

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: Case No. 2014-1814
Plaintiff-Appellee,	:
	: On Appeal from the
v.	: Montgomery County Court of Appeals,
	: 2d Appellate District,
ADRIAN L. HAND, JR.,	: Case No. 25840
	:
Defendant-Appellant.	:

MERIT BRIEF OF APPELLANT ADRIAN L. HAND, JR.

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The use of a prior juvenile adjudication to enhance an adult sentence violates a defendant’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, and the right to trial by jury as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 5 of the Ohio Constitution.	
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INTRODUCTION

A juvenile adjudication is not a conviction. The juvenile justice system is focused on rehabilitating children who have made mistakes and providing a way for children to leave behind their mistakes when they become adults. In exchange for this child-focused system, allegedly delinquent juveniles are not given certain due-process rights. Juvenile proceedings do not include all of the due-process safeguards of an adult conviction. Specifically, while an adult has the right to trial by jury, a juvenile does not.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that a prior conviction, obtained in accordance with a defendant's right to due process, can serve as an aggravating factor for felony sentencing. But the Court explained that this is only true because the prior conviction was secured under all of the strictures of the defendant's right to due process and a trial by jury. The Supreme Court again affirmed the importance of due-process safeguards to this prior-conviction exception in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

In contrast to adult criminal proceedings, juvenile delinquency proceedings do not include the right to a jury. Using facts for sentencing that were not presented to, and weighed by, a jury violates a defendant's right to due process. A juvenile adjudication has never been presented to a jury, and it has not passed the gauntlet of procedural safeguards necessary for a conviction. Courts around the country disagree on whether a juvenile adjudication can be used under the *Apprendi* prior-conviction exception, but both this Court and the United States Supreme Court recognize that the field of juvenile sentencing has drastically changed in the recent past, since many of the older cases were decided. This Court should therefore reverse the court below and hold that, as long as a juvenile adjudication remains a civil proceeding focused

on rehabilitation, and without the procedural safeguards required by due process and the right to trial by jury, such an adjudication cannot be used to enhance an adult sentence.

STATEMENT OF THE CASE AND FACTS

Adrian L. Hand, Jr. pleaded no contest in the Montgomery County Court of Common Pleas to aggravated burglary, aggravated robbery, felonious assault, and a firearm specification. (July 23, 2013 Termination Entry.) He was given an agreed sentence of six years in prison. (*Id.*) And, he did not dispute that three years of that sentence, resulting from the firearm specification, were mandatory. However, the State submitted a sentencing memorandum arguing that, on the basis of R.C. 2929.13(F)(6), the rest of Mr. Hand's sentence would be mandatory prison time as well. (July 3, 2013 State's Memorandum Regarding Mandatory Incarceration.)

Ohio Revised Code Section 2929.13(F)(6) mandates that a first- or second-degree felony sentence must be mandatory if the defendant had a prior conviction for another first- or second-degree felony, or any other equivalent offense. Mr. Hand was previously adjudicated delinquent for aggravated robbery when he was a juvenile. Because this would have been a felony of the first degree if committed by an adult, the State argued that it satisfied the sentencing-enhancement requirement of R.C. 2929.13(F)(6). (*Id.*) Mr. Hand argued in response that a juvenile adjudication was not a conviction, and that his right to due process would be violated if his prior adjudication was used against him in his adult proceedings. (July 3, 2013 Sentencing Memorandum and Request for Continuance of Sentencing.)

Before sentencing, the trial court issued a decision that Mr. Hand's prior juvenile adjudication could be used against him in his current sentencing proceedings. (July 16, 2013 Decision and Entry.) On the basis of that prior civil proceeding and resulting juvenile adjudication, the trial court ordered that the entirety of Mr. Hand's sentence would be mandatory time. (*Id.*)

Mr. Hand appealed his sentence to the Second District Court of Appeals. That court affirmed. However, the dissent noted that juvenile proceedings are fundamentally different in process and in purpose, and a resulting adjudication is not a criminal conviction that can be used for sentence enhancement. *State v. Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838, ¶ 9-29 (Donovan, J., dissenting).

Mr. Hand now appeals, urging this Court to recognize that a civil, juvenile proceeding's lack of due-process safeguards renders it unreliable as a sentencing factor in a later criminal proceeding, and using it in that way undermines the rehabilitative purpose of the juvenile system.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

The use of a prior juvenile adjudication to enhance an adult sentence violates a defendant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, and the right to trial by jury as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 5 of the Ohio Constitution.

When he was charged in the Montgomery County Court of Common Pleas, Adrian L. Hand, Jr., like any person haled into court, had a number of constitutionally guaranteed rights. Mr. Hand was entitled to have every element of a charged crime proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). He had the right to have a jury of his peers decide whether the State met its burden in proving his criminal conduct. Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 5. And, he could only be subject to punishment if the finding of guilt in his case had the proper procedural safeguards. Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 16.

In *Apprendi v. New Jersey*, the United States Supreme Court held that these rights also apply, not just to the conviction itself, but also to any aggravating sentencing factors. 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Under *Apprendi*, a judge cannot make aggravating sentencing findings; they must come from a jury. *Id.* However, the *Apprendi* decision allowed for one exception: when a defendant has been convicted of a prior offense through a proper trial by jury, that conviction can serve as the basis for a sentence enhancement without new jury findings. *Id.* at 488. The Court reasoned that the protections afforded to a defendant in a felony trial act as the necessary procedural safeguards to ensure that the findings

of fact underlying the conviction are reliable. *Id.* The Court later reaffirmed this due-process focus in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

Critical to the Court's holding was its conception of the right to a trial by jury. The *Apprendi* decision does not stand for a general exception for any prior convictions; it is a narrow exception animated by the fact that a prior conviction would necessarily have risen to the levels of due process required for a sentencing enhancement. *Id.* The *Apprendi* exception, as affirmed and further explained in *Alleyne*, essentially allows a court to insert the results of an earlier, properly conducted criminal trial into a current one.

However, the decision below disintegrates that logic, allowing the result of a much-earlier *civil* proceeding against Mr. Hand, with no right to a jury, to lead to his enhanced punishment in his criminal case. This runs afoul of the rehabilitative purposes of juvenile adjudications, the structure of Ohio's juvenile courts, and the growing shift toward individualized juvenile sentencing in the United States and Ohio Supreme Courts, as well as in legal scholarship. And, it affirmed the denial of Mr. Hand's rights to due process and trial by jury.

A. A juvenile adjudication is fundamentally different from a felony conviction, and it does not comply with the safeguards required by *Apprendi*.

The juvenile justice system rests on a different foundation than the adult criminal justice system. The purpose of a juvenile disposition in Ohio is to “provide for the care, protection, and mental and physical development of children . . . , protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender.” R.C. 2152.01. From its very inception, the juvenile justice system has been tasked with protecting wayward children from further ill influences and providing them with social and rehabilitative services. *Children's Home of Marion City v. Fetter*, 90 Ohio St. 110, 127, 106 N.E.

761 (1914). “[T]he goal of the juvenile code is to rehabilitate, not to punish, while protecting society from criminal and delinquent acts during rehabilitation.” *In re Caldwell*, 76 Ohio St.3d 156, 157, 666 N.E.2d 1367 (1996). The juvenile justice system, in short, has always been an *alternative* to a criminal conviction, one that is more focused on the child’s development than on punishment. *Id.* And though that alternative is a good one, it lacks the fundamental due-process protections to ensure that a later, adult conviction can result in an enhanced sentence on the basis of an outcome from that system.

Allowing a juvenile adjudication to enhance a later felony punishment undermines these well understood goals of the juvenile justice system, collapsing juvenile rehabilitative efforts into later punitive results. This Court has held that “Ohio’s juvenile system is designed to shield children from stigmatization based upon the bad acts of their youth.” *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 63. Allowing a juvenile adjudication to rear its head years later in an unrelated adult proceeding does the opposite: it lets a child’s mistakes lie in wait and negatively impact her life for years to come. Put simply, the *Apprendi* exception for prior convictions cannot extend to a proceeding that, by its very nature, is meant to shield mistakes of the past from being revisited upon children as they grow. A juvenile adjudication’s use to enhance a felony punishment years later undermines the juvenile system’s entrenched and understood role in protecting and rehabilitating children.

The use of a juvenile adjudication in a later criminal sentencing proceeding also undermines the careful balance of due-process rights required in the juvenile justice system. The guarantees of the Due Process Clause apply to juveniles and adults alike. *In re Gault*, 387 U.S. 1, 30-31, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368. But in exchange for these manifold differences between juvenile and adult

proceedings and the focus on rehabilitating children and steering them toward the best future they can have, children in the juvenile justice system are not given some due-process rights. A key protection missing from juvenile adjudications is also the one that underlies the *Apprendi* exception: the right to trial by jury. *See also McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). In *Apprendi*, the United States Supreme Court held that it is a court's compliance with a defendant's Sixth Amendment rights that guarantees that a resulting finding of guilt can be trusted for further sentence enhancement. *Apprendi*, 530 U.S. 466, 488 490, 120 S.Ct. 2348, 147 L.Ed.2d 435; *Alleyne*, ___ U.S. ___, 133 S.Ct. 2151, 2163-2164, 186 L.Ed.2d 314. This trust in the fairness of a conviction disintegrates in a system in which a defendant has no right to a jury trial. The decision below raises a juvenile adjudication to the level of a criminal conviction, but does nothing to raise the due process standards of a juvenile proceeding to the level of an adult criminal proceeding. The result is that Mr. Hand received "the worst of both worlds," losing out on both the protections of an adult proceeding and the rehabilitative focus of a juvenile proceeding. *See Kent v. United States*, 383 U.S. 541, 556, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

The language used by courts in juvenile proceedings also captures this bedrock difference between juvenile dispositions and *Apprendi*-exception-eligible adult convictions. A juvenile is deemed "delinquent" through a juvenile "adjudication," while an adult is deemed "guilty" through a "conviction." *In re Gault*, 387 U.S. 1, 23, 87 S.Ct. 1428, 18 L.Ed.2d 527; *State v. Hanning*, 89 Ohio St.3d 86, 89, 2000-Ohio-436, 728 N.E.2d 1059 (2000); *State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766, ¶ 10. This language difference encodes the juvenile system's primary interest in rehabilitation and a juvenile's lessened culpability for delinquent acts. *Gault* at 16. Even on a structural level, a juvenile adjudication is not a criminal

proceeding, but a civil proceeding. *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *In re Anderson*, 92 Ohio St.3d 63, 748 N.E.2d 67 (2001), syllabus. A juvenile proceeding does not result in a “conviction,” so it cannot serve like a “conviction” as a tested demonstration of prior conduct under the *Apprendi* exception.

As the dissent below aptly summarized, “[a]lthough juvenile offenders are afforded some of the same due-process rights as their adult counterparts, the purposes of a criminal conviction and juvenile adjudication are inherently different.” *Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838, at ¶ 23 (Donovan, J., dissenting). Given the separation between the juvenile and adult criminal justice systems, this Court should hold that, as long as children lack the right to a jury in their juvenile proceedings, the results of those proceedings cannot be used as “convictions.” Juvenile adjudications must remain “buried in the graveyard of the forgotten past,” where they cannot be used to enhance an adult criminal punishment years later. *Gault* at 24.

B. The lower court’s reliance on the divided state of the law around the country ignored the goals of Ohio’s juvenile justice system, and this Court should reverse to reaffirm those goals.

In holding that a juvenile adjudication can serve to enhance a felony sentence, the court below relied on a case from the Eighth District Court of Appeals, *State v. Parker*, 8th Dist. Cuyahoga No. 97841, 2012-Ohio-4741. This Court has not yet considered this issue. However, both state and federal courts have considered this question. The result is a deeply divided body of case law, one that does not serve the rehabilitative concerns of Ohio’s juvenile justice system.

For instance, some state supreme courts have held that juvenile adjudications fall under the *Apprendi*-prior-conviction exception. *See, e.g., Ryle v. State*, 842 N.E.2d 320 (Ind. 2005); *People v. Nguyen*, 46 Cal.4th 1007, 1028, 209 P.3d 946 (2009). The Louisiana Supreme Court

has held the opposite—that the use of a juvenile adjudication to enhance a felony sentence violates *Apprendi*. *State v. Brown*, 879 So.2d 1276, 1290 (La. 2004); *see also State v. Chavez*, 163 Wn.2d 262, 276-277, 180 P.3d 1250 (2007) (Madsen, J., dissenting) (noting that allowing the use of a juvenile adjudication as a sentence enhancement must necessarily create a right to trial by jury in juvenile proceedings).

In affirming Mr. Hand’s sentence, the court below relied on both the *Parker* decision from the Eighth District, and on the fact that a majority of federal courts have held that juvenile adjudications can be used to enhance adult sentences. *Compare United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001) (holding the use of juvenile adjudications without right to jury trial violates due process of law under *Apprendi*) with *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir.2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir.2003); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir.2002) (all holding that courts can use a prior juvenile adjudication to enhance an adult sentence). However, these federal cases holding that juvenile adjudications can serve to enhance later adult sentences are uninformative.

First, these cases were all decided before *Alleyne*, which clarified that *Apprendi* applies not only to factors that raise the actual length of a sentence, but to other sentencing enhancements, including the minimum sentence. More importantly, this Court must look beyond these individual cases in the distinguishable federal system, to the purposes of Ohio’s overarching juvenile justice system. Allowing juvenile adjudications to operate as “convictions” would reduce the distinction between Ohio’s criminal and juvenile systems. It would shift the focus of juvenile adjudications toward punishment and away from guidance and rehabilitation. In fact, the law on juvenile justice has been shifting toward the *opposite* direction for years, increasingly recognizing that children are different from adults. *See Part D, infra*. These federal

court decisions were made without reference to the changing landscape of juvenile justice, and without this Court's specific vision of how Ohio's two systems interact. Ohio's juvenile justice system will not serve its purpose if juvenile adjudications take on the same weight as an adult conviction, and this Court's primary consideration should be the purposes of Ohio's juvenile justice system.

C. This Court, the United States Supreme Court, and the body of scholarship on juvenile justice have all recognized in the last decade a fundamental shift toward treating juveniles as individuals in a specialized system. Allowing a juvenile adjudication to be an aggravating adult sentencing factor runs afoul of this fundamental change.

The world of juvenile justice is changing. In the past decade, the United States Supreme Court has unequivocally, and increasingly, held that children are different from adults and should be treated differently. The decision below shifts the law in the *opposite* direction, and this Court should stop that backward shift.

In *Graham v. Florida*, the United States Supreme Court acknowledged that juvenile brains are less developed than adult brains. 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). As a result, the Court held that juveniles are less culpable than adults for their actions, which might arise from the underdeveloped decision-making portions of the juvenile brain. *Id.* at 69. Scientific research shows that juveniles also might not fully understand the consequences of a juvenile adjudication. *Id.* at 78. The *Graham* Court considered these realities and compensated for them with limitations on juvenile sentencing. *Id.* at 78. And, in *Miller v. Alabama*, the United States Supreme Court went a step further, holding that every juvenile must receive individualized consideration of their youthfulness before sentencing. ___ U.S. ___, 132 S.Ct. 2455, 2475, 183 L.Ed.2d 407 (2012). Certain automatically triggered sentences, the Court held, cannot be applied to juveniles. *Id.*

Through these two cases, the United States Supreme Court has made it clear that children, even after transfer out of the juvenile system, must be treated individually and with consideration of the impermanence of their character. In this light, the holding below that a juvenile adjudication should operate in the same way as an adult criminal conviction betrays the goals of the juvenile justice system and runs afoul of *Graham* and *Miller*.

The decision below also runs afoul of this Court's holdings on juvenile sentencing. In *In re C.P.*, this Court recognized the recent sea change in juvenile sentencing: "The protections and rehabilitative aims of the juvenile process must remain paramount; we must recognize that juvenile offenders are less culpable and more amenable to reform than adult offenders." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 84. This diminished culpability for juveniles, and this emphasis on rehabilitation, demands that juvenile adjudications be left behind when a juvenile becomes an adult.

Again, the court below relied on an Eighth District decision to hold that a juvenile adjudication can be used to enhance a sentence. *Parker*, 8th Dist. Cuyahoga No. 97841, 2012-Ohio-4741, at ¶ 25; *Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838, at ¶ 6. But *Parker* was decided without consideration of the United States Supreme Court's decisions in *Graham* and *Miller*, and this Court's decision in *In re C.P.* Neither *Parker* nor the decision below reflect the current understanding of adolescent development, and of the increased protections that must be afforded to juveniles as a result of their fundamentally different brain chemistry.

Finally, there is a mounting body of scholarship criticizing the use of juvenile adjudications as sentence enhancements in felony proceedings. The dissent below aptly summarized the numerous concerns scholars have regarding applying the *Apprendi*-prior-conviction exception to juvenile adjudications:

(1) the different purposes of a juvenile adjudication and the juvenile justice system as a whole, (2) the prevalence of pleas in the juvenile system, (3) the lack of a jury trial in juvenile proceedings, (4) the difficulty juveniles face to meaningfully participate in a process they do not fully understand and do not control, and (5) the lack of zealous advocacy in juvenile proceedings. *See, e.g.*, Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile 'Adjudications' with Criminal 'Convictions,'* 49 B.C. L. Rev. 495 (2008); Alissa Malzmann, Note, *Juvenile Strikes: Unconstitutional Under Apprendi and Blakely and Incompatible with the Rehabilitative Ideal,* 15 S. Cal. Rev. L. & Women's Stud. 171 (2005); Brian P. Thill, Comment, *Prior 'Convictions' Under Apprendi: Why Juvenile Adjudications May Not be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt,* 87 Marq. L. Rev. 573 (2004); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts,* 38 Wake Forest L. Rev. 1111 (2003)."

Hand at ¶ 11 (Donovan, J., dissenting).

Both *Parker* and the decision below reflect a lack of understanding regarding adolescent development and brain function. The holdings in those cases are revealed to be deeply flawed after *Graham*, *Miller*, and *In re C.P.* *See generally* Rebecca J. Gannon, Note, *Apprendi after Miller and Graham: How the Supreme Court's Recent Jurisprudence on Juveniles Prohibits the Use of Juvenile Adjudications as Mandatory "Sentencing Enhancements,"* 79 Brook. L. Rev. 347 (2013). This Court should reverse this move in the wrong direction and remind Ohio's courts that children are different, as our modern understanding of juveniles clearly shows.

CONCLUSION

The prior-conviction exception in *Apprendi* depends upon the safeguards of due process and the right to trial by jury. Those safeguards are not present for a juvenile adjudication. And, the differences between adults and juveniles have serious consequences in sentencing, as explained in *Graham* and *Miller*. The court below did not consider the recent developments in those cases, and the case law upon which the appellate court relied neither reflects the current understanding of juvenile justice and adolescent brain development nor the purposes of Ohio's

juvenile justice system. This Court should reverse the decision below and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF APPELLANT ADRIAN L. HAND, JR.** was forwarded by regular U.S. Mail to Andrew T. French, Assistant Montgomery County Prosecuting Attorney, 301 W. Third Street, 5th Floor Courts Building, P.O. Box 972, Dayton, Ohio 45402, this 8th day of June, 2015.

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: Case No. 2014-1814
Plaintiff-Appellee,	:
	: On Appeal from the
v.	: Montgomery County Court of Appeals,
	: 2d Appellate District,
ADRIAN L. HAND, JR.,	: Case No. 25840
	:
Defendant-Appellant.	:

APPENDIX TO

MERIT BRIEF OF APPELLANT ADRIAN L. HAND, JR.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

ADRIAN L. HAND, JR.,

Defendant-Appellant.

:
 : Case No. **14-1814**
 :
 : On Discretionary Appeal from the
 : Montgomery County Court of Appeals,
 : 2d Appellate District,
 : Case No. 25840
 :
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NOTICE OF APPEAL OF DEFENDANT-APPELLANT ADRIAN L. HAND, JR.

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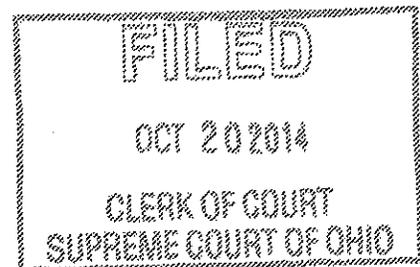
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NOTICE OF APPEAL OF APPELLANT LOWELL W. THOMPSON

Appellant Adrian L. Hand, Jr. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 25840 on September 5, 2014.

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

Respectfully submitted,

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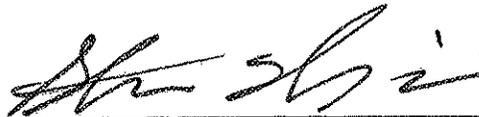
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **NOTICE OF APPEAL OF DEFENDANT-APPELLANT ADRIAN L. HAND, JR.** was forwarded by regular U.S. Mail to Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, 301 W. Third Street, 5th Floor Courts Building, Dayton, Ohio 45402, this 20th day of October, 2014.



Stephen A. Goldmeier (0087553)
Assistant State Public Defender

Counsel for Adrian L. Hand, Jr.

#428433



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GREGORY A. CRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
26

**THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

ADRIAN L. HAND, JR.

Defendant-Appellant

Appellate Case No. 25840

Trial Court Case No. 2012-CR-650/2

(Criminal Appeal from
Common Pleas Court)

.....
OPINION

Rendered on the 5th day of September, 2014.
.....

MATHIAS H. HECK, JR., by ANDREW T. FRENCH, Atty. Reg. #0069384, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

ROBERT ALAN BRENNER, Atty. Reg. #0067714, 120 West Second Street, Suite 706, Dayton, Ohio 45402
Attorney for Defendant-Appellant

.....
HALL, J.

{¶ 1} Adrian L. Hand appeals from his conviction and sentence on charges of aggravated burglary, aggravated robbery, felonious assault, and a firearm specification.¹

¹Hand also was found guilty of kidnapping, a second count of felonious assault, and additional firearm specifications. The trial court merged these offenses into the others at sentencing as allied offenses of similar import.

{¶ 2} In his sole assignment of error, Hand contends the trial court's use of a prior juvenile delinquency adjudication to enhance his sentence from a non-mandatory to a mandatory prison term violated his due process rights and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

{¶ 3} The record reflects that before his current offenses, Hand had a delinquency adjudication for aggravated robbery, a first-degree felony if committed by an adult. In the proceedings below, the trial court imposed an aggregate six-year prison sentence for Hand's current offenses. The sentence consisted of (1) concurrent three-year terms for aggravated burglary, aggravated robbery, and felonious assault and (2) a consecutive three-year term for the firearm specification. The parties agreed that the sentence for the firearm specification involved mandatory prison time. They disputed, however, whether the trial court was required to impose mandatory prison time for the substantive offenses. The trial court relied on R.C. 2929.13(F)(6) to find that those three years involved mandatory prison time as well.

{¶ 4} In relevant part, R.C. 2929.13(F)(6) requires a mandatory prison term where a defendant sentenced for the offenses at issue here has a prior conviction for any first or second-degree felony. The trial court concluded that Hand's delinquency adjudication qualified as a prior conviction for a first-degree felony. In so doing, it looked to R.C. 2901.08(A). As pertinent here, that statute provides:

If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child * * * for a violation of a law or ordinance, * * * the adjudication as a delinquent child * * * is a conviction for a violation of the law or ordinance for purposes of determining

the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person relative to the conviction or guilty plea.

R.C. 2901.08(A).

{¶ 5} On appeal, Hand argues that treating his delinquency adjudication as a prior conviction violates his due process rights because he was not afforded a jury trial in juvenile court and was not advised of the collateral consequences of accepting responsibility there. Relying on *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), he also argues that treating his juvenile adjudication as a prior conviction violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In his appellate brief, Hand acknowledges that the weight of authority is against him. He stresses that he is raising the issue "in order to argue for a change in existing law and to preserve the issue for himself in the future." (Appellant's brief at 4).

{¶ 6} Upon review, we are unpersuaded by Hand's arguments. This court explicitly rejected the same arguments in *State v. Craver*, 2d Dist. Montgomery No. 25804, 2014-Ohio-3635. Relying on *State v. Parker*, 8th Dist. Cuyahoga No. 97841, 2012-Ohio-4741, and cases cited therein, we rejected a claim that treating a delinquency adjudication as a prior conviction violates due process because the defendant was not afforded a jury trial in juvenile court and was not advised of the collateral consequences of accepting responsibility. *Craver* at ¶ 7-16. We also held that a prior delinquency adjudication falls within *Apprendi's* prior-conviction exception despite the fact that such an adjudication does not involve a jury trial and does not require an explanation of all possible collateral consequences. *Id.* at ¶ 9-14. Finally, we noted our review of a juvenile-court transcript in

Craver and found substantial compliance with Juv.R. 29(D).

{¶ 7} Based on the authority of *Craver* and the cases cited therein, we hold that treating Hand's delinquency adjudication as a prior conviction for purposes of imposing a mandatory prison sentence under R.C. 2929.13(F)(6) did not violate his due process rights or *Apprendi*.² Accordingly, Hand's assignment of error is overruled.

{¶ 8} The trial court's judgment is affirmed.

.....

WELBAUM, J., concurs.

DONOVAN, J., dissenting:

{¶ 9} I disagree. The majority cites to *Craver* in finding no Due Process violation by use of a prior juvenile adjudication to enhance a sentence from a non-mandatory to a mandatory prison term. *Craver* was decided on an *Anders* brief, hence the argument was never fully developed by appointment of new counsel to file a merit brief. In my view, it was patently wrong to characterize this Due Process argument as wholly frivolous.

{¶ 10} There is a split of authority regarding whether juvenile adjudications may be utilized as sentence enhancements in criminal cases in light of the United States Supreme Court's ruling in *Apprendi* and its progeny. Compare *Tighe* (holding the use of juvenile adjudications without right to jury trial violates due process of law under *Apprendi*), and *State v. Brown*, 879 So.2d 1276, 1290 (La. 2004) (same), with *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); and *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002).

²Unlike *Craver*, we have not reviewed a transcript of Hand's juvenile court proceeding because no such transcript is part of the record on appeal.

{¶ 11} Each of the above cited cases were decided before *Allenye v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed. 314 (2013), wherein Justice Thomas reiterated statements he made in *Apprendi*, observing that the logic of *Apprendi* applies with equal weight to facts triggering a mandatory minimum sentence. There are a significant number of law review articles which question on due process grounds whether juvenile court adjudications should be considered the equivalent of criminal convictions for purposes of sentence enhancement statutes. Generally, the critics note: (1) the different purposes of a juvenile adjudication and the juvenile justice system as a whole, (2) the prevalence of pleas in the juvenile system, (3) the lack of a jury trial in juvenile proceedings, (4) the difficulty juveniles face to meaningfully participate in a process they do not fully understand and do not control, and (5) the lack of zealous advocacy in juvenile proceedings. See, e.g., Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. Rev. 495 (2008); Alissa Malzmann, Note, *Juvenile Strikes: Unconstitutional Under Apprendi and Blakely and Incompatible with the Rehabilitative Ideal,* 15 S. Cal. Rev. L. & Women's Stud. 171 (2005); Brian P. Thill, Comment, *Prior "Convictions" Under Apprendi: Why Juvenile Adjudications May Not be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt,* 87 Marq. L. Rev. 573 (2004); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts,* 38 Wake Forest L. Rev. 1111 (2003).

{¶ 12} It is inconsistent to consider juvenile adjudications civil for one purpose, i.e., no right to jury trial, but then criminal for the purpose of classifying them as "prior

convictions” which can be counted as predicate offenses for the purpose of a mandatory prison term upon a first adult conviction. There is a significant difference between allowing a trial judge to consider a juvenile adjudication as a factor in exercising its discretion at sentencing and using that adjudication to impose a mandatory prison term.³

{¶ 13} A historical perspective is warranted before rejecting the Due Process argument. The first juvenile court system was established in Illinois, in 1899, with the aim to rehabilitate those young offenders deemed less culpable than their adult counterparts. Andrew Tunnard, *Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under Career Offender Guidelines*, 66 Vand. L. Rev. 1309, 1312 (2013); Lauren D'Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea*, 2 Roger Williams U.L.Rev. 277, 280 (1997).

{¶ 14} Until the early nineteenth century, American criminal courts punished juveniles and adults in much the same way, and it was not until the Progressive era that the idea of juvenile courts gained traction. Barry C. Feld, *Cases and Materials on Juvenile Justice Administration*, 2 (3d Ed. 2009). Changes in the ideological assumptions about crime and the social landscape supported the movement, that rehabilitation for juvenile offenders was needed. *Id.* at 3. Additionally, new thoughts about social development designated adolescence as a distinct stage before adulthood, leading to the increasingly accepted view that children were less culpable and needed preparation for life. *Id.* at 4.

³Absent a jury trial guarantee, counting juvenile adjudications as convictions falling within the “conviction exception” of *Apprendi* and its progeny violates the constitutionally guaranteed due process rights of Hand. See generally, Rebecca Gannon, Note, *Apprendi after Miller and Graham, How the Supreme Court’s Recent Jurisprudence on Juveniles Prohibits the Use of Juvenile Adjudications as Mandatory “Sentencing Enhancements”*, 79 Brooklyn Law Review 347 (2013).

{¶ 15} The United States Supreme Court recognized this in the 1960s: "From the inception of the juvenile court system, wide differences have been tolerated - indeed insisted upon - between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles." *In re Gault*, 387 U.S. 1, 14, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967).

{¶ 16} From the beginning juvenile proceedings were not considered adversarial; the state acted as *parens patriae* for the juveniles. The state would attempt, "not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop." Julian W. Mack, *The Juvenile Court*, 23 Harv.L.Rev. 104, 107 (1909). The courts deemed a juvenile offender as a "delinquent," not a "criminal," preserving the possibility of rehabilitation and signifying a lower degree of culpability. *In re Gault* at 23. The US Supreme Court considers adult criminal cases and juvenile hearings as "fundamentally different." *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984).

{¶ 17} Ohio has followed this reasoning in the construction of its juvenile justice system. In Ohio, juvenile proceedings do not result in criminal convictions; juvenile court proceedings are civil actions. *In re Anderson*, 92 Ohio St.3d 63, 748 N.E.2d 67 (2001), syllabus. Juveniles are "adjudicated delinquent" rather than "found guilty." *State v. Hanning*, 89 Ohio St.3d 86, 89, 728 N.E.2d 1059 (2000); *State v. Adkins*, 129 Ohio St. 3d 287, 2011-Ohio-3141, 951 N.E.2d 766, ¶ 10. We must recognize the concept of lessened culpability which attaches to the admission of responsibility in juvenile court.

{¶ 18} The Ohio Supreme Court in *Anderson* set forth the underlying criminal characteristics that are prevalent in juvenile proceedings:

Although the juvenile court operates in a separate system, the United States Supreme Court has carefully imposed basic due process requirements on it. We recognize that there are criminal aspects to juvenile court proceedings. For instance, in [*Gault*] the court specifically held the privilege against self-incrimination applicable to juvenile proceedings. *Id.* at 49-54, * * *. In addition, notice of the charges, the assistance of counsel, and the rights of confrontation and cross-examination were also afforded to the juvenile. *Id.* at 31-57, * * *. In *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, the court further advanced due process rights when it found that the state must prove its case against a juvenile beyond a reasonable doubt. However, in *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647, and *Schall v. Martin* (1984), 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207, the court declined further expansions when it denied juveniles the right to jury trials (*McKeiver*) and upheld the constitutionality of pretrial preventive detention for accused juvenile delinquents (*Schall*).

Id. at 65-66.

{¶ 19} The Court in *Anderson* reasoned further regarding the main goal of the juvenile justice system:

In *In re Caldwell* (1996), 76 Ohio St.3d 156, 157, 666 N.E.2d 1367, 1368, we summarized the purpose of R.C. 2151.01: "to provide for the care, protection, and mental and physical development of children, to protect the public from the wrongful acts committed by juvenile delinquents, and to

rehabilitate errant children and bring them back to productive citizenship, or, as the statute states, to supervise, care for and rehabilitate those children. Punishment is not the goal of the juvenile system, except as necessary to direct the child toward the goal of rehabilitation."[] See, also, Juv.R. 1(B)(3) and (4).

Thus, from their inception, juvenile courts existed as civil, not criminal, courts. The basic therapeutic mission of these courts continues to this day.

Id. at 66.

{¶ 20} An adjudication is further distinguishable from a criminal conviction because juveniles are much more likely to admit responsibility. As noted in a 2010 law review article:

[J]uveniles may plead guilty when they otherwise would not have out of a fear that their judge--who is often remarkably familiar with the minor and particularly knowledgeable of the facts surrounding the conduct in question--will find them guilty regardless and impose a harsher sanction in response to their unwillingness to plead initially.

Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 Berkeley J. Crim. L. 65, 79 (2010).

{¶ 21} In juvenile courts it has been widely accepted that when a judge offers a juvenile the choice between admitting to an offense, and going home that day, or waiting

another week in detention, evidence shows the juvenile will choose to go home as quickly as possible. *Id.*; See Brief of Pac. Juvenile Defender Ctr., et al. as Amici Curiae on Behalf of Appellant Nguyen, 34, *People v. Nguyen*, 46 Cal. 4th 1007 (No. S154847) (2009).

{¶ 22} Furthermore, authorities have cited additional differences such as the functions of lawyers in juvenile proceeding. It has been stated that lawyers who represent juveniles act more as guardians than advocates which would be found in adult criminal proceedings. See, Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. Rev. 927, 940-41 (1995); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 Md. L. Rev. 288, 327-28 (2003) (arguing that attorneys may have a paternalistic approach in juvenile cases and view the juvenile system as more similar to a benevolent social welfare agency). It seems that some attorneys can be dissuaded from advocating aggressively on behalf of the minor in juvenile court.⁴ Goldstein-Breyer, at 80. Juvenile proceedings can also be less reliable as a result of the different rules of evidence and criminal procedure, as well as a lack of a clear record or transcript. *Id.*

{¶ 23} Although juvenile offenders are afforded some of the same due process rights as their adult counterparts, the purposes of a criminal conviction and juvenile adjudication are inherently different. The purpose of juvenile adjudications is care and rehabilitation, which hopefully will not lead the juvenile delinquent to recidivate as an adult.

⁴See, Steven A. Drizin & Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 305 (2007).

{¶ 24} I recognize that the majority of jurisdictions in the U.S. allow prior juvenile adjudications to be used as sentencing considerations. See, Ellen Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 Hous. L. Rev. 1323, 1344 (2004). However, the adjudications in such cases are not used to enhance the defendant's sentence (or as a predicate to mandatory prison), but they can be used by the judge to determine the actual sentence within the boundaries set by the legislature. Nevertheless, the court still retains jurisdiction to consider the adult offender's youthfulness at the time of the juvenile adjudication and to exercise its judicial discretion to consider other options such as community control and community based correctional facilities.

{¶ 25} In Ohio, the judge uses many factors in sentencing. R.C. 2929.12. Among these, R.C. 2929.12(D)(2) provides, "[t]he 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." This section should be read in pari materia with R.C. 2901.08, to conclude that a juvenile adjudication should only be considered a sentencing factor in a situation such as Hand's, unlike the case where the prior adjudication does determine the level of the offense, for example a domestic violence or OMVI offense. A single juvenile adjudication should not be used to morph an adult conviction into a mandatory prison term with no consideration of community control, judicial release, or other transitional control options.

{¶ 26} The trial court herein relied in part upon *State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766, wherein the Ohio Supreme Court held that a juvenile

adjudication could serve as one of the five prior similar offenses necessary to enhance a charge of operating a motor vehicle while under the influence of alcohol, because R.C. 2901.08 expressly includes juvenile adjudications among the offenses that may be used for penalty enhancement. The court specifically noted that "R.C. 2901.08 did not change [the] juvenile adjudication; it merely added another type of legal violation as an aggravating offense under R.C. 4511.19(G)(1)(d)." *Id.* at ¶ 17. However, the *Adkins* case did not consider the Due Process implication of the lack of a right to a jury trial in juvenile court. Further, in *Adkins*, the defendant was put on notice of the aggravating circumstance of a prior juvenile adjudication, as it was set forth in the indictment. Here, Hand's prior adjudication did not determine the offense charged as R.C. 2901.08(A) contemplates, and the prior adjudication was not set forth in the indictment providing notice of the mandatory prison term. Furthermore, no jury determination was available to Hand for the aggravating circumstance that resulted in a mandatory prison term.⁵ Significantly, *Adkins* was decided before the U.S. Supreme Court decided *Alleyne*, which expanded the reasoning of *Apprendi* to mandatory minimum terms.

{¶ 27} In my view, equating *Hand's* juvenile adjudication with an adult conviction ignores the fact that Ohio has developed a system for juveniles that assumes that children are not as culpable for their acts as adults. Compared to adults, juveniles evince a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. "A

⁵Furthermore, *Adkins'* focus was on the retroactivity and Ex Post Facto implications of R.C. 2901.08(A). There was no discussion of the unavailability of jury trials in juvenile court nor the impact of *Apprendi* and its progeny on the constitutionality of the legislative enhancement provisions, particularly those which are not set forth in the indictment, providing notice consistent with Due Process.

juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.' *Thompson [v. Oklahoma]*, 487 U.S. 815] at 835, 108 S.Ct. 2687, [101 L.Ed.2d 702 (1988)] (plurality opinion)." *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 2026, 176 L.Ed.2d 825 (2010).

{¶ 28} From a moral perspective, in my view, it is misguided to equate the failings of a minor with those of an adult. Although Hand was sentenced as an adult, the majority view prohibits the trial judge from considering his "youthfulness" at the time of his predicate offense. These facts, coupled with the failure to set forth the adjudication in the indictment and the lack of jury trial in juvenile court, in my view, constitute a Due Process violation under the United States and Ohio Constitutions. Clearly, one reason *Apprendi* exempts prior convictions from its rule is the opportunity for an initial jury determination of guilt and notice through the wording of the indictment of the predicate offense. *McKeiver* did not address nor contemplate these issues at all since it was decided long before *Apprendi* and *Allenye*.

{¶ 29} I would reverse and remand for re-sentencing.

.....

Copies mailed to:

Mathias H. Heck
Andrew T. French
Robert Alan Brenner
Hon. Dennis J. Langer

Redacted by Clerk of Court

ELECTRONICALLY FILED
COURT OF COMMON PLEAS
Tuesday, July 23, 2013 9:07:43 AM
CASE NUMBER: 2012 CR 00650 /2 Docket ID: 18325308
GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION**

STATE OF OHIO

CASE NO. 2012 CR 00650/2

Plaintiff

JUDGE DENNIS J. LANGER

vs.

ADRIAN L. HAND JR.

TERMINATION ENTRY

DOB: 07/29/1991 SSN: [REDACTED]

Defendant

The defendant herein having entered a no contest plea and having been found guilty by the Court of the offenses:

**COUNT 1: AGGRAVATED BURGLARY (deadly weapon) - 2911.11(A)(2) F1
Three (3) Year Firearm Specification - 2929.14/2941.145;**

**COUNT 2: AGGRAVATED ROBBERY (deadly weapon) - 2911.01(A)(1) F1
Three (3) Year Firearm Specification - 2929.14/2941.145;**

**COUNT 3: FELONIOUS ASSAULT (deadly weapon) - 2903.11(A)(2) F2
Three (3) Year Firearm Specification - 2929.14/2941.145;**

**COUNT 4: FELONIOUS ASSAULT (serious harm) - 2903.11(A)(1) F2
Three (3) Year Firearm Specification - 2929.14/2941.145;**

**COUNT 5: KIDNAPPING (felony or flight) - 2905.01(A)(2) F1
Three (3) Year Firearm Specification - 2929.14/2941.145;**

was on July 18, 2013, brought before the Court.

For purposes of sentencing, Counts 2 and 5 merge and Counts 3 and 4 merge and State elected to proceed to sentencing on Counts 2 and 4.

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to the **CORRECTIONAL RECEPTION CENTER** there to be imprisoned and confined for a **MANDATORY** term of **THREE (3) YEARS ON COUNTS 1, 2, AND 4 TO BE SERVED CONCURRENTLY WITH EACH OTHER AND CONCURRENTLY WITH THE SENTENCE IMPOSED IN CASE NUMBER 2012-CR-2362.**

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CASE NO. 2012 CR 00650/2
STATE VS. ADRIAN L. HAND JR.

The Court hereby merges all firearm specifications into one (1) firearm specification and imposes an additional term of **THREE (3) YEARS ACTUAL INCARCERATION** on the firearm specification, which shall be served **CONSECUTIVE** to and prior to the definite terms of imprisonment, for a total term of **SIX (6) YEARS**.

The Defendant is ordered to pay complete restitution to **Ashlee Knisley** for economic loss in the amount of **\$600**, upon which execution is hereby awarded to be paid through the Montgomery County Clerk of Courts.

Court costs to be paid in full in the amount determined by the Montgomery County Clerk of Courts. If the defendant fails to pay court costs as ordered by the Court, or fails to pay court costs pursuant to a payment schedule approved by the Court, the defendant may be ordered to perform community service in an amount not more than 40 hours per month until the court cost is paid or the court is satisfied that the defendant is in compliance with the approved payment schedule. If community service is so ordered, each hour of community service performed will reduce the amount owed by a specified hourly credit rate.

The defendant is to receive credit for **THREE HUNDRED FORTY-THREE (343)** days spent in confinement **to be applied toward the total sentence of SIX (6) years**.

After reviewing the criminal history of the defendant, the pre-sentence investigation, the facts and circumstances of the offense, and any victim impact statement, the Court disapproves the defendant's placement in a program of shock incarceration under Section 5120.031 of the Revised Code, or in the intensive program prison under Section 5120.032 of the Revised Code, for the following reasons: for the reasons stated on the record.

The Court notifies the defendant that, as a part of this sentence, on **Count 1: AGGRAVATED BURGLARY (deadly weapon) - 2911.11(A)(2) F1** the defendant will be supervised by the Parole Board for a period of **Five (5)** years Post-Release Control after the defendant's release from imprisonment.

The Court notifies the defendant that, as a part of this sentence, on **Count 2: AGGRAVATED ROBBERY (deadly weapon) - 2911.01(A)(1) F1** the defendant will be supervised by the Parole Board for a period of **Five (5)** years Post-Release Control after the defendant's release from imprisonment.

The Court notifies the defendant that, as a part of this sentence, on **Count 4: FELONIOUS ASSAULT (serious harm) - 2903.11(A)(1) F2** the defendant will be supervised by the Parole Board for a period of **Three (3)** years Post-Release Control after the defendant's release from imprisonment.

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CASE NO. 2012 CR 00650/2
STATE VS. **ADRIAN L. HAND JR.**

Should the defendant violate any post-release control sanction or any law, the adult parole board may impose a more restrictive sanction. The parole board may increase the length of the post-release control. The parole board also could impose up to an additional nine (9) months prison term for each violation for a total of up to fifty percent (50%) of the original sentence imposed by the court. If the violation of the sanction is a felony, in addition to being prosecuted and sentenced for the new felony, the defendant may receive from the court a prison term for the violation of the post-release control itself.

Pursuant to R.C. 2929.19(B)(2)(f), the defendant is ordered not to ingest or be injected with a drug of abuse. The defendant is ordered to submit to random drug testing as provided in section 341.26, 753.33, or 5120.63 of the Revised Code. The results of the drug test administered shall indicate that the defendant did not ingest and was not injected with a drug of abuse.

The Court did fully explain to the defendant his appellate rights and the defendant informed the Court that said rights were understood.

BOND IS RELEASED.

JUDGE DENNIS J. LANGER

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: /s/ Michele S.H. Henne

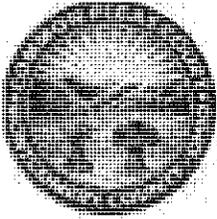
MICHELE S.H. HENNE, #0081792E
Assistant Prosecuting Attorney

By: /s/ Karina Korostyshevsky

KARINA KOROSTYSHEVSKY, #0087317E
Assistant Prosecuting Attorney

Montgomery County Sheriff's Office, Attn: Jail Records

Filed electronically with the Clerk of Court using the Electronic Criminal Filing system, which will send notification of such filing to the following: LORI CICERO, Attorney for Defendant



General Divison
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Entry: Termination
Case Number: 2012 CR 00650 /2
Case Title: STATE OF OHIO vs ADRIAN LAMONT HAND

So Ordered

A handwritten signature in black ink, appearing to read "Dennis J. Berger".

Redacted by Clerk of Court

ELECTRONICALLY FILED
COURT OF COMMON PLEAS
Tuesday, July 16, 2013 2:38:10 PM
CASE NUMBER: 2012 CR 00650 /2 Docket ID: 18310221
GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,	:	Case No. 12 CR 650 (Judge Dennis J. Langer)
Plaintiff,	:	
v.	:	DECISION AND ENTRY RULING A JUVENILE DELINQUENCY AJUDICATION FOR A FIRST OR SECOND DEGREE FELONY IS A PRIOR "CONVICTION" UNDER R.C. 2929.13 (F) (6)
ADRIAN HAND,	:	
Defendant.	:	DEFENDANT'S REQUEST TO CONTINUE SENTENCING HEARING DENIED

On June 12, 2013, the Defendant, Adrian Hand (hereinafter "Hand"), pled no contest to and was found guilty of all five indicted charges (hereinafter "the underlying felonies");

- Aggravated Burglary, Aggravated Robbery and Kidnapping - first degree felonies
- two counts of Felonious Assault - second degree felonies

He also pled no contest to and was found guilty of the three-year firearm specifications attached to each of these offenses. Given that the offenses occurred as part of the same transaction, all five firearm specifications merge into a single firearm specification.

Pursuant to the plea agreement, Hand will be sentenced to three mandatory years for the merges firearm specification to run consecutively with a three-year prison term for the underlying felonies.

The issue before this Court is whether the three-year prison term for the underlying felonies should be designated as a mandatory prison sentence by reason of Hand's previous juvenile delinquency adjudication for aggravated robbery, a first degree felony.

R.C. 2929.13 (F) (6) mandates the imposition of mandatory prison term for "Any offense that is a first or second degree felony . . . if the offender previously was convicted of . . . any first or second degree felony . . ." Id. The question is whether the term "previously was convicted of . . . any first or second degree felony" includes a prior juvenile adjudication for such offense?

R.C. 2901.08(A) provides, in relevant part: "If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child . . . for a violation of a law . . . the adjudication as a delinquent child . . . is a conviction for a violation of the law . . . for purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person relative to the conviction or guilty plea." Id.

In applying R.C. 2901.08(A), the Ohio Supreme Court has held that a juvenile delinquency adjudication for OVI may be used to enhance the penalty of an adult convicted of OVI - pursuant to R.C. 4511.19(G)(1)(d) which renders an OVI a fourth-degree felony if the offense previously convicted of or pleaded guilty to five or more OVI offenses within the previous 20 years. *State v. Adkins* (2011) 129 Ohio St. 3d 287.

State v. Parker (October 11, 2012), Cuyahoga App. No. 97841 - a case cited by the State - is factually directly on point. In *Parker*, the Eighth Appellate District held R.C. 2901.08(A) enables a juvenile delinquency adjudication for felonious assault to be used as a prior "conviction" specification under R.C. 2929.13(F)(6) in an adult prosecution for aggravated robbery. Furthermore, the Eighth Appellate District Court ruled that imposing a penalty enhancement under

R.C. 2901.08 based on a juvenile delinquency adjudication does not violate the defendant's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. *Id.* at P25.

Based upon R.C. 2901.08(A), *State v. Adkins*, *supra*, and *State v. Parker*, *supra*, this Court finds the Defendant Hand's previous delinquency adjudication for the first degree felony of aggravated robbery constitutes a previous "conviction" under R.C. 2929.13 (F) (6). Therefore, the three-year prison term for Hand's underlying felonies must be designated as a mandatory prison sentence. Furthermore, this Court finds this use of Hand's delinquency adjudication does not violate his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments.

Finally, this Court denies Hand's request to continue his sentencing hearing "so that he may challenge his prior juvenile adjudication in the Montgomery County Juvenile Court." Defendant's Sentencing Memorandum. Notwithstanding this Court's decision, Hand is free to attempt obtain a court order vacating or voiding his prior juvenile delinquency adjudication. In the event he succeeds in obtaining such an order, this Court would entertain a post conviction petition to amend its sentencing entry to designate the underlying three-year prison term to be a nonmandatory term.

SO ORDERED:

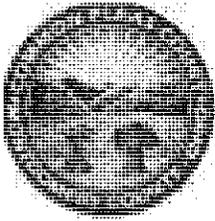
DENNIS J. LANGER, JUDGE

Copies of the above have been emailed to counsel:

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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision
Case Number: 2012 CR 00650 /2
Case Title: STATE OF OHIO vs ADRIAN LAMONT HAND

So Ordered

A handwritten signature in black ink, which appears to read "Dennis J. Langer". The signature is written in a cursive, flowing style.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 5 RIGHT OF TRIAL BY JURY

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

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.

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.

Page's Ohio Revised Code Annotated
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Current through Legislation passed by the 131st General Assembly and filed with the Secretary of
State through file 5 (HB 47)

Title 29: Crimes -- Procedure
Chapter 2929: Penalties and Sentencing
Penalties for Felony

Go to the Ohio Code Archive Directory

ORC Ann. 2929.13 (2015)

§ 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 residen-

tial 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)(8)(b) or (C)(9)(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.

HISTORY: 146 v S2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 293 (Eff 3-17-98); 147 v H 122 (Eff 7-29-98); 148 v S 142 (Eff 2-3-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 183, § 1, eff. 9-11-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09; 153 v S 58, § 1, eff. 9-17-10; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 262, § 1, eff. June 27, 2012; 2012 HB 62, § 1, eff. Mar. 22, 2013; 2012 SB 160, § 1, eff. Mar. 22, 2013; 2013 HB 59, § 101.01, eff. Sept. 29, 2013.

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Current through Legislation passed by the 131st General Assembly and filed with the Secretary of
State through file 5 (HB 47)

Title 21: Courts -- Probate -- Juvenile
Chapter 2152: Delinquent Children; Juvenile Traffic Offenders

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ORC Ann. 2152.01 (2015)

§ 2152.01 Purposes of dispositions under chapter; application of Chapter 2151.

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

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

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

HISTORY: 148 v S 179. Eff 1-1-2002.

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Current through Legislation passed by the 131st General Assembly and filed with the Secretary of
State through file 5 (HB 47)

Title 29: Crimes -- Procedure
Chapter 2929: Penalties and Sentencing
Penalties for Felony

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ORC Ann. 2929.13 (2015)

§ 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 residen-

tial 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)(8)(b) or (C)(9)(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.

HISTORY: 146 v S2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 166 (Eff 10-17-96); 146 v H 180 (Eff 1-1-97); 147 v H 32 (Eff 3-10-98); 147 v S 111 (Eff 3-17-98); 147 v H 293 (Eff 3-17-98); 147 v H 122 (Eff 7-29-98); 148 v S 142 (Eff 2-3-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 22 (Eff 5-17-2000); 148 v H 528 (Eff 2-13-2001); 148 v S 222 (Eff 3-22-2001); 149 v H 485 (Eff 6-13-2002); 149 v H 327 (Eff 7-8-2002); 149 v S 123, § 1, eff. 1-1-04; 150 v S 5, § 1, Eff 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 150 v H 163, § 1, eff. 9-23-04; 150 v H 473, § 1, eff. 4-29-05; 151 v H 95, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 151 v S 281, § 1, eff. 1-4-07; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08; 152 v S 183, § 1, eff. 9-11-08; 152 v H 280, § 1, eff. 4-7-09; 152 v H 130, § 1, eff. 4-7-09; 153 v S 58, § 1, eff. 9-17-10; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2012 HB 262, § 1, eff. June 27, 2012; 2012 HB 62, § 1, eff. Mar. 22, 2013; 2012 SB 160, § 1, eff. Mar. 22, 2013; 2013 HB 59, § 101.01, eff. Sept. 29, 2013.