ORIGINAL

THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**CASE NO. 2012-0216**
Plaintiff/Appellee/ Cross-Appellant	:	**ON APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS, NINTH DISTRICT**
vs.	:	
DAVID WILLAN	:	
Defendant/Appellant/ Cross-Appellee	:	**COURT OF APPEALS CASE NO.: CA-24894**

BRIEF OF CROSS-APPELLEE

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I. STATEMENT OF THE CASE

In November 2007, the Summit County Prosecutor's Office handed down a one-hundred and forty seven count secret indictment against Cross-Appellee David Willan and many co-defendants, alleging a RICO violation, False Representation in the Registration of Securities, Securities Fraud, Theft, Misrepresentations in the Sale of Securities, and Money Laundering among many other charges. The State moved for and was granted a severance and Mr. Willan was tried in two separate jury trials. Mr. Willan was found guilty of all charges in his first trial, including Engaging in a Pattern of Corrupt Activity and False Representation in the Registering of Securities. In the second jury, Mr. Willan was only found guilty of the charges for Tampering with Records and Falsification. On June 29, 2009, Mr. Willan was sentenced to a total of sixteen (16) years in prison.(Journal Entry, Apx. 1).

On December 21, 2011, the Court of Appeals for the Ninth District ("COA") reversed 90 percent of Mr. Willan's convictions based entirely upon the insufficiency of the evidence. 12/21/11 Decision and Journal Entry ("Decision"). The Decision affirmed six of Mr. Willan's convictions. Relevant to this Court's consideration is the affirmance (on a difference basis than argued by the State or presented to the jury in the Trial Court) of three false representation in the registration of securities in violation of O.R.C. § 1707.44(B)(1). Based upon the three false representation in the registration of securities, the COA also upheld Mr. Willan's RICO conviction.

Relevant to the case before this Court, the Court of Appeals also unanimously determined that the Trial Court incorrectly held that O.R.C. § 2929.14(D)(3)(a) automatically imposed 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." This was the only unanimous portion of the COA's Decision. See Carr, J.: concurring only "in the majority's disposition of Willan's

sixth assignment." *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 105. The COA's precise holding was:

> The former ORC § 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 ORC § 2929.14(D)(3)(a). Further, we do not discern any legislative intent to do so.
> *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 129.

Mr. Willan appealed to this Court and the State cross-appealed. The Court initially declined to take jurisdiction on May 23, 2012. Upon a Motion for Reconsideration, this Court accepted Cross-Appellant State of Ohio's, Proposition of Law No. 1: "R.C. 2929(D)(3)(a) establishes a mandatory 10-year sentence where a defendant is found guilty of a corrupt activity where the predicate crime is a felony of the first degree."

II. STATEMENT OF THE FACTS

A. History of the Evergreen Companies

Mr. David Willan began the business of buying, rehabbing and renting and/or selling homes with a partner under the corporate name of Summit Redevelopment. Mr. Willan eventually bought out his partner and changed the name of the corporation to Evergreen Homes. Mr. Willan also formed Evergreen Builders to build and sell new homes. In 2002, with major lenders opening the market to subprime lenders, the business began to grow. Neither Evergreen Homes nor Evergreen Builders were in the mortgage business. Typically, the buyers for Evergreen homes would contract with lenders who would finance 80% of the purchase price of an Evergreen home. (Transcript of the Trial, Volume ("Tr. Vol.") 11, 1443, 1444.[1]) Mr. Willan

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[1] All transcripts referred to throughout the brief are from Mr. Willan's first trial unless specifically noted by an indication that it is the second trial or from a hearing prior to trial.

learned that lenders would allow sellers to defer payment of the remaining 20% and instead permit the seller to take a promise to pay in the future. (Id. at 1443.)

Buyers paid Evergreen 20% over time, thus Evergreen's profit from its home sale came over time or when the buyer refinanced. The notes receivable for the payments over time became a portion of Evergreen's assets. The problem with the process of deferring payment of 20% of the purchase price was that any profit realized by Evergreen Homes on the sale of the homes came primarily from that 20%. The delaying of profit impeded the cash flow of the company and the ability of the company to continue to buy and rehab homes. (Id. at 1442-1444); *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 2-3. Although the assets continued to grow, Evergreen lacked the needed liquidity for continued building, buying and rehabilitating. Mr. Willan determined that it might be possible to raise money through offering investments in the company. Id. at ¶ 3.

Mr. Willan hired the law firm Roetzel & Andress, LPA, a reputable Ohio firm with offices in several other states, and an experienced partner in its regulatory and finance group. Mr. Willan dealt with Mr. George Sarkis, a partner specializing in the offering of securities and Mr. Fred Leffler. (Tr., Vol. 11, 1436, 1437 and Tr., Vol. 12,. 1682- 1684); *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 3. Mr. Willan hired Roetzel & Andress because of its reputation as an excellent law firm and as a leader in securities law. (Tr., Vol. 11, 1435-1437.) Mr. Willan worked with the attorneys for almost a year to develop a business plan to raise capital for Evergreen. Mr. Willan was concerned about the legal requirements necessary to raising money through investors and was adamant in instructing the attorneys at Roetzel & Andress that he wanted them to make sure he was in complete compliance with all of the laws and regulations regarding the raising of money. (Tr. Vol. 11, 1439, 1440 and Tr., Vol. 12, 1685-1687.) 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. *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 3. In fact, he instructed them to go above and beyond what was legally necessary to make sure the he was in strict compliance. (Tr. Vol. 11, 1440.) Mr. Willan was told that it would be very expensive to ensure such compliance. He agreed to the expense and eventually paid Roetzel & Andress over $300,000.00 for their work on behalf of the Evergreen Companies. (Tr. Vol. 12, 1441.) In addition, at the recommendation of Mr. Sarkis, Mr. Willan hired Mr. David Brockman of the accounting firm Brockman, Coats, Gedelian & Co. to do the financial records and audits to incorporate into the offering circulars. (Tr., Vol. 11, 1477.) Mr. Willan was advised that the costs would be high but hired the firm because of its reputation for honesty and integrity. (Tr., Vol. 11, 1477, 1478.)

To implement this plan Mr. Willan formed Evergreen Investment Corporation. The three firms, Evergreen Homes, Evergreen Builders and Evergreen Investment Corporation are referred to collectively as the Evergreen Companies. 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 carried interest rates around 10% or above. See, generally, (Tr., Vol. 11, 1439-14500); *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 4. Although audited financials were not required by the Ohio Division of Securities ("Division"), Mr. Willan followed his counsel's advice to fully disclose the financial condition of the company. Eventually, Evergreen Homes

secured capital directly through the sale of equity securities. These equity securities represented actual ownership interest in Evergreen Homes. *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 4. Although the State referred to it as Ponzi scheme (June 29, 2009 Sentencing Transcript, 13, 18, 35), the Evergreen Companies offered legitimate products to its consumers. See *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 77 ("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.")

B. Background to investigation into the Evergreen Companies

During May 2006, when the Division conducted an audit of Mr. Willan's companies, it learned that Daniel Mohler was the company liaison to people answering the ad approved by the Department of Securities and was receiving a commission for each sale. (Tr., Vol. 6, 1859-864.) Both Mr. Willan and Mohler openly admitted that Mohler received the commission for each security sale. In fact, Mr. Willan made no attempt to conceal anything about his business during the audit, nor did he attempt to alter the company's 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. Mr. Sarkis, his securities attorney, advised him that the necessity to report whether commissions were paid applied only to outside sales and that it did not refer to any payment made to employees of the Evergreen Companies. (Tr. Vol. 11, 1464-1465, 186-1487.) The Division described Mr. Willan as "fully cooperative" with its investigation. (Tr. Vol. 4, 582, 584.) In furtherance of his cooperation, Mr. Willan agreed to travel to Columbus to give a deposition to the Division. There is no evidence to suggest that Mr. Willan did anything to impair or hinder the Division's investigation. *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 4-5.

When an attorney at the Division first began investigating the Evergreen Companies in March 2006, he discovered that the division had received no investor complaints from any investors in the Evergreen Companies. (Tr. Vol. 4, 580.) Nonetheless, on June 19, 2006, a combined task force of the Summit County Department and State of Ohio investigators raided the offices of the three Evergreen Companies taking all of the computers and all of the hard files of the companies. (Tr. Vol. 14, 1789-1791.) The raid was made pursuant to a search warrant based upon an affidavit with demonstrably false facts and upon a belief regarding the Evergreen Companies financial health that was incorrect. That is, the affidavit claimed that the issuer was insolvent when it was not. (Tr. Vol. 11, 1492; Affidavits in Support of Search Warrants). The departments involved insured that the raid would get maximum publicity by notifying the press before the raid. (Tr. Vol. 3, 67-68.) The raid, coupled with the negative publicity, completely crippled the companies making it impossible to raise money and to sell homes. (Tr. Vol. 11, 1497-1499, Tr., Trial II, Vol. 6, 386-388.) Some of the computers and some of the documents were returned over the next several months but many were never returned. (Tr., Vol. 14, 1813-1817 and Trial II, Vol. 3 65-68.)

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 the 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 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, receivables and unsold homes, the companies lacked the liquidity to refund the investments of everyone at once. (Tr. Vol. 11, 1461); *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 11. There is no question about the solvency of the Evergreen Companies. By the end of 2005, the assets of the company had grown by nearly seven million dollars to $16,095,515. (State's Ex. 57.) In the first half of 2006, Evergreen Investments and Evergreen Homes had a combined net worth sufficient to pay, had the companies been liquidated, all of its debts including all of the debt investors and to distribute a return to the equity investors. (Tr. Vol. 11, 1491, 1492; Vol. 12, 1666.)

C. The Convictions remaining after COA Decision

Trial Court convictions with regard to the debt securities, and over 90 percent of Mr. Willan's other convictions, were vacated because there was insufficient evidence to support the convictions and, thus, judgments of acquittal will be entered. With respect to the sale of its equity securities, Evergreen homes did not register these securities with the Division of Securities, but instead filed forms with the Division to notify the Division the they were exempt from the states registration requirements. (Form D, State's Exs. 33, 34 and 35, p. 1.) The only convictions affirmed by the Court of Appeals related to any products of the Evergreen Companies were the charges based upon the form (Form D) filed with the Division to notify them of the exemption of equity securities offering. There were three separate offerings and, thus, three separate forms and three separate charges, each alleging a violation of R.C. § 1707.44(B)(1). The form was the same for each of the three filings. These convictions remain the only charges that support a further conviction for engaging in a pattern of corrupt activity in violation of R.C. § 2923.32.

Form D relates to the equity securities issued by Evergreen Homes. (Gov. Exs. 33, 34 and 35.) These are private placement equity securities and do not need to be registered. (Tr. Vol. 12, 1685.) Instead, "Blue Sky" documents must be filed with the State of Ohio because all who invested were residents in Ohio and also filed with the federal government. (Tr. Vol. 12, 1585-86.) Form D requires that many expenses related to the issuance must be listed but indicates that the internal expenses of the issuer are to be excluded. (State's Exs. 33, 34 and 35.) With regard to these charges, the State alleged that the defendant *failed to disclose* that commissions would be paid in Form D. (See Indictment, pp. 5-7 and Amended Bill of Particulars, pp. 2-4.) Page 4 of Form D asks for commissions paid and is the provision through which the State claimed that Mr. Willan made a false statement. (State's Exs. 33, 34 and 35.) The State's theory was that the omission in that section of the commissions paid to Mr. Mohler is a false statement. (State's Appellee Brief in the Ninth District, p. 14); *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 65. The Court of Appeals seemed to agree with Mr. Willan that O.R.C. § 1707.44(B)(1) only punishes affirmative false statements, not omissions, and that the failure to disclose commissions on page 4 of Form D was at best an omission. *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 65. The COA, however, upheld Mr. Willan's conviction on these charges on a different theory and a different section of Form D not discussed with the jury or in the parties pleadings to the COA. *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 66. This was a theory not raised by the State in the indictment, the bill of particulars or through witnesses at trial. It was not argued or briefed in the COA.

The Form D's for Evergreen Homes were completed by Roetzel & Andress attorney, Fred Lefler. (Tr. Vol. 12, 1687.) Attorney Leffler testified that his instructions from Mr. Willan were the same as those received by his co-worker Attorney Sarkis. Mr. Willan told Attorney

Leffler to do what he needed to do to make sure that the securities were in compliance with all applicable laws. (Tr. Vol. 12, 1685, 1687.) In fact, there was some work that Attorney Leffler told Mr. Willan would be very expensive to do properly and Mr. Willan, nevertheless, insisted that it be done in compliance with all applicable laws. (Id.) Mr. Willan never resisted any of Mr. Leffler's advice to comply with all state and federal regulations. (Tr. Vol. 12, 1687.) Additionally, Mr. Leffler specifically testified that he did not discuss the manner in which he completed the Form D section regarding commissions because it was, and is, his belief that the forms were accurate because it only refers to outside salespeople.[2] (Tr. Vol. 12, 1687-89, 1697.)

The offices of the Evergreen Companies were raided in 2006 by agents of the Office of the Ohio Attorney General, then run by Attorney General Marc Dann, and the Summit County Sheriff's Office. It was done amid a flourish of publicity and, as noted by the Court of Appeals, caused the companies to go out of business. The highly publicized indictment that was returned against Mr. Willan contained an extraordinarily large number of counts. Nearly all of the convictions from that indictment have been overturned. The only relevant convictions that remain are the three misrepresentations in the sale of securities in violation of R.C. § 1707.44(B)(1) and the Engaging in a Pattern of Corrupt Activity based solely upon those three charges. The only allegation of wrong doing with regard to the violations of R.C. §§ 1707.44(B)(1) or ORC § 2923.32 is that the Form D filed with the Division of Securities did not disclose that an internal employee of the Evergreen Companies was paid a commission in connection with his role in the sale of the equity offerings of the company. Mr. Willan's

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[2] Despite the fact the forms were completed by an attorney who believes them to be accurate to this date, the COA never addressed Mr. Willan's concern that the Trial Court refused to give an advice of counsel jury instruction.

attorney testified that he filled out the form and gave it to Mr. Willan to sign. He further testified that he believed, and still does, that the request for information on commissions only referred to sales made by outside dealers, not employees of the company. (Tr. Vol. 12, 1687-89, 1697.) The State's position is that, for this activity, Mr. Willan should be incarcerated for a mandatory minimum of 10 years. As set forth below, this position is not supported by law or by logic.

III. LAW AND ARGUMENT

A. State's Proposition of Law No. 1:

> R.C. 2929(D)(3)(a) establishes a mandatory 10-year sentence where a defendant is found guilty of a corrupt activity where the predicate crime is a felony of the first degree.

B. ORC § 2929.14(D)(3)(a)

At the time of Mr. Willan's sentencing, ORC § 2929.14(D)(3)(a), historically referred to as the major drug offender statute, read as follows:

> 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 or2925.11 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.

ORC § 2929.14 was recently amended and there is no longer a § (D)(3)(a). Section (B)(3) has replaced (D)(3)(a). However, the language at issue in the instant case remains the same in the new version of ORC § 2929.14 and this Brief will refer to ORC § 2929.14(D)(3(a).

C. The Language Of ORC § 2929.14(D)(3)(A) Does Not Unambiguously Apply To Any Conviction Under ORC § 2923.32 With A Felony Of The First Degree Supporting The Conviction

1. The State's interpretation of ORC § 2929.14(D)(3)(a) creates ambiguity in the statute

It is a fundamental tenet of due process that "[no] one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey* (1939), 306 U.S. 451, 453. It is difficult to read through ORC § 2929.14(D)(3)(a) and understand how the State can argue that the language is clear and unambiguous. While the State does not take issue with the COA's analysis of the legislative history or intent, it does argue that any interpretation was unnecessary because the statute is not vague or confusing.

At the heart of the COA's Decision is the recognition of the significance that ORC § 2929.14(D)(3)(a) does not identify "Engaging in a pattern of corrupt activity" by either name or statutory number. The COA correctly determined that the lack of reference to ORC § 2923.32 by name or number *combined* with the confusing phrasing, heavy emphasis on drug convictions and placement of the portion at issue immediately following the lengthy discussion of drug offenses made the statute ambiguous and that it could be inferred that the ten-year prison term was "only intended to apply to corrupt activity associated with the offenses that were explicitly

enumerated in R.C. 2929.14(D)(3)(a)." *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 106-107. As discussed by the COA:

> 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, 1998 Ohio App. LEXIS 4559. 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, 2001 Ohio App. LEXIS 5512.
>
> ...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, 902 N.E.2d 961.
>
> *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 105-107.

Nearly as important as the decision not to include ORC §2923.32 is the choice not to identify the offense "Engaging in a Pattern of Corrupt Activity" by name. ORC § 2929.14(D)(3)(a) does not identify ORC § 2923.32 by number or by title of the offense. This Court in *State v. Johnson* (2008), 116 Ohio St. 3d 541 discussed the conclusion drawn from the fact that the term "consecutive" was not in ORC § 2929.14. Quite simply, the Court noted, "[t]he word 'consecutive' does not appear in the statute." *Johnson*, 116 Ohio St. 3d at 546. The same is

true for any reference to ORC § 2923.32. Neither ORC § 2923.32 nor "Engaging in a Pattern of Corrupt Activity" appear in ORC § 2929.14(D)(3)(a). As in *Johnson,* the trial court was free to impose a ten-year sentence for any first-degree felony violation. But, also as in *Johnson,* the sentence must be vacated for resentencing because the trial court indicated that it was required to impose such a sentence.

The State attempts to avoid the COA's conclusion regarding the lack of any reference to ORC §2923.32 by name or statute number by arguing that "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. 2329.31." State's Brief, p. 4 (emphasis added). The State is implicitly arguing that the phrase "corrupt activity" is interchangeable with either ORC § 2923.32 or "Engaging in a pattern of corrupt activity." Such a position is untenable in the world of statutory construction. Moreover, a review of the Ohio Revised Code demonstrates that the implication is unsupported. The phrase "corrupt activity" occurs 205 times in the Ohio Revised Code. It is far from clear that the language in ORC § 2929.14(D)(3)(a) is meant to automatically apply to Mr. Willan's conviction under ORC § 2923.32.

The State seeks to create an "established crime" of corrupt activity by repeatedly capitalizing the phrase "corrupt activity." See e.g., "to impose a mandatory sentence for a conviction on a charge of Corrupt Activity..." State's Brief, p. 4. But, the language is not capitalized because "corrupt activity" is not the name of any offense. As noted above, it is language used repeatedly in the Ohio Revised Code.

The State's contention that nothing requires the "Generally Assembly to use *both* the name of a statute and the statutory reference number in order to reference a statute" (State's

Brief, p. 4 (emphasis in the original)) ignores the fundamental flaws of the State's position. ORC § 2929.14(D)(3)(a) does not references the offense of "Engaging in a pattern of corrupt activity" by number *or* by name. As noted above, the phrase "corrupt activity" is used over 200 times in the Ohio Revised Code. The State cannot simply support its claim that the phrase in ORC § 2929.14(D)(3)(a) means any conviction under ORC § 2923.32 by capitalizing the phrase "corrupt activity." The State's point here actually highlights the ambiguity in ORC § 2929.14(D)(3)(a).

The relevance of the decision not to include ORC § 2923.32 by name or by Code Section in ORC § 2929.14(D)(3)(a) cannot be overstated and is not the only way in which the portion of the statute relied upon by the State is ambiguous, at best. The manner to which corrupt activity is referred is also confusing and ambiguous and is entirely different than the remainder of the statute. For the rest of ORC § 2929.14(D)(3)(a), the dictate of the statute is: if defendant is convicted of [any of the enumerated statutes], then the ten-year mandatory minimum applies. Each requires a conviction under a certain specified statute. However, the language at issue here chosen by the legislature is quite different: "if the court imposing sentence upon an offender for a felony finds..." Had the legislature meant to apply ORC § 2929.14(D)(3)(a) for every conviction of ORC § 2923.32 under certain circumstances, that is how the statute would have been drafted. ("If the offender commits a violation of ORC § 2923.32...") But, that is not how the language is written. A significant change from the rest of ORC § 2929.14(D)(3)(a) cannot be ignored, as the State is urging this Court to do.

The ambiguity of the statute is further exacerbated because the portion at issue is the only section of ORC § 2929.14(D)(3)(a) that, if the State's position is followed, could arguably involve the imposition of two felonies, the "corrupt activity" felony that the State claims is ORC

§2923.32 and the "offense in the pattern." The State urges this Court to read the language in isolation as follows: "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." For what felony violation does ORC § 2929.14(D)(3)(a) allegedly mandate a ten-year sentence: is the "a felony" the "corrupt activity (ORC §2923.32 according to the State)," or the "offense in the pattern of corrupt activity" that is a felony of the first degree? For the remainder of ORC § 2929.14(D)(3)(a), the statement "shall impose upon the offender for the felony violation..." is easily taken to mean the single felony to which ORC § 2929.14(D)(3)(a) refers. For example, as it relates to ORC § 2925.02 in the beginning of the statute, it is clear what felony brings a ten-year mandatory sentence: ORC § 2925.02. The statute provides that "if the offender commits a felony violation of section 2925.02" and the specification applies, the ten-year mandatory sentence applies to the violation of ORC § 2925.02. But, in the reading urged by the State, it is wholly unclear to which felony the section applies.

2. Other Courts have sentenced consistent with the COA Decision here and *Schneider* is not instructive or persuassive

The State's sole argument supporting its proposition of law is that the statute is not ambiguous. While acknowledging that a statute must be written in "such a way that people of common intelligence may understand what conduct is required" and that a statute is ambiguous if its language is "susceptible to more than one reasonable interpretation," the State insists that ORC § 2929.14(D)(3)(a) contains "plain language" requiring a ten-year mandatory term of

incarceration for any "conviction of engaging in a pattern of corrupt activity, when a defendant is convicted of a first degree predicate crime..." State's Brief, pp. 2-3.[3]

The State heavily relies on *Schneider* for this conclusion that the ORC § 2929.14(D)(3)(a) is not ambiguous. Interestingly, although the Eighth District's brief analysis in *Schneider* did not find the statute ambiguous, it took pains to go out of its way to point out the statute's infirmity. First, in referring the reader to the full quote of the statute, the Court states: "See footnote 1, infra (to read *this convoluted provision* in its entirety)." *Schneider*, 8th Dist. No. 93128, 2010 Ohio 2089, **5 (emphasis added). The Court later "acknowledge[d] that it is not the General Assembly's finest work." *Schneider*, 8th Dist. No. 93128, 2010 Ohio 2089, **8, fn. 1. It noted that the "entire section is one sentence that is 307 words long and has 23 commas." Id. Even the Court's word to describe the statute, "convoluted," suggests that the statute is anything but clear and unambiguous. The Merrium-Webster's online dictionary uses the following sentence to explain convoluted: a *convoluted* explanation that left the listeners even more confused than they were before. Although the Eighth District claimed that the statute was not ambiguous, its critical discussion of the language in ORC § 2929.14(D)(3)(a) suggests otherwise.

The COA considered *Schneier* and determined that it was not persuasive because it only considered "the narrow argument of whether the corrupt activity language was ambiguous because it was immediately preceded by a description of drug offenses." *Willan*, 2011 Ohio

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[3] Interestingly, the only method to refute the COA's conclusion that the statue is ambiguous is to wholly ignore the remaining language of ORC § 292914(D)(3)(a). Every quote contained in the State's Brief ignores virtually the entirety of ORC § 2929.14(D)(3)(a) and highlights only the portion that supports the State's position. See, e.g., State's Brief, pp. 3, 7.

6603; 2011 Ohio App. LEXIS 5435, ¶ 106. "The *Schneider* court did not address the legal significance regarding the absence of any reference to R.C. 2923.32 in the statute. Id. at ¶ 107

Schneider is also not the only other Court to have confronted sentencing a defendant for the conviction under ORC § 2923.32 with a felony of the first degree as part of the pattern of corrupt activity. Omitted from the State's Brief are several cases that do not find a mandatory ten-year sentence for a conviction under ORC § 2923.32 with a felony of the first degree as an incident of corrupt activity. In *State v. Williams,* 2012 Ohio 1240; 2012 Ohio App. LEXIS 1087 (2nd App. Dist.), the defendant was convicted of two drug charges and the Court found that "the trial court was required to impose a mandatory ten-year prison term for both Counts." *Williams,* 2012 Ohio 1240, 2012 Ohio App. LEXIS 1087, ¶¶ 18-19. However, when reversing and remanding the conviction under ORC § 2923.32 that was based upon felony-one drug convictions, the Court only stated that "[t]he trial court failed to impose a mandatory term of imprisonment...Instead, the trial court imposed a four-year non-mandatory term...Accordingly, the incorrect sentence is reversed, and this matter is remanded for re-sentencing..." Id. at ¶ 25; see also Id. at ¶ 11. See also, *State v. Orosz,* 2009 Ohio 4922; 2009 Ohio App. LEXIS 4164 (6th App. Dist.) (noting that range of sentences for a defendant convicted of 2923.32 with the incidents of corrupt activity being felonies of the first and second degree was the full range available for a felony of the first degree- three through ten years); *State v. Foreman*, 2008 Ohio 4408; 2008 Ohio App. LEXIS 3711, ¶ 6 (Third App. Dist.) (noting an eight-year prison term on a conviction of 2923.32 with a felony of the first degree as one of the incidents of corrupt activity); and *State v. Skaggs*, 2004 Ohio 6653; 2004 Ohio App. LEXIS 6024 (6th App. Dist.) (noting a three year sentence on the first degree felony convictions of a pattern of corrupt activity with a felony of the first degree as a predicate.)

While it is this Court's province to correct any misinterpretation of the law, it is relevant, when looking at the question of whether a statute is ambiguous (or vague, see below), that it has been interpreted and applied differently. In addition to all three Judges on the COA panel (the only finding on which they all agreed), in *Schneider*, the State originally "informed the trial court that it...could sentence Schneider anywhere from three to ten years." *Schneider*, 2010 Ohio 2089, ¶ 14. It was the State that then appealed because its interpretation of ORC § 2929.14(D)(3)(a) had changed.

The same, to an even greater degree, is true of the State in the present case. In fact, it is difficult to understand the State's adamant position for the "mandatory" nature of ORC § 2929.14(D)(3)(a) considering it has entered into multiple plea agreements with codefendants in this case alone that flatly contradict the State's position with this Court. Two of Mr. Willan's co-defendants, Daniel Mohler and Craig E. Conner, entered into plea agreements with the State. The Defendants plead guilty to violations of ORC § 2923.32(A)(1) with predicate acts being felonies of the first degree. (See Mohler June 25, 2009 Journal Entry and Conner June 25, 2009 Journal Entry, Apx.9[4]) Pursuant to the plea agreement, Mr. Conner was sentenced to four years in prison, "not a mandatory term...." (See Conner June 25, 2009 Journal Entry, p. 1, Apx.5) After serving just 180 days, Mr. Conner was released and the Journal Entry was expressly "approved" by one of the attorneys representing the State in this case. (See Conner January 19, 2010 Journal Entry, Apx.12) Pursuant to the plea agreement, Mr. Mohler was sentenced to a *suspended* term of four years on the condition that he complete up to one year of a Community

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[4] Simultaneous with the filing of this Brief, Mr. Willan is filing a motion to supplement the record with the documents referenced herein relating to the conviction and sentencing of Messrs. Mohler and Conner.

Based Correctional Facility Program. (See Mohler June 25, 2009 Journal Entry, Apx.9) He was released prior to completion of the full year. (See Mohler October 30, 2009 Journal Entry, Apx.14) Neither of these men were sentenced to or served a fraction of time that the State claims is mandatory for Mr. Willan.

Importantly, this is not simply the case of a different prosecutor's office being involved or even a change of staff in the same office. While arguing in the Trial Court and the Court of Appeals that Mr. Willan's sentence for his RICO conviction mandated a ten-year sentence, the State, through a prosecutor that has been involved since the beginning, was taking just the opposite position regarding Mr. Mohler and Mr. Conner. Pursuant to their plea negotiations, Mr. Mohler was sentenced to a year at a local half way house and Mr. Connors was sentenced to four years but was released after six months.

Finally, The State also seeks to avoid the conclusion that ORC § 2929.14(D)(3)(a) is ambiguous by referencing ORC § 1315.55. The State claims that "[s]imilar 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." State's Brief, p. 5. The State's discussion of ORC § 1315.55 does not support its position, and, instead, give greater support to COA opinion and Mr. Willan's arguments. It is true that ORC § 1315.55 uses the term "corrupt activity." But it is not referencing ORC § 2923.32. See e.g., *State v. Rhodehamel*, 2011 Ohio 5618; 2011 Ohio App. LEXIS 4595 (10th App. Dist.) (dealing with ORC § 1315.55's use of the phrase "corrupt activity" wholly unrelated to any charge or conviction under ORC § 2923.32.); *State v. Caver*, 2009 Ohio 1272; 2009 Ohio App. LEXIS 1100 (8th App. Dist.) (same).

3. A linguistic analysis of ORC § 2929.14(D)(3)(a) and the doctrine of *ejusdem generis* demonstrates that it does not call for a ten-year mandatory minimum for Mr. Willan

It is instructive to analyze a sentence with 307 words and 23 commas grammatically, structurally, linguistically to determine its meaning. While law-makers may not always strictly adhere to clear and concise sentence structure, such a sentence, which imposes such a severe penalty, must be coherent. Given standard rules of linguistic construction and interpretation, the language in ORC § 2929.14 (D)(3)(a) at issue here, beginning with "the court imposing sentence upon an offender for a felony...," can only refer to drug offenses that involve corrupt activity. To suggest otherwise is to introduce ambiguity into the statute. The two clauses immediately preceding it use a definite article to refer to a definite offender (that is, "*the* offender") and then refer to specific identified offenses (enumerated drug violations). The portion that is the subject of this case switches to the use of an indefinite article: "the court imposing sentence on *an* offender for *a* felony . . ." The State urges the Court to find that this midsentence phrase now obliges the reader to replace the indefinite article with a definite one and then fill in the definite article to include all of the felonies that can serve as predicate acts to a pattern of corrupt activity. In other words, the State's interpretation requires the reader to assume that the language "for a felony" means all of the felonies that can serve as predicate acts and that "corrupt activity" means "Engaging in a Pattern of Corrupt Activity in violation of ORC § 2923.32". It is a stretch that is not supported by any common rules of linguistic or grammatical construction.

Proper linguistic interpretation obliges the reader, in the absence of a pragmatic clue that changes the established topic, to fill in the indefinite using the pragmatic standard of relevance. Pragmatic clues are expressions used to mark a movement away from the previously established context, i.e. relevance. A pragmatic clue for the intention to violate the standard of relevance

would be, for example, the expression "by the way." George Yule, *Pragmatics*. Oxford University Press, Oxford, New York, 1996, pp. 37-38. See also Ralph Fasold and Jeffrey Connor-Linton, *An Introduction to Language and Linguistics*, Cambridge University Press, Washington DC, 2006. Pp. 160-161. (Relevance as a linguistic maxim.) Without a pragmatic clue, in order to make sense of the change from the definite article to the indefinite article the reader must assume it is relevant to the context already established. Yule at 37. The pragmatic burden to be explicit is greater in written language than in spoken (where shifts in tone of voice or voice inflection can mark a shift in relevance). Elizabeth Traugott and Mary Pratt, *Linguistics for Students of Literature*, Harcourt Brace Jovanovich, New York, 1980, p. 260-261. In this case, the context already established is the specifically enumerated drug offenses. In the section immediately below the language that is the subject of this discussion, related to an attempted violation of ORC § 2907.02, the General Assembly switches back to the use of a definite article and clearly identifies a non-drug felony to which the mandatory 10 year sentence applies.

To hold otherwise is to infuse the statute with clear ambiguity. An initial question posed by the ambiguity created by the State's interpretation is whether the ten-year mandatory applies to the felony predicate act or the violation of the specific statute of Engaging in a pattern of corrupt activity in violation of ORC § 2923.32. The State claims that the ten-year minimum applies to a violation of ORC § 2923.32. Yet the provision reads: "if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity..." The statute is referring to the sentence "for a felony." It does not read, "if the court imposing sentence upon an offender for the felony of Engaging in a pattern of corrupt activity..."

The State's interpretation urges this Court to ignore the pragmatic standard of relevance and the lack of a pragmatic clue for a shift away from relevance. This interpretation makes the

statute not only ambiguous but makes the question of whether the mandatory minimum applies to the violation of ORC § 2923.32 or the predicate felony impossible to answer. It is impossible to answer because there is no context for the more expansive reading. The more accurate reading in light of the norms of grammatical and linguistic interpretation is that the absence of a pragmatic clue for a shift away from the relevance of the earlier sections is that there is not a shift from the relevance of the earlier section and that the only felonies to which the phrase "for a felony" refers, given the preceding context, are drug felonies involving corrupt activity.

This analysis is supported by doctrine of *ejusdem generis.* Under that doctrine, "[w]here general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." *Light v. Ohio University* (1986), 28 Ohio St. 3d 66, 68. See also *Groen v. Children's Hosp. Med. Ctr.*, 2012 Ohio 2815; 972 N.E.2d 648; 2012 Ohio App. LEXIS 2468, ¶ 24 (Fifth App. Dist.) (citing *Dingledy Lumber Co. v. Erie Railroad* (1921), 102 Ohio St. 236, syllabus; *Kay v. Pennsylvania Rd. Co.* (1952), 156 Ohio St. 503, 103 N.E.2d 751) ("The principle of ejusdem generis provides that, where general words are used after specific terms, the general words will be limited in their meaning to things of like kind and nature as those specified.") Here, the general words must be construed as applying to the things of the same general class as those enumerated immediately preceding. The corrupt activity referenced in ORC § 2929.14(d)(3)(a) relates to drug offenses.

D. There is no evidence of legislative intent to interpret ORC § 2929.14(d)(3)(a) in the manner advocated by the State

Once it has been established that the language is ambiguous, courts may look to legislative intent and must observe the rule of lenity. Importantly, the State's argument to this Court does not go beyond its claim that the statute is not ambiguous.

The COA's undertook a thorough review of the legislative history and arguments advanced by the State regarding legislative intent. First, the COA looked to the history.

> 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. 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.
>
> *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 108-109.

It is important to note here that the same Bill that created ORC § 2929.14 also changed the penalty provision for ORC § 2923.32. 1995 Ohio SB 2. If the legislature was creating a mandatory ten-year sentence for a violation of ORC § 2923.32 as argued by the State, such a penalty would have been included in the Bill.

The COA's instructive analysis goes on:

> 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.
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> *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 109.

The Court then went into an exhaustive analysis of other sections of the Ohio Revised Code, including the statutes identified in ORC § 2929.14(D)(3)(a) and ORC § 2929.13, which the State argued supported its position.

> 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).[5] 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).
>
> 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.
>
> *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 110-111.

In addition to the cross-reference to ORC § 2929.14(D)(3)(a), the enumerated statutes all cross-reference ORC § 2929.14(D)(3)(b), which no longer exists but was in effect at the time of Mr. Willan's sentencing. It provided that a 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

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[5] Although ORC § 2907.02 does not specifically reference ORC § 2929.14(D)(3)(a), it, along with its penalty provision, it references the ten year mandatory minimum to which offenders identified in ORC § 2929.14(D)(3)(a) will be subjected.

> 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.
>
> ORC § 2929.14(D)(3)(b) (2010)

As with (D)(3)(a), there is no reference to its potential penalty in ORC § 2923.32. The enumerated statutes in (D)(3)(a) or their penalty provisions directly cross-reference (D)(3)(b).

The penalty provision of ORC § 2923.32 takes great pains to detail the felony level and the mandatory nature of the prison sentence if a defendant is convicted under ORC § 2923.32 with a human trafficking specification.[6] The COA also found guidance in the human trafficking penalty discussed in ORC §2923.32. Both the language used in the penalty section of ORC §2923.32 and the stated purpose of the laws regarding human trafficking supported the COA's determination that ORC § 2929.14(D)(3)(b) did not apply to Mr. Willan. It found:

> 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, 750 N.E.2d 1149. 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.

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[6] If the State's position is followed to its logical conclusion, the legislature's intent was that those involved in human trafficking, whether actually selling human beings, often children, or forcing victims to engage in sexual conduct, were entitled to notice and the finding by a jury of a specification before they would be subject to a mandatory prison term (sometimes under ten years) but someone convicted of RICO for filing three identical forms with the ODOS is not entitled to any jury specification finding or any notice in the statute under which they are convicted that they are subject to a ten year mandatory minimum sentence. Such a position defies logic and common sense.

> 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)[.]"
>
> 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).
>
> *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 114-112.

The COA correctly notes that if an individual was already subject to a ten year mandatory prison term for a RICO violation with felony of the first degree supporting it, then the imposition of a five to ten year term for engaging in a pattern of corrupt activity to further human trafficking as detailed in ORC §2923.32 would not "increase the penalty" for many crimes. Arguably, it would actually lower the penalty.

The State argues in its Brief that another Ohio Revised Code Section provides evidence of legislative intent. It claims that ORC § 2929.13(F)(10) supports its interpretation of ORC § 2929.14(D)(3)(a). State's Brief, pp. 7-8. However, as accurately detailed by the COA, ORC § 2929.13(F)(10) does just the opposite.

> 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[.]"
>
> 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.
>
> 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.
>
> 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, 29 Ohio B. 178, 504 N.E.2d 717. 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.

Willan, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶¶ 115-118.

ORC § 2929.13(F)(10) does not simply say "corrupt activity." It says "corrupt activity in violation of section 2923.32." If the phrase "corrupt activity" automatically means a violation ORC § 2923.32, then there would be no need for the phrase "in violation of section 2923.32" after corrupt activity.

The final point by the COA in the discussion of ORC § 2929.13, that ORC § 2929.13(F)(10) must be construed to have operative effect, rather than as unnecessary or redundant legislation is supported by a comparison of the statutes enumerated in ORC § 2929.14(D)(3)(a) and ORC § 2929.13(F)(10). None of the mandatory ten-year sentences called for in ORC § 2929.14(D)(3)(a) are simply repeated in ORC § 2929.13(F)(10). While referenced in ORC § 2929.13(F)(10), they are included within a larger framework of mandatory sentences for each of the statutes.

The COA's analysis of ORC § 2929.13(F)(10) is consistent with the recent Second District opinion in *Williams,* 2012 Ohio 1240; 2012 Ohio App. LEXIS 1087. In *Williams,* the defendant appealed his sentence. The Court specifically examined ORC § 2929.13(F)(10) as it related to Mr. Williams's various drug and RICO convictions. The defendant was convicted of two drug charges and the Court stated found that "the trial court was required to impose a mandatory ten-year prison term for both Counts." *Williams,* 2012 Ohio 1240, 2012 Ohio App. LEXIS 1087, ¶¶ 18-19. However, when reversing and remanding the conviction under ORC § 2923.32 that was based upon felonies of the first degree, the Court only found that the four year

prison term imposed should have been mandatory pursuant to ORC § 2929.13(F)(10). Id. at ¶ 25; see also Id. at ¶ 11. The Second District's interpretation of ORC § 2929.13(F)(10) is identical to that of the COA in the instant case. ORC § 2929.13(F)(10) requires a mandatory term for a conviction under ORC § 2923.32, not a ten-year mandatory sentence.

The State questions the COA's review of ORC § 2929.13(F)(10) because ORC "2929.14(A)(1) makes absolutely no mention of a corrupt activity." State's Brief, p. 8. The confusion on the State's part may be due to a misreading of the COA's opinion. What the COA indicated was that ORC § 2929.13(F)(10) dictates a mandatory term of imprisonment. Because the crime referred to in ORC § 2929.13(F)(10) is a felony of the first degree, pursuant to the actual langue of ORC § 2923.32, the length of the mandatory term is determined by ORC § 2929.14(A)(1). This is because ORC § 2929.14(A)(1) dictates the terms of imprisonment available for a felony of the first degree. The fact that ORC § 2929.14(A)(1) does not reference "corrupt activity" or any of the felonies of the first degree in the Ohio Revised Code is irrelevant to the COA's opinion and this Court's analysis.

The State's Brief concludes by arguing that the COA's interpretation of ORC § 2929.14(D)(3)(a) renders portions of the statute meaningless. State's Brief, pp. 8-9. This is inaccurate. Instead, what the COA found was that ORC § 2929.14(D)(3)(a) could be interpreted to Court to impose a ten-year sentence for enumerated drug offenses when an offender is guilty of corrupt activity with the most serious predicate act being a felony of the first degree.

The COA correctly determined that ORC § 2929.14(D)(3)(a) is ambiguous and that there is no legislative history to 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 2923.32. Upon that finding, the COA moved to the necessary step of following the rule of lenity.

E. The rule of lenity mandates that ORC § 2929.14(d)(3)(a) be strictly construed to not impose a ten-year mandatory sentence upon Mr. Willan

The "rule of lenity" is codified in ORC § 2901.04(A), which provides that sections of the Revised Code that define penalties "shall be strictly construed against the state, and liberally construed in favor of the accused." "The rule of lenity is a principle of statutory construction that provides that a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous." *State v. Elmore* (2009), 122 Ohio St. 3d 472, 481. "Under the rule, ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is clearly proscribed." Id. (citing *United States v. Lanier* (1997), 520 U.S. 259, 266. The "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered" *Lanier*, 520 U. S. at 266. The rule is founded upon "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should,'" *United States v. Bass* (1971), 404 U.S. 336, 348 (quoting H. Friendly, Benchmarks 209 (1967)). The rule of lenity was recently reaffirmed by this Court in *State v. Swidas*, 2012 Ohio 4638; 2012 Ohio LEXIS 2456 (October 11, 2012). "'Under the rule, ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is clearly proscribed.' *United States v. Lanier* (1997), 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432." *Swidas*, 2012 Ohio 4638, ¶ 24 (quoting *State v. Elmore* (2009), 122 Ohio St.3d 472, 2009 Ohio 3478, 912 N.E.2d 582, ¶ 38.))

"[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v.*

United States (1980), 447 U.S. 381, 387 (citing *United States* v. *Batchelder* (1979), 442 U.S. 114, 121 and *Simpson* v. *United States* (1978), 435 U.S. 6, 14-15. "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States* (1958), 358 U.S. 169, 178.

It has even been argued that a look to legislative history is not appropriate when interpreting an ambiguous statute because "it compromises what we have described to be purposes of the lenity rule. '[A] fair warning,' we have said, 'should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *United States v. R. L. C.* (1992), 503 U.S. 291, 308-309 (Justice Scalia concurring, joined by Justice Kennedy and Justice Thomas) (quoting *McBoyle* v. *United States* (1931), 283 U.S. 25, 27).

The COA applied the rule of lenity and found that,

> 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, 902 N.E.2d 961.

Willan, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, ¶ 104, see also Id. at ¶ 119.

F. ORC § 2929.14(D)(3)(a) does not apply to Mr. Willan's sentence

This proposition of law accepted by this Court is that O.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 predicate crime is a felony of the first degree."

However, when sentencing Mr. Willan, the Trial Court did not make the necessary determination to make O.R.C. 2929.14(D)(3)(a) applicable. Therefore, upon the facts of this

case, and Mr. Willan's sentencing judgment entry, the former O.R.C. 2929.14(D)(3)(a) cannot apply and any ruling by this Court would not provide the State any relief. In fact, any ruling by this Court would be an advisory opinion, which this Court does not issue. The State has argued that the following language of former O.R.C. 2929.14(D)(3)(a) applies to Mr. Willan's sentence:

> ...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 statute clearly requires more than a simple determination that an individual has violated O.R.C. § 2923.32. As the Journal Entry indicates, the Trial Court simply sentenced Mr. Willan on the various counts of conviction, the vast majority of which were reversed by the Court of Appeals and are not before this Court. The counts for which Mr. Willan was sentenced included the crime of "Engaging in a Pattern of Corrupt Activity, as contained in Count 1 of the Indictment, Ohio Revised Code Section 2923.32(A)(1)/(B)(1), a felony of the first degree..." (7/9/09 David Willan Journal Entry, Apx. 1.) When sentencing Mr. Willan on that crime, the Journal Entry states that Mr. Willan be committed for a "definite term of Ten (10) years, which is a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), *or* 2925.01, and that he pay a fine in the amount of $10,000 for punishment of the crime of Engaging in a Pattern of Corrupt Activity, Ohio Revised Code Section 2923.32(A)(1)/(B)(1), a felony of the first degree..." (Id. at p. 2.) Nowhere in the Journal Entry does the Trial Court make the necessary findings required by O.R.C. 2929.14(D)(3)(a). That is why the Court of Appeal's Opinion was confined to the finding that O.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."

This distinction is made all the more important by the full language of O.R.C. § 2929(D)(3)(a) which, as discussed above, repeatedly calls for the ten year mandatory minimum to be imposed when a defendant "commits a violation of section..." or "if the offender is guilty of an attempted violation of section..." The section to which the State points does not say that a mandatory 10-year sentence is required if the defendant "commits a violation of section" 2923.32. If all that was necessary to activate O.R.C. § 2929(D)(3)(a) was a conviction under O.R.C. § 2923.32, then that section of the statute would read consistent with the remainder of it. Whether the language in the statute is meant to apply to a general conviction under ORC § 2923.32 or a drug conviction involving that same statute, Mr. Willan cannot be subject to it because the Trial Court failed to make the necessary findings. Because the Trial Court did not make the findings necessary for ORC § 2929.14(D)(3)(a)'s application to Mr. Willan, this appeal was improvidently granted.

Further, the State's Proposition of Law ignores the actual holding of the Ninth District Court of Appeals, which found only that O.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." *Willan*, 2011 Ohio 6603; 2011 Ohio App. LEXIS 5435, **85. The Court of Appeals ruling specifically addressed the exact language of the Trial Court's Judgment Entry. The proposition of law accepted as worded here would not contradict the ruling of the COA. For the foregoing reasons, the proposition of law can have no impact on Mr. Willan's sentence and provide no relief to the State if accepted by this Court. This appeal was, therefore, improvidently granted and Mr. Willan requests its dismissal.

G. The State's interpretation of ORC § 2929.14(d)(3)(a) violates Mr. Willan's constitutional right to due process

The COA relied upon the fact that the statutes specifically enumerated in ORC § 2929.14(D)(3)(a), or the penalty provision of those chapters, contained a cross reference to ORC § 2929.14(D)(3)(a) or notice that a defendant would be subject to a mandatory ten-year sentence in certain circumstances as evidence of legislative intent that ORC § 2929.14(D)(3)(a) did not automatically apply upon a conviction such as Mr. Willan's. However, that fact there is no cross-reference to ORC § 2929.14(D)(3)(a) or notice of a mandatory ten-year sentence has significance beyond legislative intent. It also makes the imposition of a mandatory ten-year term of imprisonment a violation of Mr. Willan's due process rights.

Due process in the criminal context involves notice to a defendant as well as the prohibition of vague statutes. Due process demands that the state provide meaningful standards in its laws. A law must give fair notice of the conduct proscribed and the penalty to be affixed if that law is breached. *Kolender v. Lawson* (1983), 461 U.S. 352, 357-358; *Colten v. Kentucky* (1972), 407 U.S. 104, 110. "Implicitly, the law must also convey an understandable standard capable of enforcement in the courts, for judicial review is a necessary constitutional counterpoise to the broad legislative prerogative to promulgate codes of conduct." *City of Norwood v. Horney* (2006), 110 Ohio St. 3d 353, 378-379 (citing *Giaccio v. Pennsylvania* (1966), 382 U.S. 399, 403.

The only notice of a penalty in ORC § 2923.32 is that:

> [w]hoever violates this section is guilty of engaging in a pattern of corrupt activity. 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...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.
> ORC § 2923.32(B)(1).

The only notice that Mr. Willan received was that he was subject to a term of three to ten years of incarceration. Any penalty information only relates to the specification of ORC § 2941.1422.

Due process is also violated because of the vague language of ORC § 2929.14(D)(3)(a).

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Footnotes omitted.)
> *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109.

Vague penal statutes do not provide reasonably clear guidelines for those charged with their administration, resulting in arbitrary and unequal enforcement. *Smith* v. *Goguen* (1974), 415 U.S. 566, 572-73. Vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute. See *United States* v. *Evans* (1948), 333 U.S. 483; *United States* v. *Brown* (1948), 333 U.S. 18. A court must determine whether a statute (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement. *Kolender*, 461 U.S. at 357.

Though the level of scrutiny is not often described with specificity, regulations resulting in civil penalties are subject to a "less strict vagueness test," but if a statute "threatens to inhibit the exercise of constitutionally protected rights" or involves criminal penalties, a more stringent

vagueness test is to be applied. *Hoffman Estates v. Flipside, Hoffman Estates* (1982), 455 U.S. 489, 498-99.

In the instant case, the COA's opinion clearly detailed how ORC § 2929.14(D)(3)(a) is vague. It is not specific in that it does not refer to ORC § 2923.32 by number or by title , "Engaging in a pattern of corrupt activity. Further, it is clear that this vagueness may subject different defendants to penalties, therefore, different enforcements. In this case alone, two of Mr. Willan's co-defendants were subject to a different term of imprisonment for the same crime that the State claims calls for a ten-year mandatory minimum. See also, *Williams, Schneider*; *Orosz, Foreman,* and *Skaggs*.

H. ORC § 2929.14(d)(3)(a) is unconstitutional as it requires judicial fact finding

As fully discussed above, ORC § 2929.14(D)(3)(a) requires a court to make factual findings. ("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…"). Because the language requires judicial factfinding before penalty enhancements are imposed, it is unconstitutional. *Apprendi v. New Jersey* (2000), 530 U.S. 466 and *Blakely v. Washington* (2004), 542 U.S. 296.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . .

The United States Supreme Court has recently accepted the case of *Alleyne v. United States*, Case No. 11-9335, an appeal from the Fourth Circuit Court of Appeals. The question before the Court will be whether its decision in *Harris v. United States* (2002), 536 U.S. 545 should be overruled. The Court in *Harris* was widely splintered and was inconsistent with this Court's line of cases beginning with *Apprendi v. New Jersey* (2000), 530 U.S. 466.

In *Alleyne,* the defendant received eighty-four months added to his basic sentence for the robbery, on the theory that he would have known that his accomplice in the robbery would wield a gun as they carried out the robbery. The added sentence was based upon the finding by the judge, not the jury. This factor leads to a mandatory minimum sentence beyond a basic sentence for the crime itself.

In *Harris*, the Court considered whether Sixth Amendment protections applied to a factual finding that increased the defendant's mandatory minimum sentence from five to seven years. 536 U.S. at 550-51. Relying on *McMillan v. Pennsylvania* (1986), 477 U.S. 79, a plurality of four Justices reasoned that facts raising the sentencing floor are constitutionally different from facts raising the ceiling, such that only the latter need be treated as elements. See *Harris*, 536 U.S. at 557. Four dissenters maintained that *Apprendi*'s principles apply with equal force to maximum and minimum sentences alike. See id. at 572-83 (Thomas, J., dissenting). "If a sentencing fact either raises the floor or raises the ceiling of a range of punishments to which a defendant is exposed, it is, by definition, [an] elemen[t]." *United States v. O'Brien* (2010), 130 S. Ct. 2169, 2184 (Thomas, J., concurring in the judgment) (quotation omitted). A strict distinction between maximum and mandatory minimum sentences cannot be reconciled with the rule of *Apprendi* that the Constitution's indictment, jury, and proof guarantees apply to all "facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *O'Brien*,

130 S. Ct. at 2174 (quoting Apprendi, 530 U.S. at 490) (in turn quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring))) (emphasis added); ." *O'Brien*, 130 S. Ct. at 2182 (Stevens, J., concurring) (same). "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). Facts triggering a mandatory minimum sentence "warrant constitutional safeguards" because as "a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense." *O'Brien*, 130 S. Ct. at 2184 (Thomas, J., concurring) (citation omitted).

Here, Mr. Willan was convicted of a violation of ORC § 2923.32. It was a felony of the first degree. A felony of the first degree has a minimum sentence of three years. But, upon a fact to be found by the trial court, the mandatory minimum for Mr. Willan was increased to ten years. This violates Mr. Willan's rights under the Fifth and Sixth Amendments to the United States Constitution.

Especially relevant in the instant case is Justice Breyer's warning in *Harris* that "statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency." *Harris*, 536 U.S. at 569-70 (Breyer, J., concurring). If this Court overturns the Court of Appeals ruling, when Mr. Willan returns to the trial court for resentencing, he will be subject to the same ten-year mandatory minimum sentence despite the fact that over 90% of his convictions have been reversed. More importantly, he will be subject to a ten-year mandatory minimum for submitting a single form on three different occasions that his attorney prepared and, to this day, believes is accurate. The Fifth and Sixth Amendments to the Constitution require that a jury must make the necessary

findings to deprive a judge from considering these relevant facts. O.R.C. 2929.14(D)(3)(a) is unconstitutional as it relates to Mr. Willan. The COA's direction to remand for Mr. Willan resentencing must be upheld.

IV. CONCLUSION

ORC § 2929.14 (D)(3)(A) does not sweep ORC § 2923.32 or any predicate offenses within its orbit. The language in ORC § 2929.14 (D)(3)(A) that begins with the phrase "the court imposing sentence upon an offender" can only refer to drug felonies involving corrupt activity. To suggest otherwise, that is, that it does sweep ORC § 2923.32 into its orbit, is contrary to law, to common sense and to common understandings of linguistic and grammatical construction. The interpretation that the State urges upon this court, that ORC § 2929.14 (D)(3)(A) does sweep either ORC § 2923.32 or relevant predicate acts within its orbit, would mean that the statute is convoluted and ambiguous.

The rule of lenity requires that ambiguous statutes "shall be strictly construed against the state, and liberally construed in favor of the accused." In this case that rule requires a ruling that does not sweep ORC § 2923.32 within the orbit of ORC § 2929.14 (D)(3)(A). An examination of legislative intent demonstrates that the general assembly did not intend ORC § 2929.14 (D)(3)(A) to impose a mandatory 10 year sentence for a violation of ORC § 2923.32 or any felony predicate acts. The decision of the Court of Appeals that ORC § 2929.14 (D)(3)(A) does not require a 10 year mandatory sentence should be affirmed.

As the propositional law presented by the State and accepted by this court does not provide the state any relief the Court should consider that the appeal be should be dismissed as improvidently granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing was served by First Class U.S. mail this 14th day of November, 2012 upon:

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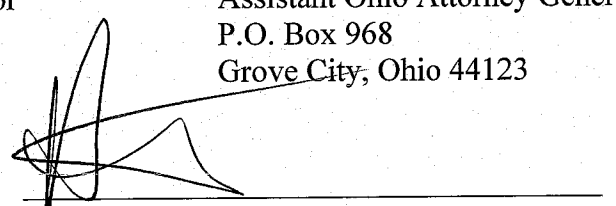

Andrea L. Whitaker

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

DANIEL M. HORRIGAN
2009 JUL -9 AM 9:44
SUMMIT COUNTY
CLERK OF COURTS

THE STATE OF OHIO)
)
vs.)
)
DAVID B. WILLAN)
(Page 1 of 4)

Case No. CR 07 12 4233 (A)

JOURNAL ENTRY

THIS DAY, to-wit: The 29th day of June, A.D., 2009, the Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. Defense counsel, WILLIAM WHITAKER and ANDREA WHITAKER, were present as was the Defendant, who was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

The Court finds that the Defendant heretofore on December 5, 2008 was found Defendant GUILTY by a Jury of the crime of ENGAGING IN A PATTERN OF CORRUPT ACTIVITY, as contained in Count 1 of the Indictment, Ohio Revised Code Section 2923.32(A)(1)/(B)(1), a felony of the first (1st) degree; GUILTY of the crime of FALSE REPRESENTATION IN THE REGISTERING OF SECURITIES, as contained in Counts 2, 3, 4, 5, and 6 of the Indictment, Ohio Revised Code Section 1707.44(B)(1), felonies of the first (1st) degree; GUILTY of the crime of UNLICENSED DEALER, as contained in Counts 7, 8, 9, 10, 11, 12, and 13 of the Indictment, Ohio Revised Code Section 1707.44(A)(1), felonies of the first (1st) degree; GUILTY of the crime of UNLICENSED DEALER, as contained in Counts 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27 of the Indictment, Ohio Revised Code Section 1707.44(A)(1), felonies of the second (2nd) degree; GUILTY of the crime of SECURITIES FRAUD, as contained in Count 28 of the Indictment, Ohio Revised Code Section 1707.44(G), a felony of the first (1st) degree; GUILTY of the crime of AGGRAVATED THEFT, as contained in Count 29 of the Indictment, Ohio Revised Code Section 2913.02(A)(3), a felony of the first (1st) degree; GUILTY of the crime of THEFT FROM THE ELDERLY, as contained in Count 30 of the Indictment, Ohio Revised Code Section 2913.02(A)(3), a felony of the first (1st) degree; GUILTY of the crime of VIOLATING OHIO SMALL LOANS ACT, as contained in Counts 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, and 75 of the Indictment, Ohio Revised Code Section 1321.02, felonies of the fifth (5th) degree; and GUILTY of the crime of UNREGISTERED SECOND MORTGAGE LENDER, as contained in Counts 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, and 99 of the Indictment, Ohio Revised Code Section 1332.52(A)(1)(B), felonies of the fifth (5th) degree, which offenses occurred after July 1, 1996, and based on the jury's findings, the Court accepts the jury's verdicts and finds the Defendant guilty of the same charges.

The Court further finds that on May 26, 2009, GUILTY by a Jury of the crime of TAMPERING WITH RECORDS, as contained in Count 76 of the Indictment, Ohio Revised Code Section 2913.42(A)(1), a felony of the third (3rd) degree, and the jury did find that the Application for Certificate of Registration of Ohio Mortgage Loan Act is kept by or belongs to a local, state or federal governmental entity; GUILTY of the crime of FALSIFICATION, as contained in Count 77 of the Indictment, Ohio Revised Code Section 2921.13(A)(5), a misdemeanor of the first (1st) degree, which

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offenses occurred on or about June 6, 2005; and NOT GUILTY of the crime of MONEY LAUNDERING, as contained in Count 142 of the Indictment, Ohio Revised Code Section 1315.55(A)(3), a felony of the third (3rd) degree.

Prior to commencing the Jury trial, the charges of MONEY LAUNDERING, as contained in Counts 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, and 58; the charges of GRAND THEFT, as contained in Counts 131, 132, and 133; the charges of TELECOMMUNICATIONS FRAUD, as contained in Counts 134 and 135; and the charge of MONEY LAUNDERING, as contained in Count 146 were DISMISSED by the Court, upon Motion of the State.

IT IS FURTHER ORDERED that the charge of UNLICENSED DEALER, as contained in Count 14; the charge of AGGRAVATED THEFT, as contained in Count 34; and the charges of MONEY LAUNDERING, as contained in Counts 141, 143, 144, 145, and 147 were dismissed at the close of the State's case upon Defendant's Rule 29 Motion.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, DAVID B. WILLAN, be committed to the OHIO DEPARTMENT OF REHABILITATION AND CORRECTION for a definite term of Ten (10) Years, which is a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, and that he pay a fine in the amount of $10,000.00 for punishment of the crime of ENGAGING IN A PATTERN OF CORRUPT ACTIVITY, Ohio Revised Code Section 2923.32(A)(1)/(B)(1), a felony of the first (1st) degree; for a definite term of Three (3) Years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of FALSE REPRESENTATION IN THE REGISTERING OF SECURITIES, on each of 5 counts, Ohio Revised Code Section 1707.44(B)(1), felonies of the first (1st) degree; for a definite term of Three (3) Years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of UNLICENSED DEALER, on each of 7 counts, Ohio Revised Code Section 1707.44(A)(1), felonies of the first (1st) degree; for a definite term of Two (2) years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of UNLICENSED DEALER, on each of 13 counts, Ohio Revised Code Section 1707.44(A)(1), felonies of the second (2nd) degree; for a definite term of Three (3) Years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of SECURITIES FRAUD, Ohio Revised Code Section 1707.44(G), a felony of the first (1st) degree; for a definite term of Three (3) Years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, and that he pay a fine in the amount of $10,000.00 for punishment of the crime of AGGRAVATED THEFT, Ohio Revised Code Section 2913.02(A)(3), a felony of the first (1st) degree; for a definite term of Three (3) Years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, and that he pay a fine in the amount of $10,000.00 for punishment of the crime of THEFT FROM ELDERLY, Ohio Revised Code Section 2913.02(A)(3), a felony of the first (1st) degree; for a definite term of One (1) year, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of VIOLATING OHIO SMALL LOANS ACT, on each of 17 counts, Ohio Revised Code Section 1321.02, felonies of the fifth (5th) degree; for a definite term of One (1) year, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of TAMPERING WITH RECORDS,

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**Case No. CR** 07 12 4233 (A)
	)	
vs.	)	
	)	
DAVID B. WILLAN	)	**JOURNAL ENTRY**

Ohio Revised Code Section 2913.42(A)(1), a felony of the third (3rd) degree; for a definite term of One (1) year, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of UNREGISTERED SECOND MORTGAGE, on each of 22 counts, Ohio Revised Code Section 1332.52(A)(1)(b), felonies of the fifth (5th) degree; and that he serve a period of Six (6) months in the Summit County Jail for punishment of the crime of FALSIFICATION, Ohio Revised Code Section 2921.13(A)(5), a misdemeanor of the first (1st) degree, to be served at the Ohio Department of Rehabilitation and Corrections, and further that the Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

IT IS FURTHER ORDERED, pursuant to the above sentence, that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the sentences imposed in Counts 1, 29, and 30 be served CONSECUTIVELY with each other and CONSECUTIVELY with all other Counts.

IT IS FURTHER ORDERED that the sentences imposed in Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, and 99 be served CONCURRENTLY with each other and CONCURRENTLY with the sentences imposed in Counts 1, 29, and 30.

IT IS FURTHER ORDERED that the Defendant is to serve a total of Sixteen (16) Years in the Ohio Department of Rehabilitation and Correction.

After release from prison, the Defendant is ordered to serve Five (5) Years of post-release control. Defendant is ORDERED to pay all prosecutions costs, including any fees permitted pursuant to O.R.C. 2929.18(A)(4).

IT IS FURTHER ORDERED that the Defendant's motion for bond is DENIED.

IT IS FURTHER ORDERED that the Defendant's motion for transcript is DENIED.

Thereupon, the Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court.

IT IS FURTHER ORDERED that credit for time served is to be calculated by the Summit County Adult Probation Department and will be forthcoming in a subsequent journal entry.

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4.

APPROVED:
July 2, 2009
dcs/mh

JAMES E MURPHY, Visiting Judge
Sitting on Assignment
Pursuant to Art. IV, Sec. 6
Ohio Constitution for

THOMAS A TEODOSIO , Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Richard Hoenigman/Colleen Sims
Criminal Assignment
(Attorney William Whitaker)
(Attorney Andrea Whitaker)
Adult Probation Department
(Registrar's Office – Email)
(Court Convey – Email)
Bureau of Sentence Computation **CERTIFIED**

A-4

COPY

DANIEL M. HORRIGAN

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

2009 JUN 25 AM 7:50

SUMMIT COUNTY CLERK OF COURTS

THE STATE OF OHIO)
)
vs.)
)
CRAIG E. CONNER)
(PAGE 1 OF 4)

Case No. CR 07 12 4233 (B)

JOURNAL ENTRY

THIS DAY, to-wit: The 22nd day of June, A.D., 2009, the Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. Defense counsel, LARRY WHITNEY, was present as was the Defendant who was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

Prior to his sentencing the Prosecutor, Colleen Sims, made an oral motion to modify the plea agreement by deleting incident one from count one. The defense had no objection to the change, and it is so ordered.

The Court finds that the Defendant heretofore on December 20, 2007, pled GUILTY to ENGAGING IN A PATTERN OF CORRUPT ACTIVITY, as contained in Count 1 of the Bill of Information, Ohio Revised Code Section 2923.32(A)(1) and (B)(1), a felony of the first (1st) degree; AGGRAVATED THEFT, as contained in Count 2 of the Bill of Information, Ohio Revised Code Section 2913.02(A)(3), a felony of the first (1st) degree; GRAND THEFT, as contained in Counts 3, 4, 5, 6, 7 and 10 of the Bill of Information, Ohio Revised Code Section 2913.02(A)(3), all felonies of the fourth (4th) degree; AGGRAVATED THEFT, as contained in Counts 8, 9 and 11 of the Bill of Information, Ohio Revised Code Section 2913.02(A)(3), all felonies of the third (3rd) degree; FRAUD RELATING TO MORTGAGE DOCUMENTS, as contained in Counts 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Bill of Information, Ohio Revised Code Section 1322.07(E), all felonies of the 5th degree; and TELECOMMUNICATIONS FRAUD, as contained in Counts 21 and 22 of the Bill of Information, Ohio Revised Code Section 2913.05(A), both felonies of the third (3rd) degree, which offenses occurred after July 1, 1996, which pleas were accepted by the Court, and the Court found the Defendant guilty of the above offenses.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, CRAIG E. CONNER, be committed to the Ohio Department of Rehabilitation and Corrections for a definite term of Four (4) Years, which is **not** a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of ENGAGING IN A PATTERN OF CORRUPT ACTIVITY, as contained in Count 1, Ohio Revised Code Section 2923.32(A)(1) and (B)(1), a felony of the first (1st) degree; for a definite term of Four (4) Years, which is **not** a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of AGGRAVATED THEFT, as contained in Count 2, Ohio Revised Code Section 2913.02(A)(3), a felony of the first (1st) degree; for a definite term of One (1) Year on each of Counts 3, 4, 5, 6, 7, and 10, which are **not** mandatory terms pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for

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punishment of the crime of GRAND THEFT, Ohio Revised Code Section 2913.02(A)(3), felonies of the fourth (4th) degree; for a definite term of One (1) Year on each of Counts 8, 9, and 11, which are **not** mandatory terms pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of AGGRAVATED THEFT, Ohio Revised Code Section 2913.02(A)(3), felonies of the third (3rd) degree; for a definite term of One (1) Year on each of Counts 12, 13, 14, 15, 16, 17, 18, 19, and 20, which are **not** mandatory terms pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of FRAUD RELATING TO MORTGAGE DOCUMENTS, Ohio Revised Code Section 1322.07(E), felonies of the fifth (5th) degree; and for a definite term of One (1) Year on each of Counts 21 and 22, which are **not** mandatory terms pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01, for punishment of the crime of TELECOMMUNICATIONS FRAUD, Ohio Revised Code Section 2913.05(A), felonies of the third (3rd) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

IT IS HEREBY ORDERED that the Court suspends the sentence on Counts 2 through 22, **except Count 1**, upon the condition that the Defendant complete 3 years of community control **following his incarceration**, with the following sanctions being imposed:

1. Report to the Adult Probation Department upon his release from prison and abide by the rules and regulations of said Department and/or the Adult Parole Authority.

2. Refrain from offensive conduct of every nature and obey all laws.

3. Pay a $20.00 per month fee for services rendered by the Adult Probation Department; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662. IT IS FURTHER ORDERED that the Defendant shall satisfy in full their costs and restitution accounts before any monies can be paid toward the supervision fees. The Clerk of Courts shall collect such fees and deposit the monies into the Summit County Probation Services Fund established in the County Treasury.

4. Provide a DNA sample pursuant to Sections 2901.07 and 2152.74 of the Ohio Revised Code.

5. He is to surrender his assets in the approximate amount of $76,341.57 to be paid to OHIO ORGANIZED CRIME INVESTIGATION COMMISSION TASK FORCE 06-4, by executing the necessary paperwork through his attorney.

6. Pay the costs of this prosecution as directed by the Adult Probation Department; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

IT IS FURTHER ORDERED that the Summit County Clerk of Courts shall collect monies from the Defendant in the following order of priority: (1) restitution, if applicable; (2) costs; (3) Adult Probation Department fees; (4) fines, if applicable.

Defendant is therefore ORDERED to report to the Summit County Adult Probation Department, UPON RELEASE FROM PRISON.

SAID COMMUNITY CONTROL TO COMMENCE UPON DEFENDANT'S RELEASE FROM PRISON.

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**Case No. CR 07 12 4233 (B)**
	)	
vs.	)	
	)	**JOURNAL ENTRY**
CRAIG E. CONNER		
(PAGE 3 OF 4)		

IT IS FURTHER ORDERED, pursuant to the above sentence, that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the sentence imposed in Counts 2 through 22 are be served CONCURRENTLY and not consecutively with each other.

As part of the sentence in this case, the Defendant may be supervised by the Adult Parole Authority after Defendant leaves prison, which is referred to as post-release control, for Five (5) years as determined by the Adult Parole Authority. If the Defendant violates post-release control supervision or any of its conditions, the Adult Parole Authority May impose a prison term, as part of the sentence, of up to Nine (9) months, with a maximum for repeated violations of Fifty percent (50%) of the stated prison term. If the Defendant commits a new felony while subject to post-release control, the Defendant May be sent to prison for the remaining post-release control period or Twelve (12) months, whichever is greater. This prison term shall be served consecutively to any prison term imposed for the new felony of which the Defendant is convicted. Defendant is ORDERED to pay all prosecution costs, including any fees permitted pursuant to O.R.C. 2929.18(A)(4).

IT IS FURTHER ORDERED that any motion for post-conviction relief is to be filed within 6 months from the date of sentencing.

IT IS FURTHER ORDERED that credit for time served **as of the date of sentencing** is to be calculated by the Summit County Adult Probation Department and will be forthcoming in a subsequent journal entry.

IT IS FURTHER ORDERED THAT THE DEFENDANT IS TO REMAIN IN THE SUMMIT COUNTY JAIL AND NOT TRANSPORTED TO THE PENAL INSTITUTION PENDING THE DEFENDANT EXECUTING THE NECESSARY PAPERWORK TO IS ATTORNEY, THEN HE MAY BE TRANSPORTED TO THE PENAL INSTITUTION.

APPROVED:
June 23, 2009
pmw

JAMES E. MURPHY, Visiting Judge
Sitting on Assignment
Pursuant to Art. IV, Sec. 6
Ohio Constitution for

THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

A-7

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cc: Prosecutor Colleen Sims
Criminal Assignment
Adult Probation Department – **JAIL CREDIT**
(Registrar's Office – **EMAIL**)
(Attorney Larry Whitney)
(Court Convey – **EMAIL)**

COPY

DANIEL M. HORRIGAN

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

2009 JUN 25 AM 7:50
SUMMIT COUNTY
CLERK OF COURTS

THE STATE OF OHIO	)	**Case No. CR 07 12 4233 (E)**
	)	
vs.	)	
	)	**JOURNAL ENTRY**
DANIEL MOHLER		

THIS DAY, to-wit: The 22nd day of June, A.D., 2009, the Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. Defense counsel, PAUL ADAMSON, was present as was the Defendant who was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, statements of counsel, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

The Court finds that the Defendant, heretofore on April 17, 2008, pled GUILTY of the charge of ENGAGING IN A PATTERN OF CORRUPT ACTIVITY, as contained in Count 1 of the Indictment, Ohio Revised Code Section 2923.32(A)(1), a felony of the first (1st) degree, UNLICENSED DEALER, as contained in Count 14 of the Indictment, Ohio Revised Code Section 1707.44(A)(1), a felony of the first (1st) degree, and SECURITIES FRAUD, as contained in Count 28 of the Indictment, Ohio Revised Code Section 1707.44(G), a felony of the first (1st) degree, which offenses occurred after July 1, 1996, which pleas, voluntarily made, and with a full understanding of the consequences, were accepted by the Court, and the Court found the Defendant guilty of the above offenses.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS HEREBY ORDERED that the Defendant be sentenced to 4 years of incarceration on each of Counts 1, 14 and 28, to be served concurrently; suspended, upon the condition that the Defendant complete 5 years of community control, with the following sanctions being imposed:

1. Report to the Adult Probation Department as directed and abide by the rules and regulations of said Department and/or the Adult Parole Authority.

2. Refrain from offensive conduct of every nature and obey all laws.

3. Pay a $20.00 per month fee for services rendered by the Adult Probation Department; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662. IT IS FURTHER ORDERED that the Defendant shall satisfy in full their costs and restitution accounts before any monies can be paid toward the supervision fees. The Clerk of Courts shall collect such fees and deposit the monies into the Summit County Probation Services Fund established in the County Treasury.

4. Provide a DNA sample pursuant to Sections 2901.07 and 2152.74 of the Ohio Revised Code.

5. Sign a waiver releasing Defendant's medical records to his probation officer in order to determine his supervision.

6. Continue all current treatment plans.

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7. Enter into, **when a bed becomes available, if accepted,** and successfully complete the Community Based Correctional Facility Program operated by the Oriana House for a term of up to one year as directed by the Adult Probation Department, and follow through with all aftercare counseling and treatment for a term of up to one year as directed.

8. Upon successful discharge from CBCF, enter into and successfully complete the transitional services component program at CBCF, operated by the Oriana House, and further, follow any recommendations and conditions as directed by the Adult Probation Department.

9. If Defendant is unable to complete the Community Based Correctional Facility Program due to his medical condition, the Adult Probation Department may use home incarceration as an alternative.

10. Pay $500.00 toward the costs of this prosecution as directed by the Adult Probation Department; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

IT IS FURTHER ORDERED that the Summit County Clerk of Courts shall collect monies from the Defendant in the following order of priority: (1) restitution, if applicable; (2) costs; (3) Adult Probation Department fees; (4) fines, if applicable.

IT IS FURTHER ORDERED that the Defendant be screened for placement into the CBCF program operated by the Oriana House, Inc. The Defendant is to report to the CBCF intake staff as directed. The Summit County Sheriff's Office, Adult Probation Department and/or Court Psycho-Diagnostic Clinic shall cooperate with and make all records available to the CBCF staff, including pre-sentence investigations, to facilitate the screening process.

IT IS FURTHER ORDERED that if the Defendant fails to follow the rules and regulations of the Community Based Correction Facility Program as interpreted by the Community Based Correction Facility or probation staff, said Defendant shall be taken into custody by the Summit County Sheriff's Office and/or Akron Police Department and transported to the Summit County Jail and held without bail until further order of this Court.

IT IS FURTHER ORDERED that leaving the CBCF without authorization, including failure to return after being granted temporary leave, will constitute a violation of R.C. 2921.34 (ESCAPE) and will cause an independent subsequent prosecution, in addition to a probation violation.

Violation of this sentence shall lead to more restrictive sanctions for the Defendant, up to and including a prison term of 4 years, as well as post release control of 5 years.

Defendant is therefore ORDERED to report to the Summit County Adult Probation Department, FORTHWITH.

IT IS FURTHER ORDERED that the Defendant was released on the same bond which was continued until a bed becomes available at the Community Based Correctional Facility, IF ACCEPTED, at which time the Defendant is to report to the Community Based Correctional Facility to commence serving the sentence imposed in this case.

SAID COMMUNITY CONTROL TO COMMENCE THIS 22ND DAY OF JUNE, A.D., 2009.

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**Case No. CR 07 12 4233 (E)**
	)	
vs.	)	
	)	**JOURNAL ENTRY**
DANIEL MOHLER		

APPROVED:
June 23, 2009
cld

JAMES E. MURPHY, Visiting Judge
Sitting on Assignment
Pursuant to Art. IV, Sec. 6
Ohio Constitution for

THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Colleen Sims
Criminal Assignment
Adult Probation Department
(Attorney Paul Adamson)
(CBCF & Oriana House – **EMAIL**)

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DANIEL M. HORRIGAN
2010 JAN 19 PM 3:10
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO	*	CASE NO. 07 12 4233 (B) CR
Plaintiff	*	
-vs-	*	JUDGE JAMES MURPHY
CRAIG E. CONNER	*	
Defendant	*	JOURNAL ENTRY

* * *

This cause came on to be heard upon the motion of Defendant for judicial release filed pursuant to R.C. 2929.20. It appears to this Court that, heretofore, the Defendant and the state entered into a written plea agreement and that the parties announced to this Court at the time of Defendant's sentencing that Defendant had fulfilled his agreement and that thus the state would abide by terms of the agreement; that at the time of sentencing this Court among other things ordered Defendant to surrender assets; that it has been announced to this Court that Defendant has surrendered assets as this Court had ordered him to do; that this Court, on June 22, 2009, suspended the Defendant's prison term on all counts but Count One and ordered the Defendant to complete three years of community control following his incarceration; and ordered other conditions of community control, all set forth in this Court's Journal Entry filed June 25, 2009; that Defendant is currently serving a four year sentence, not a mandatory term on Count One of the indictment herein; that a period of 180 days has passed since Defendant has been transferred to the institution to serve his sentence.

COPY

THEREFORE, it is hereby ORDERED that the Court suspends the sentence on Count One upon condition that the Defendant complete three years of community control, said community control to be served concurrently with the community control ordered on Counts Two through Twenty-two, said community control to begin following his release from his incarceration.

As previously ordered, Defendant is to report to the Summit County Adult Probation Department upon his release. All other orders contained in this Court's Journal Entry filed June 25, 2009, not inconsistent with this order shall remain in full force and effect.

IT IS FURTHER ORDERED that a warrant of the Court be issued by the Clerk of this Court, directed to the Summit County Sheriff to remove the Defendant, CRAIG E. CONNER, Inmate #571-044, who is now confined at the Marion Correctional Institution, or any other place he may be found, forthwith, and return him to Summit County, Ohio and thereupon, after the Defendant is processed by said sheriff, the Defendant is to be released and placed on community control, under the terms and conditions set forth in this order and the order filed by this Court on June 25, 2009.

IT IS SO ORDERED.

JUDGE JAMES MURPHY

APPROVED:

COLLEEN SIMS
Assistant Prosecutor

LAWRENCE J. WHITNEY #0023738
Attorney for Defendant

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DANIEL M. HORRIGAN
2009 OCT 30 AM 11:21
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**Case No. CR 07 12 4233 (E)**
	)	
vs.	)	
	)	**JOURNAL ENTRY**
DANIEL MOHLER		

THIS DAY, to-wit: The 30th day of October, A.D., 2009, upon due consideration of this Court, IT IS HEREBY ORDERED that the Journal Entry dated October 28, 2009 be amended to read as follows:

THIS DAY, to-wit: The 28th day of October, A.D., 2009, upon application of the Defendant, and having investigated the circumstances in this case, the Court hereby amends the prior order of June 22, 2009 granting community control.

IT IS HEREBY ORDERED that the sanctions 7, 8 and 9 of the terms of the Defendant's community control be SUSPENDED, and the Defendant shall be released from the **ORIANA HALFWAY HOUSE at the TERRENCE MANN RESIDENTIAL CENTER (TMRC)**, FORTHWITH and shall be remanded to the Summit County Adult Probation Department to serve the balance of his community control under the same terms and conditions heretofore given.

Defendant is therefore ORDERED to report to the Summit County Adult Probation Department, FORTHWITH.

APPROVED:
October 30, 2009
cld

JAMES E. MURPHY, Visiting Judge
Sitting on Assignment
Pursuant to Art. IV, Sec. 6
Ohio Constitution for

THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

cc: (Prosecutor Colleen Sims)
(Attorney Paul Adamson)
Adult Probation Department – Shari Kastor
(CBCF & Oriana House – EMAIL)

A-14