

IN THE OHIO SUPREME COURT

State of Ohio, :
 : Case No. 2013-0332
Plaintiff-Appellee, :
 :
v. : On appeal from the Butler
 : County Court of Appeals
Donald Lee Johnson, : Twelfth Appellate District
 : Case No. CA2011-11-212
Defendant-Appellant. :

MERIT BRIEF OF DEFENDANT-APPELLANT DONALD JOHNSON

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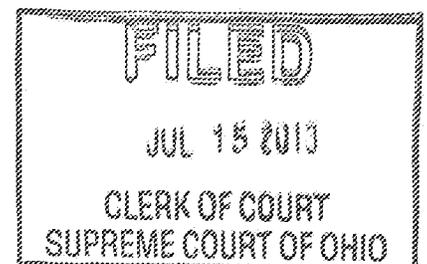


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I. **Introduction.**

The trial court relied on a presentence investigation report when it ordered Donald Johnson to pay \$19,000 in fines and serve a thirteen-year prison sentence. (Oct. 31, 2011 Disposition Hearing Tr. 13-14.) But the Twelfth District Court of Appeals will not let Mr. Johnson's attorney see that report, and Mr. Johnson cannot investigate whether the trial court properly imposed his punishment. Because the Twelfth District's refusal to allow defendant's counsel to review that report conflicts with the orders of the Fourth District Court of Appeals, Mr. Johnson filed this appeal.

II. **Statement of the Case and Facts.**

In Butler County Court of Common Pleas Case Number CR-2011-02-0199, Mr. Johnson was indicted¹ and pleaded no contest² to aggravated robbery with a gun

¹ Mr. Johnson was indicted for the following charges: Count One, aggravated robbery, a violation of R.C. 2911.01(A)(1) and a first-degree felony; Count Two, felonious assault, a violation of R.C. 2903.11(A)(2) and a second-degree felony, (Counts One and Two each had a gun specification attached to it pursuant to R.C. 2941.145); Count Three, robbery, a violation of R.C. 2911.02(A)(2) and a second-degree felony; and Count Four, aggravated possession of drugs, a violation of R.C. 2925.11 and a first-degree felony, which included a major drug offender specification pursuant to R.C. 2941.1410. (Feb. 16, 2011 Indictment.) In exchange for his plea, the major drug offender specification was dropped, and Count Two was merged into Count One. (Sept. 19, 2011 Change of Plea Hearing Tr. 7-8, 12-14.)

² The record contains some inconsistencies regarding Mr. Johnson's plea. The November 10, 2011 Judgment Entry of Conviction says that the court "considered . . . the defendant's Guilty Plea." But at the change of plea hearing, Mr. Johnson said that he was pleading no contest, which is also consistent with the No Contest & Jury Waiver form that he completed. (Sept. 19, 2011 Change of Plea Tr. 3,7, 11; Nov. 10, 2011 No Contest Plea & Jury Waiver.)

specification, felonious assault, robbery, and aggravated possession of drugs. (Sept. 19, 2011 Change of Plea Hearing Tr. 7-12.) To aid in crafting Mr. Johnson's sentence, the trial court ordered the preparation of a presentence investigation report.³ (*Id.* at 14; Oct. 31, 2011 Disposition Hearing Tr. 3, 13.) Before imposing his sentence, the court stated:

I've had a chance to review and consider the principles and guidelines of the sentencing statute, O.R.C. 2929.11, the factors the Court should consider in Section 2929.12 and 2929.13, and a presentence investigation report, and the defendant's record and the facts of this case.

(*Id.* at 13.) It then gave a brief recitation of Mr. Johnson's criminal history, including his juvenile record – but it did not say anything about his earning potential, education, or assets and imposed an aggregate sentence of thirteen years of imprisonment and \$19,000 in fines.⁴ (*Id.* at 13-14.)

On November 14, 2011, Mr. Johnson filed a notice of appeal to the Butler County Court of Appeals. While counsel was appointed to represent him, a timely merit brief was not filed, and on March 20, 2012, the court dismissed his appeal. (Mar. 20, 2012

³ During the pendency of Case Number CR-11-02-0199, Mr. Johnson was charged with additional, unrelated offenses in Case Number CR-11-10-1707 to which he pleaded guilty. (Oct. 31, 2011 Disposition Hearing Tr. 13-14.) On October 31, 2011, the trial court conducted a consolidated sentencing hearing for both cases. (*Id.*)

⁴ The trial court also imposed a mandatory term of five-years postrelease control supervision and may have attempted to impose court costs. This is because when it imposed Mr. Johnson's sentence for Count Three, it said that it was imposing "a fine of 4,000 and costs." (Oct. 31, 2011 Disposition Hearing Tr. 14.) But there is no other reference to the possible imposition of costs during the proceeding, so court costs have not been properly imposed. See *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-594, 926 N.E.2d 278, ¶ 1, 13.

Entry of Dismissal.) In August 2012, the Office of the Ohio Public Defender moved to reinstate Mr. Johnson's appeal, and in September, that motion was granted. (Sept. 21, 2012 Entry Granting Mot. to Reinstate Appeal.)

Mr. Johnson's newly appointed appellate counsel immediately tried to investigate potential assignments of error. Among other things, counsel wanted to examine whether the trial court properly imposed \$19,000 in fines. *See* R.C. 2929.19(B)(5) (stating that before imposing a fine, the trial court shall consider the defendant's present and future ability to pay financial sanctions). But, because the trial court did not include any statements on the record regarding Mr. Johnson's earning potential, education, assets, or other facts impacting his present and future ability to pay that fine, undersigned counsel requested permission to view the presentence investigation report, which the State opposed. (Nov. 29, 2012 Mot. to View and Supplement Record with PSI; Dec. 4, 2012 Memo. in Opp'n.) In December, the court of appeals denied Mr. Johnson's request, reasoning that a defendant may only review the presentence investigation report prior to sentencing and that there is no authority that permits defense counsel to view the report for purposes of appeal. (Dec. 7, 2012 Entry Granting Mot. to Supp. Record on Appeal with PSI Report and Denying Mot. by Appellant's Counsel to View Report.) Mr. Johnson asked the court to reconsider its ruling, and again, the court of appeals refused to allow Mr. Johnson's attorney access to the report. (Dec. 17, 2012 App. for Recon.; Jan. 16, 2013 Entry Denying App. for Recon.)

The Fourth District Court of Appeals has ruled that the Due Process Clause compels courts to grant newly appointed appellate counsel access to any presentence investigation report prepared in a case prior to filing an appellate brief. *State v. Jordan*, 4th Dist. No. 03CA2878, Entry at 6-7 (Nov. 17, 2003); *State v. Doss*, 4th Dist. No 09CA20, Magistrate's Order (June 7, 2010). Consequently, Mr. Johnson moved to certify a conflict between the orders of the Twelfth District and Fourth District Courts of Appeal, and in February, that motion was granted. (Jan. 25, 2013 Mot. to Certify a Conflict; Feb. 21, 2013 Entry Granting Mot. to Certify a Conflict.) But the Twelfth District Court of Appeals still ordered Mr. Johnson to file his merit brief by March 14, 2013. (Feb. 21, 2013 Entry Designating Due Date for Appellant's Brief.)

On February 25, 2013, Mr. Johnson filed a notice of a certified conflict in this Court and asked for an order directing a stay of the briefing schedule in the court of appeals. On March 20, 2013 this Court ordered a stay, and on April 24, 2013, this Court found that a conflict existed and ordered briefing on the following question: whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report. (Apr. 24, 2013 Entry.)

III. Argument.

Certified Conflict Question:

Whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report.⁵

Presentence investigation reports contain information that trial court's rely on when selecting a sentence, imposing fines, and ordering restitution. *See* R.C. 2929.11, 2929.12, 2929.13, and 2929.14. Those reports have details about the surrounding circumstances of the crime; statements from victims and financial losses they may have suffered; information about the defendant's criminal history, education, and mental and physical health; and the defendant's financial status, including information that may assist in assessing the defendant's earning potential. R.C. 2951.03(A)(1). Due to this sensitive information relating to both the victim and the defendant, those reports are not public records. R.C. 2951.03(D)(1). And, in part, that is why the State opposed Mr. Johnson's request to view the report. (Dec. 4, 2012 Memo. in Opp'n to Mot., 2.) But disclosing the report to counsel does not alter its confidential nature. R.C. 2953.08(F)(1). *See* Crim.R. 16(C) (allowing non-public documents to be classified as "counsel only"). Moreover, the legislature intended for those reports to be disclosed. *See* R.C. 2951.03(A)(3) (stating that for rehabilitative and penological purposes, a presentence

⁵ While the certified question asks only whether "newly-appointed appellate counsel" should have access to the presentence investigation report, there is no rule or statute that limits the availability of the report to "appointed" counsel.

investigation report may be disclosed to law enforcement, halfway houses, community-based correctional facilities, and mental, medical, and substance abuse treatment programs). Moreover, because they are indispensable in crafting the defendant's sentence, the legislature recognized that both parties need access to them. R.C. 2951.03(D)(1). Therefore, because a sentence is subject to review on appeal, the legislature drafted the statute so that the reports are available to appellate courts and both parties. *Id.*

But even if this Court ruled that the plain language of R.C. 2951.03(D)(1) does not expressly allow defense counsel access to a presentence investigation report on appeal, R.C. 2951.03(D)(1) must be interpreted in a manner that comports with the Due Process Clauses of the State and federal constitutions, and the only way that the Due Process Clauses are satisfied is if defense counsel has access to the report on appeal. Fourteenth Amendment to the United States Constitution; Ohio Constitution, Article I, Section 16. *See State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 149, 128 N.E.2d 59 (1955); *State v. Snito*, 43 Ohio St.2d 98, 101, 330 N.E.2d 896 (1975).

Based on the statute's plain language and the constitutional limitations implicit in all statutes, this Court should rule that R.C. 2951.03(D)(1) allows a defendant's appellate attorney to obtain a copy of any presentence investigation report prepared in the trial court proceedings so that counsel may investigate potential assignments of error for appeal.

A. Trial courts rely on presentence investigation reports when sentencing a defendant.

Presentence investigation reports contain crucial information that courts must consider when fashioning sentences, imposing fines, and ordering restitution. *See* R.C. 2951.03(A)(1);⁶ R.C. 2929.19(B)(1) (stating that the trial court “shall” consider the contents of that report prior to imposing the defendant’s sentence). Countless appellate courts have relied on presentence investigation reports when reviewing the appropriateness of a defendant’s sentence. *See, e.g., State v. Liskany*, 196 Ohio App.3d 609, 2011-Ohio-4456, 964 N.E.2d 1073, ¶ 191 (reversing the defendant’s sentence because a police officer’s recommendation contained in the presentence investigation report (sometimes referred to as the “PSI”) asked for a longer sentence than the plea agreement reached by the parties); *State v. Witt*, 8th Dist. No. 94800, 2011-Ohio-336, ¶ 7, 8 (ruling that the trial court did not err in determining that the defendant had

⁶ Revised Code 2951.03(A)(1) states:

the officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2. Whenever the officer considers it advisable, the officer’s investigation may include a physical and mental examination of the defendant. * * * If, pursuant to section 2930.13 of the Revised Code, the victim of the offense of which the defendant has been convicted wishes to make a statement regarding the impact of the offense for the officer’s use in preparing the presentence investigation report, the officer shall comply with the requirements of that section.

committed the worst form of the offense as outlined by the facts contained in the PSI); *State v. Edel*, 8th Dist. No. 79343, 2002-Ohio-651 (relying on facts contained in the PSI to determine if the trial court complied with R.C. 2929.14(B), when imposing defendant's sentence); *State v. Messer*, 10th Dist. No. 03AP-169, 2004-Ohio-2127, ¶ 19 (relying on detailed facts in the PSI to reverse finding that defendant was not a sexual predator); *State v. Rufus*, 11th Dist. Nos. 2006-L-254, 2006-L-255, and 2006-L-256, 2007-Ohio-4951, ¶ 36 (sentence affirmed based, in part, on the trial court's reliance on information from the PSI).

Further, because R.C. 2929.19(B)(5) requires courts to consider a defendant's ability to pay a financial sanction before one may be imposed, presentence investigation reports provide critical information to assist in that determination. *See, e.g., State v. Petrie*, 4th Dist. No. 12CA4, 2013-Ohio-887 (recognizing that the PSI often times includes information from which a reviewing court may determine that a defendant has the ability to pay a financial sanction, but reversing the fine because the trial court stated that it did not know the defendant's economic situation); *State v. Gilmore*, 6th Dist. No. OT-01-015, 2002-Ohio-2045 (the trial court record, including information contained in the PSI, established that defendant's attorney was ineffective for failing to object to the imposition of a fine); *State v. Sestic*, 12th Dist. No. CA2012-08-020, 2013-Ohio-2864, ¶ 9-12 (affirming the trial court's order that the defendant pay \$43,600 in restitution based upon information contained in the PSI). And when a defendant challenges the

imposition of a financial sanction on appeal, the reviewing court considers whether the trial court relied on financial information contained in the presentence investigation report. *State v. Ellis*, 4th Dist. No. 06CA3071, 2007-Ohio-2177, ¶ 32, citing *State v. Slater*, 4th Dist. No. 01CA2806, 2002-Ohio-5343, ¶ 8.

In this case, before imposing \$19,000 fines, the trial court made no mention of Mr. Johnson's current financial circumstances, education, future employability, or his earning potential. But it did indicate that it was relying on the presentence investigation report. (Oct. 31, 2011 Disposition Hearing Tr. 13.) For that reason, the report is vital to counsel's investigation of whether those fines were properly imposed.

B. The plain language of R.C. 2951.03(D)(1) allows a defendant's appellate attorney to access the presentence investigation report.

1. *Revised Code 2951.03(D)(1) says that the defendant's counsel may obtain or review the presentence investigation report for purposes of appeal.*

The plain language of R.C. 2951.03(D)(1) allows a defendant's attorney to obtain a copy of the presentence investigation report for purposes of challenging the defendant's punishment on appeal. That statute provides:

The court, **an appellate court**, authorized probation officers, investigators, and court personnel, the defendant, **the defendant's counsel**, the prosecutor who is handling the prosecution of the case against the defendant, and authorized personnel of an institution to which the defendant is committed may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation only for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08

[entitled “Grounds for appeal by defendant or prosecutor of sentence for felony”], section 2947.06, or another section of the Revised Code.

(Emphasis added.) R.C. 2951.03(D)(1).

When construing a statute, the overriding aim is to give effect to the legislature’s intent. The first step in this process is to look at the language in the statute. *In re M.W.*, 133 Ohio St.3d 303, 2012-Ohio-4538, 978 N.E.2d 164, ¶ 17. Courts give words their plain and ordinary meaning and construe them in accordance with traditional rules of grammar and usage. *Id.* If the statute is subject to only one reasonable construction, courts must stop their inquiry and cannot look beyond the words written. *Id.*

The plain language of R.C. 2951.03(D)(1) grants newly appointed appellate counsel access to the presentence investigation report: “the defendant’s counsel . . . may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation.” R.C. 2951.03(D)(1). “Defendant’s counsel” necessarily includes a defendant’s attorney on appeal, and any argument to the contrary is incredible. Indeed, a defendant is a person against whom a criminal charge is brought. *Black’s Law Dictionary* 419 (6th Ed.1990); Dictionary.com, *Defendant*, <http://dictionary.reference.com/browse/defendant?s=t&path=/> (accessed on July 9, 2013). And a charge is not final until the defendant has exhausted his or her appeals. 28 U.S.C. 2244(d)(1)(A). An “appellant” is the one who files the notice of appeal from the trial court’s judgment – and the status of an appellant has no bearing on whether the party is the defendant or plaintiff. *See Black’s Law Dictionary* 97 (6th

Ed.1990). Thus, a defendant remains a defendant on appeal, and the legislature's reference to defense counsel includes the defendant's attorney on appeal.

Moreover, the surrounding words and context of R.C. 2951.03(D)(1) establishes the legislature's intent to ensure that presentence investigation reports are made available to appellate counsel. See *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 29-30, 32 (noting that the rules of statutory construction require that words and phrases be read in context and then looking at the legislature's statutory scheme to determine that context). The statute provides that an appellate court may obtain the report so that it can review the appropriateness of the defendant's sentence: "an appellate court . . . may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation . . . for the purposes of . . . division (F)(1) of section 2953.08." Ohio Revised Code 2953.08 sets forth the grounds upon which the parties may appeal a felony sentence. In other words, the statute plainly states that the appellate court may review the presentence investigation report in determining the propriety of the defendant's sentence. When reading "defendant's counsel" in this context, the legislature must have intended for a presentence investigation report to be available to a defendant's attorney on appeal so that the defendant could raise any challenges to his or her sentence pursuant to R.C. 2953.08. Otherwise, there would be no reason to make

the report available to the appellate court because appellate counsel cannot raise arguments it cannot discover. *See* Civ.R. 11.

The plain language of R.C. 2951.03(D)(1) requires that presentence investigation reports be made available to “defendant’s counsel,” and nothing in R.C. 2951.03(D)(1) makes the report unavailable when a notice of appeal is filed.

2. *The sentencing scheme is designed so defendants may challenge their sentences on appeal, which necessarily requires access to the information relied on by the trial courts.*

Ohio Revised Code Sections 2951.03(D)(1) and R.C. 2953.08(F)(1) are read in *pari materia* and establish a statutory scheme that allows for appellate review of a defendant’s sentence. As part of that scheme, the legislature also determined that the court of appeals and counsel for the parties should have access to the same information that was before the trial court, including any presentence investigation report prepared in that case.

When two or more statutory provisions address the same subject matter, they must be read in *pari materia*. *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 2009-Ohio-2610, 910 N.E.2d 432, ¶ 25. *State ex rel. Taxpayers for Westerville Sch. v. Franklin Cnty. Bd. of Elections*, 133 Ohio St.3d 153, 2012-Ohio-4267, 976 N.E.2d 890, ¶ 17 (discussing principle that statutes that relate to the same subject matter must be read in conjunction with one another). And, unless the statutory provisions are irreconcilable, they must be construed harmoniously. *Cordray* at ¶ 25.

Ohio Revised Code 2953.08(A) grants a defendant with an appeal as a matter of right, and R.C. 2953.08(F)(1) provides that any presentence investigation report will be made a part of the appellate record. As already discussed, R.C. 2951.03(D)(1) states that defense counsel and the court of appeals shall have access to that report. Thus, when these provisions are read together, the only logical interpretation is that the legislature intended to create an appellate scheme that would allow a defendant to seek review of his or her sentence and that, that review would allow the court of appeals to review the information that was before the trial court. Part of that scheme is defense counsel's ability to review the presentence investigation report so that counsel may investigate and identify any errors and present those challenges to the court of appeals. *See Britt v. North Carolina*, 404 U.S. 226, 227-228, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971) (stating that a defendant need not make a preliminary showing of error to obtain a copy of the transcript of the trial court proceedings). The only way that a defendant can obtain meaningful appellate review of a sentence is if that defendant has access to the same information that is available to the State and the court. *See generally Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (noting that inmates are entitled to a meaningful appeal, which is impossible without a trial transcript); *State v. Arrington*, 42 Ohio St.2d 114, 116, 326 N.E.2d 667 (1975) (noting that the State must provide a defendant with adequate tools to prepare an adequate appeal).

Ohio Revised Code Sections 2951.03(D)(1) and 2953.08(F)(1) exhibit the legislature's intent to create a statutory scheme that allows a defendant to meaningfully challenge his or her punishment on appeal, which necessarily requires that the defendant and his or her counsel have access to the same information available to the trial court, the State, and the court of appeals.

C. The State and federal constitutions require that presentence investigation reports be made available to appellate counsel.

The Twelfth District Court of Appeals' interpretation of R.C. 2951.03(D)(1) leads to unconstitutional results in violation of a defendant's rights to due process and his or her effective assistance of counsel. The legislature, however, is presumed to enact constitutional laws, and whenever possible, courts will construe legislation so that it comports with the constitution. *Dickman*, 164 Ohio St. at 149; *Snito*, 43 Ohio St.2d at 98. To ensure that R.C. 2951.03(D)(1) may be harmonized with the State and federal constitutions, this Court should rule that R.C. 2951.03(D)(1) permits a defendant's appellate counsel to review the presentence investigation report prior to filing an appellate brief.

- 1. It is fundamentally unfair to force a defendant to prepare a merit brief without allowing the defendant access to the trial court record.*

Undersigned counsel did not represent Mr. Johnson before the trial court and, consequently, did not review the presentence report that was expressly relied on by the court in crafting Mr. Johnson's sentence. (Oct. 31, 2011 Disposition Tr. 13.) If Mr.

Johnson's appellate counsel is forced to file an appellate brief without being allowed to review that report, it gives the State an unjustified advantage, which is fundamentally unfair and in violation of the Due Process Clauses of the State and federal constitutions. Fourteenth Amendment to the United States Constitution; Ohio Constitution, Article I, Section 16. *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 73 (noting that the Due Process Clause demands fundamental fairness in court proceedings); *State v. Arnett*, 88 Ohio St.3d 208, 217, 724 N.E.2d 793 (2000) (noting that sentencing proceedings violate due process if they are fundamentally unfair). The State was represented by the Butler County Prosecutor before the trial court and the court of appeals, and the prosecutor had access to the presentence investigation report. The court of appeals now has access to that report. The only party who has not seen or had access to the report is Mr. Johnson and his attorney. Accordingly, the Twelfth District's decision is unreasonable.

A presentence investigation report includes vital information about the circumstances of the crime and the defendant, and that information is integral to the trial court's sentencing decision. *See* R.C. 2929.12. Because Mr. Johnson is entitled to appeal his punishment, he is equally entitled to review the information that the court considered for that determination. *See State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 (stating that a sentence may be reversed if it is contrary to law or an abuse of discretion). *See generally Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10

L.Ed.2d 215 (1963) (recognizing that the Due Process Clause protects a defendant's access to information that is material to either his guilt or punishment). It is fundamentally unfair to force Mr. Johnson to raise all meritorious issues on appeal but forbid him from accessing the information relied on by the trial court. It forces Mr. Johnson to proceed blindly on appeal while risking the waiver of arguments that are unknown and undiscoverable, and it encourages counsel to raise arguments that are not meritorious.

If the Twelfth District's interpretation of R.C. 2951.03(D)(1) is allowed to stand, the statute will be interpreted in a manner that is fundamentally unfair and which puts the State at an advantage. By allowing Mr. Johnson's new appellate counsel to review the report prior to filing an appellate brief, it will level the playing field and protect Mr. Johnson's due process rights.

2. *Counsel cannot perform effectively if counsel has to guess at the assignments of error.*

Mr. Johnson is constitutionally entitled to the effective assistance of counsel, which cannot be provided if his counsel cannot review the presentence investigation report. Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 10; *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42, 538 N.E.2d 373, 379 (1989). Appellate counsel must be able to adequately investigate the trial court proceedings to determine if Mr. Johnson's convictions and punishments comport with

the law. See *Smith v. Robbins*, 528 U.S. 259, 281, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (stating that defense counsel's "procedural and factual history, with citations of the record, both ensures that a trained legal eye has searched the record for arguable issues and assists the reviewing court in its own evaluation."). But that cannot be done if counsel cannot review the information expressly relied on by the trial court. (Oct. 31, 2011 Disposition Hearing Tr. 13.) And in later proceedings, counsel's failure to raise certain arguments on appeal cannot be the result of a strategic decision if unwarranted roadblocks prevented counsel from discovering those claims.

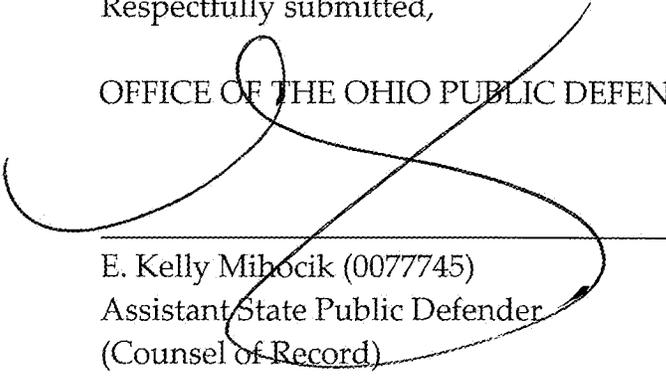
If the Twelfth District Court of Appeals' interpretation of R.C. 2951.03(D)(1) is accepted by this Court, then a defendant will be denied the effective assistance of counsel on appeal.

IV. Conclusion.

Mr. Johnson asks that this Court rule that prior to filing an appellate brief in a defendant's direct appeal, appellate counsel has the right to obtain the presentence investigation report prepared in the case.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



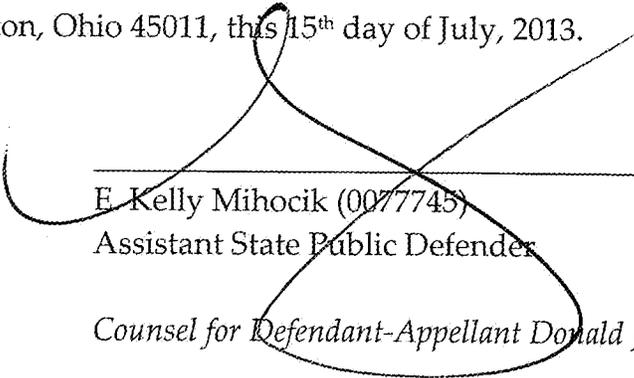
E. Kelly Mihocik (0077745)
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(Counsel of Record)

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Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)
kelly.mihocik@opd.ohio.gov

Counsel for Defendant-Appellant Donald Johnson

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular U.S. Mail, to the Office
Lina N. Alkawahwi, Assisting Prosecuting Attorney, Butler County Prosecutor's Office,
315 High Street, 11th Floor, Hamilton, Ohio 45011, this 15th day of July, 2013.



E. Kelly Mihocik (0077745)
Assistant State Public Defender

Counsel for Defendant-Appellant Donald Johnson

#397322

IN THE OHIO SUPREME COURT

| | | |
|----------------------|---|----------------------------|
| State of Ohio, | : | |
| | : | Case No. 2013-0332 |
| Plaintiff-Appellee, | : | |
| | : | |
| v. | : | On appeal from the Butler |
| | : | County Court of Appeals |
| Donald Lee Johnson, | : | Twelfth Appellate District |
| | : | Case No. CA2011-11-212 |
| Defendant-Appellant. | : | |

APPENDIX TO
MERIT BRIEF DEFENDANT-APPELLANT DONALD JOHNSON

ORIGINAL

IN THE OHIO SUPREME COURT

| | | |
|----------------------|---|--|
| State of Ohio, | : | Case No. 13-0332 |
| Plaintiff-Appellant, | : | |
| v. | : | On appeal from the Butler County Court of Appeals |
| Donald Lee Johnson, | : | Twelfth Appellate District Case No. CA2011-11-212 |
| Defendant-Appellee. | : | |

NOTICE OF CERTIFIED CONFLICT

Michael Gmoser (0002132)
Butler County Prosecutor

Michael A. Oster, Jr. (0076491)
Assistant Prosecuting Attorney
(Counsel of Record)

Butler County Prosecutor's Office
Government Services Center
315 High Street -- 11th Floor
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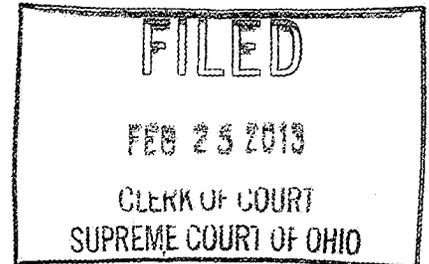
Counsel for Appellee State of Ohio

OFFICE OF THE OHIO PUBLIC DEFENDER

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kelly.mihocik@opd.ohio.gov

Counsel for Appellant Donald Lee Johnson



NOTICE OF CERTIFIED CONFLICT

In accordance with S.Ct. Prac. R. 4.1, Appellant Donald Johnson files notice that the Twelfth Appellate District has certified a conflict between its December 7, 2012 and January 16, 2013 orders in *State v. Johnson*, CA2011-11-212, which prohibit appellate counsel from reviewing a presentence investigation report prior to filing an appellate brief, and the Fourth District Court of Appeals' order in with *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003), which allows appellate counsel to have access to the presentence investigation report prepared in a case. The Entry Granting Motion to Certify Conflict and the conflicting court of appeals' orders are attached.

On January 25, 2013, Mr. Johnson filed a timely motion to certify a conflict in the Twelfth Appellate District in case number CA2011-11-212. On February 21, 2013, well within the sixty day period set forth in App.R. 25(C), the Twelfth Appellate District certified the following question: whether newly appointed appellate counsel should have the opportunity to review the appellant's presentence investigation report.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

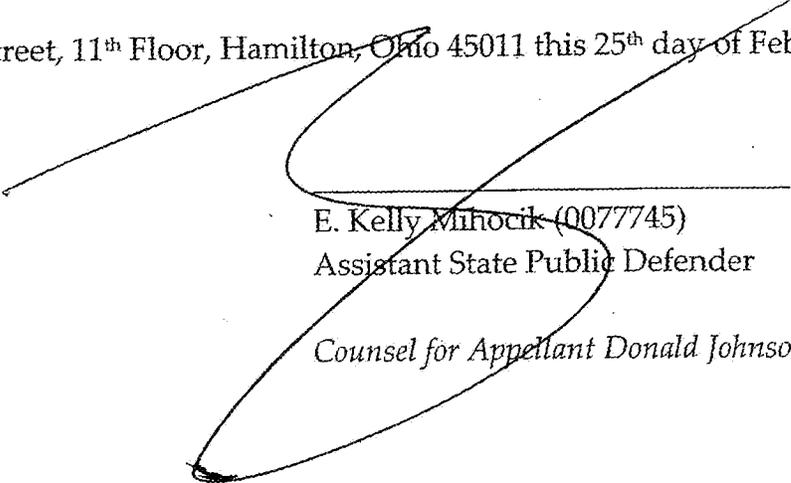
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kelly.mihocik@opd.ohio.gov

Counsel for Appellant Donald Lee Johnson

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was sent by regular U.S. Mail, to the office of Michael A. Oster, Jr., Assisting Prosecuting Attorney, Butler County Prosecutor's Office, 315 High Street, 11th Floor, Hamilton, Ohio 45011 this 25th day of February, 2013.



E. Kelly Mihocik (0077745)
Assistant State Public Defender

Counsel for Appellant Donald Johnson

#387872

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

2013 FEB 21 PM 2:58 CASE NO. CA2011-11-212

STATE OF OHIO,

Appellee,

MARY L. SWAIN
BUTLER COUNTY CLERK OF COURTS
GRANTING MOTION TO CERTIFY CONFLICT

vs.

FILED BUTLER CO.
COURT OF APPEALS

DONALD LEE JOHNSON,

FEB 21 2013

Appellant.

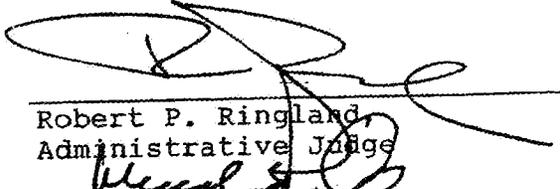
MARY L. SWAIN
CLERK OF COURTS

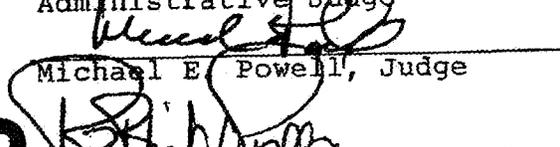
The above cause is before the court pursuant to a motion to certify conflict filed by counsel for appellant, Donald Lee Johnson, on January 25, 2013. No response to the motion has been filed. The motion seeks certification of this court's decision denying newly-appointed appellate counsel the opportunity to review the appellant's presentence investigation report as in conflict with a decision by the Fourth District Court of Appeals, *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003).

This court is authorized to certify a conflict to the Ohio Supreme Court for resolution pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, which states that when the judgment or order of a district court of appeals conflicts with a judgment pronounced upon the same question by another court of appeals, the court shall certify the matter to the Supreme Court of Ohio for review and final determination.

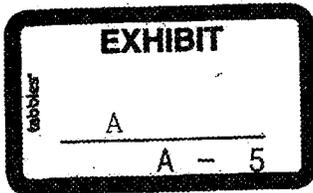
Upon consideration, the motion is GRANTED. The issue for certification is whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report.

IT IS SO ORDERED.


Robert P. Ringland,
Administrative Judge


Michael E. Powell, Judge


Robin N. Piper, Judge



IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

SCIOTO COUNTY
OHIO
FILED

2003 NOV 17 AM 8:29

State of Ohio,

Appellee,

v.

Stephanie Jordan,

Appellant.

CLERK OF COURTS
Case No. 03CA2878

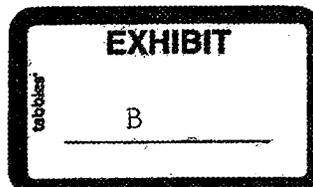
ENTRY

Appellant filed a motion to view the presentence investigation report ("PSI"), based on the right to effective assistance of appellate counsel under the Sixth Amendment to the Constitution of the United States, as accorded by *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.E.2d 821. We stayed briefing in this case until resolution of this issue.

STATUTORY BACKGROUND

R.C. 2951.03(B)(1) requires the trial court to permit the defendant or counsel to view a PSI before sentencing, except for certain, specified contents:

- (a) recommendations as to sentence;
- (b) diagnostic opinions that the court believes might seriously disrupt the defendant's rehabilitation, if disclosed;
- (c) sources of information obtained upon a promise of confidentiality;



33/54

- (d) any other information that the court believes might result in physical harm or some other type of harm to the defendant, or any other person, if disclosed.

R.C. 2951.03(B)(2) requires the trial court to permit the defendant or counsel to comment on the PSI and permits challenges to the factual accuracy of the PSI. However, under R.C. 2951.03(B)(3), if the trial court believes that any information is subject to any of the four criteria for nondisclosure, instead of releasing the PSI to the defendant or counsel, the court may provide an oral or written summary of the information it will use in sentencing. If it uses this procedure, the trial court must also permit the defendant or counsel to comment on the summary.

Under R.C. 2951.03(B)(4), if the trial court discloses any material to the defendant or counsel, the trial court must also disclose it to the prosecutor.

Under R.C. 2951.03(B)(5), if the defendant or counsel challenges the accuracy of the PSI or any summary, the trial court must either (a) make a finding as to the allegation, or (b) make a determination that no finding is necessary because the matter challenged will not be taken into account in determining sentence.

R.C. 2951.03(D)(2) requires the defendant or counsel and the prosecutor to return all copies of a PSI or summary made available to them and prohibits them from making other copies.

The statute also addresses the availability of the report after sentencing. R.C. 2951.03(D)(1) states that a PSI and summary are confidential and not public records. The section directs an appellate court to receive and use a PSI or summary only as authorized by R.C. 2953.08(F)(1). Further, R.C. 2951.03(D)(3) states that the appellate court shall retain the PSI or summary under seal, except when being used as authorized by R.C. 2953.08(F)(1).

R.C. 2953.08(F)(1) requires the trial court to make the PSI a part of the record on appeal. It also states a court of appeals that reviews a PSI in connection with an appeal shall comply with R.C. 2951.03(D)(3) - i.e., shall keep it under seal - when the court is not using it. The section further states that an appellate court's use of the PSI does not cause the PSI to become a public record after the appellate court's use of the report.

To summarize: The statutes require the trial court to provide a PSI to the defendant or counsel before sentencing. After sentencing, the parties must return any copies and not make others. The PSI is placed under seal, is not a public record, and may be used on appeal only by the appellate court,

which must preserve its confidentiality when not using it. There are other provisions for use by other authorized personnel, including personnel of the Department of Rehabilitation and Correction. However, we find no express authorization to make the PSI available to an appellant or to the prosecutor after sentencing and thus on appeal. Likewise, no special provision is made for newly appointed counsel on appeal.

ANALYSIS

Many Ohio cases hold that a convicted defendant is not entitled to view the PSI after sentencing. See, e.g., *State ex rel. Normand v. Wilkinson* (Nov. 28, 1995), Franklin App. No. APE05-563 (prisoner could not compel disclosure by writ of mandamus after sentencing); *State ex rel. Sharpless v. Gierke* (2000), 137 Ohio App.3d 821, 739 N.E.2d 1231 (writ of mandamus seeking to compel access to PSI for purposes of seeking postconviction relief); *State v. Fisher*, Butler App. No. 98-09-190, 2002-Ohio-2069, and *State v. Hicks*, Butler App. No. CA2002-07-162, 2003-Ohio-506 (appellate counsel not de facto ineffective because unable to view PSI after sentencing); and *State v. Roberson* (2001), 141 Ohio App.3d 626, 752 N.E.2d 984 [trial counsel not ineffective because unable to view parts of PSI restricted under R.C. 2951.03(B)(1)]

Roberson, supra, cited *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1069, 93 L.Ed.2d 1337, which held that due process did not require disclosure of information available to the trial court for sentencing. This was true even though the court did not reveal it to the defendant or counsel prior to sentencing and thus the defendant had no opportunity to deny or explain it. 141 Ohio App.3d at 629; 337 U.S. at 250-251. The *Williams* court based this conclusion on the historically wide latitude trial courts had to consider additional information in order to promote the modern trend in crafting individualized sentences. 337 U.S. at 246-250.

The *Roberson* court also noted that *Williams* has been distinguished in capital cases by *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. The *Gardner* court found that the trial court in *Williams* "had stated the facts of the report on the record", 141 Ohio App.3d at 630; 430 U.S. at 355. *Gardner* then held that due process required full disclosure of the PSI. 430 U.S. 362

Roberson then concluded that *Gardner* was limited to capital cases, 141 Ohio App.3d at 631-632. While we agree that *Gardner* appears to be limited to capital cases, we find, independently, that due process requires a PSI to be shown to newly appointed appellate counsel.

We believe the statute's failure to allow newly appointed appellate counsel to view the PSI is a serious omission that violates an appellant's right to due process of law under the Sixth Amendment to the Constitution of the United States. In *Evitts v. Lucey*, supra, the Supreme Court stated:

* * * if a State has created appellate courts "as an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct. at 590, the procedures used must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. 469 U.S. at 393; 105 S.Ct. at 834.

This state has, of course, created a system of appellate courts, and it has granted to every litigant a first appeal as of right. R.C. 2505.03. Moreover, R.C. 2953.08(A) provides in part:

In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

* * *

(4) The sentence is contrary to law.

* * *

Given these rights to appeal and to challenge the lawfulness of the sentence, we believe that fundamental fairness and due process require newly appointed appellate

counsel have access to the PSI. However, we deem this due process right to extend only to permitting newly appointed appellate counsel to view that part of the summary that was available to trial counsel, and not to include parts of the PSI restricted under R.C. 2953.01(B)(1). *Roberson, supra*; *State v. Gonzales* (June 15, 2001), Wood App. No. WD-00-077.

Moreover, we emphasize that our decision is based on due process, as extended through the right to effective assistance of appellate counsel by *Evitts, supra*, and not on the standard announced in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, of "deficient performance and resulting prejudice".¹ Rather, the statutory prohibition preventing newly appointed counsel from viewing the unrestricted parts of the PSI or a summary violate the due process guarantee that underlies the right to effective assistance of appellate counsel on an appeal as of right, as announced in *Evitts*.² Thus, we view this right to access akin to the right to a transcript accorded by *Griffin v. Illinois* (1956), 351 U.S. 12, 78 S.Ct. 585, 100 L.Ed. 891. Without the

¹ "Deficient performance means performance falling below an objective standard of reasonable representation. 'Prejudice' means a reasonably probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-688 * * *." (Additional citation omitted.) *State v. Hutton*, 100 Ohio St.3d 176, {¶ 44}, ___ N.E.2d ___, 2003-Ohio-5607.

² "In this case, we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such appeal [as of right]." 469 U.S. at 388-389.

PSI, newly appointed counsel is prevented from being effective, rather than being deemed ineffective under the *Strickland* standard.

We have examined the record in this case, including the PSI. It appears that the trial court did not redact the PSI or use a summary in lieu of the PSI. We find no diagnostic opinions subject to restriction under R.C. 2951.03(B)(1)(b), no sources of information obtained on promises of confidentiality subject to restriction under R.C. 2951.03(B)(1)(c), and no information indicating danger to appellant or others subject to restriction under R.C. 2951.03(B)(1)(d). We do note, however, that the final page of the report, entitled "RECOMMENDATION", contains the sentencing recommendation of the officer who compiled the report. Access to this recommendation is restricted under R.C. 2951.03(B)(1)(a). *Roberson and Gonzales supra.*

ORDER

Accordingly, we instruct the clerk of the court of appeals, upon application of counsel for the appellant or the appellee, to permit counsel to inspect and copy the presentence investigation report contained in the record, except for the last page entitled "RECOMMENDATION". Counsel may retain and use the redacted copies of the report during the pendency of this appeal. Upon the journalization of our

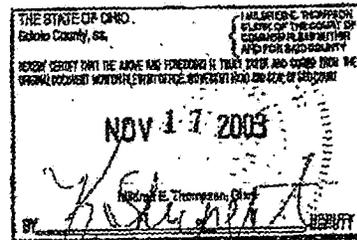
final decision and judgment entry, counsel shall return all copies to the clerk and not make others. The clerk shall accept such copies and file them with the presentence investigation report, which is then under continued seal.

Appellant shall file her brief within twenty days after this entry is filed. Thereafter, further briefing shall be conducted under App.R. 18(A). SO ORDERED.

Evans, P.J.: Concur
Kline, J.: Dissents

FOR THE COURT

William H. Harsha
William H. Harsha, Administrative Judge



IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO, 2013 JAN 16 PM 2:11

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

ENTRY DENYING APPLICATION
FOR RECONSIDERATION

vs.

DONALD LEE JOHNSON,

FILED BUTLER CO.
COURT OF APPEALS

Appellant.

JAN 16 2013

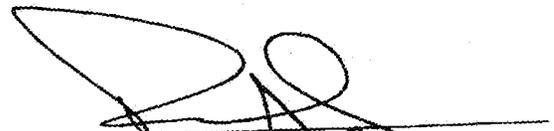
MARY L. SWAIN
CLERK OF COURTS

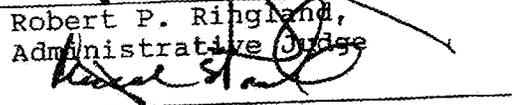
The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellant, Donald Lee Johnson, on December 17, 2012. Appellant seeks reconsideration of this court's December 7, 2012 decision denying his counsel's request to review the presentence investigation report.

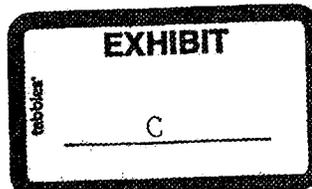
Upon consideration of the foregoing, the application for reconsideration is DENIED. The application does not call the court's attention to an obvious error in its decision, or raise an issue for consideration that was not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (1993).

Appellant's brief shall be filed within 20 days of the date of this entry or on or before **February 4, 2013**.

IT IS SO ORDERED.


Robert P. Ringland,
Administrative Judge


Michael E. Powell, Judge



IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO,

2012 DEC -7 PM 1:41

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

vs.

DONALD LEE JOHNSON

FILED BUTLER CO.
COURT OF APPEALS

Appellant.

DEC 07 2012

MARY L. SWAIN
CLERK OF COURTS

ENTRY GRANTING MOTION TO
SUPPLEMENT RECORD ON APPEAL
WITH PRESENCE INVESTIGATION
REPORT AND DENYING MOTION
BY APPELLANT'S COUNSEL TO VIEW
THE REPORT

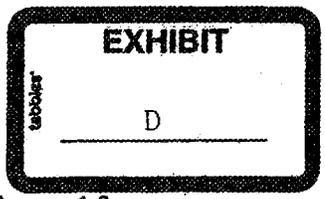
The above cause is before the court pursuant to a motion to view and supplement record with presentence investigation report filed by counsel for appellant, Donald Lee Johnson, on November 29, 2012, and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on December 4, 2012.

R.C. 2951.03 addresses presentence investigation reports in felony cases. R.C. 2951.03(D)(1) addresses disclosure of a presentence investigation report. No provision of that section permits disclosure of a presentence investigation report to counsel after the defendant has been sentenced. Accordingly, the motion to disclose the presentence investigation report to appellate counsel is DENIED.

Pursuant to R.C. 2953.08(F)(1), the record on appeal shall include "any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed." Accordingly, the motion to supplement the record on appeal with the presentence investigation report is GRANTED.

IT IS SO ORDERED.

Bennett A. Manning
Bennett A. Manning, Magistrate



IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

2013 FEB 21 PM 2:58

CASE NO. CA2011-11-212

STATE OF OHIO,

Appellee,

vs.

DONALD LEE JOHNSON,

Appellant.

MARY L. SWAIN
BUTLER COUNTY CLERK OF COURTS
ENTRUSTED WITH GRANTING MOTION TO
CERTIFY CONFLICT

FILED BUTLER CO.
COURT OF APPEALS

FEB 21 2013

MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to a motion to certify conflict filed by counsel for appellant, Donald Lee Johnson, on January 25, 2013. No response to the motion has been filed. The motion seeks certification of this court's decision denying newly-appointed appellate counsel the opportunity to review the appellant's presentence investigation report as in conflict with a decision by the Fourth District Court of Appeals, *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003).

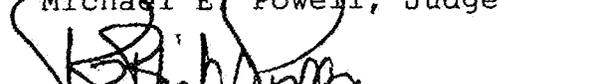
This court is authorized to certify a conflict to the Ohio Supreme Court for resolution pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, which states that when the judgment or order of a district court of appeals conflicts with a judgment pronounced upon the same question by another court of appeals, the court shall certify the matter to the Supreme Court of Ohio for review and final determination.

Upon consideration, the motion is GRANTED. The issue for certification is whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report.

IT IS SO ORDERED.


Robert P. Ringland,
Administrative Judge


Michael E. Powell, Judge


Robin N. Piper, Judge

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO, 2013 JAN 16 PM 2:15

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

ENTRY DENYING APPLICATION
FOR RECONSIDERATION

vs.

DONALD LEE JOHNSON,

FILED BUTLER CO.
COURT OF APPEALS

Appellant.

JAN 16 2013

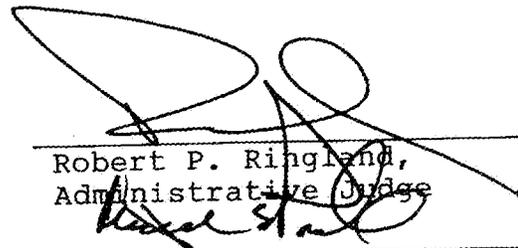
MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellant, Donald Lee Johnson, on December 17, 2012. Appellant seeks reconsideration of this court's December 7, 2012 decision denying his counsel's request to review the presentence investigation report.

Upon consideration of the foregoing, the application for reconsideration is DENIED. The application does not call the court's attention to an obvious error in its decision, or raise an issue for consideration that was not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (1993).

Appellant's brief shall be filed within 20 days of the date of this entry or on or before **February 4, 2013**.

IT IS SO ORDERED.



Robert P. Ringland,
Administrative Judge

Michael E. Powell, Judge

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO, 2012 DEC -7 PM 1:41 CASE NO. CA2011-11-212

Appellee,

vs.

DONALD LEE JOHNSON

Appellant.

MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS
FILED BUTLER CO.
COURT OF APPEALS

DEC 07 2012

MARY L. SWAIN
CLERK OF COURTS

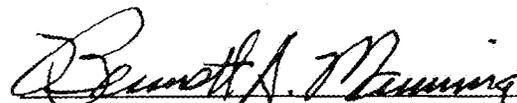
ENTRY GRANTING MOTION TO
SUPPLEMENT RECORD ON APPEAL
WITH PRESENTENCE INVESTIGATION
REPORT AND DENYING MOTION
BY APPELLANT'S COUNSEL TO VIEW
THE REPORT

The above cause is before the court pursuant to a motion to view and supplement record with presentence investigation report filed by counsel for appellant, Donald Lee Johnson, on November 29, 2012, and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on December 4, 2012.

R.C. 2951.03 addresses presentence investigation reports in felony cases. R.C. 2951.03(D)(1) addresses disclosure of a presentence investigation report. No provision of that section permits disclosure of a presentence investigation report to counsel after the defendant has been sentenced. Accordingly, the motion to disclose the presentence investigation report to appellate counsel is DENIED.

Pursuant to R.C. 2953.08(F)(1), the record on appeal shall include "any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed." Accordingly, the motion to supplement the record on appeal with the presentence investigation report is GRANTED.

IT IS SO ORDERED.


Bennett A. Manning, Magistrate

IN THE COURT OF APPEALS OF OHIO
 FOURTH APPELLATE DISTRICT
 GALLIA COUNTY

| | | |
|----------------------|---|---------------------------|
| State of Ohio, | : | Case No. 09CA20 |
| Plaintiff-Appellee, | : | MAGISTRATE'S ORDER |
| v. | : | |
| Shelena Marie Doss, | : | |
| Defendant-Appellant. | : | |

FILED
 CLERK OF COURTS
 GALLIA COUNTY, OHIO
 10 JUN -7 PM 3:10

COURT OF APPEALS

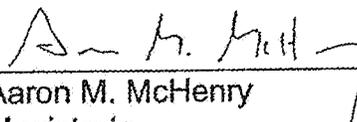
Appellant, Shelena Marie Doss, has filed a motion to permit her appellate counsel to review her presentence investigation report ("PSI"). In *State v. Jordan*, (Nov. 17, 2003), Scioto App. No. 03CA2878, this court determined that due process required a newly appointed appellate counsel be permitted to inspect and copy only those parts of a PSI not redacted under R.C. 2951.03(B)(1). We further determined that if the trial court presented a summary and withheld a PSI, as required by R.C. 2951.03(B)(3) when material restricted by R.C. 2951.03(B)(1) is present, then due process only required appellate counsel to be permitted to inspect and copy the summary of the redacted PSI.

Because appellant's counsel on appeal is different from that during the proceedings below, appellant's motion for access to the PSI is **GRANTED** to the following extent. Upon receipt of this entry, the Gallia County Adult Probation Department is **ORDERED** to provide the clerk of courts with appellant's PSI. The clerk is then **ORDERED** to send this court appellant's PSI. We will then review the PSI and any other pertinent parts of the record in camera to determine if the trial court redacted

or should have redacted any parts of the PSI pursuant to R.C. 2951.03(B)(1), or if the court withheld the PSI and offered a summary of the information relied on for sentencing under R.C. 2951.03(B)(3). We then will determine what information counsel should have the opportunity to review.

The clerk is **ORDERED** to serve by ordinary mail a copy of this order to all counsel of record and to all unrepresented parties at their last known addresses. The clerk is further **ORDERED** to serve the Gallia County Adult Probation Department with a copy of this order. **IT IS SO ORDERED.**

FOR THE COURT



Aaron M. McHenry
Magistrate

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

SCIOTO COUNTY
OHIO
FILED

2003 NOV 17 AM 8:29

State of Ohio,

Appellee,

v.

Stephanie Jordan,

Appellant.

CLERK OF COURTS
Case No. 03CA2878

ENTRY

Appellant filed a motion to view the presentence investigation report ("PSI"), based on the right to effective assistance of appellate counsel under the Sixth Amendment to the Constitution of the United States, as accorded by *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.E.2d 821. We stayed briefing in this case until resolution of this issue.

STATUTORY BACKGROUND

R.C. 2951.03(B)(1) requires the trial court to permit the defendant or counsel to view a PSI before sentencing, except for certain, specified contents:

- (a) recommendations as to sentence;
- (b) diagnostic opinions that the court believes might seriously disrupt the defendant's rehabilitation, if disclosed;
- (c) sources of information obtained upon a promise of confidentiality;

33/54

- (d) any other information that the court believes might result in physical harm or some other type of harm to the defendant, or any other person, if disclosed.

R.C. 2951.03(B)(2) requires the trial court to permit the defendant or counsel to comment on the PSI and permits challenges to the factual accuracy of the PSI. However, under R.C. 2951.03(B)(3), if the trial court believes that any information is subject to any of the four criteria for nondisclosure, instead of releasing the PSI to the defendant or counsel, the court may provide an oral or written summary of the information it will use in sentencing. If it uses this procedure, the trial court must also permit the defendant or counsel to comment on the summary.

Under R.C. 2951.03(B)(4), if the trial court discloses any material to the defendant or counsel, the trial court must also disclose it to the prosecutor.

Under R.C. 2951.03(B)(5), if the defendant or counsel challenges the accuracy of the PSI or any summary, the trial court must either (a) make a finding as to the allegation, or (b) make a determination that no finding is necessary because the matter challenged will not be taken into account in determining sentence.

R.C. 2951.03(D)(2) requires the defendant or counsel and the prosecutor to return all copies of a PSI or summary made available to them and prohibits them from making other copies.

The statute also addresses the availability of the report after sentencing. R.C. 2951.03(D)(1) states that a PSI and summary are confidential and not public records. The section directs an appellate court to receive and use a PSI or summary only as authorized by R.C. 2953.08(F)(1). Further, R.C. 2951.03(D)(3) states that the appellate court shall retain the PSI or summary under seal, except when being used as authorized by R.C. 2953.08(F)(1).

R.C. 2953.08(F)(1) requires the trial court to make the PSI a part of the record on appeal. It also states a court of appeals that reviews a PSI in connection with an appeal shall comply with R.C. 2951.03(D)(3) - i.e., shall keep it under seal - when the court is not using it. The section further states that an appellate court's use of the PSI does not cause the PSI to become a public record after the appellate court's use of the report.

To summarize: The statutes require the trial court to provide a PSI to the defendant or counsel before sentencing. After sentencing, the parties must return any copies and not make others. The PSI is placed under seal, is not a public record, and may be used on appeal only by the appellate court,

which must preserve its confidentiality when not using it. There are other provisions for use by other authorized personnel, including personnel of the Department of Rehabilitation and Correction. However, we find no express authorization to make the PSI available to an appellant or to the prosecutor after sentencing and thus on appeal. Likewise, no special provision is made for newly appointed counsel on appeal.

ANALYSIS

Many Ohio cases hold that a convicted defendant is not entitled to view the PSI after sentencing. See, e.g., *State ex rel. Normand v. Wilkinson* (Nov. 28, 1995), Franklin App. No. APE05-563 (prisoner could not compel disclosure by writ of mandamus after sentencing); *State ex rel. Sharpless v. Gierke* (2000), 137 Ohio App.3d 821, 739 N.E.2d 1231 (writ of mandamus seeking to compel access to PSI for purposes of seeking postconviction relief); *State v. Fisher*, Butler App. No. 98-09-190, 2002-Ohio-2069, and *State v. Hicks*, Butler App. No. CA2002-07-162, 2003-Ohio-506 (appellate counsel not de facto ineffective because unable to view PSI after sentencing); and *State v. Roberson* (2001), 141 Ohio App.3d 626, 752 N.E.2d 984 [trial counsel not ineffective because unable to view parts of PSI restricted under R.C. 2951.03(B)(1)]

Roberson, supra, cited *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1069, 93 L.Ed.2d 1337, which held that due process did not require disclosure of information available to the trial court for sentencing. This was true even though the court did not reveal it to the defendant or counsel prior to sentencing and thus the defendant had no opportunity to deny or explain it. 141 Ohio App.3d at 629; 337 U.S. at 250-251. The *Williams* court based this conclusion on the historically wide latitude trial courts had to consider additional information in order to promote the modern trend in crafting individualized sentences. 337 U.S. at 245-250.

The *Roberson* court also noted that *Williams* has been distinguished in capital cases by *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. The *Gardner* court found that the trial court in *Williams* "had stated the facts of the report on the record", 141 Ohio App.3d at 630; 430 U.S. at 355. *Gardner* then held that due process required full disclosure of the PSI. 430 U.S. 362

Roberson then concluded that *Gardner* was limited to capital cases, 141 Ohio App.3d at 631-632. While we agree that *Gardner* appears to be limited to capital cases, we find, independently, that due process requires a PSI to be shown to newly appointed appellate counsel.

We believe the statute's failure to allow newly appointed appellate counsel to view the PSI is a serious omission that violates an appellant's right to due process of law under the Sixth Amendment to the Constitution of the United States. In *Evitts v. Lucey*, supra, the Supreme Court stated:

* * * if a State has created appellate courts "as an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct. at 590, the procedures used must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. 459 U.S. at 393; 105 S.Ct. at 834.

This state has, of course, created a system of appellate courts, and it has granted to every litigant a first appeal as of right. R.C. 2505.03. Moreover, R.C. 2953.08(A) provides in part:

In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

* * *

(4) The sentence is contrary to law.

* * *

Given these rights to appeal and to challenge the lawfulness of the sentence, we believe that fundamental fairness and due process require newly appointed appellate

counsel have access to the PSI. However, we deem this due process right to extend only to permitting newly appointed appellate counsel to view that part of the summary that was available to trial counsel, and not to include parts of the PSI restricted under R.C. 2953.01(B)(1). *Roberson, supra*; *State v. Gonzales* (June 15, 2001), Wood App. No. WD-00-077.

Moreover, we emphasize that our decision is based on due process, as extended through the right to effective assistance of appellate counsel by *Evitts, supra*, and not on the standard announced in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, of "deficient performance and resulting prejudice".¹ Rather, the statutory prohibition preventing newly appointed counsel from viewing the unrestricted parts of the PSI or a summary violate the due process guarantee that underlies the right to effective assistance of appellate counsel on an appeal as of right, as announced in *Evitts*.² Thus, we view this right to access akin to the right to a transcript accorded by *Griffin v. Illinois* (1956), 351 U.S. 12, 78 S.Ct. 585, 100 L.Ed 891. Without the

¹ "Deficient performance means performance falling below an objective standard of reasonable representation. 'Prejudice' means a reasonably probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-688 * * *." (Additional citation omitted.) *State v. Hutton*, 100 Ohio St.3d 176, {¶ 44}, ___ N.E.2d ___, 2003-Ohio-5607.

² "In this case, we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such appeal [as of right]." 469 U.S. at 388-389.

PSI, newly appointed counsel is prevented from being effective, rather than being deemed ineffective under the *Strickland* standard.

We have examined the record in this case, including the PSI. It appears that the trial court did not redact the PSI or use a summary in lieu of the PSI. We find no diagnostic opinions subject to restriction under R.C. 2951.03(B)(1)(b), no sources of information obtained on promises of confidentiality subject to restriction under R.C. 2951.03(B)(1)(c), and no information indicating danger to appellant or others subject to restriction under R.C. 2951.03(B)(1)(d). We do note, however, that the final page of the report, entitled "RECOMMENDATION", contains the sentencing recommendation of the officer who compiled the report. Access to this recommendation is restricted under R.C. 2951.03(B)(1)(a). *Roberson and Gonzales supra.*

ORDER

Accordingly, we instruct the clerk of the court of appeals, upon application of counsel for the appellant or the appellee, to permit counsel to inspect and copy the presentence investigation report contained in the record, except for the last page entitled "RECOMMENDATION". Counsel may retain and use the redacted copies of the report during the pendency of this appeal. Upon the journalization of our

final decision and judgment entry, counsel shall return all copies to the clerk and not make others. The clerk shall accept such copies and file them with the presentence investigation report, which is then under continued seal.

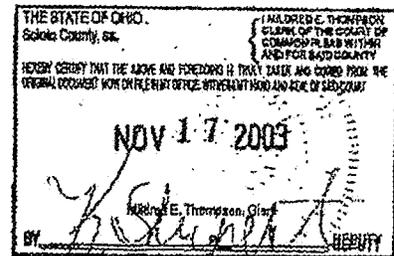
Appellant shall file her brief within twenty days after this entry is filed. Thereafter, further briefing shall be conducted under App.R. 18(A). SO ORDERED.

Evans, P.J.: Concurs
Kline, J.: Dissents

FOR THE COURT



William H. Harsha, Administrative Judge



AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

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

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

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

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

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

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

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

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

UNITED STATES CODE SERVICE
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*** Current through PL 113-15, approved 6/25/13 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

Go to the United States Code Service Archive Directory

28 USCS § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [28 USCS § 2255].

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance

of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 18
*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
ASSAULT

Go to the Ohio Code Archive Directory

ORC Ann. 2903.11 (2013)

§ 2903.11. Felonious assault

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D) (1) (a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law,

the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.01 (2013)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

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ORC Ann. 2911.02 (2013)

§ 2911.02. Robbery

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

- (1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.
- (2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2925. DRUG OFFENSES
DRUG ABUSE

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ORC Ann. 2925.11 (2013)

§ 2925.11. Possession of drugs

(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, hashish, and controlled substance analogs, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), or (g) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code

applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams but is less than forty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years.

(g) If the amount of the drug involved equals or exceeds forty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine, possession of cocaine is a felony of the fourth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine, possession of cocaine is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If possession of cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds twenty grams but is less than twenty-seven grams of cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one hundred grams of cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D.

in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or

exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), (f), or (g) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams but is less than two thousand grams of hashish in a solid form or equals or exceeds two hundred grams but is less than four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years.

(g) If the amount of the drug involved equals or exceeds two thousand grams of hashish in a solid form or equals or exceeds four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(8) If the drug involved is a controlled substance analog or compound, mixture, preparation, or substance that contains a controlled substance analog, whoever violates division (A) of this section is guilty of possession of a controlled substance analog. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(8)(b), (c), (d), (e), or (f) of this section, possession of a controlled substance analog is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams, possession of a controlled substance analog is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty grams but is less than thirty grams, possession of a controlled substance analog is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds thirty grams but is less than forty grams, possession of a controlled substance analog is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds forty grams but is less than fifty grams, possession of a controlled substance analog is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds fifty grams, possession of a controlled substance analog is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code and in addition to any other sanction that is imposed for the offense under this section, sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) (a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of section 2929.18 of the Revised Code in accordance with and subject to the requirements of division (F) of section 2925.03 of the Revised Code. The agency that receives the fine shall use the fine as specified in division (F) of section 2925.03 of the Revised Code.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

(F) It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with section 2901.05 of the Revised Code, an accused who is

charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of section 2925.03 of the Revised Code applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

(H) It is an affirmative defense to a charge of possession of a controlled substance analog under division (C)(8) of this section that the person charged with violating that offense obtained, possessed, or used an item described in division (HH)(2)(a), (b), or (c) of section 3719.01 of the Revised Code.

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

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ORC Ann. 2929.11 (2013)

§ 2929.11. Purposes of felony sentencing; discrimination prohibited

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

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

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

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CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.12 (2013)

§ 2929.12. Seriousness and recidivism factors

(A) Unless otherwise required by section 2929.13 or 2929.14 of the Revised Code, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism, and the factors set forth in division (F) of this section pertaining to the offender's service in the armed forces of the United States and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

- (1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.
- (2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.
- (3) The offender held a public office or position of trust in the community, and the offense related to that office or position.
- (4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.
- (5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.
- (6) The offender's relationship with the victim facilitated the offense.
- (7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of section 2967.16 or section 2929.141 of the Revised Code.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

(3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.

(4) The offense was committed under circumstances not likely to recur.

(5) The offender shows genuine remorse for the offense.

(F) The sentencing court shall consider the offender's military service record and whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces of the United States and that was a contributing factor in the offender's commission of the offense or offenses.

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

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ORC Ann. 2929.13 (2013)

§ 2929.13. Guidance by degree of felony; monitoring of sexually oriented offenders by global positioning device

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

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

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

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

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

(B) (1) (a) Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to

a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:

(i) The offender previously has not been convicted of or pleaded guilty to a felony offense.

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

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

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

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

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

(ii) If the offense is a qualifying assault offense, the offender caused serious physical harm to another person while committing the offense, and, if the offense is not a qualifying assault offense, the offender caused physical harm to another person while committing the offense.

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

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

(v) The offense is a sex offense that is a fourth or fifth degree felony violation of any provision of Chapter 2907. of the Revised Code.

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

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

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

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

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

(xi) The offender committed the offense while under a community control sanction, while on probation, or

while released from custody on a bond or personal recognizance.

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

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

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

(2) If division (B)(1) of this section does not apply, except as provided in division (E), (F), or (G) of this section, in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code and with section 2929.12 of the Revised Code.

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

(D) (1) Except as provided in division (E) or (F) of this section, for a felony of the first or second degree, for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, and for a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code for which a presumption in favor of a prison term is specified as being applicable, it is presumed that a prison term is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 of the Revised Code. Division (D)(2) of this section does not apply to a presumption established under this division for a violation of division (A)(4) of section 2907.05 of the Revised Code.

(2) Notwithstanding the presumption established under division (D)(1) of this section for the offenses listed in that division other than a violation of division (A)(4) or (B) of section 2907.05 of the Revised Code, the sentencing

court may impose a community control sanction or a combination of community control sanctions instead of a prison term on an offender for a felony of the first or second degree or for a felony drug offense that is a violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code for which a presumption in favor of a prison term is specified as being applicable if it makes both of the following findings:

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

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

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

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

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

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

(3) A court that sentences an offender for a drug abuse offense that is a felony of the third, fourth, or fifth degree may require that the offender be assessed by a properly credentialed professional within a specified period of time. The court shall require the professional to file a written assessment of the offender with the court. If the offender is eligible for a community control sanction and after considering the written assessment, the court may impose a community control sanction that includes treatment and recovery support services authorized by section 3793.02 of the Revised Code. If the court imposes treatment and recovery support services as a community control sanction, the court shall direct the level and type of treatment and recovery support services after considering the assessment and recommendation of treatment and recovery support services providers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(11) Any violent sex offense or designated homicide, assault, or kidnapping offense if, in relation to that offense, the offender is adjudicated a sexually violent predator;

(12) A violation of division (A)(1) or (2) of section 2921.36 of the Revised Code, or a violation of division (C) of that section involving an item listed in division (A)(1) or (2) of that section, if the offender is an officer or employee of the department of rehabilitation and correction;

(13) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, with respect to the portion of the sentence imposed pursuant to division (B)(5) of section 2929.14 of the Revised Code;

(14) A violation of division (A)(1) or (2) of section 2903.06 of the Revised Code if the offender has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, with respect to the portion of the sentence imposed pursuant to division (B)(6) of section 2929.14 of the Revised Code;

(15) Kidnapping, in the circumstances specified in section 2971.03 of the Revised Code and when no other provision of division (F) of this section applies;

(16) Kidnapping, abduction, compelling prostitution, promoting prostitution, engaging in a pattern of corrupt activity, illegal use of a minor in a nudity-oriented material or performance in violation of division (A)(1) or (2) of section 2907.323 of the Revised Code, or endangering children in violation of division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code, if the offender 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;

(17) A felony violation of division (A) or (B) of section 2919.25 of the Revised Code if division (D)(3), (4), or (5) of that section, and division (D)(6) of that section, require the imposition of a prison term;

(18) A felony violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code, if the victim of the offense was a woman that the offender knew was pregnant at the time of the violation, with respect to a portion of the sentence imposed pursuant to division (B)(8) of section 2929.14 of the Revised Code.

(G) Notwithstanding divisions (A) to (E) of this section, if an offender is being sentenced for a fourth degree felony OVI offense or for a third degree felony OVI offense, the court shall impose upon the offender a mandatory term of local incarceration or a mandatory prison term in accordance with the following:

(1) If the offender is being sentenced for a fourth degree felony OVI offense and if the offender has not been convicted of and has not pleaded guilty to a specification of the type described in section 2941.1413 of the Revised Code, the court may impose upon the offender a mandatory term of local incarceration of sixty days or one hundred twenty days as specified in division (G)(1)(d) of section 4511.19 of the Revised Code. The court shall not reduce the term pursuant to section 2929.20, 2967.193, or any other provision of the Revised Code. The court that imposes a mandatory term of local incarceration under this division shall specify whether the term is to be served in a jail, a

community-based correctional facility, a halfway house, or an alternative residential facility, and the offender shall serve the term in the type of facility specified by the court. A mandatory term of local incarceration imposed under division (G)(1) of this section is not subject to any other Revised Code provision that pertains to a prison term except as provided in division (A)(1) of this section.

(2) If the offender is being sentenced for a third degree felony OVI offense, or if the offender is being sentenced for a fourth degree felony OVI offense and the court does not impose a mandatory term of local incarceration under division (G)(1) of this section, the court shall impose upon the offender a mandatory prison term of one, two, three, four, or five years if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or shall impose upon the offender a mandatory prison term of sixty days or one hundred twenty days as specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code if the offender has not been convicted of and has not pleaded guilty to a specification of that type. Subject to divisions (C) to (I) of section 2967.19 of the Revised Code, the court shall not reduce the term pursuant to section 2929.20, 2967.19, 2967.193, or any other provision of the Revised Code. The offender shall serve the one-, two-, three-, four-, or five-year mandatory prison term consecutively to and prior to the prison term imposed for the underlying offense and consecutively to any other mandatory prison term imposed in relation to the offense. In no case shall an offender who once has been sentenced to a mandatory term of local incarceration pursuant to division (G)(1) of this section for a fourth degree felony OVI offense be sentenced to another mandatory term of local incarceration under that division for any violation of division (A) of section 4511.19 of the Revised Code. In addition to the mandatory prison term described in division (G)(2) of this section, the court may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve the prison term prior to serving the community control sanction. The department of rehabilitation and correction may place an offender sentenced to a mandatory prison term under this division in an intensive program prison established pursuant to section 5120.033 of the Revised Code if the department gave the sentencing judge prior notice of its intent to place the offender in an intensive program prison established under that section and if the judge did not notify the department that the judge disapproved the placement. Upon the establishment of the initial intensive program prison pursuant to section 5120.033 of the Revised Code that is privately operated and managed by a contractor pursuant to a contract entered into under section 9.06 of the Revised Code, both of the following apply:

(a) The department of rehabilitation and correction shall make a reasonable effort to ensure that a sufficient number of offenders sentenced to a mandatory prison term under this division are placed in the privately operated and managed prison so that the privately operated and managed prison has full occupancy.

(b) Unless the privately operated and managed prison has full occupancy, the department of rehabilitation and correction shall not place any offender sentenced to a mandatory prison term under this division in any intensive program prison established pursuant to section 5120.033 of the Revised Code other than the privately operated and managed prison.

(H) If an offender is being sentenced for a sexually oriented offense or child-victim oriented offense that is a felony committed on or after January 1, 1997, the judge shall require the offender to submit to a DNA specimen collection procedure pursuant to section 2901.07 of the Revised Code.

(I) If an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense committed on or after January 1, 1997, the judge shall include in the sentence a summary of the offender's duties imposed under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties. The judge shall inform the offender, at the time of sentencing, of those duties and of their duration. If required under division (A)(2) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that section, or, if required under division (A)(6) of section 2950.03 of the Revised Code, the judge shall perform the duties specified in that division.

(J) (1) Except as provided in division (J)(2) of this section, when considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit an offense in violation of section

2923.02 of the Revised Code, the sentencing court shall consider the factors applicable to the felony category of the violation of section 2923.02 of the Revised Code instead of the factors applicable to the felony category of the offense attempted.

(2) When considering sentencing factors under this section in relation to an offender who is convicted of or pleads guilty to an attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense, the sentencing court shall consider the factors applicable to the felony category that the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt.

(K) As used in this section:

(1) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(2) "Qualifying assault offense" means a violation of section 2903.13 of the Revised Code for which the penalty provision in division (C)(7)(b) or (C)(8)(b) of that section applies.

(L) At the time of sentencing an offender for any sexually oriented offense, if the offender is a tier III sex offender/child-victim offender relative to that offense and the offender does not serve a prison term or jail term, the court may require that the offender be monitored by means of a global positioning device. If the court requires such monitoring, the cost of monitoring shall be borne by the offender. If the offender is indigent, the cost of compliance shall be paid by the crime victims reparations fund.

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§ 2929.14. Basic prison terms

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

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

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

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

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

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

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

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

(i) A prison term of six years if the specification is of the type described in section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm

muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

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

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

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

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

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

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

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

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

(3) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender, 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 mandatory prison term of the maximum prison term prescribed for a felony of the first degree that, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, cannot be reduced pursuant to section 2929.20, section 2967.19, or any other provision of Chapter 2967. or 5120. of the Revised Code.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (B)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

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

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (B)(5) of this section, the prison term, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (B)(6) of this section, the prison term, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(6) of this section for felonies committed as part of the same act.

(7) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21,

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

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

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

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

(b) Subject to divisions (C) to (I) of section 2967.19 of the Revised Code, the prison term imposed under division (B)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967, of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

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

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

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

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

(d) If a mandatory prison term is imposed upon an offender pursuant to division (B)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed

under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, or 2921.35 of the Revised Code or division (A)(1) or (2) of section 2921.34 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of division (A)(1) or (2) of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

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

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

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

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

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

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

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

(D) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the

offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program

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

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

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

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

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ORC Ann. 2929.19 (2013)

§ 2929.19. Sentencing hearing

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

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

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

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

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

(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. This division applies with respect to all prison terms

imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in section 2967.28 of the Revised Code. If a court imposes a sentence including a prison term of a type described in division (B)(2)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(2)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(c) of this section and failed to notify the offender pursuant to division (B)(2)(c) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree that is not subject to division (B)(2)(c) of this section. This division applies with respect to all prison terms imposed for an offense of a type described in this division, including a term imposed for any such offense that is a risk reduction sentence, as defined in section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in division (B)(2)(d) of this section and failed to notify the offender pursuant to division (B)(2)(d) of this section regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence a statement regarding post-release control.

(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(2)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(2)(e) of this section that the parole board may impose a prison term as described in division (B)(2)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to division (D)(1) of section 2967.28 of the Revised Code, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(2)(e) of this section regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

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

(g) (i) Determine, notify the offender of, and include in the sentencing entry the number of days that the offender has been confined for any reason arising out of the offense for which the offender is being sentenced and by which the department of rehabilitation and correction must reduce the stated prison term under section 2967.191 of the Revised Code. The court's calculation shall not include the number of days, if any, that the offender previously served in the custody of the department of rehabilitation and correction arising out of the offense for which the prisoner was convicted and sentenced.

(ii) In making a determination under division (B)(2)(g)(i) of this section, the court shall consider the arguments of the parties and conduct a hearing if one is requested.

(iii) The sentencing court retains continuing jurisdiction to correct any error not previously raised at sentencing in making a determination under division (B)(2)(g)(i) of this section. The offender may, at any time after sentencing, file a motion in the sentencing court to correct any error made in making a determination under division (B)(2)(g)(i) of this section, and the court may in its discretion grant or deny that motion. If the court changes the number of days in its determination or redetermination, the court shall cause the entry granting that change to be delivered to the department of rehabilitation and correction without delay. Sections 2931.15 and 2953.21 of the Revised Code do not apply to a motion made under this section.

(iv) An inaccurate determination under division (B)(2)(g)(i) of this section is not grounds for setting aside the offender's conviction or sentence and does not otherwise render the sentence void or voidable.

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

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

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

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

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

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

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

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

(b) Additionally, if any criterion set forth in divisions (B)(3)(a)(i) to (vii) of this section is satisfied, in the circumstances described in division (E) of section 2929.14 of the Revised Code, the court shall impose sentence on the offender as described in that division.

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

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

sanction or fine.

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

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

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

(ii) If the offender does not dispute the bill described in division (B)(6)(a)(i) of this section and does not pay the bill by the times specified in section 2929.37 of the Revised Code, the clerk of the court may issue a certificate of judgment against the offender as described in that section.

(b) The sentence automatically includes any certificate of judgment issued as described in division (B)(6)(a)(ii) of this section.

(7) The failure of the court to notify the offender that a prison term is a mandatory prison term pursuant to division (B)(2)(a) of this section or to include in the sentencing entry any information required by division (B)(2)(b) of this section does not affect the validity of the imposed sentence or sentences. If the sentencing court notifies the offender at the sentencing hearing that a prison term is mandatory but the sentencing entry does not specify that the prison term is mandatory, the court may complete a corrected journal entry and send copies of the corrected entry to the offender and the department of rehabilitation and correction, or, at the request of the state, the court shall complete a corrected journal entry and send copies of the corrected entry to the offender and department of rehabilitation and correction.

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

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

(D) The sentencing court, pursuant to division (I)(1) of section 2929.14 of the Revised Code, may recommend placement of the offender in a program of shock incarceration under section 5120.031 of the Revised Code or an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program or prison of that nature, or make no recommendation. If the court recommends or disapproves placement, it shall make a finding that gives its reasons for its recommendation or disapproval.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2941. INDICTMENT
FORM AND SUFFICIENCY

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ORC Ann. 2941.145 (2013)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

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CHAPTER 2941. INDICTMENT
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ORC Ann. 2941.1410 (2013)

§ 2941.1410. Specification that offender is a major drug offender

(A) Except as provided in sections 2925.03 and 2925.11 of the Revised Code, the determination by a court that an offender is a major drug offender is precluded unless the indictment, count in the indictment, or information charging the offender specifies that the offender is a major drug offender. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender is a major drug offender)."

(B) The court shall determine the issue of whether an offender is a major drug offender.

(C) As used in this section, "major drug offender" has the same meaning as in section 2929.01 of the Revised Code.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2951. PROBATION

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ORC Ann. 2951.03 (2013)

§ 2951.03. Presentence investigation report in felony case

(A) (1) No person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court. If a court orders the preparation of a presentence investigation report pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2. Whenever the officer considers it advisable, the officer's investigation may include a physical and mental examination of the defendant. A physical examination of the defendant may include a drug test consisting of a chemical analysis of a blood or urine specimen of the defendant to determine whether the defendant ingested or was injected with a drug of abuse. If, pursuant to section 2930.13 of the Revised Code, the victim of the offense of which the defendant has been convicted wishes to make a statement regarding the impact of the offense for the officer's use in preparing the presentence investigation report, the officer shall comply with the requirements of that section.

(2) If a defendant is committed to any institution, the presentence investigation report shall be sent to the institution with the entry of commitment. If a defendant is committed to any institution and a presentence investigation report is not prepared regarding that defendant pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the director of the department of rehabilitation and correction or the director's designee may order that an offender background investigation and report be conducted and prepared regarding the defendant pursuant to section 5120.16 of the Revised Code. An offender background investigation report prepared pursuant to this section shall be considered confidential information and is not a public record under section 149.43 of the Revised Code.

(3) The department of rehabilitation and correction may use any presentence investigation report and any offender background investigation report prepared pursuant to this section for penological and rehabilitative purposes. The department may disclose any presentence investigation report and any offender background investigation report to courts, law enforcement agencies, community-based correctional facilities, halfway houses, and medical, mental health, and substance abuse treatment providers. The department shall make the disclosure in a manner calculated to maintain the report's confidentiality. Any presentence investigation report or offender background investigation report that the department discloses to a community-based correctional facility, a halfway house, or a medical, mental health, or substance abuse treatment provider shall not include a victim impact section or information identifying a witness.

(B) (1) If a presentence investigation report is prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the court, at a reasonable time before imposing sentence, shall permit the defendant or the defendant's counsel to read the report, except that the court shall not permit the defendant or the defendant's counsel to read any of the following:

(a) Any recommendation as to sentence;

(b) Any diagnostic opinions that, if disclosed, the court believes might seriously disrupt a program of rehabilitation for the defendant;

(c) Any sources of information obtained upon a promise of confidentiality;

(d) Any other information that, if disclosed, the court believes might result in physical harm or some other type of harm to the defendant or to any other person.

(2) Prior to sentencing, the court shall permit the defendant and the defendant's counsel to comment on the presentence investigation report and, in its discretion, may permit the defendant and the defendant's counsel to introduce testimony or other information that relates to any alleged factual inaccuracy contained in the report.

(3) If the court believes that any information in the presentence investigation report should not be disclosed pursuant to division (B)(1) of this section, the court, in lieu of making the report or any part of the report available, shall state orally or in writing a summary of the factual information contained in the report that will be relied upon in determining the defendant's sentence. The court shall permit the defendant and the defendant's counsel to comment upon the oral or written summary of the report.

(4) Any material that is disclosed to the defendant or the defendant's counsel pursuant to this section shall be disclosed to the prosecutor who is handling the prosecution of the case against the defendant.

(5) If the comments of the defendant or the defendant's counsel, the testimony they introduce, or any of the other information they introduce alleges any factual inaccuracy in the presentence investigation report or the summary of the report, the court shall do either of the following with respect to each alleged factual inaccuracy:

(a) Make a finding as to the allegation;

(b) Make a determination that no finding is necessary with respect to the allegation, because the factual matter will not be taken into account in the sentencing of the defendant.

(C) A court's decision as to the content of a summary under division (B)(3) of this section or as to the withholding of information under division (B)(1)(a), (b), (c), or (d) of this section shall be considered to be within the discretion of the court. No appeal can be taken from either of those decisions, and neither of those decisions shall be the basis for a reversal of the sentence imposed.

(D) (1) The contents of a presentence investigation report prepared pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2 and the contents of any written or oral summary of a presentence investigation report or of a part of a presentence investigation report described in division (B)(3) of this section are confidential information and are not a public record. The court, an appellate court, authorized probation officers, investigators, and court personnel, the defendant, the defendant's counsel, the prosecutor who is handling the prosecution of the case against the defendant, and authorized personnel of an institution to which the defendant is committed may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation only for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code.

(2) Immediately following the imposition of sentence upon the defendant, the defendant or the defendant's counsel and the prosecutor shall return to the court all copies of a presentence investigation report and of any written summary of a presentence investigation report or part of a presentence investigation report that the court made available to the defendant or the defendant's counsel and to the prosecutor pursuant to this section. The defendant or the defendant's counsel and the prosecutor shall not make any copies of the presentence investigation report or of any written summary of a presentence investigation report or part of a presentence investigation report that the court made available to them pursuant to this section.

(3) Except when a presentence investigation report or a written or oral summary of a presentence investigation report is being used for the purposes of or as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code, the court or other authorized holder of the report or summary shall retain the report or summary under seal.

(E) In inquiring into the information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, the officer making the report shall consider all information that is relevant, including, but not limited to, the materials described in division (B) of section 2151.14, division (C)(3) of section 2152.18, division (D)(3) of section 2152.19, and division (E) of section 2152.71 of the Revised Code.

(F) As used in this section:

- (1) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.
- (2) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.
- (3) "Public record" has the same meaning as in section 149.43 of the Revised Code.

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

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ORC Ann. 2953.08 (2013)

§ 2953.08. Grounds for appeal by defendant or prosecutor of sentence for felony; appeal cost oversight committee

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

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

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

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

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

(4) The sentence is contrary to law.

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

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C) (1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D) (1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (B)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of section 2929.14 of the Revised Code.

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

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

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

applicable:

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

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

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

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

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

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

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

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

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

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

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*** Annotations current through April 8, 2013 ***

Ohio Rules Of Civil Procedure
Title III. Pleadings and motions

Ohio Civ. R. 11 (2013)

Review Court Orders which may amend this Rule.

Rule 11. Signing of pleadings, motions, or other documents

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, facsimile number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. A party who is not represented by an attorney may further state a facsimile number or e-mail address for service by electronic means under Civ.R. 5(B)(2)(f). Except when otherwise specifically provided by these rules, pleadings, as defined by Civ.R. 7(A), need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

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Ohio Rules Of Criminal Procedure

Ohio Crim. R 16 (2013)

Review Court Orders which may amend this Rule.

Rule 16. Discovery and inspection

(A) Purpose, scope and reciprocity.

This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery; Right to copy or photograph.

Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

- (1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
- (2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
- (3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
- (4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
- (5) Any evidence favorable to the defendant and material to guilt or punishment;
- (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the

witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting attorney's designation of "counsel only" materials.

The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting attorney's certification of nondisclosure.

If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

- (1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
- (2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
- (3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
- (4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
- (5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of inspection in cases of sexual assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of prosecuting attorney's certification of non-disclosure.

Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of testimony.

Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery; Right to copy or photograph.

If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;

(2) Results of physical or mental examinations, experiments or scientific tests;

(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;

(4) All investigative reports, except as provided in division (J) of this rule;

(5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness list.

Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information not subject to disclosure.

The following items are not subject to disclosure under this rule:

(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;

(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim.R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert witnesses; Reports.

An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions.

A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.