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**EXPLANATION OF WHY THIS CASE PRESENTS A SUBSTANTIAL
CONSTITUTIONAL ISSUE, AND IS ONE OF GREAT GENERAL INTEREST AND
IMPORTANCE.**

This case should be reviewed by the Ohio Supreme Court because the most apparent issue in this case is the failure of the Court of Appeals for Erie County to follow its previous decision concerning the imposition of consecutive sentences. In defendant's prior appeal to the Court of Appeals for Erie County, defendant raised an issue concerning the statutory authority to impose a consecutive sentence. The Court of Appeals for Erie County ruled that the assignment of error number one was sustained, although it did not engage in any detailed discussion of that assignment.

However, in the second appeal, the court ignored its prior pronouncement and basically ignored the assignment of error concerning its prior pronouncement and the statutory prohibition at the time against imposition of consecutive sentences. This certainly would merit review by this court.

The second important issue in this appeal concerns the court's use of information contained in the prior presentence investigation report that was used at the first sentencing of defendant, which was subsequently reversed by the Court of Appeals and remanded for resentencing.

Counsel for defendant was not the same counsel. However, when counsel objected to the use of that information contained in a prior resentencing, the court said because the prior attorney had agreed to use that information or had at least not objected to that information, that counsel was now bound by that ruling. However, this was a de novo resentencing with different counsel, and required a new sentencing hearing, without regard to what had occurred at the first sentencing. *State v. Wilson*, 129 Ohio St.3d 214, 9510 N.E.2d 381 (2011). See *State v. Bonnell*, 140 Ohio St.3d 209, 16 N.E.3d 659 (2014).

STATEMENT OF THE CASE AND FACTS

On July 15, 2011 defendant was indicted in a ten count indictment. Defendant was charged with two counts of rape involving **“A.Z.”** occurring **“on or about the period of June 2010.”** In addition, defendant was charged with two counts of importuning also involving **“A.Z.”** occurring **“on or about the period of June, 2010, ...”**

Counts five and six charged rape again involving **“A.Z.”** occurring **“on or about the period of December, 2010.”** Count seven charged importuning involving **“A.Z.”** occurring **“on or about the period of December, 2010, ...”**

Count nine charged rape involving **“A.Z.”** occurring **“on or about the period of January, 2011.”** Count ten charged importuning involving **“A.Z.”** occurring **“on or about the period of January, 2011, ...”** At his arraignment defendant entered a plea of not guilty.

Defendant entered pleas of guilty to one count of rape and two counts of importuning. The court referred the case to the probation department for the preparation of a presentence investigation report.

On July 26, 2012 defendant appeared for sentencing and was sentenced to six (6) years for rape and consecutive sentences of four (4) years for importuning.

An appeal was taken from the judgment and sentence to the Court of Appeals for Erie County. On November 22, 2013 the court affirmed in part and reversed in part and remanded the case to the Court of Common Pleas. Case E-12-0052, 2013-Ohio-50175.

A further appeal and cross-appeal to the Ohio Supreme Court was declined by the Ohio Supreme Court on May 14, 2014. 138 Ohio St.3d 1493, 8 N.E.3d 963 (2014).

A resentencing hearing after the case was remanded by the Court of Appeals was conducted on July 25, 2014. The court again reimposed the same sentence of ten (10) years consisting of six (6) years for rape and four (4) years for importuning.

The second appeal was then taken to the Court of Appeals for Erie County. That court, on July 19, 2015, affirmed the judgment and sentence. Defendant now seeks review by the Ohio Supreme Court.

**ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW
PROPOSITION OF LAW NO. 1
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN A COURT ON
A SUBSEQUENT APPEAL AFTER RESENTENCING FAILS TO FOLLOW ITS
PRONOUNCEMENT FROM THE FIRST APPEAL.**

In the first appeal defendant raised the issue concerning the statutory authority to impose a consecutive sentence. The Court of Appeals for Erie County ruled that that assignment of error was sustained even though the court did not engage in any detailed discussion of that assignment of error. Compare *State v. Polus*, Case No. L-13-1119-20, 2014-Ohio-2321, 12 N.E.3d 1237 (2014)(holding that a statutory sentencing ambiguity must be construed against the state). In any event, since a consecutive sentence was precluded under §2929.41(A) of the Ohio Revised Code, the imposition of a consecutive sentence, even upon a remand for resentencing, rendered the new sentence void. **“A judgment will be deemed void when it is issued by a court which did not have subject matter jurisdiction or otherwise lacked the authority to act.”** *State v. Fischer*, 128 Ohio St.3d 92, 94, 942 N.E.2d 332, 336 (2010).

If a judgment is void, the doctrine of *res judicata* has no application, and the propriety of the decision can be challenged on direct appeal or by collateral attack. *Fisher* at paragraph one of the syllabus (a void sentence **“is not precluded from appellate review by principles of *res judicata*, and may be reviewed at any time, on direct appeal or collateral attack”**); *State Billiter*, 134 Ohio St.3d 103, 106, 980 N.E.2d 960, 963 (2012)(**“if a trial court imposes a sentence that is unauthorized by law, the sentence is void”**).

As a result, the trial court failed to follow to follow the mandate from the prior appeal,. *Nolan v. Nolan*, 11 Ohio St. 3d 1, 462 N.E.2d 410 (1984) (**“Absent extraordinary circumstances such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of the superior court in a prior appeal in the same case...”**).

**PROPOSITION OF LAW NO. II
A DEFENDANT HAS BEEN DENIED HIS RIGHTS UNDER THE SIXTH AMENDMENT
WHEN THE COURT BASES A RESENTENCING ON JUDICIAL FACTFINDING,
NONE OF WHICH WERE ALLEGED IN THE INDICTMENT NOR ADMITTED AS
PART OF A PLEA IN THIS CASE**

Defendant, at the resentencing hearing in this case objected to the court making its sentence based on judicial factfinding. Defendant objected to the court basing its sentence on other than what was alleged in the indictment admitted at the time of the original plea (Tr. 87-88 7/25/14). Defendant had only entered pleas of guilty to counts one (1), three (3), and seven (7). Count one of the indictment alleged that:

on or about the period of June 2010, at Erie County, Ohio David M. Deeb did engage in sexual conduct with A.Z. being less than thirteen (13) years of age, in violation of O.R.C. §2907.02(A)(1)(b) and against the peace and dignity of the State of Ohio. (F-1) (RAPE)

Count three alleged:

That on or about the period of June, 2010, at Erie County, Ohio, David M. Deeb did solicit A.Z. (DOB 05/30/98) by means of a telecommunications device as defined in O.R.C. §2913.01 to engage in sexual activity with David M. Deeb when David M. Deeb was eighteen years of age or older, and A.Z. was less than thirteen years of age, and David M. Deeb knew that the said A.Z. was less than thirteen years of age or was reckless in that regard, in violation of O.R.C. §2907.07(C)(1) and against the peace and dignity of the State of Ohio. (F-3) (IMPORTUNING)

Count seven alleged:

That on or about the period of December, 2010, at Erie County, Ohio, David M. Deeb did solicit A.Z. (DOB 05/30/98) by means of a telecommunications device as defined in O.R.C. §2913.01 to engage in sexual activity with David M. Deeb when David M. Deeb was eighteen years of age or older, and A.Z. was less than thirteen years of age, and David M. Deeb knew that the said A.Z. was less than thirteen years of age or was reckless in that regard, in violation of O.R.C. §2907.07(C)(1) and against the peace and dignity of the State of Ohio. (F-3) (IMPORTUNING)

There had been no trial. Defendant had admitted to no additional facts. Even if the court could consider the presentence investigation report, §2951.03 of the Ohio Revised Code limits the contents of that report:

The officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the

defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2. Whenever the officer considers it advisable, the officer's investigation may include a physical and mental examination of the defendant. A physical examination of the defendant may include a drug test consisting of a chemical analysis of a blood or urine specimen of the defendant to determine whether the defendant ingested or was injected with a drug of abuse. If, pursuant to section 2930.13 of the Revised Code, the victim of the offense of which the defendant has been convicted wishes to make a statement regarding the impact of the offense for the officer's use in preparing the presentence investigation report, the officer shall comply with the requirements of that section.

Moreover, even if a victim impact statement was filed and considered. Section 2930.13 of the Ohio Revised Code limits that report to any written or oral statement in regard to the impact of the crime on the person affected. A victim impact statement may include an explanation of the nature and extent of any physical, psychological, or emotional harm suffered by the victim as a result of the offense. It may include an explanation the extent of any property damage or other economic loss suffered by the victim, and an opinion concerning the extent to which if any, the victim needs restitution for any harm caused by the defendant or along with a recommendation for an appropriate sanction or disposition. It was evident in this case, that the court based its more than a minimum sentence on other improper additional information. (Tr.98-100)

Defendant, who was a first offender, was sentenced to a six (6) year sentence for rape and two (2) consecutive (2) year sentences for importuning. A minimum sentence for rape, a felony of the first degree, would be three (3) years and a minimum sentence for importuning, a felony of the third degree would be nine (9) months. Ohio Rev. Code §2929.14(A)(1), (3).

In any event, though there may be a presumption of prison or a mandatory prison sentence, the court was still required to give meaningful consideration of the purposes and principles of felony sentencing. This was not done because the court, at re-sentencing, arbitrarily imposed an effective ten (10) year sentence.

There was evidence, both from the oral findings by the court at the hearing on July

25, 2014, and the findings memorialized in the journal entry filed on August 27, 2014 that these findings were unsupported by the record of the plea proceedings.

The court, in its judgment entry, referenced matters not alleged in the indictment nor admitted at the plea of guilty. As noted, defendant had only entered a plea of guilty to count one (1), rape, which alleged that the offense happened on or about the "**period of June 2010**" when defendant engaged in sexual conduct with A.C., whose date of birth was 5/30/1998. Thus, the count one (1) alleged that A.C. was twelve (12) years of age. However, the court in its journalized findings, stated that the victim, A.C., was eleven (11) years old when the offense occurred. The court went on to recite that, in January, 2011, defendant and A.C. were caught in bed together by the victim's mother. As a result, defendant was told not to come to the house again. Defendant had also refused to reveal his identity to either the victim's mother or uncle. It was only when he was told they were going to call the police, did defendant show his driver's license.

In addition, the court made other non-alleged findings that, on March 2011, the police were called to the residence of the victim, A.C., because A.C. had cut her wrists with a knife because her mother had taken away her cell phone for talking to defendant. Based on this, the victim had solicited a friend in Florida to assist her in communicating with defendant because her mother had restricted her from having contact with defendant.

Thereafter, the court made additional findings in its judgment entry:

6. Although restricted from coming to the victim's house and having contact with her, the Defendant would come during the hours the victim's mother was at work and leave before she returned. On other occasions he would wait until the victim's brother was asleep before he came to the residence:

7. In the first few encounters the Defendant only "**fingered**" the victim, but later engaged in full vaginal intercourse with the victim. The first time the victim had sex with the Defendant it was three (3) days before her 12th birthday. These encounters happened not only in the residence, but also in Defendant's car - totaling approximately seven (7) times in the residence and seven (7) time in his car. They had sex approximately every 2 weeks.

Additionally, Defendant would bring "**protection**" when having vaginal intercourse with the victim - so that she would not get pregnant:

8. The victim relayed that Defendant was the first person ever to kiss her and have "sex" with;

9. The victim had become upset because the Defendant was having contact with his ex-girlfriend, Defendant's ex-girlfriend was 13 years old;

10. The victim was using cell phone of her mother's workers, other students and other to have contact with the Defendant after her cell phone had been taken away by her mother. In April 2011 the Defendant gave the victim the new cell phone to stay in contact with him - this would have been two (2) months after the investigation began in March;

11. In May 2011 the victim was in trouble in school for using a cell phone - she was in contact with the Defendant. The victim used the new cell phone that the Defendant had given to her after her mother took away her other cell phone (SEE para.#3 above);

12. Defendant gave the victim an engagement ring, necklace, earrings and other gifts to continue the relationship after the victim's mother had restricted him from having contact with the victim;

13. Defendant had sent a nude photo of himself to the victim, and the victim had sent a photo of herself in her underwear to the Defendant; (Judgment Entry @ p.2).

None of these facts were alleged or admitted at the plea in this case. Defendant entered a plea of guilty to rape when the victim who, according to the indictment, was twelve (12) years of age. The importuning counts again occurred when the victim was twelve (12) years of age. These counts did not allege any specific conduct which was found by the court. Thus the court based its sentence solely on unalleged or non-admitted facts by defendant when he entered his plea of guilty. This judicial factfinding runs contrary to §2929.14(C)(4) of the Ohio Revised Code:

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

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

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

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

As a result, the imposition of consecutive sentences was not appropriate. It was illegal and contrary to law. It constituted a denial of due process of law because the court did not follow the statutory law in Ohio. See *Fiore v. White*, 531 U.S. 225, 228-29 (2001).

In imposing any sentence the court must consider and the record should reflect the court had considered the purposes and principles of a felony sentencing as set forth in §2929.11 of the Ohio Revised Code:

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

A court abuses its discretion when its decision is based on an erroneous view of the law or a clearly erroneous view of the evidence. See *Coates & Bell v. Hartnax Corp.*, 496 U.S. 384, 405 (1990).

In *State v. Mathis*, 109 Ohio St.3d 54, 62, 846 N.E.2d 1, 8 (2006), the court identified what must be considered in sentencing a defendant, while noting the limitation which precluded the court from making findings which had been ruled unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470 (2006):

{¶ 38} Although after *Foster* the trial court is no longer compelled to make findings and give reasons at the sentencing hearing because R.C.2929.19(B)(2) has been excised, nevertheless, in exercising its discretion, the court must carefully consider the statutes that apply to every felony case. Those include R.C.2929.11, which specifies the purposes of sentencing, and R.C.2929.12, which provides guidance in considering facts relating to the seriousness of the offense and recidivism of the offender. In

addition, the sentencing court must be guided by statutes that are specific to the case itself.

In this case there was an absence of any judicial consideration of the mandated statutory considerations which were required to be considered. The proceedings were bereft of even the rudimentary elements of a fair hearing. See *State v. Flors*, 38 Ohio App.3d 133, 140, 528 N.E.2d 950, 957 (1987). (“**A talismanic incantation that the court followed those [sentencing] standards may not suffice....**”).

Discretion is not whim, and limiting discretion according to the legal standards helps promote the basic principle of justice that like cases should be decided alike. ... *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). (Chief Justice Roberts)

The Eighth Amendment to the United States Constitution prohibits punishment that is “**grossly disproportionate**” to the severity of the offense. *Solem v. Helm*, 463 U.S. 277 (1983); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

Section 2929.12(B)(1)-(9) of the Ohio Revised Code lists a number of factors to be considered “**as indicating that the offender’s conduct is more serious than conduct normally constituting the offense. ...**” One factor would be physical or mental injuries suffered by the victim. There was no injury in this case. All other statutory factors are inapplicable, *i.e.*, serious physical harm was not an element of the offense. Defendant did not hold a public office or position of trust. Defendant’s occupation, elected office or profession did not obligate him to prevent the offense or bring others committing the offense to justice. Likewise inapplicable was that defendant’s professional reputation or occupation, elected office or profession was a lack of to facilitate the offense.

The sentence was based on facts not alleged in the indictment nor admitted by defendant at the time of his plea. Consequently the imposition of that sentence violated defendant’s constitutional right under the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

In Blakely, the defendant pled guilty to a second degree kidnaping involving the use of a firearm. Defendant was sentenced to more than three (3) years above the fifty-three (53) month statutory maximum standard range for the offense on the basis that he acted with deliberate cruelty. The Supreme Court vacated the sentence because the sentence violated the defendant's Sixth Amendment right to a jury trial where the facts supporting the deliberate cruelty finding were neither admitted by the defendant nor found by a jury. Similarly, in this case, facts were not admitted by defendant. Also, no facts were presented or found by a jury that supported a statement that the shortest term of sentence provided by law would demean the seriousness of the defendant's conduct and would not adequately protect the public from future crimes by the defendant. Thus a sentence beyond the minimum violated defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution. The court, in Blakely ruled that "**determinate**" or fixed rule-bound sentencing, which increases a sentence based on a requirement of judicial fact-finding instead of jury fact-finding, violates the right to a trial by jury guaranteed by the Sixth Amendment. The court ruled that the system that calibrates a sentence from a grid or table based on various factual elements as found by the judge encroaches on the fact-finding authority of juries under the Sixth Amendment. Thus the court declared:

First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial fact-finding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal **right** to a lesser sentence - and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. 542 U.S. @ 308-09.

Defendant was denied due process at this resentencing hearing because the court relied upon matters occurring at a prior date involving the prior sentencing. As noted, the

court at the resentencing hearing, primarily relied upon what had occurred previously in connection with the case. The court based sentencing upon matters which were not alleged in the indictment nor part of the plea agreement. (Tr.98-100). In part, the court stated:

The offense was committed under circumstances not likely to reoccur. That one weighed in the Court's mind, and the reason the Court will set forth is because defendant's prior ex-girlfriend, Kimmy, was 13 years old as well. So there was some concern. Now we have two young girls, twelve, 13 year-olds that are his girlfriend and he's in his 20s. So the Court was concerned about reoccurrence, yes. (Tr. 92, 7/25/14)

This effectively denied defendant a fair sentencing hearing. Defendant may or may not have had another girlfriend. That was irrelevant. It should not have been relied on by the court.

A similar situation was considered by the court in State v. Mattox, 8 Ohio App. 2d 65, 220 N.E. 2d 708 (1966). In that case the court had before it a denial of a petition for post conviction relief. An evidentiary hearing was held on the petition and the court denied the petition based upon the court's recollection of events. However, the hearing judge on the post-conviction petition was the trial judge. The court based its determination on its recollection of the events. In reversing the judgment the Court of Appeals stated as follows:

The hearing judge in this case was also the trial judge in appellant's criminal cases. The record shows that the judge recounted facts bearing on the issues, which facts were not presented in evidence. In passing upon the truthfulness of appellant's testimony, the court relied not upon the state's evidence alone, but upon personal recollections of what had occurred before him at the criminal trial. With characteristic forthrightness, the court's journal entry recites that the findings of fact were based in part upon "this court's own personal recollection of the events leading up to and surrounding petitioner's trial." When a trier of facts relies upon personal knowledge, he necessarily deprives the litigant of the right of confrontation, cross-examination and an impartial tribunal. 8 Ohio App. 2d at 68, 220 N.E. 2d at 710.

Similarly, in another case decided the same date by the same court it was stated that **"the reliance of the hearing judge upon facts personally known to him, but not**

presented in evidence, constituted a denial of appellant's rights of confrontation, cross-examination, and an impartial tribunal. ..." State v. Denoon, 8 Ohio App. 2d 70, 72, 220 N.E. 2d 730, 731 (1966).

This procedure would be akin to procedure condemned by the United States Supreme Court as being a denial of due process of law. In the case of In re Oliver, 333 U.S. 257 (1948), a witness appeared before a one-man grand jury. It was claimed that the witness had given false and evasive answers and the one-man grand jury charged the witness with contempt and convicted him. Upon review by the United States Supreme Court this procedure was found to be fundamentally unfair. The Supreme Court found the procedure to be constitutionally wanting. The procedure did not provide that "... **there has been a charge fairly made and fairly tried in a public tribunal. ...**". 333 U.S. at 278. The same type of procedure is evident here. When the court cannot be cross-examined and the court relies upon its recollection of disputed facts, fundamental fairness is denied. Offutt v. United States, 348 U.S. 11, 14 (1954) ("**justice must satisfy the appearance of justice.**").

**PROPOSITION OF LAW NO. III
A DEFENDANT HAS BEEN DENIED DUE PROCESS OF LAW WHEN THE COURT
IMPOSES A CONSECUTIVE SENTENCE AT A RESENTENCING WITHOUT
CONSIDERING THE CURRENT CONDITION OF A DEFENDANT.**

At the resentencing hearing on July 25, 2014, defense counsel requested that the court consider the present situation of defendant. (Tr.33-34). The court only had a presentence investigation report which was prepared prior to the original sentencing on July 26, 2012. Thus, at the resentencing hearing, defendant had been in prison for approximately two (2) years. The court did not have information about defendant's current situation. The sentencing should have been based on the defendant's current situation rather than what it was two (2) years ago.

A similar issue was considered by the United States Supreme Court where the issue of whether post-sentencing behavior could be considered at a resentencing hearing. In an

unusual case, Pepper v. United States, 131 S.Ct. 1229 (2011), defendant appeared for several resentencing hearings as the result of his various appeals. The federal sentencing statutes required the court to consider basically similar information and impose a sentence similar to Ohio's purposes and principles of sentencing contained in §§2929.11 and 2929.12 of the Ohio Revised Code. The court, in Pepper, ruled that a resentencing sentencing court should consider the following:

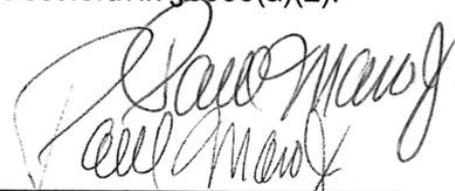
"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment ensue." Koon v. United States, 518 U.S. 81, 113, 116 S.Ct.2035, 135 L.Ed.2d 392 (1996). Underlying this tradition is the principle that "the punishment should fit the offender and not merely the crime." Williams, 337 U.S., at 247, 69 S.Ct.1079; see also Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 82 L.Ed.43 (1937)("for the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender").

Consistent with the principles, we have observed that **"both before and since the American colonies became a nation, courts in his country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." Williams, 337 U.S., at 246, 69 S.Ct. 1079. Permitting sentencing court's to consider the widest possible breadth of information a defendant "ensues that the punishment will suit not merely the offense but the individual defendant." Wasman v. United States, 468 U.S. 559, 564, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). 131 S.Ct. @ 1239-40.**

Moreover the court in considering post-sentencing rehabilitation would be a relevant factor at a resentencing ruled:

In addition, evidence of postsentencing rehabilitation may be highly relevant to several of the §3553(a) factors that Congress has expressly instructed district courts to consider at sentencing. For example, evidence of postsentencing rehabilitation may plainly be relevant to **"the history and characteristics of the defendant."** §3553(a)(1). Such evidence may also be pertinent to **"the need for the sentence imposed"** to serve the general purposes of sentencing set forth in §3553(a)(2) - in particular, to **"afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant,"** and **"provide the defendant with needed educational or vocational training ... or other correctional treatment in the most effective manner."** §§3553(a)(2)(B)-(D); see

McMannus, 496 F.3d at 853 (Melloy J., concurring) (“In assessing ... deterrence, protection of the public, and rehabilitation, 18 U.S.C. §3553(a)(2)(B)(C)&(D), there would seem to be no better evidence than a defendant’s post-incarceration conduct”). Postsentencing rehabilitation may also critically inform a sentencing judge’s overarching duty under §3553(a) to “impose a sentence sufficient, but not greater than necessary” to comply with the sentencing purposes set forth in §3553(a)(2). 131 S.Ct. @ 1242.



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SERVICE

A copy of the foregoing ***Memorandum in Support of Jurisdiction*** has been sent to Kevin Baxter, Attorney for Plaintiff-Appellee, 323 Columbus Avenue, Sandusky, Ohio 44870-2636, on this 24th day of **July**, 2015.



PAUL MANCINO, JR. (0015576)
Attorney for Defendant-Appellant

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ERIE COUNTY, OHIO

2015 JUN 19 AM 10: 20

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CLERK OF COURTS

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COURT OF APPEALS
ERIE COUNTY, OHIO

2015 JUN 19 AM 9: 35

CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-14-117

Appellee

Trial Court No. 2011-CR-228

v.

David M. Deeb

DECISION AND JUDGMENT

Appellant

Decided:

JUN 19 2015

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Paul Mancino, Jr., for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} David M. Deeb appeals an August 27, 2014 judgment of the Erie County Court of Common Pleas resentencing him on convictions, pursuant to guilty pleas, on one count of rape (a violation of R.C. 2907.02 and a first degree felony) and two counts of importuning (violations of R.C. 2907.07 and third degree felonies). Appellant was

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APPENDIX
A

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originally sentenced on August 8, 2012. In that judgment, the trial court sentenced appellant to serve a six-year term of imprisonment on the rape conviction and 24-month terms of imprisonment on both importuning convictions. The court also ordered that the sentences be served consecutively, for a total aggregate period of incarceration of ten years.

{¶ 2} On direct appeal of the August 8, 2012 judgment, this court reversed the judgment in part and remanded the case for resentencing on the issue of consecutive sentences alone. *State v. Deeb*, 6th Dist. Erie No. E-12-052, 2013-Ohio-5175, ¶ 25. We directed the trial court on remand “to consider whether consecutive sentences are appropriate under R.C. 2929.14(C), and, if so, to make the proper findings on the record.” *Id.*

{¶ 3} On remand, the trial court conducted a resentencing hearing on July 25, 2014. At the hearing, the trial court considered whether consecutive sentences were appropriate under R.C. 2929.14(C) and stated its findings under the statute on the record. The court also included R.C. 2929.14(C) findings in the August 27, 2014 resentencing judgment and ordered that the sentences on the rape and importuning convictions be served consecutively.

{¶ 4} Appellant asserts four assignments of error on appeal:

Assignments of Error

1. Defendant was denied due process of law and his rights under the Sixth Amendment when the court based its sentencing on judicial

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factfinding, none of which were alleged in the indictment or as a part of the plea in this case.

2. Defendant was denied due process of law when the court imposed a consecutive sentence which apparently was unauthorized by law and contrary to the presumption of a concurrent sentence.

3. Defendant was denied due process of law when the court imposed a consecutive sentence without considering the current condition of defendant.

4. Defendant was denied due process of law when he was sentenced to a consecutive sentence which, at the time of sentencing was unauthorized by law.

{¶ 5} Under assignment of error No. 1, appellant contends that the trial court denied him due process of law and his rights under the Sixth Amendment to the United States Constitution when the court imposed consecutive sentences at resentencing based upon judicial factfinding. We address the Sixth Amendment argument first.

{¶ 6} Appellant contends that judicial factfinding under R.C. 2929.14(C) in this case denied him his Sixth Amendment right to a jury trial. Appellant cites United States Supreme Court decisions of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 253, 159 L.Ed.2d 403 (2004), and Ohio Supreme Court decisions of *State v. Foster*, 109 Ohio

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St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, in support of this argument.

{¶ 7} The Ohio Supreme Court addressed the constitutionality of judicial factfinding under R.C. 2929.14(C)(4) in considering imposition of consecutive sentences in its decisions in *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, and *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768. In the decisions, the court recognized that in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), the United States Supreme Court held “that a statutory requirement for judges in a jury trial to find certain facts before imposing consecutive sentences is constitutional.” *Bonnell* at ¶ 3; *Hodge* at ¶ 3.

{¶ 8} In *Hodge*, the Ohio Supreme Court stated that the Ohio General Assembly could enact new legislation requiring trial courts to make findings when imposing consecutive sentences in jury cases, despite the ruling in *Foster* that such judicial factfinding was unconstitutional. *Hodge* at ¶ 6; *Bonnell* at ¶ 3. The court’s decision in *Mathis* followed *Foster* and was issued prior to *Hodge* and *Bonnell*. *Mathis* at ¶ 37-38.

{¶ 9} R.C. 2929.14(C) was enacted in Am.Sub.H.B. No. 86, effective September 30, 2011, pursuant to the authority recognized in *Hodge* to enact legislation providing for judicial factfinding to impose consecutive sentences. *Bonnell* at ¶ 4. Accordingly, we conclude that appellant’s contention that the trial court denied him his Sixth Amendment rights by undertaking judicial factfinding under R.C. 2929.14(C) with respect to consecutive sentences in this case is without merit.

{¶ 10} Under assignment of error No. 1, appellant also argues that the trial court erred by considering facts that are not alleged in the indictment, that were not admitted at the plea hearing, and that were not supported in the record in imposing sentence. Appellant pled guilty to Counts 1, 3, and 7 of a 10 count indictment filed on July 15, 2011. Each of the three counts to which appellant pled stated the birthdate of the victim (a late May 1998 date) and offense dates. Count 1 charged appellant with engaging in sexual conduct with a person less than 13 years of age, a violation of R.C. 2907.02(A)(1)(b), rape, with an offense date of June 2010. Counts 3 and 5 of the indictment charged appellant with soliciting a person to engage in sexual activity and that at the time appellant was 18 years of age or older, and knew the victim was less than 13 years of age or was reckless in that regard, violations of R.C. 2907.97(C)(1), importuning. The offense date under Count 3 is June 1010. The offense date under Count 7 is December 2010.

{¶ 11} Appellant pled guilty to the offenses at a hearing on May 21, 2012. Under a plea agreement, the remaining seven counts of the ten count indictment were dismissed. At the hearing, he also requested preparation of a presentence investigative report ("PSI"). The record demonstrates that a PSI report was prepared and includes police investigative summaries concerning the victim and her relationship with appellant. The record also demonstrates that appellant was provided copies of the PSI report, including police reports.

{¶ 12} At the sentencing hearing, the trial court stated that it relied on the PSI report and the included police reports when determining sentence and that they were the source of the additional detailed facts on which its R.C. 2929.14(C) findings are based:

[C]ounsel, * * * the Court's talked about the presentence report and investigation, and you indicated you don't know where the Court got those facts from. They must have come from a police report and the police report was unchallenged, there's no way to challenge it and things of that nature. This is the presentence report and investigation. In the presentence report and investigation is all the police reports. Defense counsel had the presentence report and investigation. He had these police reports. When the Court asked him, did you receive a copy of it? Yes. And then the Court gave an opportunity to talk. He could have challenged them. He didn't. * * * [T]he Court wants you to know that it didn't come up with these facts or these police reports of its own. It was in the presentence report and investigation.

{¶ 13} "Evid.R. 101(C)(3) specifically provides that the Ohio Rules of Evidence, other than with respect to privileges, do not apply to miscellaneous criminal proceedings including sentencing. *State v. Cook* (1998), 83 Ohio St.3d 404, 425, 700 N.E.2d 570; Evid.R. 101(C)(3)." *State v. Riley*, 184 Ohio App.3d 211, 2009-Ohio-3227, 920 N.E.2d 388, ¶ 28 (6th Dist.). Ohio appellate courts have recognized that a trial court does not err by relying on a presentence investigative report in sentencing a defendant. *State v. Cisco*,

5th Dist. Delaware No. 13 CAA 04 0026, 2013-Ohio-5412, ¶ 30; *State v. Steimle*, 8th Dist. Cuyahoga Nos. 82183 and 82184, 2003-Ohio-4816, ¶ 14.

{¶ 14} Appellant was provided a copy of the PSI reports and included police reports and an opportunity to challenge the accuracy of the materials. “The burden of proof regarding any inaccuracy in the PSI is on the defendant who alleges the report is inaccurate. R.C. 2951.03(B)(2).” *Cisco* at ¶ 28.

{¶ 15} Sentencing courts are “to acquire a thorough grasp of the character and history of the defendant before it.” *State v. Burton*, 52 Ohio St.2d 21, 23, 368 N.E.2d 297 (1977). Sentencing courts may consider at sentencing charges that were reduced or dismissed under a plea agreement. *See State v. Degens*, 6th Dist. Lucas No. L-11-1112, 2012-Ohio-2421, ¶ 19; *State v. Robbins*, 6th Dist. Williams No. WM-10-018, 2011-Ohio-4141, ¶ 9; *State v. Banks*, 10th Dist. Franklin Nos. 10AP-1065, 10AP-1066, and 10AP-1067, 2011-Ohio-2749, ¶ 24; *State v. Johnson*, 7th Dist. Mahoning No. 10 MA 32, 2010-Ohio-6387, ¶ 26.

{¶ 16} Appellant contends that even if the court could consider the PSI report, R.C. 2951.03 limits use of PSI reports. R.C. 2951.03 states that “[t]he officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant.”

{¶ 17} We have reviewed the PSI report and included police narrative reports. The materials considered by the trial court in imposing consecutive sentences concerned

the circumstances of the rape and importuning offenses on which appellant was convicted and appellant's social history.

{¶ 18} We conclude that appellant's argument that the trial court violated due process of law by basing its sentence on facts that are not alleged in the indictment, that were not admitted at the plea hearing, and that were not supported in the record to be without merit.

{¶ 19} We find assignment of error No. 1 not well-taken.

{¶ 20} We consider the remaining assignments of error out of turn. Under assignment of error No. 4, appellant contends that under R.C. 2929.41(A) and this court's judgment on direct appeal, the trial court was unauthorized by law to impose consecutive sentences on remand.

{¶ 21} As we discussed under assignment of error No. 1, the Ohio Supreme Court has determined that judicial factfinding by a trial court to impose consecutive sentences under R.C. 2929.14(C)(4) does not violate a defendant's right to trial by jury. Nor is it prohibited under R.C. 2929.41(A)'s presumption that sentences are to run concurrent. R.C. 2929.41(A) provides for a presumption, with exceptions listed in the statute, that "a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States." R.C. 2929.41(A). One exception listed in the statute, however is where consecutive sentences are imposed under R.C. 2929.14(C)(4). *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.2d 659, ¶ 23.

{¶ 22} On direct appeal, we reversed the trial court’s judgment imposing consecutive sentences and remanded the case to the trial court “to the extent necessary to consider whether consecutive sentences are appropriate under R.C. 2929.14(C), and, if so, to make the proper findings on the record.” *Deeb*, 6th Dist. Erie No. E-12-052, 2013-Ohio-5175, ¶ 25. This was based upon a conclusion that the trial court had failed to comply with the requirements of R.C. 2929.14(C) when it imposed consecutive sentences. *Id.* at ¶ 11.

{¶ 23} Nevertheless, we expressly recognized in the judgment that the trial court “had the ability to sentence appellant to consecutive terms” in this case. *Id.* at ¶ 10. We remanded the case with instructions for the trial court to consider consecutive sentences on remand and to assure compliance with the requirements of R.C. 2929.14(C) when it did so.

{¶ 24} We find assignment of error No. 4 not well-taken.

{¶ 25} Under assignment of error No. 2, appellant, in part, reargues issues addressed in our consideration of assignment of error No. 1—the contention that the trial court improperly considered material outside of the record at sentencing. Appellant also argues under assignment of error No. 2 that the trial court’s findings under R.C. 2929.14(C) are not supported in the record.

Standard of Review of Felony Sentencing

{¶ 26} After September 30, 2011, R.C. 2953.08(G)(2) provides the standard of review by appellate courts with respect to felony sentencing. *State v. Tammerine*, 6th

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Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11; *State v. Steck*, 6th Dist. Wood Nos. WD-13-017 and WD-13-018, 2014-Ohio-3623, ¶ 11-14. As stated in *Tammerine*:

R.C. 2953.08(G)(2) establishes that an appellate court may increase, reduce, modify, or vacate and remand a dispute[d] sentence if it clearly and convincingly finds either of the following:

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

(b) That the sentence is otherwise contrary to law. *Tammerine* at ¶ 11, quoting R.C. 2953.08(G)(2).

{¶ 27} Accordingly, under R.C. 2953.08(G)(2)(a), we consider whether there is clear and convincing evidence that the record does not support the sentencing court's findings under R.C. 2929.14(C)(4) to impose consecutive sentences in this case.

Required R.C. 2929.14(C)(4) Findings

{¶ 28} In *State v. Bonnell*, the Supreme Court of Ohio reviewed the procedure and required judicial factfinding necessary to impose consecutive sentences under R.C. 2929.14(C)(4):

When imposing consecutive sentences, a trial court must state the required findings as part of the sentencing hearing, and by doing so it affords notice to the offender and to defense counsel. See Crim.R.

32(A)(4). And because a court speaks through its journal, *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶ 47, the court should also incorporate its statutory findings into the sentencing entry. However, a word-for-word recitation of the language of the statute is not required, and as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld. *Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 29.

{¶ 29} The trial court made R.C. 2929.14(C)(4) findings at the resentencing hearing. The court found “it’s necessary to protect the public from future crime or punish this defendant,” satisfying the first requirement under R.C. 2929.14(C)(4). While discussing dangers posed to the public by the appellant’s conduct, the court also stated: “The Court finds consecutive sentences were not disproportionate to the seriousness of this conduct,” satisfying the second requirement.

{¶ 30} Third, a trial court must also find one of the circumstances listed in R.C. 2929.14(C)(4)(a)-(c). The court made a finding under R.C. 2929.14(C)(4)(b), finding first that “At least two of the multiple offenses were committed as part of one or more courses of conduct.” After discussing the facts, the court continued, stating “the harm caused by two or more of these offenses so committed was so great or unusual no single prison term for any offense committed as a part of the course of conduct adequately reflects the seriousness of his conduct.”

{¶ 31} We begin our analysis with the understanding that a trial court is not required to state the reasons for its R.C. 2929.14(C)(4) findings when imposing consecutive sentences. *Bonnell* at ¶ 27.

{¶ 32} We have reviewed the record, including the PSI report and associated police reports and the transcript of the resentencing hearing. Appellant was age 21 when he committed the offenses in this case. The victim was age 12. He stands convicted of raping a person under 13 years of age and of two counts of soliciting the girl to engage in sexual activity knowing the victim was less than 13 years of age or was reckless in that regard, importuning. Those offenses were committed in June and December 2010.

{¶ 33} The record discloses that appellant's relationship with the victim was discovered by the victim's mother who confronted appellant and attempted to terminate any further contact between appellant and the victim. The record also demonstrates that despite the mother's efforts, appellant maintained contact with the child surreptitiously for months, into May 2011, when criminal proceedings were filed.

{¶ 34} The trial court considered risks to the victim and other young girls presented by appellant's conduct and appellant's refusal to terminate the relationship. In considering the harm to the victim, the court considered a report included in the PSI report indicating that the victim made multiple cuts to her left wrist with a knife, threatening to kill herself, in an argument with her mother in March 2011. The argument was over the mother's efforts to prevent any contact between the victim and appellant.

{¶ 35} We conclude that the record, through the PSI report and associated police reports, contains evidence to support the determination that consecutive sentences are necessary to protect the public from future crime and to punish the offender and that the record supports the finding that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.

{¶ 36} The final finding by the trial court was a finding under R.C. 2929.14(C)(4)(b). The court found that offenses were committed as part of an ongoing course of criminal conduct and that the harm caused by two or more of the offenses was so great or unusual that no single prison term for any offense committed as part of the course of conduct adequately reflects the seriousness of the conduct.

{¶ 37} The record also supports the trial court's conclusion that the three offenses were committed as part of one or more courses of conduct. Further, the record supports a conclusion that the harm caused by two or more of the criminal offenses was so great or unusual that not one single prison term for any of the offenses adequately reflects the seriousness of appellant's conduct. We conclude that the trial court's findings under R.C. 2929.14(C)(4)(b) are supported by evidence in the record.

{¶ 38} We conclude that the trial court conducted the correct analysis in making its findings under R.C. 2929.14(C) and that the findings are supported by evidence in the record.

{¶ 39} We find assignment of error No. 2 not well-taken.

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{¶ 40} Under assignment of error No. 3, appellant contends that the trial court denied him due process of law by imposing consecutive sentences without considering his current condition. At the resentencing hearing, defense counsel requested that the trial court consider the present situation of appellant. Appellant had been in prison approximately two years at the time of resentencing. At the resentencing hearing, counsel for appellant stated that Dr. Robert Stinson could testify as to appellant's present condition, but was unavailable to testify on the date of the hearing.

{¶ 41} The state argues that a de novo resentencing hearing was not required, because the order of remand limited proceedings to consideration of whether consecutive sentences pursuant to R.C. 2929.14(C)(4) were appropriate and to make the proper findings on the record.

{¶ 42} Our review of the record discloses that the trial court did not refuse to permit Dr. Stinson to testify at the resentencing hearing. The court offered to continue the hearing to permit Dr. Stinson to testify, but stated it would limit the scope of the testimony to issues presented in resentencing under the order of remand from this court.

{¶ 43} We find no error in the trial court limiting evidence at the resentencing hearing to the scope of resentencing as identified in the order of remand.

{¶ 44} We find assignment of error No. 3 not well-taken.

{¶ 45} Justice having been afforded the party complaining, we affirm the judgment of the Erie County Court of Common Pleas. We order appellant to pay the costs of this appeal, pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

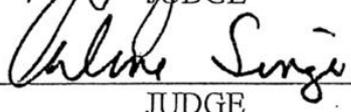
Mark L. Pietrykowski, J.

Arlene Singer, J.

Stephen A. Yarbrough, P.J.
CONCUR.



JUDGE



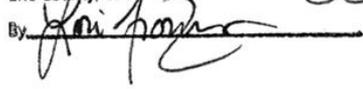
JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

I HEREBY CERTIFY THIS TO BE
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LUVADA S. WILSON, CLERK OF COURTS
Erie County, Ohio
By:  30