIES AND SENTENCING

### 2929.14 Definite prison terms.

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#### 2929.14 Definite prison terms.

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

- (1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.
- (2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.
- (3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.
- (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.
- (5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

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

- (1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.
- (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in section 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest

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likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

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

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

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

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

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

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

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

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prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 that involves a deadly weapon that is a firearm other than a dangerous ordnance, section 2923.16, or section 2923.121 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

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

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

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

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

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

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

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

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

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

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

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

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

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

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

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

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

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

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

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

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the

offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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

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

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

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

- (i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;
- (ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised Code;
- (iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised.

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

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

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

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

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

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

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

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in

which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(J)(1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a

school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

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

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

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

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

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

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

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

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the

offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

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

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

Effective Date: 04-08-2004; 06-01-2004; 09-23-2004; 04-29-2005; 07-11-2006; 08-03-2006; 01-02-2007; 01-04-2007; 04-04-2007; 2007 SB10 01-01-2008; 2008 SB184 09-09-2008; 2008 SB220 09-30-2008; 2008 HB280 04-07-2009; 2008 HB130 04-07-2009

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## **2929.14 Definite prison terms.**

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

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

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

(3)(a) For a felony of the third degree that is a violation of section 2903.06, 2903.08, 2907.03, 2907.04, or 2907.05 of the Revised Code or that is a violation of section 2911.02 or 2911.12 of the Revised Code if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

(b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

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

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

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

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

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

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

(b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (B)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (B)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (B)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (B)(1)(a) or (C) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (B)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 that involves a deadly weapon that is a firearm other than a dangerous ordnance, section 2923.16, or section 2923.121 of the Revised Code. The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

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

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

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer, as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (B)(1)(a) or © of this section relative to the same offense.

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

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

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

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

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

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section

2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

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

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

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

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

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

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

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

(3) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to

sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that, subject to divisions© to (I) of section 2967.19 of the Revised Code, cannot be reduced pursuant to section 2929.20, section 2967.19, or any other provision of Chapter 2967. or 5120. of the Revised Code.

## 2923.32 Engaging in pattern of corrupt activity.

(A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

(2) No person, through a pattern of corrupt activity or the collection of an unlawful debt, shall acquire or maintain, directly or indirectly, any interest in, or control of, any enterprise or real property.

(3) No person, who knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt, shall use or invest, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

A purchase of securities on the open market with intent to make an investment, without intent to control or participate in the control of the issuer, and without intent to assist another to do so is not a violation of this division, if the securities of the issuer held after the purchase by the purchaser, the members of the purchaser's immediate family, and the purchaser's or the immediate family members' accomplices in any pattern of corrupt activity or the collection of an unlawful debt do not aggregate one per cent of the outstanding securities of any one class of the issuer and do not confer, in law or in fact, the power to elect one or more directors of the issuer.

(B)(1) Whoever violates this section is guilty of engaging in a pattern of corrupt activity. Except as otherwise provided in this division, engaging in corrupt activity is a felony of the second degree. Except as otherwise provided in this division, if at least one of the incidents of corrupt activity is a felony of the first, second, or third degree, aggravated murder, or murder, if at least one of the incidents was a felony under the law of this state that was committed prior to July 1, 1996, and that would constitute a felony of the first, second, or third degree, aggravated murder, or murder if committed on or after July 1, 1996, or if at least one of the incidents of corrupt activity is a felony under the law of the United States or of another state that, if committed in this state on or after July 1, 1996, would constitute a felony of the first, second, or third degree, aggravated murder, or murder under the law of this state, engaging in a pattern of corrupt activity is a felony of the first degree. If the offender also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, engaging in a pattern of corrupt activity is a felony of the first degree, and the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code. Notwithstanding any other provision of law, a person may be convicted of violating the provisions of this section as well as of a conspiracy to violate one or more of those provisions under section 2923.01 of the Revised Code.

(2) Notwithstanding the financial sanctions authorized by section 2929.18 of the Revised Code, the court may do all of the following with respect to any person who derives pecuniary value or causes property damage, personal injury other than pain and suffering, or other loss through or by the violation of this section:

(a) In lieu of the fine authorized by that section, impose a fine not exceeding the greater of three times the gross value gained or three times the gross loss caused and order the clerk of the court to

pay the fine into the state treasury to the credit of the corrupt activity investigation and prosecution fund, which is hereby created;

(b) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay court costs;

(c) In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay to the state, municipal, or county law enforcement agencies that handled the investigation and prosecution the costs of investigation and prosecution that are reasonably incurred.

The court shall hold a hearing to determine the amount of fine, court costs, and other costs to be imposed under this division.

(3) In addition to any other penalty or disposition authorized or required by law, the court shall order any person who is convicted of or pleads guilty to a violation of this section or who is adjudicated delinquent by reason of a violation of this section to criminally forfeit to the state under Chapter 2981. of the Revised Code any personal or real property in which the person has an interest and that was used in the course of or intended for use in the course of a violation of this section, or that was derived from or realized through conduct in violation of this section, including any property constituting an interest in, means of control over, or influence over the enterprise involved in the violation and any property constituting proceeds derived from the violation, including all of the following:

(a) Any position, office, appointment, tenure, commission, or employment contract of any kind acquired or maintained by the person in violation of this section, through which the person, in violation of this section, conducted or participated in the conduct of an enterprise, or that afforded the person a source of influence or control over an enterprise that the person exercised in violation of this section;

(b) Any compensation, right, or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in division (B)(3)(a) of this section that accrued to the person in violation of this section during the period of the pattern of corrupt activity;

(c) Any interest in, security of, claim against, or property or contractual right affording the person a source of influence or control over the affairs of an enterprise that the person exercised in violation of this section;

(d) Any amount payable or paid under any contract for goods or services that was awarded or performed in violation of this section.

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

Effective Date: 01-01-2002; 07-01-2007; 2008 HB280 04-07-2009

## **2923.31 Corrupt activity definitions.**

As used in sections 2923.31 to 2923.36 of the Revised Code:

(A) "Beneficial interest" means any of the following:

- (1) The interest of a person as a beneficiary under a trust in which the trustee holds title to personal or real property;
- (2) The interest of a person as a beneficiary under any other trust arrangement under which any other person holds title to personal or real property for the benefit of such person;
- (3) The interest of a person under any other form of express fiduciary arrangement under which any other person holds title to personal or real property for the benefit of such person.

"Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general or limited partnership.

(B) "Costs of investigation and prosecution" and "costs of investigation and litigation" mean all of the costs incurred by the state or a county or municipal corporation under sections 2923.31 to 2923.36 of the Revised Code in the prosecution and investigation of any criminal action or in the litigation and investigation of any civil action, and includes, but is not limited to, the costs of resources and personnel.

(C) "Enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. "Enterprise" includes illicit as well as licit enterprises.

(D) "Innocent person" includes any bona fide purchaser of property that is allegedly involved in a violation of section 2923.32 of the Revised Code, including any person who establishes a valid claim to or interest in the property in accordance with division (E) of section 2981.04 of the Revised Code, and any victim of an alleged violation of that section or of any underlying offense involved in an alleged violation of that section.

(E) "Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

At least one of the incidents forming the pattern shall occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity.

For the purposes of the criminal penalties that may be imposed pursuant to section 2923.32 of the Revised Code, at least one of the incidents forming the pattern shall constitute a felony under the laws of this state in existence at the time it was committed or, if committed in violation of the laws of the United States or of any other state, shall constitute a felony under the law of the United States or the other state and would be a criminal offense under the law of this state if committed in this state.

(F) "Pecuniary value" means money, a negotiable instrument, a commercial interest, or anything of value, as defined in section 1.03 of the Revised Code, or any other property or service that has a value in excess of one hundred dollars.

(G) "Person" means any person, as defined in section 1.59 of the Revised Code, and any governmental officer, employee, or entity.

(H) "Personal property" means any personal property, any interest in personal property, or any right, including, but not limited to, bank accounts, debts, corporate stocks, patents, or copyrights. Personal property and any beneficial interest in personal property are deemed to be located where the trustee of the property, the personal property, or the instrument evidencing the right is located.

(I) "Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any of the following:

(1) Conduct defined as "racketeering activity" under the "Organized Crime Control Act of 1970," 84 Stat. 941, 18 U.S.C. 1961(1)(B), (1)(C), (1)(D), and (1)(E), as amended;

(2) Conduct constituting any of the following:

(a) A violation of section 1315.55, 1322.02, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2905.01, 2905.02, 2905.11, 2905.22, 2905.32 as specified in division (I)(2)(g) of this section, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.22, 2909.23, 2909.24, 2909.26, 2909.27, 2909.28, 2909.29, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2913.05, 2913.06, 2921.02, 2921.03, 2921.04, 2921.11, 2921.12, 2921.32, 2921.41, 2921.42, 2921.43, 2923.12, or 2923.17; division (F)(1)(a), (b), or (c) of section 1315.53; division (A)(1) or (2) of section 1707.042; division (B), (C)(4), (D), (E), or (F) of section 1707.44; division (A)(1) or (2) of section 2923.20; division (E) or (G) of section 3772.99; division (J)(1) of section 4712.02; section 4719.02, 4719.05, or 4719.06; division (c), (D), or (E) of section 4719.07; section 4719.08; or division (A) of section 4719.09 of the Revised Code.

(b) Any violation of section 3769.11, 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, or any violation of section 2915.05 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to that date.

(c) Any violation of section 2907.21, 2907.22, 2907.31, 2913.02, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.42, 2913.47, 2913.51, 2915.03, 2925.03, 2925.04, 2925.05, or 2925.37 of the Revised Code, any violation of section 2925.11 of the Revised Code that is a felony of the first, second, third, or fourth degree and that occurs on or after July 1, 1996, any violation of section 2915.02 of the Revised Code that occurred prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would not have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, any violation of section 2915.06 of the Revised Code as it existed prior to July 1, 1996, or any violation of division (B) of section 2915.05 of the Revised Code as it exists on and after July 1, 1996, when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and that is involved in the violation, or the value of the

contraband or other property illegally possessed, sold, or purchased in the violation exceeds one thousand dollars, or any combination of violations described in division (I)(2)(c) of this section when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

(d) Any violation of section 5743.112 of the Revised Code when the amount of unpaid tax exceeds one hundred dollars;

(e) Any violation or combination of violations of section 2907.32 of the Revised Code involving any material or performance containing a display of bestiality or of sexual conduct, as defined in section 2907.01 of the Revised Code, that is explicit and depicted with clearly visible penetration of the genitals or clearly visible penetration by the penis of any orifice when the total proceeds of the violation or combination of violations, the payments made in the violation or combination of violations, or the value of the contraband or other property illegally possessed, sold, or purchased in the violation or combination of violations exceeds one thousand dollars;

(f) Any combination of violations described in division (I)(2)(c) of this section and violations of section 2907.32 of the Revised Code involving any material or performance containing a display of bestiality or of sexual conduct, as defined in section 2907.01 of the Revised Code, that is explicit and depicted with clearly visible penetration of the genitals or clearly visible penetration by the penis of any orifice when the total proceeds of the combination of violations, payments made in the combination of violations, amount of the claims for payment or for other benefits that is false or deceptive and that is involved in the combination of violations, or value of the contraband or other property illegally possessed, sold, or purchased in the combination of violations exceeds one thousand dollars;

(g) Any violation of section 2905.32 of the Revised Code to the extent the violation is not based solely on the same conduct that constitutes corrupt activity pursuant to division (I)(2)(c) of this section due to the conduct being in violation of section 2907.21 of the Revised Code.

(3) Conduct constituting a violation of any law of any state other than this state that is substantially similar to the conduct described in division (I)(2) of this section, provided the defendant was convicted of the conduct in a criminal proceeding in the other state;

(4) Animal or ecological terrorism;

(5)(a) Conduct constituting any of the following:

(i) Organized retail theft;

(ii) Conduct that constitutes one or more violations of any law of any state other than this state, that is substantially similar to organized retail theft, and that if committed in this state would be organized retail theft, if the defendant was convicted of or pleaded guilty to the conduct in a criminal proceeding in the other state.

(b) By enacting division (I)(5)(a) of this section, it is the intent of the general assembly to add organized retail theft and the conduct described in division (I)(5)(a)(ii) of this section as conduct constituting corrupt activity. The enactment of division (I)(5)(a) of this section and the addition by division (I)(5)(a) of this section of organized retail theft and the conduct described in division (I)(5)(a)(ii) of this section as conduct constituting corrupt activity does not limit or preclude, and shall not be

construed as limiting or precluding, any prosecution for a violation of section 2923.32 of the Revised Code that is based on one or more violations of section 2913.02 or 2913.51 of the Revised Code, one or more similar offenses under the laws of this state or any other state, or any combination of any of those violations or similar offenses, even though the conduct constituting the basis for those violations or offenses could be construed as also constituting organized retail theft or conduct of the type described in division (I)(5)(a)(ii) of this section.

(J) "Real property" means any real property or any interest in real property, including, but not limited to, any lease of, or mortgage upon, real property. Real property and any beneficial interest in it is deemed to be located where the real property is located.

(K) "Trustee" means any of the following:

(1) Any person acting as trustee under a trust in which the trustee holds title to personal or real property;

(2) Any person who holds title to personal or real property for which any other person has a beneficial interest;

(3) Any successor trustee.

"Trustee" does not include an assignee or trustee for an insolvent debtor or an executor, administrator, administrator with the will annexed, testamentary trustee, guardian, or committee, appointed by, under the control of, or accountable to a court.

(L) "Unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted in violation of any federal or state law relating to the business of gambling activity or relating to the business of lending money at an usurious rate unless the creditor proves, by a preponderance of the evidence, that the usurious rate was not intentionally set and that it resulted from a good faith error by the creditor, notwithstanding the maintenance of procedures that were adopted by the creditor to avoid an error of that nature.

(M) "Animal activity" means any activity that involves the use of animals or animal parts, including, but not limited to, hunting, fishing, trapping, traveling, camping, the production, preparation, or processing of food or food products, clothing or garment manufacturing, medical research, other research, entertainment, recreation, agriculture, biotechnology, or service activity that involves the use of animals or animal parts.

(N) "Animal facility" means a vehicle, building, structure, nature preserve, or other premises in which an animal is lawfully kept, handled, housed, exhibited, bred, or offered for sale, including, but not limited to, a zoo, rodeo, circus, amusement park, hunting preserve, or premises in which a horse or dog event is held.

(O) "Animal or ecological terrorism" means the commission of any felony that involves causing or creating a substantial risk of physical harm to any property of another, the use of a deadly weapon or dangerous ordnance, or purposely, knowingly, or recklessly causing serious physical harm to property and that involves an intent to obstruct, impede, or deter any person from participating in a lawful animal activity, from mining, foresting, harvesting, gathering, or processing natural resources, or from being lawfully present in or on an animal facility or research facility.

(P) "Research facility" means a place, laboratory, institution, medical care facility, government facility, or public or private educational institution in which a scientific test, experiment, or investigation involving the use of animals or other living organisms is lawfully carried out, conducted, or attempted.

(Q) "Organized retail theft" means the theft of retail property with a retail value of one thousand dollars or more from one or more retail establishments with the intent to sell, deliver, or transfer that property to a retail property fence.

(R) "Retail property" means any tangible personal property displayed, held, stored, or offered for sale in or by a retail establishment.

(S) "Retail property fence" means a person who possesses, procures, receives, or conceals retail property that was represented to the person as being stolen or that the person knows or believes to be stolen.

(T) "Retail value" means the full retail value of the retail property. In determining whether the retail value of retail property equals or exceeds one thousand dollars, the value of all retail property stolen from the retail establishment or retail establishments by the same person or persons within any one-hundred-eighty-day period shall be aggregated.

Amended by 129th General Assembly File No. 142, HB 262, § 1, eff. 6/27/2012.

Amended by 129th General Assembly File No. 126, HB 386, § 1, eff. 6/11/2012.

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

Amended by 128th General Assembly File No. 58, SB 235, § 1, eff. 3/24/2011.

Effective Date: 05-15-2002; 04-14-2006; 07-01-2007; 2008 SB320 04-07-2009

See 129th General Assembly File No. 29, HB 86, §4.

## **1315.55 Additional prohibited activities.**

(A)(1) No person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the purpose of committing or furthering the commission of corrupt activity.

(2) No person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the intent to conceal or disguise the nature, location, source, ownership, or control of the property or the intent to avoid a transaction reporting requirement under section 1315.53 of the Revised Code or federal law.

(3) No person shall conduct or attempt to conduct a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity.

(4) No person shall conduct or structure or attempt to conduct or structure a transaction that involves the proceeds of corrupt activity that is of a value greater than ten thousand dollars if the person knows or has reasonable cause to know that the transaction involves the proceeds of corrupt activity.

(5) No person shall conduct or attempt to conduct a transaction that involves what has been represented to the person by a law enforcement officer or another person at the direction of or with the approval of a law enforcement officer to be the proceeds of corrupt activity or property used to conduct or facilitate corrupt activity with the intent to promote, manage, establish, carry on, or facilitate promotion, management, establishment, or carrying on of corrupt activity, to conceal or disguise the nature, location, source, ownership, or control of the property believed to be the proceeds of corrupt activity, or to avoid a transaction reporting requirement under section 1315.53 of the Revised Code or federal law.

(B) In addition to the criminal sanctions imposed under section 1315.99 of the Revised Code, the sentencing court may impose upon a person who violates division (A) of this section an additional fine of three times the value of the property involved in the transaction. The fine shall be paid to the state treasury to the credit of the general revenue fund.

(C) For the purposes of division (A) of this section, a person shall be considered to know or have reasonable cause to know that proceeds are from corrupt activity if either of the following apply:

(1) The person knows or has reasonable cause to know that the proceeds are from some form of activity that constitutes corrupt activity, though not necessarily which form of corrupt activity;

(2) As a part of a covert investigation, a law enforcement officer in his undercover capacity represents to the person that the proceeds are from some form of activity that constitutes corrupt activity.

Effective Date: 09-19-1996

## 2923.01 Conspiracy.

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder, murder, kidnapping, abduction, compelling prostitution, promoting prostitution, trafficking in persons, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespassing in a habitation when a person is present or likely to be present, engaging in a pattern of corrupt activity, corrupting another with drugs, a felony drug trafficking, manufacturing, processing, or possession offense, theft of drugs, or illegal processing of drug documents, the commission of a felony offense of unauthorized use of a vehicle, illegally transmitting multiple commercial electronic mail messages or unauthorized access of a computer in violation of section 2923.421 of the Revised Code, or the commission of a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;

(2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses.

(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed.

(C) When the offender knows or has reasonable cause to believe that a person with whom the offender conspires also has conspired or is conspiring with another to commit the same offense, the offender is guilty of conspiring with that other person, even though the other person's identity may be unknown to the offender.

(D) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the conspiracy was impossible under the circumstances.

(E) A conspiracy terminates when the offense or offenses that are its objects are committed or when it is abandoned by all conspirators. In the absence of abandonment, it is no defense to a charge under this section that no offense that was the object of the conspiracy was committed.

(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when the offenses are the object of the same agreement or continuous conspiratorial relationship.

(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit the specific offense, the person shall not be convicted of conspiracy involving the same offense.

(H)(1) No person shall be convicted of conspiracy upon the testimony of a person with whom the defendant conspired, unsupported by other evidence.

(2) If a person with whom the defendant allegedly has conspired testifies against the defendant in a case in which the defendant is charged with conspiracy and if the testimony is supported by other evidence, the court, when it charges the jury, shall state substantially the following:

## 4719.08 Prohibited acts.

No telephone solicitor shall do any of the following:

- (A) Obtain a certificate of registration or registration renewal under section 4719.03 of the Revised Code through any false or fraudulent representation or make any material misrepresentation in any registration or registration renewal application;
- (B) Fail to maintain a valid certificate of registration or registration renewal;
- (C) Advertise that one is registered as a telephone solicitor or represent that registration as a telephone solicitor constitutes approval or endorsement by any government or governmental office or agency;
- (D) Provide inaccurate or incomplete information to the attorney general when making an application for a certificate or certificate renewal;
- (E) Misrepresent that a person is registered or that the person has a valid certificate number;
- (F) Misrepresent, directly or by implication, any of the following information:
  - (1) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a telephone solicitation;
  - (2) A material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a telephone solicitation;
  - (3) A material aspect of the performance, efficacy, nature, or characteristics of goods or services that are the subject of a telephone solicitation;
  - (4) A material aspect of the nature or terms of the telephone solicitor's refund, cancellation, exchange, or repurchase policies;
  - (5) A material aspect of a prize promotion, including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment of any kind is required to win a prize or to participate in a prize promotion;
  - (6) A material aspect of an investment opportunity, including, but not limited to, risk, liquidity, earnings potential, or profitability;
  - (7) The telephone solicitor's affiliation with, or endorsement by, any government or third-party organization.
- (G) Make a false or misleading statement to induce a purchaser to pay for goods or services;
- (H) Fail to notify the attorney general within fifteen days if, in a court of competent jurisdiction of this state or any other state or of the United States, the telephone solicitor is convicted of, pleads guilty to, or enters a plea of no contest for a felony, engaging in a pattern of corrupt activity, racketeering, a violation of federal or state securities law, or a theft offense as defined in section 2913.01 of the Revised Code or in similar law of any other state or of the United States;

(I) Intentionally block or intentionally authorize or cause to be blocked the disclosure of the telephone number from which a telephone solicitation is made.

Effective Date: 04-09-2003

## **2903.01 Aggravated murder.**

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

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

Effective Date: 05-15-2002

## **2913.51 Receiving stolen property.**

(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) It is not a defense to a charge of receiving stolen property in violation of this section that the property was obtained by means other than through the commission of a theft offense if the property was explicitly represented to the accused person as being obtained through the commission of a theft offense.

(C) Whoever violates this section is guilty of receiving stolen property. Except as otherwise provided in this division, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is one thousand dollars or more and is less than seven thousand five hundred dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, receiving stolen property is a felony of the fifth degree. If the property involved is a motor vehicle, as defined in section 4501.01 of the Revised Code, if the property involved is a dangerous drug, as defined in section 4729.01 of the Revised Code, if the value of the property involved is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, or if the property involved is a firearm or dangerous ordnance, as defined in section 2923.11 of the Revised Code, receiving stolen property is a felony of the fourth degree. If the value of the property involved is one hundred fifty thousand dollars or more, receiving stolen property is a felony of the third degree.

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

Effective Date: 10-29-1999

See 129th General Assembly File No. 29, HB 86, §4.

## **2929.13 Sanction imposed by degree of felony.**

(A) Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code.

If the offender is eligible to be sentenced to community control sanctions, the court shall consider the appropriateness of imposing a financial sanction pursuant to section 2929.18 of the Revised Code or a sanction of community service pursuant to section 2929.17 of the Revised Code as the sole sanction for the offense. Except as otherwise provided in this division, if the court is required to impose a mandatory prison term for the offense for which sentence is being imposed, the court also shall impose any financial sanction pursuant to section 2929.18 of the Revised Code that is required for the offense and may impose any other financial sanction pursuant to that section but may not impose any additional sanction or combination of sanctions under section 2929.16 or 2929.17 of the Revised Code.

If the offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, in addition to the mandatory term of local incarceration or the mandatory prison term required for the offense by division (G)(1) or (2) of this section, the court shall impose upon the offender a mandatory fine in accordance with division (B)(3) of section 2929.18 of the Revised Code and may impose whichever of the following is applicable:

(1) For a fourth degree felony OVI offense for which sentence is imposed under division (G)(1) of this section, an additional community control sanction or combination of community control sanctions under section 2929.16 or 2929.17 of the Revised Code. If the court imposes upon the offender a community control sanction and the offender violates any condition of the community control sanction, the court may take any action prescribed in division (B) of section 2929.15 of the Revised Code relative to the offender, including imposing a prison term on the offender pursuant to that division.

(2) For a third or fourth degree felony OVI offense for which sentence is imposed under division (G)(2) of this section, an additional prison term as described in division (B)(4) of section 2929.14 of the Revised Code or a community control sanction as described in division (G)(2) of this section.

(B)(1)(a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense or to an offense of violence that is a misdemeanor and that the offender committed within two years prior to the offense for which sentence is being imposed.

(ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.

(iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

(b) The court has discretion to impose a prison term upon an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence if any of the following apply:

(i) The offender committed the offense while having a firearm on or about the offender's person or under the offender's control.

(ii) The offender caused physical harm to another person while committing the offense.

(iii) The offender violated a term of the conditions of bond as set by the court.

(iv) The court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, and the department, within the forty-five-day period specified in that division, did not provide the court with the name of, contact information for, and program details of any community control sanction of at least one year's duration that is available for persons sentenced by the court.

(c) If a court that is sentencing an offender who is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence believes that no community control sanctions are available for its use that, if imposed on the offender, will adequately fulfill the overriding principles and purposes of sentencing, the court shall contact the department of rehabilitation and correction and ask the department to provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court. Not later than forty-five days after receipt of a request from a court under this division, the department shall provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court, if any. Upon making a request under this division that relates to a particular offender, a court shall defer sentencing of that offender until it receives from the department the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court or for forty-five days, whichever is the earlier.

If the department provides the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty-five-day period specified in this division, the court shall impose upon the offender a community control sanction under division (B)(1)(a) of this section, subject to divisions (B)(1)(b)(i) and (ii) of this section. If the department does not provide the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court within the forty-five-day period specified in this division, the court may impose upon the offender a prison term under division (B)(1)(b)(iii) of this section.

(d) A sentencing court may impose an additional penalty under division (B) of section 2929.15 of the Revised Code upon an offender sentenced to a community control sanction under division (B)(1)(a) of this section if the offender violates the conditions of the community control sanction, violates a law, or leaves the state without the permission of the court or the offender's probation officer.

(2) If division (B)(1) of this section does not apply, except as provided in division (B)(3), (E), (F), or (G) of this section, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court shall determine whether any of the following apply:

(a) In committing the offense, the offender caused physical harm to a person.

(b) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person with a deadly weapon.

(c) In committing the offense, the offender attempted to cause or made an actual threat of physical harm to a person, and the offender previously was convicted of an offense that caused physical harm to a person.

(d) The offender held a public office or position of trust and the offense related to that office or position; the offender's position obliged the offender to prevent the offense or to bring those committing it to justice; or the offender's professional reputation or position facilitated the offense or was likely to influence the future conduct of others.

(e) The offender committed the offense for hire or as part of an organized criminal activity.

(f) The offense is a sex offense that is a fourth or fifth degree felony violation of section 2907.03, 2907.04, 2907.05, 2907.22, 2907.31, 2907.321, 2907.322, 2907.323, or 2907.34 of the Revised Code.

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

(h) The offender committed the offense while under a community control sanction, while on probation, or while released from custody on a bond or personal recognizance.

(i) The offender committed the offense while in possession of a firearm.

(3)(a) If the court makes a finding described in division (B)(2)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a prison term is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code and finds that the offender is not amenable to an available community control sanction, the court shall impose a prison term upon the offender.

(b) Except as provided in division (E), (F), or (G) of this section, if the court does not make a finding described in division (B)(2)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and if the court, after considering the factors set forth in section 2929.12 of the Revised Code, finds that a community control sanction or combination of community control sanctions is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code, the court shall impose a community control sanction or combination of community control sanctions upon the offender.

(C) Except as provided in division (D), (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the third degree or a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to this division for purposes of sentencing, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

(D)(1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being

applicable, and for a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code, the sentencing court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

(a) A community control sanction or a combination of community control sanctions would adequately punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a lesser likelihood of recidivism outweigh the applicable factors under that section indicating a greater likelihood of recidivism.

(b) A community control sanction or a combination of community control sanctions would not demean the seriousness of the offense, because one or more factors under section 2929.12 of the Revised Code that indicate that the offender's conduct was less serious than conduct normally constituting the offense are applicable, and they outweigh the applicable factors under that section that indicate that the offender's conduct was more serious than conduct normally constituting the offense.

(E)(1) Except as provided in division (F) of this section, for any drug offense that is a violation of any provision of Chapter 2925. of the Revised Code and that is a felony of the third, fourth, or fifth degree, the applicability of a presumption under division (D) of this section in favor of a prison term or of division (B) or © of this section in determining whether to impose a prison term for the offense shall be determined as specified in section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, or 2925.37 of the Revised Code, whichever is applicable regarding the violation.

(2) If an offender who was convicted of or pleaded guilty to a felony violates the conditions of a community control sanction imposed for the offense solely by reason of producing positive results on a drug test, the court, as punishment for the violation of the sanction, shall not order that the offender be imprisoned unless the court determines on the record either of the following:

(a) The offender had been ordered as a sanction for the felony to participate in a drug treatment program, in a drug education program, or in narcotics anonymous or a similar program, and the offender continued to use illegal drugs after a reasonable period of participation in the program.

(b) The imprisonment of the offender for the violation is consistent with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code.

(3) A court that sentences an offender for a drug abuse offense that is a felony of the third, fourth, or fifth degree may require that the offender be assessed by a properly credentialed professional within a specified period of time. The court shall require the professional to file a written assessment of the offender with the court. If the offender is eligible for a community control sanction and after considering the written assessment, the court may impose a community control sanction that includes treatment and recovery support services authorized by

section 3793.02 of the Revised Code. If the court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after considering the assessment and recommendation of treatment and recovery support services providers.

(F) Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and except as specifically provided in section 2929.20, divisions (A) to (I) of section 2967.19, or section 2967.191 of the Revised Code or when parole is authorized for the offense under section 2967.13 of the Revised Code shall not reduce the term or terms pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for any of the following offenses:

(1) Aggravated murder when death is not imposed or murder;

(2) Any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape if, had the offender completed the rape that was attempted, the offender would have been guilty of a violation of division (A)(1)(b) of section 2907.02 of the Revised Code and would be sentenced under section 2971.03 of the Revised Code;

(3) Gross sexual imposition or sexual battery, if the victim is less than thirteen years of age and if any of the following applies:

(a) Regarding gross sexual imposition, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and the victim of the previous offense was less than thirteen years of age;

(b) Regarding gross sexual imposition, the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation.

(c) Regarding sexual battery, either of the following applies:

(i) The offense was committed prior to August 3, 2006, the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(ii) The offense was committed on or after August 3, 2006.

(4) A felony violation of section 2903.04, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, 2905.32, or 2907.07 of the Revised Code if the section requires the imposition of a prison term;

(5) A first, second, or third degree felony drug offense for which section 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99, or 4729.99 of the Revised Code, whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses;

(7) Any offense that is a third degree felony and either is a violation of section 2903.04 of the Revised Code or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

(a) Aggravated murder, murder, involuntary manslaughter, rape, felonious sexual penetration as it existed under section 2907.12 of the Revised Code prior to September 3, 1996, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense listed in division (F)(7)(a) of this section that resulted in the death of a person or in physical harm to a person.

(8) Any offense, other than a violation of section 2923.12 of the Revised Code, that is a felony, if the offender had a firearm on or about the offender's person or under the offender's control while committing the felony, with respect to a portion of the sentence imposed pursuant to division (B)(1)(a) of section 2929.14 of the Revised Code for having the firearm;

(9) Any offense of violence that is a felony, if the offender wore or carried body armor while committing the felony offense of violence, with respect to the portion of the sentence imposed pursuant to division (B)(1)(d) of section 2929.14 of the Revised Code for wearing or carrying the body armor;

(10) Corrupt activity in violation of section 2923.32 of the Revised Code when the most serious offense in the pattern of corrupt activity that is the basis of the offense is a felony of the first degree;

## **2929.14 Definite prison terms.**

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

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